No. 22A____

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, ET AL., APPLICANTS

v.

STATE OF NEBRASKA, ET AL.

APPLICATION TO VACATE THE INJUNCTION ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PARTIES TO THE PROCEEDING

Applicants (defendants-appellees below) are Joseph R. Biden, Jr., in his official capacity as President of the United States; Miguel Cardona, in his official capacity as Secretary of Education; and the U.S. Department of Education.

Respondents (plaintiffs-appellants below) are the States of Nebraska, Missouri, Arkansas, Iowa, Kansas, and South Carolina.

RELATED PROCEEDINGS

United States District Court (E.D. Mo.):

Nebraska v. Biden, No. 22-cv-1040 (Oct. 21, 2022)

United States Court of Appeals (8th Cir.):

Nebraska v. Biden, No. 22-3179 (Nov. 14, 2022)

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Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of the applicants, respectfully applies to vacate the injunction pending appeal entered on November 14, 2022, by the United States Court of Appeals for the Eighth Circuit (App., infra, 1a-6a).

Congress charged the Secretary of Education with administering federal student-loan programs. Because borrowers who default on their student loans face severe financial consequences -- including wage garnishment, long-term credit damage, and ineligibility for federal benefits -- Congress specifically authorized the Secretary to waive or modify any applicable statutory or regulatory provision as he deems necessary to ensure that borrowers

affected by a national emergency are not worse off in relation to their student loans. See Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act or Act), Pub L. No. 108-76, § 2, 117 Stat. 904-905 (20 U.S.C. 1098bb). Confronted with the deadliest pandemic in the Nation's history, which has wreaked global economic havoc, both the Trump and Biden Administrations invoked the HEROES Act to pause repayment obligations and suspend interest accrual on all federally held student loans since March 2020. That pause is estimated to have cost the government more than $100 billion.

In August 2022, the Secretary determined that the across-the-board pause on all payments for all borrowers should come to an end and directed the Department to restart loan payments at the end of the year. But the Secretary also found that when repayment obligations resume, lower-income borrowers will be at heightened risk of delinquency and default because of the continuing economic consequences of the COVID-19 pandemic. The Secretary thus directed the Department to issue up to $10,000 in student-loan relief to eligible borrowers with annual incomes under $125,000 ($250,000 for borrowers filing jointly). Qualifying Pell Grant recipients, who are at even greater risk of default, can receive up to $20,000 in relief. This relief, the Secretary found, is necessary to ensure that delinquency and default rates among these borrowers would not spike above pre-pandemic levels.

Respondents are a group of six States that challenged the Secretary's plan. The district court dismissed their suit for lack of Article III standing, but the Eighth Circuit granted their request for a universal injunction pending appeal. In so doing, the court did not analyze the merits of respondents' claims, much less determine they are likely to succeed. The court's discussion of the merits instead consisted, in its entirety, of the following statement: "[T]he 'merits of the appeal before this court involve substantial questions of law which remain to be resolved.'" App., infra, 5a (citation omitted). That analysis does not suffice to support any injunction -- much less a universal injunction prohibiting the government from implementing a critically important policy with direct and tangible effects on millions of Americans.

This Court should vacate that injunction. Respondents lack standing to challenge the plan. On the merits, the plan falls squarely within the plain text of the Secretary's statutory authority. Indeed, the entire purpose of the HEROES Act is to authorize the Secretary to grant student-loan-related relief to at-risk borrowers because of a national emergency -- precisely what the Secretary did here. And the plan rested on the Secretary's examination of the relevant economic data and the Department's long experience with borrowers transitioning back into repayment. The Eighth Circuit did not address either the text of the statute or the data supporting the plan. And the court compounded its errors by issuing sweeping nationwide relief, rather

than limiting the injunction to loans serviced by the sole entity on which the court relied in finding that respondents had standing.

The Eighth Circuit's erroneous injunction leaves millions of economically vulnerable borrowers in limbo, uncertain about the size of their debt and unable to make financial decisions with an accurate understanding of their future repayment obligations. If the Court declines to vacate the injunction, it may wish to construe this application as a petition for a writ of certiorari before judgment, grant the petition, and set the case for expedited briefing and argument this Term to avoid prolonging this uncertainty for the millions of affected borrowers. Cf. United States v. Texas, cert. granted, No. 22-58 (oral argument scheduled for Nov. 29, 2022).

STATEMENT

A. Background

1. The Department of Education administers various student-loan programs under Title IV of the Higher Education Act of 1965 (Education Act), 20 U.S.C. 1070 et seq. Those programs include the William D. Ford Federal Direct Loan Program (Direct Loans), 20 U.S.C. 1087a-1087j, under which the federal government lends money directly to students, and the Federal Family Education Loan Program (Family Education Loans), 20 U.S.C. 1071 to 1087-4, and Federal Perkins Loan Program (Perkins Loans), 20 U.S.C. 1087aa-1087ii, under which non-federal lenders issue loans guaranteed by entities reinsured by the federal government. Although authority to issue

new loans under the latter two programs has expired, many loans remain outstanding. Borrowers generally may consolidate their federal student loans into loans held by the federal government. 34 C.F.R. 685.220. Nearly 43 million borrowers have outstanding loans under the three programs, and their debts total roughly $1.62 trillion. Office of Federal Student Aid, U.S. Dep't of Educ., Federal Student Aid Portfolio, https://studentaid.gov/data-center/student/portfolio (last visited Nov. 15, 2022).

The Education Act charges the Secretary of Education with carrying out federal student-loan programs. 20 U.S.C. 1070(b). The Act grants the Secretary substantial "powers and responsibilities," 20 U.S.C. 1082 (emphasis omitted); see 20 U.S.C. 3441, 3471, including authority to "compromise, waive, or release any right, title, claim, lien, or demand" acquired in the Secretary's performance of his "functions, powers, and duties" in administering the Department's portfolio of loans, 20 U.S.C. 1082(a)(6).

A few months after the September 11, 2001 terrorist attacks, Congress enacted the Higher Education Relief Opportunities for Students Act of 2001, Pub. L. No. 107-122, 115 Stat. 2386, to "provide the Secretary of Education with specific waiver authority to respond to conditions in the national emergency declared by the President on September 14, 2001," ibid. Congress authorized the Secretary to "waive or modify any statutory or regulatory provision applicable to" student aid programs under Title IV of the Education Act "as may be necessary to ensure that" borrowers affected by

September 11 and later terrorist attacks are not in a worse position in relation to their student loans. § 2(a)(1) and (2), 115 Stat. 2386; see § 5, 115 Stat. 2388.

