No. 22-2886

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FRANK GARRISON, ET AL.,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees

On Appeal from the Judgment of the
United States District Court
for the Southern District of Indiana
No. 1:22-cv-1895
The Honorable Richard L. Young, District Judge

APPELLANTS' BRIEF IN CHIEF AND REQUIRED APPENDIX

Oral Argument Is Requested

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RULE 26.1 DISCLOSURE STATEMENT

The full name of every party that undersigned counsel represents in this case is Frank Garrison, IV and Noel Johnson. Undersigned certifies that Pacific Legal Foundation is the only law firm that has represented Appellants Garrison and Johnson in this case. Appellants are not corporations and have not used pseudonyms.

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JURISDICTIONAL STATEMENT

In their Amended Complaint, Appellants argued that the challenged policy being implemented by Appellees was invalid under 5 U.S.C. § 706(2)(A), (B), and (C) and the U.S. Constitution's Non-Delegation Provisions in Article I, §1, and Article II, §3. Dist. Ct. Dkt. No. 1.

The district court had jurisdiction pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 1331 because Appellants challenged the statutory and constitutional validity of the policy.

On October 21, 2022, the district court dismissed Appellants' Amended Complaint, after it concluded that the plaintiff class lacked standing to sue because the tax consequences of cancellation were not "traceable" to the challenged federal program. Dist. Ct. Dkt. No. 36 at 6. The district court also entered final judgment against Appellants. Dist. Ct. Dkt. No. 37. Appellants filed a notice of appeal that same day. Dist. Ct. Dkt. No. 38.

Appellants moved for an injunction pending appeal with this Court on October 24, 2022. On October 28, 2022, a panel of this Court denied the motion in an unpublished order, once again finding a lack of standing,

but this time because Appellees had successfully excluded the class representatives after they filed suit. *Garrison, et al., v. Dept. of Education, et al.*, No. 22-2886, Dkt. No. 9 (Oct. 28, 2022).

Appellants now file their merits appeal, and this Court has appellate jurisdiction from the district court's final decision dismissing this case. *See* 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether state tax liability that automatically arises as a result of the challenged federal policy is an injury that is "fairly traceable" to federal action sufficient to confer standing to sue under Article III.

II. Did the Department of Education succeed in depriving this Court of a live controversy by selectively exempting two class representatives from its challenged policy in direct response to their lawsuit?

SUMMARY OF ARGUMENT

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

Dissatisfied with Congress's response, the President announced in August that Respondents Secretary of Education Miguel Cardona and the Department of Education (collectively, ED) will unilaterally cancel up to $20,000 in loan principal for each of 40 million borrowers at a cost of over $500 billion. Of those 40 million borrowers, 8 million are set to have their debts cancelled automatically.

Despite the staggering scope of this regulatory action, it was taken with breathtaking informality and opacity. The Department did not undertake the notice-and-comment process required for rulemaking, much less solicit any public input. It did not even issue a formal order or directive setting out its cancellation program. Instead, it issued a press

release on August 24th along with two legal memoranda providing its justifications, and, later, a hastily created FAQ section on its website.

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

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

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

Even after the filing of this suit, the Department's slapdash policy has changed from hour to hour and remained utterly elusive. In response to this and other suits, ED simply updated its website FAQs to try to negate individual claims by creating an opt-out program whose contours remain informal. Indeed, ED also excluded the class representatives from the program in a transparent effort to moot their claims.

Meanwhile, however, ED has pressed forward with its stated intent to cancel hundreds of billions of dollars in student loan debt. Even though the Eighth Circuit Court of Appeals, and another federal district court, have enjoined the policy in separate cases, ED still promises to cancel loans, saying, "We are seeking to overturn those orders." *One-Time Student Loan Debt Relief*, https://studentaid.gov/debt-relief-announcement/one-time-cancellation (Nov. 30, 2022) (*Nov. 30 FAQs*).

Indeed, the Supreme Court has now granted *certiorari* before judgment at the Department's request in the case arising from the Eighth Circuit, and argument will be heard in February 2023. *See Biden v. Nebraska*, No. 22-506, 598 U.S. --- (Dec. 2, 2022).

But rather than defend the policy on the merits, ED succeeded in convincing the district court in this case that its policy was simply unreviewable because Appellants lacked standing to sue. ED insisted that Appellants will actually be injured by their respective states, rather than the cancellation policy, and, in any event, ED noted that it had changed the policy in response to this lawsuit just enough to avoid judicial review. The district court was wrong to accept that reasoning and dismiss this case for lack of standing. The state tax consequences of cancellation are certain for members of the automatic cancellation class, which, at the time this suit was filed, included the class representatives, and even now continues to include potentially millions of class members. Moreover, nothing ED has done since this suit was filed has mooted the case—well-established exceptions to the mootness doctrine ensure that this Court retains jurisdiction over this matter. In the end, this Court

should vacate the district court's decision, and order what ED seems to fear the most: remand for a decision on the *merits* of Appellants' claims.

STATEMENT OF THE CASE

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, the class representative 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. Dist. Ct. Dkt. No. 4-2 (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.

Since the beginning of the COVID-19 pandemic, Appellees 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. 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.

B. The Automatic Loan Cancellation Policy as Originally Announced

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

Originally, the cancellation was to have been implemented in "early October." Dist. Ct. Dkt. No. 4-7 at 2. But ED will not undertake notice and comment or any other ordinary procedure before implementing the program. *See Use of the Heroes Act of 2003 to Cancel the Principal Loan*

[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/.

Amounts of Student Loans, 46 Op. O.L.C. __, 2022 WL 3975075, at *3 (Aug. 23, 2022) (OLC Op.).

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

As originally enacted, 32 million of the 40 million borrowers were required to apply for the cancellation, but loan cancellation was fully "automatic" for the other 8 million borrowers. As of September 27, 2022, ED emphasized on its website that, "Although most borrowers will have

[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.

to apply for debt relief, we have income data on hand for around 8 million borrowers. These borrowers will get the relief automatically." *Sept. 27 FAQs*. This "automatic[]" cancellation applies to borrowers who have provided income or other information to ED or their servicer because they have enrolled in programs like IDR or have certified payments made under PSLF. *Id.* According to ED, again as of September 27, 2022, for those receiving automatic cancellation, "Your loan servicer will notify you when the relief has been applied to your account, with details on how the relief was applied." *Id.*

Many of the borrowers facing automatic cancellation also face potential state income-tax liabilities, though. While loan cancellation is not taxed federally as income, at least six states *will* tax cancellation as income. *See* Ark. Code § 26-51-404(b)(1); Ind. Code § 6-3-1-3.5(a)(30); Minn. Stat. § 290.01(19)(f); Miss. Code § 27-7-15(4)(mm); N.C. Stat. § 105-153.5(c2)(22); Wis. Stat. § 70.01. ED expects that approximately 856,400 borrowers are eligible for cancellation in the state of Indiana, which taxes the cancellation as income. *See FACT SHEET 2*. Likewise, ED expects more than 3.5 million borrowers in the other five states that tax

cancellation as income will qualify. *See id.* Potentially massive numbers of those borrowers will receive cancellation automatically.

C. This Lawsuit Is Filed, and ED Changes the Policy to Try to Moot Mr. Garrison's Claim

Appellant Frank Garrison filed suit on September 27, 2022, on his own behalf, asserting standing to sue based on his impending receipt of automatic loan cancellation and associated tax liability from the State of Indiana. Dist. Ct. Dkt. No. 1. Mr. Garrison also filed for a temporary restraining order to stop Appellees from implementing "automatic" cancellation. Dist. Ct. Dkt. No. 4.

It is undisputed that Mr. Garrison faced automatic and mandatory loan cancellation of $20,000 of his debt at the time this suit was initially filed. *See* Dist. Ct. Dkt. No. 4, at 6–8. Mr. Garrison, however, is pursuing PSLF, has his monthly payments capped at a percentage of his income, and resides in Indiana, meaning that the one-time cancellation will not benefit him by either reducing his monthly payment or quickening his eventual forgiveness, but will result in a state-tax liability of more than $1,000. *Id.*; *see also* Ind. Code § 6-3-1-3.5(a)(30).

In response to this suit, ED hastily created a mechanism for borrowers to opt out from the automatic cancellation. Just hours after

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

The next day, ED quietly amended its website to conform its policy to the Press Secretary's statement. As ED said in a notice to the district court, it had amended its website, which apparently contains the full and final regulatory action concerning cancellation, to now include the language, "If you would like to opt out of debt relief for any reason, including because you are concerned about a state tax liability, you will be given an opportunity to opt out." *See* Dist. Ct. Dkt. No. 13.

D. Mr. Johnson Joins on Behalf of a Putative Class of Borrowers, and ED Once Again Tries to Moot Their Claims

Mr. Garrison, joined by Appellant Noel Johnson, filed an Amended Complaint on behalf of a class of similarly-situated borrowers on October 10, 2022. Dist. Ct. Dkt. No. 23. The same day, they moved for preliminary relief and class certification. *See* Dist. Ct. Dkt. Nos. 24, 25, 26.

Like Mr. Garrison, Mr. Johnson faced automatic cancellation of $10,000 of his debt when he joined the suit at the time the Amended Complaint was filed. *See* Dist. Ct. Dkt. No. 25-8 (Johnson Decl. ¶¶ 2–8). Mr. Johnson was also pursuing PSLF and resided in Indiana and would likewise receive no reduction in his monthly or eventual payments from the one-time cancellation, but would face a state-tax liability of more than $500. *See id.*

Both Mr. Garrison and Mr. Johnson also sought to act as the representatives of a putative class that still faces automatic cancellation, will incur state tax liability, and has had inadequate notice of any opt-out provision. *See* Dist. Ct. Dkt. No. 24.

When Appellants filed their Amended Complaint on October 10, 2022, the opt-out mechanism remained completely unspecified. *See* Dist. Ct. Dkt. Nos. 23–26. Appellants filings pointed out there was no actual

mechanism to opt out and no notice was planned to inform borrowers of the ability to opt out.

In response, ED *yet again* changed its website to avoid review. In its briefing in the district court, ED revealed that "since October 12, it has provided instructions a borrower can use to contact her loan servicer to opt out of such relief." Dist. Ct. Dkt. No. 31 at 6. ED's FAQs put the onus entirely on the borrower; "If you would like to opt out of debt relief for any reason—including because you are concerned about a potential state tax liability—contact your loan servicer by phone or email and tell them that you don't want to receive one-time student loan debt relief." *One-Time Student Loan Debt Relief*, https://studentaid.gov/debt-relief-announcement/one-time-cancellation (Oct. 12, 2022) (*Oct. 12 FAQs*).

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

notify the class, remain elusive. *See id.* ED also represented that borrowers in the automatic cancellation class only have "until November 14 to opt out." *Id.* After that date, ED suggested that it intended to automatically cancel a portion of their debts. *Id.*

Even after ED changed its policy in response to this litigation, opting out requires affected borrowers to recognize that they face state tax liability for cancellation and then contacting their servicers, and not ED, to request relief from ED's policy. *Oct. 12 FAQs*. Automatic cancellation for those who do not opt out will still occur once ED resumes its program. *See* Dist. Ct. Dkt. No. 31 at 6.

E. The District Court Dismisses the Suit and ED Promises to Move Forward with Automatic Cancellation

On October 21, 2022, the district court dismissed Appellants' Amended Complaint, after it concluded that the class lacked standing because the tax consequences of cancellation were not "traceable" to the federal program. Dist. Ct. Dkt. No. 36 at 6. The district court's factual analysis was confined to the pleadings and arguments of the parties. *See id.* at 4 n.1. The district court also entered final judgment against Appellants. Dist. Ct. Dkt. No. 37. Appellants filed a notice of appeal that same day. Dist. Ct. Dkt. No. 38.

