Nos. 22-506 & 22-535

In the Supreme Court of the United States

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

Petitioners,

V.

STATE OF NEBRASKA, ET AL.,

Respondents.

DEPARTMENT OF EDUCATION, ET AL.,

Petitioners,

V.

MYRA BROWN, ET AL.,

Respondents.

ON WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND FIFTH CIRCUITS

BRIEF FOR SAMUEL L. BRAY AND WILLIAM BAUDE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

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INTRODUCTION AND SUMMARY OF ARGUMENT

Amici believe that the administration's student loan forgiveness program is unlawful. But even if the executive branch has exceeded its authority under Article II, that does not permit the judicial branch to exceed *its* authority under Article III. "The case-or-controversy doctrines state fundamental limits on federal judicial power in our system of government." *Allen v. Wright*, 468 U.S. 737, 750 (1984). Any executive overreach is troubling. But "[t]here is no reason to magnify the separation-of-powers dilemma . . . by letting Article III judges—like jackals stealing the lion's kill—expropriate some of the power that [the Executive] has wrested from [Congress]." *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 525-26 (2009) (plurality opinion).

The standing theories that have been thrown at the wall in these cases are wrong, and many of them would have dangerous implications. Each theory

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[1] No counsel for a party authored this brief in whole or in part; and no such counsel, any party, or any other person or entity—other than amici curiae and their counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

falters on several grounds, but amici focus this brief on three points.

First, when it comes to standing, the critical question is who is the "proper party" to sue. This inquiry has been framed in different ways but the central aim is to ensure that the person most affected by the challenged action is before the court. Applying that principle here, Missouri has no standing to complain about the loan servicing fees that the Missouri Higher Education Loan Authority (MOHELA) might lose. Missouri set up MOHELA as a separate legal and financial entity, with the power to sue and be sued. MOHELA is far and away the most interested plaintiff, with Missouri's claims being merely derivative of MOHELA's. MOHELA has chosen not to bring a lawsuit, and as the "proper party" to the suit, its decision ought to carry the day.

Second, there is danger in countenancing extravagant theories of state standing that have exploded in the wake of this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). In the last decade, state attorneys general have relied on that case's underexplained language about "special solicitude," *see id.* at 520, producing a barrage of suits with tenuous standing theories against administrations of the opposing political party. Overbroad readings of that case should be forcefully rejected by this Court, lest state standing be allowed to transform the role of the federal judiciary.

Third, there is a fundamental disconnect between the states' weak claim for standing and the broad remedy they obtained—a national injunction. That disconnect is incompatible with the traditional limits of equitable jurisdiction and with this Court's instruction that standing must be demonstrated for

each form of relief. The Court has not granted review specifically on the scope of the injunction, and may not wish to consider all aspects of that question in this case. But the scope of the relief is relevant, whether as part of the standing inquiry or as part of the broader questions of judicial power the Court should consider. Not only did the states seek and obtain a national injunction—a remedy lacking any traditional basis in equity—but they obtained this exceedingly broad remedy with an unusually weak basis for standing. That combination is at odds with basic principles of standing and equity jurisprudence that are applicable in the federal courts.

ARGUMENT

Article III gives the federal judiciary, including this Court, the "judicial Power" to be exercised only in deciding "Cases" and "Controversies." Those terms, and the justiciability doctrines expounding them, help define "the judiciary's proper role in our system of government." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341-42 (2006) (citation omitted). Standing "is perhaps the most important of these doctrines." *Allen v. Wright*, 468 U.S. 737, 750 (1984). As this Court recently reiterated, "[t]he 'law of Art. III standing is built on a single basic idea—the idea of separation of powers.'" *TransUnion LLC v. Ramirez,* 141 S. Ct. 2190*,* 2203 (2021) (citation omitted). As such, "[r]elaxation of standing requirements is directly related to the expansion of judicial power." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408-09 (2013) (quoting *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)). Because "[f]ederal courts do not possess a roving commission to publicly opine on every legal question," nor do they

"exercise general legal oversight of the . . . Executive Branch[]," the Court must decline "to publicly opine" on the "legal question" here. *TransUnion*, 141 S. Ct. at 2203.