In 2003, Congress extended and expanded that authority by enacting the HEROES Act. Like its predecessor, the HEROES Act authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" under Title IV. 20 U.S.C. 1098bb(a)(1). But the HEROES Act does not limit relief to borrowers who suffered hardship as a result of terrorist attacks; rather, it authorizes waiver or modification "as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide the waivers or modifications authorized by paragraph (2)." Ibid. Paragraph 2, in turn, authorizes the Secretary "to waive or modify any provision described in paragraph (1) as may be necessary to ensure that" certain objectives are achieved. 20 U.S.C. 1098bb(a)(2). The first objective is that "recipients of student financial assistance under title IV of the [Education] Act who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." 20 U.S.C. 1098bb(a)(2)(A). An "affected individual" is defined to include any individual who "resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency." 20 U.S.C. 1098ee(2)(C).

Several provisions of the HEROES Act underscore Congress's intent to authorize the Secretary to respond quickly and fully to emergencies and other extraordinary circumstances. The Secretary need not act through notice and comment; instead, he need only publish a notice in the Federal Register setting forth "the waivers or modifications * * * the Secretary deems necessary to achieve the purposes of this section." 20 U.S.C. 1098bb(b)(1). Nor need the Secretary comply with other procedural requirements that would delay implementation of relief. 20 U.S.C. 1098bb(d). In addition, Congress explicitly provided that "[t]he Secretary is not required to exercise the waiver or modification authority * * * on a case-by-case basis." 20 U.S.C. 1098bb(b)(3).

The HEROES Act was originally set to expire in 2005. Pub. L. No. 108-76, § 6, 117 Stat. 908. But Congress extended the Act by two years, Pub. L. No. 109-78, 119 Stat. 2043, and in 2007 made the Act permanent, Pub. L. No. 110-93, 121 Stat. 999. Since 2003, the Secretary has repeatedly invoked the Act to provide categorical relief to borrowers affected by emergencies, including by extending forbearance for Perkins loans and waiving the requirement that borrowers return overpayments of certain grant funds. See Office of Legal Counsel, U.S. Dep't of Justice, Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans, 2022 WL 3975075, at *5-*6 (Aug. 23, 2022) (OLC Op.); App., infra, 30a.

2. In March 2020, President Trump declared a national emergency in light of the COVID-19 pandemic. Proclamation 9994,

3 C.F.R. 56 (2020 Comp.). That declaration remains in effect, and the government has declared all 50 States, the District of Columbia, and the territories to be disaster areas. See FEMA, COVID-19 Disaster Declarations, https://perma.cc/B7KA-W4KD. COVID-19 has killed more than one million Americans and led to the hospitalization of millions more. Centers for Disease Control and Prevention, COVID Data Tracker (Nov. 16, 2022), https://perma.cc/64SG-ZCL4. COVID-19 continues to kill more than 2,000 Americans a week. Ibid. The pandemic has also inflicted severe economic harms, including layoffs, spikes in inflation, rising delinquency rates on debt, and projected reductions in lifetime earnings for students who left school during the pandemic. See App., infra, 37a-39a, 45a. These harms have disproportionately affected lower-income households. Id. at 37a-38a, 41a-47a.

In response to the pandemic, the federal government provided substantial relief to borrowers with Department-held loans. In March 2020, then-Secretary of Education DeVos invoked the HEROES Act to pause repayment obligations and suspend interest accrual on all such loans. 85 Fed. Reg. 79,856, 79,857 (Dec. 11, 2020). Congress directed the Secretary to extend those policies through September 2020. COVID-19 Pandemic Education Relief Act of 2020, Pub. L. No. 116-136, Div. A, Tit. III, Subtit. B, § 3513, 134 Stat. 404. Both the Trump and Biden Administrations then further extended these protections under the HEROES Act. See, e.g., 85 Fed. Reg. at 79,857; App., infra, 32a-33a.

In August 2022, Secretary Cardona determined that, despite those measures, any resumption of repayment obligations would put many lower-income borrowers "at heightened risk of loan delinquency and default" due to the pandemic. App., infra, 32a. The Secretary thus adopted a two-pronged approach. He announced that he would extend the pause a final time, through December 31, 2022. Id. at 33a. And to ensure that "borrowers are not in a worse position financially due to the pandemic with regard to their ability to repay their loans" when payment obligations resume in January 2023, the Secretary invoked the HEROES Act and directed the Department to issue up to $10,000 in student-loan relief to eligible borrowers with annual incomes under $125,000 ($250,000 for borrowers filing jointly). Id. at 32a. Qualifying Pell Grant recipients, who tend to have fewer resources and are at greater risk of default, can receive up to $20,000. Ibid.

As explained in the supporting analysis on which the Secretary relied, this relief will mitigate the pandemic's adverse economic effects and significantly reduce delinquency and default rates among those borrowers most affected by the pandemic. App., infra, 36a, 39a-40a. The Department analyzed its past experience with borrowers who transitioned back to repayment after long periods of forbearance, including after emergencies, and concluded that such borrowers are typically at "elevated risk of delinquency and default." Id. at 37a. Indeed, default rates increase twentyfold after the period of non-payment ends, and Pell Grant recipients

affected by such events experience even "larger increases in default." Ibid. The Department reviewed borrower surveys, economic studies, and credit analyses conducted by the Consumer Financial Protection Bureau and Federal Reserve Banks that documented current economic conditions borrowers face due to the pandemic, including rising delinquency rates on non-student-loan debt; stark increases in the number of borrowers that anticipate difficulty making loan payments; and acute inflationary pressures on household budgets for "basic necessities, including energy, food, and shelter costs." Id. at 37a-39a. The Department also emphasized the substantial penalties imposed on borrowers who default on student-loan payments, including 50-to-90-point drops in credit scores that make insurance, rent, and other financial products more expensive and limit employment opportunities; exposure to involuntary collection methods; and lost access to affordable or flexible repayment options. Id. at 39a.

