No. 22A489

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF EDUCATION, ET AL.,
Applicants,
v.

MYRA BROWN, ET AL.,
Respondents.

On Application to Stay the Judgment Entered by the
United States District Court for the Northern District of Texas

RESPONSE TO APPLICATION TO STAY THE JUDGMENT

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INTRODUCTION

Respondents agree that the Court should grant certiorari before judgment. This case presents the same issue of imperative public importance as *Biden v. Nebraska*: whether the HEROES Act authorizes the Department to cancel 400 billion dollars in student loan debts. But the different facts, claims, and posture of the two cases make it possible that the Court's decision in *Nebraska* will not resolve this case. To fully and finally resolve the legality of the Debt Forgiveness Program, the Court should "consider the full range of challenges to the plan at once." Appl. 38.

Respondents are two individuals with federal student-loan debt. If the Department is going to provide debt forgiveness, Respondents believe their debts should be forgiven too. Under the Administrative Procedure Act and the Higher Education Act, the Department could not adopt a new debt forgiveness program without engaging in negotiated rulemaking and providing notice and an opportunity to comment. Yet instead of following these procedures, the Department decided the key details of the program behind closed doors, including which individuals will receive debt forgiveness, how much of their debt will be forgiven, and which types of debt will qualify.

The result was predictable: some will benefit handsomely, some will be shortchanged, and others will be left out entirely. Here, Respondent Myra Brown does not qualify for debt forgiveness because the Program does not cover commercially held federal student loans that are not in default, and Respondent Alexander Taylor does not qualify for the full amount of debt forgiveness because he did not receive a Pell Grant when he was in college. Respondents believe it is irrational, arbitrary, and unfair to exclude Brown from the Program just because her debt is commercially held

and not in default, and to calculate the amount of debt forgiveness Taylor receives based on the financial circumstances of his *parents*. Respondents want an opportunity to present their views to the Department and to provide additional comments on any proposal from the Department to forgive student loan debts. By adopting the Program without negotiated rulemaking and notice-and-comment, the Department deprived Respondents of their "procedural right[s] to protect [their] concrete interests." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

The Department believes that the HEROES Act excuses it from its rulemaking obligations. But the HEROES Act is a three-page law that passed Congress by voice vote and was designed to defer loan payments for soldiers fighting abroad. As the district court correctly held, this statute does not authorize the Department to cancel the debts of tens of millions of individuals at a cost of nearly half a *trillion* dollars. Indeed, it "strains credulity to believe that this statute grants the [Department] the sweeping authority that it asserts." *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2486 (2021). Because no statute excuses the Department from its rulemaking obligations, the baseline rules apply and so the Department's failure to use negotiated rulemaking and provide notice-and-comment violated the APA.

Despite the Department's strained interpretation of the HEROES Act, it boldly asks this Court to stay the district court's judgment so it can immediately complete the Debt Forgiveness Program—*before* the Fifth Circuit and this Court can rule on the merits of its appeal. There is no emergency justifying this extraordinary request.

Nor can the Department satisfy any of the factors needed for a stay. Respondents are likely to succeed on the merits because they have standing, the Department failed to follow the proper rulemaking procedures, and the Department cannot enact the Program through the HEROES Act. The Department will not suffer irreparable harm during this appeal because the Program is illegal, the Department recently suspended payment obligations for borrowers through August 2023, and the Program is already subject to a nationwide injunction by the Eighth Circuit. Indeed, staying the judgment in this case will have no immediate effect because this Court declined to vacate the Eighth Circuit's injunction while it reviews *Nebraska*. Respondents, by contrast, would be severely harmed if the Department completed the Program because Respondents would be permanently deprived of their procedural rights. And there is no public interest in upholding illegal agency actions.

The application to stay the judgment should be denied. The Court should instead set this case for oral argument on the same day as *Nebraska* and resolve all these issues on the merits. But the Department's proposed questions presented are imprecise and would risk a nonfinal resolution. To ensure that the Court has the full range of issues before it, the questions presented should be (1) whether Respondents have Article III standing; and (2) whether the Department adopted the Program without following the proper procedures and without statutory authority.

STATEMENT OF THE CASE

I. The Department's Procedural Obligations and Existing Regulations

By law, the Department must follow two procedures before adopting any rule affecting student loans. First, under the Higher Education Act of 1965, the

Department must "obtain public involvement in the development of proposed regulations." 20 U.S.C. §1098a(a)(1). Specifically, it must use "negotiated rulemaking" to develop any rule "pertaining" to Title IV of the HEA, which is the subchapter governing student-loan programs. *Id.* §1098a(b)(2); Respondents' Appendix ("Resp. App'x") 2. The Department must, among other things, "obtain the advice of and recommendations from individuals and representatives of the groups involved in student financial assistance programs," including students, universities, loan servicers, and others. 20 U.S.C. §1098a(a)(1). "If consensus is achieved, the Department uses that regulatory language in its NPRM." *The Negotiated Rulemaking Process for Title IV Regulations*, U.S. Dep't of Educ., perma.cc/2V6K-5USE; *see* 20 U.S.C. §1098a(b)(2).

Second, under the Administrative Procedure Act, the Department must provide notice and an opportunity to comment. 5 U.S.C. §553(c); *see The Negotiated Rulemaking Process*, *supra* ("When the NPRM is published in the Federal Register, it contains a request for public comments and a deadline for submitting those comments."). By requiring notice and comment, the APA "gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes—and it affords the agency a chance to avoid errors and make a more informed decision." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1816 (2019).