I. THE CONSTITUTION REQUIRES THE PROPER PARTY TO BRING SUIT

Article III standing requires the proper party to bring suit. Missouri primarily argues it has standing to challenge the loan forgiveness program because MOHELA stands to lose loan servicing fees if federal student loans are forgiven. Missouri is not the proper party to pursue relief for MOHELA's lost loan servicing fees.

A. Article III Standing Requires The Proper Party To Bring Suit

Distilled to its core, "[t]he fundamental inquiry that standing derives from is who is a 'proper party' to a given lawsuit." William Baude, *Standing in the Shadow of Congress*, 2016 Sup. Ct. Rev. 197, 228 (2017); *see* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine*, 102 Mich. L. Rev. 689, 695 (2004) ("The concept of proper parties is central to standing doctrine, and it may also infuse notions of a 'Case.'"). When the proper party is bringing the lawsuit, courts can act judicially, and are not transformed into "publicly funded forums for the ventilation of public grievances or the refinement of judicial understanding." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982).

The "proper party" inquiry is deeply rooted in the courts. "[E]arly American courts did not use the term 'standing' much . . . . But eighteenth- and nineteenth-century courts were well aware of the need for proper

parties . . . ." Woolhandler & Nelson, *supra*, at 691. This principle "cut across various causes of action," and was understood both as a general principle of law and equity and as a constitutional principle. *Id.* at 692. So to ask whether the plaintiffs have standing to challenge executive action is to ask whether any of them is the "proper party," in the constitutional sense.

In a similar vein, modern standing doctrine frequently depends on whether the plaintiff is the right one to sue, relatively speaking. The underpinning of many modern standing decisions, argues Professor Richard Re, is the "most interested plaintiff rule." Richard M. Re, *Relative Standing*, 102 Geo. L.J. 1191, 1196 (2014). Standing often is "made available on a *relative* basis," taking into account "where the particular plaintiff before the court stands as compared" to other potential plaintiffs, *id.* at 1195-96, with standing often being awarded to "plaintiffs with the greatest stake in obtaining the requested remedy," *id.* at 1196. For instance, in *Clapper* the Court denied standing and concluded its analysis by pointing to other plaintiffs who would have "a stronger evidentiary basis for establishing standing than do respondents in the present case." 568 U.S. at 421-22. Though not the only basis for denying standing, the Court's decision to draw attention to this point reflects the continuing influence of the fundamental principle of proper parties.

Whether under modern doctrine or more classical terminology, the federal courts have the power to issue the requested relief only if it is being requested by the correct plaintiffs. In this respect, "standing also reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order." *Valley Forge*, 454 U.S. at 473.

In cases involving state plaintiffs, across various doctrines, this Court has repeatedly scrutinized whether a state is the proper constitutional party. For instance, *Oklahoma ex rel. Johnson v. Cook* held that Oklahoma could not invoke state statutory authority to sue the shareholder of a state bank. 304 U.S. 387, 395-96 (1938). And *New Hampshire v. Louisiana* rejected the states' attempt to prosecute debts that really belonged to their citizens. 108 U.S. 76, 91 (1883); *cf. South Carolina v. North Carolina*, 558 U.S. 256, 277-78 (2010) (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("To invoke [original] jurisdiction, a State 'must, of course, represent an interest of her own and not merely that of her citizens or corporations.'" (quoting *Arkansas v. Texas*, 346 U.S. 368, 370 (1953); and citing *Kansas v. Colorado*, 533 U.S. 1, 8-9 (2001); *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (per curiam)). As Woolhandler and Nelson put it, if "a state . . . could not point to any litigable interest of its own, the Court did not view it as a proper party to a genuine case or controversy, even if state law purported to let the state bring suit." Woolhandler & Nelson, *supra*, at 716.

B. Missouri Is Not The Proper Party To Bring This Suit

The strongest argument for standing made by any of the plaintiffs in these cases is the state of Missouri's argument that it has standing to challenge the loan forgiveness program because MOHELA is a state entity that will lose loan servicing fees if federal student loans are forgiven.