The Department explained that the contemplated debt relief would ameliorate these harms. App., infra, 39a-47a. The Department surveyed economic data establishing that borrowers with incomes under $125,000, especially Pell Grant recipients, are more likely to experience financial hardship in repaying their loans when payments resume. Id. at 41a-47a. Among other things, such borrowers were disproportionately likely to become unemployed and experience material hardship due to the pandemic, including food insecurity and difficulty making utility, rent, and mortgage

payments. Id. at 38a, 45a-47a. As to the amount of debt to be discharged, the Department observed that "it should discharge an amount of debt necessary to significantly decrease the rates of delinquency and default." Id. at 40a. After considering borrower loan balances and the effectiveness of various monthly payment reductions in reducing delinquency rates, the Department determined that the $10,000 threshold (and $20,000 for Pell Grant recipients) would "mitigate the risk that delinquency and default rates will rise above pre-pandemic levels." Ibid.

B. Proceedings Below

Respondents are the States of Arkansas, Iowa, Kansas, Missouri, Nebraska, and South Carolina. App., infra, 9a. On September 29, 2022, respondents sued the President, the Secretary, and the Department in the U.S. District Court for the Eastern District of Missouri, alleging that the plan exceeds the Secretary's authority and is arbitrary and capricious. Ibid. Respondents moved for a preliminary injunction. Id. at 13a.

1. On October 20, 2022, the district court denied the motion and dismissed the suit for lack of Article III standing. App., infra, 9a-27a. As relevant here, the court rejected Missouri's argument that it had standing because the Missouri Higher Education Loan Authority (MOHELA), a non-profit entity that services federal loans, would suffer financial harms because of the plan. Id. at 18a. The court explained that MOHELA is a distinct legal person from the State of Missouri; MOHELA traditionally has not been

considered an "arm of the State"; it has the capacity to "sue and be sued in its own name"; it "retains financial independence from the [S]tate"; and the State has no legal obligation to pay MOHELA's debts. Id. at 20a; see id. at 18a-21a. The court accordingly concluded that Missouri lacks the capacity to sue based on any harms to MOHELA. Id. at 21a. The court also rejected respondents' other theories of standing. Id. at 21a-26a.

2. The next day, the district court denied respondents' motion for an injunction pending appeal. App., infra, 8a. Later the same day, the court of appeals entered an "administrative stay prohibiting the [Department] from discharging any student loan debt under the Cancellation program." Id. at 7a.

3. Three weeks after issuing its administrative stay, the court of appeals issued a six-page per curiam opinion granting respondents an injunction pending appeal. App., infra, 1a-6a.

The court of appeals concluded that Missouri likely has standing to bring this suit (and did not address the other respondents' standing). App., infra, 5a. The court reasoned that MOHELA, as a loan servicer, "obtains revenue from the accounts it services," but that "the total revenue MOHELA recovers will decrease if a substantial portion of its accounts are no longer active under the Secretary's plan." Id. at 4a. The court concluded that, because MOHELA has "financial obligations to the State treasury," the plan's "financial impact on MOHELA" could lead to "financial harm to the State." Id. at 4a-5a.

The court of appeals then turned to the merits and the equities. App., infra, 5a. The court stated, without elaboration, that the "merits of the appeal before this court involve substantial questions of law which remain to be resolved." Ibid. (citation omitted). The court also stated that the "equities strongly favor an injunction considering the irreversible impact the Secretary's debt forgiveness action would have as compared to the lack of harm an injunction would presently impose." Ibid. In particular, the court emphasized that "collection of student loan payments as well as accrual of interest on student loans have both been suspended," but it did not acknowledge that the suspension was scheduled to end on December 31. Ibid.

Finally, the court refused to limit its injunction "to the plaintiff States, or even more broadly to student loans affecting the States." App., infra, 6a. "Given MOHELA's national role in servicing accounts," the court "discern[ed] no workable path in this emergency posture for narrowing the scope of relief." Ibid.

4. In the meantime, four days before the Eighth Circuit issued its injunction in this case, a federal district court in Texas found the plan unlawful and vacated it on a nationwide basis. See Brown v. U.S. Dept of Educ., No. 22-cv-908, 2022 WL 16858525 (N.D. Tex. Nov. 10, 2022). The plaintiffs in that case are two individual borrowers who do not assert any injury from the provision of debt relief to others, and instead brought only a procedural claim asserting that they were improperly denied the

opportunity to comment on the plan. Id. at *7-*8. The district court rejected that argument as foreclosed by the plain text of the HEROES Act. Id. at *10-*11 (citing 20 U.S.C. 1098bb(b)(1)). But the court then granted nationwide relief based on a substantive claim that the plaintiffs themselves had not asserted (and would not have had standing to assert in any event). Id. at *11-*15.

The government has appealed the Texas district court's decision and has sought a stay pending appeal. See Brown v. U.S. Dep't of Educ., appeal pending, No. 22-11115 (filed Nov. 14, 2022). That motion for a stay remains pending. If the Fifth Circuit denies a stay, the government intends to seek relief from this Court.

ARGUMENT

An injunction "is an extraordinary remedy never awarded as of right." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 24 (2008). A party seeking an injunction must show, among other things, that it is "likely to succeed on the merits." Id. at 20. Here, however, "one searches the opinion[] below in vain for any mention of [respondents'] likelihood of success on the merits." Munaf v. Geren, 553 U.S. 674, 690 (2008). The Eighth Circuit instead granted a universal injunction based on the assertion, unsupported by any further analysis, that the "merits of the appeal before this court involve substantial questions of law which remain to be resolved." App., infra, 5a. That deficiency by itself justifies vacating the injunction. See Munaf, 553 U.S. at 690.

Nor could the Eighth Circuit have granted an injunction had it conducted the proper analysis. In considering interim equitable relief like an injunction pending appeal, this Court considers the "likelihood of success on the merits" and the "equities." Alabama Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2488-2489 (2021) (per curiam). In this case, the government is likely to succeed on the merits and the equities favor vacatur of the injunction.

I. THE GOVERNMENT IS LIKELY TO SUCCEED ON THE MERITS

If the court of appeals finds the plan unlawful, this Court would likely review that decision invalidating a national program affecting millions of Americans. See pp. 38-40, infra. And if the Court granted review, it would likely reverse a decision finding the plan unlawful. Contrary to the court of appeals' decision, respondents lack Article III standing to bring this suit. The plan is in any event lawful. And at a minimum, the Eighth Circuit's universal relief was overbroad.

A. The States Lack Article III Standing

Article III empowers the federal courts to decide only "Cases" and "Controversies." U.S. Const. Art. III, § 2, Cl. 1. An Article III case or controversy exists only if the plaintiff has standing -- that is, only if the plaintiff has suffered a concrete, particularized, and actual or imminent injury, the injury was likely caused by the defendant, and the injury would likely be redressed by judicial relief. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021). Respondents cannot satisfy those requirements. The

plan confers benefits on third parties, but it does not require respondents to do anything, forbid them from doing anything, or harm them in any other way.