In November 2016, after negotiated rulemaking and notice-and-comment, the Department promulgated new regulations governing, among other things, the circumstances under which the Department can forgive student-loan debts. *See Student Assistance General Provisions*, 81 Fed. Reg. 75926, 75933-34, 76070 (Nov. 1, 2016).

Per these regulations, *see* 34 C.F.R. §30.70(a)(1), (e)(1), the Department can "compromise a debt" only in four circumstances: (1) where "[t]he debtor is unable to pay the full amount in a reasonable time, as verified through credit reports or other financial information"; (2) the Department is "unable to collect the debt in full within a reasonable time by enforced collection proceedings"; (3) the "cost of collecting the debt does not justify the enforced collection of the full amount"; or (4) there is "significant doubt concerning the Government's ability to prove its case in court." 31 C.F.R. §902.2(a). The Department has never claimed that the Debt Forgiveness Program is lawful under its current regulations.

II. The Debt Forgiveness Program

Last summer, reports emerged that the White House was considering forgiving student-loan debt for tens of millions of individuals. *See* Dkt. 1 at 7-10. But instead of promulgating a new rule through negotiated rulemaking and notice-and-comment, White House officials secretly debated and decided the countless legal, policy, economic, and other issues implicated by such a program. *See, e.g.*, Pager, *Latest White House Plan Would Forgive $10,000 in Student Debt Per Borrower*, Wash. Post (May 27, 2022), perma.cc/Q2BE-7GMS. According to reports, White House officials "dr[ew] up a range of proposals" and were "waiting on the president to make a final decision." Restuccia, *Biden Decision on Student-Loan Forgiveness Unlikely Until Later in Summer, Officials Say*, Wall St. J. (June 6, 2022), perma.cc/8YRQ-7F4D.

On August 24, the White House announced that it would immediately implement a new debt forgiveness program. Under the Program, those who received a Pell Grant in college would get up to $20,000 in debt forgiveness, while those who did not

would get only $10,000. Resp. App'x 36. In addition, although "[m]ost federal student loans" would qualify, individuals with federal loans that are commercially held and not in default would "not [be] eligible for debt relief." *Id.* at 39-41; *see id.* at 2. The Department claimed that the new program was authorized by the HEROES Act. *See The Secretary's Legal Authority for Debt Cancellation*, U.S. Dep't of Educ. (Aug. 23, 2022), perma.cc/YN9U-7GW3.

On September 27, a month after announcing the program, the Secretary of Education sent a memorandum to two Department officials stating that he was using his HEROES Act authority to "waive[]" and "modif[y]" certain statutes and regulations that implement the student-loan programs. Applicants' App'x 29a. The Secretary instructed these officials to immediately implement the Debt Forgiveness Program. *Id.*

The Secretary's memorandum made no mention of the Program's costs. But the nonpartisan Congressional Budget Office has estimated that the Program will cost over $400 billion. *Costs of Suspending Student Loan Payments and Canceling Debt*, Cong. Budget Off. (Sept. 26, 2022), perma.cc/2N85-PRGL.

III. Respondents and Proceedings Below

Respondent Myra Brown has more than $17,000 in federal student loans. Resp. App'x 27. But Brown is ineligible for the Debt Forgiveness Program because her student loan debt is commercially held and not in default. *Id.* at 27-28. Respondent Alexander Taylor has more than $35,000 in federal student loans. *Id.* at 30. But Taylor is ineligible for the full $20,000 in debt forgiveness because he did not receive a Pell Grant in college. *Id.* at 30-31. If the Department is going to provide debt forgiveness,

Respondents believe that their debts should be forgiven too. *Id.* at 28, 31. They believe it is irrational, arbitrary, and unfair to exclude Brown from the Program just because her debt is commercially held and not in default and to deny Taylor full debt forgiveness based on the financial circumstances of his *parents* many years ago. *Id.* Indeed, Taylor makes less than $25,000 a year, yet others making more than *five* times as much (up to $125,000 a year) will receive $20,000 in debt forgiveness if they received a Pell Grant. *Id.* at 31. Respondents want an opportunity to present their views to the Department and to provide additional comments on any proposal to forgive student-loan debts. *Id.* at 28, 31.

On October 10, Respondents sued the Department, asking the court to, among other things, declare the Program unlawful and vacate and set it aside. Dkt. 1 at 14. Respondents filed a motion for a preliminary injunction, asking the district court to enjoin the Department from implementing the Program. Dkt. 3. Respondents argued that the Department improperly adopted the Program without going through the required negotiated rulemaking and notice-and-comment process and that the Department could not skirt those obligations by relying on the HEROES Act because that law does not authorize the Program. Dkt. 4 at 13-22; Dkt. 26 at 5-12. The district court held a lengthy hearing on October 25. On November 2, the court told the parties that it intended to convert Respondents' motion to a decision on the merits, and it instructed the parties to file objections by November 4. Dkt. 33.

On November 10, the district court granted Respondents summary judgment

and vacated the Program.[1] The district court first held that Respondents had standing. Resp. App'x 11-15. Respondents were injured because they "alleged deprivation of their procedural right[s]" and have a "concrete interest in having their debts forgiven to a greater degree." *Id.* at 11, 13. Their injuries were traceable to the Department's actions because they "lost the chance to obtain more debt forgiveness, which flows directly from [the Department's] promulgation of the Program's eligibility requirements that failed to undergo a notice-and-comment period." *Id.* at 13. And there was "at least some possibility that [the Department] would reconsider the eligibility requirements of the Program if it were enjoined or vacated, which fulfills the lighter redressability requirement that applies when a procedural injury is alleged." *Id.* at 14.

