No. 22A867

IN THE SUPREME COURT OF THE UNITED STATES

EVERGLADES COLLEGE, INC., ET AL., APPLICANTS

v.

MIGUEL CARDONA, SECRETARY OF EDUCATION, ET AL.

FEDERAL RESPONDENTS' OPPOSITION TO THE APPLICATION
TO STAY THE JUDGMENT ENTERED BY THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

PARTIES TO THE PROCEEDING

Applicants (intervenors-appellants below) are Everglades College, Inc., Lincoln Educational Services Corporation, and American National University.

Respondents (defendants-appellees below) are Miguel Cardona, in his official capacity as Secretary of Education, and the U.S. Department of Education.

Respondents (plaintiffs-appellees below) also include Theresa Sweet, Alicia Davis, Tresa Apodaca, Chenelle Archibald, Daniel Deegan, Samuel Hood, and Jessica Jacobson, all on behalf of themselves and all others similarly situated.

Respondent The Chicago School of Professional Psychology was an intervenor in the United States District Court for the Northern District of California but did not appeal from the final judgment of that court or move for a stay pending appeal in any court.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

Sweet v. Cardona, No. 19-cv-3674 (Nov. 16, 2022) (approving settlement and entering final judgment)

Sweet v. Cardona, No. 19-cv-3674 (Feb. 24, 2023) (denying intervenors' motion for a stay pending appeal)

United States Court of Appeals (9th Cir.):

Sweet v. Everglades College, Inc., No. 23-15049 (Mar. 29, 2023) (denying intervenors' motion for a stay pending appeal)

Sweet v. Lincoln Educ. Servs. Corp., No. 23-15050 (Mar. 29, 2023) (denying intervenors' motion for a stay pending appeal)

Sweet v. American Nat'l Univ., No. 23-15051 (Mar. 29, 2023) (denying intervenors' motion for a stay pending appeal)

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The Solicitor General respectfully files this response in opposition to the application for a stay of the judgment issued by the United States District Court for the Northern District of California in this case.

Applicants seek a stay blocking further implementation of a settlement of a certified class action brought against the Department of Education by individuals who applied to discharge their student loans under a statute authorizing discharges based on misrepresentations or other misconduct by the borrower's school. The Department agreed to that settlement in the context of an unprecedented surge in requests for such borrower-defense relief, which has led to a backlog of hundreds of thousands of applications -- many of which have been pending for years.

To resolve this long-running litigation and address that backlog, the settlement provides for the automatic discharge of loans to certain class members who attended 151 schools for which

the Department identified significant indicia of misconduct, and individualized adjudications of claims by other class members. The settlement involves only class members and the Department; it neither adjudicates any rights of nor imposes any duties or liabilities upon the relevant schools. Instead, any future recoupment against those schools could occur only if the Department separately determined that the borrower-defense standards are met (without considering the settlement), and then instituted separate proceedings in which the schools would be entitled to de novo hearings where the settlement would have no legal or evidentiary effect.

Applicants are three of the 151 schools identified in the settlement. They were not parties to this suit; instead, they were granted permissive intervention to object to the settlement. The district court rejected their objections on the merits and denied a stay of the settlement pending appeal, finding that applicants had not made a showing of irreparable injury and that the balance of equities and the public interest weighed heavily in favor of the class members and the government.

To allow applicants to seek relief from the court of appeals, the district court granted a temporary administrative stay delaying the settlement's implementation with respect to class members with loans related to the three applicants' schools. But the court of appeals likewise denied a stay, finding that applicants had not demonstrated irreparable injury.

Applicants have not shown any basis for a stay from this Court. The settlement does not subject them to any liability, adjudicate their rights, or require them to do or refrain from doing anything. Instead, applicants principally assert that their reputations are being harmed by their inclusion on the list of schools whose borrowers are entitled to automatic relief. But that purported reputational harm is speculative and would not be redressed by a stay in any event. It does not qualify as an Article III injury, much less constitute irreparable harm.

Even if applicants could overcome that fatal defect, their objections to the settlement are unlikely to succeed. The settlement is amply supported by the Secretary of Education's statutory authority to discharge loans based on borrower defenses, by the Secretary's statutory authority to compromise claims against the Department, and by the Attorney General's broad authority to settle litigation in which the federal government is a party. Applicants cite no decision by any court holding that the Secretary and Attorney General lack the requisite authority.

Instead, applicants attempt to equate the settlement at issue here with the pandemic-related debt-relief program this Court is considering in Biden v. Nebraska, No. 22-506, and Department of Education v. Brown, No. 22-535 (argued Feb. 28, 2023). But the cases are entirely distinct. This case involves a settlement of litigation involving affirmative applications for relief under a statute and existing regulations providing for loan discharge, not

a new program instituted by the Department. The settlement provides remedies to a class certified by the district court over the government's objection, not one created by the Department. The settlement rests on statutory authorities separate from those at issue in Nebraska and Brown. And the settlement was negotiated and executed months before the adoption of the entirely distinct loan-forgiveness program challenged there.

Applicants have thus failed to justify the extraordinary relief they seek. A stay would prejudice the government, the plaintiff class, and the public interest by disrupting the implementation of a settlement that all parties to the litigation have agreed upon. And a stay is particularly unwarranted because only a tiny fraction of the plaintiff class attended applicants' schools; applicants lack even an arguable interest in blocking the discharge of loans held by other class members, which is already substantially underway. The Court should deny the application.

STATEMENT

A. Borrower-Defense Relief

The U.S. Department of Education administers student loan programs under Title IV of the Higher Education Act of 1965 (Education Act), 20 U.S.C. 1070 et seq. Those programs include the William D. Ford Federal Direct Loan Program (Direct Loans), 20 U.S.C. 1087a-1087j, under which the federal government lends money directly to students, and the Federal Family Education Loan Program

(Family Education Loans), 20 U.S.C. 1071 to 1087-4, under which non-federal lenders issue loans guaranteed by entities reinsured by the federal government. Family Education Loans are no longer issued, but prior loans remain outstanding, and those borrowers are also able to "consolidate" (i.e., convert) their loans into Direct Loans. See 34 C.F.R. 685.220.

