No. 22A____

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES DEPARTMENT OF EDUCATION, ET AL.,
APPLICANTS

v.

MYRA BROWN, ET AL.

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

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PARTIES TO THE PROCEEDING

Applicants (defendants-appellants below) are the U.S. Department of Education and Miguel Cardona, in his official capacity as Secretary of Education.

Respondents (plaintiffs-appellees below) are Myra Brown and Alexander Taylor.

RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

Brown v. Department of Educ., No. 22-cv-908 (Nov. 10, 2022)

United States Court of Appeals (5th Cir.):

Brown v. Department of Educ., No. 22-11115 (Nov. 30, 2022)

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Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of the applicants, respectfully applies to stay the judgment entered on November 10, 2022, by the United States District Court for the Northern District of Texas (App., infra, 28a).

This is the second of two cases in which lower courts have entered nationwide orders blocking the Secretary of Education's plan to use his statutory authority to provide debt relief to student-loan borrowers affected by the COVID-19 pandemic. Yesterday, this Court granted certiorari before judgment in the first case, Biden v. Nebraska, cert. granted, No. 22-506 (Dec. 1, 2022). In this case, the district court rejected the only claim in

respondents' complaint but proceeded to vacate the plan based on a separate claim that respondents themselves never asserted -- and would not have had standing to assert in any event. The Fifth Circuit then denied the government's stay motion without explanation. This Court should stay the district court's judgment, which flouts fundamental principles of party presentation and Article III. If the Court is not prepared to grant that relief, it may wish to defer this application pending oral argument, treat the application as a petition for certiorari before judgment, grant the petition, and hear this case along with Nebraska.

Congress charged the Secretary with administering federal student-loan programs. Because borrowers who default on their student loans face severe financial consequences -- including wage garnishment, long-term credit damage, and ineligibility for federal benefits -- Congress specifically authorized the Secretary to waive or modify any applicable statutory or regulatory provision as he deems necessary to ensure that borrowers affected by a national emergency are not worse off in relation to their student loans. See Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act or Act), Pub L. No. 108-76, § 2, 117 Stat. 904-905 (20 U.S.C. 1098bb). Confronted with the deadliest pandemic in the Nation's history, which has wreaked global economic havoc, both the Trump and Biden Administrations invoked the HEROES Act to pause repayment obligations and suspend interest accrual on all

federally held student loans since March 2020. That pause is estimated to have cost the government more than $100 billion.

In August 2022, the Secretary determined that the across-the-board pause on all payments for all borrowers should come to an end and directed the Department to restart loan payments. But the Secretary also found that when repayment obligations resume, lower-income borrowers will be at heightened risk of delinquency and default because of the continuing economic consequences of the COVID-19 pandemic. The Secretary thus directed the Department to issue up to $10,000 in student-loan relief to eligible borrowers with annual incomes under $125,000 ($250,000 for borrowers filing jointly). Qualifying Pell Grant recipients, who are at even greater risk of default, can receive up to $20,000 in relief. This relief, the Secretary found, is necessary to ensure that delinquency and default rates among these borrowers would not spike above pre-pandemic levels.

Respondents are two student-loan borrowers. Myra Brown is not eligible for relief under the plan, and Alexander Taylor is eligible for $10,000 rather than $20,000 in relief. Respondents alleged that they were improperly denied the opportunity to comment on the plan and represented that if the Secretary had proceeded through notice and comment, they would have urged him to adopt broader eligibility criteria and to provide greater debt relief. The district court rejected respondents' procedural claim, observing that the HEROES Act expressly exempts the Secretary's actions

from notice-and-comment procedures. Yet even though respondents had raised only a procedural claim and had not argued that the Secretary's provision of debt relief to other borrowers inflicted any injury on them, the court went on to hold that, as a substantive matter, the plan exceeded the Secretary's statutory authority. Based on that holding, the court vacated the plan nationwide -- a result that afforded no redress to respondents, and actually cost Taylor $10,000. The court of appeals, in turn, issued an unreasoned order denying a stay pending appeal.

This Court should stay the district court's judgment pending appeal and, if necessary, the disposition of a petition for a writ of certiorari. The district court profoundly erred by raising and deciding a claim that respondents did not assert and could not have asserted consistent with Article III. And the Secretary's plan in any event falls squarely within the plain text of his statutory authority. Indeed, the entire purpose of the HEROES Act is to authorize the Secretary to grant student-loan-related relief to at-risk borrowers because of a national emergency -- precisely what the Secretary did here.

