

1 JOSEPH JARAMILLO (SBN 178566)
2 jjaramillo@heraca.org
3 NATALIE LYONS (SBN 293026)
4 nlyons@heraca.org
5 HOUSING & ECONOMIC RIGHTS
6 ADVOCATES
7 1814 Franklin Street, Suite 1040
8 Oakland, CA 94612
9 Tel.: (510) 271-8443
10 Fax: (510) 868-4521

11 EILEEN M. CONNOR (SBN 248856)
12 econnor@law.harvard.edu
13 TOBY R. MERRILL (*Pro Hac Vice*)
14 tomerrill@law.harvard.edu
15 MARGARET E. O'GRADY (*Pro Hac Vice*)
16 mogrady@law.harvard.edu
17 LEGAL SERVICES CENTER OF
18 HARVARD LAW SCHOOL
19 122 Boylston Street
20 Jamaica Plain, MA 02130
21 Tel.: (617) 390-3003
22 Fax: (617) 522-0715

23 *Attorneys for Plaintiff*

24 UNITED STATES DISTRICT COURT
25 NORTHERN DISTRICT OF CALIFORNIA

26 CALVILLO MANRIQUEZ, ET AL.,

27 *Plaintiffs,*

28 v.

BETSY DEVOS, ET AL.,

Defendants.

Case Number: 17-cv-7210-SK

**PLAINTIFFS' BRIEF IN RESPONSE TO
THE COURT'S ORDER REQUIRING
BRIEFING AND SETTING HEARING
REGARDING MONETARY CONTEMPT
SANCTIONS AND SOVEREIGN
IMMUNITY**

**TELEPHONIC HEARING: 3 PM, MON.
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INTRODUCTION

1
2 The Court has asked the parties to address the following question: May the Court impose
3 monetary contempt sanctions of a compensatory nature against the Government? In other words:
4 Do federal courts have the authority to prevent the government from violating court orders with
5 impunity? The answer to both questions—according to the Administrative Procedure Act, the
6 United States Constitution, the Supreme Court, and several other Courts that have considered the
7 issue—is a resounding “yes.” Here, Defendants unquestionably and egregiously violated the
8 preliminary injunction ordered by the Court. As a result, the Court held Defendants in civil
9 contempt, ordered them to comply with monthly reporting requirements, and imposed monetary
10 contempt sanctions. Under the Administrative Procedure Act, the Government waives sovereign
11 immunity for all actions other than “money damages.” Monetary contempt sanctions—whether
12 characterized as “compensatory” or “coercive”—are not damages. Sanctions are integral to the
13 Court’s contempt power, and a crucial part of its ability to hold the Government accountable. As
14 such, the Court’s imposition of monetary contempt sanctions against Defendants was both
15 necessary and permissible.

STATEMENT OF FACTS

16
17
18 Plaintiffs are a class of students who borrowed federal student loans to pay for career
19 training programs at schools owned and operated by Corinthian Colleges, Inc. (“Corinthian”).
20 Defendants initially had a policy of discharging completely the loans of defrauded students who
21 attended Corinthian schools for certain programs within certain windows of time, but in December
22 2017, Defendants abruptly changed course to impose a different formula, using co-opted personal
23 data to determine arbitrary “tiers” of borrower relief to force class members to pay a portion of
24 their wholly invalid loans (the “Average Earnings Rule”). Upon the imposition of this new rule,
25 Plaintiffs filed suit, and moved for a preliminary injunction. ECF No. 35 (March 17, 2018). The
26 Court granted in part the motion for a preliminary injunction and enjoined Defendants from
27 utilizing the Average Earnings Rule and collecting on class members during the pendency of the
28 case. Order, ECF No. 60 at 18-22 (May 25, 2018).

