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 13  
 14 **UNITED STATES DISTRICT COURT**  
 15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

16  
 17 THERESA SWEET, *et al.*,  
 18 Plaintiffs,

19 v.

20 MIGUEL CARDONA, in his official capacity  
 21 as Secretary of Education, and the UNITED  
 STATES DEPARTMENT OF EDUCATION,  
 22 Defendants.  
 23

No. 3:19-cv-03674-WHA

**DEFENDANTS' CONSOLIDATED  
 OPPOSITION TO MOTIONS FOR  
 INTERVENTION**

Date: August 4, 2022  
 Time: 8:00 a.m.  
 Place: Courtroom 12, 19th Floor  
 Judge William Alsup

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## INTRODUCTION

1  
2 This class action lawsuit presents a dispute between student loan borrowers and the U.S.  
3 Department of Education (“Department”) regarding the Department’s process for reviewing and  
4 adjudicating borrowers’ applications for the Department to relieve them of their loan repayment  
5 obligations based on the alleged misconduct of the schools they attended. The lawsuit exclusively  
6 addresses the Department’s obligations to borrowers; it has no potential to adjudicate any rights  
7 or obligations of those schools. After three years of litigation—which has now involved multiple  
8 rounds of summary judgment briefing, extensive discovery, and months of settlement  
9 negotiations—the parties have executed a settlement agreement to resolve this dispute without the  
10 expense, uncertainty, and delay of additional protracted litigation. As detailed in the parties’ joint  
11 motion seeking the Court’s preliminary approval, the agreement resolves the disputed issues in  
12 this case fairly and comprehensively for the class as a whole, taking due account of the  
13 complexities of this case and the relief Plaintiffs could potentially obtain if the parties were to  
14 proceed to judgment on the merits. Now, on the eve of the scheduled preliminary approval hearing,  
15 four institutions against whom class members have alleged misconduct and sought borrower  
16 defense relief seek to intervene to object to the settlement. But they have no interest whatsoever  
17 in this litigation—much less in the exercise of the Education Secretary’s and the Attorney  
18 General’s discretion, respectively, to compromise class members’ federal student loan debts and  
19 settle litigation on terms that further the interests of the United States. The Court should deny the  
20 intervention motions.

21 To start, the proposed intervenors’ motions are premature. Rule 23 provides an ordered  
22 process for the consideration of objections to a proposed class action settlement, and that occurs  
23 only after the Court first grants the agreement preliminary approval. No one, not even the class  
24 members whose interests the class action settlement approval process is designed to protect, have  
25 a right to object to *preliminary*, as opposed to final, approval of a proposed settlement. For that  
26 reason, the Court should, at a minimum, hold the motions in abeyance until it makes a  
27 determination whether to preliminarily approve the proposed settlement. Proceeding otherwise  
28 would elevate the concerns of the third-party intervenors over those of the class members who,

1 unlike the intervenors, have a right to submit objections prior to the Court’s final approval of the  
2 settlement.

3         If the Court does rule on the intervention motions now, it should deny them. The  
4 Department’s decision to resolve this case by, among other things, agreeing to provide up-front  
5 settlement relief to class members who attended certain schools for which the Department believes  
6 there exists a sufficient basis, for settlement purposes only, to warrant such relief has no  
7 independent legal effect on the putative intervenor schools. The proposed settlement agreement  
8 provides for the Department to afford this relief—not the schools. Any concrete consequences on  
9 the schools—financial or otherwise—could be imposed only after the Department initiated a  
10 separate, future proceeding, in accordance with regulations that require the Department to prove a  
11 sufficient basis for liability and provide schools with notice and an opportunity to be heard. The  
12 proposed settlement agreement is not, and does not purport to be, a substitution for those  
13 proceedings; it will not be introduced as evidence in the event any such proceeding is initiated in  
14 the future, and it creates no independent basis for action against the schools. Nor does the  
15 settlement guarantee that future borrower defense claims by non-class member students of those  
16 schools will be approved or have any effect on the Department’s substantive adjudication of such  
17 non-class member claims going forward. As such, the proposed intervenors do not meet Rule 24’s  
18 requirements for intervention of right, both because they fail to identify any concrete, protectable  
19 interest, and because they fail to demonstrate that their participation in the closing stages of *this*  
20 *action* (for the purpose of derailing a duly negotiated settlement that provides for an expeditious  
21 resolution in a case about agency delay) is necessary to protect any such interest.

22         The Court should deny permissive intervention for the same reasons and in recognition of  
23 the prejudice that would inevitably result from delaying resolution of this action at this late stage.  
24 In its role as fiduciary for the class, the Court should reject the entreaties of institutions whose  
25 actions gave rise to class members’ borrower defense applications in the first place—and who have  
26 no interest in the parties’ negotiated resolution of this class action complaint—and deny  
27 intervention.



## BACKGROUND

### **I. Statutory and Regulatory Background**

Defendants have described the relevant legal framework in multiple filings throughout this case. In short, through Title IV of the Higher Education Act of 1965 (“HEA”), “Congress provides billions of dollars through loan and grant programs to help students pay tuition for their postsecondary education.” *Ass’n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 433 (D.C. Cir. 2012). While student borrowers are generally required to repay their federal loans, Congress has granted the Education Secretary wide authority to “cancel a student federal loan repayment based on a school’s misconduct.” Order Granting Mot. for Class Certification at 2, ECF No. 46 (“Class Cert. Order”). Specifically, the HEA authorizes the Secretary to “specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment.” 20 U.S.C. § 1087e(h).

Pursuant to this authority, the Department has promulgated three sets of borrower defense regulations, with various standards and procedures that apply depending on the disbursement date of the relevant student loan underlying a given borrower defense claim. *See* 34 C.F.R. §§ 685.206; 685.222. In general, these regulations require the Department to initiate a factfinding process to adjudicate borrower defense applications. *Id.* §§ 685.222(e); 685.206(e). As part of that process, the Department considers all relevant information in its possession—including evidence submitted by applicants and the institutions they attended and evidence that is available from any other source—and issues a written decision resolving the claim. *Id.* §§ 685.222(e)(3)-(4); 685.206(e)(9)-(11).

Separately, the regulations authorize the Secretary to “initiate a proceeding” to “collect from the school the amount of relief resulting from a borrower defense.” 34 C.F.R. § 685.222(e)(7) (loans disbursed between July 1, 2017 and July 1, 2020); *see also id.* § 685.206(c)(3)-(4) (loans disbursed prior to July 1, 2017); *id.* § 685.206(e)(16) (loans disbursed after July 1, 2020). Regardless of when a loan was first disbursed, the Department can only seek to recoup amounts discharged for a granted borrower defense application in accordance with the procedures specified in regulations governing the Department’s affirmative enforcement activities. *See* 34 C.F.R. part

1 668, subpart G. To recover any losses incurred on the basis of institutional misconduct giving rise  
2 to a borrower defense, the Department must provide written notice to the relevant institution of its  
3 intent to do so. 34 C.F.R. § 668.87(a)(1). That notice must include “a statement of facts and law  
4 sufficient to show that the Department is entitled” both to grant the underlying borrower defense  
5 and to recover from the school any associated losses, and it must inform the institution of its right  
6 to submit a written response and request a hearing. *Id.* § 668.87(a)(1)(ii)-(iii). The written notice  
7 must also specify the date that the Department intends to take action to recover such losses, and  
8 inform the institution that the Department will “not take action to recover” the losses on that date  
9 if the institution provides a written response. *Id.* § 668.87(a)(1)(iii). If an institution requests a  
10 hearing, “[n]o liability shall be imposed on the institution prior to the hearing.” *Id.* § 668.87(b)(2).  
11 The Department will not take action to recover from the institution until the institution’s written  
12 response is considered or the hearing conducted and a decision issued. *Id.* § 668.87(b).