The Eighth Circuit determined that Missouri likely has standing because the plan causes financial harm to MOHELA, a state-created entity in Missouri that contracts with the federal government to service student loans and that would stop receiving administrative fees from the government for borrowers whose loans are discharged in their entirety. App., infra, 4a-5a. But it is well established that a plaintiff must demonstrate that it has a "personal stake in the outcome" of the litigation. Los Angeles v. Lyons, 461 U.S. 95, 101 (1983). That is, the plaintiff must "assert [its] own legal rights and interests, and cannot rest [its] claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499 (1975). Here, Missouri has chosen to structure MOHELA as a legal person that is distinct from the State -- specifically, as a corporation with the capacity to "sue and be sued" in its own name. Mo. Rev. Stat. § 173.385(3) (2022). And MOHELA has publicly stated that it was "not involved with the decision of the Missouri Attorney General's Office" to seek to block the program and that "the only communications between MOHELA and that Office as it relates to student debt relief" have involved the Office's "sunshine law requests" to MOHELA seeking documents for use in this litigation. C.A. Rule 28(j) Letter, Attach. 1 (Nov. 1, 2022). Even if alleged financial harm to MOHELA

would establish standing for MOHELA, therefore, it would not establish standing for the State of Missouri.

The Eighth Circuit attempted to overcome that problem by observing that Missouri law requires MOHELA to contribute a specified amount to a fund in the State Treasury, and that "the financial impact on MOHELA due to the Secretary's debt discharge" may impair MOHELA's ability to fulfill that obligation. App., infra, 4a. But the court cited no authority for the proposition that, if A causes financial harm to B, and B owes money to C, C has standing to sue A. Such a theory of standing is irreconcilable with the principle that a plaintiff must "assert [its] own legal rights and interests, and cannot rest [its] claim to relief on the legal rights or interests of third parties." Warth, 422 U.S. at 499. If the Eighth Circuit's contrary theory were taken to its logical conclusion, banks could sue anyone who causes financial harm to their borrowers, credit-card companies could sue anyone who causes financial harm to their customers, and governments could sue anyone who causes financial harm to taxpayers.

The Eighth Circuit's theory of standing also conflicts with this Court's "usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." Clapper v. Amnesty International USA, 568 U.S. 398, 414 (2013). It is pure speculation that, if the plan causes financial harm to MOHELA, MOHELA will default on its obligations to the state treasury. The plan may not cause a significant drop in MOHELA's revenue

at all. Alternatively, MOHELA may make enough money that it can fulfill its financial obligations to the State despite any loss of revenue. Or the supposed loss of revenue may lead MOHELA to cut other expenditures rather than to default on its obligations to the State. Guesswork about how the plan will affect MOHELA and how MOHELA will react to those effects does not suffice to establish Article III standing.

B. The Secretary's Action Is Lawful

Respondents have asserted that the Secretary's plan exceeds his statutory authority and is arbitrary and capricious. App., infra, 2a. Without addressing either contention in substance, the court of appeals issued an injunction because respondents had raised "substantial questions of law." Id. at 5a (citation omitted). But neither contention is persuasive, let alone sufficient to demonstrate a "substantial likelihood of success on the merits." Alabama Ass'n of Realtors, 141 S. Ct. at 2488.

1. The HEROES Act authorizes the Secretary's action

The HEROES Act provides that, "[n]otwithstanding any other provision of law," the Secretary may respond to a "national emergency" by waiving or modifying "any statutory or regulatory provision" governing federal student loans "as the Secretary deems necessary" to "ensure" that loan recipients who are "affected individuals" are not "placed in a worse position financially" because of the emergency. 20 U.S.C. 1098bb(a)(1) and (2). The Secretary's action falls within that specific grant of authority.

a. The COVID-19 pandemic is a "national emergency declared by the President of the United States." 20 U.S.C. 1098ee(4); see 87 Fed. Reg. 10,289, 10,289 (Feb. 23, 2022). Both the Trump and Biden Administrations previously invoked the HEROES Act to categorically suspend payments and interest accrual on all Department-held loans in light of the pandemic. See p. 8, *supra*. Respondents have not disputed that those actions were lawful.

Similarly, all student-loan borrowers are "affected individuals" under the HEROES Act. 20 U.S.C. 1098bb(a)(2)(A). The vast majority qualify based on where they "reside[]" or are "employed," 20 U.S.C. 1098ee(2): The 50 States, the District of Columbia, and all five permanently populated United States territories have been designated as COVID-19 disaster areas. See p. 8, *supra*. And because the pandemic has inflicted global economic harms, with particularly severe effects on lower-income borrowers, the Secretary reasonably "determined" that the small fraction of eligible borrowers living and working abroad qualify because they have suffered "direct economic hardship" due to the pandemic. 20 U.S.C. 1098ee(2)(D). Again, the payment pauses adopted by both the Trump and Biden Administrations rested on the same understanding of "affected individual."

The Secretary reasonably "deem[ed]" relief "necessary to ensure" that a subset of these affected individuals -- namely, those with lower incomes -- "are not placed in a worse position" in relation to their student-loan obligations "because of their

status as affected individuals," <u>i.e.</u>, because of the effects of the COVID-19 pandemic. 20 U.S.C. 1098bb(a)(1) and (2). That determination was supported by analysis and evidence showing that, because of the pandemic, such borrowers were at particularly high risk of delinquency and default once payment obligations restart. See pp. 9-11, <u>supra</u>.

Finally, the Act authorizes the type of relief that the Secretary granted. The provisions governing student-loan repayment obligations, cancellation, and discharge are "statutory or regulatory provision[s] applicable to the student financial assistance programs under title IV." 20 U.S.C. 1098bb(a)(1); see, <u>e.g.</u>, 20 U.S.C. 1807 (2018 & Supp. I 2019), 1087dd(g); 34 C.F.R. 682.402, 685.212. The Secretary thus properly "waiv[ed] or modif[ied]" those provisions to reduce the scope of vulnerable borrowers' payment obligations to ensure that they are not worse off in relation to their student-loan obligations because of the pandemic. 20 U.S.C. 1098bb(a)(1); App., <u>infra</u>, 28a, 32a.

b. Respondents' contrary arguments lack merit.