But the state of Missouri is not the "proper party" to bring this lawsuit. MOHELA was established with

financial and legal independence from the state of Missouri. For starters, MOHELA has the power "[t]o sue and be sued . . . in any court having jurisdiction of the subject matter and of the parties." Mo. Rev. Stat. § 173.385.1(3). In earlier litigation, MOHELA conceded that Missouri is not legally liable for any judgments against it. *Dykes v. MOHELA*, No. 4:21-CV-00083, 2021 WL 3206691, at *3 (E.D. Mo. July 29, 2021). MOHELA also has the power "[t]o issue bonds or other forms of indebtedness" and "[t]o acquire, hold, and dispose of personal property." Mo. Rev. Stat. § 173.385.1(6), (14). And MOHELA has the power to contract with any government agency, person, or corporation, *id.* § 173.385.1(15), which is how it entered into multiple contracts with the Department of Education to service federal student loans.

As to MOHELA's assets, none are "considered to be part of the revenue of the state"; none are "subject to appropriation by the general assembly"; and, other than what MOHELA is required to contribute to the Lewis and Clark discovery fund, none "shall be required to be deposited into the state treasury." *Id.* § 173.425. That is, "the vast majority of MOHELA's funds are segregated from state funds and controlled exclusively by MOHELA." *Dykes,* 2021 WL 3206691, at *4.

The parties have discussed MOHELA partly through the "arm of the state" doctrine. It is disputed whether, under various multifactor tests, these facts would be sufficient to establish that MOHELA is not an "arm of the state" for the purposes of sovereign

immunity.[2] But under the more traditional approach "prevailing until the 1970s," which was described by Judge Stephen Williams, the fact that MOHELA has the capacity to sue and be sued would establish that it is not an arm of the state. *See Puerto Rico Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 881 (D.C. Cir. 2008) (Williams, J., concurring). Perhaps that insight from Judge Williams should be enough to resolve the standing inquiry as well.

But even putting aside how the "arm of the state" doctrine is formulated, MOHELA, not Missouri, is the proper party in this case. Any dispute about the loan cancellation is between MOHELA and the federal executive, and not between the state of Missouri and the federal executive. MOHELA's ability to sue and be sued means that it can vindicate its own injuries if it chooses. To the extent that the loss of servicing fees is a cognizable injury, MOHELA is far and away the most interested plaintiff, and Missouri's claim is entirely derivative. For whatever reason—whether politics or mission or something else—MOHELA has chosen not to do so, and the federal courts should be skeptical of another party's attempt to force that interest into federal court.

Additionally, it is salient that MOHELA alone is responsible for any judgment against it, and that it alone is the direct beneficiary of any judgment for it. Who would be bound or benefitted by the judgment

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[2] *Compare Dykes*, 2021 WL 3206691, at *2-4, *and Perkins v. Equifax Info. Servs., LLC*, No. SA-19-1281-FB, 2020 WL 13120600, at *5 (W.D. Tex. May 1, 2020), *with Good v. U.S. Dep't of Educ.*, No. 21-CV-2539, 2022 WL 2191758, at *3 (D. Kan. June 16, 2022), *and Gowens v. Capella Univ., Inc.*, No. 4:19-CV-362, 2020 WL 10180669, at *4 (N.D. Ala. June 1, 2020).

was another central question in the proper party inquiry, especially when the government was litigating. Woolhandler & Nelson, *supra*, at 723-24. MOHELA's ability to vindicate its own injuries, buttressed by its financial independence regarding judgments, demonstrates that MOHELA, not Missouri, is the "proper party" to bring this suit.[3]

II. THIS COURT SHOULD REJECT EXTRAVAGANT THEORIES OF STATE STANDING

The states have put forward other, vaguer, theories of standing. Those theories are both weaker as a matter of law and more dangerous if accepted. The states' more extravagant theories are emblematic of the broader trend where states are taking advantage of vague language in *Massachusetts v. EPA*, 549 U.S. 497 (2007), to challenge any federal action with which they disagree. Unless this Court wishes to sit in constant judgment of every major executive action—which is not its constitutional role—it is time to say "stop."

