No. 22A444

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.,
Respondents.

On Application to Vacate Injunction Entered by the
United States Court of Appeals for the Eighth Circuit

RESPONSE TO APPLICATION TO VACATE INJUNCTION

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INTRODUCTION

The Administration is once again invoking the COVID-19 pandemic to assert power far beyond anything Congress could have conceived. Previously, this Court stopped CDC's eviction moratorium. *Ala. Ass'n of Realtors* v. *Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021) (per curiam). Later, it stayed OSHA's vaccine-or-test mandate. *NFIB* v. *OSHA*, 142 S. Ct. 661, 666–67 (2022) (per curiam). Now, while President Biden publicly declares the pandemic over, the Secretary and Department of Education are using COVID-19 to justify the Mass Debt Cancellation—an unlawful attempt to erase over $400 billion of the $1.6 trillion in federal student-loan debt and eliminate all remaining loan balances for roughly 20 million of 43 million borrowers.

The States of Nebraska, Missouri, Arkansas, Iowa, Kansas, and South Carolina are likely to succeed in this challenge to the Cancellation. The Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act), Pub. L. No. 108-76, does not authorize this sweeping action of great economic and political significance. The Act requires a real connection to a national emergency. But the Department's reliance on the COVID-19 pandemic is a pretext to mask the President's true goal of fulfilling his campaign promise to erase student-loan debt. Hiding the real motive, the agency attempts to connect the Cancellation to the pandemic by citing current economic conditions supposedly caused by COVID-19. But those conditions are not directly attributable to the pandemic, so the Department has failed to adequately link the Cancellation to a national emergency.

In addition, the Act's text and context demonstrate that its purpose is to keep certain borrowers from falling into a *worse* position financially in relation to their student loans. Yet the Secretary uses it here to place tens of millions of borrowers in a *better* position by cancelling their loans en masse. The Act does not allow the Secretary to effectively transform federal student loans into grants. It is telling that the Secretary has never before used the Act in this way.

The equities also weigh heavily against granting the application. The Department can point to *no emergency or imminent harm* because, just yesterday, the agency extended the payment pause on student loans until the summer of 2023. Nor would lifting the injunction have any practical effect since all the Department's alleged injuries are independently caused by a separate judgment vacating the Cancellation in another case. In contrast to the Department's absence of any immediate injury, lifting the injunction risks unleashing on the States a wave of harms that could not be undone because of the Cancellation's "irreversible impact." App. 5a. Given this lopsided balance, the Court should deny the Department's request to vacate the Eighth Circuit's injunction.

STATEMENT

I. Background on Student Loans

The Higher Education Act (HEA) creates the Direct Loan Program. 20 U.S.C. §1087a *et seq*. Direct Loans are held by the Department and serviced by non-federal entities. *See* D. Ct. Doc. 5-1, at 194–254. The Higher Education Loan Authority of the State of Missouri (MOHELA)—a "public instrumentality" of the State, Mo. Rev. Stat. §173.360, and part of the Missouri Department of Higher Education and Workforce Development, §173.445—is one of those servicers. *See* D. Ct. Doc. 5-1, at 194–254. MOHELA services loan accounts for borrowers in all 50 States. *See id*. at 92–93.

The HEA also establishes the Federal Family Education Loan (FFEL) Program. 20 U.S.C. §1071 *et seq*. FFEL loans are held by either the Department or non-federal organizations. *See* D. Ct. Doc. 31-1, at 7–

10. Non-federal entities that hold FFEL loans—such as MOHELA and the Arkansas Student Loan Authority (ASLA)—use them to secure bonds and earn income. *See* D. Ct. Doc. 5-1, at 60, 66–67; D. Ct. Doc. 5-4, at 2, ¶6. Other institutions—like the Nebraska Investment Council (NIC), which manages that State's assets—invest in FFEL student-loan asset-backed securities (SLABS). *See* D. Ct. Doc. 5-2, at 1–2, ¶¶4–7. Federal law allows borrowers to consolidate FFEL loans, which converts them into Department-held Direct Loans. 34 C.F.R. §685.220.

The Secretary must "try to collect a claim . . . for money . . . arising out of the activities of" the Department, which is to say he must collect outstanding student-loan debt. 31 U.S.C. §3711(a)(1). When Congress does not want the Secretary to collect on loans, it identifies specific groups of borrowers eligible for loan cancellation. *E.g.*, 20 U.S.C. §1078-10 ($5,000 in cancellation for teachers); 20 U.S.C. §1078-11 ($10,000 in cancellation for service in areas of national need); 20 U.S.C. §1087ee (percentage of cancellation for certain public service). Relatedly, when Congress wants to give educational funds that students need not repay, it establishes grant programs. *See* 20 U.S.C. §1070 *et seq.*

II. The HEROES Act

Enacted in 2003, the HEROES Act permits the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" when "necessary in connection with a war or other military operation or national emergency." 20 U.S.C. §1098bb(a)(1). To be authorized, the waiver or modification must also, as relevant here, "be necessary to ensure that recipients of student financial assistance . . . 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." §1098bb(a)(2)(A).

