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**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

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**CONTINENTAL SERVICE GROUP, INC.,**  
*Plaintiff-Appellee*

**PIONEER CREDIT RECOVERY, INC.,**  
*Consolidated-Plaintiff-Appellant*

**COLLECTION TECHNOLOGY, INC.,**  
**PROGRESSIVE FINANCIAL SERVICES, INC.,**  
*Intervenor-Plaintiffs-Appellees*

**ALLTRAN EDUCATION, INC.,**  
*Intervenor-Plaintiff-Appellant*

v.

**UNITED STATES,**  
*Defendant-Appellant*

**CBE GROUP, INC., GC SERVICES LIMITED PARTNERSHIP,**  
**FINANCIAL MANAGEMENT SYSTEMS, INC.,**  
**VALUE RECOVERY HOLDINGS, LLC,**  
*Intervenor-Defendants-Appellees*

**PREMIERE CREDIT OF NORTH AMERICA, LLC, WINDHAM**  
**PROFESSIONALS, INC., AUTOMATED COLLECTION SERVICES, INC.**  
*Intervenor-Defendants*

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2017-2155, -2215, -2342

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Appeal from the United States Court of Federal  
Claims in Nos. 1:17-cv-00449-SGB and 1:17-cv-00499-  
SGB, Chief Judge Susan G. Braden.

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**ACCOUNT CONTROL TECHNOLOGY, INC.,**  
*Plaintiff-Appellee*

**v.**

**UNITED STATES,**  
*Defendant-Appellant*

**PREMIERE CREDIT OF NORTH AMERICA, LLC, AUTOMATED  
COLLECTION SERVICES, INC., WINDHAM PROFESSIONALS, INC.,  
TEXAS GUARANTEED STUDENT LOAN CORP.,**  
*Intervenor-Defendants*

**GC SERVICES LIMITED PARTNERSHIP,  
FINANCIAL MANAGEMENT SYSTEMS, INC.,  
VALUE RECOVERY HOLDINGS, LLC, CBE GROUP, INC.,**  
*Intervenor-Defendants-Appellees*

**ALLTRAN EDUCATION, INC.,**  
*Intervenor-Defendant-Appellant*

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2017-2156, -2210

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Appeal from the United States Court of Federal  
Claims in No. 1:17-cv-00493-SGB, Chief Judge Susan G.  
Braden.

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**ALLTRAN EDUCATION, INC.,**  
*Plaintiff-Appellant*

**v.**

**UNITED STATES,**  
*Defendant-Appellant*

**PREMIERE CREDIT OF NORTH AMERICA, LLC,  
WINDHAM PROFESSIONALS, INC.,**  
*Intervenor-Defendants*

**GC SERVICES LIMITED PARTNERSHIP,  
FINANCIAL MANAGEMENT SYSTEMS, INC., CBE GROUP, INC.,  
VALUE RECOVERY HOLDINGS, LLC,**  
*Intervenor-Defendants-Appellees*

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2017-2157, -2216

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Appeal from the United States Court of Federal  
Claims in No. 1:17-cv-00517-SGB, Chief Judge Susan G. Braden.

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**PROGRESSIVE FINANCIAL SERVICES, INC.,**  
*Plaintiff-Appellee*

**PERFORMANT RECOVERY, INC.,**  
*Intervenor-Plaintiff*

**COLLECTION TECHNOLOGY, INC., VAN RU CREDIT  
CORPORATION, ALLIED INTERSTATE LLC,**  
*Intervenor-Plaintiffs-Appellees*

**v.**

**UNITED STATES,**  
*Defendant-Appellant*

**PREMIERE CREDIT OF NORTH AMERICA, LLC,**  
*Intervenor-Defendant*

**GC SERVICES LIMITED PARTNERSHIP,**  
*Intervenor-Defendant-Appellee*

**ALLTRAN EDUCATION, INC.,**  
*Intervenor-Defendant-Appellant*

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2017-2158, -2214

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Appeal from the United States Court of Federal  
Claims in No. 1:17-cv-00558-SGB, Chief Judge Susan G. Braden.

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**COLLECTION TECHNOLOGY, INC.,**  
*Plaintiff-Appellee*

**PROGRESSIVE FINANCIAL SERVICES, INC.,**  
*Intervenor-Plaintiffs-Appellee*

**v.**

**UNITED STATES,**  
*Defendant-Appellant*

**CBE GROUP, INC.,**  
*Intervenor-Defendant-Appellee*

**PREMIERE CREDIT OF NORTH AMERICA, LLC,**  
*Intervenor-Defendant*

**ALLTRAN EDUCATION, INC.,**  
*Intervenor-Defendant-Appellant*

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2017-2159, -2212

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Appeal from the United States Court of Federal  
Claims in No. 1:17-cv-00578-SGB, Chief Judge Susan G. Braden

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**VAN RU CREDIT CORPORATION,**  
*Plaintiff-Appellee*

**PROGRESSIVE FINANCIAL SERVICES, INC.,**  
*Intervenor-Plaintiff-Appellee*

**v.**

**UNITED STATES,**  
*Defendant-Appellant*

**PREMIERE CREDIT OF NORTH AMERICA, LLC,**  
*Intervenor-Defendant*

**ALLTRAN EDUCATION, INC.,**  
*Intervenor-Defendant-Appellant*

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2017-2160, -2221

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Appeal from the United States Court of Federal  
Claims in No. 1:17-cv-00633-SGB, Chief Judge Susan G. Braden.

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**CORRECTED BRIEF FOR DEFENDANT-APPELLANT,  
THE UNITED STATES**

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CHAD A. READLER  
Acting Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.  
Director

PATRICIA M. McCARTHY  
Assistant Director

STEVEN M. MAGER  
Senior Trial Counsel  
U.S. Department of Justice  
Commercial Litigation Branch  
Civil Division  
P.O. Box 480  
Ben Franklin Station  
Washington, D.C. 20044  
Tel: (202) 616-2377  
Fax: (202) 305-7643  
E-mail: [steven.mager@usdoj.gov](mailto:steven.mager@usdoj.gov)

August 14, 2017

Attorneys for Defendant-Appellant,  
The United States

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### **STATEMENT OF RELATED CASES**

Pursuant to Fed. Cir. R. 47.5, counsel for defendant-appellant, the United States, states that *Continental Service Group Inc. v. United States*, No. 2017-2155, the above-captioned appeal, is part of a consolidated set of directly-related appeals filed by appellants the United States, Alltran Education, Inc. (Alltran), and Pioneer Credit Recovery, Inc. (Pioneer), including *Account Control Technology v. United States*, No. 2017-2156, *Alltran Education, Inc. v. United States*, No. 2017-2157, *Progressive Financial Services v. United States*, No. 2017-2158, *Collection Technology, Inc. v. United States*, No. 2017-2159, *Van Ru Credit Corporation v. United States*, No. 2017-2160, *Account Control Technology v. United States*, No. 2017-2210, *Collection Technology, Inc. v. United States*, No. 2017-2212, *Progressive Financial Services v. United States*, No. 2017-2214, *Continental Service Group, Inc. v. United States*, No. 2017-2215, *Alltran Education, Inc. v. United States*, No. 2017-2216, *Van Ru Credit Corporation v. United States*, No. 2017-2221; and *Continental Service Group, Inc. v. United States*, No. 2017-2342. On August 2, 2017, a separate appeal was filed by National Recoveries, Inc. (National Recoveries) from the Court of Federal Claims' denial of the small businesses' motion to intervene, docketed as *Continental Service Group, Inc. v. United States*, No. 2017-2391. Although this Court designated National Recoveries's appeal as a companion to the other appeals, unlike Alltran and

Pioneer, National Recoveries is appealing a separate and distinct issue, not the preliminary injunctions themselves.

Other than the above-listed appeals, counsel for defendant-appellant, the United States, is unaware of any other appeal in or from this action that was previously before this Court or any other appellate court under the same or similar title. Other than the above-listed appeals, we are unaware of other cases pending in this or any other court that will directly affect or be directly affected by this Court's decision in this appeal, although we are aware of three cases that are related to the present consolidated appeals: *Coast Professional, Inc. v. United States*, Fed. Cl. No. 15-207 (bid protest by parties seeking an award term extension, previously reversed by this Court on appeal in Fed. Cir. No. 15-5077); *Continental Service Group Inc. v. United States*, Fed. Cl. No. 17-664 (bid protest of the corrective action in *Coast*); and *Automated Collection Services, Inc. v. United States*, Fed. Cl. No. 17-765 (a bid protest challenging a portion of the agency's May 19, 2017 corrective action in connection with the protested procurement). Although *Coast* and *Continental* are still pending before the trial court, on August 10, 2107, the trial court entered its judgment in the *Automated Collection* protest, after holding that Education acted reasonably in setting the scope of its corrective action.

### **STATEMENT OF JURISDICTION**

This Court possesses jurisdiction to review the trial court's grant of preliminary injunction orders pursuant to 28 U.S.C. §§ 1292(a)(1), (c)(1), 1295(a)(3). The various plaintiffs below asserted that the trial court possessed jurisdiction to entertain their protests of the agency's contract awards pursuant to 28 U.S.C. § 1491(b)(1).

### **STATEMENT OF THE ISSUE**

Whether the Court of Federal Claims abused its discretion in issuing preliminary injunctions that not only bar the United States Department of Education (Education) from authorizing the performance of seven contract awards under protest (which the agency has voluntarily stayed), but also from assigning vital work to other lawful, existing contracts.