1 In March 2019, Defendants, through loan servicers, notified some students that their loans
2 were entering repayment. Upon learning of this, and other actions taken against students, Plaintiffs
3 filed a motion to Lift the Stay of Proceedings and Enforce the Preliminary Injunction. ECF No.
4 103 (July 15, 2019). The Court subsequently ordered Defendants to file a detailed compliance
5 report, which Defendants did on September 8, 2019. ECF No. 110 (Aug. 19, 2019); ECF No.
6 111-3 (“September Compliance Report”). The compliance report revealed that Defendants had
7 done virtually nothing to comply with the preliminary injunction. *Id.*; *see also* Plaintiffs’ Brief in
8 Support of Contempt Sanctions, ECF No. 126 at 5-8 (Oct. 21, 2019). Defendants failed to keep
9 all defaulted class members’ loans in stopped collection status, garnished wages, seized tax
10 refunds, and did little to monitor servicers’ compliance with the Injunction, merely sending a
11 handful of emails in hopes that collections would cease. September Compliance Report, ECF 111-
12 3. Students who had been subject to the collections and garnishments in violation of the
13 preliminary injunction suffered irreparable harm. On October 24, 2019, this Court found
14 Defendants in civil contempt and ordered them to pay \$100,000 in monetary sanctions. Order
15 Regarding Sanctions, ECF No. 130 (“Sanctions Order”).

16 Defendants are still not in compliance with the preliminary injunction. When the Court
17 held Defendants in contempt, Defendants represented that they had violated the preliminary
18 injunction approximately 16,000 times. September Compliance Report, ECF No. 111-3 at 2-4;
19 Sanctions Order, ECF No. 130 at 5; *see also* Plaintiffs’ Brief in Support of Contempt Sanctions,
20 ECF No. 126 at 5-8 (Oct. 21, 2019). However, this was untrue. Defendants had in fact violated
21 the preliminary injunction over 45,000 times. ECF No. 156-3 at 10 (Dec. 2, 2019) (“December
22 Compliance Report”). Given these new facts, which Defendants should have disclosed earlier,
23 Plaintiffs moved for Partial Reconsideration of the Sanctions Order. ECF No. 164 (Dec. 23, 2019)
24 (“Plaintiffs’ Sanctions Reconsideration Motion”). Now, *twenty months* after the Court first
25 ordered the preliminary injunction, Defendants still have not fully complied. According to the
26 February Compliance Report filed just last week, forty-nine borrowers are currently subject to
27 wage garnishments in violation of the preliminary injunction. ECF No. 194-3 at 9-10 (Mar. 2,
28 2020).

1 In their Opposition to Plaintiffs’ Sanctions Reconsideration Motion, Defendants
2 erroneously state that Plaintiffs put forth a “consequential damages theory.” ECF No. 174 at 12
3 (Jan. 22, 2020) (“Defendants’ Sanctions Reconsideration Opposition”); *see also id.* at 2, 11.
4 Plaintiffs have put forth no such theory, but Defendants nonetheless claim that this non-existent
5 “theory” would “raise serious concerns about sovereign immunity.” *Id.* at 12. The Court ordered
6 briefing on the question Defendants first brought up in their Sanctions Reconsideration
7 Opposition: “whether the Court is able to impose sanctions of a compensatory nature against the
8 government.” ECF No. 188 at 2 (Feb. 11, 2020) (“Sovereign Immunity Briefing Order”).
9

10 ARGUMENT

11 I. Congress Waived Sovereign Immunity for Monetary Contempt Sanctions Under 12 the Administrative Procedure Act, 5 U.S.C. § 702.