In Nebraska, the Court deferred ruling on the government's application to vacate the Eighth Circuit's injunction, treated the application as a petition for a writ of certiorari before judgment, granted certiorari, and ordered briefing on a schedule that will allow the case to be heard in the February 2023 argument session. Order, Nebraska, supra, No. 22-506 (Dec. 1, 2022). Here, the

government submits that the district court's extraordinary departure from principles of party presentation and Article III warrants an immediate stay, without the need for further briefing. If, however, the Court is not prepared to grant that relief now, it may wish to defer a decision on the application pending oral argument, treat the application as a petition for a writ of certiorari before judgment, and grant certiorari so that this case can be heard along with Nebraska.[1]

STATEMENT

A. Background

1. The Department of Education administers various student-loan programs under Title IV of the Higher Education Act of 1965 (Education Act), 20 U.S.C. 1070 et seq. Those programs include the William D. Ford Federal Direct Loan Program (Direct Loans), 20 U.S.C. 1087a-1087j, under which the federal government lends money directly to students, and the Federal Family Education Loan Program (Family Education Loans), 20 U.S.C. 1071 to 1087-4, and Federal Perkins Loan Program (Perkins Loans), 20 U.S.C. 1087aa-1087ii, under which non-federal lenders issue loans to student borrowers using federally supported funds. Although authority to issue new loans under the latter two programs has expired, many loans remain outstanding. Borrowers generally may consolidate their federal

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[1] Because respondents challenge the same plan at issue in Nebraska, the background section and Parts I.C and II of this brief substantially overlap with the background section and Parts I.B.1 and II of the government's application in that case.

student loans into loans held by the federal government. 34 C.F.R. 685.220. Nearly 43 million borrowers have outstanding loans under the three programs, and their debts total roughly $1.62 trillion. Office of Federal Student Aid, U.S. Dep't of Educ., Federal Student Aid Portfolio, https://studentaid.gov/data-center/student/portfolio (last visited Dec. 1, 2022).

The Education Act charges the Secretary of Education with carrying out federal student-loan programs. 20 U.S.C. 1070(b). The Act grants the Secretary substantial "powers and responsibilities," 20 U.S.C. 1082 (emphasis omitted); see 20 U.S.C. 3441, 3471, including authority to "compromise, waive, or release any right, title, claim, lien, or demand" acquired in the Secretary's performance of his "functions, powers, and duties" in administering the Department's portfolio of loans, 20 U.S.C. 1082(a)(6).

A few months after the September 11, 2001 terrorist attacks, Congress enacted the Higher Education Relief Opportunities for Students Act of 2001, Pub. L. No. 107-122, 115 Stat. 2386, to "provide the Secretary of Education with specific waiver authority to respond to conditions in the national emergency declared by the President on September 14, 2001," ibid. Congress authorized the Secretary to "waive or modify any statutory or regulatory provision applicable to" student aid programs under Title IV of the Education Act "as may be necessary to ensure that" borrowers affected by September 11 and later terrorist attacks are not in a worse

position in relation to their student loans. § 2(a)(1) and (2), 115 Stat. 2386; see § 5, 115 Stat. 2388.

In 2003, Congress extended and expanded that authority by enacting the HEROES Act. Like its predecessor, the HEROES Act authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" under Title IV. 20 U.S.C. 1098bb(a)(1). But the HEROES Act does not limit relief to borrowers who suffered hardship as a result of terrorist attacks; rather, it authorizes waiver or modification "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)." Ibid. Paragraph 2, in turn, authorizes the Secretary "to waive or modify any provision described in paragraph (1) as may be necessary to ensure that" certain objectives are achieved. 20 U.S.C. 1098bb(a)(2). The first objective is that "recipients of student financial assistance under title IV of the [Education] 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." 20 U.S.C. 1098bb(a)(2)(A). An "affected individual" is defined to include any individual who "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." 20 U.S.C. 1098ee(2)(C).

Several provisions of the HEROES Act underscore Congress's intent to authorize the Secretary to respond quickly and fully to emergencies and other extraordinary circumstances. The Secretary need not act through notice and comment; instead, he need only publish a notice in the Federal Register setting forth "the waivers or modifications * * * the Secretary deems necessary to achieve the purposes of this section." 20 U.S.C. 1098bb(b)(1). Nor need the Secretary comply with other procedural requirements that would delay implementation of relief. 20 U.S.C. 1098bb(d). In addition, Congress explicitly provided that "[t]he Secretary is not required to exercise the waiver or modification authority * * * on a case-by-case basis." 20 U.S.C. 1098bb(b)(3).

The HEROES Act was originally set to expire in 2005. § 6, 117 Stat. 908. But Congress extended the Act by two years, Act of Sept. 30, 2005, Pub. L. No. 109-78, 119 Stat. 2043, and in 2007 made the Act permanent, Act of Sept. 30, 2007, Pub. L. No. 110-93, 121 Stat. 999. Since 2003, the Secretary has repeatedly invoked the Act to provide categorical relief to borrowers affected by emergencies, including by extending forbearance for Perkins loans and waiving the requirement that borrowers return overpayments of certain grant funds. See Office of Legal Counsel, U.S. Dep't of Justice, Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans, 2022 WL 3975075, at *5-*6 (Aug. 23, 2022) (OLC Op.); App., infra, 31a.

