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.

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

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Congress authorized the Secretary of Education to respond to national emergencies by providing relief to affected student loan borrowers. Without making any finding that the Secretary exceeded that express statutory authority, the Eighth Circuit issued a nationwide injunction preventing the Secretary from granting critical relief to millions of Americans suffering the continuing economic effects of a global pandemic. Respondents cannot justify that extraordinary result.

Respondents largely retreat from the only theory of standing endorsed by the Eighth Circuit, and their alternative theories likewise contravene settled Article III principles. On the merits, respondents' arguments depend on limitations found nowhere in the text of the HEROES Act and on mischaracterizations of the Secretary's plan and its supporting analysis. And respondents make little effort to justify the injunction's universal scope.

This Court should vacate or, at a minimum, narrow the injunction. But if the Court declines to do so, it may wish to grant certiorari and set the case for argument this Term. See Resp. 39-40 (agreeing that review is warranted). Only prompt review by this Court would avoid the prolonged uncertainty that the Eighth Circuit's sweeping injunction would otherwise inflict on millions of vulnerable borrowers.

I. THE GOVERNMENT IS LIKELY TO SUCCEED ON THE MERITS

A. Respondents Lack Article III Standing

1. Respondents scarcely defend the only theory of standing adopted by the Eighth Circuit: that the plan injures Missouri because it causes financial harm to the Missouri Higher Education Loan Authority (MOHELA), which in turn owes money to the State. Appl. App. 4a-5a. Respondents briefly suggest (Resp. 17) that the plan will "hinder[] MOHELA's contributions to the State." But respondents have not shown that any reduction in revenue would lead MOHELA to default on its obligations to Missouri.

Respondents instead focus (Resp. 15) on a theory that the Eighth Circuit declined to adopt: that "financial injuries to MOHELA are harms to the State." MOHELA itself has not objected to the Secretary's plan and has played no role in this suit. Appl. 16. And respondents' assertion that the State can assert MOHELA's rights contradicts the "long settled" principle that "separately incorporated organizations are separate legal units with distinct legal rights." Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2087 (2020). In keeping with the general rule that a plaintiff "'cannot rest his claim to relief on the legal rights or interests of third parties,'" even a shareholder that otherwise satisfies Article III ordinarily cannot "initiat[e] actions to enforce the rights of [a] corporation." Franchise Tax Bd. v. Alcan Aluminium Ltd., 493 U.S. 331, 336 (1990) (citation omitted). That is true even if the shareholder "created" the corporation, "selected its board," and receives "millions of dollars" in dividends. Resp. 15, 18.

No basis exists to treat a corporation created by Missouri any differently. Missouri chose to structure MOHELA as a separate corporation that can sue and be sued in its own name. Mo. Rev. Stat. § 173.385(3) (2022). Respondents identify no prior case in which the State purported to sue on MOHELA's behalf. Having chosen to establish MOHELA as a separate legal entity and reaped the benefits of that choice, Missouri may not now maintain that the State and MOHELA are one and the same merely because it believes that MOHELA has standing to challenge a policy the State opposes.

2. Respondents advance (Resp. 18-22) three other theories that the district court rejected, Appl. App. 21a-26a, and the court of appeals did not consider, id. at 3a, 5a. All lack merit.

a. Iowa, Kansas, Nebraska, and South Carolina assert (Resp. 18-20) that the plan diminishes their tax revenues. They contend (Resp. 19) that some student loans that would have been discharged in the future will instead be discharged under the plan. That hypothesized shift in timing matters because the Internal Revenue Code normally treats "discharge of indebtedness" as a form of gross income, 26 U.S.C. 61(a)(11), but a temporary provision excludes discharges of federal student loans from 2021 to 2025, see 26 U.S.C. 108(f)(5). The States argue (Resp. 18-20) that, because they have chosen to incorporate the Code's definition of "gross income" into their own laws, a change in the timing of discharges will diminish their revenues. That roundabout theory is incorrect.

First, respondents' alleged harm results from their own choice to tie their tax laws to the Code. Respondents are free to depart from the federal definition of "gross income." If they opt not to do so, any resulting reduction in their tax revenues is traceable to that choice, not the plan. And the States "cannot manufacture standing merely by inflicting harm on themselves." Clapper v. Amnesty Int'l USA, 568 U.S. 398, 416 (2013).