A. *Massachusetts v. EPA*'s Reference to "Special Solicitude" Has Emboldened States

In *Massachusetts v. EPA*, the Court concluded that Massachusetts had standing to challenge the EPA's

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[3] By contrast, in *Arkansas v. Texas* (cited in Resp. to Appl. to Vacate Inj. 15, *Biden v. Nebraska*, No. 22A444), the Court noted that "the State owns all the property used by the University," 346 U.S. at 370, and that "a suit against the University is a suit against the State," *id.*, and cited authority noting that the University was "not authorized by the statutes to sue and be sued," *Allen Eng'g Co. v. Kays*, 152 S.W. 992 (Ark. 1913) (cited in 346 U.S. at 370 n.9).

denial of a petition seeking to have the agency regulate emissions of certain greenhouse gases. *Id.* at 519-20. In so concluding, the Court announced that "the Commonwealth is entitled to special solicitude in our standing analysis." *Id.* at 520. Although the Court made passing mention of "Massachusetts' stake in protecting its quasi-sovereign interests," *id.*, it did little to explain the scope and contours of the "special solicitude" due to a state in the standing analysis.

The dissent—authored by Chief Justice Roberts and joined by Justices Scalia, Thomas, and Alito—accused the Court of inventing a new standing doctrine out of whole cloth. "Relaxing Article III standing requirements because asserted injuries are pressed by a State," the dissent argued, "has no basis in our jurisprudence, and support for any such 'special solicitude' is conspicuously absent from the Court's opinion." *Id.* at 536. On a practical level, the dissent also worried that the newly-minted doctrine of special solicitude would make "standing seem a lawyer's game, rather than a fundamental limitation ensuring that courts function as courts and not intrude on the politically accountable branches." *Id.* at 548.

The dissent's practical concerns have proved prophetic. In the years since *Massachusetts v. EPA*, the number of lawsuits brought by state attorneys general challenging actions by the federal government has skyrocketed. *See generally* Paul Nolette & Colin Provost, *Change and Continuity in the Role of State Attorneys General in the Obama and Trump Administrations*, 48 Publius 469, 473-74 (2018), https://doi.org/10.1093/publius/pjy012 (noting a dramatic rise in such lawsuits during the Obama and Trump administrations). The pattern has become familiar and predictable. When a Republican

administration is in power, attorneys general from Democratic states line up (most often as a group) to challenge any politically controversial act by the federal government; and when a Democratic administration is in power, the roles are reversed. Republican state attorneys general initiated around 50 lawsuits against the Obama Administration; Democratic state attorneys general initiated over 130 lawsuits against the Trump Administration; and Republican state attorneys general have already initiated close to 50 lawsuits against the Biden Administration.[4]

The Court is familiar with this dynamic, as states have repeatedly pressed extreme theories of standing, pointing to the "special solicitude" they are due. *See, e.g.*, *United States v. Texas*, No. 22-58. It is almost as though states have been proceeding on the assumption that *Massachusetts v. EPA* somehow announced "a bright-line rule that states *always* have standing to sue the federal government." Bradford Mank & Michael E. Solimine, *State Standing and National Injunctions*, 94 Notre Dame L. Rev. 1955, 1969 (2019). Whether the Court wishes to officially abandon *Massachusetts v. EPA*, or simply to clarify its limits, the Court should not resolve this case in a way that encourages this dynamic.

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[4] State Litigation and AG Activity Database, *Multistate Litigation Database*, https://attorneysgeneral.org/list-of-lawsuits-1980-present/ (last visited Jan. 9, 2023).

B. Some Of The States' Theories Of Standing Are Emblematic Of Unchecked "Special Solicitude"

The states' other theories of standing in this case demonstrate this problem. They are contrary to basic principles of standing and so they implicitly depend on a boundless solicitude of the states' desire to sue.

1. For instance, an alternative version of the MOHELA theory claims that the state is injured because loan forgiveness reduces the chances MOHELA will make statutorily-required contributions to the Lewis and Clark discovery fund, which is used to make capital improvements at higher education institutions in Missouri. *See* Mo. Rev. Stat. §§ 173.385, 173.392. Black-letter standing law requires a plaintiff seeking injunctive relief to point to a future injury that is "certainly impending," *Clapper*, 568 U.S. at 410, or at the very least, for which there is "substantial risk." *Id.* at 414 n.5 (citation omitted). Missouri's alleged injury is far too speculative to meet either standard.

For one thing, the number of federal accounts MOHELA services for the Department of Education can fluctuate wildly from year to year, and indeed it almost doubled last year.[5] It is accordingly too soon to tell whether any of MOHELA's revenue losses will be offset.