The Education Act grants the Secretary of Education authority to cancel the repayment of a loan, and to allow the borrower to recover amounts already paid, based on misconduct by the borrower's school. 20 U.S.C. 1087e(h). The statute confers on the Secretary the duty to specify by regulation "which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan." Ibid. The Secretary first promulgated regulations implementing that borrower-defense authority in the 1990s and amended those regulations in 2016, 2019, and 2022; as a result, loans disbursed at different times are subject to different provisions. See 59 Fed. Reg. 61,664 (Dec. 1, 1994); 60 Fed. Reg. 37,768 (July 21, 1995); 81 Fed. Reg. 75,926 (Nov. 1, 2016); 84 Fed. Reg. 49,788 (Sept. 23, 2019); 87 Fed. Reg. 65,904 (Nov. 1, 2022) (effective July 1, 2023); see also 34 C.F.R. 685.206(c)-(e), 685.222(a)(1) and (2).

The regulations set forth grounds on which borrowers may seek borrower-defense relief. For example, borrowers may seek a discharge based on a substantial misrepresentation by their school. 34 C.F.R. 685.206(c)(1) and (e)(2), 685.222(d). The relevant

school may respond to a borrower's allegations, but is not required to do so. 34 C.F.R. 685.206(e)(10) and 685.222(e)(3)(i). If relief is approved, the Department may forgive some or all of the outstanding balance of the borrower's loan and reimburse amounts previously paid. 34 C.F.R. 685.206(e)(12), 685.222(*i*). In addition, the Department may initiate a separate proceeding to recoup the discharged amounts from the school, in which event the school is entitled to a hearing and the opportunity to litigate the issue de novo. 34 C.F.R. 668.87(a) and (b), 685.308(a)(3); see 34 C.F.R. 685.206(c)(3) and (4), 685.222(e)(7).

B. Private Respondents' Suit Against The Department

Beginning in 2015 -- after the collapse of Corinthian Colleges, Inc., a for-profit college with more than 100 campuses and 70,000 students -- there was an unprecedented surge in borrower-defense applications. Appl. App. 30a. The flood overwhelmed the Department, which began to reconsider its then-current borrower-defense policies. Id. at 30a-31a. That reconsideration resulted in a total pause of borrower-defense adjudications and a backlog of hundreds of thousands of applications. Id. at 31a.[1]

In June 2019, a group of borrowers (private respondents here) filed this class action under the Administrative Procedure Act (APA), 5 U.S.C. 701 et seq.; their original complaint sought to

[1] Before the pause, the Department granted relief to approximately 99% of borrower-defense applicants. Appl. App. 30a.

compel the Department to resume adjudicating applications. Appl. App. 31a. In October 2019, the district court certified a class under Federal Rule of Civil Procedure 23(b)(2) of "[a]ll people who borrowed a Direct Loan or [Family Education] loan to pay for a program of higher education, who have asserted a borrower defense to repayment to the U.S. Department of Education, whose borrower defense has not been granted or denied on the merits, and who is not a class member in" another suit seeking borrower-defense relief in connection with a particular set of schools. Appl. App. 68a.

In April 2020, the Department and private respondents reached a proposed settlement, which would have established a mandatory timeline for the Department to adjudicate class members' applications and provide relief. D. Ct. Doc. 97, at 2, 5-6 (Apr. 10, 2020). Around that same time, however, the Department issued "form letters" denying a large number of applications without individualized explanations. In re U.S. Dep't of Educ., 25 F.4th 692, 696 (9th Cir. 2022). Upon learning of those denials, the district court denied approval of the proposed settlement, ordered that the case be "resume[d] on the merits," and authorized extensive discovery. D. Ct. Doc. 146, at 1, 16-17 (Oct. 19, 2020).

Private respondents then amended their complaint to add several new claims, including claims that the denials were substantively and procedurally unlawful in violation of the APA and the Due Process Clause. C.A. App. A124, A195-A197. In addition to other relief, private respondents sought an order declaring the

Department's denial procedures unlawful, compelling adjudication under different procedures, and vacating prior denials. Id. at A198-A199. And in seeking summary judgment, private respondents requested that the district court issue an order requiring the Department to show cause within 30 days "why each and every class member's [borrower-defense] application should not be granted immediately." D. Ct. Doc. 245, at 1, 33, 35-37 (June 9, 2022).

C. The June 2022 Settlement And Proceedings Below

1. In June 2022 -- after three years of litigation, an interlocutory appeal to the Ninth Circuit, and more than a year of negotiations -- the parties reached another settlement. Appl. App. 32a-33a; see C.A. App. A217. The settlement (Appl. App. 69a-95a) proposed to comprehensively resolve this case and address the growing backlog of hundreds of thousands of borrower-defense applications by dividing the borrowers into three groups.

First, the settlement grants automatic discharge relief to approximately 196,000 class members (Group One)[2] with pending applications who attended one of 151 schools listed in Exhibit C to the settlement agreement. Appl. App. 33a; see id. at 104a-108a. As explained in the parties' filings, the Exhibit C schools were identified based on the Department's determination "that attendance at one of these schools justifies presumptive relief, for

[2] That figure, as well as other figures pertaining to the settlement or its implementation, were provided by the Department of Education to this Office.

purposes of this settlement, based on strong indicia regarding substantial misconduct by listed schools, whether credibly alleged or in some instances proven, and the high rate of class members with applications related to the listed schools." Id. at 42a (citation omitted). The settlement provides that Group One class members will receive from the Department a full discharge of the loan debt claimed in their application and a refund of loan payments previously paid. Ibid.; see id. at 72a, 74a-75a. And the agreement requires the Secretary to take all steps necessary to effectuate that full relief -- including notifying Group One class members of the relief to be afforded under the settlement, working with loan servicers to grant discharges and refunds, and removing the credit tradelines associated with discharged debts -- within a year of the settlement's effective date. Id. at 72a, 74a.

Second, for the roughly 100,000 class members with then-pending borrower-defense applications who did not attend one of those 151 schools (Group Two), the settlement provides for a streamlined adjudication process. Appl. App. 33a. The Department agreed to adjudicate these applications within set timeframes and to apply certain presumptions in the borrower's favor. Ibid.; see id. at 75a-79a. If the Department does not adjudicate an application within the designated timeframe, the borrower will automatically receive full relief. Id. at 78a.