13 Hearings are then conducted in accordance with the Department’s general enforcement  
14 regulations, pursuant to which institutions have the opportunity to submit evidence, including  
15 expert evidence, and in some instances present oral argument. *See generally id.* § 668.89. At such  
16 a hearing, the Department carries “the burden of persuasion in a borrower defense and recovery  
17 action.” *Id.* § 668.89(b)(3)(iii). Similar procedures apply any time the Department seeks to take  
18 enforcement action against an institution based on its misconduct, including when it seeks to fine,  
19 suspend, limit, or terminate institutions from participating in Title IV programs, *see id.* § 668.84  
20 (fine proceedings); *id.* § 668.85 (suspension proceedings); *id.* § 668.86 (limitation or termination  
21 proceedings), or when it pursues financial liabilities resulting from audits and program reviews of  
22 institutions, *see* 34 C.F.R. part 668, subpart H.

## 23 **II. Procedural History**

24 Plaintiffs filed a class action complaint on June 25, 2019, challenging the Department’s  
25 alleged delay in adjudicating borrower defense claims. *See* ECF No. 1. On October 30, 2019, the  
26 Court certified a class consisting of, with certain exceptions, “[a]ll people who borrowed a Direct  
27 Loan or FFEL loan to pay for a program of higher education, who have asserted a borrower defense  
28 to repayment to the U.S. Department of Education, [and] whose borrower defense has not been

1 granted or denied on the merits.” Class Cert. Order at 14.

2 Defendants filed an answer and an administrative record, and the parties proceeded to brief  
3 cross-motions for summary judgment in December 2019 and January 2020. In their summary  
4 judgment briefing, Defendants contended, among other things, that the Court lacked jurisdiction  
5 because Plaintiffs’ claims had become moot and that the Court lacked authority to issue any  
6 coercive relief against the Secretary. *See* Opp’n to Pls.’ Mot. for Summ. J. & Reply in Supp. of  
7 Defs.’ Mot. for Summ. J. at 2-7, ECF No. 72. Before the Court ruled on these motions, the parties  
8 executed a settlement agreement and submitted it for the Court’s preliminary approval on April  
9 10, 2020. ECF No. 97. The Court preliminarily approved the agreement on May 22, 2020, ECF  
10 No. 103 (“Prelim. Approval Order”), but ultimately, on October 19, 2020, denied final approval  
11 of the settlement because the parties had not reached a “meeting of the minds,” Order Denying  
12 Class Settlement, to Resume Discovery, and to Show Cause at 10, ECF No. 146 at 10. This  
13 conclusion was based largely on concerns Plaintiffs raised about the Department’s procedures for  
14 issuing decisions denying the claims of class members, including its issuance of “form denial  
15 letters,” *id.* at 13, which the Court determined “hang[] borrowers out to dry,” *id.* at 15. The Court  
16 also found a “strong showing of agency pretext,” *id.*—which it characterized as “the paradigm of  
17 agency bad faith,” *id.* at 12—based on the Court’s conclusion that it was presented “with an  
18 explanation for agency action that is incongruent with what the record reveals about the agency’s  
19 priorities and decisionmaking process.” *Id.* (citation omitted).

20 Based on these findings, the Court authorized discovery to include inquiry into, among  
21 other things, the “development and use of the form denial letters” and the “extent to which the  
22 Secretary has denied applications of students who have attended schools subject to findings of  
23 misconduct by the Secretary or any other state or federal body or agency, and the rationale  
24 underlying those denials.” *Id.* at 16. This discovery effectively expanded the case from one solely  
25 about the Department’s delay to a far-reaching challenge to the Department’s procedures for  
26 reviewing and adjudicating (and specifically denying) borrower defense applications.

27 Plaintiffs took extensive discovery and deposed multiple Department officials, eventually  
28 filing a supplemental complaint in May 2021. ECF No. 198 (“Suppl. Compl.”). This complaint

1 added new claims alleging that the Department had “adopt[ed] a policy of near-automatic denial  
2 of borrower defense applications” and issued “unlawful denials of borrower defense applications.”  
3 *Id.* ¶ 6. As part of Plaintiffs’ overarching claim that the Department had inappropriately denied  
4 borrower defense applications, the complaint documented allegations and evidence of wrongdoing  
5 at several institutions. *E.g., id.* ¶¶ 198-232 (describing “common evidence” of misconduct  
6 supporting borrower defense applications filed against several institutions, including Everglades  
7 University). When Plaintiffs moved for summary judgment on June 9, 2022, they requested,  
8 among other things, that the Court “[o]rder Defendants to show cause, within thirty days of the  
9 Court’s ruling on this Motion, why each and every class member’s BD application should not be  
10 granted immediately.” Pls.’ Mot. for Summ. J. at 1, ECF No. 245.

11 On June 22, 2022, the day before Defendants’ opposition brief and cross-motion was due,  
12 the parties executed a settlement agreement and jointly submitted it to the Court for preliminary  
13 approval. *See* Joint Mot. for Prelim. Approval of Settlement, ECF No. 246 (“Prelim. Approval  
14 Mot.”). Immediately thereafter, the parties’ submitted a stipulated request to vacate the operative  
15 briefing schedule. ECF No. 247. When the Court did not rule on that request prior to Defendants’  
16 filing deadline,<sup>1</sup> Defendants filed a brief opposing Plaintiffs’ summary judgment motion and cross-  
17 moving for summary judgment. *See* ECF No. 249.

### 18 **III. The Settlement Agreement**

19 Following discovery and after the change in presidential administration in January 2021,  
20 the parties began a new round of settlement negotiations in May 2021. These negotiations  
21 continued for more than a year, reflecting the tremendous complexity of this case and the  
22 Department’s larger efforts to clear an ever-growing backlog of borrower defense applications that  
23 now numbers well over 200,000. The parties’ joint motion for preliminary approval of the  
24 agreement, ultimately filed on June 22, 2022, aptly summarizes the terms of the agreement and its  
25 benefits to all parties. *See* Prelim. Approval Mot. Defendants highlight a few key provisions  
26 below.

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27 <sup>1</sup> Pursuant to prior orders of the Court, that filing deadline was at Noon Pacific Time on June 23,  
28 2022. *See* ECF No. 240; ECF No. 224 (providing that “[a]ll [summary judgment] filings are due  
at Noon”).

1 The settlement agreement provides an overarching framework for the Department to  
2 eliminate the massive backlog of borrower defense applications—and resolve the claims of all  
3 class members—according to a schedule that is workable for the Department and fair to the class.  
4 To achieve that result, the settlement provides that class members who attended certain specified  
5 institutions will receive “Full Settlement Relief” within a year of the settlement’s effective date.  
6 Proposed Settlement Agreement § IV.A.1, ECF No. 246-1 (“Agreement”). The institutions are  
7 listed on Exhibit C to the parties’ proposed agreement. The parties’ preliminary approval motion  
8 explained that “because the Department has identified common evidence of institutional  
9 misconduct by the schools, programs, and school groups identified in Exhibit C . . . , it has  
10 determined that every Class Member whose Relevant Loan Debt is associated with those schools  
11 should be provided presumptive relief under the settlement due to strong indicia regarding  
12 substantial misconduct by the listed schools, whether credibly alleged or in some instances proven,  
13 and the high rate of class members with applications related to the listed schools.” Prelim.  
14 Approval. Mot. at 17-18.