13 This Court is able to impose sanctions of a compensatory nature against the Government.
14 The Administrative Procedure Act (“APA”) expressly waives sovereign immunity to allow the
15 imposition of monetary contempt sanctions against the Government. 5 U.S.C. § 702. The APA
16 states that “**action[s] in a court of the United States seeking relief other than money damages**
17 . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United
18 States or that the United States is an indispensable party.” *Id.* (emphasis added). Where a waiver
19 of immunity contains a single exception, that waiver should be construed broadly. *See FDIC v.*
20 *Meyer*, 510 U.S. 471, 480 (1994) (concluding that broadly stated waivers of immunity should be
21 “liberally construed” . . . notwithstanding the general rule that waivers of sovereign immunity are
22 to be read narrowly in favor of the sovereign”) (quoting *FHA v. Burr*, 309 U.S. 242, 245 (1940)).
23 The Supreme Court has explained that a “restrictive interpretation” of the APA would counteract
24 its purpose: to provide broad avenues for judicial relief. *Bowen v. Massachusetts*, 487 U.S. 879,
25 904 (1988). Thus, under the plain language of the APA, while actions for money damages are
26 barred based on sovereign immunity principles, courts remain empowered to require payment in
27 other contexts—including monetary contempt sanctions.
28

1 **A. Monetary Contempt Sanctions Are Not a Separate “Action.”**

2 As an initial matter, the award of monetary contempt sanctions cannot credibly be
3 characterized as an “action” for “money damages” because **“there is no such thing as an**
4 **independent cause of action for civil contempt.”** *Blalock v. United States*, 844 F.2d 1546, 1550
5 (11th Cir. 1988) (emphasis added) (“[C]ivil contempt is a device used to coerce compliance with
6 an . . . order of the court.”) (citing *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949)).
7 Although “money damages” can be imposed on any person through an independent cause of
8 action, contempt sanctions can be imposed only on the litigants before the court, and only for a
9 violation of a court’s prospective injunction. The Supreme Court has described civil sanctions as
10 “instituted and tried as part of the main cause.” *Gompers v. Buck Stove & Range Co.*, 221 U.S.
11 418, 445 (1911); *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 452–53 (1932)
12 (describing “a proceeding in equity for civil contempt where the only remedial relief possible was
13 a fine, payable to the complainant,” and explaining that it “was not to be regarded as an
14 independent [suit], but as a part of the original cause”). Sanctions for civil contempt are themselves
15 equitable, and not by definition money damages, having “originated . . . in equity, as a device for
16 enforcing compliance with equitable decrees.” *In re Matter of Grand Jury Proceedings*
17 *Empanelled May 1988*, 894 F.2d 881, 884 (7th Cir. 1989).

18 The Court imposed sanctions in response to the Defendants’ blatant violation of the
19 preliminary injunction, not as a separate “action” for “money damages.” The Court noted that the
20 amount of monetary contempt sanctions would be used to “remedy Defendants’ wrongful acts.”
21 Order, ECF No. 130 at 5-6. The “wrongful acts” clearly refer to the violation of the preliminary
22 injunction, not the actions underlying the suit, and the “harm” is the illegal collections, not
23 the equitable relief sought in the underlying suit.

24 **B. Monetary Contempt Sanctions Are Not “Money Damages.”**

25 When civil contempt sanctions involve the payment of money, this fact alone does not
26 make such payments “money damages,” regardless of whether they are considered
27 “compensatory” or “coercive.” The Supreme Court has confirmed this, holding that courts may
28 impose monetary contempt sanctions if the underlying suit is one for equitable relief. *Bowen*, 487

1 U.S. at 904 (“The fact that a judicial remedy may require one party to pay money to another is not
2 a sufficient reason to characterize the relief as ‘money damages’ under the APA”). In *Bowen*, the
3 Court held that federal courts can order the federal government to reimburse a state for Medicare
4 program expenditures, even though it would require payment from the United States Treasury.
5 The *Bowen* Court considered the legislative history of the APA to conclude that the sovereign
6 immunity waiver, as is stated plainly in the statute, prohibits action[s]” for “money damages” only:
7 “No one suggested that the term [“money damages”] was the functional equivalent of a broader
8 concept such as ‘monetary relief’ and no one proposed that the broader term be substituted for the
9 familiar one.” *Id.* at 897.