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

On November 1, 2022, Appellants moved for an injunction pending appeal with Associate Justice of the Supreme Court of the United States, Amy Coney Barrett. That application was denied without opinion on November 4, 2022.

Meanwhile, in other litigation, on November 14, 2022, which was the day that ED had promised to resume automatic cancellation, the Eighth Circuit Court of Appeals issued an emergency injunction blocking ED's cancellation policy pending further proceedings. *See Nebraska v. Biden*, 52 F.4th 1044, 1048, No. 22-3179 (8th Cir. 2022). The Department moved to vacate the injunction in the Supreme Court, and on December 1, 2022, the Court granted *certiorari* before decision, ordered argument in February 2023, but declined to vacate the injunction. *Biden v. Nebraska*, No. 22-506, 598 U.S. --- (Dec. 2, 2022). The injunction thus

remains in effect, although ED's intent to overturn the injunction and proceed with its program is clear.

ARGUMENT

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

When a district court finds "a lack of standing on the pleadings," but does "not make any factual findings," this Court's "review is therefore *de novo*." *Matushkina v. Nielsen*, 877 F.3d 289, 292 (7th Cir. 2017). This Court will reverse a final judgment dismissing a case for lack of standing if, based on the facts pled by the plaintiffs, "at least one plaintiff has standing." *Id.* (citation omitted).

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 Supreme 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).

This Court 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 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. *See id.* at 498.

Appellants, and the members of the putative class, would all suffer a concrete injury from ED's automatic cancellation through the state tax

consequences that necessarily would arise under state law. Any loan forgiveness that Mr. Garrison or Mr. Johnson receive pursuant to the pre-existing PSLF program, as it was enacted prior to January 1, 2020, will not be taxed in Indiana as income. *See* Ind. Code § 6-3-1-3.5(a)(30). But if Mr. Garrison received $20,000 in automatic cancellation, he would face a state income tax liability (including county income tax) of more than $1,000 for 2022. *See id*. Mr. Johnson would face more than $500 in tax liability for his $10,000 cancellation. *See id.* And both class representatives would face a net loss from that tax liability, as the automatic cancellation policy would not reduce their monthly payments or the number of payments they would need to make under the PSLF program. *See* Dist. Ct. Dkt. No. 23 at ¶¶ 76–77, 92–93. It is thus "predictable" that Indiana will apply its laws as written, and they will suffer a concrete harm. *See Commerce*, 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 and avoiding these harms. Appellants and the class members therefore have standing to sue to stop ED's policy. *See Commerce*, 139 S. Ct. at 2566.

Despite this straightforward analysis, the district court dismissed this case after it erroneously concluded that the certain tax consequences of cancellation were not "traceable" to the federal program. Dist. Ct. Dkt. No. 36 at 6. In the district court's view, the tax liability, which does not exist today because the cancellation has not occurred, but which will arise the moment ED's policy is enacted, was simply a matter for state courts to resolve. *Id.*

Standing is "not confined to those who could show 'economic harm,'" although economic harms of even a few dollars will certainly do so. *See United States v. Students Challenging Regul. Agency Procs. (SCRAP)*, 412 U.S. 669, 686, 689 n.14 (1973); *see also California v. Azar*, 911 F.3d 558, 571–72 (9th Cir. 2018) ("There is also no requirement that the economic harm be of a certain magnitude."). And standing arises from a mere "risk of harm," so long as it is "certainly impending." *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 692–94 (7th Cir. 2015). Thus,

standing arises when the challenged action has a "substantial risk" of harms, *particularly* where they are economic. *See id.* at 693 (victims of data breach had standing to sue because of "an increased risk of future fraudulent charges and greater susceptibility to identity theft").

The district court was wrong in its assertion that "[a]n injury is not traceable to the decision of a defendant where the injury flows from a different, independent decision made by a third party." *Id.* at 6. On the contrary, "Article III requires no more than *de facto* causality." *Commerce*, 139 S. Ct. at 2566. Cases therefore abound where parties had standing to challenge agency action that resulted in an indirect harm, even when it came from an independent third party. *See id.* For instance, the Supreme Court has long held that a party has standing to challenge agency action when it will simply *allow* conduct that results in an injury. *See, e.g., Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986) (whale watchers suffered injury-in-fact from agency's refusal to punish unlawful Japanese whaling activities); *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 620–21 (1971) (regulated parties could challenge Comptroller of the Currency's regulatory policy allowing national banks to compete in field previously barred to them); *accord Animal Legal Def. Fund, Inc. v.*

Glickman, 154 F.3d 426, 440–41 (D.C. Cir. 1998) ("This circuit's case law confirms the proposition that a plaintiff satisfies the causation prong of constitutional standing by establishing that the challenged agency rule permitted the activity that allegedly injured her, when that activity would allegedly have been illegal otherwise.").

The Supreme Court has likewise found standing where a defendant's actions were reasonably likely to result in a third party injuring the plaintiff, even where the defendant does not coerce or even *encourage* that injury. In *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), the Court held that realtors' racial steering practices injured the village through third parties. A higher minority population could "precipitate an exodus of white residents," injuring the municipality's "racial balance and stability," even though the white residents had no interactions with the realtors themselves. *Id.* at 110–11; *see also Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1304–05 (2017) (discriminatory loans injured city, because, inter alia, the expected foreclosures can result in individuals committing more crimes in the area and thus requiring more police services). These cases reinforce the conclusion in *Commerce* that the relevant inquiry is *de facto* causation,

not whether the defendant determined, coerced, or cajoled a third party into injuring the plaintiff.

It is impossible to reconcile this substantial body of case law with the district court's view of the traceability requirement. If, for instance, a party has standing to challenge a federal policy of failing to *stop* certain *illegal* behavior that may be repeated as in *Japan Whaling Ass'n*, 478 U.S. at 230, then certainly those like Appellants who will face quantifiable tax penalties can challenge the policy causing those penalties to arise.

The district court's reliance on *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006), is particularly puzzling. The district court cited that case for the proposition that an "injury traceable to municipality's decision to levy tax did not create standing to challenge state decision to levy different taxes." Dist. Ct. Dkt. No. 36 at 6. But that case simply held, unremarkably, that a "taxpayer plaintiff has no right to insist that the government dispose of any increased revenue it might experience as a result of his suit by decreasing his tax liability or bolstering programs that benefit him." *DaimlerChrysler*, 547 U.S. at 344–45. In other words,

a plaintiff cannot challenge all of a state's actions simply "by virtue of their status as [] taxpayers." *Id.* at 342.

While paying taxes does not automatically furnish standing to challenge every government action, a person has standing to challenge a government action *resulting* in tax liability. Consider *Clinton v. City of New York*, 524 U.S. 417, 421, 431 (1998). There both the city and individual hospitals challenged the President's reinstatement of a decision by Health and Human Services that resulted in tax liability. *Id.* The Court found standing to challenge the President's actions because the city and hospitals had a "multibillion dollar contingent liability that had been eliminated" without the President's action. *Id.* at 430. Even to the extent that the contingent liability may or may not ever need to be paid by the challengers, they suffered an "immediate injury" merely by the effect of the "contingent liability." *Id.* at 431. Even the hospitals, which would not be responsible for the full liability, suffered the same immediate harm merely from the danger they would someday "be assessed by the State for substantial portions of any recoupment payments that the State may have to make to the Federal Government." *Id.*

Appellants suffer the same type of contingent tax liability, which will only arise once cancellation occurs. Thus, Appellants have standing to challenge the cancellation policy that gives rise to that liability. *See Clinton*, 524 U.S. at 430–31.

The district court's heavy reliance on *Segovia v. United States*, 880 F.3d 384, 389 (7th Cir. 2018), was also misplaced. *See* Dist. Ct. Dkt. No. 36 at 7. There the plaintiffs challenged a federal statute that required states to send absentee ballots to states' former residents who moved to certain U.S. territories. Those territories did not include those where the plaintiffs lived, so the statute did not require the states to send the plaintiffs absentee ballots. Illinois (the relevant state) was free to provide absentee ballots; it simply chose not to do so. 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. "Federal law ... does not *prohibit* Illinois from providing such ballots to [the] former residents .... State law could provide the plaintiffs the ballots they seek; it simply doesn't." *Id*. The federal action, therefore, was not in the chain of causation resulting in the plaintiffs' lack of absentee ballots. Here, however, the loan cancellation is a *de facto*

cause of the state tax liability; but for that federal action, Appellants will owe less in state taxes.

The district court also attempted to distinguish the decision in *Commerce* as establishing only that the "question is [] whether the federal policy influenced the decision making of a third-party in a predictable way[.]" Dist. Ct. Dkt. No. 36 at 10. And since the state tax laws at issue here were already on the books, they had to be independent. *Id.* But that flies in the face of the Supreme Court's decision itself. The Court spoke only in terms of the challenged action having a "predictable effect" resulting in the harm to the plaintiff. *Commerce*, 139 S. Ct. at 2566. A preexisting law that is triggered by federal action is one such effect. There is no requirement, however, that the law be *enacted* as a result of the challenged action. If that were so, then the plaintiffs in *Commerce* could never have challenged the "*reinstate[ment]*" of a citizenship question on the census based on evidence that "noncitizen households have historically responded to the census at lower rates" over "reluctance to answer a citizenship question." *See id.* There are other examples—the plaintiffs in *Clinton*, 524 U.S. at 431, could never have challenged the President's decision to *reinstate* their contingent tax

liability if the district court's view was correct. *See also*, *e.g.*, *Cent. Ariz. Water Conservation Dist. v. EPA*, 990 F.2d 1531, 1537–38 (9th Cir. 1993) (traceability satisfied where the cost of satisfying pre-existing obligations increased due to EPA regulation).

Perhaps the most apt comparison with the situation at issue here can be made with the D.C. Circuit's decision in *Tozzi v. HHS*, 271 F.3d 301, 308-09 (D.C. Cir. 2001). In that case, the court found that manufacturers of medical devices using PVC plastics, which contained the chemical dioxin, could challenge the Department of Health and Human Service's upgrading of dioxin as a "known carcinogen," because the manufacturers faced municipal regulations forcefully calling for "healthcare institutions to eliminate their use" of the products. *Id.* at 308. Standing existed from the manufacturers lost goodwill and reduced profits, even though "the anti-dioxin movement predates the listing process," and "pressure on government agencies to regulate dioxin and on healthcare companies to reduce the use of PVC products will continue whether or not dioxin remains listed as a known human carcinogen." *Id.* Indeed, the Court had "little doubt" that the HHS decision was a "substantial factor" in the harms the manufacturers faced, and the

agency action "will cause some non-trivial number of healthcare companies, already under pressure from environmental activists, to reduce or end their use of PVC plastics." *Id.* at 309.

This case follows that same logic. While the state tax laws were already on the books when ED announced its cancellation policy, they will still result in predictable harms to Appellants. And far from being merely one of several factors that contribute to the tax liability, ED's policy is the sole intervening action that results in the harms to Appellants. They plainly have standing to try to stop those harms. *See id.*

The district court's decision on standing was thus wholly inconsistent with controlling precedent. It should therefore be vacated, and this case should be remanded for a merits determination.

II. ED's Attempts to Moot this Case by Selectively Exempting the Class Representatives from Loan Cancellation in Direct Response to this Litigation Must Be Rejected

The only question decided by the district court was whether Appellants had standing when they filed suit. And since the district court was wrong on that issue, this case should be remanded.

The course of litigation, however, has raised potential concerns about mootness. Indeed, without even requesting input from ED, a panel of this Court denied temporary relief by erroneously confusing standing with mootness and then getting the mootness question wrong. According to the panel, "The federal program is not compulsory. Debtors who do not want their loans reduced or cancelled are free to opt out. The Department of Education has treated both plaintiffs as exercising this option. None of their debt will be cancelled, and they will not be subject to a tax on a reduction of indebtedness. It follows that the program does not injure them and that they lack standing to sue." Dkt. No. 9.