Third, the settlement addresses claims submitted by borrowers who were not yet class members because their borrower-defense ap-

plications were not on file at the time of the settlement's execution. Appl. App. 33a; see id. at 79a. For this "Post-Class" Group -- which comprises approximately 206,000 borrowers who filed applications in the five months between the settlement's execution and its final approval -- the Department agreed to adjudicate their applications within three years of the settlement's effective date, using regular adjudication procedures. Id. at 33a-34a; see id. at 79a.[3] But to avoid the logistical complications created by the three different sets of regulatory procedures potentially applicable to this group, see p. 5, supra, the settlement provides that the Department will adjudicate these applications under the set of borrower-defense regulations applicable to loans disbursed between 2017 and 2020, Appl. App. 79a. As with the Group Two deadlines, if the borrower's application is not adjudicated within the designated three-year timeframe, the borrower will automatically receive the requested relief. Ibid.

2. Applicants moved to intervene to oppose the settlement, joined by a fourth school that has not appealed. Appl. App. 34a. The schools objected to their inclusion on Exhibit C and argued that the settlement exceeded the Secretary's authority. Ibid. The district court denied the schools' motion to intervene as of

[3] As the district court noted, although the parties described this third group of borrower-defense applicants as falling outside the "class" -- based on a class closure date supplied in the agreement, see Appl. App. 74a -- the class as certified had no defined end point. Id. at 49a-50a; see p. 7, supra.

right, but granted permissive intervention to allow them to present their objections to the settlement. C.A. App. A391.

On November 16, 2022, the district court approved the settlement and entered final judgment. Appl. App. 29a-53a, 54a. The court first concluded that the government had authority to enter into the agreement, citing the Attorney General's authority under 28 U.S.C. 516 and 519 to settle litigation on behalf of the United States, as well as the Secretary of Education's own compromise-and-settlement authority under 20 U.S.C. 1082(a)(6). Appl. App. 35a-36a. While the court noted that the government could not agree to a substantive remedy exceeding the Secretary's authority, id. at 35a, it concluded that the settlement requires the Secretary to provide discharge relief he could already provide under a statutorily authorized regime, id. 38a-40a. The court likewise rejected applicants' argument that the Secretary's use of his Section 1082(a)(6) compromise-and-settlement authority implicated the major questions doctrine; the court explained that the authority claimed here "is inherently limited to the metes and bounds of this federal class-action litigation." Id. at 37a-38a.

In rejecting applicants' understanding of the government's settlement authority -- and in finding the settlement itself fair, reasonable, and adequate -- the district court also emphasized the massive scale of the problem confronting the Department. Appl. App. 39a; see id. at 50a-51a. The court noted that the borrower-defense system "has devolved into an impossible quagmire," which

had lasted across three administrations. Id. at 39a. The court further reasoned that if every class member had sued the Department individually, the Department could have settled each action under the same criteria applied in the settlement. Ibid.

Next, the district court determined that the settlement did not prejudice the rights of the intervenor schools. Appl. App. 42a-45a. The court explained that Exhibit C "do[es] not impose any liability whatsoever on intervenors," because inclusion on the list simply requires the Department to forgive loans from borrowers affiliated with those schools pursuant to the settlement's terms. Id. at 42a-43a. The court also explained that inclusion on Exhibit C could not serve as a legal predicate for a later recoupment action; rather, "[a]ny hypothetical, future remedial action would proceed according to established regulations, which would provide the schools with full due process." Id. at 43a-44a. The court also relied upon the sworn declaration of a Department official stating that the Department would not consider a school's inclusion on Exhibit C as evidence of misconduct in any future action, including a recoupment proceeding, by the Department against a school. Id. at 44a; see C.A. App. A376-A377.

Finally, the district court rejected applicants' various other objections to the settlement, including their suggestion that the class no longer met the standards of Rule 23, and their argument that the settlement's refund relief could not be effectuated with a Rule 23(b)(2) class. See id. at 48a-49a.

3. No class member appealed, and the settlement thus became effective on January 28, 2023. Appl. App. 10a-11a. But applicants appealed and sought to stay the entire settlement -- or in the alternative, to stay its implementation "for any settlement class member who attended one of [applicants'] schools" -- pending their appeals' resolution. D. Ct. Doc. 350, at 25 (Jan. 13, 2023). As applicants acknowledged, their former students "represent only a miniscule fraction of the claims included in the class." Ibid.

At a January 26 status conference addressing applicants' stay request, the government represented that the Department was prepared to begin implementing the settlement upon its effective date, including by contacting the loan servicers of Group One borrowers, who could potentially process some discharges "within that week." Appl. App. 8a (citation omitted). Because the Department informed the district court that it was not then able to segregate borrowers from applicants' schools from the rest of the Group One borrowers, the court stayed any implementation of the settlement pending its decision on the motion. Ibid.

On February 24, 2023, the district court denied the stay motion. Appl. App. 4a-28a. Echoing its analysis at the settlement-approval stage, the court found that applicants could not show irreparable harm because the settlement does not deny them any procedural rights or impose liability on them. Id. at 14a-16a. The court also rejected applicants' claim of irreparable reputational injury based on the "stigma" of being included on

Exhibit C. Id. at 16a-23a. The court observed that applicants failed to explain how a stay would avoid or undo whatever stigmatic effect their inclusion on the list might have had. Id. at 16a-17a. And the court deemed applicants' claims of past or future reputational injury insufficiently substantiated, not fairly traceable to Exhibit C, or otherwise speculative. Id. at 17a-23a. For similar reasons, the court found that applicants likely lacked Article III standing to appeal. Id. at 23a-25a.

The district court additionally found that the harms to the settling parties and the public interest "heavily weigh against a stay." Appl. App. 25a. The court stressed that private respondents had brought suit three years earlier for the very purpose of addressing the Department's alleged delay in adjudicating their applications. Id. at 26a-27a. And it agreed with the settling parties that "[t]here is no public interest in the preservation of this stubborn and burgeoning backlog." Ibid.

By the time the district court denied the stay motion, the Department had informed the court that it could separate out borrowers who attended applicants' schools from the rest of Group One. Appl. App. 8a n.3; see D. Ct. Doc. 376 (Feb. 14, 2023). Thus, to enable applicants to seek a stay in the court of appeals, the court entered a limited administrative stay prohibiting loan discharges to that narrow group. Appl. App. 5a, 27a-28a.

4. On March 29, 2023, the court of appeals denied applicants' motion for a stay pending appeal. Appl. App. 3a. The

court's unanimous order noted that applicants "fail[ed] to demonstrate a sufficient probability of irreparable harm to warrant a stay of the challenged settlement." Ibid. Because applicants had not requested a continuation of the district court's administrative stay with respect to the borrowers from their schools, that stay lifted upon the Ninth Circuit's order.