10 Following *Bowen*, courts have continued to distinguish traditional “money damages” from
11 other kinds of monetary relief, repeatedly holding that the latter does not violate sovereign
12 immunity. For example, in *Connell v. United States*, the Ninth Circuit held that sovereign
13 immunity did not bar a claim of improper garnishment because the plaintiff sought “only
14 restitution of the garnished monies, rather than damages.” 69 F. Appx. 867, 868 (9th Cir. 2003).
15 Likewise, in *Mittelstadt v. Perdue*, the Seventh Circuit held that sovereign immunity did not bar a
16 request that the government “pay all amounts due” under an environmental regulation. 913 F.3d
17 626, 633 n.20 (7th Cir. 2019). The court explained that the requested payment was not “money
18 damages” under the APA because the plaintiff had not requested compensation, but rather
19 requested the “very thing to which he was entitled” under the law. *Id.* (quoting *Bowen*, 487 U.S.
20 at 895).

21 The purpose of all civil contempt sanctions is to punish “disobedience to the orders of the
22 Judiciary.” *Young v. United States ex rel. Vuitton Et. Fils. S.A.*, 481 U.S. 787, 798 (1987). As the
23 Court stated in its Sanctions Order, “[c]ivil contempt is coercive.” Sanctions Order, ECF No. 130
24 at 5. As such, the APA’s waiver of sovereign immunity for monetary contempt sanctions does *not*
25 rest on whether the sanctions are a lump sum (characterized as “compensatory”), or imposed as a
26 per-day payment, because sovereign immunity is waived for both types under the APA. Once a
27 court determines that monetary contempt sanctions are appropriate, the *only* question is how they
28 will be measured and levied. Here, the Court chose to impose a lump sum of \$100,000, and it was

1 well within its power to do so. Sanctions Order, ECF No. 130 at 5. Unlike “money damages,”
2 even “remedial” civil contempt sanctions are a “vindication of the court’s authority.” *Gompers v.*
3 *Buck Stove & Range Co.*, 221 U.S. 418, 443 (1911).

4 **C. In the Context of the Federal Rules of Civil Procedure, Courts Have**
5 **Repeatedly Held that Monetary Contempt Sanctions are not “Money**
6 **Damages.”**

7 Courts have consistently held that sanctions for misconduct in litigation are permitted
8 notwithstanding sovereign immunity principles. The Rules Enabling Act, 28 U.S.C. §§ 2071,
9 2072, binds the federal government to the Federal Rules of Civil Procedure, and as such, also
10 waives sovereign immunity for sanctions imposed for violations of the Rules. As the Ninth Circuit
11 held, “[t]he Rules of Civil Procedure...apply by their own force to all litigants before the
12 court...Since Congress authorized the promulgation of these rules[,] applying them to the
13 government with full force cannot be said to violate the principles of sovereign immunity.”
14 *Mattingly v. United States*, 939 F. 2d 816, 818 (9th Cir 1991). The Federal Circuit has also
15 recognized that there is “no justification for exempting the United States” from sanctions under
16 Rule 37 of the Federal Rules of Civil Procedure “for failure to make discovery.” *M.A. Mortenson*
17 *Co. v. United States*, 996 F.2d 1177, 1181 (Fed. Cir. 1993) (quoting S. Rep. No. 253, 96th Cong.,
18 1st Sess. 4) (“At a minimum, the United States should be held to the same standards in litigating
19 as private parties”); *see also United States v. Gavilan Joint Cmty Coll. Dist.*, 849 F.2d 1246, 1251
20 (9th Cir.1988) (sovereign immunity does not prohibit sanctions under Fed. R. Civ. P. 11); *United*
21 *States v. Nat’l Med. Enter.*, 792 F. 2d 906, 911 (9th Cir. 1986) (Upholding the district court’s
22 award of a “compensatory sanction” against the government for violations of discovery orders);
23 *United States v. Smimoto Marine & Fire Ins. Co.*, 617 F.2d 1365, 1371 (9th Cir. 1980) (same).
24 Although these cases are outside the context of the APA, they underscore that federal courts can
25 and should impose monetary sanctions against the government for misconduct, just as the Court
26 did here.