ED's efforts to moot this case *after* Appellants filed, should not succeed. Indeed, the motions panel's order ignores controlling law that shows Appellants' individual claims should be reviewed under well-known exceptions to mootness, while the class allegations remain live. This Court should therefore correct the mistake made by the motions panel and conclude that this matter is not moot. *See Johnson v. Burken*, 930 F.2d 1202, 1205 (7th Cir. 1991) ("We are free to reexamine the motion panel's determination of [a] question unembarrassed by the law of the case doctrine or by the requirement that a panel opinion overruling a

decision of this court be circulated in advance to all the judges in regular active service. … Decisions by motions panels are summary in character, made often on a scanty record, and not entitled to the weight of a decision made after plenary submission.").

A. ED's Voluntary Exclusion of the Named Appellants and Creation of the Opt-Out Mechanism Does Not Moot the Original Claims

First, under the voluntary cessation doctrine, this Court may review this case notwithstanding any of ED's changes since Appellant Garrison first filed. In essence, this Court should return to the circumstances first presented and ignore ED's shifting efforts to alter the program to evade review.

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

"confuse[] mootness with standing." *See id.* at 189. "The distinction matters because the Government, not petitioners, bears the burden to establish that a once-live case has become moot." *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022).

When this case was filed, Mr. Garrison faced an imminent injury from the loan cancellation policy proposed by ED. There was no opt-out at all. The motions panel's observation that "[d]ebtors who do not want their loans reduced or cancelled are free to opt out," Dkt. No. 9, focused only on ED's *response* to the litigation. And when the Amended Complaint was filed, Mr. Johnson likewise faced automatic cancellation, as did the class he immediately moved to certify. *See* Dist. Ct. Dkt. Nos. 23, 24. It was therefore also false that, at the time of the *filing*, "ED has treated both plaintiffs as exercising this option" to opt-out. *See* Dkt. No. 9. Thus, the motions panel "confused mootness with standing." *Friends of the Earth*, 528 U.S. at 189.

When the question of mootness arises because of a defendant's voluntary action, the defendant "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190.

If the Government invokes mootness based on its voluntary conduct, a court "do[es] not dismiss a case as moot" if "the Government nowhere suggests that if this litigation is resolved in its favor it will not reimpose" the challenged policy, but instead "vigorously defends the legality of such an approach." *West Virginia*, 142 S. Ct. at 2607. (cleaned up); *see also Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (emphasizing that "even if the government withdraws or modifies a [policy] in the course of litigation, that does not necessarily moot the case").

Voluntary cessation looks closely at the realities of a defendant's conduct—where the circumstances surrounding the cessation suggest that the defendant is "attempting to manipulate the [c]ourt's jurisdiction to insulate a favorable decision from review," a case is not moot. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000). Further, 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 West Virginia*, 142 S. Ct. at 2607.

From the start, ED has done everything in its power to change the program *just enough* to avoid review. When Mr. Garrison filed his

original complaint on September 27, 2022, ED still advertised "automatic" cancellation for up to 8 million borrowers, including him. At the time, there was no way to opt out. But just hours after this suit was filed, the White House announced an opt-out policy that did not yet exist. *See* Shabad, NBC News, *supra*. The next day, ED amended its website to say, "If you would like to opt out of debt relief for any reason, including because you are concerned about a state tax liability, you will be given an opportunity to opt out." *See* Dist. Ct. Dkt. No. 13. How a recipient of loan cancellation would capitalize on that "opportunity" would remain unclear for weeks, until ED yet again amended its website in response to this litigation to inform the public that they must contact their loan servicers instead of ED to request a chance to opt-out. *See Oct. 12, FAQs*. Meanwhile, ED addressed Mr. Garrison's claims directly. ED filed a notice alerting the district court that it had tried to moot Mr. Garrison's claim by considering the suit his effort "to opt out of the program." Dist. Ct. Dkt. No. 13. Thus, in *direct* response to the suit, ED created the opt-out mechanism and simultaneously excluded Mr. Garrison from the automatic cancellation policy.

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

ED's manipulation should prompt careful review. ED has not disavowed its policy, or the legality of it, for the 8 million borrowers it still insists will get "automatic" cancellation as soon as it is successful in "overturn[ing] those orders" enjoining the policy. *See Nov. 30 FAQs*. And while the voluntary cessation doctrine allows review even if *no* class member still faces *any* harm, the opt-out policy—which places the onus entirely on members of the class to know they face adverse tax consequences and then to opt out of loan cancellation—is hardly sufficient to alleviate their potential harms. Indeed, just the fact that some automatic cancellation still exists proves it is not "absolutely clear" that the policy "could not reasonably be expected to recur." *See West Virginia*, 142 S. Ct. at 2607. ED's voluntary change in conduct toward Appellants does not prevent review.

ED's actions in other cases confirm its motives. The day after ED tried to moot this suit, it tried the same tactic against the suit filed by six states. Within hours of that suit's filing, ED *yet again* changed the program. Even the New York Times noticed what ED was doing—since the "automatic cancellation" at issue in this case "would leave the plan open to legal challenges," and the challenged aspect of forgiveness in the States' lawsuit raised profound legal question, "[t]he effort [from ED] was no coincidence—eliminating eligibility for those students could make it harder for a Republican attorney general to successfully attack the entire program in court." Katie Rogers, *Biden's Student Debt Plan Touches Off Lawsuits, Scams and Confusion*, NY Times (Sept. 30, 2022).[4] Of course, ED's tactics there failed—and the Supreme Court has now granted review of that very case. *See Biden v. Nebraska*, No. 22-506, 598 U.S. --- (Dec. 2, 2022). But ED should not be allowed to succeed in this case in evading review through the same dubious means.

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

B. The Class Will Still Suffer Harm, even if the Named Representatives No Longer Face Loan Cancellation

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

Indeed, the Supreme Court has long recognized the need to review class actions of this type *particularly* where the defendant tries to remedy only the class representatives' harms. *See, e.g.*, *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51–52 (1991) (challenge to lack of probable

cause hearing for the class was not moot even when class representatives were given hearings). As the Court said, "[T]he termination of a class representative's claim does not moot the claims of the unnamed members of the class." *Id.* (citations omitted). Moreover, "[t]hat the class was not certified until after the named plaintiffs' claims had become moot does not deprive us of jurisdiction." *Id.*

ED's attempt to moot the class-wide injury suffered by borrowers in the relevant states by suddenly stopping the harm to the class representatives fails under this exception. Instead, the analysis should focus on the state of affairs when the plaintiffs sought class certification and challenged the adequacy of the hastily created opt-out mechanism. Even though ED has *since* excluded the class representatives, they can still challenge the policy on behalf of the class.

The loan cancellation program remains pending for anyone in the class of automatic cancellation, and once it occurs, it is irreversible. And while the Supreme Court has now granted review of the Eighth Circuit's injunction of the cancellation policy, it is far from certain whether that decision will resolve the claims raised by the class in this case. And ED

remains committed to moving forward with automatic cancellation as soon as it is allowed to do so.

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

The class, meanwhile, continues to face a wholly inadequate opt-out mechanism that will not prevent the harms it faces, *because ED is not acting toward the class as it has acted toward the class representatives*. Whereas ED exempted the class representatives from the program, it has merely created an opt-out for the class that they have to

choose to activate themselves. These are not equivalent options. The only way to make them equivalent would be to allow class members to *opt in* to loan cancellation. Otherwise, the only option for class members that would allow them to be treated the same as ED has treated the class representatives would be for each member of the class to sue individually, so ED could then exempt them from the program. This, of course, would defeat the whole point of a class action and of the voluntary cessation exception to mootness.

ED should not be permitted to evade review from this Court by changing course mid-litigation, as it so obviously is attempting to do. Review is therefore proper notwithstanding ED's attempted manipulation of this Court's Article III jurisdiction.

CONCLUSION

The judgment of the district court should be vacated and this case should be remanded for a decision on the merits of Appellants' claims.

DATED: December 5, 2022.

Respectfully submitted,

/s/ Caleb Kruckenberg

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this document complies with Federal Rule of Appellate Procedure 32(a)(7). It is printed in Century Schoolbook, a proportionately spaced font, and includes 7,852 words. I relied on my word processor, Microsoft Word, to obtain the count.

I hereby certify that all required privacy redactions have been made, any required paper copies to be submitted to the Court are exact copies of the version submitted electronically, and the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses.

DATED: December 5, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to all counsel of record.

Respectfully submitted,

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CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that that all of the materials required by parts (a) and (b) of Circuit Rule 30 are included in this appendix.

DATED: December 5, 2022.

/s/ Caleb Kruckenberg
CALEB KRUCKENBERG

APPENDIX

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

FRANK GARRISON, on behalf of himself and all others similarly situated, & NOEL JOHNSON, on behalf of himself and all others similarly situated, Plaintiffs, v. U.S. DEPARTMENT OF EDUCATION, & MIGUEL CARDONA, in his official capacity as U.S. SECRETARY OF EDUCATION Defendants.	NO.: 1:22-CV-01895-RYL-TAB **FIRST AMENDED CLASS ACTION COMPLAINT** *JURY TRIAL DEMANDED*

INTRODUCTION

Student debt cancellation has been the subject of great debate in America for at least a decade. Some argue that the government should provide relief to students to offset skyrocketing tuition costs and the consequent debt incurred by many to attend college. Others point to the regressive quality of student debt relief, arguing that it is unfair to cancel student debts that were freely assumed with taxes raised from those who predominately have not attended college, or attended but avoided debt, or paid it off. Congress has authorized a variety of student debt relief programs, including the Public Service Loan Forgiveness program, by which some debt is written off for students who choose to work in relatively lower-paying public service or non-profit organization positions after graduation and follow program rules for a period of years. Perhaps

because of the costs of student loan cancellation, or its potential impact on the economy, or the inherently divisive nature of this debate, Congress has declined to enact more sweeping debt cancellation. This is, of course, Congress's prerogative under our Constitution, as Congress is the branch of government that possesses the exclusive power to make law.

Purporting to step into the breach left by Congress, and making good on a campaign promise, the President in August announced that his administration would, by October, begin canceling between $10,000 and $20,000 of loan debts categorically—without respect to hardship or Congressionally authorized program rules—for more than 40 million borrowers. The authority for this $500 billion write-off, according to the administration, can be found in a 2003 law passed in response to the Iraq war as a means of aiding veterans and their families. This law—the Higher Education Relief Opportunities for Students or "HEROES" Act—authorizes the Secretary of Education to "waive or modify any statutory or regulatory provision applicable to" student aid programs when "necessary in connection with a war or other military operation or national emergency." 20 U.S.C. § 1098bb(a)(1). Importantly, to qualify for such a waiver or modification, individuals must reside or be employed in a "disaster area" as declared by a "Federal, State, or local official in connection with a national emergency." Concluding that the entire nation is a "disaster area" because of the COVID pandemic, the administration claims that the Secretary of Education has the power to "automatically" issue blanket loan forgiveness to 8 million borrowers almost immediately.

Despite the staggering scope of this regulatory action, it was taken with breathtaking informality and opacity. The Department did not undertake the notice-and-comment process required for rulemaking, much less solicit any public input. It did not even issue a formal order or directive setting out its cancellation program. Instead, it issued a press release on August 12th

along with two legal memoranda providing its justifications, and, later, a hastily created a FAQ section on its website.

In the rush, the administration has created new problems for borrowers in at least six states that tax loan cancellation as income. People like Plaintiffs Frank Garrison and Noel Johnson will actually be worse off because of the cancellation. Indeed, both Mr. Garrison and Mr. Johnson will face immediate tax liability from the state of Indiana because of the automatic cancellation of a portion of their debt. These taxes would not be owed for debt forgiveness under the Congressionally authorized program rewarding public service. Mr. Garrison, Mr. Johnson, and millions of others similarly situated in the six relevant states will receive no additional benefit from the cancellation—just a one-time additional *penalty*.