Respondents have asserted that the plan seeks to place borrowers in a better position, rather than prevent them from falling into a worse position because of the pandemic. See Resp. C.A. Mot. For Inj. Pending Appeal 19-20. But the evidence before the Secretary showed that without relief, lower-income borrowers were likely to experience increased default and delinquency rates <u>beyond</u> pre-pandemic levels. See App., <u>infra</u>, 37a-39a, 41a, 45a-46a;

pp. 9-10, supra. And the evidence further showed that reducing the principal owed by such borrowers by the proposed amounts, and reducing their monthly payments accordingly, would ameliorate the "risk that delinquency and default rates will rise above pre-pandemic levels." App., infra, 40a (emphasis added); p. 11, supra. The Secretary thus acted to "ensure" an enumerated objective of the Act: that borrowers "are not placed in a worse position financially in relation to" their loans "because of their status as affected individuals." 20 U.S.C. 1098bb(a)(2)(A).

Contrary to respondents' contention, see Resp. C.A. Mot. For Inj. Pending Appeal 21, the proposed relief directly targets those borrowers facing "a worse position financially" in relation to their student loans "because of" the invoked national emergency, 20 U.S.C. 1098bb(a)(2)(A) -- here, the COVID-19 pandemic. The evidence before the Secretary showed that borrowers with individual incomes below $125,000 or household incomes below $250,000 were most likely to have experienced job loss, non-student-loan debt delinquency, and other material hardships as a result of the pandemic, and thus face the highest risk of delinquency and default when student-loan obligations resume. See App., infra, 38a, 41a, 45a-47a; pp. 9-11, supra.

Respondents have also asserted that the HEROES Act limits the Secretary to "temporary" measures and thus bars debt relief. Resp. C.A. Mot. For Inj. Pending Appeal 20 (emphasis omitted). But the Act expressly authorizes the Secretary to "waive or modify any

statutory or regulatory provision applicable to the student financial assistance programs under Title IV." 20 U.S.C. 1098bb(a)(1) (emphasis added); see United States v. Gonzales, 520 U.S. 1, 5 (1997) ("[T]he word 'any' has an expansive meaning.") (citation omitted). To waive is "[t]o abandon, renounce, or surrender (a claim, privilege, right, etc.)" or "to give up (a right or claim) voluntarily," Black's Law Dictionary 1894 (11th ed. 2019); to modify is "[t]o make somewhat different" or "to reduce in degree or extent," id. at 1203. The Act thus authorizes the Secretary to eliminate or to reduce by some degree a borrower's obligation to comply with any Title IV student-aid provision so long as the other requirements of the statute are satisfied. Among the Title IV provisions eligible for waiver or modification are those that establish the obligation to repay loans and the circumstances in which such obligations can be cancelled or discharged. See p. 20, supra.

Previous invocations of the HEROES Act -- by both the Trump and Biden Administrations -- likewise had permanent and substantial economic effects. Most significantly, the previous COVID-19 relief measures, including the suspension of loan payments and interest accrual, are estimated to have cost the federal government $102 billion. See U.S. Gov't Accountability Office, Student Loans: Education Has Increased Federal Cost Estimates of Direct Loans by Billions due to Programmatic and Other Changes 14 (July 2022). The Department has estimated that these measures saved the

average borrower approximately $233 a month -- comparable to the $200 to $300 reduction in monthly payments that the Department estimates will be achieved by the challenged plan. See App., infra, 40a-41a. Moreover, because the months during which these measures were in effect count toward the income-driven repayment and public service loan forgiveness programs, these measures resulted in additional debt cancellation for borrowers eligible for those programs. See Office of Federal Student Aid, U.S. Dep't of Educ., COVID-19 Relief: Income-Driven Repayment (IDR) Plans, https://perma.cc/9EX9-W64J (last visited Nov. 14, 2022); Office of Federal Student Aid, U.S. Dep't of Educ., COVID-19 Relief: Public Service Loan Forgiveness (PSLF), https://perma.cc/M6NV-ENSU (last visited Nov. 14, 2022). Likewise, the Secretary in December 2020 expanded eligibility for defenses to repayment by allowing certain borrowers to have their claims evaluated under more beneficial standards, 85 Fed. Reg. at 79,862, which "will almost certainly reduce the amount of principal repaid by borrowers," OLC Op., 2022 WL 3975075, at *12. Pre-2020 invocations of the Act similarly resulted in forgiveness of affected borrowers' debt obligations. For example, the Secretary in 2003 waived the requirement that affected borrowers return overpayments of certain grant funds. 68 Fed. Reg. 69,312, 69,314 (Dec. 12, 2003).

Respondents have argued that some individual borrowers who qualify for relief may not be in a worse position financially as they enter repayment. See Resp. C.A. Mot. For Inj. Pending Appeal

20. But the Act makes clear that "[t]he Secretary is not required to exercise the waiver or modification authority * * * on a case-by-case basis." 20 U.S.C. 1098bb(b)(3). And Congress authorized the Secretary to issue relief "as may be necessary to ensure" that affected individuals are not worse off with respect to their student loans. 20 U.S.C. 1098bb(a)(2) (emphasis added); see Webster's Third New International Dictionary 756 (2002) ("ensure" means "to make sure, certain, or safe"). By authorizing the Secretary to act on a class-wide basis as may be necessary to make "sure" or "certain" that borrowers are not placed in a worse position financially, Congress anticipated just this sort of relief. See Weinberger v. Salfi, 422 U.S. 749, 776-777 (1975) (Congress may conclude "that the expense and other difficulties of individual[ized] determinations justif[y] the inherent imprecision of a prophylactic rule.").

Previous invocations of the HEROES Act have likewise afforded relief on a class-wide basis, see OLC Op., 2022 WL 3975075, at *4-*5; indeed, each invocation to pause payment obligations and interest accrual during the pandemic -- which respondents do not challenge -- provided relief for all borrowers with federally held student loans. See, e.g., 85 Fed. Reg. at 79,857; 87 Fed. Reg. at 61,512, 61,513-65,514 (Oct. 12, 2022). Here, by contrast, the Secretary limited eligibility for relief to the subset of affected borrowers most likely to be in a "worse position financially in

relation to" their student loans because of the pandemic. 20 U.S.C. 1098bb(a)(2)(A). No more is required.

c. Respondents have also invoked the major questions doctrine, see Resp. C.A. Mot. For Inj. Pending Appeal 17-19, but that doctrine provides no sound reason to depart from a straightforward application of the statutory text. In "extraordinary cases," this Court has required that an agency "point to 'clear congressional authorization'" -- rather than a more ordinary "textual basis" -- "for the power it claims." West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022); see id. at 2607-2609. But this case lacks the hallmarks of those extraordinary cases, and clear authorization exists in any event.