D. Status Of Settlement Implementation

Once the district court denied applicants' stay motion on February 24 -- thereby allowing the settlement to go into effect with respect to the vast majority of class members -- the Department began carrying out its obligations under the agreement.[4] Pursuant to the agreement's terms, see Appl. App. 74a, the Department has sent notifications to Group One borrowers (other than those who attended applicants' schools) informing them that they will receive discharges pursuant to the settlement. The Department has

[4] As noted, the agreement requires the Department to effect full relief for every Group One class member by January 28, 2024. See p. 9, supra. That includes identifying the borrower and her loans, timely providing the required notice, contacting the relevant loan servicer or servicers (who must also coordinate with the Department of the Treasury to effect refunds), and working with credit-reporting agencies to remove the debts from the borrower's records. See ibid. For many Group One class members, that process can be carried out relatively efficiently, but the Department has informed this Office that it anticipates that some class members may present more complicated situations that require additional time. The Department accordingly began implementing Group One discharges promptly upon the settlement's effective date to allow sufficient time and resources to fulfill its obligations to all Group One class members while balancing the Department's competing responsibilities under the agreement, including the need to adjudicate Group Two and Post-Class applications.

also instructed all servicers for those loans that they should begin processing discharges (including refunds). It is the Department's understanding that as of April 11, approximately 78,000 borrowers in Group One have received discharges.

In addition, once the district court's administrative stay lifted on March 29, and in the absence of a new administrative stay, the Department began taking steps to implement the settlement with respect to the approximately 3,800 Group One borrowers who attended applicants' schools by instructing loan servicers to discharge those loans as well. On April 6, after applicants filed a stay application in this Court, the Department instructed servicers to pause those discharge-processing efforts pending action on the stay application. The Department understands that some servicers effectuated discharges before that pause, resulting in approximately 400 borrowers from applicants' schools receiving discharges after the administrative stay lifted on March 29.

ARGUMENT

The application for a stay should be denied. "To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per

curiam); see Merrill v. Milligan, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of applications for stays). In addition, a stay is never "a matter of right, even if irreparable injury might otherwise result." Nken v. Holder, 556 U.S. 418, 433 (2009) (citation omitted). "It is instead 'an exercise of judicial discretion,'" and "'the propriety of its issue is dependent upon the circumstances of the particular case,'" including "the public interest." Ibid. (brackets and citations omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." Id. at 433-434.

I. APPLICANTS HAVE NOT SHOWN ARTICLE III STANDING TO CHALLENGE THE SETTLEMENT OR IRREPARABLE HARM FROM ITS IMPLEMENTATION

As a threshold matter, applicants cannot demonstrate a likelihood of success because they lack Article III standing to challenge the settlement's approval. "[A]n intervenor must meet the requirements of Article III if the intervenor wishes to pursue relief not requested by a [party]." Town of Chester v. Laroe Estates, Inc., 137 S. Ct. 1645, 1648 (2017). An Article III case or controversy exists only if the litigant has standing -- a requirement that "ensures that [the] federal courts decide only 'the rights of individuals'" and "exercise 'their proper function in a limited and separated government.'" TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021) (citations omitted).

The "irreducible constitutional minimum of standing" has "three elements." Lujan v. Defenders of Wildlife, 504 U.S. 555,

560 (1992). "First, the plaintiff must have suffered an injury in fact -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Ibid. (citations and internal quotation marks omitted). Second, the injury must be "fairly traceable to the challenged action of the defendant." Id. at 560-561 (brackets, citation, and ellipsis omitted). "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Id. at 561 (citation omitted). "The party invoking federal jurisdiction bears the burden of establishing these elements." Ibid.

Applicants have not carried that burden here. And for similar and even more straightforward reasons, applicants also cannot show that a denial of a stay will cause them irreparable harm.

A. Applicants Have No Redressable Reputational Injury

Applicants primarily assert standing (Appl. 34 n.9) and irreparable harm (Appl. 27-31) based on a purported "reputational injury" stemming from their inclusion on the list of Exhibit C schools. That contention fails for multiple reasons.

To begin with, applicants' claim of a legally cognizable reputational injury is dubious. This Court has recognized that some reputational harms qualify as injuries in fact without proof of concrete harm based on their "'close relationship'" to "the reputational harm associated with the tort of defamation." TransUnion, 141 S. Ct. at 2208 (citation omitted). But applicants' inclusion

on Exhibit C is a far cry from the kind of defamatory label -- like being falsely designated a "potential terrorist" -- that this Court has found to qualify. See id. at 2209. By its own terms, Exhibit C is merely a list of schools whose former students will receive automatic discharges under the settlement. Appl. App. 74a, 104a-108a. And as the Department has further explained in public filings, a school's listing in Exhibit C means only that the Department identified "strong indicia regarding substantial misconduct" -- "credibly alleged" and in some (unspecified) instances "proven" -- and that the Department received a certain number of applications relating to that institution. Id. at 42a.

The Department has also made clear that Exhibit C was created only "for purposes of this settlement," Appl. App. 42a; that the Department "does not consider the fact of an institution's inclusion on Exhibit C to constitute a finding of fact of misconduct," C.A. App. A375; and that the list creates no legal liability, see id. at A375-A377; pp. 22-24, infra. Those facts are reflected in the district court's orders. Appl. App. 15a, 42a, 44a. Especially given that context, the harms applicants contend were caused by Exhibit C -- including their lead example of a single teacher disinviting an applicant from giving a talk on a single occasion (Appl. 28) -- do not constitute cognizable Article III injuries.[5]

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[5] Applicants assert that the Federal Trade Commission (FTC) has used Exhibit C to "malign[] all listed schools." Appl. 29. But as the district court explained, that characterization is in-

Even if applicants could establish an injury in fact, they have not shown that whatever reputational harm they have suffered due to Exhibit C would be redressed by their requested relief. Applicants' appeals seek an order reversing the settlement's approval. But the reputational harm that they allege stems from, in their words, "[b]eing publicly branded a presumptive wrongdoer." Appl. 27. Applicants do not explain how a determination by an appellate court that the settlement exceeds the Secretary's statutory authority (see Appl. i-ii) would "rehabilitate [applicants'] reputation," McBryde v. Committee to Review Circuit Council Conduct & Disability Orders of the Judicial Conference of the U.S., 264 F.3d 52, 57 (D.C. Cir. 2001), even assuming it was damaged by Exhibit C's release in June 2022.