15 The agreement makes clear that this relief is the result of the parties’ negotiated settlement,  
16 not any borrower defense adjudication through the Department’s regulatory process. *See, e.g.*,  
17 Agreement §§ II.O (defining “final decision” for purposes of the agreement as a decision “either  
18 approving or denying settlement relief to a borrower under the terms of this Agreement”); § IV.A  
19 (providing for class members who attended institutions on the Exhibit C list to receive “Full  
20 Settlement Relief”). An institution’s inclusion on Exhibit C is not based on an official finding of  
21 misconduct or wrongdoing by the Department. *See* Decl. of Benjamin Miller ¶ 7 (“Miller Decl.”)  
22 (attached hereto as Ex. A). Rather, it is the result of the parties’ negotiated assessment that, for  
23 each school, there exists a sufficient threshold indication of wrongdoing to justify summary  
24 settlement relief for associated class members. By concentrating this kind of relief among the class  
25 members most likely (though in no sense guaranteed in every case) to obtain relief through the  
26 Department’s ordinary borrower defense process—itsself the subject of multiple claims in  
27 Plaintiffs’ supplemental complaint—the agreement allows the Department to resolve a large  
28 volume of claims in a more rational way than if the Court awarded the kind of relief Plaintiffs have

1 demanded (*e.g.*, granting all borrower defense applications immediately) or imposed a shorter  
2 schedule for resolving the backlog of claims that would force a more arbitrary resolution of those  
3 claims as a whole. It also allows the Department to issue decisions on a more expedited timeline  
4 to the remaining class members than would otherwise be possible.

5 The remainder of class members (*i.e.*, those who did not attend a school on the Exhibit C  
6 list) will receive decisions on their applications according to specified timelines, keyed to how  
7 long their applications have been pending. Agreement § IV.C.3. In response to Plaintiffs’  
8 allegations that the Department’s prior methods for reviewing and adjudicating applications were  
9 unlawfully weighted towards denying such applications, the agreement provides for the  
10 Department to apply certain streamlined review procedures to class member applications. *Id.*  
11 § IV.C.1. And to account for Plaintiffs’ allegations about insufficient denial notices, the agreement  
12 provides that the Department will not deny a class member’s application without first providing  
13 that class member an opportunity to revise and resubmit her application, and that any denial  
14 decision will “explain the reasons the application was denied and apprise the recipient of his or  
15 her right to seek review of the decision in federal district court.” *Id.* § IV.C.2. Any final decisions  
16 issued through this process are not borrower defense decisions (and do not reflect adjudications  
17 through the Department’s borrower defense process) and will lead either to approval of an  
18 application for settlement (not borrower defense) relief or to denial of that application. *See, e.g.*,  
19 *id.* § IV.C.2 (a “settlement relief decision” notifies a class member “that his or her borrower  
20 defense application has been approved under the terms of this Settlement Agreement and that the  
21 Class Member will receive Full Settlement Relief”); *see also* Miller Decl. ¶¶ 7-9.

22 The agreement provides that the Court will retain limited jurisdiction for the specific  
23 purpose of enforcing specified breaches of the agreement, and it authorizes specified remedies in  
24 the event of non-compliance. *See generally* Agreement § V. Otherwise, the agreement requires  
25 the Court to “relinquish[] jurisdiction” over this action. *Id.* § V.E & V.F. The class members, in  
26 turn, covenant not to sue in certain situations, *id.* § IX, and agree to waive all claims asserted in  
27 this action, *id.* § VII, while Defendants remain free to assert any applicable *res judicata* defenses  
28 in future actions involving Class Members, *id.*

1 The settlement class closed as of the date of the agreement’s execution, June 22, 2022. *Id.*  
2 § III.D. However, the settlement agreement provides certain limited relief to “post-class  
3 applicants” who submit borrower defense applications between that date and the date the Court  
4 finally approves the agreement. *See id.* § IV.D. These individuals are entitled to a decision on  
5 their claims within 36 months of the agreement’s effective date; if that deadline is missed, the post-  
6 class applicants will receive full settlement relief. *Id.* Those claims will be reviewed under normal  
7 borrower defense processes, and the post-class applicants are entitled to none of the streamlined  
8 processes specified in the agreement—including relief based on attendance at designated Exhibit  
9 C institutions. The proposed treatment of this limited set of “post-class applicants” is in line with  
10 the Department’s proposals for handling borrower defense applications outside of the proposed  
11 settlement, beginning July 1, 2023. *See* Notice of Proposed Rulemaking, 87 Fed. Reg. 41,878,  
12 42,008 (proposed section 685.406(f)) (July 13, 2022) (proposing that borrower defense decisions  
13 should be issued within three years of receipt of a materially complete application, and that the  
14 Department’s failure to provide a decision on that timeframe will render the loan obligation  
15 unenforceable).

#### 16 **IV. The Intervention Motions**

17 On June 23, 2022, the Court vacated the remaining schedule for summary judgment  
18 briefing and scheduled a July 28, 2022 hearing on the parties’ joint motion for preliminary approval  
19 of the settlement agreement. ECF No. 250. Approximately three weeks later, four institutions  
20 referenced in Exhibit C of the parties’ settlement agreement filed a total of three intervention  
21 motions. *See* ECF No. 254 (American National University and Lincoln Education Services  
22 Corporation (“LESC”) (“ANU Mot.”); ECF No. 261 (Everglades College, Inc.) (“ECI Mot.”);  
23 ECF No. 265 (The Chicago School of Professional Psychology) (“TCSPP Mot.”) (collectively,  
24 “Movants”). The Movants frame their requests slightly differently, but all essentially seek to  
25 intervene for the purpose of objecting to the parties’ proposed settlement agreement. *See* ANU  
26 Mot. at 1 (requesting “a seat at the table in the finalization and implementation of a settlement that  
27 affects their interests”); ECI Mot. at 3 (seeking intervention for the “limited purpose of protecting  
28 its rights and objecting to a ‘settlement’”); TCSPP Mot. at 2 (requesting leave to “object to the

1 settlement and file an opposition to the proposed settlement”).

2 The putative intervenors object to their inclusion on Exhibit C of the proposed settlement  
3 agreement. In their telling, such inclusion infringes their regulatory rights to “defend  
4 [themselves],” *e.g.*, TCSPP Mot. at 2, raises the specter of “potential adverse consequences” at a  
5 later date, *e.g.*, ANU Mot. at 2, and harms the schools’ “reputation[s],” *e.g.*, ECI Mot. at 3; TCSPP  
6 Mot. at 3. All seek to intervene as of right pursuant to Federal Rule of Civil Procedure 24(a), as  
7 well as permissive intervention under Rule 24(b). Pursuant to the timeline set forth in the Court’s  
8 July 15, 2022 order, ECF No. 269, Defendants submit this consolidated opposition brief.

### 9 LEGAL STANDARDS

10 Federal Rule of Civil Procedure 24(a)(2) establishes four requirements for intervention as  
11 of right: “(1) the motion must be timely; (2) the applicant must claim a ‘significantly protectable’  
12 interest relating to the property or transaction which is the subject of the action; (3) the applicant  
13 must be so situated that the disposition of the action may as a practical matter impair or impede its  
14 ability to protect that interest; and (4) the applicant’s interest must be inadequately represented by  
15 the parties to the action.” *Callahan v. Brookdale Senior Living Cmty., Inc.*, 38 F.4th 813, 820  
16 (9th Cir. 2022) (citation omitted). “Failure to satisfy any one of the requirements is fatal to the  
17 application.” *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 841 (9th Cir. 2011)  
18 (citation omitted). A would-be intervenor bears the burden of establishing that it meets each  
19 requirement. *Id.* Where, as here, a non-party seeks intervention to “pursue relief that is different  
20 from that which is sought by a party with standing,” the would-be intervenor “must have Article  
21 III standing.” *Town of Chester, NY v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017); *see also*  
22 *Or. Prescription Drug Monitoring Program v. U.S. DEA*, 860 F.3d 1228, 1234 (9th Cir. 2017)

23 Federal Rule of Civil Procedure 24(b)(1)(B) provides for permissive intervention. “An  
24 applicant who seeks permissive intervention must prove that it meets three threshold requirements:  
25 (1) it shares a common question of law or fact with the main action; (2) its motion is timely; and  
26 (3) the court has an independent basis for jurisdiction over the applicant’s claims.” *Cooper v.*  
27 *Newsom*, 13 F.4th 857, 868 (9th Cir. 2021) (citation omitted). The district court may deny  
28 permissive intervention even where a movant has satisfied these threshold requirements. *Id.* “In



1 exercising its discretion, the district court must consider whether intervention will unduly delay  
2 the main action or will unfairly prejudice the existing parties.” *Id.*; *see also Callahan*, 38 F.4th at  
3 822 (identifying additional factors court may consider).