On the merits, the court held that the Department "did not violate the APA's procedural requirements" because "the Secretary may waive or modify any provision without notice and comment under the HEROES Act." *Id.* at 18. In other words, the court believed that the Department could disregard the APA's notice-and-comment requirements merely by saying that it was acting pursuant to the HEROES Act, even if the Program was not "authorized" by the HEROES Act. *Id.* The district court did not address the Department's failure to adopt the rule through negotiated rulemaking.

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[1] On November 14, the district court issued a slightly modified opinion. *See* Dist. Ct. Dkt. Notes to Entry 37. Because the Department's appendix includes only the original opinion, *see* App'x 2a-27a, Respondents provide the modified opinion in their appendix, *see* Resp. App'x 1-26.

Although it found that the Department did not violate the APA's procedural requirements, the district court agreed with Respondents that the Department "lacks the authority to implement the Program under the HEROES Act." *Id.* at 18-24. As an initial matter, the court found that the major-questions doctrine applied. *Id.* at 19-21. The Program has "vast economic significance" because it "will cost more than $400 billion," which was far more than the amount at issue in *Alabama Association of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485, 2489 (2021) (describing an economic impact of $50 billion). Resp. App'x 19-20. The Program also has "vast political significance" because "Congress has introduced multiple bills to provide student loan relief" in similar circumstances and "all have failed." *Id.* at 20.

Applying the doctrine, the district court found no "'clear congressional authorization'" under the HEROES Act to implement the Program. *Id.* at 21 (quoting *West Virginia v. EPA*, 142 S. Ct. 2587, 2614 (2022)). In particular, the HEROES Act "does not mention loan forgiveness," and the "broad" and "general" provisions the Department pointed to didn't "supply a clear statement" of authorization. *Id.* at 21-23. Also relevant was the Department's "'past interpretation[]'" that it lacked such authority under the HEROES Act and the fact that the Department has never relied on the HEROES Act to cancel student loans. *Id.* at 23 (citing *Memorandum to Betsy DeVos Secretary of Education*, U.S. Dep't of Educ. Off. of the Gen. Couns. (Jan. 12, 2021), perma.cc/EL4Z-B73B). Recognizing that the "'ordinary'" remedy under the APA is "'to vacate unlawful agency action,'" the court declared the Program unlawful and vacated it. *Id.* at 24, 26.

On November 17, the Department filed an emergency motion with the Fifth Circuit to stay the judgment pending appeal. The Fifth Circuit denied the motion on November 30. App'x 1a.

Separately, on December 1, this Court granted certiorari before judgment in *Biden v. Nebraska*, No. 22-506. In that case, six States challenge the Program as exceeding the Department's authority and as arbitrary and capricious. After the district court dismissed the suit for lack of standing, the Eighth Circuit enjoined implementation of the Program pending appeal. *Nebraska v. Biden*, 52 F.4th 1044 (8th Cir. 2022). This Court deferred consideration of the Department's application to vacate the injunction, and it set the case to be argued in the February 2023 session. *See* Order, *Biden v. Nebraska*, No. 22-506 (Dec. 1, 2022). The questions presented are "(1) whether respondents have Article III standing, and (2) whether the plan exceeds the Secretary's statutory authority or is arbitrary and capricious." Application at 38, *Nebraska*, No. 22-506; Order, *Nebraska*, No. 22-506 (Dec. 1, 2022) (granting the petition "on the questions presented in the application").

ARGUMENT

This Court should deny the Department's request for a stay. The Court grants a stay pending appeal "only in extraordinary circumstances." *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). To prevail in an application for a stay, an applicant "must carry the burden of making a 'strong showing' that it is 'likely to succeed on the merits,' that it will be 'irreparably injured absent a stay,' that the balance of the equities favors it, and that a stay is consistent with the public interest." *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (quoting

Nken v. Holder, 556 U.S. 418, 434 (2009)). The Department satisfies none of these factors. In fact, it doesn't even come close, given the Eighth Circuit's existing injunction against the Program, which this Court declined to disturb in *Nebraska*.

The Department is correct, however, that the Court should grant certiorari before judgment. As this Court recognized in granting certiorari before judgment in *Nebraska*, this case "is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. R. 11.

I. The request for a stay should be denied.

A. The Department is unlikely to succeed on the merits.

1. Respondents have standing.

Respondents' standing flows directly from this Court's precedent. A plaintiff suffers an injury in fact when he is deprived of "a procedural right to protect his concrete interests." *Lujan*, 504 U.S. at 572 n.7; *see Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). When this injury occurs, "the normal standards for redressability and immediacy" do not apply. *Lujan*, 504 U.S. at 572 n.7. A plaintiff "'who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered.'" *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007); *see Lujan*, 504 U.S. at 572 n.7 (the plaintiff need not "establish with any certainty" that the result would be different). Instead, "[w]hen a litigant is vested with a procedural right, that litigant has standing if there is *some possibility* that the requested relief will prompt the injury-causing

party to reconsider the decision that allegedly harmed the litigant." *Massachusetts*, 549 U.S. at 518 (emphasis added).