2. In March 2020, President Trump declared a national emergency in light of the COVID-19 pandemic. Proclamation 9994, 3 C.F.R. 56 (2020 Comp.). That declaration remains in effect, and the government has declared all 50 States, the District of Columbia, and the territories to be disaster areas. See FEMA, COVID-19 Disaster Declarations, https://perma.cc/B7KA-W4KD. COVID-19 has killed more than one million Americans and led to the hospitalization of millions more. Centers for Disease Control and Prevention, COVID Data Tracker (Nov. 30, 2022), https://perma.cc/ZH65-9PX3. COVID-19 continues to kill nearly 2,000 Americans a week. Ibid. The pandemic has also inflicted severe economic harms, including layoffs, spikes in inflation, rising delinquency rates on debt, and projected reductions in lifetime earnings for students who left school during the pandemic. See App., infra, 38a-40a, 46a. These harms have disproportionately affected lower-income households. Id. at 38a-39a, 42a-48a.

In response to the pandemic, the federal government provided substantial relief to borrowers with Department-held loans. In March 2020, then-Secretary of Education DeVos invoked the HEROES Act to pause repayment obligations and suspend interest accrual on all such loans. 85 Fed. Reg. 79,856, 79,857 (Dec. 11, 2020). Congress directed the Secretary to extend those policies through September 2020. COVID-19 Pandemic Education Relief Act of 2020, Pub. L. No. 116-136, Div. A, Tit. III, Subtit. B, § 3513, 134 Stat. 404. Both the Trump and Biden Administrations then further

extended these protections under the HEROES Act. See, e.g., 85 Fed. Reg. at 79,857; App., infra, 33a-34a.

In August 2022, Secretary Cardona determined that, despite those measures, any resumption of repayment obligations would put many lower-income borrowers "at heightened risk of loan delinquency and default" due to the pandemic. App., infra, 33a. The Secretary thus adopted a two-pronged approach. He announced that he would extend the pause a final time, through December 31, 2022. Id. at 34a. And to ensure that "borrowers are not in a worse position financially due to the pandemic with regard to their ability to repay their loans" when payment obligations resume, the Secretary invoked the HEROES Act and directed the Department to issue up to $10,000 in student-loan relief to eligible borrowers with annual incomes under $125,000 ($250,000 for borrowers filing jointly). Id. at 33a. Qualifying Pell Grant recipients, who tend to have fewer resources and are at greater risk of default, can receive up to $20,000. Ibid.

As explained in the supporting analysis on which the Secretary relied, this relief will mitigate the pandemic's adverse economic effects and significantly reduce delinquency and default rates among those borrowers most affected by the pandemic. App., infra, 37a, 40a-41a. The Department analyzed its past experience with borrowers who transitioned back to repayment after long periods of forbearance, including after emergencies, and concluded that such borrowers are typically at "elevated risk of delinquency and

default." Id. at 38a. Indeed, default rates increase twentyfold after the period of non-payment ends, and Pell Grant recipients affected by such events experience even "larger increases in default." Ibid. The Department reviewed borrower surveys, economic studies, and credit analyses conducted by the Consumer Financial Protection Bureau and Federal Reserve Banks that documented current economic conditions borrowers face due to the pandemic, including rising delinquency rates on non-student-loan debt; stark increases in the number of borrowers that anticipate difficulty making loan payments; and acute inflationary pressures on household budgets for "basic necessities, including energy, food, and shelter costs." Id. at 39a; see id. at 38a-40a. The Department also emphasized the substantial penalties imposed on borrowers who default on student-loan payments, including 50-to-90-point drops in credit scores that make insurance, rent, and other financial products more expensive and limit employment opportunities; exposure to involuntary collection methods; and lost access to affordable or flexible repayment options. Id. at 40a.

The Department explained that the contemplated debt relief would ameliorate these harms. App., infra, 40a-48a. The Department surveyed economic data establishing that borrowers with incomes under $125,000, especially Pell Grant recipients, are more likely to experience financial hardship in repaying their loans when payments resume. Id. at 42a-48a. Among other things, such borrowers were disproportionately likely to become unemployed and

experience material hardship due to the pandemic, including food insecurity and difficulty making utility, rent, and mortgage payments. Id. at 39a, 46a-48a. As to the amount of debt to be discharged, the Department observed that "it should discharge an amount of debt necessary to significantly decrease the rates of delinquency and default." Id. at 41a. After considering borrower loan balances and the effectiveness of various monthly payment reductions in reducing delinquency rates, the Department determined that the $10,000 threshold (and $20,000 for Pell Grant recipients) would "mitigate the risk that delinquency and default rates will rise above pre-pandemic levels." Ibid.

B. Proceedings Below

1. Respondents Myra Brown and Alexander Taylor are individuals with outstanding student loans. App., infra, 6a. Brown is ineligible for relief under the plan because her loans are held by commercial entities rather than the Department. Ibid. Taylor is eligible for $10,000 in relief, but not for $20,000, because he did not receive a Pell Grant. Ibid.