The HEROES Act's congressional findings focus on affording relief to people serving in the "military" for "our nation's defense." 20 U.S.C. §1098aa(b)(1)–(6). The legislative history confirms the goal of relieving active-duty military from "making student loan payments . . . while they are away." 149 Cong. Rec. at H2522 (Apr. 1, 2003) (Rep. Garrett).[1]

[1] *See also id.* at H2524 (Rep. Isakson) (the Act ensures that the "loan payments" of troops who "serve us in the Middle East and in Iraq" "are deferred until they return"); *id.* at H2525 (Rep. Burns) ("The HEROES bill would excuse military personnel from their Federal student loan obligations while they are on active duty"); 153 Cong. Rec. at H10790 (Sept. 25, 2007) (Rep. Kline) ("This bill is specific in its intent to insure that, as a result of a war or military contingency operation or national

III. COVID-19 Pandemic and Student Loans

As soon as the COVID-19 pandemic began, the Department invoked the HEROES Act to pause payments and interest accrual on Department-held student loans. *See* 85 Fed. Reg. 79,856, 79,862–63 (Dec. 11, 2020). Congress quickly extended that forbearance through September 2020, *see* Pub. L. No. 116-136, §3513, and the Department later issued repeated extensions that were set to expire on December 31, 2022, *see* 87 Fed. Reg. 61,512, 61,514 (Oct. 12, 2022). Yesterday, however, the Department extended forbearance again, and it is now scheduled to expire 60 days after (1) resolution of litigation over the Cancellation or (2) June 30, 2023, whichever is later. Department's Press Release on Payment Pause (Nov. 22, 2022), https://tinyurl.com/5n8z2tj9.

Earlier in the pandemic, Congress considered—but rejected—a COVID-relief bill that would have discharged up to $10,000 in student-loan debt for some borrowers. H.R. 6800, 116th Cong. §150117(h) (2020). In recent months, with COVID-19 subsiding, the President has declared

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emergency, our men and women in uniform are protected."); *id.* (Rep. McKeon) ("What this bill does is allow the Secretary of Education to accommodate the unique needs of our student soldiers").

"[t]he pandemic . . . over." 60 Minutes, Twitter (Sept. 18, 2022), https://tinyurl.com/2s35maau.

IV. The Mass Debt Cancellation

Meanwhile, on August 24, 2022, the Department announced its Mass Debt Cancellation. D. Ct. Doc. 5-3, at 4. The Administration explained that President Biden had "promised to provide targeted student debt relief" "[d]uring the [2020 presidential] campaign" and was now "following through." *Id.* at 29. In an accompanying memorandum, the Department revoked its prior view that it cannot cancel student-loan debt, *see* Memorandum from Rubinstein to DeVos 6 (Jan. 12, 2021), https://tinyurl.com/3kp29ys6 (Jan. 2021 Memo), and claimed such power for the first time, *see* 87 Fed. Reg. 52,943, 52,943–45 (Aug. 30, 2022).

The Congressional Budget Office estimates that the Cancellation will eliminate $430 billion of the $1.6 trillion in federal student-loan debt. CBO Sept. 26, 2022 Letter at 3, https://tinyurl.com/2p95x8kk. Other analyses project that the costs will approximate $519 billion. D. Ct. Doc. 5-3, at 23. Of the 43 million borrowers who still owe money, *see* CBO Sept. 26, 2022 Letter, *supra*, at 3, over 40 million will be eligible for the

Cancellation, and nearly 20 million "will have their debt completely canceled," D. Ct. Doc. 5-3, at 31.

The Cancellation applies to Department-held loans, including Direct, FFEL, and Perkins. 87 Fed. Reg. at 61,514. To be eligible, borrowers must have had "an Adjusted Gross Income (AGI) below $125,000 for an individual taxpayer or below $250,000 for borrowers filing jointly . . . in *either* the 2020 or 2021 Federal tax year." *Ibid.* (emphasis added). These income cutoffs include most borrowers because 93 percent of American households earn less than $250,000 annually. *See Household Income Percentiles*, DQYDJ, https://tinyurl.com/vrks5mps. The Department will cancel up to $20,000 for eligible borrowers who received a Pell grant and $10,000 for those who did not. 87 Fed. Reg. at 61,514. Borrowers can apply until December 31, 2023. D. Ct. Doc. 31-1, at 5.

The Cancellation's details initially appeared only on the Department's website. At that time, the website told "borrowers with privately held federal student loans," including FFEL loans, that they can receive the Cancellation "by consolidating these loans into the Direct Loan program." D. Ct. Doc. 5-3, at 9. This incentivized borrowers to consolidate those loans. *See* D. Ct. Doc. 5-4, at 2, ¶7. Then on September 29, 2022—

the day the States filed suit—the Department edited its website to say that borrowers with non-federally held FFEL loans can no longer become eligible "by consolidating . . . into Direct Loans," but that those who "applied to consolidate" before that date remain "eligible." D. Ct. Doc. 31-1, at 9. The Department has never explained this change, but by all accounts, it was a ploy to avoid judicial review because entities holding and investing in FFEL loans were "widely seen . . . inside . . . the administration[] as presenting the greatest legal risk" to the Cancellation. Michael Stratford, *Biden Administration Scales Back Student Debt Relief for Millions Amid Legal Concerns*, Politico (Sept. 29, 2022), https://tinyurl.com/2hexr9cf.

The Department did not publicly disclose its justification for the Cancellation until it filed the August 24 Rationale Memo in this case. App. 36a–48a. That filing shows that the Secretary received the Memo on August 24 and authorized the Cancellation at 9:25 am that same morning. *Id.* at 32a–33a. The Department eventually published the HEROES Act waiver authorizing the Cancellation on October 12. 87 Fed. Reg. at 61,512.

V. Procedural History

On September 29, the States sued and moved for a preliminary injunction. App. 13a. On October 20, the district court denied the States' motion and dismissed the case for lack of standing, *id.* at 9a–27a, but the court recognized that the States raise "important and significant challenges" to the Cancellation, *id.* at 26a. The next day, after the appeal was docketed with the Eighth Circuit, the States moved for (1) an injunction pending appeal and (2) a temporary administrative stay, which the court promptly granted. *Id.* at 7a.