Respondents assert (Resp. 19-20) that States cannot be required to "chang[e] their tax laws" to avoid an injury. But this Court held otherwise in Pennsylvania v. New Jersey, 426 U.S. 660 (1976) (per curiam). There, Pennsylvania sought to establish standing to challenge a New Jersey tax by arguing that, because Pennsylvania provided a credit for taxes paid to other States, New

Jersey's tax increase would lead Pennsylvania to lose revenue. Id. at 663-664. The Court rejected that argument, observing that "nothing prevents Pennsylvania from withdrawing that credit" and emphasizing that "[n]o State can be heard to complain about damage inflicted by its own hand." Id. at 664. So too here.

Second, even apart from the self-inflicted nature of the States' asserted harm, this Court's decision in Florida v. Mellon, 273 U.S. 12 (1927), establishes that a federal policy's incidental effects on state tax revenues are not judicially cognizable injuries. There, Florida sought to establish standing to challenge a federal inheritance tax by arguing that the tax would prompt the "withdrawal of property" and diminish the State's tax base. Id. at 18. This Court rejected that argument, explaining that Florida was required to show a "direct injury" and that any harm caused by the federal tax was, "at most, only remote and indirect." Ibid.

Florida controls this case. If the State there could not establish standing by claiming that state tax revenues would decline because of a federal policy, then the States here cannot do so either. Indeed, the States' theory is particularly speculative: The hypothesis that state tax revenues will decrease rests on the premise that, if borrowers do not receive discharges under the plan, some of them would receive discharges for other reasons after 2025. But respondents have not shown that borrowers covered by the plan would otherwise receive discharges for independent reasons. Nor have they shown that those hypothesized discharges would occur in 2026 or later, rather than, say, in 2024 or 2025.

b. Arkansas, Missouri, and Nebraska also argue (Resp. 8) that, because the plan provides relief for Direct Loans but not for Family Education Loans, it has "incentivized" borrowers to consolidate their Family Education Loans into Direct Loans. The States argue (Resp. 20-21) that such consolidation would harm them because they hold (or have invested in) Family Education Loans.

The most obvious problem with respondents' incentive-to-consolidate theory is that the plan does not create an incentive to consolidate. Under a decision the Department made the day before respondents sued and announced the same day they sued, "borrowers with federal student loans not held by the Department cannot obtain the one-time student debt relief by consolidating those loans into Direct Loans." Appl. App. 21a. Because consolidation does not make borrowers eligible for relief under the plan, the plan does not encourage borrowers to consolidate.

Respondents assert (Resp. 20-21) that they could secure relief for past consolidations in the form of an order requiring borrowers who recently consolidated to pay interest "to the entity that held their prior [Family Education] loan." But even if that were correct, any injury stemming from already-completed consolidations would not support respondents' request for an injunction barring future loan forgiveness -- the only relief at issue here. "[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim they press and each form of relief they seek." TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208 (2021).

c. Finally, Missouri argues (Resp. 21-22) that it may sue as parens patriae to protect the wellbeing of its residents. But the very case on which Missouri relies explains that "[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, 458 U.S. 592, 610 n.16 (1982).

B. The Secretary's Action Is Lawful

Respondents assert (Resp. 12) that the Eighth Circuit permissibly granted injunctive relief without finding a likelihood of success on the merits because it observed, without elaboration, that the appeal involves "substantial questions of law." Appl. App. 5a (citation omitted). But "a party seeking a preliminary injunction must demonstrate, among other things, 'a likelihood of success on the merits.'" Munaf v. Geren, 553 U.S. 674, 690 (2008) (emphasis added; citation omitted). The Eighth Circuit's failure to find a likelihood of success is thus a sufficient reason to vacate the injunction. And respondents' merits arguments fail to shore up that deficiency in any event.

1. Contrary to law. As the government explained (Appl. 18-28), the plan falls within the plain text of the HEROES Act. Respondents' contrary arguments fail.

a. Respondents principally seek to read limitations into the HEROES Act found nowhere in the statutory text. Respondents assert (Resp. 23), for instance, that the Act requires "more than" a "but-for" connection between the proposed relief and the national emergency. But the Act authorizes the Secretary to ensure that borrowers are not worse off in relation to their student loans "because of" an emergency. 20 U.S.C. 1098bb(a)(2)(A). And the term "because of" is most "often associated with but-for causation." Comcast Corp. v. National Ass'n of African Am.-Owned Media, 140 S. Ct. 1009, 1016 (2020); see University of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350 (2013) (collecting cases).