Respondents sued the Department and the Secretary. Their complaint asserted a single claim alleging that the Department and the Secretary improperly promulgated the plan without notice-and-comment rulemaking. Compl. ¶¶ 62-73. Respondents asserted that they were deprived of an opportunity to argue "that their student loan debt should be forgiven too." Id. ¶ 10; see id. ¶¶ 58-61. Respondents further asserted that the Secretary improperly adopted

the plan without engaging in the negotiated-rulemaking process required by the Education Act, 20 U.S.C. 1098a(b)(2). Compl. ¶¶ 71-72.

2. On November 10, 2022, the district court granted summary judgment in favor of respondents. App., infra, 2a-27a. The court concluded that respondents have Article III standing to raise their notice-and-comment claim, explaining that Brown had been injured because she had received no relief at all under the plan, and that Taylor had been injured because he had received only $10,000 rather than $20,000. Id. at 11a-16a.

Turning to the merits, the district court rejected respondents' claim that the plan was procedurally defective. App., infra, 18a-19a. The court observed that the HEROES Act expressly provides that the Secretary need not act through notice and comment; instead, he need only publish a notice in the Federal Register setting forth "the waivers or modifications * * * the Secretary deems necessary to achieve the purposes of this section." Id. at 19a (quoting 20 U.S.C. 1098bb(b)(1)). The court rejected the contention that respondents could establish that the plan fell outside the Act's notice-and-comment exemption by showing that the plan exceeded the Secretary's statutory authority. Ibid.

Although respondents had raised only a procedural claim, and although the district court had analyzed their standing only as to that claim, the court proceeded to hold that the plan is substantively unlawful. App., infra, 19a-25a. The court first concluded

that, "because the [plan] is an agency action of vast economic and political significance, the major-questions doctrine applies." Id. at 22a. The court then concluded that the HEROES Act did not authorize the plan with sufficient clarity to satisfy that doctrine. Id. at 22a-24a. The court declared the plan unlawful and vacated it nationwide. Id. at 24a-25a.

3. The government appealed. After seeking a stay from the district court, see D. Ct. Doc. 40 (Nov. 15, 2022), the government sought a stay pending appeal from the Fifth Circuit. On November 30, 2022, the Fifth Circuit denied the motion in an unreasoned, per curiam order. App., infra, 1a.

4. In the meantime, a group of six States challenged the plan in federal district court in Missouri. See Nebraska v. Biden, No. 22-cv-1040, 2022 WL 11728905, at *1 (E.D. Mo. Oct. 20, 2022). The district court dismissed that suit for lack of standing, see id. at *7, but the Eighth Circuit enjoined the plan nationwide pending appeal, see Nebraska v. Biden, 52 F.4th 1044 (2022). The government applied to this Court for vacatur of that injunction. See Appl. at 1, Biden v. Nebraska (No. 22A444). This Court deferred consideration of the application pending oral argument, treated the application as a petition for a writ of certiorari before judgment, granted the petition, and set the case to be argued in the February 2023 session. See Order, Biden v. Nebraska, No. 22-506 (Dec. 1, 2022).

5. On November 22, 2022, in response to the orders in Nebraska and this case preventing implementation of the plan, the Secretary of Education extended the payment pause and suspension of interest accrual. Press Release, U.S. Dep't of Educ., 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. "[E]fforts to block student debt relief in the courts," the Department explained, "have caused tremendous financial uncertainty for millions of borrowers who cannot set their family budgets or even plan for the holidays without a clear picture of their student debt obligations." Ibid. The extension will "alleviate uncertainty for borrowers" while this Court "review[s] the lower-court orders." Ibid. Payment obligations will resume "60 days after the Department is permitted to implement the program or the litigation is resolved," but no later than 60 days after June 30, 2023. Ibid.

ARGUMENT

In considering interim equitable relief such as a stay pending appeal and certiorari, this Court considers the "likelihood of success on the merits" and the "equities." Alabama Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2488-2489 (2021) (per curiam). The government is likely to succeed on the merits and the equities favor staying the judgment.

I. THE GOVERNMENT IS LIKELY TO SUCCEED ON THE MERITS

If the court of appeals finds the plan unlawful, this Court would likely review that decision invalidating a national program affecting millions of Americans. See pp. 37-39, infra. Indeed, this Court has already granted certiorari before judgment in response to the Eighth Circuit's nationwide injunction against the plan. And this Court would likely reverse a decision upholding the district court's vacatur for multiple independent reasons: The court erred in considering a claim that respondents never raised; respondents lack standing to challenge the substantive lawfulness of the plan; the plan is in any event lawful; and the court erred in vacating the plan nationwide.

A. The District Court Erred In Considering A Claim Respondents Neither Pleaded Nor Argued

Throughout the proceedings in the district court, respondents presented only the claim that the plan was procedurally defective. Their complaint asserted a single count: "failure to follow proper rulemaking procedures" under the Administrative Procedure Act, 5 U.S.C. 701 et seq. Compl. 13 (capitalization and emphasis omitted). Their brief likewise raised only one merits argument: "The Department violated the APA by adopting the [plan] without following the proper rulemaking procedures." D. Ct. Doc. 4, at 20 (Oct. 10, 2022) (emphasis omitted). And although respondents argued that the plan was substantively unlawful, they did so only in service of their claim that it fell outside the HEROES Act's

exception from notice-and-comment procedures. See, e.g., id. at 29 ("Because the HEROES Act does not authorize the Debt Forgiveness Program, the Department could not adopt the Program without following the proper rulemaking procedures.").