On November 14, the Eighth Circuit enjoined the Cancellation. App. 6a. The court's analysis focused on Missouri's standing. *Id.* at 3a–5a. It began by detailing the close relation between Missouri and MOHELA, explaining that Missouri's legislature created MOHELA as a state entity, charged it with "support[ing] the efforts of public colleges and universities," and required it to contribute to the Lewis and Clark Discovery Fund (LCD Fund) "in the State Treasury." *Id.* at 3–4 (citations omitted). Given those facts, "MOHELA may well be an arm of the State," the court said. *Id.* at 4 (collecting cases that so held). But even if not, the Cancellation's negative "financial impact on MOHELA . . . threatens to independently impact Missouri" by preventing MOHELA from satisfying its remaining obligation to pay $105.1 million into the LCD Fund. *Ibid.* Because Missouri has standing, the court did not "address the standing of the other States." *Id.* at 5a.

The Eighth Circuit then concluded that the States have raised "substantial questions of law" about the Cancellation's legality. App. 5a. The court also found that "the equities strongly favor an injunction considering the irreversible impact the [Cancellation] would have as compared to the lack of harm an injunction would presently impose." *Ibid.* To "provide complete relief to the plaintiffs," the court explained, it could not limit the injunction to certain States or loans. *Id.* at 6a. Because MOHELA services "$168.1 billion in student loan assets" nationwide and is "one of the largest" servicers of federal student loans, the court determined that there is "no workable path in this emergency posture for narrowing the scope of relief." *Ibid.*

ARGUMENT

The Court should not vacate the Eighth Circuit's injunction. The Department passingly argues (at 14) that courts issuing injunctions must announce plaintiffs' likelihood to succeed on the merits and that the

Eighth Circuit's finding of "substantial questions of law" is not enough. The agency claims that *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008), and *Munaf* v. *Geren*, 553 U.S. 674, 690 (2008), establish this rule. They do not.

Winter addressed the standard for "irreparable harm" rather than the standard for assessing the merits. 555 U.S. at 21–22. And the error in *Munaf* was the lower court's failure to "consider[] the merits" at all. 553 U.S. at 690–91. Tellingly, after *Winter* and *Munaf*, many circuits—like the Eighth Circuit here—continue to approve injunctions where plaintiffs present substantial questions on the merits and the equities strongly favor them. *See, e.g.*, *Citigroup Glob. Mkts., Inc.* v. *VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34–38 (2d Cir. 2010) ("If the Supreme Court had meant" for *Winter* or *Munaf* "to abrogate the more flexible standard for a preliminary injunction, one would expect some reference to the considerable history of the flexible standards applied in this circuit, seven of our sister circuits, and in the Supreme Court itself"). The Eighth Circuit thus committed no error here.

Though there is no basis to do so, if the Court remands over this issue, it should enter an administrative stay forbidding the Department from discharging loans under the Cancellation while the Eighth Circuit takes up the injunction request again. The Department has already approved "16 million applications" from borrowers, and their debts are set "to be discharged" as soon as "allowed by the courts." Secretary's Nov. 11, 2022 Statement, https://tinyurl.com/2cewh6h4. Permitting those discharges to occur would immediately inflict the irreparable harms that the States are trying to avoid through this suit.

I. The States are likely to succeed on the merits.

A. The States have standing.

States are "entitled to special solicitude in [the] standing analysis." *Massachusetts* v. *EPA*, 549 U.S. 497, 520 (2007). Contrary to what the Department says (at 15–18), Missouri has standing. And though the Department ignores it, the other States have standing too.

1. Missouri has standing due to the Cancellation's negative effect on MOHELA's loan servicing.

The Cancellation will unquestionably inflict financial harm on MOHELA. Last fiscal year, MOHELA earned $88.9 million for "servicing 5.2 million" Direct Loan accounts. MOHELA FY 2022 Financial Statement at 4, https://tinyurl.com/4chp295x. This revenue is determined by how many accounts MOHELA services—the more it does, the more it earns, *see* D. Ct. Doc. 5-1, at 197–98, 209–10—and the Cancellation will "completely" eliminate the debt of nearly half of all borrowers (20 of 43 million), D. Ct. Doc. 5-3, at 31. Because many borrowers have more than one account, *see* D. Ct. Doc. 5-1, at 403–07, MOHELA is at risk of losing at least half of the Direct Loan accounts it services, which equates to millions of dollars of revenue per year. These financial losses to MOHELA harm Missouri in three ways.

First, MOHELA is a state agency, so financial harms to it are harms to Missouri. MOHELA and Missouri are organizationally and politically intertwined. MOHELA is "a public instrumentality" of Missouri that performs "essential public function[s]." Mo. Rev. Stat. §173.360. It is part of the Missouri Department of Higher Education and Workforce Development. §173.445. Its board members are state officials appointed by the State with the advice and consent of the legislature. §173.360; *see also* §173.005.2 (coordinating board); §173.007 (commissioner of higher education). And State law establishes MOHELA's powers. §173.385.

MOHELA and Missouri are also financially linked. MOHELA owes $105.1 million to the State's LCD Fund, *see* MOHELA FY 2022 Financial Statement, *supra*, at 20; Mo. Rev. Stat. §173.385.2, which supports "capital projects" at Missouri's "public colleges and universities," §173.392.2. And MOHELA is authorized to provide student financial aid, *see* §173.385.1(6), (19), which it does by giving millions of dollars per year to three scholarship programs run by its parent agency, the Department of Higher Education and Workforce Development, *see* MOHELA FY 2022 Financial Statement, *supra*, at 10 (listing the programs).