#### 4 ARGUMENT

##### 5 **I. The Intervention Motions Are Premature And Should Be Held In Abeyance Pending 6 The Court’s Preliminary Approval Determination.**

7 To begin, the putative intervenors are mistaken in their contention that the Court must  
8 decide their motions before making a determination whether to preliminarily approve the parties’  
9 proposed settlement. *See, e.g.*, ECF No. 265-1 (TCSPP’s proposed motion to continue preliminary  
10 approval hearing until after a ruling on TCSPP’s intervention motion); ECI Mot. at 11 (contending  
11 that “ECI should be granted intervention—prior to the Court’s consideration of the Proposed  
12 Settlement (either preliminary or final)”). As described below, the institutions have no concrete  
13 interest in this litigation at all, and the Court should therefore deny their motions to intervene. But  
14 at a minimum, because the Movants have no role to play in the preliminary approval process, the  
15 Court should at least defer consideration of their motions unless and until it sets a schedule for  
16 class member objections to a preliminarily-approved agreement.

17 Approval of a class action settlement is “a two-step process.” *See, e.g., In re Volkswagen*  
18 *“Clean Diesel” Mktg., Sales Practices, & Prods. Liability Litig.*, 229 F. Supp. 3d 1052, 1062 (N.D.  
19 Cal. 2017). The court determines first “whether a proposed class action settlement deserves  
20 preliminary approval and then, after notice is given to class members, . . . the court entertains any  
21 of their objections . . . [and] determines whether the parties should be allowed to settle the class  
22 action pursuant to the agreed-upon terms.” *Id.* (citations omitted). “Preliminary approval is  
23 appropriate if ‘the proposed settlement appears to be the product of serious, informed, non-  
24 collusive negotiations, has no obvious deficiencies, does not improperly grant preferential  
25 treatment to class representatives or segments of the class, and falls within the range of possible  
26 approval.’” Prelim. Approval Order at 2 (quoting *In re Tableware Antitrust Litig.*, 484 F. Supp.  
27 2d 1078, 1079 (N.D. Cal. 2007)).  
28

1 In light of these standards,<sup>2</sup> there is no basis to allow the would-be intervenors to “object[]  
2 to preliminary approval of the settlement.” ECI Mot. to Shorten Time for Briefing & Hearing Mot.  
3 to Intervene at 1, ECF No. 268. Instead, “it is premature under Rule 24 for objectors to intervene  
4 at the preliminary approval stage, as all objections to the settlement agreement are contemplated  
5 to be lodged after preliminary approval and before final approval.” *Chi v. Univ. of S. Cal.*, No.  
6 2:18-cv-4258, 2019 WL 3064457, at \*6 (C.D. Cal. Apr. 18, 2019); *see also, e.g., Lane v. Facebook,*  
7 *Inc.*, No. C 08-3845, 2009 WL 3458198, at \*5 (N.D. Cal. Oct. 23, 2009) (denying leave to  
8 intervene “to advance the argument that the terms of the proposed settlement are contrary to public  
9 policy and are unfair, inadequate, and unreasonable” because the proposed intervenors “failed to  
10 establish that their rights to raise these issues are not adequately protected through the process for  
11 submitting objections that will follow upon preliminary approval of the settlement agreement”);  
12 *Casey v. Citibank, N.A.*, No. 5:12-cv-820, 2014 WL 3468188, at \*1 (N.D.N.Y. Mar. 21, 2014)  
13 (intervention to “object to the proposed settlement agreement is inappropriate and premature”  
14 because the “proper time to present” such objections is “at the final approval hearing”).

15 Indeed, not even putative class members are permitted “to file objections to a motion for  
16 preliminary approval.” *Chavez v. PVH Corp.*, No. C 13-01797, 2015 WL 12915109, at \*3 (N.D.  
17 Cal. Aug. 6, 2015). The would-be intervenors, then, seek to circumvent the ordinary class action  
18 settlement approval process and elevate their objections to the proposed settlement over the class  
19 members whose interests the approval process is designed to protect. *See, e.g., In re Volkswagen,*  
20 229 F. Supp. 3d at 1061 (noting that “the district court has a fiduciary duty to look after the interests  
21 of those absent class members” (citation omitted)). The Court should decline to do so. The  
22

23 <sup>2</sup> ECI proclaims that that the parties “have colluded to impair . . . ECI’s significant interests.” ECI  
24 Mot. at 18. But it offers nothing in support of this assertion, which appears to be based solely on  
25 the fact the parties negotiated their settlement “in secret.” *Id.* It should go without saying that  
26 there is nothing collusive about confidential settlement negotiations. *See, e.g., BB&T Co. v.*  
27 *Pahrump 194, LLC*, No. 2:12-cv-1462, 2015 WL 1877422, at \*2 (D. Nev. Apr. 23, 2015) (“Federal  
28 courts have long held that settlement negotiations should be kept secret.”). And as explained in  
the parties’ preliminary approval motion, the agreement here was the result of arms-length  
negotiation. *See* Prelim. Approval Mot. at 14 (noting that in the class action settlement context,  
collusion is typically limited to the situation where “attorneys’ fees will be paid out of the  
settlement funds that would otherwise be distributed to class members”).

1 intervention motions should be denied, but at a minimum, the Court should hold them in abeyance  
2 until it has determined whether or not to grant preliminary approval.

## 3 **II. Movants Are Not Entitled To Intervene As Of Right.**

4 Even if the intervention motions were appropriately considered now, there is no basis for  
5 the Court to grant them. “Cases involving non-class members’ attempts to intervene and/or object  
6 to settlements are few, and the courts usually reject outsiders’ attempts to enter the litigation during  
7 the settlement phase.” *Gould v. Alleco, Inc.*, 883 F.2d 281, 285 (4th Cir. 1989). Here, intervention  
8 is inappropriate because the putative intervenors lack any concrete interest in the exercise of the  
9 Attorney General’s and the Education Secretary’s considerable discretion to settle claims.  
10 Accordingly, the Court should deny intervention under Rule 24(a).

### 11 **A. The Proposed Settlement Is a Valid Exercise of the Federal Government’s 12 Settlement Authority, Not an Application of the Department’s Borrower 13 Defense Regulations.**

14 Movants’ assertions of significant protectable interests are based on their misunderstanding  
15 of the nature of the proposed agreement. Contrary to Movants’ allegations, the agreement is a  
16 litigation settlement, not a vehicle for the “resolution of borrower-defense claims . . . under the  
17 Department’s regulations,” ANU Mot. at 15, or a “finding of wrongdoing . . . against the schools,”  
18 ECI Mot. at 14-15; *see also* TCSPP Mot. at 13 (contending that inclusion on Exhibit C reflects “an  
19 unadjudicated determination by the Department that TCSPP has committed substantial  
20 misconduct”). Because Movants’ premise is incorrect, their arguments fail.