The district court correctly rejected that claim. The HEROES Act expressly exempts the Secretary from complying with "section 553 of title 5" -- i.e., the APA's notice-and-comment provisions -- when "publish[ing] the waivers or modifications of statutory and regulatory provisions the Secretary deems necessary to achieve the purposes of this section." 20 U.S.C. 1098bb(b)(1). As the district court recognized, that exemption does not depend on whether, as a substantive matter, the HEROES Act actually authorizes the Secretary's action. App., infra, 19a.

Insofar as respondents further challenged (Compl. ¶¶ 71-72) the Secretary's compliance with Education Act procedural requirements requiring the Department to engage in negotiated rulemaking in developing certain proposed rules, see 20 U.S.C. 1098a, the HEROES Act likewise states that Section 1098a "shall not apply to the waivers and modifications authorized or required by [the Act]." 20 U.S.C. 1098bb(d). Because the Secretary issued the challenged plan pursuant to the HEROES Act, respondents' procedural objections are meritless.

That should have been the end of the case, but the district court went on to resolve an additional claim that respondents had never raised: that the plan was substantively unlawful because it

exceeded the Secretary's statutory authority. App., infra, 19a-25a. Respondents themselves had not attempted to raise that claim, presumably because they recognized that they plainly lack standing to assert it. See pp. 18-20, infra. In deciding that claim sua sponte, the court violated the bedrock "principle of party presentation." United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020). Under that settled principle, courts ordinarily must "rely on the parties to frame the issues for decision" and confine themselves to "the role of neutral arbiter[s] of matters the parties present." Greenlaw v. United States, 554 U.S. 237, 243 (2008). In raising and resolving a claim that respondents had never pressed, the court went "well beyond the pale." Sineneng-Smith, 140 S. Ct. at 1582.

B. Respondents Lack Standing To Challenge The Substantive Lawfulness Of The Plan

Article III empowers the federal courts to decide only "Cases" and "Controversies." U.S. Const. Art. III, § 2, Cl. 1. An Article III case or controversy exists only if the plaintiff has standing -- that is, only if the plaintiff has suffered a concrete, particularized, and actual or imminent injury, the injury was likely caused by the defendant, and the injury would likely be redressed by judicial relief. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021). And as this Court has repeatedly admonished, "standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief

that they seek." Id. at 2208; see, e.g., Davis v. FEC, 554 U.S. 724, 733-734 (2008).

Even if respondents had standing to raise their notice-and-comment claim, they lack standing to raise (or to have the district court raise for them) a claim of substantive unlawfulness. Respondents assert that the plan injures them by denying them a benefit: Brown is not eligible for any relief at all, and Taylor is eligible only for $10,000 rather than $20,000. App., infra, 11a-16a. But a judgment that the plan exceeds the Secretary's substantive authority would not redress either of those injuries. It would leave Brown's financial position unchanged; she would still receive no relief. And it would leave Taylor worse off than before; he would receive neither the $10,000 the plan provides nor the $20,000 he seeks, but instead nothing at all.

To be sure, the district court found that a judgment on respondents' procedural challenge would redress respondents' asserted injury. App., infra, 15a-16a. The court perceived "at least some possibility" that, if the plan were vacated as procedurally defective, the Secretary would redo the plan through notice-and-comment rulemaking, consider respondents' comments, and, in light of those comments, make debt relief available to borrowers like Brown and make the full $20,000 of debt relief available to borrowers like Taylor. Id. at 15a. But that rationale, whatever its merits, simply does not apply to a claim of substantive unlawfulness. Indeed, the district court explicitly confirmed that,

in its view, "the agency's misstep is not correctible on remand." Id. at 24a. A judgment that the plan exceeds the Secretary's statutory power would not redress the claimed injury; to the contrary, it would carve the injury in stone by ensuring that neither respondent receives any debt relief at all.

C. The HEROES Act Authorizes The Plan

The district court did not deny that the HEROES Act, read most naturally and in light of ordinary principles of statutory construction, authorizes the Secretary's plan. Indeed, the court recognized that "the Secretary's action falls within the Act's plain text." App., infra, 16a. But the court nonetheless vacated the plan, holding that that the major questions doctrine applies and "the Secretary lacks 'clear Congressional authorization' to implement the program." Id. at 22a (capitalization and emphasis omitted). Both of those conclusions were incorrect. The major questions doctrine has no application here and, even if it did, the Act clearly authorizes the challenged plan.

1. The plan is authorized by the Act's plain text

The HEROES Act provides that, "[n]otwithstanding any other provision of law," the Secretary may respond to a "national emergency" by waiving or modifying "any statutory or regulatory provision" governing federal student loans "as the Secretary deems necessary" to "ensure" that loan recipients who are "affected individuals" are not "placed in a worse position financially" because

of the emergency. 20 U.S.C. 1098bb(a)(1) and (2). The Secretary's action falls squarely within that specific grant of authority.