1 **D. Defendants’ Sovereign Immunity “Concerns” Rely on the False Dichotomy of**
2 **“Compensatory” and “Coercive” Sanctions.**

3 As explained above, monetary contempt sanctions are not “money damages” under the
4 APA. *See Gompers*, 221 U.S. at 443; Sanctions Order, ECF No. 130 at 5. Nonetheless, Defendants
5 have previewed their position that “compensatory sanctions” should be treated differently than so-
6 called “coercive” sanctions. However, there is no reason to give any weight to this distinction
7 when deciding if sovereign immunity is waived for monetary contempt sanctions under the APA.

8 None of the cases in which a court has accepted the Government’s assertion of sovereign
9 immunity in the face of contempt sanctions has relied on the distinction between lump-sum
10 “compensatory” sanctions and per-day fines. First, in *Coleman v. Espy*, the Eighth Circuit found
11 that sovereign immunity barred sanctions for a violation of an injunction that had been vacated
12 several years before. 986 F.2d 1184, 1192 (8th Cir. 1993); *see* Defendants’ Sanctions
13 Reconsideration Opposition, ECF No. 174 at 12. The Defendants cite this case to assert that
14 “compensatory sanctions” are unavailable, but the *Coleman* holding is quite narrow. The purpose
15 of the sanctions at issue in *Coleman* could only be compensation and not compliance with an
16 ongoing court order, because the injunction had been vacated. *Coleman*, 986 at 1192 (noting that
17 the appellants argued they were “consequently damaged by the officials’ failure to adhere to the
18 appropriate standard of care” and denied the sanctions award because the case was not a contempt
19 proceeding, but instead was “essentially a tort action, recovery for which must be sought through
20 the FTCA.”). The *Coleman* court did not address the APA’s waiver of immunity at all. *Id.*
21 Meanwhile, in the instant case, the contempt sanctions imposed for violations of ongoing
22 injunctions are inherently coercive and as such, sovereign immunity has been waved. To the extent
23 the Court’s monetary contempt sanctions are meant to “compensate” plaintiffs, that compensation
24 is squarely related to Defendants’ violation of a preliminary injunction, *not* the underlying action.
25 Sanctions Order, ECF No. 130 at 5-6 (“Given that there are over 16,000 borrowers who have
26 suffered damages from Defendants’ violation of the preliminary injunction and given that there
27 may be some administrative expenses to remedy the harm, the Court finds the amount
28 reasonable.”).

1 In *Barry v. Bowen*, another case cited by the Defendants, the Court considered whether
2 sovereign immunity had been waived under the Equal Access to Justice Act (EAJA)— not the APA.
3 884 F.2d 442 (9th Cir. 1993); *see* Defendants’ Sanctions Reconsideration Opposition, ECF No.
4 174 at 12. The Ninth Circuit stated explicitly that “[w]e have no desire to call into question the
5 decisions of this court that imposed sanctions on the United States under Fed. R. Civ. P. 11, 37(b),
6 and 60.” *Barry*, 884 F.2d at 444. Defendants make much of the court’s professed “doubt” about
7 its own power to impose sanctions, but that “doubt” is squarely about the scope of the EAJA
8 waiver, not the APA or myriad other contexts in which waiver of sovereign immunity is clearly
9 delineated. *Barry*, 884 F.2d. at 444 (acknowledging the “multitude of other instances in which
10 sovereign immunity expressly has been waived for purposes not including sanctions.”).
11 Additionally, the Ninth Circuit conceded that its doubts might be “ill founded,” and ultimately
12 reversed the sanctions because the amount awarded lacked a connection to the violation. *Id.* In
13 the instant case, sovereign immunity has been waived under the APA and there is more than an
14 ample basis for the sanctions: “[T]here is no question that Defendants violated the preliminary
15 injunction. There is also no question that Defendants’ violations harmed individual borrowers.”
16 Sanctions Order, ECF No. 130 at 6.