The fact that applicants were originally included on Exhibit C, and the justification for their inclusion, are matters of public record. Regardless of whether the settlement is fully implemented, "third-party activists" could still point to Exhibit C in criticizing listed schools. Appl. 29-30. It is likewise entirely speculative to predict (Appl. 35 n.9) that vacatur of the settlement on unrelated grounds would lead "interested parties" to con-

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accurate. Appl. App. 22a. The September 2022 FTC post merely noted that three other institutions on "the list of schools" (not applicants) might "look familiar" because the FTC had previously brought enforcement actions against them, for the purpose of explaining that borrowers from those schools were still eligible to obtain relief through this separate settlement. Id. at 125a-126a.

clude that the Department's decision to list applicants was "unsupported." Applicants' attempt to leverage any injury stemming from the existence of Exhibit C in the settlement agreement to seek disapproval of the settlement itself thus amounts to an end-run around the principle that "'past injuries alone are insufficient'" to establish jurisdiction for "forward-looking" relief. NB ex rel. Peacock v. District of Columbia, 682 F.3d 77, 82 (D.C. Cir. 2012) (citation omitted).

For much the same reason, applicants also cannot show that a stay of the settlement pending appeal would shield them from any purported irreparable harm. See Appl. App. 16a-17a, 21a-22a. They offer only a vague assertion that delaying "the efficacy of the Department's determination" could "accomplish the kind of reputation-repairing correction that is now necessary." Appl. 31. But they fail to connect the supposed "stigma" of being listed in Exhibit C to borrowers' receipt of their already-promised discharges from the Department. A temporary stay preventing the Department from granting relief to class members could not forestall the reputational consequences (if any) that result from the intervenors' inclusion on Exhibit C. Those consequences thus provide no basis for a stay pending appeal.

B. Applicants Have Not Shown A Procedural Injury

Applicants also renew their contention (Appl. 31-34) that the settlement inflicts a procedural injury by denying them the ability to participate in borrower-defense adjudications for individual

class members. They note that the Department's regulations allow a school to submit evidence in connection with the Department's consideration of borrower-defense applications from their former students. See 34 C.F.R. 685.206(e)(10), 685.222(e)(3)(i). And applicants observe that regulations allow the Secretary to bring separate recoupment proceedings against schools to recover discharged amounts. 34 C.F.R. 668.87(a) and (b), 685.308(a)(3); see 34 C.F.R. 685.206(c)(3) and (4), 685.222(e)(7). But applicants' arguments based on those regulations do not establish Article III injury, much less irreparable harm.

The Group One discharges are being "effectuated pursuant to the terms of the Settlement Agreement, not pursuant to the Department's borrower defense regulations." C.A. App. A375. As the district court explained, the "settlement does not call for the Department to adjudicate the borrower defense applications of the group of class members to which Exhibit C applies." Appl. App. 14a (citation omitted). Applicants are accordingly not being denied the opportunity to participate in borrower-defense adjudications under the Department's regulations because the Department is not conducting individual proceedings for Group One class members.

In any event, this Court has made clear that "deprivation of a procedural right without some concrete interest that is affected by the deprivation -- a procedural right in vacuo -- is insufficient to create Article III standing." Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009). Here, the concrete interest

applicants assert is an interest in not being found liable in future recoupment proceedings by the Department. Appl. 31. But because the settlement discharges are not the product of a borrower-defense adjudication, such discharges cannot serve as a predicate under the Department's borrower-defense regulations for a later recoupment action. Appl. App. 15a.

If there were any ambiguity about this, the government dispelled it through a sworn declaration of a Department Deputy Under Secretary explaining that the settlement discharges "provide[] no basis to the Department for initiating a borrower defense recoupment proceeding against any institution identified on Exhibit C." C.A. App. A376. The declaration also clarifies that the Department will not treat an institution's inclusion on Exhibit C as a finding of misconduct, and states that an institution's inclusion "does not constitute evidence that can or will be considered by the Department in bringing" any recoupment proceeding under its regulations, or in enforcing another Education Act provision, 20 U.S.C. 1099c, that could lead to institutional liability. C.A. App. A376-A377; see id. at A377-A388 ("[I]f the Department were to initiate any such [enforcement] actions or proceedings against any Exhibit C institution, it will comply with all applicable regulations without any reliance on the fact of an institution's inclusion on Exhibit C and each institution would be afforded all due process and opportunities to defend itself to which it would otherwise be entitled."). The district court emphasized that it would hold the

government to those representations. Appl. App. 15a.

Applicants' assertion that they "will be automatically exposed to potential liability to the Department for all borrower-defense claims that were summarily granted" (Appl. 31) is thus incorrect. The same goes for their contention that "they are being held liable" without "the opportunity * * * to present a defense." Appl. 34. And their attempts to prove that the Department has used or will use settlement discharges against Exhibit C schools in the future are equally unfounded. They cite a Department brief in another case (Appl. 33), but that filing states only that any "theoretical" recoupment proceedings against Exhibit C schools "would have to be based on separate decisions that the standard for borrower defense is met," not based on the settlement. Reply Br. in Supp. of Mot. to Dismiss at 10 n.4, DeVry Univ., Inc. v. United States Dep't of Educ., No. 22-cv-5549 (N.D. Ill. Mar. 3, 2023). As for the Department press release announcing guidance on when it will hold school leaders liable for their school's outstanding debts, it merely states that the Department may consider "[c]ivil or criminal lawsuits, settlements, or disciplinary or legal actions by the Department or other state or federal agencies" in making decisions about whom to pursue; it says nothing about considering the settlement in this case. U.S. Dep't of Educ., Education Department Takes Steps to Hold Leaders of Risky Colleges Personally Liable (Mar. 2, 2023), https://www.ed.gov/news/press-releases/education-department-takes-steps-hold-leaders-risky-

colleges-personally-liable. In any event, any injury that depends on such speculative hypotheticals is not a "certainly impending" harm required for standing, Clapper v. Amnesty Int'l USA, 568 U.S. 398, 410 (2013) (citation omitted) -- and plainly is not sufficient to establish irreparable harm from the denial of a stay pending appeal.[6]

C. Applicants Lack Standing To Challenge The Settlement's Application To Students From Other Schools And Other Settlement Subgroups

Separately, there is a massive disconnect between applicants' alleged injury from their inclusion on Exhibit C and the relief they have sought: a stay of the entire settlement. As this Court has made clear, "standing is not dispensed in gross," and instead must be demonstrated "for each claim" and "for each form of relief." TransUnion, 141 S. Ct. at 2208. Yet applicants have not even attempted to explain how effectuating the settlement with respect to the vast majority of class members who attended other schools could possibly harm them.