The COVID-19 pandemic is a "national emergency declared by the President of the United States." 20 U.S.C. 1098ee(4); see 87 Fed. Reg. 10,289, 10,289 (Feb. 23, 2022). Both the Trump and Biden Administrations previously invoked the HEROES Act to categorically suspend payments and interest accrual on all Department-held loans in light of the pandemic. See pp. 9-10, supra. Neither the district court nor respondents have suggested that those actions were unlawful.

Similarly, all student-loan borrowers are "affected individuals" under the HEROES Act. 20 U.S.C. 1098bb(a)(2)(A). The vast majority qualify based on where they "reside[]" or are "employed," 20 U.S.C. 1098ee(2): The 50 States, the District of Columbia, and all five permanently populated United States territories have been designated as COVID-19 disaster areas. See p. 9, supra. And because the pandemic has inflicted global economic harms, with particularly severe effects on lower-income borrowers, the Secretary reasonably "determined" that the small fraction of eligible borrowers living and working abroad qualify because they have suffered "direct economic hardship" due to the pandemic. 20 U.S.C. 1098ee(2)(D). Again, the payment pauses adopted by both the Trump and Biden Administrations rested on the same understanding of "affected individual."

The Secretary reasonably "deem[ed]" relief "necessary to ensure" that a subset of these affected individuals -- namely, those with lower incomes -- "are not placed in a worse position" in relation to their student-loan obligations "because of their status as affected individuals," i.e., because of the effects of the COVID-19 pandemic. 20 U.S.C. 1098bb(a)(1) and (2). That determination was supported by analysis and evidence showing that, because of the pandemic, such borrowers were at particularly high risk of delinquency and default once payment obligations restart. See pp. 10-12, supra.

Finally, the Act authorizes the type of relief that the Secretary granted. The provisions governing student-loan repayment obligations, cancellation, and discharge are "statutory or regulatory provision[s] applicable to the student financial assistance programs under title IV." 20 U.S.C. 1098bb(a)(1); see, e.g., 20 U.S.C. 1087 (2018 & Supp. I 2019), 1087dd(g); 34 C.F.R. 682.402, 685.212. The Secretary thus properly "waiv[ed] or modif[ied]" those provisions to reduce the scope of vulnerable borrowers' payment obligations to ensure that they are not worse off in relation to their student-loan obligations because of the pandemic. 20 U.S.C. 1098bb(a)(1); App., infra, 29a, 33a.

2. The major questions doctrine provides no reason to depart from the Act's plain text

The district court held that the major questions doctrine compels a different result, App., infra, 19a-23a, but that doctrine

provides no sound reason to depart from a straightforward application of the statutory text. In "extraordinary cases," this Court has required that an agency "point to 'clear congressional authorization'" -- rather than a more ordinary "textual basis" -- "for the power it claims." West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (citation omitted); see id. at 2607-2609. This case lacks the hallmarks of those extraordinary cases, and clear authorization exists in any event.

a. The district court believed that the major questions doctrine applies "because the Program is an agency action of vast economic and political significance." App., infra, 22a. But 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, 142 S. Ct. at 2608-2609 (citations omitted; third set of brackets in original).

No such reason exists here. This is not a case where the agency has "'no comparative expertise' in making [the relevant] policy judgments," West Virginia, 142 S. Ct. at 2613 (citation omitted); relied on "'ancillary'" provisions to locate "newfound

power," id. at 2610 (citation omitted); or asserted authority that falls outside the agency's "particular domain," Alabama Ass'n of Realtors, 141 S. Ct. at 2489. 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.

Nor is the asserted agency power here "'transformative'" or "sweeping." West Virginia, 142 S. Ct. at 2608, 2610 (citation omitted). Although the HEROES Act gives the Secretary powerful tools to address the situations encompassed by the Act, it applies only in a limited set of circumstances (including a "national emergency," 20 U.S.C. 1098bb(a)(1)); authorizes relief only for a defined class of individuals, 20 U.S.C. 1098ee(2) (defining "affected individual"); to accomplish limited objectives (such as "ensur[ing]" that these individuals are not "placed in a worse position financially" in relation to their loans, 20 U.S.C. 1098bb(a)(2)(A)); through specific measures (waiving or modifying applicable student-loan requirements, 20 U.S.C. 1098bb(a)(1)). In keeping with that authority, the Secretary issued relief to ensure

that vulnerable borrowers would not be worse off in relation to their student loans due to the pandemic. This case is thus far afield from cases like West Virginia, where the Court found that the agency action at issue would have required a complete reorganization of American energy infrastructure. 142 S. Ct. at 2604.