Overall, the connection between MOHELA and Missouri is so close that, as the Eighth Circuit noted, the agency "may well be an arm of the State" for sovereign immunity. App. 4a (collecting cases reaching that conclusion). Because of this tight relationship, financial injuries to MOHELA are harms to the State. *See Arkansas* v. *Texas*, 346 U.S. 368, 370–71 (1953) (injury to state university is injury to the State); *Alaska* v. *Chevron Chem. Co.*, 669 F.2d 1299, 1302–03 (9th Cir. 1982) (similar).

The Department's contrary arguments are unavailing. It is irrelevant that MOHELA "was not involved with the decision of the Missouri Attorney General's Office" to bring this suit, Appl. 16, because the Attorney General alone decides whether to sue "to protect the rights and interests of the state," Mo. Rev. Stat. §27.060. And it is not dispositive that MOHELA may "sue and be sued," Appl. 16 (quoting Mo. Rev. Stat.

§173.385.1(3)), because bestowing that power on a state entity does not mean that it is separate from the State. *See State Highway Comm'n of Wyo.* v. *Utah Constr. Co.*, 278 U.S. 194, 199 (1929) (connecting a state entity to the State without addressing "the effect of the general grant of power to sue or be sued . . . or its withdrawal").

Second, Missouri has declared everything MOHELA does to be "the performance of an essential public function." Mo. Rev. Stat. §173.360. Those functions include advancing vital state goals like ensuring that Missouri "students have access to student loans" and providing funds to Missouri's "public colleges and universities." *Ibid.* MOHELA's revenue funds those essential state functions. *See* §173.385.1–.2. The Cancellation's negative effect on MOHELA's finances injures Missouri by impairing MOHELA's ability to carry out its state functions or forcing the State to appropriate money to make up the deficit.

Third, Missouri has standing because the Cancellation's adverse "financial impact on MOHELA . . . threatens to independently impact Missouri" by preventing or delaying MOHELA's contributions to "the LCD Fund," App. 4a, and the State's student aid programs, *see* MOHELA FY 2022 Financial Statement, *supra*, at 10. MOHELA affirms that "[a]ny available funds above its operating needs and reasonable reserves are devoted . . . to student financial aid." C.A. Rule 28(j) Letter, Attach. 1 (Nov. 1, 2022). By hindering MOHELA's contributions to the State, the Cancellation inflicts a classic financial injury on Missouri. *See Czyzewski* v. *Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017). This conclusion rebuts the Department's third-party standing arguments (at 16–17) because it establishes that even if MOHELA and Missouri are separate entities, Missouri may raise harms to its own interests. *See Clinton* v. *City of New York*, 524 U.S. 417, 431 (1998) (concluding that the city's claim did not "belong[] to the State" even though the State would have had a similar claim of its own).

The Department objects (at 17–18) to this standing theory as relying on "[g]uesswork" about "how MOHELA will react" to the Cancellation. Not so. The States rely on MOHELA's legal obligation to contribute to the LCD Fund, *see* Mo. Rev. Stat. §173.385.2, MOHELA's demonstrated practice of funding the State's student financial aid programs, *see* MOHELA FY 2022 Financial Statement, *supra*, at 10, and "the predictable effect" that decreasing MOHELA's revenue will have on those contributions to the State, *see Dep't of Com.* v. *New York*, 139 S. Ct. 2551, 2566 (2019). That goes far beyond "mere speculation." *Ibid.*

The Department also asserts (at 17) that if Missouri has standing to sue because of the harm to MOHELA, then "banks could sue anyone who causes financial harm to their borrowers." This analogy is off base. Missouri created MOHELA, tasked it with performing essential functions for the State, selected its board members, and bestowed power on it. That is entirely unlike the relationship between banks and their borrowers. Accordingly, the Department's dire predictions about these kinds of far-reaching implications miss the mark.

2. The States have standing on other grounds.

Direct Tax Losses. Nebraska, Iowa, Kansas, and South Carolina have standing because they face a "direct injury in the form of a loss of specific tax revenues." *Wyoming* v. *Oklahoma*, 502 U.S. 437, 448 (1992). Those States use federal adjusted gross income (AGI) to determine state taxable income. *See* Neb. Rev. Stat. §77-2714.01(1); Iowa Code §422.7; Kan. Stat. Ann. §79-32,117(a); S.C. Code §12-6-40. Normally, federal AGI includes student loan discharge. *See* 26 U.S.C. §61(a)(11). But under the American Rescue Plan Act (ARPA), federal AGI excludes those discharges until January 1, 2026. *See* 26 U.S.C. §108(f)(5).

Without the Cancellation, hundreds of thousands of loans are set to be discharged each year after January 1, 2026, under the Department's existing income-driven repayment (IDR) program. *See* U.S. Gov't Accountability Office, GAO-22-103720, Federal Student Aid: Education Needs to Take Steps to Ensure Eligible Loans Receive Income-Driven Repayment Forgiveness 16 fig. 3 (2022), https://tinyurl.com/bdhzca8z. These discharges will produce significant tax revenue for the States. But the Cancellation will erase over $400 billion in student-loan debt now when the States are not taxing loan discharges. That directly reduces the loans available for discharge once the States resume taxing it and thus will shrink the States' revenue.

Even if the States could respond to the Cancellation by changing their tax laws, that does not erase the injury. States have a sovereign right "to create . . . a legal code." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982). Forcing States to exercise that power by upending their preferred system for calculating state taxable income is itself an injury, and "the possibility that a plaintiff could avoid [one] injury by incurring [another] does not negate standing." *Texas* v. *United States*, 809 F.3d 134, 156–57 (5th Cir. 2015), *aff'd by an equally divided court*, 579 U.S. 547 (2016). That is why many circuits have declined to "treat[] the availability of changing state law as a bar to standing." *Id.* at 157; *accord California* v. *Azar*, 911 F.3d 558, 574 (9th Cir. 2018).