Even after the filing of this suit, the Department's slapdash policy has changed from hour to hour and remained utterly elusive. In response to this and other suits, ED simply updated its FAQs to try to negate individual claims and promised to delay the program until October 17th. Meanwhile, however, it has pressed forward with its stated intent to cancel hundreds of billions of dollars in student loan debt before any court meaningfully reviews the action. Up to 8 million borrowers still face "automatic" cancellation, many of them in states taxing the cancellation as income.

Nothing about loan cancellation is lawful or appropriate. In an end-run around Congress, the administration threatens to enact a profound and transformational policy that will have untold economic impacts. The administration's lawless action should be stopped immediately.

PARTIES

1. Plaintiff Frank Garrison is an individual who resides within the jurisdiction of the U.S. District Court for the Southern District of Indiana. He is employed by Pacific Legal Foundation, a

501(c)(3) non-profit organization in a position that qualifies him for the Congressionally authorized Public Service Loan Forgiveness program.

2. Mr. Garrison brings this case on his own behalf and on behalf of those similarly situated.

3. Plaintiff Noel Johnson is an individual who resides within the jurisdiction of the U.S. District Court for the Southern District of Indiana.

4. Mr. Johnson is also employed in a position that qualifies him for the Congressionally authorized Public Service Loan Forgiveness program.

5. Mr. Johnson brings this case on his own behalf and on behalf of those similarly situated.

6. Defendant U.S. Department of Education (ED) is an agency of the United States.

7. Defendant ED will implement the challenged regulatory action in this case—cancellation of federal student loan debt for more than 40 million Americans (loan cancellation).

8. Defendant Miguel Cardona (Secretary Cardona) is the U.S. Secretary of Education and is sued in his official capacity.

9. Defendant Secretary Cardona is the agency head of Defendant ED, which is responsible for issuing and implementing the challenge regulatory action.

10. Throughout this Complaint, Defendants are referred to jointly as ED or the Department except where otherwise specified.

JURISDICTION AND VENUE

11. This Court has federal question jurisdiction pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 1331.

12. This Court has the authority to grant an injunction and declaratory judgment and to "set aside" agency action in this matter pursuant to 28 U.S.C. §§ 2201, 2202 and 5 U.S.C. §§ 705, 706(2).

13. Venue for this action properly lies in this district pursuant to 5 U.S.C. § 703 and 28 U.S.C. § 1391(b)(2), (e)(1) because a defendant resides in this district, Plaintiffs resides in this judicial district, and a substantial part of the events or omissions giving rise to the claim occurred in this judicial district.

STATEMENT OF FACTS

I. BACKGROUND

A. Statutory Background

14. The Higher Education Act (HEA) establishes the Direct Loan Program (DLP) and Federal Family Education Loan Program (FFELP). 20 U.S.C. §§ 1071 *et seq.*, 1087a *et seq.*

15. The HEA and its implementing federal regulations provide a comprehensive legal framework governing federal student loan assistance and borrowers' obligations to repay their loans, including how and when certain loan statuses qualify for income-driven repayment (IDR) and the Public Service Loan Forgiveness (PSLF) program.

16. The HEA sets forth the "[t]erms and conditions" of DLP loans, including the "[r]epayment plan for public service employees" and "income-based repayment plan." *Id.* § 1087e. Federal regulation also specifies the conditions under which "[a] borrower may obtain loan forgiveness under [the FFELP] program," 34 C.F.R. § 685.219(c), and under which a borrower "qualif[ies] for loan forgiveness" under the IDR program, *id.* § 685.221(f).

B. The Department's Actions

17. While on the campaign trail in 2020, then-candidate Biden promised to provide sweeping relief to federal student loan borrowers.

18. For instance, Mr. Biden tweeted on March 22, 2020, "We should forgive a minimum of $10,000/person of federal student loans, as proposed by Senator Warren and colleagues."

19. In October 2021, ED announced "transformational changes" to the PSLF program. U.S. Department of Education, *U.S. Department of Education Announces Transformational Changes to the Public Service Loan Forgiveness Program, Will Put Over 550,000 Public Service Workers Closer to Loan Forgiveness* (Oct. 6, 2021).

20. ED later stated that this "[r]evamping" of the PSLF program has already resulted in loan relief for approximately 100,000 borrowers under that program. U.S. Department of Education, *Biden-Harris Administration Extends Student Loan Pause Through August 31* (Apr. 6, 2022).

21. In April 2022, ED announced additional actions to provide loan forgiveness to borrowers through the PSLF program and IDR plans, which it estimated would result in debt cancellation for more than 40,000 borrowers and credit toward IDR forgiveness for millions more. U.S. Department of Education, *Department of Education Announces Actions to Fix Longstanding Failures in the Student Loan Programs* (Apr. 19, 2022).

22. On August 24, 2022, President Biden finally revealed his new regulatory policy by press release.

23. On that date, ED announced that it plans to cancel $10,000 to $20,000 in student debt for all borrowers with ED-owned loans and annual income "during the pandemic" less than $125,000 (or $250,000 for households).

24. According to ED as of September 27, 2022, "The U.S. Department of Education will provide up to $20,000 in debt cancellation to Pell Grant recipients with loans held by the Department of Education and up to $10,000 in debt cancellation to non-Pell Grant recipients. Borrowers are eligible for this relief if their individual income is less than $125,000 or $250,000 for households." U.S. Department of Education, *One-Time Student Loan Debt Relief*, https://studentaid.gov/debt-relief-announcement/one-time-cancellation (Sept. 27, 2022).

25. The Department estimates that approximately 40 million borrowers would receive this relief, 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).

26. Independent estimates calculate the one-time cost of debt cancellation to be up to $519 billion. *See* Chen, Smetters & Paulson, *The Biden Student Loan Forgiveness Plan: Budgetary Costs and Distributional Impact*, University of Pennsylvania, Wharton School (August 26, 2022).

27. Prior to the filing of this lawsuit, ED announced that many borrowers will have cancellation automatically applied to them almost immediately.

28. According to the White House, "Nearly 8 million borrowers may be eligible to receive relief automatically because relevant income data is already available to the U.S. Department of Education." *FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most*, White House (Aug. 24, 2022).

29. Indeed, as of September 27, 2022, ED emphasized on its website that, "Although most borrowers will have to apply for debt relief, we have income data on hand for around 8 million borrowers. These borrowers will get the relief automatically." *One-Time Student Loan Debt Relief*, https://studentaid.gov/debt-relief-announcement/one-time-cancellation (Sept. 27, 2022).

C. The Original Cancellation Date Was the First Week in October

30. ED planned to apply this automatic cancellation in early October.

31. Representatives from the Department required loan servicers to begin preparing for loan cancellation and advised servicers to prepare for large call volumes during the Columbus Day weekend—October 8-10th.

32. ED informed certain servicers that it would send a test cancellation file on Saturday, October 8, 2022, with a potential automatic cancellation date of Tuesday, October 11, 2022.

33. For other borrowers, as of September 27, 2022, ED outlined its process on its website.

34. "If the U.S. Department of Education doesn't have your income data, the Administration will launch a simple application which will be available by early October." U.S. Department of Education, *The Biden-Harris Administration's Student Debt Relief Plan Explained*, https://studentaid.gov/debt-relief-announcement/ (Sept. 27, 2022).

35. "Once a borrower completes the application, they can expect relief within 4-6 weeks." *Id.*

36. The "automatic[]" cancellation for the approximate 8 million borrowers applies to borrowers who have provided income or other information to ED or their servicer because they have enrolled in programs like IDR or have certified payments made under PSLF. *Id.*

37. According to ED, again as of September 27, 2022, for those receiving automatic cancellation, "Your loan servicer will notify you when the relief has been applied to your account, with details on how the relief was applied." U.S. Department of Education, *One-Time Student Loan Debt Relief*, https://studentaid.gov/debt-relief-announcement/one-time-cancellation (Sept. 27, 2022).

38. ED has not issued a formal rule and has not complied with notice-and-comment rulemaking procedures concerning the loan cancellation.

39. ED has also confirmed that it does not intend to undergo formal rulemaking or submit its actions to Congress under the Congressional Review Act.

40. In an email to Members of Congress on August 26, 2022, Claire Viall, Deputy Assistant Secretary for Higher Education, said, "[A]s a general matter, the Department submits rules to

Congress under the CRA, but not ongoing Departmental actions. Neither this nor the prior administration has submitted COVID-related HEROES actions to Congress under the CRA."

D. The Purported Source of Authority for ED's Action

41. ED stated that it had determined that the Higher Education Relief Opportunities for Students (HEROES) Act of 2003 provides the Secretary of Education with legal authority to cancel student debt.

42. The HEROES Act was passed in 2003, in response to the Iraq war as a means of providing assistance to veterans and their family.

43. It provides that ED may "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" when "necessary in connection with a war or other military operation or national emergency." 20 U.S.C. § 1098bb(a)(1).

44. The Act further specifies, as relevant here, that this waiver or modification must be "necessary to ensure that" one of certain statutory objectives are achieved, including to ensure that "recipients of student financial assistance . . . are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." *Id*. § 1098bb(a)(2)(A).

45. In a legal memorandum issued with its announcement of loan cancellation, ED revoked a prior Department legal analysis of the issue and asserted that the HEROES Act "grants the Secretary authority that could be used to effectuate a program of targeted loan cancellation directed at addressing the financial harms of the COVID-19 pandemic." Lisa Brown, General Counsel, U.S. Department of Education, *The Secretary's Legal Authority for Debt Cancellation* at 1 (Aug. 23, 2022).

46. ED further claimed that it is "not required to show that any individual borrower is entitled to a specific amount of relief" and "instead may provide relief on a categorical basis." *Id.* at 3.

47. In a separate memo published that same day, the Office of Legal Counsel concluded that "the Secretary can exercise the waiver or modification authority granted by the HEROES Act of 2003 to reduce or cancel the principal balances of student loans[.]" Christopher H. Schroeder, Asst. Attorney General, U.S. Dept. of Justice, Office of Legal Counsel, *Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans*, Memorandum Op. for the General Counsel, Dept. of Education, 46 Op. O.L.C. ___, Slip Op. at 24 (Aug. 23, 2022) (OLC Memo).

48. As an initial matter, OLC concluded that because ED may waive or modify "any" covered statutory or regulatory provision, it may waive or modify any provisions "applicable to the repayment of the principal balances of loans." *Id*. at 2.

49. The memo then proceeded to analyze three relevant criteria governing the Secretary of Education's authority under the Act to effect mass cancellation. *Id.* at 19.

50. First, it considered whether cancellation is directed toward "affected individuals," *id.*, which here includes individuals who "reside[] or [are] employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency." 20 U.S.C. § 1098ee(2).

51. OLC noted that all of the United States and its permanently populated territories had been declared a disaster area due to COVID-19 and therefore all persons residing or working in those areas were eligible (along with anyone who suffered direct economic hardship due to the pandemic). *Id.* at 21.

52. Second, OLC observed that, under the Act, a waiver or modification "would be permissible only as may be necessary to ensure the individuals are not placed in a 'worse position financially

. . . *because of*'" their status as affected individuals. *Id.* (quoting 20 U.S.C. § 1098bb(a)(2)(A) (emphasis added)).

53. According to OLC, this required ED to "determine that the COVID-19 pandemic was a but-for cause of the financial harm" to be addressed by mass debt cancellation. *Id.*

54. Third, the OLC memo considered the Act's requirement that any waiver and modification "be necessary" to "ensure" that affected individuals "*are not placed in a worse position financially in relation to that financial assistance* because of their status as affected individuals." *Id.* at 22 (quoting 20 U.S.C. § 1098bb(a)(2) (emphasis added)).

55. OLC read this requirement to mean that any waiver or modification should "put loan recipients back into the financial position they would be in" in relation to their loans "were it not for the national emergency." *Id.* at 21.