Indeed, unlike every case where this Court has invoked the major questions doctrine, this case does not involve any assertion of regulatory authority at all. Instead, it involves the exercise of authority over a government benefit program to lift otherwise applicable requirements on beneficiaries. The district court believed the major questions doctrine applies even to "the disbursement of a federal benefit," App., infra, 22a, but offered no sound basis for expanding that doctrine -- which the Court has applied only to claims of an "[e]xtraordinary grant[] of regulatory authority," West Virginia, 142 S. Ct. at 2609 -- to this novel context.

The district court suggested that "Congress's extensive consideration of various bills attempting to forgive student loans and failure to pass such bills" further justified applying the major questions doctrine. App., infra, 21a. But each bill the court cited meaningfully differed from the relief the Secretary authorized.[2] The far more relevant congressional action is a

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[2] See, e.g., H.R. 2034, 117th Cong., 1st Sess. (2021) (proposing discharge of entire loan balances); H.R. 6800, 116th Cong., 2d Sess. § 150117(h) (2020) (omnibus $3 trillion relief package that included many other contested provisions); S. 2235,

measure included in pandemic-relief legislation enacted in 2021. At that time, when the possibility of forgiveness under the HEROES Act was already being publicly debated, Congress anticipated the possibility of such relief by adopting a "Special Rule for Discharges in 2021 Through 2025" that makes student-loan discharges during that period tax-free. See American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9675(a), 135 Stat. 185-186.

b. Even if the major questions doctrine applied, it would not support vacatur of the plan. Section 1098bb(a) of the HEROES Act is not a "vague statutory grant," West Virginia, 142 S. Ct. at 2614; rather, Congress clearly authorized the Secretary to ensure that student-loan borrowers are not placed in a worse financial position because of a national emergency, and the Secretary complied with the Act's plain terms in affording a limited measure of relief to borrowers at risk because of COVID-19. See pp. 20-22, supra.

The district court disagreed for three reasons: (1) the Act does not use the term "loan forgiveness"; (2) the pandemic does not justify the proposed relief; and (3) the asserted power is "'unheralded.'" App., infra, 22a-24a (citation omitted). Each contention lacks merit.

First, the HEROES Act does not enumerate any of the specific forms of relief the Secretary has long issued under the Act --

116th Cong., 1st Sess. (2019) (proposing discharge of up to $50,000 before the pandemic).

including extending forbearance, suspending interest accrual, waiving the requirement that borrowers return overpayments of certain grant funds, and altering the requirements for loan deferrals. See OLC Op., 2022 WL 3975075, at *5-*6. Rather, the Act ensures that the Secretary can act quickly and effectively to afford relief to student-loan borrowers affected by national emergencies by authorizing the Secretary to "waive or modify <u>any</u> statutory or regulatory provision applicable to the student financial assistance programs under title IV." 20 U.S.C. 1098bb(a)(1) (emphasis added); see <u>United States</u> v. <u>Gonzales</u>, 520 U.S. 1, 5 (1997) ("[T]he word 'any' has an expansive meaning.") (citation omitted). To waive is "[t]o abandon, renounce, or surrender (a claim, privilege, right, etc.)" or "to give up (a right or claim) voluntarily," <u>Black's Law Dictionary</u> 1894 (11th ed. 2019); to modify is "[t]o make somewhat different" or "to reduce in degree or extent," <u>id.</u> at 1203. The Act thus authorizes the Secretary to eliminate or to reduce by some degree a borrower's obligation to comply with any Title IV student-aid provision so long as the other requirements of the statute are satisfied. Among the Title IV provisions eligible for waiver or modification are those that establish the obligation to repay loans and the circumstances in which such obligations can be cancelled or discharged. See p. 22, <u>supra</u>.

Congress, moreover, expressly contemplated the Secretary's exercise of discretion in fashioning appropriate relief, authorizing the Secretary to waive or modify "any" applicable Title IV

statutory or regulatory provision "as the Secretary deems necessary." 20 U.S.C. 1098bb(a)(1); see Webster v. Doe, 486 U.S. 592, 600 (1988) (statutory authority to take actions an official "'deem[ed] * * * necessary or advisable'" conveyed "deference") (emphasis omitted). Congress underscored the point in the following paragraph, authorizing the Secretary to waive or modify any such provision "as may be necessary" to "ensure" the Act's objectives. 20 U.S.C. 1098bb(a)(2) (emphasis added); see City of New York v. FCC, 486 U.S. 57, 67 (1988) (holding that the phrase "'may be necessary'" confers "legitimate discretionary power" on the agency) (citation omitted).

Second, the proposed relief directly targets those borrowers facing "a worse position financially" in relation to their student loans "because of" the invoked national emergency, 20 U.S.C. 1098bb(a)(2)(A) -- here, the COVID-19 pandemic. The evidence before the Secretary showed that borrowers with individual incomes below $125,000 or household incomes below $250,000 were most likely to have experienced job loss, non-student-loan debt delinquency, and other material hardships as a result of the pandemic, and thus faced the highest risk of delinquency and default when student-loan obligations resume. See App., infra, 39a, 42a, 46a-48a; pp. 10-11, supra. And the evidence further showed that reducing the principal owed by such borrowers by the proposed amounts, and reducing their monthly payments accordingly, would ameliorate the

"risk that delinquency and default rates will rise above pre-pandemic levels." App., infra, 41a; pp. 11-12, supra.