### **STATEMENT OF THE CASE SETTING FORTH RELEVANT FACTS**

The United States appeals the trial court's May 31, 2017 preliminary injunctions, which continue indefinitely earlier preliminary injunctions that not only restrain Education from authorizing the awardees under the solicitation to perform work on their challenged contracts, but also from assigning work to other lawful, existing contracts. *Cont'l Servs. Grp., Inc. v. United States*, 132 Fed. Cl. 401 (2017) (Appx000001-000090); *see Cont'l Servs. Grp., Inc. v. United States*, 132 Fed.

Cl. 191 (2017) (Appx000091-000105); *Cont'l Servs. Grp., Inc. v. United States*, 132 Fed. Cl. 385 (2017) (Appx000106-000123).

The trial court's preliminary injunctions are causing serious harm to hundreds of thousands of student loan borrowers, who are being denied critical services and prevented from learning about and accessing significant benefits that may be available to them regarding their loans. The court's rulings have also harmed the Government, which has not only lost a substantial amount of revenue, but also has been stymied in its ability to fulfill its obligations to these student loan borrowers under Federal law. And the court's rulings have harmed Federal contractors with valid legal contracts that are not at issue in the protests, including many small businesses who may have limited access to capital and other resources. Additional damages and losses accrue every day that the preliminary injunctions remain in place.

As demonstrated below, the preliminary injunctions radically alter the pre-litigation *status quo* and satisfy none of the requirements for injunctive relief. Further, because Education is taking corrective action (including re-evaluating the proposals submitted by every protestor who is before the trial court) and has voluntarily stayed all performance on the contracts directly at issue in these protests, no harm could accrue to the protestors if the Court were to vacate the preliminary injunctions. They should be vacated immediately to restore the pre-litigation *status quo*.



**I. Education Has Long Used Private Collection Agencies To Collect Defaulted Student Loans**

Since 1981, Education has relied on private collection agency contractors to assist in administering its debt management and collections system for student loans that have entered into default. Private collection agency contractors provide critical debt collection and related services that directly and significantly affect the Federal treasury and millions of student borrowers and their families. *See generally* Appx100245, Appx102042-102043, Appx400011, Appx500015.

Education currently has three existing contracting vehicles to collect and rehabilitate student loans that have entered into default. *See* Appx100169-100172 (Queen-Harper Decl.). First, Education has existing contracts with 11 small business private collection agency contractors, which were awarded in 2014. *Id.*; *see also* Appx100697. There is no challenge to the award of these small business contracts. *Id.* Second, Education has granted award-term extension (ATE) contracts<sup>1</sup> to several private collection agency contractors, including appellants

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<sup>1</sup> In 2009, Education awarded 22 contracts, each with a five-year term, to collect and rehabilitate student loans that have entered into default. Education extended the majority of these contracts through April 2015, and, thereafter, issued several ATEs to a limited number of contractors. *See* Appx100693. ATEs are provisions included in the relevant contract that set out criteria for Education to determine whether a contractor has qualified for a reward based upon the quality of its performance under the contract. Rather than cash (called an award fee), the reward in an ATE is an additional period of performance or extension of the

Alltran and Pioneer,<sup>2</sup> whose contracts were originally awarded in 2009. *Id.*; *see also* Appx100693. Third, in December 2016, after a competition among 47 offerors who responded to Solicitation No. ED-FSA-16-R-0009 (the solicitation) for the collection of defaulted student loans under Education's Federal Student Aid program, Education awarded seven new contracts to private collection agency contractors. *Id.*; *see also* Appx100694.

Before the trial court had begun to issue the preliminary injunctions and temporary restraining orders (TROs) in these protests, Education was able to assign a defaulted student loan account needing collection services to one of its many active contracts.<sup>3</sup> *See* Appx100169 (Queen Harper Decl. ¶¶ 6, 7). It did not reserve pools of accounts for a particular contractor or set of contracts. Appx100170 (¶ 9); *see also* Appx101263 (Queen Harper Decl. ¶¶ 8-11).

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contract. *See generally* 48 C.F.R. § 3416.470 (2011). Although Alltran and Pioneer were not original ATE awardees, they later received ATEs as part of Education's corrective action in connection with *Coast Professional, Inc. et al. v. United States* (Fed. Cl. No. 15-207 *et al.*). *See* Appx100693.

<sup>2</sup> Plaintiff-appellees Continental and Account Control Technology (ACT) received ATE contracts in April 2016. *See* Appx100693.

<sup>3</sup> As discussed below, however, during the protests at the Government Accountability Office (GAO), Education could not permit performance under the seven December 2016 contracts to private collection agency contractors. *See* 31 U.S.C. § 3553(d)(1). The statutory stay at the GAO did not, however, affect the other contracting vehicles. *Id.*

Education had placed a substantial portion of the defaulted accounts available for assignment to private collection agencies with the small business private collection agency contractors to whom it had awarded contracts under a small business set-aside procurement in 2014. Appx100169 (¶ 6); Appx100170-100171 (¶ 9). These 2014 contracts are not the subject of the underlying procurement and no one is challenging their validity. *See id.*

Because of the trial court's preliminary injunctions (and prior TROs), however, Education has been unable to assign newly defaulted student loan accounts to *any* of these contract vehicles, including the small business private collection agency contractors on whom Education had relied heavily for accomplishing this work prior to this litigation. *See* Appx101712 (Runcie Decl. ¶¶ 6,7); *see also* Appx102041 (Manning Decl. ¶¶ 3, 4, 5). Education has also been unable to recall previously defaulted accounts which had been assigned to private collection agencies and whose contracts have now expired. Appx101714 (Runcie Decl. ¶¶ 16, 17, 18).

The underlying December 2016 contracts have been under protest since shortly after their award. Twenty-two of the unsuccessful offerors first filed protests with respect to the agency's evaluation of their proposals at the Government Accountability Office (GAO). *See* Appx1016260-101666 (*Gen. Revenue Corp.*, B-

414220.2 et al. (Comp. Gen. Mar. 27, 2017)). The filing of the initial protest with the GAO triggered the automatic stay of performance of the seven new contracts under the Competition in Contracting Act (CICA). *See* 31 U.S.C. § 3553(d)(1). Thirteen of the protestors prevailed at the GAO, which recommended that Education take corrective action to remedy specific errors in the evaluation. *See* Appx1016260-101666. Since early April 2017, Education has voluntarily stayed performance of the December 2016 awards.<sup>4</sup> *See* Appx100147-100148; Appx100149-100151. But the trial court's preliminary injunctions have barred Education from assigning newly defaulted student loan accounts to its two other existing, valid contractual vehicles: the ATE contracts and the small business contracts.

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<sup>4</sup> On April 24, 2017, the trial court carved out an exception to the TRO in order to allow three awardees to provide continuing services on a small number of accounts held by those awardees under prior contracts. Appx101025-101027. Accordingly, on April 26, 2017, Education issued task orders under three of the contracts awarded in December 2016. Those task orders authorized only continuing services on a small number of accounts currently held by three awardees under their 2009 incumbent contracts. No other work was authorized, and no new accounts were allocated to these firms. But on May 2, 2017, the trial court rescinded its April 24, 2017 order, at which time Education immediately issued stop work order on those three task orders. *See, e.g.*, Appx000093.

## **II. Beginning In March 2017, Disappointed Offerors File Bid Protest Actions In The Court Of Federal Claims To Challenge The 2016 Awards**

On March 28, 2017, the day after the GAO had issued its recommendation regarding other protesters' claims, Continental Service Group, Inc. (Continental) filed a complaint in the Court of Federal Claims. Appx100022-100058 (Continental Compl.). Continental was an unsuccessful offeror in the procurement that had resulted in the December 2016 awards. *See* Appx100040. It had filed a protest at the GAO, *see* Appx100042, but later withdrew that protest before the GAO could issue a recommendation. *See* Appx100695. In its complaint filed in the trial court, Continental challenged Education's determination that it was non-responsible under the terms of the solicitation and Federal Acquisition Regulation (48 C.F.R.) subpart 9.1, and thus ineligible for award. More specifically, it alleged that its small business participation plan and subcontracting plans were not inconsistent and, therefore, not a reason to find it non-responsible under the terms of the solicitation. Appx100044-100054 (¶¶ 68-106).

Continental also alleged that it was not receiving as many accounts under its existing 2015 ATE debt collection contract as it believed it was due under its contract. Appx100054-100056 (¶¶ 107-114 (Count VII)). Continental claimed to be entitled to

receive some number or a portion of the monthly account allocations that Education was instead assigning to other valid, existing contracts. *Id.*

Following Continental's lead, several other unsuccessful offerors, who either did not prevail at the GAO or whose protest was dismissed by the GAO, filed complaints in the trial court. *See* Appx200012-200036; Appx300004-300036; Appx400009-400025. Generally, these protestors have alleged that Education violated procurement rules in its evaluation and award decisions. *Id.* Although one of these protestors (Account Control Technology (ACT)) has expressly sought broad injunctive relief from the trial court by staying all private collection agency contracts, Appx200042, only Continental has pled the type of argument presented in its Count VII, that the agency is supposedly diverting defaulted student loan accounts to 11 small business set-aside contracts that have been in place since 2014, away from that protestor's incumbent contract.

In addition, four former contract holders who had filed successful GAO protests—Progressive Financial, Inc. (Progressive), Collection Technology, Inc. (CTI), Performant Recovery, Inc. (Performant)<sup>5</sup> and Van Ru Credit Corporation (Van

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<sup>5</sup> Performant, despite requesting and receiving relief from the trial court, never filed a complaint in the trial court directly challenging Education's award of contracts or recall of accounts; it has been granted relief through its status as a plaintiff-intervenor. *See* Appx000107-000108.