56. Having defined the Act's criteria for waiver or modification, OLC then analyzed whether "within these parameters" the Secretary was authorized to implement mass debt cancellation.

57. At this point, the memo balked at reaching a firm conclusion, stating only that affording "broad, categorical" debt cancellation "*could be* an appropriate invocation of the Act." *Id.* OLC asserted that the Secretary has unlimited discretion to make this analysis as he "deems necessary." *Id.* at 22.

58. OLC also claimed to find "contextual clues" in the Act that "Congress used the word 'necessary' in a more flexible and capacious sense, as meaning 'appropriate' or 'conducive' rather than 'essential.'" *Id.* at 23.

59. In addition, the memo implicitly acknowledged the lack of a "closely tailored fit" between ED's mass debt cancellation plan and the Act's waiver requirements—in particular, the

requirement that the waiver be necessary to restore affected individuals to the position they would have been in but for the pandemic-caused financial harm to their student loans. *Id.*

60. But no such "fit" is necessary, OLC concluded, because the Secretary need not proceed "case-by-case" under the Act and is allowed to "minimize 'administrative requirements." *Id.*

II. THE EFFECT ON BORROWERS

A. The Effect on Mr. Garrison

61. Mr. Garrison financed his college education using federal student loans, which have been consolidated and are currently serviced by the Missouri Higher Education Loan Authority (MOHELA).

62. Mr. Garrison was also a Pell Grant recipient.

63. Since entering the workforce Mr. Garrison has worked in the public interest and has pursued PSLF while making timely monthly payments on his outstanding loan debt.

64. Mr. Garrison has also enrolled in income-driven repayment, which has capped his monthly payment amount based on his income.

65. Mr. Garrison has regularly certified both his IDR eligibility and PSLF payments with his loan servicers.

66. As of October 2021, the Department of Education recognized that Mr. Garrison had made 57 payments toward PSLF while working in qualifying public service employment.

67. Since that time, he has accrued additional qualifying payments towards PSLF.

68. As of October 2021, Mr. Garrison also certified his IDR eligibility with the Department, through his servicer, and voluntarily disclosed his yearly tax information to the Department to support that certification.

69. Mr. Garrison intends to continue making monthly payments toward PSLF and expects to qualify for full forgiveness based on his public service in slightly more than four years.

70. Mr. Garrison is a current resident of the State of Indiana.

71. By statute, any loan forgiveness that Mr. Garrison receives 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).

72. Mr. Garrison qualifies for $20,000 in loan cancellation under ED's impending regulatory action, as his household income is less than $125,000 per year, he holds eligible student loan debt, and was a Pell Grant recipient.

73. As a borrower who has recently certified his employment status and income with ED through his servicer, Mr. Garrison is in the class of automatic cancellation that ED had announced would occur in early October.

74. Under Indiana law, 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).

75. Mr. Garrison would not incur that state tax liability if not for the Department's automatic cancellation of a portion of his federal student loan debt.

76. Because Mr. Garrison otherwise intends to seek forgiveness under PSLF and has limited monthly payments under IDR, a $20,000 reduction in his total indebtedness will not change either his monthly payment obligation or the total amount of the loans he must repay.

77. ED's loan cancellation would cause Mr. Garrison to incur a financial obligation that he would not otherwise have faced.

B. The Effect on Mr. Johnson

78. Mr. Johnson financed his college education using federal student loans, which are currently serviced by MOHELA.

79. Since entering the workforce Mr. Johnson has worked in the public interest and has pursued PSLF while making timely monthly payments on his outstanding loan debt.

80. Mr. Johnson has also enrolled in income-driven repayment, which has capped his monthly payment amount based on his income.

81. Mr. Johnson has regularly certified both his IDR eligibility and PSLF payments with his loan servicers.

82. Mr. Johnson previously certified his income with his servicer for IDR eligibility by providing his income tax information to his servicer.

83. Mr. Johnson is currently enrolled in IDR, and his servicer lists his certification as current, with a re-certification date of July 7, 2023.

84. Mr. Johnson was also enrolled in IDR through his same servicer in 2020 and 2021.

85. Mr. Johnson intends to continue making monthly payments toward PSLF and expects to qualify for full forgiveness based on his public service in the next few years.

86. Mr. Johnson is a current resident of the State of Indiana.

87. By statute, any loan forgiveness that Mr. Johnson receives 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).

88. Mr. Johnson qualifies for $10,000 in loan cancellation under ED's impending regulatory action, as his household income is less than $125,000 per year and he holds eligible student loan debt.

89. As a borrower who has certified his income with ED through his servicer, and is currently enrolled in IDR, Mr. Johnson is in the class of automatic cancellation that ED had announced would occur in early October.

90. Under Indiana law, if Mr. Johnson received $10,000 in automatic cancellation of his federal student loan debt, he would face a state income tax liability of more than $500 for 2022. *See* Ind. Code § 6-3-1-3.5(a)(30).

91. Mr. Johnson would not incur that state tax liability if not for the Department's automatic cancellation of a portion of his federal student loan debt.

92. Because Mr. Johnson otherwise intends to seek forgiveness under PSLF and has limited monthly payments under IDR, a $10,000 reduction in his total indebtedness will not change either his monthly payment obligation or the total amount of the loans he must repay.

93. ED's loan cancellation would cause Mr. Johnson to incur a financial obligation that he would not otherwise have faced.

C. Harms to the Proposed Class

94. Plaintiffs seek to maintain this action both on behalf of themselves and on behalf of others similarly situated under Federal Rule of Civil Procedure 23.

95. Plaintiffs propose the following class definition: "All persons who qualify for ED's impending automatic loan cancellation and reside in states imposing income tax obligations for any amount of debt cancelled under ED's policy."

96. The class meets all the Rule 23(a) prerequisites for maintaining a class action.

97. **Numerosity under Rule 23(a)(1):** The putative class is so numerous that joinder of all members is impracticable:

a. At least six states, Arkansas, Indiana, Minnesota, Mississippi, North Carolina and Wisconsin, will tax student loan cancellation as income;

b. ED estimates that 365,600 borrowers in Arkansas will be eligible for loan cancellation, with 269,000 eligible for Pell Grant cancellation of up to $20,000;

c. ED estimates that 856,400 borrowers in Indiana will be eligible for loan cancellation, with 555,500 eligible for Pell Grant cancellation of up to $20,000;

d. ED estimates that 729,700 borrowers in Minnesota will be eligible for loan cancellation, with 416,300 eligible for Pell Grant cancellation of up to $20,000;

e. ED estimates that 417,200 borrowers in Mississippi will be eligible for loan cancellation, with 316,400 eligible for Pell Grant cancellation of up to $20,000;

f. ED estimates that 1,190,500 borrowers in North Carolina will be eligible for loan cancellation, with 785,500 eligible for Pell Grant cancellation of up to $20,000;

g. ED estimates that 685,100 borrowers in Wisconsin will be eligible for loan cancellation, with 412,700 eligible for Pell Grant cancellation of up to $20,000; and

h. ED estimates that up to 8 million borrowers will receive automatic loan cancellation, many of whom reside in the relevant states that tax the cancellation as income.

98. **Commonality under Rule 23(a)(2):** Questions of law or fact are common to Plaintiffs' claims against ED's regulatory action and the putative class's claims as the two counts alleged in this Complaint assert that the regulatory action is invalid under the Administrative Procedure Act and the U.S. Constitution.

99. **Typicality under Rule 23(a)(3):** Plaintiffs' claims and the putative class's claims arise out of the same regulatory action taken by ED, which cases the same harms to both Plaintiffs and the

putative class and the declaratory and injunctive relief sought by Plaintiffs would afford complete relief to the putative class.

100. Adequacy of Representation under Rule 23(a)(4):

a. Plaintiffs' interests are aligned with those of the putative class because they will suffer the same injuries, from the same action taken by the same defendants as each member of the putative class; and

b. The putative class would be adequately represented by Pacific Legal Foundation. Founded in 1973, PLF is a nonprofit, tax-exempt, California corporation established for the purpose of litigating matters affecting the public interest. PLF provides a voice in the courts for Americans who believe in limited constitutional government, private property rights, and individual freedom.

c. PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. PLF's attorneys have participated as lead counsel or counsel for *amici* in several cases involving the role of the Judicial Branch as an independent check on the Executive and Legislative branches under the Constitution's Separation of Powers. *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (SEC administrative-law judge is "officer of the United States" under the Appointments Clause); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Rapanos v. United States*, 547 U.S. 715 (2006) (agency regulations defining "waters of the United States").

d. Lead counsel for Plaintiffs, Caleb Kruckenberg, has represented clients as lead counsel in numerous regulatory challenges under the Administrative Procedure Act, including complex challenges with nationwide effect. *See, e.g., Michigan Assoc. of Public School Academies*, *et al., v. U.S. Dept. of Education, et al*., 1:22-cv-00712 (W.D. Mich.) (challenge to ED rule for charter school grant funding); *John Doe, et al., v. U.S. Dept. of Justice, et al.*, 5:22-cv-00855 (C.D. Cal.) (challenge to final rule implementing sex offender registration requirements); *Duke Bradford, et al., v. U.S. Dept. of Labor, et al.*, 1:21-cv-3283 (D. Co.) (challenge to minimum wage rule), *rule enjoined by* No. 22-1023 (10th Cir.).

101. The putative class also meets the requirements of Rule 23(b)(2) and (c)(4) of the Federal Rules of Civil Procedure. These requirements are pleaded collectively and in the alternative.

a. As to Rule 23(b)(2), ED has acted on grounds generally applicable to the putative class. Declaratory and injunctive relief is appropriate with respect to all members of the class.

b. As to Rule 23(c)(4), the question of the validity of ED's regulatory action is eligible for resolution on an issue-certified basis because whether the loan cancellation violates the APA is a "particular issue[]" that is appropriately decided on a class-wide basis.

III. THE DEPARTMENT'S EFFORTS TO AVOID LEGAL REVIEW

102. Mr. Garrison filed suit on September 27, 2022. *See* ECF No. 1.

103. Central to Mr. Garrison's complaint was that both he and up to 8 million others would receive what the Department promised to be "automatic cancellation" of a portion of their student debt, which would result in income tax liability. *See id.*

104. Mr. Garrison also sought a temporary restraining order and a preliminary injunction to prevent ED from granting immediate automatic cancellation as it had promised. *See* ECF Nos. 4, 5.

105. In response to the suit, ED took several actions, only some of which it acknowledged to this Court.

106. 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, https://www.nbcnews.com/politics/politics-news/lawsuit-seeks-block-bidens-student-debt-forgiveness-program-rcna49638.

107. At the time, however, ED's own website said nothing about opting out, and still proudly 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).

108. The next day, ED quietly amended its website to conform its policy to the Press Secretary's.

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

110. ED also noted that it had taken steps to attempt to moot the present case, "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.*

111. The following day, September 29, 2022, a group of six states filed suit challenging the debt cancellation plan, this time objecting, in part, to ED's action of consolidating Federal Family Education Loan Program (FFELP) loans into the new cancellation program. *See Nebraska, et al., v. Biden, et al.*, No. 4:22-cv-1040 (E.D. Mo.), ECF No. 1 at ¶¶ 62-63, 119-20.

112. Up until the filing of that suit ED had proclaimed on its loan cancellation FAQs that FFELP borrowers could benefit from the cancellation program. *See id.* at ¶¶ 62-63.

113. Within hours, ED *yet again* updated its website, this time in an effort to moot the States' challenge.

114. According to one report, "In a remarkable reversal that will affect the fortunes of many student loan borrowers, the U.S. Department of Education has quietly changed its guidance around who qualifies for President Biden's sweeping student debt relief plan." Cory Turner, *In a reversal, the Education Dept. is excluding many from student loan relief*, NPR (Sept. 30, 2022), https://www.npr.org/2022/09/29/1125923528/biden-student-loans-debt-cancellation-ffel-perkins?utm_campaign=npr&utm_medium=social&utm_term=nprnews&utm_source=twitter.com.