21 As a general matter, “the Attorney General has exclusive authority and plenary power to  
22 control the conduct of litigation in which the United States is involved.” *United States v. Hercules,*  
23 *Inc.*, 961 F.2d 796, 798 (8th Cir. 1992); *see also* 28 U.S.C. §§ 516-519. That includes the authority,  
24 at issue here, to settle litigation involving the United States. In light of the strong public interest  
25 in settling such litigation, *see, e.g., Util. Reform Project v. Bonneville Power Admin.*, 869 F.2d  
26 437, 443 (9th Cir. 1989)—an interest that is only magnified by the “strong judicial policy” favoring  
27 the settlement of “complex class action litigation,” *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir.  
28 2015) (citation omitted)—the Attorney General’s settlement authority is given a broad  
construction. Indeed, “courts have long acknowledged that the Attorney General’s authority to

1 control the course of the federal government’s litigation is presumptively immune from judicial  
2 review.” *Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1480 (D.C. Cir. 1995); *accord United*  
3 *States v. Carpenter*, 526 F.3d 1237, 1241-42 (9th Cir. 2008) (recognizing that Attorney General’s  
4 “plenary discretion” to “settle litigation to which the federal government is a party” is “committed  
5 to absolute agency discretion by law,” and only reviewable in exceptional circumstances).

6 While Congress can place certain limits on the Attorney General’s authority, which of  
7 course “stops at the walls of illegality,” *Carpenter*, 526 F.3d at 1242 (citation omitted), “the  
8 statutory authority of the Attorney General to control litigation is not diminished without a clear  
9 and unambiguous directive from Congress,” *Hercules*, 961 F.2d at 798. No such directive is at  
10 issue here, and the proposed intervenors do not argue otherwise. To the contrary, the settlement  
11 agreement provides for resolution of this lawsuit based on an exercise of the Education Secretary’s  
12 considerable discretion under the HEA to compromise and settle claims arising out of the federal  
13 student loan programs. *See* 20 U.S.C. § 1082(a)(6). The Secretary’s “compromise and settlement  
14 authority” includes the authority to compromise and release the student loan debts owed to him by  
15 federal student loans borrowers on terms determined by the Secretary. *See Weingarten v. DeVos*,  
16 468 F. Supp. 3d 322, 338 (D.D.C. 2020) (finding that the Secretary’s exercise of this authority is  
17 generally “not subject to judicial review” (citation omitted)).

18 The Attorney General’s delegated settlement authority, *see* 28 C.F.R. §§ 0.160-0.172, and  
19 the Secretary’s compromise and settlement authority were exercised to resolve the disputed claims  
20 at issue in this litigation. The proposed settlement sets forth procedures and a framework for the  
21 Secretary to exercise his statutory authority to provide settlement relief to class members in a  
22 comprehensive manner. In some cases, that is through the up-front discharge of loan obligations  
23 based on attendance at a specified list of schools; in others, it is through the further review of  
24 borrower defense applications through streamlined procedures specific to the parties’ proposed  
25 settlement agreement. In either situation, the procedures specified in the settlement are distinct  
26 from what class members would “receive if their claims were adjudicated outside of [the]  
27 settlement.” Prelim. Approval Mot. at 18. Indeed, the proposed agreement speaks only in terms  
28 of “settlement relief”—never borrower defense relief—and defines “final decision” in the context

1 of the agreement as a decision “either approving or denying settlement relief to a borrower under  
2 the terms of [the] Agreement.” Agreement § II.O (Definitions); *see also supra* pp. 7-8. The  
3 settlement agreement does not provide for Defendants to exercise their authority under the  
4 Department’s borrower defense regulations; nor does it mandate or even suggest that the relief  
5 class members will receive is in the form of borrower defense decisions issued through the  
6 regulatory process that would be applicable outside of this settlement.

7 **B. Movants Lack Any Concrete Interest in the Proposed Settlement.**

8 With this context in mind, Movants’ claims to intervention fall apart. While their motions  
9 are long on complaints about the settlement agreement in general, they are short on identifying  
10 any concrete, protectable interest that is impaired by the parties’ settlement of disputed claims.  
11 For example, each of the proposed intervenors refers to its ability to receive notice of a pending  
12 borrower defense claim and an opportunity to respond before the Department issues a final  
13 decision resolving the borrower’s application. *See, e.g.*, ANU Mot. at 16; ECI Mot. at 15-16;  
14 TCSPP Mot. at 14. But these procedures apply only when the Department is reviewing and  
15 adjudicating borrower defense applications in the ordinary course, which could lead to a  
16 recoupment claim against the school that is the subject of the application. They do not apply to  
17 the situation here, *i.e.*, an exercise of the Secretary’s authority to settle the debts of federal student  
18 loan borrowers—in conjunction with the Attorney General’s authority to settle litigation—outside  
19 the regulatory process for reviewing and adjudicating borrower defense applications.

20 In any event, even if the Department had announced an intention to issue final borrower  
21 defense decisions pursuant to its operative regulations (rather than the procedures set forth in the  
22 settlement agreement), Movants would still have no standing to object. At most, the schools object  
23 to a procedural deprivation in the Department’s broader process of rendering decisions to  
24 borrowers on the merits of their applications. It is well established, however, that “deprivation of  
25 a procedural right without some concrete interest that is affected by the deprivation—a procedural  
26 right *in vacuo*—is insufficient to create Article III standing.” *Summers v. Earth Island Inst.*, 555  
27 U.S. 488, 496 (2009). A school has no “concrete interest,” *id.*, in the Department’s determination  
28

1 whether to approve or deny the borrower defense claim of a student who attended that school.<sup>3</sup>  
 2 *See, e.g., Big Country Foods, Inc. v. Bd. of Educ. of Anchorage Sch. Dist.*, 952 F.2d 1173, 1176  
 3 (9th Cir. 1992) (party lacks standing to challenge the manner in which an agency exercises its  
 4 enforcement discretion against other parties). Any such interest is only implicated later, if and  
 5 when the Department decides to take further action against the school—either to recoup funds or  
 6 to impose other sanctions or penalties through regulatory processes for establishing institutional  
 7 misconduct. *See* 34 C.F.R., subparts G & H.

8 Movants, then, are left with the argument that they are concerned that the Department *may*  
 9 use inclusion on Exhibit C “as a precursor to further adverse action against the institution.” ANU  
 10 Mot. at 16; *see also* TCSPP Mot. at 15 (expressing concern that the settlement may “provide the  
 11 Department with an avenue to seek adverse administrative actions against TCSPP”). But that is  
 12 incorrect. *See generally* Miller Decl. The fact that a school is included on the attachment to the  
 13 settlement agreement is not a formal finding of misconduct, establishes no institutional liability,  
 14 and does not provide an evidentiary basis on which the Department can take any action against the  
 15 school. *See id.* ¶¶ 7-14. Far from determining that “every school on the Exhibit C list has  
 16 committed wrongdoing as to every single borrower-defense applicant in the Class,” ECI Mot. at  
 17 16, the settlement agreement merely states that “Defendants will effectuate Full Settlement Relief  
 18 for each and every Class Member whose Relevant Loan Debt is associated with the schools,  
 19 programs, and School Groups listed in Exhibit C hereto,” without reference to wrongdoing by any  
 20 particular school. *See* Agreement § IV.A.1; *see also* Miller Decl. ¶ 14 (“The fact of an institution’s  
 21 inclusion on Exhibit C will be used by the Department solely for purposes of effectuating its  
 22 obligations under the Settlement Agreement to award Full Settlement Relief to certain class  
 23 members.”). And while Movants highlight the statement in the parties’ preliminary approval  
 24 motion that in the context of the settlement the Department has identified common evidence of  
 25 institutional misconduct by the schools identified in Exhibit C and/or that there is a high rate of

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26 <sup>3</sup> Were it otherwise, institutions would be able to challenge any decision approving a borrower  
 27 defense claim in federal court, an unwarranted result that would be inconsistent with the regulatory  
 28 process for holding institutions accountable from the initial decision—affecting only the  
 applicant’s rights—of whether to approve the claim.