Ru)—sought to restrain Education from recalling defaulted accounts that they had previously been assigned. Appx500010-500030 (Progressive Compl.); Appx600006-600020 (CTI Compl.); Appx700005-700016 (Van Ru Compl.). But not only had the ordering period on these contracts expired in April 2015, these contracts also provided only the ability to retain in-repayment accounts for 24 months past the expiration of the performance period. *See* Appx500015, Appx500018 (¶¶ 12, 19, 20); Appx600013 (¶ 35); Appx700009, Appx700011 (¶¶ 13, 14, 21). The 24-month in-repayment retention period ended on April 21, 2017. *Id.* Thus, by April 22, all these four former contract holders lacked valid contracts with the agency on which they could work on accounts. *Id.*

### **III. The Trial Court Twice Extends Its March 29 Temporary Restraining Orders Barring Education From Assigning Work To Valid, Existing Contracts**

On the day following Continental’s filing, March 29, the trial court held an initial status conference. During the conference, the trial court indicated that it would restrain performance of the December 2016 contracts until the agency produced a written representation “that the matter of contract performance is stopped.”

Appx100123-100126. Continental, however, further requested that the trial court not only restrain performance of the seven new contracts under protest, but also restrain Education’s assignment of defaulted student loans to any other existing contract,

pursuant to Count VII of Continental's complaint. Appx100127-100128. We objected to any stay of performance on Education's other contracts as overly broad, and explained to the trial court that it lacked jurisdiction to entertain Count VII. Appx100128-100129, Appx100130-100131.

Despite our objections, the trial court issued a TRO on the evening of March 29. *Cont'l Servs. Grp., Inc. v. United States*, 130 Fed. Cl. 798, (2017) (Appx100140-100142). In the TRO, the trial court restrained Education not only from proceeding with the seven newly-awarded contracts, *id.*, but also from "transferring work to be performed under the contract at issue in this case to other contracting vehicles to circumvent or moot this bid protest for a period of fourteen days, i.e., until April 12, 2017." Appx100142. The trial court declined to address the merits of the protest because "the Government has not yet produced the Administrative Record and the parties have not had an opportunity to brief the merits of this bid protest."

Appx100141. As to the other three injunctive relief factors, the trial court stated, without any elaboration, that "Continental Services would be immediately and irreparably injured" if Education permitted any performance under the contract at issue or other contracting vehicles; held that the public interest "is served by open and fair competition in public procurement and preserving the integrity of the competitive process," without explaining how the court's broad injunction supported these goals;



and, rather than balance any harms, declared as a general rule that “[c]ourts have recognized that any harm to the Government caused by delay in performance is generally less significant than the harm caused to the bid protestor.” Appx100141-100142 (citing *PGBA, LLC v. United States*, 57 Fed. Cl. 655, 663 (2003)).

In compliance with the trial court’s March 29 admonition, on April 3, we filed a sworn declaration advising the trial court that Education had voluntarily stayed performance of the seven new contracts, and would continue to stay pending the Court’s resolution of the case, thereby obviating any claim of irreparable harm by the protesters. Appx100149-100151 (Queen Harper Decl.); *see also* Appx100147-100148. On the following day, April 4, although still objecting to the TRO in its entirety, we filed a motion to amend the TRO to rescind the court’s prohibition on Education’s assignment of defaulted loan accounts to valid, existing contracts that are in place to receive those accounts. *See* Appx100152-100167. We again explained to the trial court that it lacked jurisdiction to award this specific injunctive relief. Appx100158. In our motion, we demonstrated that the TRO violated settled limits on the trial court’s authority to stay only protested contracts, and also that Continental’s challenge to Education’s assignment of work was a contract administration claim subject to the Contract Disputes Act, 41 U.S.C. § 7103 (CDA). Appx100161-100164. We explained that the allegations contained in paragraphs 107 through 114 of

Continental's complaint (Count VII), that Continental did not receive the expected volume of debt collection work under its existing ATE contract, should be submitted as a CDA-certified claim to the contracting officer for that contract, Appx100160-100161, and that the trial court's bid protest jurisdiction did not extend to Continental's contract administration claim. Appx100158-100161. We further emphasized that a stay of work under contested contracts cannot bar the Government from obtaining necessary services under other lawful, existing contracts. Appx100161-100164.

The trial court declined to grant the Government's request to "amend the March 29, 2017 TRO to allow [Education] to assign defaulted student loan accounts to eleven small businesses that were awarded contracts for student loan collection services in 2014, under a small business set-aside solicitation." Appx100659; *see* Appx100658-100659. Specifically, on April 10, the trial court denied the motion to amend and extended the TRO in its entirety through April 24, so that it could receive further briefing on the "complex history" of the bid protest, and the parties could explain the relationship of the protest "if any, to the eleven contracts for student loan collection services that [Education] awarded under a small business set-aside solicitation in 2014." Appx100659.

#### **IV. The Trial Court Attempts To Induce Settlement Through Injunctive Relief**

On April 19, 2017, the trial court issued a stay of proceedings for 30 days, to allow Education an opportunity to formulate a global resolution. Appx100699-100700. Despite the stay of proceedings, the trial court repeatedly urged the parties to seek a mediator to assist with a global settlement of the protested procurement. Appx100950 (providing “sobering advice about” the court’s workload); Appx100952 (“I have other cases way before you guys that are lined up and briefed. So nothing’s going to happen any time soon.”); Appx100974-100975(referring to possible mediators); Appx100993 (“ . . . it’s just—it’s a very—this type of thing needs to be done by mediation, . . . .”). Although, among other reasons, the absence in the trial court of the majority of the 47 offerors in the procurement reduced the feasibility of any global settlement, the court pressed for a resolution through mediation with the parties before the court. Appx100966-100967. Although the Department of Justice alone is authorized to represent the United States in this matter, *see* 28 U.S.C. § 516, the trial court acknowledged having directly contacted the Secretary of Education’s office via email to attempt to force the United States into mediation. As the trial court explained on April 24:

And I don’t have any other way of communicating to anybody, other than what I did, which is I tried to get the person who was in the Secretary’s office to sit down and

work on this. And he went off on an airplane. I don't even know that he read my email. You know, you're going to have to put the hurt on him. You don't like it, you go get somebody to get their attention. That's the only way they're going to do this.

Appx100973-100974.<sup>6</sup>

At the same April 24 status conference, the court questioned why Education would not simply award sole-source contracts to certain parties to collect on accounts that Education had previously assigned to them under contracts that had expired on April 21, 2017. Appx100953 (“Well, it would seem to me that you’d need to do a bridge contract for six months. I mean, I’m not going to have a resolution of the cases.”). The court later pondered creating something “like a bridge [contract]” through a modification to its TROs ). Appx100973; *see also* Appx100948 ( “I can turn it into what is like a bridge by putting a time period on

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<sup>6</sup> Pursuant to the Competition in Contracting Act, 41 U.S.C. § 3301, the Government generally contracts by competition, not settlement. The Government must comply with law and regulations, not the (often conflicting) desires of offerors. To the extent that the Government enters into a settlement to resolve bid protest disputes, it typically does so by taking corrective action, as it has here. Although encouraging settlement may sometimes be a laudable motive, the court’s authority to issue an injunction “may not be used to create a right but only to enforce an existing right,” *NTN Bearing Corp. of Am. v. United States*, 892 F.2d 1004, 1005–06 (Fed. Cir. 1989), and forcing Education to award contracts or create new rights would be an abuse of discretion. Because the trial court’s TROs have long since expired, this is not directly at issue in this appeal.

it.”); Appx100969 ( “I mean, they should do a bridge contract, but if they can’t, I can do effectively a bridge contract.”).

The court then heard argument on a motion to intervene filed by counsel for some of the 2014 small business private collection agency contractors who were adversely affected by the TROs. Counsel explained to the trial court why assigning new accounts to her small business clients was not a diversion of work from the protested procurement. Appx100958-100959. The court dismissed the applicable statutory and regulatory scheme directing that work should flow to small businesses whenever possible: “forget policy. . . . It doesn’t work.” Appx100958; *see also* Appx100960-10061. The court nonetheless invited the small businesses to draft language for a modified order to carve out a typical flow of account assignments from the TROs. Appx100962; Appx100981.

While counsel for the small business private collection agency contractors was outside the courtroom working on carve-out language, Continental’s counsel complained to the trial court that any such carve-out would weaken the TROs and undermine their purpose: to cause “pain” for Education and pressure the United States to settle the litigation. Appx100984 (“until the parties feel some pain here nothing is going to happen”). The court agreed and embraced the TROs’ overly broad prohibitions as “its part” in forcing settlement. Appx100987 (“Well, how

are you guys putting pressure on them? I've done my part.”). The court advised Continental to “go upstairs. You're going to have to get the attention of the principals.” Appx100988-100989; Appx100993 (“All I can just do—the only thing I can do is either say the status quo is terrific, or enjoin the agency and go back and figure up another solution, which is kind of where we are now. This is a very inefficient way of solving problems if it involves this type of situation.”).

Without analyzing the merits of the protests, the trial court again extended the TROs on April 24, after the conference had concluded. *Cont'l Servs. Grp., Inc. v. United States*, 132 Fed. Cl. 157 (2017) (Appx101025-101027).