Consolidation Harms. Missouri, Arkansas, and Nebraska have experienced other harms because the Cancellation predictably prompted the widespread consolidation—and thus elimination—of non-federally held FFEL loans. *See* D. Ct. Doc. 5-4, at 2, ¶¶6–7 ($5–6 million of ASLA's $100 million in FFEL loans were consolidated after the Cancellation was announced). Missouri and Arkansas hold FFEL loans, and Nebraska invests in SLABS backed by FFEL loans. Eliminating those loans "reduc[es] the return on [the States'] investments" and thus inflicts an "actual financial injury." *Franchise Tax Bd. of Cal.* v. *Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990).

While the Cancellation now excludes consolidation as a pathway to eligibility, that does not foreclose standing. The States can still press their consolidation injuries for two reasons. First, the Department changed its website's language on consolidation and published the HEROES waiver reflecting that change *after* suit was filed, so this is a mootness (not standing) issue. *See Davis* v. *FEC*, 554 U.S. 724, 734 (2008) (standing focuses on "when the suit was filed"). This sort of "voluntary cessation" does not moot the States' claims, *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2019 n.1 (2017), especially because the Department is attempting "to insulate [its] decision from review," *Knox* v. *Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012). Second, the States can still obtain relief for their consolidation harms. For example, the Department could be ordered to direct borrowers who recently consolidated that they must pay part of their interest to the entity that held their prior FFEL loan. Such partial relief suffices for standing. *See Massachusetts*, 549 U.S. at 526.

Quasi-Sovereign Harms. The States also have "a quasi-sovereign interest in the health and well-being—both physical and economic—of [their] residents." *Alfred L. Snapp*, 458 U.S. at 607. MOHELA furthers Missouri's quasi-sovereign interest in higher education through its "essential public function[s]" of providing funding to students and the State's public universities. Mo. Rev. Stat. §173.360. When the Cancellation reduces MOHELA's revenue, it impairs Missourians' access to high education and harms that quasi-sovereign state interest.

B. The Cancellation exceeds the Department's authority.

A reviewing court shall "hold unlawful and set aside agency action" "in excess of statutory . . . authority." 5 U.S.C. §706(2)(C). The Department claims authority under the HEROES Act. That Act allows the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" when "necessary in connection with a . . . national emergency" "to ensure that recipients of student financial assistance . . . 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)(1)–(2)(A). This text does not authorize the Cancellation.

Insufficient Connection to Emergency. To begin, the Act requires a real connection to a national emergency. The first clause demands that the action be "necessary in connection with a . . . national emergency." 20 U.S.C. §1098bb(a)(1). And the next specifies that borrowers must face "a worse position financially in relation to [their] financial assistance *because of*" the national emergency. §1098bb(a)(2)(A) (emphasis added).

This statutory text requires more than the Department's "but-for causation" standard. *See Use of the Heroes Act of 2003 to Cancel the Principal Amounts of Student Loans*, 2022 WL 3975075, at *14 (O.L.C. Aug. 23, 2022). Because the but-for "consequences of an act go forward to eternity," *Holmes* v. *Sec. Inv. Prot. Corp.*, 503 U.S. 258, 266 n.10 (1992), that interpretation produces absurd results, allowing COVID-19 to justify the mass elimination of debt for years to come, *see United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (counseling against absurd constructions). In fact, the Department has argued that "in ten years, [it] could still use the HEROES Act to forgive student loan debt because of the COVID-19 pandemic if the Secretary deems it 'necessary.'" *Brown* v. *U.S. Dep't of Educ.*, No. 4:22-CV-0908-P, 2022 WL 16858525, at *13 (N.D. Tex. Nov. 10, 2022). Read correctly, however, the Act demands proximate or direct causation, meaning COVID-19 must be the "cause that directly produces" the need for relief. *Proximate Cause*, Black's Law Dictionary (11th ed. 2019); *see, e.g.*, *Holmes*, 503 U.S. at 265–68 (interpreting "by reason of" in RICO to require proximate causation).

The Cancellation fails that requirement. The Department tries to justify the program by citing "current economic conditions." App. 37a–

39a (capitalization omitted). But those conditions are not primarily attributable to COVID-19. They are influenced by myriad other factors, including the President's fiscal policies and geopolitical events. Indeed, the Department admits that the cause of these economic conditions includes "other factors (such as Russia's invasion of Ukraine)." *Id.* at 38a. The Department's "indiscriminate approach" to economic conditions "fails to account for [the] crucial distinction" between economic risk from COVID-19 and economic "risk more generally." *NFIB*, 142 S. Ct. at 666.

The Department also argues that the end of forbearance supports the Cancellation. App. 37a. If, by this, the Secretary is suggesting that the end of forbearance always leads to defaults, then the Department (not COVID-19) caused the problem. Or if he thinks that resuming payments will risk harm to borrowers because of the broader economic conditions, the payment pause adds little to the analysis. Either way, the Department did not adequately connect the Cancellation to the pandemic.

Cannot Put Borrowers in Better Position by Discharging Principal. The Cancellation also falls because the HEROES Act does not authorize the direct discharge of loan principal. Relief must be "necessary" to keep borrowers from falling into "a worse position financially in relation to" their student loans. 20 U.S.C. §1098bb(a)(2)(A). Yet this direct discharge of principal does not simply prevent borrowers from slipping into a *worse* position but rather places them in a *better* one.

The Act's obvious focus on addressing *temporary* challenges like a "military operation or national emergency," 20 U.S.C. §1098bb(a)(1), further demonstrates that it is "incompatible" with the *permanent* cancellation of principal. *See Utility Air Regulatory Group* v. *EPA*, 573 U.S. 302, 322 (2014). Similarly, allowing the Secretary to erase loan principal conflicts with Congress's explicit distinction between student loans and student grants. *Compare* 20 U.S.C. §1070 *et seq.* (grant programs), *with* 20 U.S.C. §1087a *et seq.* (Direct Loan Program). Blurring the division between these two different forms of student aid would bring about "a fundamental revision" of the statutory scheme. *See MCI Telecommunications Corp.* v. *AT&T, Co.*, 512 U.S. 218, 231 (1994).