Respondents err in asserting (Resp. 23) that Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992), suggests otherwise. Holmes acknowledged that terms like "by reason of" often require only "but for" causation, but departed from that approach because the particular statute at issue incorporated a "judicial gloss" that required a higher showing. Id. at 267-268. The opposite inference is warranted here, where Congress expressly authorized class-wide rather than "case-by-case" relief, 20 U.S.C. 1098bb(b)(3), making proximate causation particularly inapt.

In any event, the plan satisfies any standard of causation. The evidence before the Secretary included substantial data showing that the pandemic has inflicted severe economic harms, including layoffs, inflationary spikes, rising delinquency rates, and projected reductions in lifetime earnings for students who left school in 2020 and 2021 -- and that these material hardships have disproportionately affected lower-income households. Appl. 8, 20-

21. The evidence further showed that, without the proposed relief, those borrowers would likely experience default and delinquency rates beyond pre-pandemic levels. Appl. 20-21. The plan thus directly targets those borrowers facing "a worse position financially" "because of" the pandemic, 20 U.S.C. 1098bb(a)(1) and (2).

Respondents next argue (Resp. 24) that the HEROES Act bars "discharge of loan principal." But nothing in the Act reflects that limit; to the contrary, the Act specifically authorizes the Secretary to "waive or modify <u>any</u> statutory or regulatory provision applicable to the student financial assistance programs" under the Education Act, 20 U.S.C. 1098bb(a)(1) (emphasis added) -- provisions that include those governing student-loan repayment obligations, cancellation, and discharge. Appl. 20. Contrary to respondents' suggestion (Resp. 25), nothing about the nature of events that can trigger the Act -- <u>i.e.</u>, military operations or national emergencies -- suggests a limit on the <u>type</u> of relief that might be necessary to respond to those conditions. And here, the Secretary determined that the best way to "ensure," 20 U.S.C. 1098bb(a)(2)(A), that borrowers are not worse off as a result of a devasting global pandemic was a one-time discharge of principal rather than a continued pause on interest and payments.

Economically, moreover, no principled line distinguishes discharges from other types of relief that likewise reduce the total amount a borrower will ultimately pay the government. Appl. 23. Most obviously, respondents do not challenge the across-the-board pause on interest accrual and payments maintained by Secretary Cardona and his predecessors since March 2020. But depending on a borrower's loan balance and interest rate, a 2.5-year pause on interest accrual could be worth significantly more than the plan's $10,000 forgiveness. Respondents also concede (Resp. 25-26) that earlier uses of the HEROES Act "might have the indirect effect of reducing the principal that a borrower will ultimately pay," and they make no attempt to argue that such uses were unlawful.

Respondents likewise err in their characterizations of the plan itself. For instance, respondents suggest (Resp. 26) that the Secretary failed to limit the plan to "affected individuals," but ignore that the vast majority of borrowers qualify based on where they work and reside, and that the Secretary could reasonably "determine[]" -- as both the Trump and Biden Administrations did -- that the small fraction of eligible borrowers who live and work abroad qualify because they have suffered "direct economic hardship" due to a global pandemic. 20 U.S.C. 1098ee(2)(D); Appl. 19.

Similarly, respondents suggest (Resp. 26-27) that the Secretary failed to "tailor the eligibility requirements or relief amount" to borrowers "facing 'a worse position financially in relation to' their loans." That is wrong. The plan directly corresponds to the Department's supporting analysis, which examined the relevant data and determined that $125,000 is the income threshold at which repayment capability is likely to change dramatically, and that a $10,000 discharge ($20,000 for qualifying

Pell Grant recipients) will mitigate the risk that vulnerable borrowers will be worse off in relation to their student loans as a result of the pandemic. Appl. 10-11. As respondents recognize (Resp. 27), the Act expressly permits the Secretary to provide relief on a class-wide basis sufficient to "ensure" affected borrowers are not worse off, 20 U.S.C. 1098bb(a)(2); see 20 U.S.C. 1098bb(b)(3); some imprecision is inherent in class-wide criteria.

b. Lacking support in the HEROES Act's text, respondents retreat to the major questions doctrine. But that doctrine has no application here -- and even if it did, it would not support respondents' claims. Appl. 25-28.