The class-action settlement resolves the claims of hundreds of thousands of borrowers, including approximately 196,000 bor-

[6] Applicants also allude (Appl. 34) to a procedural due process interest in protecting their reputations. But they cite no authority suggesting that a corporation's reputation is property protected by the Due Process Clause. See Paul v. Davis, 424 U.S. 693, 701 (1976) (rejecting "the proposition that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the [Clause's] procedural protection").

rowers who attended one of the 151 schools listed on Exhibit C. But as applicants themselves have stressed, borrowers from their schools "represent only a miniscule fraction of the claims included in the class." D. Ct. Doc. 350, at 25. And applicants avowed below that they "simply want what justice demands -- their removal from Exhibit C and the assurance that any [borrower-defense] claims against them will be adjudicated fairly and in accordance with law." Ibid. As explained above, applicants already have that reassurance. See pp. 22-24, supra. But even if they did not, their asserted interest would provide no justification for denying discharges to borrowers from the other 148 Exhibit C schools.

Similarly, applicants have not asserted -- and could not plausibly assert -- standing to challenge the settlement's remedies for Group Two and the Post-Class Group (nor any irreparable harm from those remedies' further implementation). See Appl. 34-35 n.9. By definition, borrowers from applicants' schools do not fall within Group Two, which consists only of borrowers who did not attend a school listed in Exhibit C. Appl. App. 75a. And applicants will have an opportunity under the Department's regulations to submit evidence in connection with the adjudication of claims for borrower-defense relief filed by Post-Class borrowers who attended their schools. See id. at 79a; see also 34 C.F.R. 685.222(e)(3)(i). It would, moreover, be speculative to assume that the Department might not adjudicate the application of any such borrower within the agreement's three-year timeframe. Appl.

App. 79a. Again, establishing standing is applicants' burden, see TransUnion, 141 S. Ct. at 2203, 2212, and they have not even purported to carry it with respect to wide swaths of the settlement they are unilaterally attempting to undo.

II. THE COURT WILL NOT LIKELY GRANT CERTIORARI AND REVERSE THE SETTLEMENT'S APPROVAL

Even aside from applicants' lack of standing, their challenge to the settlement's approval fails and cannot justify the extraordinary relief of a stay.

A. The Settlement Was Statutorily Authorized

There is neither a "reasonable probability" that this Court will consider applicants' challenge sufficiently meritorious to warrant certiorari nor a "fair prospect" of reversal. Hollingsworth, 558 U.S. at 190. The district court correctly concluded that the agreement's terms represent a valid exercise of the government's settlement authority; its decision does not conflict with any decision of this Court or another court of appeals; and this unusual case would be a poor vehicle in which to consider the broader issues applicants seek to raise.

1. As an initial matter, the United States, like other parties in litigation, has the ability to settle and compromise claims. Congress has expressly conferred upon the Attorney General authority and discretion to conduct, and thus settle, litigation to which the federal government is a party. 28 U.S.C. 516, 519; see Settlement Authority of the United States in Oil Shale Cases,

4B Op. O.L.C. 756, 756 (1980); Appl. App. 35a. As reflected in both Executive Branch precedent and judicial opinions, that discretionary authority to settle is "plenary." The Attorney General's Role as Chief Litigator for the United States, 6 Op. O.L.C. 47, 59-60 (1982); see, e.g., 4B Op. O.L.C. at 756-757; United States v. Hercules, Inc., 961 F.2d 796, 798 (8th Cir. 1992); see also Swift & Co. v. United States, 276 U.S. 311, 331–332 (1928) (rejecting challenge to Attorney General's exercise of settlement authority because the Court did not "find in the statutes defining the powers and duties of the Attorney General any such limitation on the exercise of his discretion").

To be sure, this settlement authority is not unlimited; for instance, it cannot be exercised to approve a settlement requiring an agency to take substantive action clearly beyond its statutory authority. See Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion, 23 Op. O.L.C. 126, 136-138 (1999); Hercules, 961 F.2d at 798. But there is no dispute that the Secretary has statutory authorization to provide discharges and refunds to borrowers who have made borrower-defense claims. See 20 U.S.C. 1087e(h); see also In re U.S. Dep't of Educ., 25 F.4th 692, 695 (9th Cir. 2022) ("Congress has allowed for the cancellation of federal student loans in certain cases of school misconduct.").

The Secretary is also empowered to compromise and settle claims, including by waiving or releasing rights to repayment.

The Education Act grants the Secretary authority to "enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired." 20 U.S.C. 1082(a)(6). Although that provision applies by its terms to Part B of Title IV of the Education Act, which covers Family Education Loans, Congress has provided that Direct Loans "shall have the same terms, conditions, and benefits" as Family Education Loans. 20 U.S.C. 1087e(a)(1). Thus, as the district court concluded (Appl. App. 36a-37a), the Secretary has authority to settle a claim relating to Family Education Loans, and that same settlement and release authority -- which reflects terms, conditions, and benefits of the loans -- also attaches to claims related to Direct Loans. This settlement authority, combined with the Secretary's substantive authority under Section 1087e(h) and the Attorney General's own settlement power, provide ample support for the discharges here.

2. Applicants' contrary arguments are not persuasive. They ignore the Attorney General's settlement authority. And they deny (Appl. 16-18) that the Secretary's compromise-and-settlement authority under Section 1082(a)(6) extends to Direct Loans by way of Section 1087e(a)(1). But the Secretary's authority to compromise claims related to a loan is naturally construed as both a "term" and "condition" of the loan, as it necessarily affects the terms and conditions governing repayment. Applicants' contrary argument also overlooks that Congress intended the Direct Loan Program "to eventually replace the [Family Education Loan] Program," which

demonstrates a congressional intent to ensure "parity" between the two programs. Appl. App. 36a. And applicants fail to locate any other statutory provision providing the Secretary with "functions, powers, or duties" related to Direct Loans, meaning that their construction would lead to the absurd proposition that the Secretary lacks any powers related to such loans.