The Department argues (at 22–23) that other uses of the HEROES Act have "had permanent and substantial economic effects." This is beside the point because none of the past examples directly erased loan principal. Some of them—such as the COVID-19 payment pause and expanded eligibility for defenses to repayment—might have the indirect effect of reducing the principal that a borrower will ultimately pay. But those are incidental effects of actions not aimed at eliminating principal.

Excessive Scope. The Cancellation's scope—both who it covers and the amount of debt discharged—also exceeds the Secretary's authority. The Secretary has not limited the Cancellation to only "affected individuals." 20 U.S.C. §1098bb(a)(2)(A). While the Department argues (at 19) that this class includes *every* borrower in the world, nothing in the Department's materials purports to find that all borrowers have suffered "direct economic hardship" due to the pandemic. §1098ee(2)(D).

In addition, the Department has failed to respect the Act's requirement that "affected individuals" be at risk of facing "a worse position financially in relation to" their loans. 20 U.S.C. §1098bb(a)(2)(A). Many eligible borrowers face no such peril. For instance, the program includes high-income borrowers whose annual earnings have increased substantially since 2020, such as married individuals whose households earned between $200,000 and $250,000 in 2020 and more than $350,000 in 2021. No one can seriously contend that these borrowers need this relief.

The Department responds (at 24) by arguing that it need not provide relief "on a case-by-case basis" and that it may seek to "ensure" affected individuals are not worse off. 20 U.S.C. §§1098bb(a)(2) & (b)(3). But these statutory features at best permit modest imprecision. They do not excuse the Department's failure to tailor the eligibility requirements or relief amount at all.[2]

Nondelegation. Under the Department's reading of the HEROES Act, it has the power to cancel student-loan debt, of any amount, *see* Appl. 22 (claiming the Secretary may "eliminate . . . borrower's obligation"), for "[a]ll student-loan borrowers," *see id.* at 19, even a decade after a national emergency begins, *see Brown*, 2022 WL 16858525, at *13. This interpretation raises serious nondelegation concerns, *see Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 429–30 (1935), which counsels against accepting it, *see Clark* v. *Martinez*, 543 U.S. 371, 380–81 (2005) (avoidance doctrine).

Major-Questions Doctrine. The major-questions doctrine further reinforces the Department's lack of statutory authority. It applies to agency action that addresses issues of immense "economic and political significance" and demands that the agency show "clear congressional

[2] As explained in the amicus brief of Utah, Ohio, and others (at Section II.B.3.), the Cancellation also exceeds the Secretary's authority because it does not "waive" or "modify"—but rather rewrites—the provisions referenced in the Federal Register notice. *See* Fed. Reg. at 61,514.

authorization." *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2608–09 (2022). A "plausible textual basis" will not do. *Id.* at 2609.

The major-questions doctrine applies here for four reasons. *First*, as the Department conceded below, *see* D. Ct. Doc. 27, at 41, it is claiming authority to resolve a matter of great "economic and political significance," *West Virginia*, 142 S. Ct. at 2608. With estimated costs between $430 billion and $519 billion, *see* CBO Sept. 26, 2022 Letter, *supra*, at 3; D. Ct. Doc. 5-3, at 23, the economic significance is plain, *see Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (per curiam) (applying the doctrine when the effect was $50 billion). So is the political significance. In recent years, Congress has "conspicuously and repeatedly declined to enact" many student-loan discharge bills, *West Virginia*, 142 S. Ct. at 2610, including one aimed at COVID-19 relief. *E.g.*, H.R. 2034, 117th Cong. (2021); H.R. 6800, 116th Cong. §150117(h) (2020); S. 2235, 116th Cong. (2019).

Second, the Department claims an "unheralded power." *West Virginia*, 142 S. Ct. at 2610. Until now, the agency has not "relied on the HEROES Act . . . for the blanket or mass cancellation . . . of student loan principal balances." Jan. 2021 Memo, *supra*, at 6; *see also The Biden Administration Extends the Pause on Federal Student Loan Payments*, Congressional Research Service, at 2–3 (Jan. 27, 2021), https://tinyurl.com/yxwm4eyj ("[B]efore the COVID-19 pandemic, Secretaries generally invoked the HEROES Act relatively narrowly to grant relief to limited subsets of borrowers, such as deployed military service members or victims of certain natural disasters"). Illustrating just how unprecedented this is, the Department has not erased loan principal in its "[p]ast experience[s] with student loan borrowers transitioning back into repayment after long periods of forbearance," App. 37a—even though it says that this circumstance requires the Cancellation here.

The Department denies (at 27) that it is asserting novel authority, citing the COVID-19 payment pause's $100 billion cost as a comparator. That the Department's best comparator is an action that did not directly discharge loan principal—implemented during the pandemic's lockdown phase for a fraction of the Cancellation's $430 billion cost—shows that the agency has no real analogue.

Third, "the sheer scope of the [Department's] claimed authority" confirms the major-questions doctrine's application. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. As explained above, the Department asserts power under the Act to cancel student-loan debt, of any amount, for any borrower, even a decade or more after a national emergency begins. *See* p. 27, *supra*. In other words, the agency believes that it has authority to erase all $1.6 trillion in student-loan debt, effectively converting the student-*loan* program into a student-*grant* program. Courts rightly greet such "assertions of extravagant statutory power" with skepticism. *West Virginia*, 142 S. Ct. at 2609 (cleaned up). That the Department also asks (at 26–27) for judicial deference to the Secretary's actions under the Act further underscores the vast power it claims.