This Court has never treated the major questions doctrine as a license for courts to override statutory text simply because an agency's action is controversial or has substantial economic effects. Instead, the doctrine applies when an agency claims an "[e]xtraordinary grant[] of regulatory authority" based on "'modest words,' 'vague terms,' or 'subtle device[s]'" and the "history and the breadth" of that asserted power provide "reason to hesitate before concluding that Congress" meant to confer such authority. West Virginia v. EPA, 142 S. Ct. 2587, 2608-2609 (2022). No such reason exists here. This is not a case where the agency has "no comparative expertise in making [the relevant] policy judgments," id. at 2613; relied on "ancillary" provisions to locate "newfound power," id. at 2610; or asserted authority that falls outside the agency's "particular domain," Alabama Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021). Rather, the Department of Education -- i.e., the federal agency primarily responsible for administering federal student loans -- has modified the scope of those loan obligations because of a national emergency, pursuant to the central provision of the HEROES Act, which expressly authorizes the Secretary to do just that. The plan "fits neatly within the language of the statute," Biden v. Missouri, 142 S. Ct. 647, 652 (2022) (per curiam), because the entire point of the HEROES Act is to authorize the Secretary to grant student-loan debt relief to mitigate economic harms borrowers face from national emergencies.

Critically, moreover, respondents do not dispute that every case this Court has treated as presenting a major question involved an agency asserting the power to regulate the conduct of private parties. This case, in contrast, does not involve a claimed "[e]xtraordinary grant[] of regulatory authority" at all, West Virginia, 142 S. Ct. at 269, but rather the exercise of authority over a benefit program to alleviate burdens on beneficiaries.

Respondents nevertheless characterize (Resp. 28) the Department as claiming an "unheralded power" to discharge loan principal. But as explained above, see pp. 9-10, supra, no principled legal or economic line distinguishes discharge of principal from other forms of student-loan relief. Insofar as respondents challenge the scale of relief as "unprecedented" (Resp. 29), the same could be said of the Department's across-the-board 2.5-year pause on payments and interest accrual, which respondents have not challenged. And the unprecedented scale of those responses reflects the unprecedented scale of the national emergency that the Secretary confronted: a multi-year global pandemic driven by an infectious disease that caused massive disruption to the economy, commerce, and employment.

Respondents attempt to avoid this conclusion by distorting the Secretary's position. The Secretary is not asserting the power to "cancel student-loan debt, of any amount, for any borrower, even a decade or more after a national emergency." Resp. 29-30. Rather, the plan reflects the Secretary's determination that a one-time discharge of a limited measure of debt for a subset of affected borrowers is necessary as the country works to recover from the devastating effects of COVID-19. Other emergencies may be different in kind, scope, or scale, and may require different relief -- but always subject to the terms of the HEROES Act, which limit (1) the circumstances in which the Secretary can act; (2) the class of individuals eligible for relief; (3) the objectives any relief must aim to accomplish; and (4) the measures the Secretary may implement. Appl. 26.

Respondents also argue (Resp. 28) that Congress has "repeatedly declined to enact" supposedly similar student-loan relief measures. But each bill respondents cite meaningfully differed from the relief the Secretary authorized.[1] The far more relevant

[1] See, e.g., H.R. 2034, 117th Cong. (2021) (proposing discharge of entire loan balances); H.R. 6800, 116th Cong. § 150117(h) (2020) (omnibus $3 trillion relief package that included many other

congressional action is the 2021 pandemic relief legislation that specifically anticipated that the Secretary would discharge loan principal by adopting a special rule making such discharges tax free from 2021 until 2025. Appl. 28. Respondents' suggestion (Resp. 32) that this measure was intended to apply only to existing discharge programs strains credulity. Nothing in the provision is so limited, and its sponsors specifically contemplated that it would "pave the way for President Biden to provide real debt relief." Sen. Menendez, Press Release, Menendez, Warren Bill to Make Student Loan Relief Tax-Free Passes as Part of COVID Relief Package, Clearing Hurdle for Broad Loan Forgiveness (Mar. 6, 2021).