Here, the Department is pursuing a program of debt forgiveness and Respondents want their debts forgiven too. Resp. App'x 28, 31. Under the APA and the HEA, Respondents should have had an opportunity to express their views through the rulemaking process. But the Department deprived Respondents of their "procedural right[s] to protect [their] concrete interests" by adopting the Program without negotiated rulemaking and notice and comment. *Lujan*, 504 U.S. at 572 n.7; *see TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) ("monetary harms" "readily qualify as concrete injuries under Article III"). Respondents' injuries are traceable to the Department's actions because their "lost chance" to obtain debt forgiveness "flows directly from [the Department's] promulgation of the Program's eligibility requirements." Resp. App'x 13; *see Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017). And Respondents' injuries are redressable because there is at least "some possibility" that vacating the Program "will prompt [the Department] to reconsider [its] decision." *Massachusetts*, 549 U.S. at 518; *see also Summers*, 555 U.S. at 496-97.

Indeed, the Department has never disputed that there is at least "some possibility" that, if the Program is vacated, it will go through the proper process and promulgate a rule that forgives Respondents' debts. *Massachusetts*, 549 U.S. at 518. Forgiving student loan debt is one of the Administration's top priorities. *See Fact Sheet*, The White House (Aug. 24, 2022), perma.cc/4AWB-5E6W. Although the Department cannot adopt the Program under the HEROES Act, it has repeatedly claimed

"significant authority" to forgive debts under the HEA. *See* Defs' Mot. to Stay at 2, 16-17 (5th Cir. Nov. 17, 2022) (citing 20 U.S.C. §§1082(a)(6), 1087hh(2)); Dkt. 24 at 24-25; Appl. 6. Multiple commentators agree and have urged the Department to use its HEA authority. *See, e.g.*, Hunt, *Jubilee Under Textualism*, 48 J. Legis. 31, 33, 37-38 (2021); Herrine, *The Law and Political Economy of a Student Debt Jubilee*, 68 Buff. L. Rev. 281, 341-42 (2020). Yet the Department avoided the HEA *precisely because* it would require the lengthy negotiated rulemaking and notice-and-comment process. *Supra* 3-4. For Brown, the Department has repeatedly expressed interest in "expand[ing] eligibility to borrowers with privately owned federal student loans" and, until the States sued, encouraged borrowers with privately held federal loans to obtain debt forgiveness through consolidation. Resp. App'x 41, 54. For Taylor, he is being arbitrarily denied $10,000 in forgiveness because he did not receive a Pell Grant years ago; his level of debt forgiveness could easily increase if the Department based eligibility on a more relevant metric, such as current income. *Id.* at 31.

The Department does not dispute that Respondents have standing to challenge the Program on procedural grounds. Appl. 18-20. Instead, it argues only that Respondents lack standing to "challenge the *substantive* lawfulness" of the Program. Appl. 18-20 (emphasis added). But Respondents have shown "concrete injury" and, if their "objections carry the day, the [Program] will be struck down and their injury redressed." *Mozilla Corp. v. FCC*, 940 F.3d 1, 46-47 (D.C. Cir. 2019); *see DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 n.5 (2006) (noting authority 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'"). Contra the Department (at 19-20), vacatur on substantive grounds could "prompt [the Department] to reconsider [its] decision" to withhold debt forgiveness from Respondents, thus redressing their injuries. *Massachusetts*, 549 U.S. at 518.

2. The Department violated the APA.

1. Because the baseline rules require the Department to engage in negotiated rulemaking and notice-and-comment—and it is undisputed that the Department did not take these steps—the Department must point to another statute that excuses it from its rulemaking obligations. The Department has sought refuge in the HEROES Act. But as the district court correctly held, the Department "lacks the authority to implement the Program under the HEROES Act." Resp. App'x 18-23. With no other statute to rely on, the baseline rules apply, and so the Department's failure to use negotiated rulemaking and provide notice-and-comment violated the APA.

The Department has never disputed that the Program is a "rule" under the APA. 5 U.S.C. §551(4). The Program has the "'force and effect of law,'" *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (2015), and it "'affect[s] individual rights and obligations'" to repay federal student-loan debts, *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). The Program also effectively amends or repeals the Department's existing regulations that permit debt forgiveness only in limited circumstances. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995). The Department also has never denied that the Program "pertain[s]" to Title IV of the HEA, the subchapter governing student loans. 20 U.S.C. §1098a(b)(2); Resp. App'x 2. The Department thus

recognizes that negotiated rulemaking and notice-and-comment are "otherwise applicable procedural requirements." Defs' Mot. to Stay at 3 (5th Cir. Nov. 17, 2022).

The Department believes it can ignore these rulemaking procedures merely by *saying* that it is acting pursuant to the HEROES Act, even if the Program is not *actually* authorized by the HEROES Act. Appl. 17. But "[a]gencies have never been able to avoid notice and comment simply by mislabeling their substantive pronouncements." *Azar*, 139 S. Ct. at 1812. The Court must "look[] to the *contents* of the agency's action, not the agency's self-serving *label,* when deciding whether statutory notice-and-comment [and negotiated-rulemaking] demands apply." *Id.* (emphasis in original). Congress would never create such obvious loopholes to the rulemaking process. *Id.*; *accord Bauer v. DeVos*, 325 F. Supp. 3d 74, 97 (D.D.C. 2018) (exceptions to notice-and-comment and negotiated rulemaking must be "'narrowly construed and only reluctantly countenanced'" (quoting *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012)).