To start, the asserted agency power here is neither "'transformative'" nor "sweeping." West Virginia, 142 S. Ct. at 2608, 2610 (citation omitted). The Secretary's plan lies within the heartland of his statutory authority to administer federally held loans in a federal student-loan program. He does not claim any authority to "intrude[] into an area that is the particular domain of state law" or to impose novel requirements on regulated parties. Alabama Ass'n of Realtors, 141 S. Ct. at 2489. Indeed, unlike every case where this Court has invoked the major questions doctrine, this case does not involve any assertion of regulatory authority at all. Instead, it involves the exercise of authority over a government benefit program to lift otherwise applicable requirements on beneficiaries. And although the HEROES Act gives

the Secretary powerful tools to address the situations encompassed by the Act, it applies only in a limited set of circumstances (including a "national emergency," 20 U.S.C. 1098bb(a)(1)); authorizes relief only for a defined class of individuals, 20 U.S.C. 1098ee(2) (defining "affected individual"); to accomplish limited objectives (such as "ensur[ing]" that these individuals are not "placed in a worse position financially" in relation to their loans, 20 U.S.C. 1098bb(a)(2)(A)); through specific measures (waiving or modifying applicable student-loan requirements, 20 U.S.C. 1098bb(a)(1)). In keeping with that authority, the Secretary issued relief to ensure that vulnerable borrowers would not be worse off in relation to their student loans due to the pandemic. This case is thus far afield from cases like West Virginia, where the Court found that the agency action at issue would have required a complete reorganization of American energy infrastructure. 142 S. Ct. at 2604.

Relatedly, this case does not implicate the principle that "ancillary," West Virginia, 142 S. Ct. at 2602, or "cryptic" statutory provisions should not be read to "delegat[e]" to an agency a question's resolution, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000). The central provision of the HEROES Act, on its face, authorizes the Secretary to "waive or modify" federal student-loan provisions in "response to military contingencies and national emergencies," "[n]otwithstanding any other provision of law," 20 U.S.C. 1098bb(a)(1). Congress, moreover,

expressly contemplated the Secretary's exercise of discretion in fashioning appropriate relief, authorizing the Secretary to waive or modify "any" applicable Title IV statutory or regulatory provision "as the Secretary deems necessary." *Ibid.* (emphasis added); see *Webster* v. *Doe*, 486 U.S. 592, 600 (1988) (statutory authority to take actions an official "deem[ed] * * * necessary or advisable" conveyed "deference") (emphasis omitted). Congress underscored the point in the following paragraph, authorizing the Secretary to waive or modify any such provision "as *may* be necessary" to "ensure" the Act's objectives. 20 U.S.C. 1098bb(a)(2) (emphasis added); see *City of New York* v. *FCC*, 486 U.S. 57, 67 (1988) (holding that the phrase "'may be necessary'" confers "legitimate discretionary power" on the agency) (citation omitted).

Nor has the Secretary relied on a "long-extant statute" to claim "unheralded power." *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 324 (2014). Since its enactment in 2003, the Department has repeatedly invoked the HEROES Act to provide class-wide relief to certain borrowers, see pp. 7, 24-25, *supra*, and since March 2020, both the Trump and Biden Administrations have invoked the Act to issue relief to all borrowers, see pp. 8-9, 22-23, *supra*. The pandemic-related relief is estimated to have cost the government more than $100 billion. See pp. 22-23, *supra*. To the extent the Secretary's pre-pandemic actions under the Act were narrower in certain respects, that reflects the pandemic's unprecedented scope, not any established understanding of the Act's limits. It

is only natural that the Secretary's response to an unprecedented pandemic will go "further than what the Secretary has done in the past" in response to less severe or less widespread exigencies. Biden v. Missouri, 142 S. Ct. 647, 653 (2022) (per curiam).

Even if the major questions doctrine applied, it would not rescue respondents' claim. Section 1098bb(a) of the HEROES Act is not a "vague statutory grant," West Virginia, 142 S. Ct. at 2614; rather, Congress clearly authorized the Secretary to ensure that student-loan borrowers are not placed in a worse financial position because of a national emergency, and the Secretary complied with the Act's plain terms in affording a limited measure of relief to borrowers at risk because of COVID-19. See pp. 9-11, supra. The notion that Congress might not have foreseen such relief is likewise implausible. The Act specifically contemplates that the Secretary will provide financial relief to classes of borrowers by waiving loan-repayment provisions in these circumstances. And in pandemic-relief legislation enacted in 2021, when the possibility of forgiveness under the HEROES Act was already being publicly debated, Congress anticipated the possibility of such relief by adopting a "Special Rule for Discharges in 2021 Through 2025" that makes student-loan discharges during that period tax-free. See American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9675(a), 135 Stat. 185 (capitalization altered).

2. The Secretary's action was not arbitrary or capricious

The Administrative Procedure Act (APA), 5 U.S.C. 701 et seq., authorizes courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). "The APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies," FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1160 (2021), and "[i]t is not infrequent that the available data do not settle a regulatory issue," State Farm, 463 U.S. at 52. In assessing agency action, "[a] court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." FERC v. Electric Power Supply Ass'n, 577 U.S. 260, 292 (2016). Instead, to satisfy judicial scrutiny, an agency need only "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" State Farm, 463 U.S. at 43 (citation omitted). The Secretary's action readily satisfies that deferential standard.

a. The Secretary reviewed the Department's "[p]ast experience with student loan borrowers transitioning back into

repayment" after emergency-related forbearance; borrower surveys, economic studies, and credit analyses examining "current economic conditions facing borrowers" as a result of the pandemic; and evidence about the "substantial negative penalties" imposed on borrowers "who go delinquent or default on their student loans." App., infra, 37a-39a (capitalization altered; emphasis omitted); pp. 9-10, supra. The Secretary also considered whether "pandemic-connected loan discharge will reduce * * * delinquency and default rates"; the availability of "other options to reduce monthly payments"; the "amount of debt to discharge" to "mitigate the risk that delinquency and default rates will rise above pre-pandemic levels"; and "borrower income threshold[s]" to confine relief to those borrowers "mo[st] likely to experience delinquency and default." App., infra, 39a-48a (capitalization altered; emphasis omitted); pp. 10-11, supra.