17 Another case Defendants cite in their Opposition, *McBride v. Coleman*, is irrelevant to the
18 question before the Court. 955 F.2d 571 (8th Cir. 1992); Defendants’ Sanctions Reconsideration
19 Opposition, ECF No. 174 at 13. In *McBride*, the court reversed a sanctions award because the
20 plaintiffs exhibited “a total failure to show a causal connection” between Defendants’ violation of
21 the injunction and the harm that violation caused. 955 F.2d at 577 (finding the sanctions
22 inappropriate because “the damages the court awarded flow from conduct that antedated the . . .
23 injunction or that otherwise is not encompassed by that injunction.”). The Court made clear the
24 limitations of its holding, noting that unlike actions brought under the Tucker Act or the Federal
25 Tort Claims Act, “[t]here does not appear to be any express waiver of sovereign immunity
26 applicable to this case.” *Id.* at 576. This is easily distinguishable from the instant case, where the
27 APA waives sovereign immunity, and there is a clear causal connection between the improper
28 collections and garnishment that were in violation of the preliminary injunction and the sanctions

1 award. Sanctions Order, ECF No. 130 at 5.

2
3 **II. The Court's Authority to Impose Monetary Contempt Sanctions Against the**
4 **Defendants Is Not Only Granted by the APA but Demanded by the Constitution.**

5 The Court need not become mired in constitutional principles, because the meaning of the
6 APA is plain: sovereign immunity is waived for purposes of monetary contempt sanctions.
7 5 U.S.C. § 702; *see Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)
8 (emphasizing the need to interpret statutes, where possible, to avoid constitutional rulings). That
9 said, the principles of separation of powers and the rule of law also support the Court's ability to
10 impose of monetary sanctions against the government for violation of a court order. This is
11 because (1) Monetary contempt sanctions are an essential function of the federal judiciary; and (2)
12 Interference with this essential function would violate Article III of the Constitution.

13 **First**, the power to impose monetary contempt sanctions is essential to the Court's
14 contempt power. The Supreme Court has long described contempt power as "a necessary and
15 integral part of the independence of the judiciary" and as "absolutely essential to the performance
16 of the duties imposed on them by law." *Gompers*, 221 U.S. at 450; *see also Int'l Union, United*
17 *Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994) ("The traditional justification for the
18 relative breadth of contempt power has been necessity. . . . Courts . . . have embraced an inherent
19 contempt authority as a power necessary to the exercise of all others."). Federal courts have
20 "inherent authority to initiate contempt proceedings for disobedience to their orders." *Young*, 481
21 U.S. at 793 (1987) (noting that Congress cannot render contempt power "practically inoperative"
22 (*id.* at 799)); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) ("[I]t is firmly established
23 that the power to punish for contempt is inherent in all courts") (internal quotations omitted).

24 **Second**, sovereign immunity cannot impinge the judiciary's ability to carry out its essential
25 duties. Without contempt fines, agencies would effectively have the power to disregard or review
26 federal court decisions, violating the Constitution. *See INS v. Chadha*, 462 U.S. 919, 963 (1982)
27 (Separation of powers is violated when one branch "interfere[s] impermissibly with the other's
28 performance of its constitutionally assigned function" or "assumes a function that more properly