The provisions that the Department cites confirm this principle. The Department relies on §1098bb(d) of the HEROES Act for the proposition that it need not engage in negotiated rulemaking. Appl. 17. But that provision states that 20 U.S.C. §1098a (the HEA section requiring negotiated rulemaking) "shall not apply to the waivers and modifications *authorized* or *required* by [the HEROES Act]." 20 U.S.C. §1098bb(d) (emphasis added). Thus, if the Program is not "authorized" or "required" by the HEROES Act, then negotiated rulemaking still applies. The Department also points to §1098bb(b)(1). Appl. 17. But that provision similarly excuses notice-and-

comment only for the actions "authorized" in the prior section. *Id.* §1098bb(a)(1)-(2); *see Utility Air Reg. Grp. v. EPA*, 573 U.S. 302, 321 (2014) (courts must examine '"the design and structure of the statute as a whole"'). Simply put, if the Program is not authorized by the HEROES Act, the statute's relaxed procedures do not apply.

2. The key question, then, is whether the Program is authorized by the HEROES Act. If it isn't, then the Department violated the APA by failing to follow the proper procedures. And, of course, the Program would lack statutory authority.[2]

The HEROES Act was enacted following the September 11 attacks and was reauthorized shortly after the start of the Iraq War. *See* Pub. L. 107-122, 115 Stat. 2386 (Jan. 15, 2002); Pub. L. 108-76, 117 Stat. 904 (Aug. 18, 2003). Congress recognized that "[h]undreds of thousands of Army, Air Force, Marine Corps, Navy, and Coast Guard reservists and members of the National Guard [had] been called to active duty or active service." 20 U.S.C. §1098aa(b)(4). Through the HEROES Act, Congress sought to "provide[] to the Reservists who are leaving from their jobs to go overseas right now relief from making student loan payments for a period of time while

[2] The Department wrongly argues that the district court couldn't grant summary judgment to Respondents on the grounds that the Department "exceeded [its] statutory authority." Appl. 16-18. Respondents brought suit under the APA and asked the district court to vacate the Program. Dkt. 1 at 4, 14. From day one, Respondents have argued that the Department "lacks the authority to implement the Program under the HEROES Act." Resp. App'x 6; Dkt. 4 at 16-22. This lack of authority is why the Department had to employ negotiated rulemaking and notice-and-comment. Dkt. 1 at 10-11, 13-14; Dkt. 4 at 16, 22. That Respondents did not plead section 706(2)(C) as a separate count or "legal theory" is irrelevant. *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 11 (2014); *Koger v. Dart*, 950 F.3d 971, 974 (7th Cir. 2020) ("Complaints plead *grievances*, not legal theories."). Nor can the Department "assert any prejudice." *Quinones v. City of Binghamton*, 997 F.3d 461, 469 (2d Cir. 2021).

they are away." 149 Cong. Rec. H2522 (Apr. 1, 2003) (Rep. Garrett); *id.* at H2524 (Rep. Ryan) (the Act gives the Secretary "the opportunity to forbear a loan as our servicemen and servicewomen are activated" so that they will not have "to pay on their student loans for the time that they are active.").

The Act accomplishes this goal by letting the Secretary "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the Act as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide the waivers or modifications authorized by paragraph (2)." 20 U.S.C. §1098bb(a)(1). Paragraph 2, in turn, authorizes the Secretary to "waive or modify any provision described in paragraph (1) as may be necessary to ensure that recipients of student financial assistance under title IV of the Act who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." *Id.* §1098bb(a)(2)(A). An "affected individual" is an individual who "(A) is serving on active duty during a war or other military operation or national emergency; (B) is performing qualifying National Guard duty during a war or other military operation or national emergency; (C) resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency; or (D) suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary." *Id.* §1098ee(2).

The district court correctly held that the Department could not adopt the Program under the HEROES Act. Resp. App'x 18-23. To begin, "this is a major questions case." *West Virginia*, 142 S. Ct. at 2610. The Program has "vast 'economic and political significance.'" *Utility Air Reg. Grp.*, 573 U.S. at 324. It would allow the Department to wipe away the debts of tens of millions of borrowers at a cost of more than 400 *billion* dollars. Resp. App'x 20; Dkt. 42 at 2, ¶5. And loan forgiveness "has been the subject of an earnest and profound debate across the country." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (cleaned up); *see, e.g.*, Shear, *Biden Gave In to Pressure on Student Debt Relief After Months of Doubt*, N.Y. Times (Aug. 26, 2022), perma.cc/T75A-3J9L (noting that the Program "has drawn fierce criticism from Republicans, who describe it as a costly giveaway to many who do not deserve it," and has "ignited an intense debate about the economic consequences"). The Department also provided debt forgiveness "that Congress ha[s] conspicuously and repeatedly declined to enact itself." *West Virginia*, 142 S. Ct. at 2610; *see* Resp. App'x 2, 20 (describing failed legislation).

