No. 22A489

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES DEPARTMENT OF EDUCATION, ET AL.,
APPLICANTS

v.

MYRA BROWN, ET AL.

REPLY IN SUPPORT OF APPLICATION TO STAY THE JUDGMENT ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

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This Court has already granted certiorari to consider the lawfulness of the Secretary of Education's plan to provide critical relief to student-loan borrowers suffering the continuing economic fallout from an unprecedented pandemic. See Biden v. Nebraska, No. 22-506. This case concerns a second nationwide order preventing the Secretary from implementing the plan and providing much-needed relief to millions of borrowers. Respondents agree (Resp. 1, 27-29) that the Court should at minimum grant certiorari and hear this case along with Nebraska. But respondents' submission further confirms that the better course would be to simply grant an immediate stay. Respondents do not seriously defend the district court's extraordinary decision to raise and decide a

substantive claim they never pressed. Instead, respondents urge this Court to take up the procedural claim that the district court rejected. But that contrived claim does not warrant this Court's review: The district court correctly rejected it; respondents identify no other court that has ever accepted such a claim; and respondents' challenge to the district court's procedural holding does not satisfy this Court's ordinary criteria for certiorari, let alone present a legal issue "of such imperative public importance" as to warrant "immediate determination in this Court." Sup. Ct. R. 11. Review of respondents' novel and meritless procedural claim -- and their standing to raise such a claim -- would add nothing but needless complications to this Court's consideration of the issues presented in Nebraska. In this posture, granting an immediate stay would not reflect any determination on the merits of the Secretary's plan -- which is one of the questions presented in Nebraska -- but would instead simply reflect that the district court erred in deeming this case an appropriate vehicle to consider that issue when respondents never asserted a standalone substantive claim and plainly lacked standing to do so.

I. RESPONDENTS DO NOT DEFEND THE DISTRICT COURT'S DECISION

Respondents scarcely defend the district court's decision to raise and resolve, on its own initiative, a claim of substantive unlawfulness that respondents themselves neither pleaded nor pursued. See Appl. 16-18. Respondents address the issue in a single footnote, noting that they argued in the district court that the

Secretary "lacks the authority to implement the [plan] under the HEROES Act." Resp. 16 n.2 (citation omitted). But they did so only in service of their claim that the plan fell outside the HEROES Act's exception from notice-and-comment procedures. Respondents never raised a freestanding claim of substantive unlawfulness below. And they adhere to that strategy in this Court, pressing their substantive arguments only in support of their claim that the Secretary failed to follow the proper procedures. Resp. 16; see id. at 29 ("[T]he Department's 'statutory authority' is wrapped up in Respondents' procedural claim.").

That is no accident. From the outset, respondents have made it plain that their ultimate objective is to block the Secretary's plan by securing a decision holding that it exceeds his statutory authority. But rather than pursuing a straightforward claim of substantive unlawfulness, respondents deliberately crafted a bank-shot theory that nests their substantive arguments as a subsidiary step in their procedural claim. The only apparent reason for that convoluted approach is that respondents recognized that they could not plausibly claim to have suffered any Article III injury justifying a substantive challenge to a plan that will cost respondent Brown nothing and relieve respondent Taylor of $10,000 in debt.

The district court, however, took an entirely different approach. It rejected respondents' procedural claim, correctly recognizing that the HEROES Act's express exemption from notice-and-comment procedures does not depend on whether, as a substantive

matter, the Act actually authorized the challenged action. Appl. App. 19a. That should have ended the case. But the district court instead raised and resolved the standalone claim of substantive unlawfulness that respondents had deliberately declined to pursue. Id. at 19a-25a. That "radical transformation of this case goes well beyond the pale," flouting basic principles of party presentation and Article III. United States v. Sineneng-Smith, 140 S. Ct. 1575, 1582 (2020). The Fifth Circuit did not endorse it. Appl. App. 1a. And petitioners themselves make no real attempt to defend it. That by itself is sufficient reason to grant a stay.

II. RESPONDENTS LACK STANDING

Respondents cannot overcome the Article III problem created by the fundamental disconnect between their purported injury and the relief they seek: Respondents claim to be injured because the Secretary's plan provides them too little debt relief, but they ask this Court to hold that the Secretary can provide no debt relief at all -- to them or to anyone else. That theory makes a mockery of Article III, and respondents cannot save it by clothing their substantive challenge in procedural garb.

A. Respondents plainly lack standing to press the substantive claim the district court actually decided. A judgment holding that the plan exceeds the Secretary's statutory authority would not allow respondents to urge the Secretary to grant them greater debt relief under the HEROES Act; instead, it would mean that neither they nor any other borrowers would receive any debt relief

at all. Appl. 19-20. The district court did not hold otherwise; indeed, it did not even consider respondents' standing to bring a substantive challenge.