**V. After A Hearing And *Ex Parte* Conference Held On May 2, 2017, The Trial Court Converts Its TROs Into Preliminary Injunctions Without Modifying Their Scope To Account For Its Jurisdictional Ruling**

While Education continued to review the GAO recommendation to determine whether, and, if so, what kind of corrective action would be appropriate, on May 2, the trial court conducted a hearing on the various protestors' motions for preliminary injunctions. Although the trial court finally dismissed Continental's Count VII claim (alleging an improper diversion of work to other valid, existing contracts) for lack of jurisdiction, Appx000091-000105, and despite Education's voluntary stay of performance of the 2016 contracts, the trial court nevertheless converted its prior TROs into similarly broad preliminary injunctions. *Id.* The trial court refused to

accept our assurances that Education had stayed performance of the seven new contracts, despite our filing of sworn declarations by Education officials, insisting that the Department of Justice could not be trusted. Appx101421-101422 (complaining that the court had previously believed it could enforce a voluntary stay in another case “[u]ntil they [the Department of Justice] lied to me. And once they lied, I’m not going to do it again.”); Appx101422 (rejecting the notion that a voluntary stay would be enforceable under Rule 11, “just a useless piece of paper. Useless rule.”).<sup>7</sup>

During the May 2 preliminary injunction hearing, we again requested that the trial court, at a minimum, lift the injunction regarding all existing, uncontested contracts, especially where the trial court had recognized that it lacked jurisdiction to entertain contract administration claims under other, existing contracts. *See* Appx101356-10165. Various attorneys representing the protesters, intervenors, and others who had not filed notices of appearance in any of the actions addressed our request. The trial court repeatedly asked Government counsel why Education would not simply issue sole-source contracts to disappointed offerors to perform

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<sup>7</sup> The other case to which the court referred is *Level 3 Communications, LLC v. United States*, Fed. Cl. No. 16-829C, another bid protest matter, which is pending appeal before this Court. No. 2017-1924, 2017-2068. The Government’s opening brief in *Level 3 Communications* was filed on July 25, 2017.

the private collection work restrained by the TROs. Appx101379, Appx101404.

We explained to the trial court that Education had no legal or practical basis to issue sole-source contracts, which would be subject to challenge, especially where it already had uncontested, valid, existing contracts from other procurements, such as the 2014 small business contracts, ready and available to perform the collection work. Appx101415-101417.

The trial court then recited the names of the four disappointed offerors concerned about the recall of accounts that Education had previously assigned to them under since-expired contracts—Progressive, CTI, Performant, and Van Ru—directed their counsel to stand, and had them proceed to chambers to craft a proposed preliminary injunction order. Appx101436-101450. Government counsel of record also proceeded to chambers. The court dismissed counsel for the plaintiffs, defendant-intervenors, and others in the courtroom until later in the day. Appx101450.<sup>8</sup>

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<sup>8</sup> In its May 2 order, the trial court stated that it had “invited all Plaintiffs, Intervenor-Plaintiffs and the Government to convene in the court’s chambers to prepare a draft order to preserve the *status quo* until the United States Department of Education (‘ED’) issues corrective action, in response to the Government Accountability Office’s (‘GAO’) March 27, 2017 Decision in Gen. Revenue Corp. B-414220.2, Mar. 27, 2017, 2017 WL 1316186. Upon circulating the draft order, parties who were not invited or allowed to go to chambers, particularly defendant-intervenors and plaintiffs, objected. May 2, 2017 Order at 2. The hearing



When the trial court reconvened the preliminary injunction hearing at 5:30 p.m., it distributed copies of a draft proposed order and requested comments from counsel. Appx101464-101465. The parties excluded from the *ex parte* conference objected to the terms of the proposed order. *See, e.g.*, Appx101478, Appx101480-101482. Counsel for several of the small businesses who have existing contracts with Education then asked to address the trial court on their long-pending motions to intervene in the litigation. Appx101485. Although discussion of the small businesses' motion to intervene was one of the identified agenda items for the hearing, the trial court refused to let counsel speak and, shortly thereafter, ordered her removal from the courtroom by the United States Marshal. Appx101486-101487 ( "Would you remove her, please, from the courtroom . . . I've not had a chance to grant your intervention. Enough is enough." ).<sup>9</sup>

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transcript does not support the trial court's description of the *ex parte* chambers conference. *See* Appx101436-101450.

<sup>9</sup> Although the trial court has expeditiously and liberally granted numerous motions to intervene, it denied the small business contractors' motions to intervene on July 7, 2017. Appx000124-000130. One of the small business private collection agencies affected by this order, National Recoveries, Inc., appealed the trial court's order on the motion to intervene on August 2, No. 2017-2391, Appx102205-102206, and its appeal was designated as a companion case to the appeals of the May 31, 2017 preliminary injunctions.

By the end of the day on May 2, even though Education already had voluntarily stayed the seven new contract awards for nearly one month, obviating any possibility of irreparable harm to plaintiffs, and the court had dismissed for lack of jurisdiction the claim underlying Continental's request for an injunction on the assignment of accounts to other valid, uncontested contracts, the trial court again enjoined Education from assigning to private collection agencies any newly-defaulted accounts or from recalling accounts from former contractors whose contracts had expired. Appx000091-000105. The preliminary injunctions continued the overly-broad scope of the previous TROs, enjoining Education from not only performance of the seven newly-awarded contracts (which was unnecessary because Education had already voluntarily stayed their performance), but also preventing the agency from assigning defaulted loan accounts to valid, existing contract holders.<sup>10</sup> *Id.*; see also Appx101712-101713 (Runcie Decl. ¶¶ 6, 7, 8,

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<sup>10</sup> The preliminary injunctions issued on May 2 also precluded Education from assigning work to contracts that were recently awarded as a result of corrective action taken to resolve related protests filed in February 2015. That case is *Coast Professional Corp., et al. v. United States*, Nos. 15-207C, 15-242C, 15-249C, 15-265C (Fed. Cl.). The *Coast* plaintiffs have asserted that the terms of the court's May 2 preliminary injunction in the *Continental Services* and related protests—which preclude Education from assigning any new debt collection work, including to the *Coast* plaintiffs under their newly-awarded contracts resulting from corrective action—likely will prevent the court from dismissing the *Coast* case as moot. In light of its May 31 orders extending indefinitely the preliminary

Appx102042 (Manning Decl. ¶ 5). That is, the trial court continued to grant injunctive relief regarding valid, existing contracts even though it recognized that it had no jurisdiction to entertain claims regarding those contracts.

# **VI. The Trial Court Refuses To Dismiss The Protests As Moot After The Agency Decides To Take Corrective Action Setting Aside The December 2016 Awards**

On May 19, we informed the trial court that Education had decided to take corrective action, which consists of amending the solicitation, inviting revised offers, and reevaluating all of the proposals submitted by every one of the parties before the court. *See* Appx101611-101624, Appx101667-101671 (Bradfield Decl.). The same day, the trial court scheduled a status conference for May 22 and indicated that it was inclined to lift the preliminary injunctions provided the Government assured the court that Education would not assign any work to existing contracts so as to avoid “diluting” the work for the future awardees. Appx101672-101673. That evening, we filed a motion to vacate the preliminary injunctions, citing the corrective action as having rendered the protests moot, and noting that the injunctions’ overly broad scope had been based entirely on a claim that the trial court had dismissed weeks earlier. Appx101685-101696. Our motion included numerous declarations establishing the

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injunctions in *Continental Services* and the related cases, the court cancelled a status conference that had been scheduled for June 7, 2017 in the *Coast* matter.

substantial harm that the injunctions were causing small businesses, student borrowers, and the agency. *See id.*; Appx101713 (Runcie Decl. ¶¶ 8-10) (by May 31, 2017, trial court’s injunctions had deprived approximately 234,000 defaulted borrowers, holding accounts valued at \$4.6 billion, of loan servicing services); Appx101713-101714 (¶ 13) (by end of June 2017, Government will have failed to collect approximately \$2.4 million due to the injunctions); Appx101708-101710 (Wong Decl. ¶¶ 4-12) (Associate Administrator of Small Business Administration describes “disproportionate irreparable harm” that small-business contractors will likely suffer from injunctions due to credit access issues); Appx101718-101719 (Traficante-Cann Decl. ¶¶ 11-16) (outlining business harm sustained by women-owned small-business contractor due to injunctions on its existing contract); Appx101721-101722 (Yanes Decl. ¶¶ 5-9) (minority-owned small-business contractor with existing contract describing “significant, irreparable harm” caused by injunctions). Finally, because of the substantial, continuing harm to hundreds of thousands of borrowers, small businesses with valid contracts, and the agency caused by the trial court’s injunctions, we explicitly declined to assure the trial court that Education would not assign work to valid and unchallenged contracts, as demanded by the trial court as a condition for lifting the injunctions. Appx101696.

On May 22, the trial court continued the preliminary injunctions until June 1, 2017. Appx000106-000123. Earlier that day, the trial court had announced that it no longer believed that a “dilution” theory supported the injunctions. The court acknowledged that “every month, there are new accounts that come up because people are in default. So there’s new work that will be coming down the road. And I think that kind of . . . offsets the concern about the dilution business.” Appx101875; *see id.* (“I was looking at these things as being the universe of business, and that’s not true. This is the universe of business as of today. There will be other work in the future.”). Although the court at that time rejected Continental’s theory that Education would be “diluting” the work for the future awardees by assigning work to other contractors while corrective action was ongoing, Appx101875, it still refused to modify the injunctions to allow the agency to assign work to existing contracts. *See* Appx000106-000123.