Congress never could have fathomed that the HEROES Act would be used to justify an agency action like the Program. The HEROES Act initially passed by unanimous voice vote in both the House and the Senate, 147 Cong. Rec. H7155 (Oct. 23, 2001); 147 Cong. Rec. S13311 (Dec. 14, 2001), and it was reauthorized and amended in 2003 by unanimous voice vote in the Senate and with only one dissenting voice in the House, 149 Cong. Rec. S10866 (July 31, 2003); *id.* at H2553-54 (Apr. 1, 2003). The Act was uncontroversial because Congress thought it was doing little more than

relieving active-duty military from "making student loan payments for a period of time while they are away." *Id.* at H2522 (Apr. 1, 2003) (Rep. Garrett). Over and over, legislators recognized this purpose. *See, e.g.*, *id.* at H2524 (Rep. Isakson) (the Act ensures that our troops who "serve us in the Middle East and in Iraq" and their families "are not harassed by collectors and that their loan payments 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 in service to the United States."); *id.* at H2524 (Rep. Ryan) (the Act gives the Secretary "the opportunity to forbear a loan as our servicemen and servicewomen are activated" so that they will not have "to pay on their student loans for the time that they are active"); *id.* at H2524-25 (Rep. Boehner) ("None of us believe that our active duty soldiers should be in a position where they are going to have to make payments on their student loans while in fact they are not here.").

Despite the September 11 attacks and multiple wars, the Department has *never* used the HEROES Act to cancel a single student's debts. Indeed, the Department's previous view was that it had no such authority. Resp. App'x 3. The Department identifies not one legislator who believed that the HEROES Act authorized the Department to cancel debts—let alone to cancel nearly half a trillion dollars in debt for millions of borrowers. The Department also can't identify any other agency action of similar size, scale, and importance that was lawfully created through the stroke of a pen, without notice and comment or any other similar process. That is because the baseline presumption is that important and consequential agency actions should be

"tested via exposure to diverse public comment." *Int'l Union v. MSHA*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

Though it tries, the Department cannot avoid the major-questions doctrine. The Department concedes that the Program is "controversial" and will have "substantial economic effects." Appl. 23. That puts things mildly. The Program will cost more than 400 *billion* dollars and is a highly contentious issue. The Department contends that the major-questions doctrine does not apply because the Department of Education is "primarily responsible for administering federal student loans," the HEROES Act applies "only in a limited set of circumstances," and the Debt Forgiveness Program involves "government benefit[s]." Appl. 23-25. But these are distinctions without a difference. None explains how *Congress* possibly empowered the Department to adopt this sweeping federal policy through the HEROES Act.

Nor is the legislation that Congress has rejected "meaningfully differe[nt]" from the Debt Forgiveness Program. Appl. 25. Congress has "conspicuously and repeatedly declined to enact" broad student-loan forgiveness. *West Virginia*, 142 S. Ct. at 2610; *see, e.g.*, H.R. 6800, 116th Cong. §150117 (2020) (cancelling up to $10,000 of student loan debt for economically distressed borrowers); S. 2235, 116th Cong. §101 (2019) (cancelling up to $50,000 of student loan debt for those who make under $100,000); H.R. 2034, 117th Cong. §2 (2021) (cancelling the outstanding balance on loans for all borrowers under a certain income cap). That the size or forgiveness conditions in these bills differed from those in the Program doesn't change the analysis; indeed, the Department appears to believe that it can unilaterally forgive *any* amount

of debt under the HEROES Act. And Congress didn't "anticipate[]" that the Program was possible through a section of the American Rescue Plan Act, Appl. 25-26, a provision that exempts *all* debt discharges from taxation and never references the HEROES Act, *see* Pub. L. 117-2, §9675, 135 Stat. 4, 185-86 (Mar. 11, 2021).

Applying the major-questions doctrine, the district court correctly found no "clear congressional authorization" to implement the Program. Resp. App'x 21-23. Yet the Department lacks authority even without the major-questions doctrine. The Department relies on its ability to "waive" or "modify" certain provisions concerning student loans. 20 U.S.C. §1098bb(a)(1). But these "modest words" do not authorize debt *cancellation*. *West Virginia*, 142 S. Ct. at 2609. Under the Act, the Department's waivers or modifications can do nothing more than ensure that borrowers "are not placed in a *worse* position financially in relation to [their] financial assistance." 20 U.S.C. §1098bb(a)(2)(A) (emphasis added). But cancelling debt places individuals in a *better* position. *E.g.*, Dkt. 42 at 7, ¶7b (noting that 18 million individuals will "have their federal student loans discharged in their entirety").

Moreover, Congress explicitly authorized the Department to cancel student loan debt in other circumstances. *See, e.g.*, 20 U.S.C. §1087ee(a)(2) ("[l]oans shall be canceled" for certain individuals engaging in public service); *id.* §1087j(a)-(b) (the Secretary shall "carry out a program of canceling the obligation [of teachers] to repay a qualified loan amount" if certain conditions are met); *id.* §1078-11(a)(1) ("The Secretary shall forgive . . . the qualified loan amount . . . of the student loan obligation of a borrower who is employed full-time in an area of national need."). But the HEROES

Act never "mention[s] loan forgiveness." Resp. App'x 21; *see* 20 U.S.C. §§1098aa-1098ee. The Court should not "read [debt cancellation] into" the HEROES Act "when it is clear that Congress knew how to [authorize it] when it wanted to." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004); *see* Scalia & Garner, *Reading Law* 182 (2012) (noting the "'familiar 'easy-to-say-so-if-that-is-what-was-meant' rule of statutory interpretation'"). The Act's legislative history also confirms this understanding. *See* 149 Cong. Rec. at H2522-27.