For another, just a quick reading of MOHELA's latest financial statement reveals that it has already

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[5] MOHELA Financial Statements, FY 2022 ("Mohela FY 2022 Statement") at 4 (2022), https://www.mohela.com/DL/common/publicInfo/financialStatements.aspx (accounts went to 5.2 million from 2.7 million, increasing MOHELA servicing fees to $107.5 million from $69.9 million).

received numerous extensions for payment to the Lewis and Clark discovery fund and that, as of June 30, 2022 (without any mass loan forgiveness), "payment of the unfunded amount has not been deemed probable."[6] So it is far from certain, or even a substantial risk, that loan forgiveness is going to be the reason MOHELA misses a payment.

More fundamentally, the MOHELA-misses-a-check theory of standing is too attenuated: Missouri will suffer injury, the theory goes, because MOHELA owes Missouri money, and if MOHELA loses revenue, it will then be less likely to make required payments. That theory would not be taken seriously in ordinary contexts. By that logic, any lender would have Article III standing to sue the government to enjoin enforcement of any regulation that reduced the income of any of its borrowers. And there is no reason why this theory of standing would be limited to government regulation. If one friend owed another money, the lender would seemingly be able to litigate any of his friend's interests, from wrongful termination to a divorce settlement. Such a theory should not be taken more seriously here.

2. MOHELA aside, four of the six respondent states—Nebraska, Iowa, Kansas, and South Carolina—have argued that loan forgiveness would reduce their tax revenue. The theory is fairly convoluted. Those states have chosen to adopt the federal Adjusted Gross Income (AGI) as a baseline for calculating state income tax. In general, student loan discharge is included in federal AGI, 26 U.S.C.

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[6] Mohela FY 2022 Statement 21 (explaining why MOHELA does not record the unfunded amount as a liability).

§ 61(a)(11), but Congress passed a law in 2021 excluding from that rule any discharge occurring before January 1, 2026. *See id.* § 108(f)(5). Without loan cancellation, the states argue, a substantial number of student loans stand to be discharged after 2025, in which case they will be included in the federal AGI, and therefore subject to state income tax. But if the federal government cancels loans now, that would reduce the number of loans that stand to be discharged after 2025, which would, in turn, reduce the income subject to state income tax.

Even if we grant the assumptions undergirding this theory, it still fails. It directly contradicts the teaching of *Pennsylvania v. New Jersey* that "[n]o state can be heard to complain about damage inflicted by its own hand." 426 U.S. 660, 664 (1976). In that case, Pennsylvania argued that it was injured by an allegedly unconstitutional New Jersey tax that New Jersey collected from nonresidents for New Jersey-derived income. *Id.* at 662-63. Pennsylvania's theory of injury was that New Jersey's tax diverted revenue from Pennsylvania's treasury because Pennsylvania allowed a tax credit for income tax its residents paid to other states. *Id.* at 664. In a consolidated case, Maine, Massachusetts, and Vermont challenged a New Hampshire tax on a similar theory. The Court soundly rejected those theories, noting that "[t]he injuries to the plaintiffs' fiscs were self-inflicted, resulting from decisions by their respective state legislatures." *Id.* After all, "[n]othing required Maine, Massachusetts, and Vermont to extend a tax credit to their residents for income taxes paid to New Hampshire, and nothing prevents Pennsylvania from withdrawing that credit for taxes paid to New Jersey." *Id.* The same, of course, goes for the states' theory

here. Nothing requires Nebraska, Iowa, Kansas, and South Carolina to adopt the Federal AGI as the baseline for calculating state taxes, and nothing stops them from adopting a carveout for loan discharges. Any injury flowing from not making those choices is self-inflicted and cannot support Article III standing.

This tax revenue theory is also representative of another common feature of overreaching state standing arguments: the invocation of "indirect fiscal burdens" caused by government action. "But," as Chief Judge Sutton asked, "why would that humdrum feature of a regulation count as a uniquely sovereign harm? Most regulations have costs. A State has no more, and no less, reason to fear harms to its bottom line from federal regulations than a person or business does." *Arizona v. Biden*, 40 F.4th 375, 386 (6th Cir. 2022). To say otherwise would "make a mockery . . . of the constitutional requirement of case or controversy." *Id.* (omission in original) (quoting Alexander M. Bickel, *The Voting Rights Cases*, 1966 Sup. Ct. Rev. 79, 89 (1966)).