115. Other reports recognized ED's calculated attempt to avoid the lawsuits.

116. The New York Times reported that the "automatic cancellation" at issue in this case "would leave the plan open to legal challenges" since "[o]pponents of automatic debt relief say that borrowers in some states would be forced to pay taxes on the forgiven debts." Katie Rogers, *Biden's Student Debt Plan Touches Off Lawsuits, Scams and Confusion*, NY Times (Sept. 30, 2022) https://www.nytimes.com/2022/09/30/us/politics/biden-student-loans.html.

117. But in response to this suit, "This week, the administration updated its guidance to let borrowers know they could opt out of automatic relief." *Id.*

118. The FFELP borrowers, in turn "have been excluded without much notice: On the same day officials in six Republican-led states filed a lawsuit accusing Mr. Biden of abusing his power and acting unlawfully, the administration updated eligibility guidance to say that borrowers whose federal loans are privately held were no longer part of the program. The effort 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." *Id.*

119. This Court held a status report on September 29, 2022, and ED's attorney represented that the Department would not cancel Mr. Garrison's loans, and thus, the case had been successfully mooted.

120. ED's attorney did not say when the remaining cancellation would occur, nor did it commit to doing so only after a formal rulemaking or other written action by the President or the Department.

121. In reliance on the representations made by ED, this Court denied the motions for preliminary relief without prejudice and allows Mr. Garrison to amend his complaint on or before October 10, 2022. ECF No. 16.

122. This Court also requested that Mr. Garrison address the following issues:

a. Whether he (and any additional plaintiffs) have standing. Particularly, whether their injury is caused by and fairly traceable to the debt relief program or to the Indiana Tax Code. *See Segovia v. United States*, 880 F.3d 384, 388–89 (7th Cir. 2018).

b. Whether the Department of Education has taken sufficient action for the case to be ripe for adjudication. Plaintiff's allegations speculate about the terms of the

program. But as evidenced by the Government's recent addition of an optout provision, the plan is still evolving.

123. In a stipulation that ED filed that same day in the litigation initiated by the States, ED was slightly more forthcoming concerning its intent in the coming weeks.

124. It represented that ED "will not discharge any student loan debt pursuant to the policy challenged in this case before October 17, 2022[.]" *See Nebraska, et al., v. Biden, et al.*, No. 4:22-cv-1040 (E.D. Mo.), ECF No. 14 at 1.

125. That stipulation is signed by the same counsel appearing in this matter on ED's behalf. *See id.* at 3.

IV. LOAN CANCELLATION REMAINS IMMINENT

126. ED does not intend to follow the normal, formal pathways to implementing its cancellation policy.

127. It has confirmed that it views loan cancellation as an "ongoing Departmental action[]," not a rule that will be submitted to Congress under the Congressional Review Act.

128. ED will implement loan cancellation without issuing a final rule or undertaking notice and comment. *See Use of the Heroes Act of 2003 to Cancel the Principal Loan Amounts of Student Loans*, 46 Op. O.L.C. __, 2022 WL 3975075, at *3 (Aug. 23, 2022) (OLC opinion advising ED that it "is authorized to disregard notice-and-comment requirements when implementing the [HEROES] Act," "is exempt from otherwise-applicable procedural requirements that would delay the implementation" of loan cancellation, and need "only publish a notice" to effect loan cancellation).

129. ED's FAQs appear to be the only public description of the actual policy, even though ED intends 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).

130. ED also intends to apply cancellation to millions of borrowers who do not apply. *Id.*

131. According to ED, "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.*

132. ED has already implemented part of its cancellation policy, by improperly allowing consolidation of FFELP loans. *See Nebraska, et al., v. Biden, et al.*, No. 4:22-cv-1040 (E.D. Mo.), ECF No. 1 at ¶¶ 62-63, 119-20.

133. ED only stopped improperly consolidating loans in direct response to litigation.

134. 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.

135. Meanwhile, ED has taken steps to implement its application for cancellation, which "is expected to go live" any day. *See* Katie Lobosco, *Biden's student loan forgiveness application is coming soon. Here's what you need to know*, CNN (Oct. 4, 2022) https://www.cnn.com/2022/10/04/politics/student-loan-forgiveness-application-rules.

136. ED has also publicly stated that it does not intend to delay its cancellation even in light of the stipulated delay.

137. According to one report, "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) https://www.washingtonpost.com/education/2022/10/05/student-loan-forgiveness-application-scams/.

138. ED confirmed during the same call 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.*

139. If ED is not enjoined, it will apply automatic cancellation to up to 8 million borrowers, including members of the putative class, who do not opt-out, during the month of October 2022. *One-Time Student Loan Debt Relief*, https://studentaid.gov/debt-relief-announcement/one-time-cancellation (Oct. 5, 2022).

140. Mr. Johnson is just one of those borrowers facing imminent and unwanted cancellation.

V. PLAINTIFFS HAVE STANDING TO SUE

A. Mr. Garrison and Other Borrowers Have Standing

141. The date Mr. Garrison's original complaint was filed, he suffered an imminent injury fairly traceable to ED's loan cancellation policy because he was in the class of borrowers who would be subjected to automatic cancellation and ensuing state tax liability.

142. Traceability "requires no more than *de facto* causality." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019). A plaintiff's injury by a third party is traceable to a defendant's action when

"third parties will likely react in predictable ways" to the defendant's actions, and that predictable action causes the injury. *Id.*

143. It was (and remains) predictable that Indiana will react to ED's loan cancellation by levying higher taxes against Mr. Garrison for the 2022 tax year, because the state has specified in statute that it will tax cancelled loan amounts as income. Ind. Code § 6-3-1-3.5(a)(30). Mr. Garrison's impending state tax liability was therefore traceable to ED's cancellation policy as a but-for cause of the tax liability.

144. An injunction and declaratory judgment against the cancellation would redress Mr. Garrison's impending injury.

145. Mr. Johnson also faces an imminent injury fairly traceable to ED's loan cancellation policy because he remains subject to automatic loan cancellation and ensuing state tax liability.

146. As with Mr. Garrison, Mr. Johnson faces the predictable and unwanted tax liability arising from Indiana law once ED takes action, but an injunction would redress this injury.

147. Members of the putative class also have standing because, like Mr. Garrison and Mr. Johnson, they too would face state tax liability from ED's cancellation.

148. Members of the putative class also face imminent cancellation if they fail to opt-out of ED's policy, even if they lack notice of the cancellation policy. An injunction and declaratory judgment would redress the impending injuries faced by the putative class.

B. The Challenge Is Not Moot

149. ED's attempt to avoid judicial review of its cancellation policy by relieving Mr. Garrison of the cancellation in direct response to this lawsuit does not moot this challenge.

150. ED's actions are designed solely to avoid litigation, and judicial review is available under the voluntary cessation exception to mootness. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000).

151. ED's actions constitute an involuntary settlement, which does not prevent a putative class representative from continuing to litigate a class action even when he "no longer has a personal stake." *Wrightsell v. Cook Cnty.*, 599 F.3d 781, 783 (7th Cir. 2010).

152. ED's "inherently transitory" cancellation policy can also be reviewed for a class-wide injunction, even if Mr. Garrison's individual injury has been stopped, because the nature of the cancellation policy is too transitory for immediate judicial review. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 76 (2013).

153. Furthermore, Mr. Johnson still faces imminent automatic cancellation, and has a live controversy that he shares with members of the putative class.

COUNT I—VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 706(2)—RULE IN EXCESS OF STATUTORY AUTHORITY

154. Plaintiffs repeat and reallege each and every allegation above as if fully set forth herein.

155. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Thus, "an 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). The Administrative Procedure Act (APA) directs a court 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)(A), (B), (C).

156. "'[A]gency action' includes the whole or a part of an agency rule, order, license, sanction, relief[.]" 5 U.S.C. § 551(13).

157. ED's debt cancellation is reviewable agency action as it is a final decision by the agency that has sweeping legal consequences.

158. The cancellation, announced formally and supported by two memos, one from ED's own general counsel and one from OLC, marks the consummation of the Department's decision-making process concerning its decision to cancel student loans.

159. The action also determines rights and legal obligations, as it purports to erase more than $500 billion in federal student debt, for more than 40 million borrowers, and does so automatically for up to 8 million borrowers.

160. The Department has no lawful authority to issue the rule.

161. The debt cancellation is not justified by the HEROES Act because, among other reasons, the cancellation is neither "necessary," nor is it targeted at harms that are "a direct result of a . . . national emergency." *See* 20 U.S.C. § 1098ee(2).

162. The putative harms targeted by the cancellation are not a "direct result" of the "national emergency" surrounding the COVID-19 pandemic, as student loan borrowers are not directly "affected individuals" who "suffered direct economic hardship as a direct result of a war or other military operation or national emergency." *See* 20 U.S.C. § 1098ee(2).

163. The mass cancellation is also hardly "necessary" to mitigate the economic harms of the pandemic. *See* 20 U.S.C. § 1098bb(a)(2)(A).

164. Cancellation also runs afoul of the requirement in Section 1098bb(a)(2) that borrowers "are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." For borrowers like Mr. Garrison and Mr. Johnson as well as putative

class members who are borrowers in other states that tax cancellation as income, the overall debt burden increases as a result of the Department's debt cancellation program.

165. Cancellation also affords relief to those who are "not placed in a worse position financially in relation to [their] financial assistance because of their status as affected individuals," because it extends to individuals who are not worse off compared to early 2020, individuals who are not worse off relative to their federal student loans, and individuals who are not worse off because of their status as affected individuals.

166. Additionally, to the extent the statute can *arguably* justify the cancellation, the major questions doctrine requires a clear authorization by Congress of such an economically and politically significant action, which is lacking here. *See West Virginia v. EPA*, No. 20-1530, 2022 WL 2347278 (U.S. June 30, 2022).

167. Without a valid source of authority, the Secretary has "literally has no power to act." *See La. Pub. Serv. Comm'n*, 476 U.S. at 374.

168. The impending cancellation was issued in excess of statutory authority and is therefore invalid.

169. As a result of the foregoing, Plaintiffs are entitled to a declaratory judgment and permanent injunction barring any cancellation action, attorneys' fees, expenses, costs and disbursements, and any other relief that may be appropriate.

COUNT II—VIOLATION OF U.S. CONSTITUTION, NON-DELEGATION DOCTRINE AND SEPARATION OF POWERS

170. Plaintiffs repeat and reallege each and every allegation hereinabove as if fully set forth herein.

171. The APA directs a court to "hold unlawful and set aside" an agency's rule that is "contrary to constitutional right." 5 U.S.C. § 706(2)(B).

172. Article I, § 1, of the Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States."

173. No agency has any inherent power to make law, and "an agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n*, 476 U.S. at 374.

174. Article II, § 3, of the Constitution directs that the President "shall take Care that the Law be faithfully executed . . . ."

175. A "fundamental precept" of "another strand of [] separation-of-powers jurisprudence, the delegation doctrine," "is that the lawmaking function belongs to Congress, U.S. Const., Art. I, § 1, and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996).

176. Congress may not "abdicate or [] transfer to others the essential legislative functions with which it is thus vested." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935).

177. 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).

178. 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).

179. 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).

180. The statute thus bestows the Executive with lawmaking power in violation of Article I of the Constitution.

181. As a result of the foregoing, Plaintiffs are entitled to a declaratory judgment and permanent injunction declaring the delegations in 20 U.S.C. § 1098bb(a)(1) invalid, barring any cancellation action, attorneys' fees, expenses, costs and disbursements, and any other relief that may be appropriate.

PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, Plaintiffs demand judgment against Defendants as follows:

(i) The issuance of an injunction, pursuant to 5 U.S.C. § 705 and 28 U.S.C. § 2201, prohibiting Defendants from enacting loan cancellation;

(ii) A declaratory judgment, pursuant to 5 U.S.C. § 706(2) and 28 U.S.C. § 2202, holding unlawful and setting aside any action by Defendants to enact loan cancellation;

(iii) A declaratory judgment and permanent injunction declaring the delegations in 20 U.S.C. § 1098bb(a)(1) invalid;

(iv) An award of attorneys' fees and costs to Plaintiffs; and

(v) Any other relief as the Court deems just, equitable and proper.

JURY DEMAND

Plaintiff herein demands a trial by jury of all triable issues in the present matter.

DATED: October 10, 2022.

Respectfully submitted,

/s/ Caleb Kruckenberg

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Attorneys for Plaintiff

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.

/s/ Caleb Kruckenberg
CALEB KRUCKENBERG

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

FRANK GARRISON on behalf of himself and all others similarly situated and NOEL JOHNSON on behalf of himself and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	No. 1:22-cv-01895-RLY-TAB
U.S. DEPARTMENT OF EDUCATION and MIGUEL CARDONA in his official capacity as U.S. Secretary of Education,	)	
Defendants.	)	

ENTRY DISMISSING PLAINTIFFS' AMENDED COMPLAINT

Plaintiffs Frank Garrison and Noel Johnson allege they will be injured by how the Indiana Revenue Code treats certain types of debt forgiveness. To remedy the problem of an increased state tax burden, Garrison and Johnson sue the Federal Government. But the Federal Government's student loan relief program did not injure them. The State's legislative decision did. Thus, the injury-in-fact is not fairly traceable to the Defendants—the United States Department of Education and Miguel Cardona, the Secretary of Education. As Garrison and Johnson do not have standing, the court is obligated to **DISMISS** the amended complaint (Filing No. 23).

I. Background

Plaintiff Frank Garrison is a Pell Grant recipient who has taken out federal student loans. (Filing No. 4-2, Garrison Decl. ¶ 2). To pay back his student loans, Garrison

utilizes an income-driven repayment program and intends to seek forgiveness of his student loans through the Department of Education's Public Service Loan Forgiveness ("PSLF") plan. (*Id.* at ¶¶ 5, 10).

Under income-driven repayment programs, a student loan borrower contributes a standard portion of their income toward outstanding loans. 20 U.S.C. §§ 1087e(d), 1098e. These plans only last for a set period, after which any remaining balance is forgiven. 34 C.F.R. § 685.209 (setting loan forgiveness period at 20 years). Under the PSLF plan, borrowers who make a qualifying number of payments while working in public service will have remaining balances forgiven. 20 U.S.C. § 1087e(m).

On August 24, 2022, the Department of Education announced that it would cancel $10,000 of federally held student debt for unmarried borrowers who made less than $125,000 per year. (Filing 25-3, Ex. 1 Debt Relief Plan at 2). Pell Grant recipients like Garrison would receive $20,000 dollars of benefit. (*Id.*). These benefits apply automatically to borrowers the government has data on unless those borrowers opt out. (Ex. 1 at 3 ("[Eight] million people for whom we have data . . . will get the relief automatically.")). As an unmarried individual with an annual income below $125,000, Garrison submits he would have automatically received debt relief. (Garrison Decl. ¶ 3).

Indiana, however, will treat these federal benefits as taxable income. Ind. Code § 6-3-1-3.5(a)(30). Accordingly, when $20,000 of his loans are automatically forgiven, Indiana will tax Garrison approximately $1,000 dollars more than before he received relief. (Garrison Decl. ¶ 18). Not wanting to pay Indiana more than necessary, Garrison brought suit against the Secretary of the Department of Education and the Department

itself. (Compl. ¶¶ 2–5; Am. Compl. ¶¶ 6–9). He sought a temporary restraining order to prevent the Department of Education from implementing student debt relief plan. (Filing 4, Motion for Temporary Restraining Order).

On September 29, the court held a telephonic scheduling conference. (Filing No. 12). Prior to that conference, the Department of Education opted Garrison out of the loan forgiveness program which prevented Garrison from establishing irreparable harm. (Filing No. 13, Notice from Defendants). The Department of Education also created an opt-out provision that would allow other individuals who would otherwise automatically receive relief to opt-out of the program. (Filing No. 31-1, Kvaal Decl. at 28). During the conference, Plaintiff orally requested leave to amend his complaint, which the court granted. Following the conference, the court denied the motions for a temporary restraining order and preliminary injunction without prejudice. (Filing No. 16). That denial was without prejudice pursuant to the parties' agreement. (*Id.*).

Plaintiffs then filed an Amended Complaint on October 10, 2022. (Filing No. 23). In this Amended Complaint, Garrison added an additional Plaintiff, Noel Johnson, who is in a materially identical position as Garrison was before the Department of Education opted Garrison out of the relief program. (Am. Compl. ¶¶ 78–91 (describing Johnson as an Indiana resident and a public interest employee pursuing PSLF forgiveness with a household income of less than $125,000 per year)). The Amended Complaint also alleges the beginnings of a class action suit for a putative class of "[a]ll persons who qualify for . . . impending automatic loan cancellation and reside in states imposing tax obligations for any amount of debt cancelled." (*Id.* at ¶ 95). Plaintiffs then moved for a

temporary restraining order (Filing No. 26), a preliminary injunction (Filing No. 25), and to certify this class (Filing No. 24).

II. Legal Standard

A court has an "independent duty" to investigate its own subject matter jurisdiction. *Dexia Crédit Loc. v. Rogan*, 602 F.3d 879, 883 (7th Cir. 2010). These potential jurisdictional problems "must" be addressed "at whatever point they arise in the proceedings." *United States v. Furando*, 40 F.4th 567, 579 (7th Cir. 2022) (quoting *George v. Islamic Rep. of Iran*, 63 F. App'x 917, 918 (7th Cir. 2003)). Article III standing is one of those jurisdictional problems. *Bazile v. Fin. Sys. of Green Bay, Inc.*, 983 F.3d 274, 278 (7th Cir. 2020). Providing "notice and a hearing or an opportunity to amend" is preferred, but a court may dismiss the case immediately if it determines the jurisdictional "defect is incurable."[1] *Furando*, 40 F.4th at 579 (quoting *George*, 63 F. App'x at 918).

Ultimately, the plaintiff "bears the burden of establishing" standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Where the case is at the pleading stage, the plaintiff need "clearly . . . allege facts demonstrating" they are the "proper party to invoke judicial resolution of the dispute." *Warth v. Seldin*, 422 U.S. 490, 518 (1975). "That a suit may be a class action . . . adds nothing to the question of standing." *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 40 n.20 (1976).

[1] The Plaintiffs were made aware of possible jurisdictional deficiencies, given an opportunity to amend, amended their complaint, and briefed this issue. (*See* Filing Nos. 13 (explaining possible standing issues and granting leave to amend), 23 (Am. Compl.), 25 at 6–10 (Pls.' Br.)).

III. Discussion

Garrison and Johnson do not have standing because their injury is not traceable to the Department of Education or Secretary Cardona. Because this defect is incurable,[2] the court must dismiss the Amended Complaint.

The Article III standing requirement that triggers a federal court's jurisdiction is "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth*, 422 U.S. at 498. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Simon*, 426 U.S. at 37). The importance of this doctrine precludes treating the analysis as "a mechanical exercise." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Instead, standing questions are answered "chiefly by comparing the allegations of the particular complaint to those made in prior cases" as well as by referencing the "single basic idea" behind standing: the separation of powers. *Id.* at 751–52; *see also Flast v. Cohen*, 392 U.S. 83, 97 (1968) (explaining adjudication is acceptable only where it is "consistent with a system of separated powers"). The standing doctrine therefore "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

[2] As the court concludes Garrison and Johnson have sued the wrong defendant for their injury (i.e. the Federal Government rather than Indiana), any further amendment of the complaint would be unresponsive to the jurisdictional deficiency. That makes amendment futile. *Campania Mgmt. Co. v. Rooks, Pitts & Poust*, 290 F.3d 843, 850 (7th Cir. 2002).

"The irreducible constitutional minimum of standing contains three elements": (1) a concrete and particularized injury-in-fact that is "actual or imminent, not conjectural or hypothetical," (2) that is "fairly . . . traceable to the challenged action of the defendant" and (3) will likely be "redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (cleaned up). Plaintiffs fail to establish the second element.

Traceability measures causation. *Allen*, 468 U.S. at 753 n.19. It does so to ensure the injury-in-fact does not flow from "the independent action of some third party not before the court." *Simon*, 426 U.S. at 41–42. Relatedly, "the right to complain of *one* administrative deficiency" does not "automatically confer the right to complain of *all* administrative deficiencies." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) (emphasis in original). Were the law otherwise, a citizen injured by one law "could bring the whole structure of [government] administration" into question. *Id.* That would be inconsistent with the carefully balanced "tripartite allocation of power," *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982), and the principle that courts will not undertake tasks assigned to other branches would be become "hollow rhetoric," *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006).

An injury is not traceable to the decision of a defendant where the injury flows from a different, independent decision made by a third party. *Id.* at 350–53 (finding injury traceable to municipality's decision to levy tax did not create standing to challenge state decision to levy different taxes). That means where there is nothing but a state's independent, discretionary decision to create harm, "the federal government cannot be the

cause of [plaintiff's] injuries" in the constitutional sense. *Segovia v. United States*, 880 F.3d 384, 389 (7th Cir. 2018).

Segovia, 880 F.3d at 388–89, illustrates this concept. Congress enacted a bill that required States to permit "overseas voters to . . . vote by absentee ballot." *Id.* at 387. While the federal law required States to permit absentee voting by individuals in overseas territories, the law did not extend this command to "Puerto Rico, Guam, [and] the Virgin Islands." *Id.* Illinois complied, but excluded voters, through state statute, in Guam, Puerto Rico and the Virgin Islands from voting through absentee ballot. *Id.* Plaintiffs challenged both the federal and state law. *Id.*

The Seventh Circuit held the plaintiffs' injuries were not traceable to the federal law because it only provided a benefit (requiring absentee ballots in certain territories) while Illinois law caused the harm (prohibiting absentee ballots in other territories). *Id.* at 388. That meant "the reason the plaintiffs cannot vote in federal elections in Illinois is not the [federal law], but Illinois' own election law." *Id.* And Illinois had "wide[]" discretion "to determine eligibility for overseas absentee ballots under its election laws." *Id.* at 389. As "the federal government [did not] run the elections in Illinois . . . whether the plaintiffs can obtain absentee ballots is entirely up to Illinois." *Id.*

Likewise in *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976), the Court held that a unilateral decision by some States to reimburse their residents for taxes levied by other States was not a basis to attack the other States' tax schemes. *FEC v. Cruz*, 142 S. Ct. 1638, 1647 (2022) (describing the holding of *Pennsylvania v. New Jersey*). The challenged tax schemes did not require the plaintiff States to enact any law; the injury

flowed "from decisions by [plaintiffs'] respective legislatures" made at their own discretion.[3] *Pennsylvania*, 426 U.S. at 664. *Simon* is similar. 426 U.S. 26. There, the Supreme Court determined the injury of not providing emergency services to indigent patients was not traceable to an IRS policy that gave favorable tax treatment to hospitals without such services. *Id.* That was because "it was the hospitals—not the IRS—that made the decision not to treat the patients." *Segovia*, 880 F.3d at 388 (describing *Simon*, 426 U.S. at 41–42).