1 class members with borrower defense applications related to the listed schools, *see* ANU Mot. at  
2 8; ECI Mot. at 2; TCSPP Mot. at 5 (all citing Prelim. Approval Mot. at 17-18), that document is  
3 not an official finding of misconduct and has no more independent effect on the Department’s  
4 relationship with the Exhibit C institutions than the proposed settlement agreement itself.

5 Accordingly, present concerns about future administrative enforcement actions are purely  
6 speculative. *See, e.g., Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013) (“[W]e have  
7 repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact,  
8 and that allegations of *possible* future injury are not sufficient.” (cleaned up)); *Bova v. City of*  
9 *Medford* 564 F.3d 1093, 1096-97 (9th Cir. 2009) (injury that “has not yet occurred,” and is  
10 contingent on the occurrence of future events, is not “concrete and particularized enough to survive  
11 the standing/ripeness inquiry”). Any claimed injury is expressly “premised on a contingency that  
12 may never materialize; namely, the initiation of a subsequent” recoupment or enforcement  
13 proceeding by the Department (the outcome of which is not pre-determined in any event). *See*  
14 *Moore v. Verizon Commc’ns Inc.*, No. C 09-1823, 2013 WL 450365, at \*13 (N.D. Cal. Feb. 5,  
15 2013). As discussed above, the Department can recover discharged amounts from schools only  
16 after providing those schools with notice and opportunity to respond to any assertions of  
17 misconduct with precisely the same evidence they seek to submit here. And an institution’s  
18 inclusion on the Exhibit C list “does not itself provide any evidentiary support or basis for initiating  
19 any such action.” Miller Decl. ¶ 14. Thus, Movants purely hypothetical fear of future adverse  
20 actions does not constitute an interest that is “‘direct, non-contingent, substantial and legally  
21 protectable’ to justify intervention.” *Moore*, 2013 WL 450365, at \*13 (quoting *Dilks v. Aloha*  
22 *Airlines*, 642 F.2d 1155, 1157 (9th Cir. 1981)).

23 The schools also claim that their inclusion on the Exhibit C attachment is already causing  
24 them reputational harm. *E.g.*, TCSPP Mot. at 13 (asserting “harm” from “being labeled by the  
25 Department as an institution deemed to have engaged in substantial misconduct”); *accord* ANU  
26 Mot. at 16-17; ECI Mot. at 10. This contention is undermined by the fact that, as discussed above,  
27 the exhibit is a basis for providing relief under the specific terms of the parties’ settlement  
28 agreement—not a broader determination that any school engaged in substantial misconduct. *See*,

1 *e.g.*, *Talavera v. Global Payments, Inc.*, No. 21-cv-1585, 2021 WL 5331000, at \*4 (S.D. Cal. Nov.  
 2 16, 2021) (party seeking to establish reputational harm “must produce *evidence* as opposed to  
 3 ‘platitudes’” (citation omitted)). The schools are of course free to make this point to any current  
 4 or prospective students. In any case, inclusion on the settlement agreement list is not the first  
 5 adverse publicity that the would-be intervenors (and/or their affiliates) have experienced.<sup>4</sup>

6 Ultimately, intervention must be based on “a particularized showing of . . . reputational  
 7 harm” resulting from the proposed settlement. *FTC v. Apex Cap. Grp. LLC*, No. CV 18-9573,  
 8 2022 WL 1060486, at \*3 (C.D. Cal. Mar. 10, 2022) (rejecting intervention in the absence of such  
 9 a showing or a showing that any claimed injury “could be redressed through intervention in this  
 10 case”). But Movants’ declarations consist largely of unsupported speculation and lack any specific  
 11 assertions of concrete reputational harm. Indeed, ECI’s entire “showing” of harm reduces to the  
 12 following conclusory assertion from an Assistant Vice Chancellor of Compliance: “It is my belief  
 13 that the Department of Education’s inclusion of ECI, Keiser, and Everglades on the Exhibit C List  
 14 is already causing them reputational harm, as third parties are treating it like a finding of  
 15 wrongdoing by the schools.” Decl. of Brandon Biederman ¶ 12, ECF No. 261-3; *see also* Decl. of  
 16 Steven Cotton (“Cotton Decl.”) ¶ 8, ECF No. 254-1 (ANU) (stating, without elaboration, that  
 17 unidentified “individuals” “[o]n social media” are “falsely suggesting that [the schools listed on  
 18 Exhibit C] have been subject to an adverse adjudication”); Decl. of Francis Giglio (“Giglio Decl.”)

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19 <sup>4</sup> *See, e.g.*, Veronica Jean Seltzer, American National Univ. found guilty of violating KY  
 20 Consumer Protection Act, *WVTQ* (June 18, 2019), [https://www.wvtq.com/american-national-](https://www.wvtq.com/american-national-univ-found-guilty-violating-ky-consumer-protection-act/)  
 21 [univ-found-guilty-violating-ky-consumer-protection-act/](https://www.wvtq.com/american-national-univ-found-guilty-violating-ky-consumer-protection-act/); Karishma Mehrotra, Two for-profit  
 22 colleges settle lawsuit with attorney general for \$2.3 million, *Boston Globe* (July 30, 2015),  
 23 [https://www.bostonglobe.com/business/2015/07/30/two-for-profit-colleges-settle-lawsuit-with-](https://www.bostonglobe.com/business/2015/07/30/two-for-profit-colleges-settle-lawsuit-with-attorney-general-for-million/PLtMSKNp9QxG19ZGXcXUZI/story.html)  
 24 [attorney-general-for-million/PLtMSKNp9QxG19ZGXcXUZI/story.html](https://www.bostonglobe.com/business/2015/07/30/two-for-profit-colleges-settle-lawsuit-with-attorney-general-for-million/PLtMSKNp9QxG19ZGXcXUZI/story.html) (reporting that Lincoln  
 25 Technical Institute, an affiliate of Movant LESC, settled a lawsuit accusing it of “using unfair  
 26 recruiting tactics and inflating job placement numbers”); Lucy Campbell, Students Win \$11.2M  
 27 Settlement in Chicago School of Psychology Fraud Lawsuit, *Lawyers & Settlements.com* (Sept.  
 28 22, 2016) [https://www.lawyersandsettlements.com/settlements/19167/students-win-11-2m-](https://www.lawyersandsettlements.com/settlements/19167/students-win-11-2m-settlement-in-chicago-school-of.html)  
[settlement-in-chicago-school-of.html](https://www.lawyersandsettlements.com/settlements/19167/students-win-11-2m-settlement-in-chicago-school-of.html) (describing settlement in lawsuit brought by students who  
 “wanted to study at the Chicago School of Professional Psychology,” and “alleged they were  
 provided with misleading information regarding the school’s accreditation and their job prospects  
 after completing their courses”); Suppl. Compl. ¶ 199 (describing settlement agreement between  
 Everglades University and the state of Florida “over alleged violations of Florida’s Unfair Trade  
 Practices Act”).