3. Respondent states have also argued that they have standing to vindicate their quasi-sovereign interests in the health and well-being of their residents. This type of claim, sometimes referred to as a *parens patriae* claim, is also a mainstay in litigation by state attorneys general against the federal government. These claims are foreclosed by canonical precedent.

Massachusetts v. Mellon said:

> It cannot be conceded that a state, as parens patriae, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the state, under some circumstances, may sue in that capacity for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the federal government. In that field it is the United States, and not the state, which represents them as parens patriae, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.

262 U.S. 447, 485-86 (1923) (citation omitted). In other words, "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982); *see also Florida v. Mellon*, 273 U.S. 12, 18 (1927). The dissent thought that those cases doomed the state claim in *Massachusetts v. EPA*. 549 U.S. at 539. And while the Court did not agree, that is only because the majority perceived "a critical difference between allowing a State 'to protect her citizens from the operation of federal statutes' (which is what [*Massachusetts v.*] *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do)." *Id.* at 520 n.17 (citation

omitted). That distinction provides no help to the states here.[7]

III. THE REMEDY IN THIS CASE REINFORCES THE STATES' LACK OF STANDING

"Equity is essentially a system of remedies." D.E.C. Yale, *Introduction*, to *Lord Nottingham's "Manual of Chancery Practice" and "Prolegomena of Chancery and Equity*" 16 (D.E.C. Yale ed., 1965). But the potency of equitable remedies has consequences for the circumstances in which courts will grant them. In particular, equity has never had a sharp disjuncture between what it takes to get into equity (broadly, "standing") and what the plaintiff can get out of equity (broadly, "remedies"). The plaintiff's grievance and the plaintiff's remedy are instead connected. The broader and more intense the relief requested, the stronger the plaintiff's showing of harm must be. These principles of traditional equity have a counterpart in the Article III requirement that "'a plaintiff must demonstrate standing . . . "for each form of relief"' that is sought." *Davis v. FEC*, 554 U.S. 724, 734 (2008) (citation omitted).

The states' basis for standing in these cases is especially tenuous, while the remedy they sought and obtained—a national injunction—is especially broad. Whether viewed from the perspective of equitable principles or the requirement of standing for each form of relief, plaintiffs utterly lack standing for the remedy they received.

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[7] To be clear, the non-state respondents in No. 22-535 also lack standing, substantially for the reasons set forth in the Brief for the Petitioners at 31-33.

A. Under Both Article III Standing Doctrine And Equitable Principles, A More Intense Remedy Demands A Stronger Demonstration Of Standing

The connection between standing and remedy can be considered as a matter of Article III standing doctrine or as a matter of traditional equitable principles. Either way, the conclusion is the same: stronger remedies require stronger standing.

First consider Article III. It is often said that "standing is not dispensed in gross." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (citation omitted). Seen from the standing end of litigation, that proposition means that "'a plaintiff must demonstrate standing . . . "for each form of relief"' that is sought." *Davis*, 554 U.S. at 734 (citation omitted). Seen from the remedy end of litigation, that proposition means that "the remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (citing a case about equitable remedies, *Missouri v. Jenkins*, 515 U.S. 70, 88-89 (1995)); *see also Gill*, 138 S. Ct. at 1934 ("A plaintiff's remedy must be tailored to redress the plaintiff's particular injury.").

One implication is that the slight injuries that might suffice to establish standing for nominal damages are not enough to establish standing for an injunction, and the broader the injunction, the stronger the showing of injury needed. One case that illustrates this point is *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). The district court issued a preliminary injunction that prohibited the use of certain chokehold techniques by police officers, as

well as requiring police training, record-keeping, and reporting. *Id.* at 99-100. This Court did not ask whether Mr. Lyons had been injured in the past or whether he faced any conceivable risk in the future, but rather it scrutinized "Lyons' standing to seek the injunction requested." *Id.* at 105. He had none because there was a remedy available at law and his fears of future injury were too speculative. *See id.* at 106 n.7 (rejecting the view, expressed in Justice Marshall's dissent, that because Mr. Lyons had standing to recover damages, there was standing to obtain "the scope of the injunction that Lyons prayed for"); *id* at 108 ("[I]t is surely no more than speculation to assert . . . that Lyons himself will again be involved in one of those unfortunate instances . . . .").