Another apparent implication of applicants' reading of Sections 1082(a)(6) and 1087e(a)(1) is that the Secretary has no authority at all to settle any claim related to any Direct Loan. But that would make no sense. If the Secretary initially denies or fails to act on a claim by a borrower but subsequently determines that the borrower may be entitled to relief and might prevail in pending litigation, it is entirely reasonable, efficient, and equitable for the Secretary to settle that claim by agreeing to discharge the borrower's debt. Such a settlement avoids costly administrative procedures and litigation, which would delay the relief that Congress intended for the borrower, impose costs on the government, and deplete the Department's resources for resolving other borrowers' claims. Applicants have provided no persuasive reason to think that Congress intended to preclude the Secretary from taking that reasonable step. And a fortiori there is no basis to conclude that the Attorney General may not settle such a claim if the dispute proceeds to court.

Applicants also contend (Appl. 18) that the Secretary's power to compromise claims related to loans does not include the power

to grant "blanket debt cancellation." But contrary to applicants' repeated assertions (Appl. 3, 14, 15, 22), the settlement does not reflect any "en masse" cancellation of outstanding debt, nor an assertion by the Secretary of the power to discharge the Department's entire $1.6 trillion loan portfolio. It is instead the resolution of specific claims that were submitted to the Department pursuant to the statutorily authorized borrower-defense regime and then became the subject of litigation in court in a certified class action. Again, applicants do not deny that the Department has statutory authority to resolve claims alleging borrower defenses, including by discharging loans and refunding payments. See 20 U.S.C. 1087e(h). And, in turn, the Attorney General's authority to compromise and settle litigation necessarily includes the settlement of litigation brought against a federal agency on behalf of a certified class.

As regards class members whose loans were obtained to attend the schools listed on Exhibit C, the settlement rests on the Department's determination that there were strong indicia of misconduct by these schools and a high rate of applications related to them. The Department made a reasonable determination about how best to use its compromise authority to resolve long-running litigation, not involving applicants, and to address a crippling backlog of submitted claims. And the Department of Justice supported that determination through an exercise of the Attorney General's settlement authority.

Applicants additionally argue (Appl. 15) that the settlement implicates the major questions doctrine, requiring a more explicit source of statutory authorization. That is wrong. To begin with, the Secretary did not "discover[]" his Section 1082(a)(6) authority (ibid.) in entering into this settlement. As the government detailed in the district court, that authority has been invoked to discharge millions and even billions of dollars in student-loan debt -- including Direct Loan debt -- to classes of borrowers from particular schools. See Appl. App. 38a; see also D. Ct. 337, at 1 (Nov. 9, 2022). In any event, as discussed, clear congressional authorization for this settlement can be found not only in Section 1082(a)(6) but also in another provision of the Education Act, 20 U.S.C. 1087e(h), as well as 28 U.S.C. 516 and 519. The mere number of persons and loans affected does not reflect an assertion of an "[e]xtraordinary grant[] of regulatory authority." West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022). It simply reflects the application of the Department's and the Attorney General's ordinary settlement authority as applied to a certified class reflecting a huge backlog of applications rendering individual adjudications impracticable.

Applicants also argue (Appl. 24-25) that the settlement's terms required notice-and-comment rulemaking, because some pending individual adjudications in the Department will be resolved outside of established regulatory provisions. But as the district court recognized, the "Secretary has not altered the borrower-

defense procedures at all" and "[t]hose regulations remain in place." Appl. App. 41a. The settlement merely establishes a framework of standards for resolving a discrete set of outstanding applications, and one that all parties whose rights are affected have now accepted. Applicants' position would suggest that agencies could never settle litigation challenging an adjudication except by first adopting new regulations covering that individual or set of individuals, or perhaps by agreeing to a full re-do of the adjudication or set of adjudications. But applicants cite no authority endorsing that novel and illogical result.

Applicants finally complain (Appl. 23 n.8) that the settlement exceeded what private respondents sought in their APA suit. It is true that private respondents originally sought to compel adjudication of the class's applications. But as applicants elsewhere acknowledge (Appl. 25), private respondents later brought other claims and sought other remedies, including an order that would have effectively compelled the Department to grant all outstanding applications. See p. 8, supra (discussing plaintiffs' request for an order requiring the Department to show cause why each outstanding application should not be granted immediately). The settlement -- which enabled the Department to set an orderly and workable schedule of adjudication, and to grant automatic relief to only those applications it determined have sufficient indicia of being meritorious -- was a reasonable resolution in light of the litigation risks, prolonged proceedings, and intractable

backlog that the Department faced. See Appl. App. 50a-51a; see also C.A. App. A405-A406.

Moreover, this Court has recognized that settlement terms exceeding the forms of relief that a court could have ordered at trial are sometimes permissible. See Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 389 (1992); see also 23 Op. O.L.C. at 149. That is consistent with the fact that settlements often resolve claims beyond those squarely in the lawsuit; indeed, the agreement here included general releases of the class members' claims against the Department for declaratory, injunctive, or monetary relief. See Appl. App. 89a-90a; see also Pacific R.R. v. Ketchum, 101 U.S. 289, 297 (1880) ("Parties to a suit have the right to agree to any thing they please in reference to the subject-matter of their litigation, and the court, when applied to, will ordinarily give effect to their agreement, if it comes within the general scope of the case made by the pleadings.").

3. Applicants do not (and could not) claim a conflict in the lower courts over the unique question presented in this case: Whether the government permissibly exercised its settlement authority to resolve pending borrower-defense claims in a class action brought against the Department. Nor do applicants contend that any court of appeals has faced a similar question regarding the Secretary's settlement power.

Instead, applicants' contention that this case would warrant this Court's review rests almost entirely on their attempt to link

the settlement at issue here to the pandemic-related debt relief program the Court is considering in Nebraska, supra (No. 22-506), and Brown, supra (No. 22-535). See Appl. 1, 13-14, 38. But no such link exists. As the district court explained, this is a litigation settlement resolving borrower claims that have been submitted to the Department and then made the subject of litigation in a class action certified by the district court. That settlement predated, and is "separate and apart" from, the Secretary's August 2022 program of pandemic-related debt relief, and it is "anchored in separate authority." Appl. App. 34a-35a; see id. at 29a, 33a, 47a-48a. Or, as the district court also put it, this case involves a "discrete settlement" that is "based on a separate policy, enacted under a separate legal authority, designed to serve different purposes under different circumstances." Id. at 9a.