Moreover, contrary to respondents' contention (Resp. 30) that any loan discharge conflicts with the Education Act, discharge of principal in appropriate circumstances is a familiar measure. The Act authorizes the Secretary to "compromise, waive, or release" any "right, title, claim, lien, or demand" acquired in the performance of his "functions, powers, and duties" in administering the student-loan programs. 20 U.S.C. 1082(a)(6). Pursuant to this authority, the Secretary has long discharged debts owed by federal borrowers -- including substantial amounts on a class-wide basis.[2] Those discharges do not "convert loans into grants."

contested provisions); S. 2235, 116th Cong. (2019) (proposing discharge of up to $50,000 before the pandemic).

[2] See, e.g., Education Department Approves $5.8 Billion Group Discharge to Cancel all Remaining Loans for 560,000 Borrowers who Attended Corinthian (June 1, 2022), https://perma.cc/MTW6-XABV; Secretary DeVos Cancels Student Loans, Resets Pell Eligibility, and Extends Closed School Discharge Period for Students Impacted

Resp. 30. Instead, they reflect the Secretary's authority to alter the ordinary operation of the Education Act, including the terms relevant to loans, to administer the student-loan programs. The same is true here; the HEROES Act specifically authorizes the Secretary to modify repayment terms to respond to an emergency.

Indeed, it is respondents who seek an "unprecedented" result -- a holding that, even though the relevant statutory text expressly authorizes debt relief in cases of national emergency, some heightened measure of specificity is required simply because the rule exceeds an unspecified dollar threshold or has engendered some undefined measure of political disagreement. Agencies cannot "act unlawfully even in pursuit of desirable ends," Alabama Ass'n, 141 S. Ct. at 2490, but neither are they disabled from acting lawfully because some find the ends undesirable. To rely on such "extratextual sources" would "risk amending statutes outside the legislative process reserved for the people's representatives," thereby undermining, not furthering, the separation of powers. Bostock v. Clayton County, 140 S. Ct. 1731, 1738 (2020); accord id. at 1824 (Kavanaugh, J., dissenting).

2. Arbitrary and capricious. Respondents argue (Resp. 32-35) that the plan is arbitrary and capricious, asserting that the Secretary did not consider "any" alternatives or the States' reliance interests. That charge is unfounded. Appl. 31-32. The

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by Dream Center School Closures (Nov. 8, 2019), https://perma.cc/FRT6-WAWS.

supporting analysis considered whether discharge was necessary "even though borrowers have other options to reduce monthly payments, like income-driven repayment (IDR) plans." Appl. App. 39a-40a. The analysis determined that "[l]oan discharges" would reduce "delinquency and default rates" beyond what could be accomplished even through "efforts to increase enrollment in IDR." Ibid. And the Secretary's decision to continue forbearance until December 31, but resume payments after that date, id. at 32a-33a, reflects his determination that the Department's objectives would be best served by resuming payments rather than indefinitely continuing forbearance -- so long as lower-income borrowers could receive relief to address the difficulties they would face, ibid.

Respondents' contention (Resp. 34) that the Department did not justify "key aspects" of the plan likewise fails. The supporting analysis explains at length how the Department arrived at the $125,000 income threshold, including by examining data showing that "[t]here is a break in repayment capacity at around $125,000" and that "borrowers with incomes between $100,000 and $124,000 have rates of payment inconsistency * * * nearly double what they are for those with incomes between $125,000 and $149,000." Appl. App. 42a-43a. To account for the greater expenses associated with multi-person households, the Secretary reasonably set $250,000 -- i.e., twice that threshold -- as the ceiling for borrowers filing jointly or as head of household. Id. at 28a, 41a. Given that the COVID-19 disaster spanned both 2020 and 2021, it was likewise reasonable to consider borrowers' incomes from both years. Id. at 45a. And the Secretary reasonably set the deadline to apply for relief to reflect the fact, emphasized in the Department's analysis, that lower-income borrowers often do not immediately apply for available relief. Id. at 39a-40a.