In this Court, respondents seek to establish standing by piggybacking on their procedural challenge. Citing a footnote in DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006), respondents argue that "once a litigant has standing to request invalidation of a particular agency action, it may do so by identifying all grounds on which the agency may have 'failed to comply with its statutory mandate.'" Resp. 13-14 (quoting Cuno, 547 U.S. at 353 n.5). But even if respondents had standing to bring their procedural claim, the cited portion of Cuno would not assist them. The language they quote does not set forth a holding of this Court; rather, it describes the views expressed in two "cases from the Courts of Appeals" in the 1970s. 547 U.S. at 353 n.5. Whatever courts of appeals may have said in the 1970s, this Court has since repeatedly made clear, including in Cuno itself, that "standing is not dispensed in gross," id. at 353 (citation omitted), and that "plaintiffs must demonstrate standing for each claim that they press," TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208 (2021).

B. In any event, respondents also lack standing to raise their procedural claim. Respondents argue that, when a plaintiff alleges that he has been deprived of a "procedural right" that "protect[s] his concrete interests," "the normal standards of redressability" do not apply, and the plaintiff need only show "some

possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." Resp. 11-12 (citations and emphasis omitted). But respondents' claim fails that test.

Respondents contend (Resp. 14-16) that, although the HEROES Act exempts certain actions from notice-and-comment and negotiated-rulemaking procedures, the exemption does not apply here because the plan exceeds the Secretary's HEROES Act authority. A judgment based on that theory would not "prompt the [Secretary] to reconsider" the decisions that allegedly harmed respondents, id. at 11-12 (citation omitted) -- i.e., the decision not to extend any HEROES Act relief to borrowers such as respondent Brown and the decision to extend only $10,000 rather than $20,000 in HEROES Act relief to borrowers such as respondent Taylor. Such a judgment would instead mean that no one could receive any HEROES Act relief at all -- a result that would in no way redress respondents' asserted injury.

Respondents assert (Resp. 12-13) that, although the HEROES Act (in their view) does not authorize the Secretary to provide debt relief, the Higher Education Act of 1965 (Education Act), 20 U.S.C. 1070 et seq., may do so. But if respondents want debt relief under the Education Act, they should file a petition for rulemaking under that statute and present their arguments for debt relief in that petition. See 5 U.S.C. 553(e). Challenging the Secretary's separate decision to grant relief to other borrowers

under the HEROES Act will not lead to the relief respondents purport to seek; instead, all respondents could achieve by challenging that distinct decision is to deny debt relief to others (and to Taylor) without getting anything for themselves. They do not have standing to do that.

III. RESPONDENTS' PROCEDURAL CLAIM IS MERITLESS

Even if respondents had Article III standing to press their procedural claim as an alternative ground for affirming the district court's judgment, that claim would fail on the merits. The Secretary adopted the plan under the HEROES Act. The HEROES Act, in turn, expressly exempts waivers and modifications from notice-and-comment and negotiated-rulemaking procedures. See 20 U.S.C. 1098bb(b)(1) and (d). All the HEROES Act requires "is that the Secretary publish the modifications." Appl. App. 19a. The Secretary has done that here. See ibid. The Secretary therefore satisfied the applicable procedural requirements.

Respondents contend (Resp. 14-16) that the plan falls outside the scope of the HEROES Act's express exemption from notice-and-comment procedures because it exceeds the Secretary's substantive authority. But as the district court explained, "[w]hether the HEROES Act authorized the [plan] is a different story" from whether the plan "violate[d] the APA's procedural requirements." Appl. App. 19a. The statute provides: "Notwithstanding [the APA's notice-and-comment provisions], the Secretary shall, by notice in the Federal Register, publish the waivers or modifications of

statutory and regulatory provisions the Secretary deems necessary to achieve the purposes of this section." 20 U.S.C. 1098bb(b)(1). That text makes clear that the procedural exemption depends only on the Secretary's determination that the HEROES Act applies -- not on the substantive merits.

Respondents also invoke Section 1098bb(d), which specifies that a provision requiring the Secretary to proceed by negotiated rulemaking in certain circumstances "shall not apply to the waivers and modifications authorized or required" by the HEROES Act. But that direction cannot plausibly be read to condition the procedural exception on the substantive validity of the Secretary's action. To the contrary, the referenced provision for negotiated rulemaking imposes requirements only on "proposed regulations" issued for public comment. 20 U.S.C. 1098a(b)(1) and (2). By its terms, that provision has no application where, as here, an express exemption from notice-and-comment procedures applies and the Secretary need not issue "proposed regulations" at all.