The court instead revisited the status of the same four former contract holders—Progressive, CTI, Performant, and Van Ru—with whom it had conducted its May 2 *ex parte* conference.<sup>11</sup> *See, e.g.,* Appx000107-000108. The court

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<sup>11</sup> Because the three plaintiffs challenged the recall of accounts on expired contracts, we also filed motions to dismiss their complaints as outside the trial court’s bid protest jurisdiction. *See* Appx500174-500182; Appx600359-600369; Appx700018-700025. The court has not ruled on our motions as of this date. We

expressed concern that these four unsuccessful offerors' earlier contracts had expired in April 2017, and that those former contract holders would suffer if the accounts previously assigned to their expired contracts were transferred to other existing contracts, because the former contractors might have received one of the seven new contracts, and thus have been entitled to keep the accounts assigned to them, had the evaluation process for the new contracts not been allegedly flawed. *See id.* The trial court ordered Education, including specific agency officials, to consider issuing sole-source contracts to the four former contractors pending the outcome of corrective action. *See, e.g.,* Appx000108.

On May 23, we filed a motion to dismiss the *Continental* protest as moot due to the corrective action. Appx101888-101894. The court formally denied our motion on June 14. *Cont'l Servs. Grp., Inc. v. United States*, 132 Fed. Cl. 570 (2017) (Appx102066-102075).

After engaging in good faith discussions with the four former contractors, as directed by the trial court, the agency determined that it could not properly award sole-source contracts to the four offerors pending the outcome of corrective action.

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did not, and could not, file a motion to dismiss Performant's claims because Performant is not a plaintiff in the underlying protests.

*See* Appx500453-500455; Appx600691-60093; Appx700130-700132. We so advised the court in a May 31 status report. *Id.*

## **VII. The Trial Court Continues Its Preliminary Injunctions Indefinitely Based Upon Its *Sua Sponte* Consideration Of Three News Articles**

Shortly after we filed our May 31 status report,<sup>12</sup> the trial court issued published orders in all of the related Education bid protest actions that continued the preliminary injunctions indefinitely. Appx000001-000090. The trial court appended to the order three news articles (including an opinion piece) regarding the Federal student loan program, which it viewed as describing “relevant developments” that none of the parties had brought to its attention. *See, e.g.*, Appx000002, Appx000004-000006 (article from *Politico*); Appx000008-000010 (article from *The Hill*, *Pundits Blog*) (*see* <http://thehill.com/blogs/pundits-blog/education/334524-department-of-education-must-end-the-billion-dollar-student-loan>); Appx000012-000015 (article from *New York Times DealB%k*). The trial court asserted that these “reports belie numerous representations to the court about the ‘so-called’ harm to the student debtors and the public fisc from the preliminary injunction pending in this case.”

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<sup>12</sup> The May 31 order states that the United States had not provided a response to the court’s request that Education consider issuing sole-source contracts to four offerors. Appx000002. This is incorrect. Appx500007 (Progressive docket sheet); Appx600004 (CTI docket sheet); Appx700002 (Van Ru docket sheet); *see also* Appx500453-500455; Appx600691-60093; Appx700130-700132.

Appx000002. Referring to possible plans to move responsibility for the Federal student loan program to another Executive agency, as reported in the *New York Times DealBook*, the trial court concluded, “[i]f so, the bid protests before the court will become moot.” *Id.* “For these reasons,” the trial court ruled, “the preliminary injunction will remain in place to preserve the *status quo* until the viability of the debt collection contracts at issue is resolved.” *Id.* (citing *Litton Sys., Inc. v. United States*, 750 F.2d 952, 961 (Fed. Cir. 1984)).

### **SUMMARY OF ARGUMENT**

Congress has assigned Education the responsibility for collecting on student loans that have entered into default and for assisting delinquent borrowers in repaying and rehabilitating their loans, which Education has long fulfilled through contracting with private collection agencies. *See* 31 U.S.C. § 3711(a)(1), 31 C.F.R. § 901.1 (requiring agencies to collect on all debts); 20 U.S.C. §§ 1078-6(a), 1087e(a)(1), 1087dd(h) (providing student loan borrowers a statutory right to rehabilitation, among other things); 20 U.S.C. §§ 1087f , 1082(a)(3-5) (authorizing the Secretary of Education to contract for origination, servicing, and collection of loans). Although the trial court serves an important role in “render[ing] judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award



of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement,” 28 U.S.C. § 1491(b)(1), the court must adhere to exacting standards when it seeks to provide extraordinary relief in the form of an injunction.

Here, the trial court abused its discretion by issuing preliminary injunctions that do not meet the standards required by law. The court failed to take into Education’s decision to voluntarily take corrective action. And the court has improperly presumed, without supporting findings, that the protesters would be harmed unless overly broad injunctions were in place to preserve a “*status quo*” of its own creation. By preserving a post-litigation “*status quo*” of its own making, the trial court continues to ignore the serious harm its injunctions are inflicting on hundreds of thousands of student loan borrowers, who are being denied critical services and prevented from learning about and accessing significant benefits that may be available to them regarding their defaulted loans; the Government, which has not only lost a significant amount of revenue, but also is stymied in its ability to fulfill its obligations to student loan borrowers under Federal law; and Federal contractors with valid legal contracts not directly at issue in the protests, including many small businesses who may have limited access to capital and other resources.

Accordingly, this Court should vacate the trial court's preliminary injunctions and remand for further proceedings.

## **ARGUMENT**

### **I. Standard Of Review**

A preliminary injunction is a “drastic and extraordinary remedy, which should not be granted as a matter of course.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). Because the grant of an injunction is “extraordinary relief,” a trial court must apply “exacting standards” in deciding to afford a plaintiff such relief. *Lermer Germany GmbH v. Lermer Corp.*, 94 F.3d 1575, 1577 (Fed. Cir. 1996). The movant must establish (1) a likelihood of success on the merits; (2) irreparable harm if preliminary relief is not granted; (3) that the balance of the hardships tips in the movant's favor; and (4) that a preliminary injunction will not be contrary to the public interest. *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993). The failure to meet the criteria of any one factor may require denial of the request for a preliminary relief. *Id.* (“If the [preliminary] injunction is denied, the absence of an adequate showing with regard to any one factor may be sufficient, given the weight or lack of it assigned to the other factors, to justify the denial.”) (citation omitted).

This Court reviews the trial court's decision to issue or continue the preliminary injunction orders for abuse of discretion. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). "An abuse of discretion in granting or denying a preliminary injunction may be found 'by showing that the court made a clear error of judgment in weighing relevant factors or exercised its discretion based on an error of law or clearly erroneous factual findings.'" *Abbott Labs. v. Andrx Pharms., Inc.*, 452 F.3d 1331, 1335 (Fed. Cir. 2006) (quoting *Polymer Techs., Inc. v. Bridwell*, 103 F.3d 970, 973 (Fed. Cir. 1996)).

## **II. The Trial Court Failed To Properly Analyze Plaintiff's Likelihood Of Success On The Merits**

Although the trial court stated that the protesters were likely to succeed on the merits in its initial May 2 preliminary injunctions (before the agency had decided to take corrective action), it made no findings and conducted no analysis relevant to the merits of the case, and, in any event, failed to update its analysis in light of Education's voluntary decision to take corrective action. The May 31 preliminary injunctions under review do not even allude to the merits of the protests. The trial court's failure to properly consider such a critical aspect of injunctive relief is alone an abuse of discretion. *See Munaf v. Geren*, 553 U.S. 674, 690-91 (2008) (finding an abuse of discretion where the trial court failed to consider the likelihood of success on the merits).

On May 2, the trial court issued its initial preliminary injunctions based solely on the strength of the GAO recommendation (which did not even concern the claims of the two lead protesters before the trial court, Continental and Pioneer). Appx000091-000105. The trial court broadly enjoined Education from performing the seven newly-awarded contracts and, far more critically, also from assigning defaulted loan accounts to valid, existing contract holders. *Id.* Shortly thereafter, on May 19, we advised the trial court that Education would take corrective action consistent with the GAO's recommendation, including amending the solicitation, inviting revised offers, and reevaluating offers, obviating findings of harm based on the Government's failure to take corrective action. *See* Appx101607-101624; Appx101667-101671 (Bradfield Decl.). We further noted that "[i]n the event that any of the current awardees are not evaluated as having a proposal among the most advantageous to the Government, [Education] will terminate those awards for the convenience of the Government." Appx101670 (Bradfield Decl. ¶ 13).

Although the May 2 preliminary injunctions include a bare finding of likelihood of success on the merits based on the GAO recommendation, this recommendation does not reasonably support a "likelihood of success on the merits" analysis for any of the lead protestors, and the Court failed to describe with

any particularity how the recommendation related to them. *See, e.g.*, Appx000093. Although both Continental and Pioneer were unsuccessful offerors in the procurement that had resulted in the December 2016 awards, neither received a favorable recommendation from the GAO. *See* Appx100695. Continental withdrew its GAO protest prior to the GAO recommendation, and Pioneer's protest was dismissed by the GAO. *See id.* Another two protesters, ERS/Alltran and ACT lost at the GAO, because there was no prejudicial error in Education's decision to exclude them from award. *See id.*; Appx101663; Appx101665-101666. As for the other four former contactors before the court (Progressive, Van Ru, CTI, and Performant) who did prevail at the GAO, *see* Appx100696, Appx101626-101666, the gravamen of their claims to the trial court does not concern the substance of the GAO's recommendation.