The settlement at issue here also involves many fewer borrowers than the program challenged in Nebraska and Brown. The total number of borrowers covered by the settlement amounts to barely 1% of the more than 43 million borrowers with outstanding student loans, and those in Group One (whose loans will be automatically discharged) amount to less than .05%. Office of Fed. Student Aid, U.S. Dep't of Educ., Federal Student Aid Portfolio, https://studentaid.gov/data-center/student/portfolio (last visited Apr. 11, 2023). Moreover, there can be no dispute that much of the cost of the settlement would have been incurred by the Department even in the absence of the challenged settlement through

discharges granted after individualized adjudications of borrower-defense applications. Cf. p.6 n.1, <u>supra</u>. And those adjudications themselves would have been extraordinarily time- and resource-intensive.

B. There Is No Reasonable Probability That The Court Will Grant Certiorari To Review The District Court's Class-Certification Analysis

Applicants also briefly argue (Appl. 25-26) that a stay is warranted because this Court is likely to grant certiorari to review "the district court's refusal to decertify the class" in this case. Appl. 25 (capitalization and emphasis omitted). But that factbound claim of error does not warrant this Court's review. In an effort to show otherwise, applicants claim a split of authority over whether certification under Rule 23(b)(2) is appropriate where members of a class seek "'equitable' restitution." Appl. 26 (citation omitted). But this case would be a highly unsuitable vehicle to address that issue because it does not include a freestanding claim or award of equitable restitution by a court in the exercise of its own equitable powers.

The authority to discharge loans and refund loan payments is conferred on the Secretary by statute, and discharges and refunds are an ordinary feature of the administrative process under the borrower-defense regulations. It naturally follows that the settlement of litigation arising out of applications filed with the Department could entail refunds as well as discharge of future

liability. And unlike in Thorn v. Jefferson-Pilot Life Insurance Co., 445 F.3d 311, 331-332 (4th Cir. 2006), and Randall v. Rolls-Royce Corp., 637 F.3d 818, 825 (7th Cir. 2011), cited by applicants (Appl. 26), the implementation of that relief requires no individualized determination by the court of the amounts owed to particular borrowers. Applicants point to no case that has addressed a similar question about Rule 23(b)(2) in the settlement context.

III. THE PUBLIC INTEREST AND THE BALANCE OF THE EQUITIES WEIGH HEAVILY AGAINST A STAY

Even if applicants could satisfy the other stay requirements, they could not carry their "burden" to show that the public interest and other equitable factors "justify an exercise [of this Court's] discretion" to grant a stay. Nken, 556 U.S. at 434. Applicants' inability to show any irreparable injury that would result from the settlement during the appellate process, see pp. 18-27, supra, stands in sharp contrast to obvious harm to the settling parties that would result from a delay of its further implementation. The district court correctly concluded that the balance of the equities and the public interest -- two factors that "merge" when the government is a party, Nken, 556 U.S. at 435 -- "heavily weigh against a stay." Appl. App. 25a.

Any stay of the settlement -- which could postpone its further implementation by a year or more -- would substantially harm the Department, private respondents, and the public. As the district court recognized after supervising this dispute for three years,

the Department is facing a "massive, ever-expanding backlog of unresolved borrower-defense claims." Appl. App. 26a (citation omitted); see id. at 39a. The Department has a strong interest in resolving this litigation and reducing that logjam -- including by providing for discharge relief for claims with substantial indicia of merit -- and doing so according to a schedule that is workable for the Department and that permits it to continue devoting appropriate resources to its other priorities. The public similarly has an interest in resolution of "this stubborn and burgeoning backlog" without further delay. Appl. App. 26a-27a.

The same holds true for private respondents and class members, the vast majority of whom have no relation to applicants' schools, who originally brought suit because of the delay they were already experiencing in 2019. See Appl. App. 27a. Applicants' cavalier suggestion that any further delay could not matter to them (Appl. 35) ignores the weight of financial uncertainty those borrowers will continue to experience until the settlement's discharges are effectuated. See ibid.[7]

Given the strong interest in moving forward, and consistent with the agreement's binding terms (including deadlines), the De-

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[7] Applicants contend that it is "entirely contradictory" for the settling parties to claim harm from prolonged delay when the settlement provided for the postponement of its effective date in the event of a class member's appeal. Appl. 36. But the parties' acceptance of that delay to protect the rights of class members -- who are bound under the settlement's terms -- hardly shows that the parties considered delay to be costless.

partment has already begun implementing the settlement by notifying class members that they will receive discharges, directing loan servicers to start processing those discharges, updating its own internal systems to reflect the rescission of previous denials, and beginning the adjudication process for those reopened cases through the settlement's streamlined procedures. See pp. 15-16, supra; see also Appl. App. 8a (describing the implementation process). The whipsawing that would occur if the settlement were stayed would cause confusion among the affected borrowers, loan servicers, and the public and would undermine the Department's ability to effectively implement the borrower-defense program.

IV. APPLICANTS' ALTERNATIVE REQUEST FOR CERTIORARI BEFORE JUDGMENT SHOULD BE DENIED

In the alternative, applicants propose that the Court treat their application as a petition for a writ of certiorari before judgment, again based on a purported "interrelationship" between this case, Nebraska, and Brown. Appl. 38-39. But as even applicants concede (Appl. 39), that is an "extraordinary" request, and it is not remotely warranted here. As discussed, this settlement and the questions it presents are unrelated to the statutory authority question the Court is presently considering in Nebraska and Brown. See p. 35, supra. Applicants are also wrong to contend (Appl. 39) that the justifications for granting the government's request for certiorari before judgment in those cases apply here. An important government relief program has not been enjoined na-

tionwide, leaving millions of economically vulnerable Americans in limbo. Nor would it be appropriate for this Court to dispense with the ordinary process of appellate review simply based on the settlement's "economic stakes," ibid., which do not affect applicants.

* * *

As the district court found, the class-action settlement at issue here is a reasonable and statutorily authorized solution to the unprecedented problem posed by a flood of borrower-defense applications asserting a right to discharge under the applicable statute and regulations. The relief the Department has promised borrowers in that settlement "should not be delayed any longer by three intervenor schools who were not parties to the settlement agreement and who were not involved in the long, hard-fought litigation that preceded it." Appl. App. 27a. Applicants are not entitled to the extraordinary stay they seek.

CONCLUSION

The application for a stay should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

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