Next consider equitable principles. As this Court has often reiterated, the Judiciary Act of 1789 grants to the federal courts the equitable jurisdiction that was possessed by the English Court of Chancery. *See, e.g.*, *Marshall v. Marshall*, 547 U.S. 293, 308 (2006) ("[T]he equity jurisdiction conferred by the Judiciary Act of 1789 . . . , which is that of the English Court of Chancery in 1789 . . . ." (first omission in original) (quoting *Markham v. Allen*, 326 U.S. 490, 494 (1946)); *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) ("We have long held that '[t]he "jurisdiction" [the Judiciary Act of 1789] thus conferred . . . is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.'" (first alteration and omission in original) (quoting *Atlas Life Ins. Co. v. W.I. S., Inc.*, 306 U.S. 563, 568 (1939)));

Gordon v. Washington, 295 U.S. 30, 36 (1935) ("From the beginning, the phrase 'suits in equity' [in the Judiciary Act of 1789] has been understood to refer to suits in which relief is sought according to the principles applied by the English Court of Chancery before 1789, as they have been developed in the federal courts."); *see also Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 535 (2021) ("The equitable powers of federal courts are limited by historical practice."). It is therefore beyond dispute that federal courts today need to trace their exercise of equity jurisdiction to traditional equitable principles.

And what do traditional equitable principles say about the relationship between the plaintiff's basis for equitable jurisdiction and the relief granted?

> For legal claims, justiciability is a threshold, and once through the door the plaintiff is able to obtain remedies without much consideration of whether the plaintiff just barely made it over the threshold. But in equity it all connects—the broader and deeper the remedy the plaintiff wants, the stronger the plaintiff's story needs to be.

Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 Notre Dame L. Rev. 1763, 1797 (2022); *see also id.* at 1792-95, 1798.

That point can be illustrated by this Court's own cases. It is not an accident that the cases in which this Court has emphasized the standing–remedy connection—cases like *Lyons*, *Lewis*, and *Gill*—have almost always involved equitable remedies. As this Court said in *Lyons*, "case or controversy considerations obviously shade into those determining whether the complaint states a sound

basis for equitable relief." 461 U.S. at 103 (citation omitted); *see also id.* at 111. More generally, this Court's cases regarding standing overwhelmingly involve equitable remedies. *See* Ernest A. Young, *Standing, Equity, and Injury in Fact*, 97 Notre Dame L. Rev. 1885, 1906 (2022) ("[T]he familiar landmarks of standing doctrine—*Data Processing*, *Warth v. Seldin*, *Allen v. Wright*, *Lujan v. Defenders of Wildlife*—all involved equitable relief.").

The reason the Article III doctrine and the equity doctrine coincide on the standing–remedy connection is that they reflect a common understanding of the judicial role. Judges decide cases for parties, and give remedies to those parties. They do not dispense standing "in gross," *Gill*, 138 S. Ct. at 1934 (citation omitted); and they do not "enjoin the world at large," *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930) (L. Hand, J.). And equitable doctrines, even though not designed for our constitutional system, often reinforce constitutional principles. *See Younger v. Harris*, 401 U.S. 37, 44 (1971) ("The doctrine may originally have grown out of circumstances peculiar to the English judicial system and not applicable in this country, but its fundamental purpose of restraining equity jurisdiction within narrow limits is equally important under our Constitution . . . .").[8]

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[8] The Eighth Circuit decision below appealed to the "principle[] of equity jurisprudence" that the injunction should match the "extent of the violation." JA166 (citation omitted). That language allows the remedy to be untethered from the harm to the plaintiff and be attached to "the violation" at large. But there is no such principle. The authority cited for that principle is *Rodgers v. Bryant*, 942 F.3d 451 (8th Cir. 2019), an Eighth Circuit decision relying on this Court's decision in *Califano v. Yamasaki*, 442 U.S. 682 (1979). *Rodgers*, 942 F.3d at

The trends of the last decade undermine this case-focused understanding of the federal judicial role. These trends in particular are (i) exceedingly broad claims of state standing and (ii) exceedingly broad equitable remedies, especially national injunctions. And both trends are exacerbated by the failure of lower courts to require injunction bonds. *But see* Fed. R. Civ. P. 65(c). These, if routinely required, would strongly encourage plaintiffs seeking preliminary injunctions to align the scope of those injunctions with their own injuries.