Respondents' assertion (Resp. 33-34) that the Secretary's decision was pretextual is based on legally irrelevant political statements that cast no doubt on the Secretary's stated explanation. A "court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities." Department of Commerce v. New York, 139 S. Ct. 2551, 2573 (2019). The statements on which respondents rely reflect, at most, the sort of policy and political considerations that "routinely" inform policymaking. Ibid. They do not come close to the "strong showing of bad faith or improper behavior" necessary before this Court looks behind an agency's stated rationale. Id. at 2574 (citation omitted); see Biden v. Texas, 142 S. Ct. 2528, 2546-2547 (2022).[3]

C. The Eighth Circuit's Universal Relief Was Overbroad

Respondents offer no sound justification for enjoining the plan on a universal basis. They argue (Resp. 36) that "the De-

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[3] Respondents mention in passing (Resp. 7) a 2021 memorandum that opined that the Secretary could not forgive student loans under the HEROES Act. But the Department reviewed that memorandum in consultation with the Office of Legal Counsel and determined that it should be "rescinded" because its conclusions are "unsupported and incorrect." 87 Fed. Reg. 52,945 (Aug. 30, 2022).

partment could skirt" an injunction limited to loans serviced by MOHELA "by transferring" eligible loans to "the agency's eight other loan servicers." But the obvious solution would be to simply apply the injunction to all loans currently serviced by MOHELA, even if they are later transferred. Similarly, respondents assert that an injunction limited to borrowers within their borders would not protect against their asserted tax harms because borrowers living in other States today might move to the respondent States in the future. But an injunction is an equitable remedy that must be "tailored" to the scope of the harm, the burden on the opposing party, and the public interest. Winter v. NRDC, Inc., 555 U.S. 7, 33 (2008). It would be grossly inequitable to enjoin relief for millions of borrowers in other States simply because of the speculative possibility that some might one day move to the respondent States and thereafter pay lower state taxes sometime after 2025.

II. THE EQUITIES FAVOR A STAY

Respondents principally argue (Resp. 37-39) that the equities favor the States because the Department recently extended the payment pause and suspension of interest accrual. Respondents ignore, however, that the Department determined that this extension was necessary only because of the court orders blocking implementation of the plan -- and that payment obligations will resume whenever the Department is permitted to implement the plan. U.S. Dep't of Education, Biden-Harris Administration Continues Fight for Student Debt Relief for Millions of Borrowers, Extends Student Loan Repayment Pause (Nov. 22, 2022), https://perma.cc/6T7Y-2YK9. The injunction has thus already frustrated -- and continues to frustrate -- the government's ability to effectuate its chosen policy. Moreover, vulnerable borrowers will face profound uncertainty as long as this litigation persists, lacking basic information about their loan obligations relevant to a host of financial decisions. On the other side of the ledger, respondents' asserted harms do not even satisfy Article III. See pp. 2-7, supra.

Respondents emphasize (Resp. 37) that a federal district court has also vacated the plan nationwide. See Brown v. U.S. Dep't of Educ., No. 22-cv-908, 2022 WL 16858525 (N.D. Tex. Nov. 10, 2022). But that ruling does not insulate the Eighth Circuit's injunction from review. The government has appealed and sought a stay pending appeal in Brown. If the Fifth Circuit denies a stay, the government will seek relief from this Court in Brown as well. Appl. 14. But even if the Fifth Circuit grants relief, the Department cannot implement the plan while the Eighth Circuit's injunction remains in place. That injunction thus independently prevents the Department from effectuating its chosen policy.

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

Respondents agree (Resp. 39-40) that if the Court believes the application presents "close questions," it may wish to grant certiorari before judgment and set this case for expedited briefing and argument. Respondents likewise agree (ibid.) that the Court should hear the case in the February 2023 sitting. They contend (Resp. 40) that, if this Court grants certiorari, "the States should be petitioners because the district court entered final judgment against them." But this Court is empowered to grant review "upon the petition of any party." 28 U.S.C. 1254(1). "That language covers petitions brought by litigants who have prevailed, as well as those who have lost, in the court below." Camreta v. Greene, 563 U.S. 692, 700-701 (2011). Here, applicants filed the document that would be treated as a petition for a writ of certiorari and thus would be petitioners if this Court granted review.

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

Respectfully submitted.

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