1 ¶ 15, ECF No. 254-2 (Lincoln) (speculating, based on sporadic citations to “recent media  
2 coverage,” that inclusion on the list “will erroneously associate Lincoln with allegedly *proven*  
3 wrongdoers”); Decl. of Ted Scholz ¶ 15, ECF No. 265-4 (TSCPP) (speculating that TCSPP’s  
4 inclusion on the settlement agreement exhibit “will negatively affect TCSPP’s reputation and  
5 ability to recruit and retain students and faculty,” based on the fact that TCSPP has “received  
6 questions from current and prospective students” of unknown substance in an unidentified  
7 quantity). Absent a “particularized showing” of specific reputational harm resulting from the  
8 proposed settlement, the movants cannot base a claim to intervention on this type of harm.

9 Finally, to the extent the would-be intervenors assert that the proposed settlement will lead  
10 to additional borrower defense discharge applications being filed, or raise the prospect of future  
11 lawsuits by borrowers or enforcement actions from state regulators or accreditation boards, *see*  
12 Cotton Decl. ¶ 8; Giglio Decl. ¶¶ 17-19, such speculation about hypothetical future events (with  
13 only a tenuous, at best, connection to the proposed settlement agreement) is insufficient to confer  
14 standing to intervene for the reasons discussed above. In any event, Movants will have ample  
15 opportunity to defend themselves in any such future action (should it ever come to pass), rendering  
16 intervention here unnecessary.

17 **C. The Interests Claimed in the Intervention Motions Would Not Be Impaired**  
18 **Absent Intervention.**

19 Even if the putative intervenors could claim some protectable interest in the parties’  
20 proposed settlement agreement, they cannot show that final approval of the settlement in this action  
21 would “impair or impede [their] ability to protect that interest.” *United States v. Aerojet Gen.*  
22 *Corp.*, 606 F.3d 1142, 1148 (9th Cir. 2010) (citation omitted). This is because, as described above,  
23 additional proceedings are required before the Department could take any action—*e.g.*, seeking to  
24 recover funds discharged on the basis of institutional misconduct—that would affect any of the  
25 Movants’ interests. *See, e.g., Commodity Futures Trade Comm’n v. Heritage Cap. Advisory*  
26 *Servs., Ltd.*, 736 F.2d 384, 387 (7th Cir. 1984) (where proposed intervenors had alternative forum  
27 in which to protect the interest at issue in intervention motion, denial of intervention was  
28 appropriate because the interest “will not be impaired”); *Aerojet Gen. Corp.*, 606 F.3d at 1152

1 (recognizing that “[p]roposed intervenors’ interest might not be *impaired* if they have other means  
2 to protect them, even if the lawsuit would affect those interests” (citation omitted)). Movants will  
3 have a full opportunity to assert their “procedural rights” and defend against any “material adverse  
4 consequences,” ANU Mot. at 18, by taking advantage of the procedures available to them should  
5 the Department actually choose to initiate the type of proceeding—*e.g.*, a recoupment action  
6 against the school, not the current settlement agreement or even the Department’s first-level  
7 adjudication of a borrower defense application—that actually had the potential to impose such  
8 “adverse” consequences. *See United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir.  
9 2004) (intervention denied where “other means” are available “by which [the putative intervenor]  
10 may protect its interests”).

### 11 **III. The Court Should Deny Permissive Intervention.**

12 For similar reasons, the Court should deny permissive intervention. More so than  
13 intervention of right, the “decision to grant or deny [permissive] intervention is discretionary,  
14 subject to considerations of equity and judicial economy.” *Garza v. Cnty. of L.A.*, 918 F.2d 763,  
15 777 (9th Cir. 1990). Even where Rule 24(b)’s threshold requirements are met, a court has  
16 discretion to deny intervention where, for example, “intervention will unduly delay the main action  
17 or will unfairly prejudice the existing parties.” *Cooper*, 13 F.4th at 868 (citation omitted); *see also*  
18 *Callahan*, 38 F.4th at 822 (identifying additional factors court may consider). Notably, courts  
19 “analyze the timeliness element more strictly than [they] do for intervention as of right.” *Raquedan*  
20 *v. Centerplate of Del. Inc.*, 376 F. Supp. 3d 1038, 1042 (N.D. Cal. 2019) (quoting *League of United*  
21 *Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997)).

22 Here, Movants seek intervention after years of complex litigation and on the eve of  
23 settlement. Even assuming the would-be intervenors moved in a timely fashion once the proposed  
24 settlement was publicly announced, it is undoubtedly the case that allowing intervention, for the  
25 stated purpose of undermining the parties’ negotiated agreement, would “disrupt and delay the  
26 settlement proceedings and prejudice both the parties and the putative class members.” *Brooks v.*  
27 *Life Care Ctrs. of Am., Inc.*, No. SACV 12-659, 2015 WL 13390031, at \*3 (C.D. Cal. Mar. 3,  
28 2015) (denying intervention); *see also Zepeda v. PayPal, Inc.*, No. 10-cv-2500, 2014 WL 1653246,

1 at \*8-9 (N.D. Cal. Apr. 23, 2014) (finding intervention motion timely for Rule 24(a) purposes, but  
 2 exercising “discretion” to deny permissive intervention because “at this stage—after extensive  
 3 mediated settlement negotiations and when an amended motion for preliminary approval is to be  
 4 filed soon—[intervention] would delay the potential resolution of this case” and cause prejudice);  
 5 *Allen*, 787 F.3d at 1222 (affirming denial of intervention motion that was filed “on the eve of  
 6 settlement[] and threatened to prejudice settling parties by potentially derailing settlement talks”).

7 These considerations warrant denial of the putative intervenors’ motions outright. At a  
 8 minimum, they counsel limiting any intervention to submitting an objection to the settlement  
 9 agreement—in the event that it receives preliminary approval—on the same schedule that the  
 10 Court sets for class members to participate “through the normal objection process.” *Id.*<sup>5</sup>

### 11 CONCLUSION

12 For the foregoing reasons, the Court should deny the pending motions for intervention.

13  
 14 Dated: July 25, 2022

Respectfully submitted,

15  
 16 BRIAN D. NETTER  
 Deputy Assistant Attorney General

17  
 18 MARCIA BERMAN  
 Assistant Branch Director

19  
 20 */s/ R. Charlie Merritt*  
 R. CHARLIE MERRITT (VA Bar # 89400)  
 STUART J. ROBINSON  
 Trial Attorneys  
 U.S. Department of Justice  
 Civil Division, Federal Programs Branch  
 1100 L Street NW

24  
 25 <sup>5</sup> If Movants are allowed to intervene to submit their objections to the proposed settlement,  
 26 Defendants expect to establish at that time that the objections of these third parties are not relevant  
 27 to the Court’s consideration of whether to finally approve the agreement as “fair, adequate, and  
 28 reasonable” to the class. *E.g.*, *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 254 (N.D.  
 Cal. 2015) (listing the factors a “a court typically considers”); *see also In re Novatel Wireless Secs.*  
*Litig.*, No. 08CV1689, 2014 WL 2858518, at \*7 (S.D. Cal. June 23, 2014) (“appreciat[ing]” the  
 intervenors’ position,” but noting that “the Court’s duty is ultimately to ensure a fair, reasonable,  
 and adequate settlement *for the class*” and granting final approval (emphasis added)).

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*Attorneys for Defendants*

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**Exhibit A**

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UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF  
EDUCATION and MIGUEL CARDONA, in  
his official capacity as Secretary of Education,

Defendants.

No. 19-cv-03674-WHA

DECLARATION OF BENJAMIN MILLER

1 I, Benjamin Miller, hereby declare under the penalty of perjury as follows:

2 1. I am over the age of 18 and competent to testify to the matters herein.

3 2. On January 21, 2021, I was appointed to serve as a senior adviser to the chief of  
4 staff to the Secretary of the Department of Education (“Department”). I currently serve as a  
5 Deputy Under Secretary, a role I have held since March 2022.