More broadly, respondents' theory would subvert the distinction between procedural and substantive challenges. Many statutes authorizing agency actions include specific procedural provisions that govern actions taken pursuant to that statute. If litigants could characterize a claim that the action was not "actually" authorized by the statute, Resp. 15 (emphasis omitted), as a procedural challenge -- based on the agency's use of the procedures associated with the asserted statutory basis for its action --

nearly all substantive challenges could be reconceptualized as procedural claims, providing a ready end-run around the "normal standards for redressability and immediacy." Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7 (1992). Respondents cite no decision by any court endorsing -- or even entertaining -- such an end-run.*

IV. THIS COURT SHOULD GRANT A STAY RATHER THAN CERTIORARI BEFORE JUDGMENT

Respondents appear to acknowledge that the district court's extraordinary decision should not be permitted to block the Secretary's plan nationwide without further review. But respondents maintain that, rather than simply granting a stay, this Court should grant certiorari before judgment, hear this case along with Nebraska, and reformulate the questions presented to allow them to present their novel claim of procedural-error-through-substantive-invalidity as an alternative ground for affirmance. Resp. 1, 27-29. If this Court prefers full briefing and argument in this case, the government remains prepared to brief and argue the case on the same schedule as Nebraska. See Appl. 4-5, 38. But the government

* In support of their claim that the Secretary failed to follow the proper procedures, respondents also argue at length (Resp. 16-23) that the plan exceeds the Secretary's authority under the HEROES Act. The government has explained why those arguments lack merit. Appl. 20-31; Gov't Reply at 7-15, Biden v. Nebraska, No. 22A444 (Nov. 28, 2022). But respondents' procedural claim would fail even if those arguments were correct; respondents have all but abandoned the standalone substantive claim on which the district court granted relief; and the parties will present the arguments relating to the Secretary's substantive authority in full briefing and argument in Nebraska. We accordingly do not repeat our substantive arguments here.

respectfully submits that the better course would be to simply stay the district court's extraordinary and essentially undefended decision.

Respondents' substantive arguments are materially identical to the arguments being pressed by the State respondents in Nebraska. Compare Resp. 16-23 with Resp. 22-32, Nebraska, supra (No. 22A444). Respondents assert (Resp. 28) that this case "presents an additional claim not raised by the States" -- namely, that the Secretary failed to follow "proper rulemaking procedures." But that procedural claim is entirely dependent on the substantive claim presented in Nebraska: If the Secretary's plan is substantively authorized by the HEROES Act, then petitioners concede that he followed the proper procedures. And if the plan was not authorized by the HEROES Act, then it is invalid -- regardless of the procedures used to adopt it.

Hearing this case along with Nebraska would thus add only unnecessary complication by requiring the parties to brief and argue respondents' Article III standing and their novel and convoluted procedural claim. The district court has already rejected that claim; respondents have identified no court endorsing such a claim; and respondents have not otherwise attempted to argue that the claim merits this Court's review.

Respondents maintain (Resp. 25-26) that a stay is not warranted because the nationwide injunction in Nebraska will independently bar the Secretary from implementing the plan pending

this Court's review. But in this unusual posture, the parties agree that the only question is whether the Court should hear this case along with Nebraska or instead simply grant an immediate stay. And in the government's view, an immediate stay is the better course: Respondents do not seriously defend the only basis for the district court's decision; they lack Article III standing; and the contrived procedural claim they press as an alternative ground for affirmance does not warrant this Court's review. Under the circumstances, an immediate stay would not impose any "irreparable harms" on respondents (Resp. 25-26); instead, it would simply confirm that two uninjured plaintiffs cannot block critical relief to millions of Americans suffering the continuing economic effects of a global pandemic based on a claim they never asserted -- while still allowing this Court to consider the relevant issues in Nebraska.

If the Court is not prepared to grant an immediate stay, however, it may wish to defer consideration of the application pending oral argument, construe the application as a petition for a writ of certiorari before judgment, grant the petition, and hear this case along with Nebraska. In the absence of a stay, immediate review would be warranted to avoid leaving vulnerable borrowers in limbo and to ensure that all challenges to the plan can be resolved this Term before student-loan payment obligations resume.

* * * * *

This Court should stay the judgment of the district court pending appeal and pending the filing and disposition of any petition for a writ of certiorari. If, however, the Court is not prepared to grant an immediate stay, it may wish to defer consideration of this application pending oral argument, construe the application as a petition for a writ of certiorari before judgment, grant the petition, and hear this case along with Nebraska.

Respectfully submitted.

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DECEMBER 2022