Despite the significant differences in the GAO recommendation and the claims now before the trial court, the May 2 injunctions contained no analysis of the likelihood of success on the merits. Rather, the trial court simply stated that, although it had not received the administrative record, "it is likely that some or all Plaintiffs may prevail on the merits, based on the GAO's March 27, 2017 Decision finding that [Education's] prior evaluation of proposals was unreasonable in numerous respects and resulted in the reasonable possibility of prejudice." *See*,

*e.g.*, Appx000093. This Court has prohibited a trial court from issuing an injunction when it “merely stat[es] its findings in conclusory terms;” rather, the trial court “must provide sufficient detail to elucidate the reasoning by which the court reached its ultimate finding on an issue of fact or conclusion on an issue of law.” *Eli Lilly & Co. v. Teva Pharm. USA, Inc.*, 557 F.3d 1346, 1353-54 (Fed. Cir. 2009) (citing *Gechter v. Davidson*, 116 F.3d 1454, 1458 (Fed. Cir. 1997)). Further, the trial court here could not merely rule as to the ultimate fact; rather, it had to make express findings based on the necessary subsidiary facts. *See id.*; *see also Murata Mach. USA v. Daifuku Co. Ltd.*, 830 F.3d 1357, 1363-64 (Fed. Cir. 2016). The trial court’s May 2 injunction failed to meet the strict standard for providing such “extraordinary relief.” *See generally, Monsanto Co.*, 561 U.S. at 165.

In any event, even this conclusory finding of a likelihood of success was later overtaken by events. The agency’s decision to take corrective action on May 19, Appx101607-101624, Appx101667-101671, rendered the protesters’ original challenges to the December 2016 awards moot, and there is no longer any relief within the trial court’s jurisdiction that the trial court could grant the protesters beyond what they seek in their complaints. *See Chapman Law Firm Co. v. Greenleaf Constr. Co.*, 490 F.3d 934, 939-940 (Fed. Cir. 2007) (“When, during the

course of litigation, it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should generally be dismissed.”). Furthermore, the trial court had dismissed Count VII of Continental’s complaint, which had served as the basis for enjoining the assignment of newly defaulted accounts to other existing contracts. As of May 19, the trial court could no longer continue its preliminary injunctions based on disputes that no longer existed.

During a status conference held on May 22, the trial court, citing *Guardian Moving and Storage Company, Inc. v. United States*, 657 F. App’x 1018 (Fed. Cir. Aug. 22, 2016) (Appx800003-800009), suggested that this Court has held that a bid protest action will not be rendered moot until the agency has *completed* (or “taken”) its corrective action. Appx101871. That is not the holding of *Guardian*.<sup>13</sup> See *id.* at 1025 (“In response to its First Post-Award Protest, the agency, by *virtue of its decision* to institute corrective action, provided [the only other possible relief [Guardian] could be entitled to].”) (emphasis added). This Court in *Guardian* treated the *decision* itself to take corrective action as rendering the protest moot, explaining that “the corrective action extinguished the existing

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<sup>13</sup> *Guardian* is an unpublished decision of this Court, which limits its precedential value. See Appx800003-800009.

controversy—i.e., whether MVS’s proposal was technically acceptable at the time of Guardian’s First Post-Award Protest.” *Id.* Similarly, there was no “existing controversy” regarding the Education’s evaluation of proposals because that evaluation was rendered inoperative by the corrective action.

Seemingly recognizing all these flaws, the trial court shifted the focus of its concerns to four former contract holders who had filed successful protests before the GAO, and indicated that, but for its concerns about these four former contractors, it otherwise would be “inclined to lift the May 2, 2017 Preliminary Injunction.” *See* Appx000107; Appx101872 (“What I’d like to do is to lift the preliminary injunction if I can get assurances from the Department of Education that the people who have account in the recall category and the Van Ru situation where their contract expired but you haven’t yet transferred the accounts, I’d like to have them keep their work, which should be in the Government’s best interest, until the corrective action is taken.”).

On May 22, despite its statement that it was otherwise “inclined to lift the May 2, 2017 Preliminary Injunction” in light of the agency’s corrective action, the trial court continued the preliminary injunctions for the limited purpose of granting Education “an opportunity to determine whether [Education] can enter into a temporary contractual relationship with Progressive Financial, Inc., Collection



Technology, Inc., Performant Recovery, Inc. and Van Ru Credit Corporation that will allow those companies to continue to service their prior accounts until [Education] completes the proposed corrective action.” *See, e.g.*, Appx000108.

The May 22 injunctions, however, do not address the broader likelihood of success on the merits in light of the agency’s corrective action. Appx000106-000123.

Rather, the trial court focused exclusively on the concerns of four former private collection agency contractors (only three of whom had filed suit) who were attempting to prevent Education from recalling and reassigning defaulted student loan accounts from their now-expired contracts to other valid, existing contracts.

*Id.* Despite this new focus, the trial court again failed to analyze (or even state) whether these four former contractors have a likelihood of success on the merits.

*Id.* Instead, the trial court expressly acknowledged that the four former contractors have no contracts with Education, and, by implication, no existing right to retain defaulted accounts. *See, e.g.*, Appx000108. A party without a legal right cannot have a likelihood of success in any action that seeks to enforce its nonexistent right.

Although the trial court surmised that this situation “would appear unfair,” *see, e.g.*, Appx000108, fairness and likelihood of success on the merits are two distinct concepts. As an initial matter, the trial court failed to elaborate how it

could possibly be “unfair” for Education to recall defaulted student loan accounts from former contractors who lack any contractual right to be assigned specific defaulted accounts, or a contract, without complying with the general statutory mandate for full and open competition. The borrowers whose accounts are ensnared by the trial court’s injunctions are unable to obtain certain critical services, such as establishing new repayment agreements, and it is in the best interests of the United States to be able to recall accounts from expired contracts and to be able to re-assign these accounts to an existing contractor who may lawfully work on them. Appx101714 (Runcie Decl. ¶¶ 16, 17, 18). The former contractors simply have no legal or contractual right that permits the trial court to enjoin Education from recalling and assigning these accounts to a lawful contractor for proper collection activities. In any event, a trial court’s subjective opinion of fairness is no substitute for a finding of a likelihood of success on the merits. To the contrary, this Court has repeatedly emphasized the importance of analyzing the likelihood of success on the merits, and not substituting other concepts for the likelihood of success. *See Abbott Labs. v. Sandoz, Inc.*, 544 F.3d 1341, 1363 (Fed. Cir. 2008) (rejecting the notion that “vulnerability” is a proper substitute for likelihood of success on the merits).

Again, the trial court expressly recognized that the four former contract holders' contracts had "expired on April 21, 2017." See, e.g., Appx000108. These former contractors simply had no legal right to retain the borrowers' accounts past April 21. As this Court has held, injunctions "may not be used to create a right but only to enforce an existing right," *NTN Bearing Corp. of Am. v. United States*, 892 F.2d 1004, 1005-06 (Fed. Cir. 1989), and the trial court abused its discretion in preventing Education from protecting these borrowers and arranging to have their accounts recalled and re-assigned to an existing contractor for collection and rehabilitation services.

Finally, the May 31 preliminary injunctions, which continue indefinitely the trial court's earlier grants of injunctive relief, do not separately address the merits of the protests. Instead, as demonstrated below, the May 31 injunctions merely state, in passing, that the three news articles attached to the order purportedly relate to "the 'so-called' harm to the student debtors and the public fisc from the preliminary injunction," and that the trial court is issuing the injunction to allegedly preserve the *status quo*.<sup>14</sup> See, e.g., Appx000002. The trial court did not make any findings as to how these articles demonstrate a likelihood of success on

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<sup>14</sup> The trial court's treatment of the *status quo* and its balancing of the harms in connection with the May 31 injunctions is addressed later in this brief.

the merits and, indeed, they do not. Without any analysis of the likelihood of success on the merits, the May 31 injunctions cannot stand. *See Munaf*, 553 U.S. at 690-91.

Simply put, the trial court abused its discretion by issuing and continuing injunctions without properly analyzing the likelihood of success on the merits. For this reason alone, the preliminary injunctions should be vacated.

### **III. The Trial Court Failed To Properly Weigh The Harms And Public Interest, And Issued Overly Broad Injunctions That Restrain Legitimate Contracts Not In Dispute**

The trial court not only abused its discretion by failing to properly consider the likelihood of success on the protests' merits as of May 31, but also, more significantly, it failed to properly consider and balance the equities, including the overall public interest. First, the trial court ignored the presumption of regularity and rejected Education's sworn representations that it has been voluntarily staying the protested awards since early April, and that it is currently taking corrective action, thereby obviating any claims of irreparable harm. Second, the trial court's overly broad injunctions do not merely enjoin the protested awards (which, again, Education already has voluntarily stayed for several months), but also enjoin other, valid contracts that are unrelated to the procurement before the trial court, for a period of time unconnected to the underlying litigation, without any findings of

harm to the protesters, the public, or any other interested party. In so doing, the trial court radically altered the *status quo*, itself creating the serious and continuing harm to the United States, borrowers, and the contractors whose contracts were not the subject of protest—extraordinarily substantial harm that did not exist before the inception of this litigation.