Fourth, the Cancellation conflicts with the HEA's overall structure and the HEROES Act's legislative findings. The HEA not only distinguishes loans from grants, but also establishes specific classes of borrowers eligible for loan discharge. *See* p. 4, *supra*. Yet the Department's reading of the HEROES Act overrides those choices by authorizing the agency to convert loans into grants and identify new, broadly defined groups eligible for loan cancellation. The HEA also recognizes the importance of notice, comment, and collaboration by mandating "negotiated rulemaking" when the Department regulates on matters of student financial assistance. 20 U.S.C. §1098a(b)(2). Given this, it is implausible that Congress authorized the Department to use HEROES Act authority to completely bypass notice-and-comment rulemaking for one of the agency's most costly and consequential actions ever. §1098bb(b)(1). And because the HEROES Act's congressional findings focus on affording relief to those serving in the military, §1098aa(b)(1)–(6), "[t]here is little reason to think Congress" intended the Act to authorize worldwide debt discharge entirely unconnected to the military, *West Virginia*, 142 S. Ct. at 2612.

The Department says (at 25) that the major-questions doctrine does not apply because this case "involves the exercise of authority over a government benefit program." Yet the doctrine rests on "separation of powers principles and a practical understanding of legislative intent" that "presume[s] . . . Congress intends to make major policy decisions itself." *West Virginia*, 142 S. Ct. at 2609 (cleaned up). That presumption applies regardless of whether an agency is regulating private actors or administering a congressionally created benefit program. What matters is whether an agency is exceeding authority that Congress gave it. That can happen either when agencies regulate private parties or when they administer government benefits. There is nothing about the latter situation that is inconsistent with the major-questions doctrine.

The Department also insists (at 28) that the HEROES Act "specifically contemplates that the Secretary" would "waiv[e] loan-repayment provision." But it cites no support for that statement because none exists. Nor does the part of ARPA that "makes student-loan discharges . . . tax-free" until 2025 mean that Congress endorsed this use of HEROES. *Contra* Appl. 28. Already-established loan programs, such as the IDR program mentioned above, result in the ongoing discharge of student-loan debt. So the referenced ARPA provision, which exempts debt discharges beyond the circumstances at issue here, says nothing about the HEROES Act. *See* Pub. L. 117-2, §9675, 135 Stat. 4, 185–86 (Mar. 11, 2021).

C. The Cancellation is arbitrary and capricious.

Courts must "hold unlawful and set aside agency action" that is "arbitrary" or "capricious." 5 U.S.C. §706(2)(A). The Cancellation is arbitrary and capricious for at least five reasons.

First, the Department did not consider *any* reasonable alternatives to the Cancellation. "[W]hen an agency rescinds a prior policy its reasoned analysis must consider the alternatives that are within the ambit of the existing policy." *DHS* v. *Regents of the Univ. of Cal.*, 140 S. Ct.

1891, 1913 (2020) (cleaned up). The Department is moving from a forbearance policy to the Cancellation, so it must consider alternatives like (1) continuing forbearance and (2) other options to decrease monthly loan payments. Because those alternatives are within the ambit of the existing policy, the failure to consider them "renders [the] decision arbitrary." *Ibid.* The Department says (at 30) that the Secretary "considered . . . the availability of 'other options to reduce monthly payments.'" But the Secretary did not consider what *he* might do to reduce monthly payments; rather, the Rationale Memo simply observed that "*borrowers have* other options to reduce monthly payments, like income-driven repayment (IDR) plans." App. 39a (emphasis added). Nor, despite what the Department implies (at 31), did the Secretary "consider[]" the option of "continuing forbearance" in lieu of the Cancellation.

Second, the Department's reliance on COVID-19 as its justification for the Cancellation is "pretextual," *Dep't of Com.*, 139 S. Ct. at 2573, and an impermissible "*post hoc* rationalization," *Regents*, 140 S. Ct. at 1908 (citation omitted). The agency did not first identify the Cancellation as "necessary" to protect borrowers. 20 U.S.C. §1098bb(a)(2)(A). Rather, the Department pursued the Cancellation after failed legislative efforts, and it is using the pandemic as cover to "follow[] through" on the President's campaign "promise." D. Ct. Doc. 5-3, at 29. Indeed, the Secretary approved the Cancellation at 9:25 am on the day he received the Rationale Memo. *See* App. 33a. Such rapid turnaround is the opposite of reasoned decisionmaking and shows that the supposed reliance on COVID-19 is "contrived." *Dep't of Com.*, 139 S. Ct. at 2575.

Third, the Department has not tried to justify key aspects of the Cancellation's broad scope. For example, the agency documents do not offer any explanation—much less a reasonable one—for the $250,000 household income cutoff. Nor has the Department addressed why borrowers who exceed the income cutoff in either 2020 or 2021 qualify or why a borrower can apply *over a year from now* for a program purportedly addressing a pressing emergency. Such failures to explain core eligibility requirements—which drive the Cancellation's broad scope—cannot survive review.

Fourth, because the Department was changing its forbearance policy and "not writing on a blank slate, it *was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns."

Regents, 140 S. Ct. at 1915 (cleaned up). Yet nothing in the agency materials suggests the Department did this. This failure to "consider[]" any "reliance interests" is "arbitrary and capricious." *Ibid.* The Department accepts that it ignored the States' reliance interests but asserts (at 31) that those interests are not "cognizable." The HEA itself, however, recognizes the vital interests of "groups involved in student financial assistance programs," including the interests of "lenders," secondary-market participants, and "loan servicers" like the States. 20 U.S.C. §1098a(a)(1).