In short, even though this Court has used various rubrics for its analysis—Article III standing, traditional equitable principles, and even prudential standing—it has consistently considered the connection between the basis for standing and the scope of the remedy. The lesson is that standing and remedy can and should be brought into equilibrium: either by denying standing to obtain an excessively broad remedy, or else by narrowing the remedy to match the standing.

B. The States' Tenuous Basis For Standing Cannot Support The Extraordinarily Broad Equitable Remedy In This Case

The connection needed between standing and remedy demolishes the states' case. Their basis for standing is tenuous, as analyzed in Parts I and II of this brief. And their remedy is a national injunction.

The national injunction is the broadest remedy known to contemporary American law. It is a remedy with no basis in traditional equity. *See Dep't of*

457-58. But *Rodgers* misunderstood *Califano*, as made clear by Judge Stras in his separate opinion in that case. *Id.* at 467 n.10 (Stras, J., concurring in part and dissenting in part).

Homeland Sec. v. New York, 140 S. Ct. 599, 600-01 (2020) (Gorsuch, J., concurring in the grant of stay); *Trump v. Hawaii*, 138 S. Ct. 2392, 2425-29 (2018) (Thomas, J., concurring). *See generally* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417 (2017).

But despite its breadth and novelty, in less than a decade, the national injunction has reshaped the relationship between the federal judiciary and the federal executive. An increasing number of federal judges have warned about the deleterious effects of the national injunction. *See Arizona*, 40 F.4th at 394-98 (Sutton, C.J., concurring); *Feds for Med. Freedom v. Biden*, 25 F.4th 354, 360 (5th Cir. 2022) (Higginson, J., dissenting); *Georgia v. President of the United States*, 46 F.4th 1283, 1303-08 (11th Cir. 2022) (Grant, J., joined separately by Anderson, J., with Edmondson, J., concurring in the result); *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 255-63 (4th Cir.) (Wilkinson, J., joined by Neimeyer, J.), *reh'g en banc granted and vacated*, 981 F.3d 311 (4th Cir. 2020) (mem.); *Doe #1 v. Trump*, 957 F.3d 1050, 1094-98 (9th Cir. 2020) (Bress, J., dissenting); *Ramos v. Wolf*, 975 F.3d 872, 902-06 (9th Cir. 2020) (R. Nelson, J., concurring); *Rodgers v. Bryant*, 942 F.3d 451, 460-65 (8th Cir. 2019) (Stras, J., concurring in part and dissenting in part); *California v. Azar*, 911 F.3d 558, 583 (9th Cir. 2018) (Wallace, J., joined by Graber, J.); *City of Chicago v. Sessions*, 888 F.3d 272, 296-99 (7th Cir.) (Manion, J., concurring in the judgment in part and dissenting in part), *reh'g en banc granted in part and vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, Nos. 17-2991, 18-2649, 2018 WL 4268814 (7th Cir. Aug. 10, 2018); *see also Doster v. Kendall*, 54 F.4th 398, 439 (6th Cir.

2022) (Murphy, J., joined by Kethledge & Bush, JJ.) ("If, as the rising chorus would seem to suggest, courts eventually scrap these universal remedies, Rule 23(b)(2)'s importance will reemerge.").

In this case, the questions the Court has granted certiorari to consider are standing and the merits. So it may well choose not to address specifically the scope of the remedy. But even so, the breadth of the remedy should affect its scrutiny of the states' basis for standing. *See NLRB v. P*I*E* Nationwide, Inc.*, 894 F.2d 887, 893 (7th Cir. 1990) (Posner, J.) ("The principles of equitable jurisprudence are not suspended merely because a government agency is the plaintiff."). The narrow and derivative basis for standing cannot support the massive remedy the states sought and obtained.

CONCLUSION

The judgment of the United States District Court for the Eastern District of Missouri should be affirmed. The judgment of the United States District Court for the Northern District of Texas should be reversed.

Respectfully submitted,

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January 11, 2023