1 is entrusted to another.”). The Supreme Court has affirmed this principle in many contexts. *See*,
2 *e.g.*, *Young*, 481 U.S. at 787 (holding that federal courts have the inherent power to appoint special
3 prosecutors to prosecute contempt of court; noting that “[t]he ability to punish disobedience to
4 judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicating its
5 own authority without complete dependence on other Branches”); *see also United States v. Nixon*,
6 418 U.S. 683 (1974) (holding that executive privilege, which (like sovereign immunity) is
7 constitutionally protected but not enumerated, cannot interfere with the ability of the federal courts
8 to carry out their essential functions; noting that “[t]he impediment that an absolute, unqualified
9 privilege would place in the way of the primary constitutional duty of the Judicial Branch . . .
10 would plainly conflict with the function of the Courts under [Article] III”). Allowing agencies to
11 shield themselves from accountability behind sovereign immunity would prevent the federal courts
12 from fulfilling their duty to remedy injuries to the litigants before them. *See Marbury v. Madison*,
13 5 U.S. (1 Cranch), 137, 163 (1803) (“The very essence of civil liberty certainly consists of the right
14 of every individual to claim the protection of the laws, whenever he receives an injury.”).
15 Sovereign immunity cannot trump the award of contempt sanctions. Allowing it to do so would
16 render judicial opinions merely advisory, and would allow the executive branch to ignore federal
17 court orders with impunity. *See Gompers*, 221 U.S. at 445 (“For while it is sparingly used, yet the
18 power of the courts to punish for contempts is a necessary and integral part of the independence
19 of the judiciary, and is absolutely essential to the performance of the duties imposed on them by
20 law. Without it they are mere boards of arbitration, whose judgments and decrees would be only
21 advisory.”).

22
23 **III. Defendants Raised Sovereign Immunity “Concerns” to Divert Attention From**
24 **Their Ongoing Noncompliance.**

25 Defendants waited until filing their Sanctions Reconsideration Opposition to mention
26 sovereign immunity, and even then, did not clearly assert it as a defense. Instead, they note that
27 “Plaintiffs’ consequential damages theory would also raise serious concerns about sovereign
28 immunity.” ECF No. 174 at 16. Because sovereign immunity is a jurisdictional issue, the defense

1 itself cannot be waived. What is telling, however, is that Defendants have not moved to reconsider
2 the initial award of monetary contempt sanctions. Defendants are gesturing toward sovereign
3 immunity to do what they cannot: get out from the hole they themselves dug by repeatedly and
4 egregiously violating the preliminary injunction.

5 **First**, as detailed in Plaintiffs' Reply in Support of Reconsideration, Defendants' attempt
6 to characterize the sanctions award as "damages" is based on a false premise. Plaintiffs never
7 argued for "consequential damages." To the extent that Plaintiffs have addressed the harm of the
8 collections in violation of the preliminary injunction, they did so in response to this Court's
9 determination that the \$100,000 monetary sanction was at least in part connected to the harm that
10 Defendants' noncompliance caused. *See* Sanctions Order, ECF No. 130 at 6. Defendants
11 mischaracterize both the Court's Order and the Plaintiffs' arguments in their Opposition, in order
12 to create the appearance of a sovereign immunity "concern" where none actually exists.

13 **Second**, Defendants are still not in compliance with the preliminary injunction. According
14 to the Compliance Report filed just last week, forty-nine borrowers are currently subject to wage
15 garnishment in violation of the preliminary injunction. February Compliance Report, ECF No.
16 194-3 (March 2, 2020). The problem of ongoing noncompliance has plagued Defendants
17 throughout this litigation. In November 2019, Defendants filed a Motion for Leave to File a
18 Motion for Partial Reconsideration of the Sanctions Order, but withdrew that motion four days
19 later, stating that they could not "fairly represent" that they were in "full compliance." ECF No.
20 140 at 2 (Nov. 5, 2019). In their next Compliance Report, they revealed that there were over
21 45,000 borrowers potentially affected by their improper collections – *three times as many* as they
22 had initially said. December Compliance Report, ECF No. 156-2; Errata, ECF No. 161. In their
23 Sanctions Reconsideration Opposition, Defendants could only claim to have made "substantial
24 progress" toward "substantial compliance." ECF No. 174 at 2. Their gesture in that brief toward
25 a potential sovereign immunity defense is a transparent attempt to distract from the clear facts as
26 they are. The Court issued a preliminary injunction, which Defendants violated. The Court
27 properly imposed monetary contempt sanctions. Defendants' violation of the preliminary
28 injunction was on a much greater scale than they originally told the Court, and it continues to this

1 day. Without monetary sanctions, the contempt finding is akin to a mere advisory opinion,
2 allowing the Department to continue violating students' rights with impunity while facing no
3 consequences for having done so for many months.