Fifth, the Department's September 29 about-face on FFEL consolidation arbitrarily distinguishes between borrowers with non-federally held FFEL loans who applied for consolidation before September 29 and those who did not. The agency never rationalizes that distinction—nor can it. By all accounts, it was an attempt to avoid legal challenges to the program and thus reflects a failure to consider "the relevant issues" in crafting the Cancellation. *FCC* v. *Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021).

D. The injunction is not overbroad.

The current scope of the Eighth Circuit's injunction is necessary "to provide complete relief" to the States. *Madsen* v. *Women's Health Ctr.,* *Inc.*, 512 U.S. 753, 765 (1994). Denying this, the Department contends (at 35) that the court should have simply "enjoined the Secretary from discharging loans that are serviced by MOHELA." But as the States told the Eighth Circuit, such an injunction would not prevent the harms to Missouri through MOHELA because the Department could skirt that relief by transferring loans eligible for the Cancellation to one of the agency's eight other loan servicers. *See Who's My Student Loan Servicer*, U.S. Dep't of Educ., https://tinyurl.com/2p9xkya8 (listing nine servicers).

A "geographically-limited injunction" would likewise "be ineffective" because borrowers and accounts "move among states." *Texas*, 809 F.3d at 188; *see also Pennsylvania* v. *President U.S.*, 930 F.3d 543, 576 (3d Cir. 2019), *rev'd on other grounds*, *Little Sisters of the Poor* v. *Pennsylvania*, 140 S. Ct. 2367 (2020). Regarding the States' tax harms, interstate migration means that a borrower living in California with a loan serviced in Wisconsin may reside in Iowa in 2026, so cancelling that debt inflicts injury on Iowa. And as for the consolidation harms, FFEL consolidations injure the States even if the borrowers live beyond their borders.

II. The equities support the injunction.

The equities analysis begins and ends with the Cancellation's unlawfulness. "[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490. Accordingly, it is Congress's "responsibility"—not this Court's—"to weigh [the] tradeoffs" of the Cancellation. *NFIB*, 142 S. Ct. at 666.

Even so, the equitable balance tilts decidedly toward the States. All the Department's purported harms have been independently caused by a judgment vacating the Cancellation in a different case. *See Brown*, 2022 WL 16858525, at *15. Thus, lifting the injunction here will not solve the Department's concerns. Even without that judgment, now that the Department has extended the payment pause into the summer of 2023, its allegations of immediate harm fall flat.

The Department's specific arguments about harms to itself are likewise unpersuasive. The agency contends (at 35) that the injunction impedes its ability to "act quickly" to help borrowers during a national emergency. But this plea for speed rings hollow now that the President has declared the pandemic over and the payment pause has been extended. Also unavailing is the Department's protest (at 36–37) about the supposedly "significant cost" of continuing the pause. Whatever those temporary costs (roughly a few billion dollars per month), they pale in comparison to the Cancellation's $400 billion-plus price tag and the $100 billion already incurred for forbearance. Yesterday's additional extension of the pause further undermines any claim that it is too expensive.

Nor does the injunction harm the public. To be sure, many eligible borrowers prefer the Cancellation to proceed. But millions of others "who pay taxes to finance the government," App. 2a, and object to funding the loans that borrowers voluntarily assumed, want the Cancellation to fall. *See* Alexandra Marquez, *Voters Split on Student Loan Forgiveness, New Poll Shows*, NBC News (Sep. 20, 2022), https://tinyurl.com/2p8ku6se. The Department complains (at 37) about leaving borrowers in "limbo," but any uncertainty exists only because the agency publicly announced an unlawful handout and has desperately tried to shield it from legal review. Such "unclean hands" undercut the agency's appeal to equity. *See Henderson* v. *United States*, 575 U.S. 622, 625 n.1 (2015). The Department is also incorrect (at 35) that confining the injunction to MOHELA's accounts would benefit the public. From the public's perspective, such a distinction would be arbitrary and unjust.

On the other hand, vacating the injunction would risk exposing the States to the irreparable harms identified in the standing section above. Missouri illustrates the point. It faces irreparable injury from the financial harms to MOHELA. Those monetary losses to MOHELA and the corresponding adverse impact on Missouri's receipt of funds from MOHELA are not recoverable and thus are irreparable. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (lost income "with no guarantee of eventual recovery" is "irreparable harm"). Also irreparable are the injuries to Missouri's quasi-sovereign interests in promoting higher education. *See Georgia* v. *Tenn. Copper Co.*, 206 U.S. 230, 239 (1907) (finding proper an injunction to protect Georgia's quasi-sovereign interests). And finally, the other States face irreparable harm to their tax revenue and their respective quasi-sovereign interests.

III. If the Court thinks the application raises close questions, it should leave the injunction in place and grant certiorari before judgment.

The Court should decline to lift or modify the injunction because, as discussed above, the States have a strong likelihood of success on the merits and the equities weigh decidedly in their favor. Yet if the Court thinks the application raises close questions, it should leave the injunction in place, grant certiorari before judgment on the two questions presented, set an expedited timetable for briefing, and schedule a February argument, as the Department suggests. Now that the agency has extended the payment pause well into 2023, no one will be harmed by leaving the injunction while this Court reviews the case.

If the Court grants certiorari, the States should be petitioners because the district court entered final judgment against them. "This Court reviews judgments," *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (cleaned up), and the "usual rule" is that the Court does not "consider[] prevailing parties' petitions," *Camreta* v. *Greene*, 563 U.S. 692, 709 (2011). Because the Department won the only judgment entered in this case, the States should be petitioners if review is granted.

CONCLUSION

The Court should decline to vacate or modify the injunction.

Respectfully submitted,

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