The same is true here. It is Indiana—not the Department of Education—that made the decision to impose a higher tax burden. (Compl. ¶ 90 (describing harm from Ind. Code § 6-3-1-3.5(a)(30))). Indiana has wide latitude to determine its own tax policy, U.S. Const. amend X; Ind. Const. art. 10 §§ 1, 8, and its decision caused Plaintiffs' injuries. The debt relief program only provides a benefit by eliminating part of Plaintiffs' debt load. As federal law only provides benefits and Indiana law solely causes the injury, whether Plaintiffs face an injury is entirely up to Indiana. Indeed, allowing a Plaintiff to subject a government program to review solely because the plaintiffs were injured by an entirely separate legal code was the exact theory of standing rejected by the *Lewis* Court. *Lewis*, 518 U.S. at 358 n.6 (describing that theory as "not the law"). Such a suit would be inconsistent with the principles governing the separation of powers as well as those undergirding our system of Federalism. *See Younger v. Harris*, 401 U.S. 37, 44–45

[3] Importantly, *Pennsylvania* does not stand for the principle that a party lacks standing when it self-inflicts an injury. *See Cruz*, 142 S. Ct. at 1647 (rejecting this reading and holding a party choosing to self-inflict injuries still has standing if it satisfies traceability and redressability).

(1971) (explaining "Our Federalism" represents "a system . . . in which the National Government," which necessarily includes the judiciary, will "always endeavor" to avoid "unduly interfer[ing] with the legitimate activities of the States").

Plaintiffs attempt to circumvent the precedents discussed above by distinguishing their facts. In their view, this case is unlike *Segovia* because there "the alleged harm arose solely because of a state law decision *permitted* by federal statute" while the injury here results from "the inevitable operation of state tax law" following the administration of a federal benefits program. (Pls.' Br. at 10) (emphasis in original). That is no distinction at all; it simply rephrases the point. State tax law is a state decision permitted by federal law. As Plaintiffs concede, the thrust of *Segovia* is that "state law inflicted the harm" instead of federal law. (*Id.*). That is true here as well: state tax burdens are solely a state law decision—Indiana's "policymakers . . . retain broad discretion to make policy decisions concerning state" financing. *DaimlerChrysler*, 547 U.S. at 346. Whether Plaintiffs suffer an injury, then, is solely a matter of Indiana law.

This proposition becomes more apparent after examining those excluded from Plaintiffs' class action. The proposed class encompasses "[a]ll persons who qualify for . . . automatic loan cancellation and reside in states imposing income tax obligations." (Am. Compl. ¶ 95). These states are currently limited to Arkansas, Indiana, Minnesota, North Carolina, and Wisconsin. *See* Ark. Code § 26-51-404(b)(10); Ind. Code § 6-3-1-3.5(a)(30); Minn. Stat. § 290.01(19)(f); N.C. Stat. § 105-153.5(c2)(22); Wis. Stat § 70.01. A person in California, for example, suffers no injury at all despite the application of the same federal benefits program. The only difference between this hypothetical California

plaintiff and the current Plaintiffs is the decisions of their respective state legislatures. Put differently, the injury-in-fact materializes only once a state legislature decides to structure its tax code in a particular way. That theory of traceability is untenable under established standing precedents. *See, e.g.*, *Pennsylvania*, 426 U.S. at 664 ("The injuries to plaintiffs . . . result[ed] from decisions by their respective state legislatures," and as "[n]othing required" the plaintiff States to enact these laws, there was no standing.); *Segovia*, 880 F.3d at 389 (finding no standing to challenge federal law "because there is *nothing* other than [state] law" causing harm) (emphasis in original).

Plaintiffs' last redoubt misidentifies the traceability principle at issue. They argue this injury-in-fact is traceable to the Department of Education because the application of Indiana's tax code is a "predictable" result of granting student loan relief. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019) (explaining that Article III only requires "*de facto*" causality). When the Court spoke of *de facto* causality, it spoke not of the results of the Government action but of the "predictable effect of Government action *on the decisions of third parties*." *Dep't of Com.*, 139 S. Ct. at 2566 (emphasis added). The question is, therefore, whether the federal policy influenced the decision making of a third-party in a predictable way; if the decision of the third-party is independent from the federal policy, there is no traceability. *See Bennett v. Spear*, 520 U.S. 154, 169 (1997) (explaining there is no standing where the injury "is the result of the *independent action* of some third party not before the court" but that "does not exclude injury produced by determinative or coercive effect upon the action of someone else") (emphasis in original); *see also California v. Texas*, 141 S. Ct. 2104, 2117 (2021) (explaining an "independent

third party" action will only establish traceability where the third party "will likely *react*" to the federal program) (emphasis added). Put another way, this strand of traceability is satisfied only where the allegedly unlawful Government decision predictably encourages a third-party to decide to injure the plaintiff. *See, e.g.*, *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 501 (7th Cir. 2005).

So in *Lac Du Flambeau*, an Indian tribe had standing to challenge a gaming compact between Wisconsin and another tribe that limited the Lac Du Flambeau band's ability to start up an off-reservation casino. *Id.* Under the relevant statutory scheme, the United States had to reject the compact within 45 days or it would take effect and injure Plaintiff. *Id.* at 494. That injury, created by the compact between a State and another tribe, was traceable to the United States because the United States gave "silent approval" to the plan. *Id.* at 501. That silent approval predictably encouraged the third parties to enforce the plan to harm the Lac Du Flambeau tribe, which created causation. *Id.*

That is not the issue here. The student loan relief program did not persuade, cajole, or otherwise influence Indiana's legislature in the construction of its tax code. Much the opposite, Indiana's "power to levy and collect taxes is one of the highest attributes of [its] sovereignty, and can only be exercised by the authority of the legislature." *Bright v. McCullough*, 27 Ind. 223, 232 (1866). This is not to say the federal government can never coerce a state legislature to implement a tax, as federal coercion of state legislatures does occur on occasion. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 175–77 (1992). That is just not the case here. The Department of Education does not give silent approval to Indiana's tax code; those decisions are entirely

within the discretion of the Indiana legislature. "Given that type of unfettered discretion with respect to the plaintiffs, the federal government cannot be the cause of their injuries." *Segovia*, 880 F.3d at 389.

At bottom, "that a litigant cannot, 'by virtue of his standing to challenge one government action, challenge other governmental actions that did not injure him'" is a fundamental principle of Article III standing. *Cruz*, 142 S. Ct. at 1650 (quoting *DaimlerChrysler*, 547 U.S. at 353 n.5). "Standing is not dispensed in gross," *Lewis*, 518 U.S. at 359 n.6, but dispensed only toward "the challenged action" that fairly causes the injury, *Poe v. Ullman*, 367 U.S. 497, 504 (1961). Because Garrison and Johnson fail to establish the student loan relief plan fairly caused their injury, Plaintiffs lack standing to challenge that plan and this case does not present a justiciable controversy.

IV. Conclusion

For the reasons discussed above, the complaint is **DISMISSED without prejudice**. *See T.W. and M.W. v. Brophy*, 124 F.3d 893, 898 (7th Cir. 1997) (explaining dismissals for want of subject-matter jurisdiction are necessarily without prejudice). Plaintiffs' Motions to Certify Class (Filing No. 24), for a Preliminary Injunction (Filing No. 25), and for a Temporary Restraining Order (Filing No. 26) are **DENIED as moot**. Defendants' Motion to Dismiss for Lack of Jurisdiction (Filing No. 30) and Motion for Extension of Time to File Response (Filing No. 34) are **DENIED as moot**.

IT IS SO ORDERED this 21st day of October 2022.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Distributed Electronically to Registered Counsel of Record.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

FRANK GARRISON, on behalf of himself and all others similarly situated, and NOEL JOHNSON, on behalf of himself and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	No. 1:22-cv-01895-RLY-TAB
U.S. DEPARTMENT OF EDUCATION, MIGUEL CARDONA, in his official capacity as U.S. Secretary of Education,	)	
Defendants.	)	

FINAL JUDGMENT

In today's Entry, the court dismissed the Plaintiffs amended complaint without prejudice. In doing so, the court resolved all of the claims at issue in the case. Accordingly, the court now enters final judgment in favor of the Defendants and against the Plaintiffs.

IT IS SO ORDERED this 21st day of October 2022.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Roger A.G. Sharpe, Clerk

BY: Dina M. Dafle
Deputy Clerk, U.S. District Court

Distributed Electronically to Registered Counsels of Record.

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

NOTICE OF APPEAL

Plaintiffs Frank Garrison and Noel Johnson, on behalf all those similarly situated, hereby appeal, pursuant to 28 U.S.C. § 1291, to the United States Court of Appeals for the Seventh Circuit from the memorandum and order of the district court, entered on October 21, 2022 (ECF Nos. 36 and 37), dismissing Plaintiffs' Amended Complaint and entering final judgment in favor of Defendants and against Plaintiffs.

DATED: October 21, 2022

Respectfully submitted,

/s/ Caleb Kruckenberg
CALEB KRUCKENBERG*

/s/ Michael Poon
MICHAEL POON*

**Pro Hac Vice*
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that on this day, October 21, 2022, I served copies of the foregoing on counsel of record for all Defendants using the Court's CM/ECF system.

/s/ Caleb Kruckenberg
CALEB KRUCKENBERG

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 28, 2022

Before

FRANK H. EASTERBROOK, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 22-2886

FRANK GARRISON and NOEL JOHNSON,
Plaintiffs-Appellants,

v.

DEPARTMENT OF EDUCATION and MIGUEL A. CARDONA, Secretary of Education,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:22-cv-01895-RLY-TAB
Richard L. Young, *Judge*.

O R D E R

The application for an injunction pending appeal is denied.

Plaintiffs, who borrowed money to finance their educations, contend that the federal program for cancelling student loans is unauthorized. They say that they do not want their loans cancelled or reduced. Although cancellation of debt usually is a boon to a debtor, plaintiffs maintain that it will injure them because Indiana treats the cancellation of debt as a form of income, which is subject to tax.

The federal program is not compulsory. Debtors who do not want their loans reduced or cancelled are free to opt out. The Department of Education has treated both plaintiffs as exercising this option. None of their debt will be cancelled, and they will not be subject to a tax on a reduction of indebtedness. It follows that the program does not injure them and that they lack standing to sue.

From: CA07_CMECFMail@ca7.uscourts.gov
To: Incoming Lit
Subject: 22-2886 Frank Garrison, IV, et al v. EDUC, et al "Brief filed"
Date: Monday, December 5, 2022 2:24:09 PM

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Seventh Circuit Court of Appeals

Notice of Docket Activity

The following transaction was entered on 12/05/2022 at 1:23:21 PM Central Standard Time and filed on 12/05/2022

Case Name: Frank Garrison, IV, et al v. EDUC, et al
Case Number: 22-2886
Document(s): Document(s)

Docket Text:
Appellant's brief filed by Appellants Frank D. Garrison, IV and Noel Johnson. Paper copies due on 12/12/2022. Appellee's brief due on or before 01/04/2023 for Miguel Cardona and United States Department of Education. Electronically Transmitted. REMINDER: If a case is designated to proceed to oral argument, hearing notices will be mailed shortly before the date of oral argument. Please note that counsel's unavailability for oral argument must be submitted by letter, filed electronically with the Clerk's Office, no later than the filing of the appellant's brief in a criminal case and the filing of an appellee's brief in a civil case. See Cir. R. 34(b)(3). The court's calendar is located at https://www.ca7.uscourts.gov/cal/argcalendar.pdf. Once scheduled, oral argument is rescheduled only in extraordinary circumstances. See Cir. R. 34(b)(4), (e). [15] [7277164] [22-2886] (MLM)

Notice will be electronically mailed to:

Simon Christopher Brewer, Attorney
Sarah Carroll, Attorney
Courtney Dixon, Attorney
Caleb Kruckenberg, Attorney
Robert Charles Merritt, Attorney
Michael Poon, Attorney

The following document(s) are associated with this transaction:
Document Description: Brief filed
Original Filename: 22-2886 brief.pdf
Electronic Document Stamp:
[STAMP acecfStamp_ID=1105395651 [Date=12/05/2022] [FileNumber=7277164-0]
[9e6e217c53b775ed93a18741ddb326a6bc6ff6801ff02209019c8df9eaafc7d47aec1a6bf17614889b32ffca01822915d51d08db87a83004bee2e8baee87a11c]]