6  
7 3. As a Deputy Under Secretary, I advise the Department’s Under Secretary  
8 regarding the formulation and implementation of Department policy related to postsecondary  
9 education and federal student aid, including borrower defense.

10 4. Through the execution of my duties and my discussions with Department staff  
11 working on borrower defense and enforcement issues, and based on my knowledge of this  
12 litigation, I certify that I am duly authorized, am qualified, and have been given authority by the  
13 Department to make the statements contained in this Declaration regarding the terms of the  
14 settlement agreement executed on June 22, 2022 by the parties to this litigation (“Settlement  
15 Agreement”) (ECF 246-1) and how they relate to actions and proceedings that the Department is  
16 authorized to initiate against institutions participating in programs authorized pursuant to Title  
17 IV of the Higher Education Act of 1965, as amended, 20 U.S.C. §§1070 *et seq.* (“Title IV, HEA  
18 programs”). The statements contained herein are based on my personal knowledge as an  
19 employee of the Department, my review of the pertinent records, and information provided to me  
20 in the performance of my official duties.  
21  
22

23  
24 5. After months of complex settlement negotiations, the parties reached an agreement that,  
25 if approved by the Court, will fully and finally resolve this litigation by providing negotiated  
26 relief to class members on a timeline that is operationally feasible for the Department. The  
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28

1 deadlines set forth in the Settlement Agreement were carefully negotiated, and the Department  
2 has every intention of meeting those deadlines.

3 6. One of the settlement terms that is critical to the Department's ability to operationalize its  
4 obligations under the agreement in a way that will allow it to meet the deadlines the parties  
5 agreed to is the Department's agreement to automatically discharge the Relevant Loan Debt (a  
6 defined settlement term) of the borrowers who attended the institutions that are listed on Exhibit  
7 C to the Settlement Agreement.

8  
9 7. The Settlement Agreement provides that the Department "will effectuate Full Settlement  
10 Relief for each and every Class Member whose Relevant Loan Debt is associated with the  
11 schools, programs, and School Groups listed in Exhibit C" to the Settlement Agreement.  
12 Settlement Agreement at §IV. The Department does not consider the fact of an institution's  
13 inclusion on Exhibit C to constitute a finding of fact of misconduct. The discharges of the  
14 Relevant Loan Debt of certain class members will be effectuated pursuant to the terms of the  
15 Settlement Agreement, not pursuant to the Department's borrower defense regulations.  
16

17  
18 8. For example, those regulations allow a borrower to assert a defense to repayment of an  
19 applicable loan based on a school's alleged misconduct. *See* 34 C.F.R. §§ 685.206; 34 C.F.R.  
20 685.222 (together, the "Borrower Defense Regulations"). If an individual borrower asserts a  
21 borrower defense to repayment pursuant to the Borrower Defense Regulations, the Department  
22 can grant the borrower's defense only if the Department makes an affirmative finding that the  
23 school engaged in a violation of state law (34 C.F.R. § 685.206(c)(1)), made a substantial  
24 misrepresentation to the borrower (34 C.F.R. § 685.222(d)), breached a contract with the  
25 borrower (34 C.F.R. § 685.222(c)), or was subject to a final judgment on the merits in favor of  
26 the borrower (34 C.F.R. § 685.222(b)). When a borrower defense application is submitted and  
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1 adjudicated pursuant to the Borrower Defense Regulations, the Department is required to  
2 “determine whether the application states a basis for a borrower defense, and resolves the claim  
3 through a fact-finding process conducted by the Department official.” 34 C.F.R. §685.222(e)(3).  
4 As part of the fact-finding process, the Department is required to “notif[y] the school of the  
5 borrower defense application and consider[] . . . [a]ny response or submissions from the  
6 school[.]” *Id.* at § 685.222(e)(3)(i). If the Department concludes, after completing the fact-  
7 finding process, that the borrower defense should be granted and a loan discharged, the  
8 Department may then initiate a proceeding against the school to collect the amount discharged.  
9 *Id.* § 685.222(e)(7); § 668.87 (setting forth procedures for borrower defense and recovery  
10 proceedings).  
11  
12

13 9. Providing a class member with Full Settlement Relief under the Settlement Agreement  
14 does not constitute the granting or adjudication of a borrower defense pursuant to the Borrower  
15 Defense Regulations, and therefore provides no basis to the Department for initiating a borrower  
16 defense recoupment proceeding against any institution identified on Exhibit C to the Settlement  
17 Agreement.  
18

19 10. The Department’s authority to undertake the borrower defense recoupment proceedings  
20 is set forth in Subpart G of 34 C.F.R. Part 668. Pursuant to these regulations, the Department  
21 can also take an emergency action against a school; impose a fine against a school; or limit,  
22 suspend or terminate a school’s participation in a program under Title IV of the Higher  
23 Education Act of 1965, as amended. *See* 34 C.F.R. § 668.81 through § 668.99 (“Subpart G  
24 Regulations” or “Subpart G Proceeding”).  
25

26 11. The fact of an institution’s inclusion on Exhibit C to the Settlement Agreement does not  
27 constitute evidence that can or will be considered by the Department in bringing any Subpart G  
28

1 Proceeding, including a borrower defense recoupment proceeding, against an institution. If the  
2 Department were to bring a Subpart G Proceeding against any Exhibit C institution, there would  
3 have to be a basis to do so other than the mere fact that the institution is included on Exhibit C.  
4 Moreover, any institution on Exhibit C against whom the Department might bring a Subpart G  
5 Proceeding in the future would have all the due process rights that any institution would be  
6 entitled to under the Subpart G Regulations.  
7

8 12. Another example of an action that might result in a liability finding against an institution  
9 is the program review that the Department is authorized by Section 498A of the HEA, 20 U.S.C.  
10 § 1099c to conduct of institutions participating in Title IV, HEA programs. At the conclusion of  
11 a program review, the Department issues a program review report that may include findings  
12 (“Program Findings”) that may ultimately result in the issuance of a federal program review  
13 determination and establishment of liabilities against an institution (“Program Liabilities”).  
14

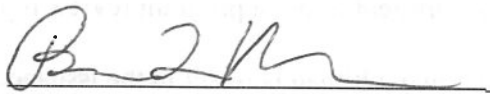
15 13. The fact of an institution’s inclusion on Exhibit C to the Settlement Agreement does not  
16 constitute evidence that can or will be considered by the Department in making Program  
17 Findings or establishing Program Liabilities against an institution.  
18

19 14. The fact of an institution’s inclusion on Exhibit C will be used by the Department solely  
20 for purposes of effectuating its obligations under the Settlement Agreement to award Full  
21 Settlement Relief to certain class members. In any action or proceeding that the Department  
22 might take in the future against an institution, including but not limited to the foregoing  
23 examples, the fact that an institution is included on Exhibit C to the Settlement Agreement does  
24 not itself provide any evidentiary support or basis for initiating any such action against any of the  
25 listed institutions. If the Department were to initiate any such actions or proceedings against any  
26 Exhibit C institution, it will comply with all applicable regulations without any reliance on the  
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1 fact of an institution's inclusion on Exhibit C and each institution would be afforded all due  
2 process and opportunities to defend itself to which it would otherwise be entitled in any such  
3 action or proceeding.  
4

5  
6  
7 I declare under penalty of perjury, pursuant to the provisions of 28 U.S.C. § 1746, that the  
8 foregoing is true and correct.  
9

10 Executed on this 25<sup>th</sup> day of July, 2022.  
11

12 

13 Benjamin Miller  
14 Deputy Under Secretary  
15 United States Department of Education  
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