4
5 **IV. The Court May Award Additional Sanctions If It Grants Plaintiffs' Motion for**
6 **Reconsideration.**

7 This Court's contempt finding and reporting requirements will remain intact regardless of
8 whether it changes the amount or characterization of the monetary sanctions awarded. In other
9 words, whether monetary contempt sanctions are characterized as "coercive" or "compensatory"
10 has no bearing on the finding of contempt. Defendants question only the nature of the monetary
11 fine. *See* Order, ECF No. 130 at 6 ("[T]here is no question that Defendants violated the preliminary
12 injunction . . . [t]he only question is the type of relief that is appropriate in this situation.").

13 When Plaintiffs moved for sanctions, they proposed both "coercive" and "compensatory"
14 monetary contempt sanctions. ECF No. 126 at 19 (proposing sanctions, including but not limited
15 to the form of a \$500/day fine against the Secretary because "[s]tudents cannot afford to trust
16 Defendants' promises and a coercive sanction is needed to ensure that they follow through.").
17 Contempt sanctions are often per-day charges. Order, ECF No. 130 at 5 (quoting *Bagwell*,
18 512 U.S. at 828 ("The paradigmatic coercive, civil contempt sanction [...] involves confirming a
19 contemnor indefinitely until he [or she] complies with an affirmative command."); *Ahearn ex rel.*
20 *N.L.R.B. v. Int'l Longshore & Warehouse Union, Locals 21 & 4*, 721 F.3d 1122, 1131 (9th Cir.
21 2013) (characterizing sanctions as appropriate to "compel or coerce obedience to a Court order"
22 or "compensate the contemnor's adversary for injuries resulting from the contemnor's
23 noncompliance."). The Court awarded a \$100,000 lump sum it characterized as "compensatory,"
24 while also noting that "civil contempt is coercive." Sanctions Order, ECF No. 130 at 5-6. The
25 Court further noted: "The Court does not foreclose the possibility that, if Defendants fail to comply
26 with the preliminary injunction in a timely matter, the Court will impose additional sanctions."
27 *Id.* at 6.

28 As explained above, monetary contempt sanctions—whether they are considered

1 “compensatory” or “coercive”—are permissible under the APA and the Constitution. They are not
 2 separate “actions” and they are not “damages.” No matter how described, courts award monetary
 3 contempt sanctions for a singular purpose: to ensure compliance with a court order. In its initial
 4 Sanctions Order, the Court characterized the monetary sanctions in this case as “compensatory”
 5 and ordered payment of a lump sum. Sanctions Order, ECF No. 130 at 5-6. If the Court grants
 6 the Plaintiffs’ Motion for Partial Reconsideration of the Sanctions Order (ECF No. 167), it can
 7 increase the lump sum payment or order a per-day fine. Either way, monetary contempt sanctions
 8 are permissible, and provide a mechanism to give the Plaintiffs the compliance they were entitled
 9 to under the preliminary injunction. How to calculate them is within the Court’s discretion.

10 CONCLUSION

11 For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs’
 12 Motion for Reconsideration of the Sanctions Order (ECF No.167), and issue additional monetary
 13 contempt sanctions against the Defendants for violation of the preliminary injunction.
 14

15
 16
 17 Dated: March 10, 2020

Respectfully submitted,

/s/ Margaret E. O’Grady

Eileen M. Connor (SBN 248856)
 Toby R. Merrill (*pro hac vice*)
 Margaret E. O’Grady (*pro hac vice*)
 LEGAL SERVICES CENTER OF
 HARVARD LAW SCHOOL
 122 Boylston Street
 Jamaica Plain, MA 02130
 Tel.: (617) 390-3003
 Fax: (617) 522-0715

Joseph Jaramillo
 Natalie Lyons
 HOUSING & ECONOMIC RIGHTS
 ADVOCATES
 1814 Franklin Street, Suite 1040

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Oakland, CA 94604
Tel.: (510) 271-8443
Fax: (510) 280-2448

Attorneys for Plaintiffs