The Secretary found that, when loan-repayment obligations resume, many lower-income borrowers "will be at heightened risk of loan delinquency and default" due to the pandemic's effects. App., infra, 32a. The Secretary further determined that "[a]dditional steps are needed to * * * ensure that borrowers are not in a worse position financially due to the pandemic with regard to their ability to repay their loans." Ibid. Accordingly, the Secretary determined -- as part and parcel of the decision to end forbearance and restart repayments -- that eligible borrowers with annual incomes under $125,000 ($250,000 for married couples) should be

afforded up to $10,000 in student-loan debt relief, and that Pell Grant recipients can receive up to $20,000. Ibid.

b. Respondents have argued that the Secretary failed to consider reasonable alternatives, overlooked reliance interests, and disregarded the statutory factors. Resp. C.A. Mot. For Inj. Pending Appeal 22-24. Those criticisms lack merit.

An agency need not consider "every alternative device and thought conceivable by the mind of man." DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915 (2020) (citation omitted). And here, the Secretary considered the availability of alternatives, such as income-driven repayment plans and continuing forbearance, App., infra, 39a -- and the Secretary in fact did temporarily continue forbearance, id. at 33a. But the Secretary reasonably determined that the Department's objectives would be best served by resuming payments rather than indefinitely continuing forbearance, and that additional action was necessary to address the difficulties lower-income borrowers would face when payments resume. Id. at 32a-33a.

Nor did the Secretary ignore cognizable reliance interests in issuing relief to certain federal borrowers. Respondents have no cognizable interest at all in this action, see pp. 15-18, supra, let alone "'serious'" or "significant reliance interests." Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 222 (2016) (citation omitted); see also Solenex LLC v. Bernhardt, 962 F.3d 520, 529 (D.C. Cir. 2020) ("[U]nproven reliance interests are not a valid

basis on which to undo agency action.”). This case bears no resemblance to Regents, where the Court found that the agency had ignored the interests of DACA recipients themselves in rescinding a program those recipients had relied upon to “embark[] on careers,” “purchase[] homes, and even marr[y] and ha[ve] children.” 140 S. Ct. at 1914.

The Secretary also considered the relevant statutory factors in determining the scope of relief. Evidence showed that borrowers with individual incomes under $125,000 are most at risk of being in a “worse position financially in relation to” their student loans as a result of the pandemic. 20 U.S.C. 1098bb(a)(2)(A); see App., infra, 41a-47a. And given that the COVID-19 disaster declaration began in 2020 and continued throughout 2021, it was reasonable to consider borrowers’ incomes from both years. See, e.g., App., infra, 45a (surveying evidence that lower-income borrowers were disproportionately impacted over the course of the pandemic). The Secretary has “‘wide discretion’ in making [such] line-drawing decisions,” National Shooting Sports Found., Inc. v. Jones, 716 F.3d 200, 214 (D.C. Cir. 2013) (citation omitted), particularly where the authorizing statute expressly contemplates such discretion, see pp. 26-27, supra.

C. The Eighth Circuit’s Universal Relief Was Overbroad

Even if respondents had standing and were likely to succeed on the merits, the court of appeals seriously erred in enjoining the plan on a universal basis. As Members of this Court have

recognized, such universal remedies are "inconsistent with longstanding limits on equitable relief and the power of Article III courts" and impose a severe "toll on the federal court system." Trump v. Hawaii, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring); see DHS v. New York, 140 S. Ct. 599, 599-601 (2020) (Gorsuch, J., concurring in the grant of stay).

Under Article III, "a plaintiff's remedy must be 'limited to the inadequacy that produced his injury.'" Gill v. Whitford, 138 S. Ct. 1916, 1930 (2018) (brackets and citation omitted). This Court has accordingly narrowed injunctions that "improper[ly]" "grant[ed] a remedy beyond what was necessary to provide relief to [the injured parties]." Lewis v. Casey, 518 U.S. 343, 360 (1996).

Principles of equity reinforce that constitutional limitation. A federal court's authority is generally confined to the relief "traditionally accorded by courts of equity" in 1789. Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 319 (1999). Such relief must "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). Thus, English and early American "courts of equity" typically "did not provide relief beyond the parties to the case." Hawaii, 138 S. Ct. at 2427 (Thomas, J., concurring).

Universal relief is irreconcilable with these limitations. By definition, it extends to parties who were not "plaintiff[s] in th[e] lawsuit, and hence were not the proper object of th[e

court's] remediation." Lewis, 518 U.S. at 358. And when a court awards relief to nonparties, it exceeds the relief "traditionally accorded by courts of equity" in 1789. Grupo Mexicano, 527 U.S. at 319; see Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 424-445 (2017) (detailing historical practice).

Universal relief also creates other legal and practical problems. It circumvents the rules governing class actions. See Fed. R. Civ. P. 23. It encourages forum shopping by empowering a single district court to nullify the decisions of other courts upholding the challenged agency action. See New York, 140 S. Ct. at 601 (Gorsuch, J., concurring in the grant of stay). And it operates asymmetrically: The government must prevail in every suit to keep its policy in force, but plaintiffs can derail a federal program nationwide with just a single lower-court victory. Ibid.

The prospect that a single lower-court decision can halt a government policy nationwide for years while the ordinary appellate process unfolds often leaves the Executive Branch with little choice but to seek emergency appellate relief. See New York, 140 S. Ct. at 600-601 (Gorsuch, J., concurring in the grant of stay). Emergency litigation in turn deprives the judicial system, including this Court, of the benefits that accrue when different courts grapple with complex legal questions in a considered, orderly dialogue. Ibid.

The Eighth Circuit granted a universal remedy because it could "discern no workable path" to crafting a narrower remedy that would "provide complete relief" to respondents. App., infra, 6a. But a workable path was obvious: The court of appeals could have simply enjoined the Secretary from discharging loans that are serviced by MOHELA. Such an injunction would have fully remedied the injury that Missouri asserts, namely, financial harm allegedly caused by the forgiveness of loans serviced by MOHELA. The Eighth Circuit also believed that "tailoring an injunction to address the alleged harms to the remaining States" would be too "complex." App., infra, 6a. But the Eighth Circuit did not find that any of the remaining States had standing or that they faced irreparable harm because of the plan. The Eighth Circuit accordingly had no basis to grant them any injunctive relief at all -- much less to grant universal relief in order to avoid the supposed complications of tailoring an injunction to their asserted harms.