**A. The Trial Court Abused Its Discretion By Enjoining The Performance Of Contracts That The Agency Already Is Voluntarily Staying**

On April 3, we provided notice to the trial court that Education is voluntarily staying performance of the contested contract awards involved in this protest until the resolution of this bid protest. Appx100147-100148. We supported this statement of undisputable fact with a sworn declaration attesting to the agency’s voluntary stay of the December 2016 contract awards. Appx100149-100151 (Queen Harper Decl.). The contracting officer for the procurement has stated sworn in writing that the agency “will not transfer any accounts under any of those seven contracts, or otherwise authorize, order or accept any work under those seven contracts,” pending the resolution of the protest. Appx100150. She further attested that the “stop work orders issued on those seven contracts will remain in place,” pending resolution of the protest. *Id.*

On May 19, we filed with the trial court a further declaration confirming that the agency had decided to take corrective action to resolve the protests, and noted that “[i]n the event that any of the current awardees are not evaluated as having a proposal among the most advantageous to the Government, [Education] will terminate those awards for the convenience of the Government.” Appx101670 (Bradfield Decl. ¶ 13). At the May 22 conference, after several parties questioned whether Education intended to continue staying performance of the awarded contracts during the pendency of corrective action, we confirmed that Education is staying performance of those seven awards, as set forth in the prior declaration. Appx101872; *see also* Appx101915-101916 (e-mail regarding stay during corrective action).

By voluntarily staying performance of the seven awarded contracts, and voluntarily deciding to take corrective action on the protesters’ underlying complaints, Education obviated any claim of irreparable harm that the protesters might have had in connection with the procurement at issue in these bid protest actions. Simply put, the trial court had no lawful basis to maintain jurisdiction, much less enjoin the United States during the pendency of its corrective action.<sup>15</sup>

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<sup>15</sup> An interested party disappointed with the corrective action could challenge the agency’s corrective action by a separate suit. *Sys. Application & Techs., Inc. v. United States*, 691 F.3d 1374, 1385 (Fed. Cir. 2012). Only one party

Although the trial court previously expressed doubt that it could trust the Government's representations, Appx101421-101422, the trial court "was required to assume that the Government would carry out the corrective action in good faith." *Chapman Law Firm*, 490 F.3d at 940 (citing *T & M Distribs., Inc. v. United States*, 185 F.3d 1279, 1285 (Fed. Cir. 1999) ("Government officials are presumed to act in good faith, and 'it requires "well-nigh irrefragible proof" to induce a court to abandon the presumption of good faith.")) (quoting *Kalvar Corp. v. United States*, 211 Ct. Cl. 192, 543 F.2d 1298, 1301-02 (1976))).

**B. The Trial Court Abused Its Discretion By Issuing Overly Broad Injunctions That Are Unsupported By Findings Of Irreparable Harm**

Even assuming that the trial court had made factual findings explaining how the protesters would be irreparably harmed despite Education's voluntary stay and corrective action (which, we demonstrate above, it did not), the trial court further abused its discretion by issuing overly broad injunctions that enjoin not only the seven disputed awards under the procurement before the trial court, but also awards under other contractual vehicles whose validity is unchallenged in these protests, until such time as "the viability of the debt collection contracts at issue is

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did so. *Automated Collection Services, Inc. v. United States*, Fed. Cl. No. 17-765. On August 9, the trial court entered judgment in this protest after upholding the agency's challenged corrective action. See Appx810189-810193.

resolved.” See, e.g., Appx000002. This extremely broad grant of relief is unsupported by any analysis or finding by the trial court, and is also fundamentally contrary to the scheme envisioned by the Competition in Contracting Act.

As demonstrated above, to fulfill its statutory obligations to collect student loans that have fallen into default, Education has issued contracts to private collection agency contractors in several separate procurements. See Appx100169-100170 (Queen-Harper Decl. ¶¶ 6, 7, 8). First, in 2014, Education awarded contracts to 11 small business private collection agency contractors, whose contracts remain in effect to this day. See Appx100170 (¶ 8). Second, Education granted a set of ATE contracts to several contractors, including Alltran and Pioneer, who originally had been awarded contracts in 2009. See *id.* Third, in December 2016, after a bid process involving a pool of 47 offerors, Education awarded new contracts to seven private collection agencies. See *id.* The trial court has enjoined Education from using any of these contracting vehicles.

Despite this, none of the trial court’s injunctions explain why such broad injunctions are necessary to prevent harm to the protestors, or to any subgroup of protesters, in derogation of the law. See *Eli Lilly*, 557 F.3d at 1353-54. Such omissions are fatal. This Court has held that “[s]ufficient factual findings on the material issues are necessary to allow this court to have a basis for meaningful



review,” *Nutrition 21 v. United States*, 930 F.2d 867, 869 (Fed. Cir. 1991), and that the absence of such findings can serve as a basis for setting aside an injunction. *Id.* Because no findings of fact establish that the protestors will be harmed by allowing Education to assign defaulted loans to contractors with lawful, unchallenged contracts, the injunctions should be vacated.

Indeed, on May 2, the trial court dismissed for lack of jurisdiction Count VII of Continental’s complaint, which had alleged that the agency was “diverting” new defaulted student loan accounts to 11 small business set-aside contracts that have been in place since 2014, away from that protestor’s incumbent contract. *See, e.g.*, Appx000092. The trial court itself observed at the May 22 status conference that Education would not be “diluting” the work for the future awardees by assigning work to other contractors (such as Alltran, Pioneer, or the small business contractors) while corrective action is pending. Appx101875. Having correctly dismissed Count VII, the court abused its discretion by enjoining contracts based upon a theory of harm that it had dismissed and that was not embodied in any specific findings of fact. *See Munaf*, 553 U.S. at 691; *U.S. Ass’n of Imps. of Textiles & Apparel v. United States*, 413 F.3d 1344 (Fed. Cir. 2005).

The trial court’s continuing injunctions on Education’s broader ability to assign defaulted accounts to existing contracts are also contrary to the spirit of the

Competition in Contracting Act (CICA), 31 U.S.C. § 3553. Protestors filing at the GAO can receive an automatic stay under CICA that prohibits the protested awardee from receiving work under the awarded contract, but the statute does not contemplate interference with the agency's performance of its other, lawful contracts. *See* 31 U.S.C. § 3553(d)(3)(A) (contracting officer may not authorize performance on challenged contract while protest is pending.). Although this provision does not directly apply to the Court of Federal Claims, we are aware of no contrary legal authority that would contemplate such overly broad preliminary injunctions. The bid protest statute is designed to permit the Court of Federal Claims to “render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation *in connection with a procurement or a proposed procurement*,” 28 U.S.C. § 1491(b)(1) (emphasis added), not stay an entire program. *See generally Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1384 (Fed. Cir. 2009) (“Supreme Court has warned against undue judicial interference with the lawful discretion given to agencies.”).

Nor does the trial court's later focus on the four former contract holders (Progressive, CTI, Performant, and Van Ru) in the May 22 injunctions justify their

overbreadth, because the trial court never articulated how these contractors' narrower interests require broad injunctions to prevent irreparable harm to any existing rights. Put another way, although the focus of the May 22 injunctions was the four former contract holders and the recall of accounts by Education after the expiration of these former contractors' contract rights, it is unclear why the trial court's concern about the recall of accounts could not have been satisfied by merely enjoining Education from recalling these accounts of borrowers in default. As the Supreme Court has held "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U. S. 682, 702 (1979). Here, the injunctions were not tailored in any way to the alleged harm, to the extent the trial court even identified the ostensible harm. It was an abuse of discretion to continue a broad injunction to solve a fairly limited concern.

Indeed, the four former contractor's expired contract rights were insufficient to justify any injunctive relief. As established above, injunctions "may not be used to create a right but only to enforce an existing right." *NTN Bearing Corp. of Am.*, 892 F.2d at 1005-06. None of the four former contract holders have any right to prevent Education from recalling the defaulted accounts after their contracts had expired on April 21, and they cannot be harmed by the recall of the accounts of

borrowers in default where they have no right to exclude Education from assisting such borrowers. Although the four former contract holders filed protests with the GAO, CICA does not prevent a protestor's prior contract rights from a different procurement from expiring of their own accord *See* 31 U.S.C. § 3553. Although the GAO recommended that Education re-evaluate these four former contract holders proposals and issue a new source selection decision, Appx101666, GAO did not (nor could it) presume the outcome of this re-evaluation or direct a contract award to the successful protestors.

Even assuming, for argument's sake, that the recall and reassignment would somehow violate the express contractual rights of the four former contract holders, these former contractors would have the right to money damages pursuant to the Contract Disputes Act. The Contract Disputes Act is the "exclusive mechanism" for the resolution of such disputes. *Dalton v. Sherwood Van Lines, Inc.*, 50 F.3d 1014, 1017 (Fed. Cir. 1995). Because the availability of money damages for such a breach would compensate these parties for any such injury, even an injunction merely preventing the recall and assignment of accounts would be inappropriate. *See Monsanto Co.*, 561 U.S. at 141.

Similarly, the trial court's reliance on *Litton Systems, Inc. v. Sundstrand Corp.*, 750 F.2d 952, 961 (Fed. Cir. 1984), for the proposition that "the function of

preliminary injunctive relief is to preserve the *status quo* pending a determination of the action on the merits,” does not support the trial court’s overly broad injunctions. *See, e.g.*, Appx000002. As an initial matter, “the ‘status quo’ is not a talisman” which can dispose of the question of harm in and of itself. *Atlas Powder Co. v. Ireco Chemicals*, 773 F.2d 1230, 1232 (Fed. Cir. 1985). In any event, this Court has defined the *status quo* as the “state of affairs existing immediately before the filing of the litigation, the last uncontested status which preceded the pending controversy.” *Id.* at 1231 (citing *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 809 (9th Cir. 1963)). Here, immediately before the filing of the litigation, Education could use existing lawful contracts with small businesses and other contractors to collect defaulted student accounts. Education could recall the borrower accounts from any contractors with expired contracts. The court’s injunctions have severely disrupted the *status quo*, not preserved it. The only *status quo* that the trial court is maintaining is the *status quo* that the court had imposed on Education through prior TROs and injunctions. The trial court’s attempt to create, and then preserve, a new *status quo* was an abuse of discretion, warranting this Court to vacate the trial court’s injunctions.