But even if the HEROES Act allowed some form of debt cancellation, the Program's scope is far too broad and untailored to fit within the HEROES Act. Individuals must "suffer[] *direct* economic hardship as a *direct* result of a . . . national emergency." 20 U.S.C. §1098ee(2)(D) (emphasis added). The Department argues that when repayment obligations resume "many lower-income borrowers" will be "'at heightened risk of loan delinquency and default' due to the pandemic." Appl. 10. Even if true, the Program is not remotely tailored to these borrowers. Individuals with household income up to $250,000—everyone except "the top 5% of incomes"—are eligible for loan forgiveness. *Fact Sheet*, *supra*. Nor does the Department provide evidence that the Program is "necessary" to prevent the 40 million individuals receiving debt forgiveness from defaulting or becoming delinquent on their loans. 20 U.S.C. §1098bb(a)(2)(A); *see Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City*, 685 F.3d 917, 923 (10th Cir. 2012) (Gorsuch, J.) (the word "'necessary' . . . implies more than something merely helpful or conducive. It suggests instead something 'indispensable,' 'essential,' something that 'cannot be done without.'"). And the Program is not

limited to those who "reside[d] or [were] employed in an area that is declared a disaster area," 20 U.S.C. §1098ee(2)(C), because individuals who were living abroad during the pandemic (about nine million) are eligible for debt forgiveness, *see Consular Affairs by the Numbers*, U.S. Dep't of State (Jan. 2020), perma.cc/L8PN-BCX4. These mismatches are not minor imprecisions that inevitably occur when providing "categorical relief." Appl. 8. They are fatal flaws showing that the Department made no serious attempt to comply with the HEROES Act.

3. The district court's remedy was proper.

The Department argues that the district court's remedy should be stayed because the APA does not authorize courts to vacate agency actions. Appl. 31-34. Although the Court may resolve this question eventually, it should not do so in a stay posture. Vacatur has been "standard administrative law practice" for decades. Oral Arg. Tr. at 54-55, *United States v. Texas*, No. 22-58 (Kavanaugh, J); *see, e.g.*, *Cream Wipt Food Prods. Co. v. Fed. Sec. Adm'r*, 187 F.2d 789, 790 (3d Cir. 1951) (the APA "affirmatively provides for vacation of agency action"). Many distinguished judges who have examined the text, context, and history of the APA have concluded that vacatur is authorized. *E.g.*, *Checkosky v. SEC*, 23 F.3d 452, 491-93 (D.C. Cir. 1994) (Randolph, J., concurring); *Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 50 (D.D.C. 2020) (Jackson, J.). Even if the Court were inclined to reinterpret the APA, it should not do so in an emergency posture with limited briefing and no argument.

Regardless, the district court's remedy was correct. Vacatur is "the normal remedy under the APA" because section 706 "provides that a reviewing court 'shall . . . set aside' unlawful agency action." *Long Island Power Auth. v. FERC*, 27 F.4th

705, 717 (D.C. Cir. 2022) (quoting 5 U.S.C. §706(2)). Nor does vacatur raise the same concerns as nationwide injunctions. Vacatur is a "less drastic remedy" for APA violations, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010), as it "neither compels nor restrains further agency decision-making," *Texas v. United States*, 40 F.4th 205, 219-20 (5th Cir. 2022). The district court correctly applied section 706 to vacate the Debt Forgiveness Program.

B. The equities weigh strongly against a stay.

1. None of the equities support the Department's stay request. The Department claims it will suffer irreparable harm without a stay because the judgment below "frustrates [its] ability" to provide "relief to protect vulnerable borrowers" who may face "delinquency and default" once payment obligations resume. Appl. 34-35. This argument fails for multiple reasons. Because the Department has no authority under the HEROES Act to implement the Program, its inability to carry out an illegal activity is not irreparable harm. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490. And any "institutional injury" is not irreparable because the Department "'may yet pursue and vindicate its interests in the full course of this litigation.'" *Doe #1 v. Trump*, 957 F.3d 1050, 1059 (9th Cir. 2020). Nor can the Department show irreparable harm based solely on injuries to third-party borrowers because the inquiry is whether "the *applicant* will suffer irreparable injury if the judgment is not stayed pending his appeal." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers) (emphasis added). Even if third-party harms carry some weight, the risks of delinquency and default identified in an untested, lightly sourced, 13-page memorandum are the thinnest of reeds to justify a stay. *See* App'x 37a-49a.

In any event, the Department's recent actions confirm that no emergency exists. Since March 2020, the Department has paused repayment obligations and suspended interest accrual. Appl. 2-3. On November 22, the Department announced that it was "exten[ding] . . . the pause on student loan repayment, interest, and collections" until either 60 days after this case and *Biden v. Nebraska* are resolved or August 29, 2023, whichever comes first. *Press Release*, U.S. Dep't of Educ. (Nov. 22, 2022), perma.cc/S8VL-UA5R. This freeze, according to the Department, will "give the Supreme Court an opportunity to resolve the case[s] during its current term." *Id.*; *see* Appl. 15.

The Department's decision to extend the repayment pause is dispositive here. The relevant question is whether "applicant will suffer irreparable injury if the judgment is not stayed *pending [its] appeal*." *Ruckelshaus*, 463 U.S. at 1316 (emphasis added). Because no debts will be due or interest accrued until August 2023, there is no reason why the Department cannot comply with the district court's judgment while the appeal proceeds.