II. THE EQUITIES FAVOR A STAY

The harm to the government and the public from enjoining the Secretary's action is significant. The HEROES Act reflects Congress's judgment that the Secretary must be able to act quickly and effectively to afford relief to student-loan borrowers affected by national emergencies. See pp. 6-7, 26-29, supra. Here, the Secretary has crafted relief to protect vulnerable borrowers from delinquency and default (and thus from wage garnishment, credit-report damage, and seizure of federal benefits, see Office

of Federal Student Aid, U.S. Dep't of Educ., Student Loan Delinquency and Default, https://perma.cc/4A6N-DA5Z; D. Ct. Doc. 42, at ¶ 6, Brown v. U.S. Dep't of Educ., No. 22-cv-908 (N.D. Tex. Nov. 15, 2022) (Kvaal Decl.)). The record includes ample evidence of the severity of the problem and the consequences of failing to act. See pp. 9-11, 30-31, supra. The injunction thus frustrates the government's ability to respond to the harmful economic consequences of a devastating pandemic with the policies it has determined are necessary. See Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (barring a sovereign from "employ[ing] a duly enacted statute to help prevent * * * injuries constitutes irreparable harm"); INS v. Legalization Assistance Project of L.A. County Fed'n of Labor, 510 U.S. 1301, 1305-1306 (1993) (O'Connor, J., in chambers) (emphasizing harm from "improper intrusion by a federal court into the workings of a coordinate branch of the Government").

Indeed, the Eighth Circuit's injunction (along with the Brown court's vacatur) threatens the Secretary's previously announced plan to resume student-loan payment obligations more broadly. The debt-relief measure was an integral component of the Secretary's simultaneous decision to restart such obligations after a lengthy period of forbearance during a devastating global pandemic. App., infra, 32a-33a; p. 9, supra. The injunction and vacatur thus place the Secretary in an unwarranted dilemma: Restart payments as previously planned -- and thereby invite the cascade of

delinquencies and defaults that prompted the Secretary to adopt the debt-relief measure in the first place -- or continue forbearance in some form, at significant cost to the government. Both options undermine the Secretary's chosen policy, and both risk confusion and uncertainty for affected borrowers. The Department of Education is currently considering how to address that problem. Given the urgency of providing guidance to borrowers who need to know whether they will be required to resume payments in a matter of weeks, the Department plans to make a public announcement as soon as practicable.

No matter what the Secretary does, however, the injunction and vacatur will leave vulnerable borrowers in untenable limbo. Eligible borrowers have been told that they will be able to obtain meaningful debt relief: for the average borrower, the relief contemplated by the plan would result in $200 to $300 reductions in monthly payments. Kvaal Decl. ¶ 6. Those amounts are substantial to anyone attempting to responsibly manage his finances -- and all the more so for lower-income borrowers eligible for relief under the plan. App., infra, 39a-41a. Yet because of the injunction, the borrowers most likely to default if payment obligations resume without some relief face prolonged uncertainty about the scope of their payment obligations and when those obligations will resume. So long as that uncertainty continues, many borrowers will lack information they need to decide whether they can afford to change

jobs, buy a home or a car, or assume other long-term financial obligations.

On the other side of the ledger, respondents would not face irreparable harm if the Eighth Circuit's injunction were vacated. Respondents have not even established the injury necessary for standing, see pp. 15-18, supra -- much less the irreparable injury necessary for the extraordinary remedy of an injunction. And even if the Secretary's plan did harm respondents, a universal injunction preventing the Secretary from implementing the plan anywhere in the Nation would be a disproportionate response to that harm. The balance of hardships therefore tips in favor of lifting the Eighth Circuit's injunction.

III. IN THE ALTERNATIVE, THE COURT MAY WISH TO TREAT THIS APPLICATION AS A PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

For the foregoing reasons, this Court should vacate the injunction pending appeal entered by the Eighth Circuit. If, however, the Court denies that relief, it may wish to construe this application as a petition for a writ of certiorari before judgment, grant the petition, and set this case for expedited briefing and argument this Term on the questions (1) whether respondents have Article III standing, and (2) whether the plan exceeds the Secretary's statutory authority or is arbitrary and capricious. Cf. United States v. Texas, cert. granted, No. 22-58 (oral argument scheduled for Nov. 29, 2022); Nken v. Mukasey, 555 U.S. 1042 (2008). The government would be prepared to brief this case on a

schedule that would allow argument during the Court's February 2023 sitting.

A writ of certiorari before judgment under 28 U.S.C. 2101(e) is an extraordinary remedy, but the issues presented by the Eighth Circuit's injunction of the Secretary's action are "of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. Congress expressly contemplated that national emergencies would necessitate student-loan relief for affected borrowers, and Congress specifically authorized the Secretary to grant such relief without delay. See pp. 6-7, 26-29, supra. Here, the Secretary determined that relief was necessary to ensure that borrowers do not default on their loans or enter delinquency when payments obligations resume, with potentially irreparable consequences for their credit and financial futures. See pp. 9-11, 20-21, supra. Yet the Eighth Circuit, in a six-page opinion that omits any discussion of the merits, enjoined the Secretary's plan nationwide. That injunction, so long as it remains in place, thwarts the Secretary's considered judgment in responding to the harmful economic consequences of a devastating pandemic. See pp. 35-38, supra. And it leaves borrowers in limbo, uncertain of the scope of their debt obligations. Ibid.

Absent certiorari before judgment, however, this Court likely could not hear the case this Term. Based on the briefing schedule set by the Eighth Circuit, the appeal will not be fully briefed

until February at the earliest, and there is no guarantee when the Eighth Circuit will rule. Postponing review until the Eighth Circuit enters judgment would thus likely delay the Court's resolution of this case until sometime in 2024, extending the uncertainty for vulnerable borrowers for an additional year or more. Certiorari before judgment would allow this Court to "promptly" consider the States' novel standing arguments and the legality of the plan after "full briefing and oral argument." See Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting).

CONCLUSION

This Court should vacate, or at minimum narrow, the injunction pending appeal entered by the court of appeals. If, however, the Court declines to vacate the injunction, it may wish to construe this application as a petition for a writ of certiorari before judgment, grant the petition, and set this case for expedited briefing and argument this Term.

Respectfully submitted.

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Solicitor General

NOVEMBER 2022