**C. The Trial Court Ignored The Significant Harm To Be Suffered By Education, Borrowers, And Existing Small Business And Other Contractors**

The trial court also failed to take account of the substantial harm that its injunctions cause the agency and the borrowers whom Education serves, as well as other contractors with existing valid contracts, dismissing these significant interests in its May 31 preliminary injunction as merely “‘so called’ harm.” *See, e.g.*, Appx000002. In so doing, the trial court abused its discretion, causing serious harm without proper consideration of the equities.

Questions of harm to the Government and the public interest often “merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, Education has an obligation under Federal law to collect on defaulted student loans and assist delinquent borrowers in repaying and rehabilitating their loans. *See* 31 U.S.C. § 3711(a)(1), 31 C.F.R. § 901.1 (requiring agencies to collect on all debts); 20 U.S.C. §§ 1078-6(a), 1087e(a)(1), 1087dd(h) (providing student loan borrowers a statutory right to rehabilitation, among other things); 20 U.S.C. §§ 1087f, 1082(a)(3-5) (authorizing the Secretary of Education to contract for origination, servicing, and collection of loans). The “Supreme Court has warned against undue judicial interference with the lawful discretion given to agencies.” *Axiom Res. Mgmt.*, 564 F.3d at 1384 (citation omitted).

Despite this general rule, the trial court severely interfered with Education's lawful discretion to collect from and assist student loan borrowers with financial difficulties. The harm to the Government of the continued preliminary injunctions is demonstrably severe, as set forth in the declarations we filed with the trial court. Appx101711-101715 (Runcie Decl.); *see also* Appx102040-102046 (Manning Decl.). The trial court's preliminary injunctions have resulted in, and will continue to cause immediate, extensive, and severe harm both to the Government as well as to hundreds of thousands of Federal student loan borrowers. Appx101712 (¶ 7); *see also* Appx102041-102042 (¶ 3). The trial court's injunctions have deprived, and will continue to deprive, the Government of significant revenue. Appx101713 (¶ 8). Education estimates that approximately 91,000 borrower accounts, most of them newly-defaulted, would have been assigned to the small businesses. *Id.* The total dollar value of those accounts is approximately \$2.1 billion. *Id.* For the month of May 2017, Education estimates that approximately 143,000 additional accounts, most of them newly defaulted borrowers, were available for assignment. *Id.* (¶ 9). The total dollar value of those accounts is approximately \$2.5 billion. *Id.* In summary, by the end of May 2017, a total of 234,000 borrowers, holding accounts valued at approximately \$4.6 billion, have been denied private collection agency services. *Id.* (¶ 10).

Education estimates that, as of the end of June 2017, the Government had already lost \$2.4 million in collections due to the trial court's orders. Appx101713 (¶ 13). The harm to the Government would grow with each day that the injunctions remain in place. *Id.*

The injunctions are also harming the Government and borrowers by preventing Education from recalling and reassigning accounts held by contractors whose contracts expired on April 21, 2017. Appx101714 (¶ 16). Education could not transfer the recalled accounts to the small business contractors or existing ATE contractors. *Id.* As a result, thousands of borrowers are unable to obtain certain critical services, such as establishing a new repayment agreement. Because many of the borrowers whose accounts have not been recalled are enrolled in rehabilitation programs, they may be particularly affected by any disruption in service and may be at risk of falling out of rehabilitation. *Id.* (¶ 18).

This harm is not limited to the borrowers whose accounts cannot be recalled, but extends to borrowers who have fallen into default since Education was first enjoined from assigning such accounts to contractors. By prohibiting the assignment of any defaulted student loan accounts to any valid, existing contract, such as the 11 small business contracts or the ATE contracts, the trial court has



seriously disrupted the Government's ability to assist such newly defaulted borrowers. *See* Appx101713-101714 (¶¶ 10, 11, 18).

Harm has and will also continue to accrue for those Federal contractors who have valid, existing contracts with Education to service defaulted loans. Alltran and Pioneer detail the harm that is befalling the ATE contractors. The small business contractors (including National Recoveries, Inc.; F.H. Cann & Associates, Inc.; Immediate Credit Recovery, Inc.; Credit Adjustments, Inc.; and Professional Bureau of Collections of Maryland, Inc., who were denied the right to intervene in these protests despite the severe disruption to their businesses caused by the preliminary injunctions) also have been and will continue to suffer substantial harm. With injunctions having been in place for more than four months now, the small businesses are being forced to place their personnel on unpaid leave, or worse, terminate them. As one small business declarant stated, “[e]ither scenario will result in the permanent loss of our highly skilled workforce as they look for other job opportunities elsewhere given the uncertainty of the [c]ontract. Such a loss is not easily replaceable for a small business such as ourselves.”

Appx101718-101719(Decl. Traficante-Cann ¶ 15); *see also* Appx101721-101722 (Decl. Yanes ¶¶ 7, 8); Appx101724 (Decl. Smith ¶¶ 7, 8).

There can be little doubt that the trial court's preliminary injunctions place small business contractors in a precarious position going forward. As the Associate Administrator for the Small Business Administration's Office of Government Contracting and Business Development, Robb Wong, stated in his declaration, Appx101705-101710, "[t]he [s]mall [b]usiness [c]ontractors likely will suffer disproportionate harm from the continuation of the prohibition on assigning new accounts. In general, small business contractors lack full access to credit and capital and, as such, are less able than larger businesses to withstand shocks to cash flow and performance schedules." Appx101710 (Decl. Wong ¶ 11). Associate Administrator Wong also explained that allowing the small business contractors to resume their work "advances the public interest by ensuring that the Department of Education utilizes the maximum possible capacity of its small business contractors." *Id.* (¶ 12).

Finally, the trial court's *sua sponte* reliance on three news articles (one of which is an opinion piece) to rebut these claims of harm was improper. Such news articles were not an adequate substitute for the trial court's careful and complete consideration of the required four-factor test for injunctive relief. *See generally, Lermer Germany GmbH*, 94 F.3d at 1577 (because the grant of an injunction is "extraordinary relief," a

trial court must apply “exacting standards” in deciding to afford a plaintiff such relief).

None of the articles on which the trial court relied are pertinent to the question of harm. The first article refers to allegations of improper payments to borrowers (in the form of both grants and loans), rather than the *repayment* of defaulted loans. *See* Appx000004-000006. An improper payment is “any payment that should not have been made or that was made in an incorrect amount under statutory, contractual, administrative, or other legally applicable requirements.” OMB Circular A-123, Appendix C, at 7, *available at* <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2015/m-15-02.pdf> (last visited June 27, 2017). There is a significant difference between erroneous payments made *by* the Government to student loan borrowers and payments made *to* the Government from borrowers in repayment. Quite simply, there is no connection between the allegations in the article and Education’s administration of its private collection agency contracts.

The second article is an opinion piece that expresses the author’s belief that Education should stop contracting with *all* private collection agencies. *See* Appx000008- 000010 (“The Department of Education should end this billion dollar boondoggle to enrich private collection agencies and instead set up a system where borrowers can get unbiased and accurate information to resolve their student loan

defaults.’’). None of the protestors have argued that the Government should not contract with *any* private collection agencies (including themselves). In any event, opinions are not indisputable, and, pursuant to Rule 201(b) of the Federal Rules of Evidence, “indisputability is a prerequisite” to judicial notice. *See Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1354 (7th Cir. 1995); *see also Cofield v. Alabama Pub. Serv. Comm’n*, 936 F.2d 512, 517 & n. 6 (11th Cir. 1991) (facts contained in newspaper article not indisputably accurate).

The third article discusses possible potential changes to the administration of student loans by transferring responsibility for the processing of loans from Education to the Department of the Treasury. *See* Appx000012-000015. As an initial matter, the servicing of student loans, and the collection of defaulted loans (as is at issue here), are two different matters. Whether Education restructures (or does not restructure) the servicing of loans to a single provider has no bearing on how it contracts for the collection of defaulted loans or the underlying procurement at issue. It is unclear (and the trial court did not clarify) why such changes might be relevant to the preliminary injunctions in this case.

Finally, the third article does not describe these potential changes to a different program as imminent (even if they were relevant, which they are not), but rather acknowledges that such changes would likely require “congressional approval.”

Appx000013. No pending legislation is identified in the article. Although administrative and legislative changes may always be possible, the mere possibility of future changes is insufficient to support the preliminary injunctions. *C.f. Winter v. Nat. Resources Def. Council*, 555 U.S. 7, 22 (2008) (rejecting the “possibility” of harm standard).

### **CONCLUSION**

For these reasons, we respectfully request this Court to vacate the preliminary injunctions.

Respectfully submitted,

CHAD A. READLER  
Acting Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.  
Director

/s/ Patricia M. McCarthy  
PATRICIA M. McCARTHY  
Assistant Director

/s/ Steven M. Mager  
STEVEN M. MAGER  
Senior Trial Counsel  
U.S. Department of Justice  
Commercial Litigation Branch  
Civil Division  
P.O. Box 480  
Ben Franklin Station  
Washington, D.C. 20044  
Tel: (202) 616-2377  
Fax: (202) 305-7643  
E-mail: [steven.mager@usdoj.gov](mailto:steven.mager@usdoj.gov)

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Attorneys for Defendant-Appellant,  
United States