The Department criticizes its decision to extend the repayment pause because it imposes "significant cost to the government" in delayed payments. Appl. 35. But these payments are merely being "pause[d]," not lost forever. *Id.* at 36. The Department's spending concerns also ring hollow given its intention to permanently forgive 400 *billion* dollars in debts. Regardless, any injuries from the "dilemma" it faced, Appl. 35, were "self-inflicted and therefore do not count," *Texas v. Biden*, 10 F.4th

538, 558 (5th Cir. 2021) (citing Wright & Miller, *Federal Practice & Procedure* §2948.1).

Finally, "from a practical perspective," the Program "is already subject to a nationwide injunction out of" the Eighth Circuit, *Kentucky v. Biden*, 23 F.4th 585, 611 (6th Cir. 2022). And this Court declined to vacate that injunction while it reviews *Nebraska* on the merits. Thus, "even if [the Court] thought the district court's" decision was wrong, staying the judgment here would not "revive the [Program] and prevent [the Department's] allegedly irreparable injuries." *Id.*

2. Respondents, by contrast, would suffer severe and irreparable harms if this Court stays the judgment below and vacates the Eighth Circuit's injunction. The Department seeks to stay the judgment so it can complete the Program *before* its appeal is resolved. But that course would permanently deprive Respondents of their procedural rights. Resp. App'x 6; *see Eli Lilly & Co. v. Cochran*, 526 F. Supp. 3d 393, 408-09 (S.D. Ind. 2021) ("'[M]any courts have found that a preliminary injunction may be issued solely on the grounds that a regulation was promulgated in a procedurally defective manner'" because "the purpose of the notice and comment requirement is to permit regulated entities to influence rulemaking at the beginning of the process and not simply after rules are already in place, at which point the agency 'is far less likely to be receptive to comments.'"). Indeed, the Department has promised to do nationwide debt forgiveness only "one time." Resp. App'x 49; Appl. 29.

3. More broadly, a stay would disserve the public interest. The "public interest is in having governmental agencies abide by the federal laws that govern their

existence and operations." *Biden*, 10 F.4th at 559 (cleaned up). "[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. In addition, countless individuals, universities, companies, governments, and others have an interest in participating in the rulemaking process, and these rights will be lost forever if the Program is completed before the Department's appeal is resolved. Finally, "maintenance of the status quo is an important consideration in granting a stay." *Dayton Bd. of Educ. v. Brinkman*, 439 U.S. 1358, 1359 (1978) (Rehnquist, J., in chambers). And "here it can be preserved only by denying one." *Id.* at 1358. The difficulty of restoring the status quo if the Department unlawfully completes the Program weighs strongly against a stay.

II. Certiorari before judgment is warranted.

Respondents agree with the Department that the Court should grant certiorari before judgment. This case presents issues of "imperative public importance" that warrant this Court's immediate review. S. Ct. R. 11. The Department seeks to immediately forgive the debts of tens of millions of individuals at a cost of nearly half a trillion dollars, and it seeks to do so without going through the proper rulemaking process. This Court should decide whether these extraordinary actions are lawful.

The Court's grant of certiorari in *Nebraska* confirms that Respondents' case should be heard. This Court often grants certiorari before judgment "in situations where similar or identical issues of importance [are] already pending before the Court and where it [is] considered desirable to review simultaneously the questions posed in the case still pending in the court of appeals." *Supreme Court Practice* §2.4 (11th

ed. 2019) (listing cases). Here, both this case and *Nebraska* present the same basic issue: whether the Department can lawfully cancel 400 billion dollars in student loan debts under the HEROES Act. But this case presents an additional claim not raised by the States: whether the Department violated the APA by failing to follow the proper rulemaking procedures. Respondents agree with the Department that the Court should "consider the full range of challenges to the plan at once." Appl. 38.

In addition, Respondents' injuries differ from the States'. So if the Court finds that the States lack standing, that holding would have no effect on Respondents' case, and the Department's authority to implement the Debt Forgiveness Program would remain unresolved. The Program would remain vacated by the district court's decision here, and this Court thus would likely need to revisit these same issues after the Fifth Circuit resolves the Department's appeal. Given the issues of national importance raised by the two cases, Respondents agree that the Court should resolve them both now.

If the Court follows this course, it should not adopt the questions presented by the Department, which appear to be imprecise. The Department asks this Court to review "(1) whether respondents have Article III standing to challenge the Secretary's *statutory authority* to adopt the plan, and (2) whether the plan exceeds the Secretary's *statutory authority*." Appl. 38 (emphases added). But Respondents independently have Article III standing to challenge the Department's failure to follow the proper rulemaking procedures. *See Morgan Stanley Capital Grp. Inc. v. Pub. Utility Dist. No. 1*, 554 U.S. 527, 552 (2008) ("affirm[ing] the judgment below on alternative

grounds"). To be sure, the Department's "statutory authority" is wrapped up in Respondents' procedural claim; but treating the Department's authority as the question itself risks imprecision. This Court should instead mirror the questions presented in *Nebraska*. Specifically, it should review (1) whether Respondents have Article III standing; and (2) whether the Department adopted the Program without following the proper procedures and without statutory authority. *See Nebraska*, No. 22-506 (granting certiorari before judgment to consider "(1) whether respondents have Article III standing, and (2) whether the plan exceeds the Secretary's statutory authority or is arbitrary and capricious.").

CONCLUSION

The Court should deny the Department's motion to stay the judgment and it should grant certiorari before judgment.

Respectfully submitted,

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