The district court's suggestion that "it is unclear if COVID-19 is still a 'national emergency' under the Act," App., infra, 23a, is baseless. The Act defines that term as "a national emergency declared by the President of the United States," 20 U.S.C. 1098ee(4), and the presidential declaration identifying the COVID-19 pandemic as a national emergency remains in effect. See p. 9, supra. Moreover, the Secretary is not asserting the power to "use the HEROES Act to forgive student-loan debt" "in ten years * * * because of the COVID-19 pandemic." App., infra, 23a. 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 to ensure that those borrowers are not placed in a worse position as they and the country work to recover from the immediate and 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. See pp. 20-22, supra.

Third, the Secretary has not relied on a "rarely invoked statutory provision" to claim "'unheralded power.'" App., infra, 24a (quoting West Virginia, 142 S. Ct. at 2625 (Gorsuch, J.,

concurring)). Since its enactment in 2003, the Department has repeatedly invoked the HEROES Act to provide class-wide relief to certain borrowers, see p. 8, supra, and since March 2020, both the Trump and Biden Administrations have invoked the Act to issue relief to all borrowers, see pp. 9-10, supra.

These previous invocations of the HEROES Act -- by both the Trump and Biden Administrations -- likewise had permanent and substantial economic effects. Most significantly, the previous COVID-19 relief measures, including the suspension of loan payments and interest accrual, are estimated to have cost the federal government $102 billion. See U.S. Gov't Accountability Office, Student Loans: Education Has Increased Federal Cost Estimates of Direct Loans by Billions due to Programmatic and Other Changes 14 (July 2022). The Department has estimated that these measures saved the average borrower approximately $233 a month -- comparable to the $200 to $300 reduction in monthly payments that the Department estimates will be achieved by the challenged plan. See App., infra, 41a-42a. Moreover, because the months during which these measures were in effect count toward the income-driven repayment and public service loan forgiveness programs, these measures resulted in additional debt cancellation for borrowers eligible for those programs. See Office of Federal Student Aid, U.S. Dep't of Educ., COVID-19 Relief: Income-Driven Repayment (IDR) Plans, https://perma.cc/Q9WK-5YDE (last visited Dec. 2, 2022); Office of Federal Student Aid, U.S. Dep't of Educ., COVID-19 Relief: Public

Service Loan Forgiveness (PSLF), https://perma.cc/M6NV-ENSU (last visited Dec. 2, 2022). Likewise, the Secretary in December 2020 expanded eligibility for defenses to repayment by allowing certain borrowers to have their claims evaluated under more beneficial standards due to pandemic-related difficulties, 85 Fed. Reg. at 79,862, which "will almost certainly reduce the amount of principal repaid by borrowers," OLC Op., 2022 WL 3975075, at *12.

Pre-2020 invocations of the Act similarly resulted in forgiveness of affected borrowers' debt obligations. For example, the Secretary in 2003 waived the requirement that affected borrowers return overpayments of certain grant funds. 68 Fed. Reg. 69,312, 69,314 (Dec. 12, 2003). To the extent the Secretary's pre-pandemic actions under the Act were narrower in certain respects, that reflects the pandemic's unprecedented scope, not any established understanding of the Act's limits. It is only natural that the Secretary's response to an unprecedented pandemic will go "further than what the Secretary has done in the past" in response to less severe or less widespread exigencies. Missouri, 142 S. Ct. at 653.

D. The District Court Erred By Vacating The Plan On A Universal Basis

Even if respondents had standing and even if the plan exceeded the Secretary's statutory authority, the district court erred in "vacat[ing]" the plan on a universal basis. App., infra, 28a (capitalization and emphasis omitted). As Members of this Court

have recognized, such universal remedies are "inconsistent with longstanding limits on equitable relief and the power of Article III courts" and impose a severe "toll on the federal court system." Trump v. Hawaii, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring); see DHS v. New York, 140 S. Ct. 599, 599-601 (2020) (Gorsuch, J., concurring in the grant of stay).

The district court concluded that universal vacatur was authorized by 5 U.S.C. 706(2), which provides that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions" found to be unlawful. App., infra, 25a. Many lower court decisions have applied the same understanding of Section 706(2). But this Court has never squarely considered the issue. And as the government has long argued, the "unremarkable language" in Section 706(2) should not be interpreted to "upset the bedrock practice of case-by-case judgments with respect to the parties in each case or create a new and far-reaching power" to grant universal vacatur. Arizona v. Biden, 40 F.4th 375, 396 (6th Cir. 2022) (Sutton, C.J., concurring). Instead, Section 706(2) simply directs a court to disregard unlawful "agency action, findings, and conclusions" in resolving the case before it. 5 U.S.C. 706(2); see U.S. Br. at 40-44, United States v. Texas, No. 22-58 (argued Nov. 29, 2022).[3]

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[3] See also, e.g., Gov't Reply Br. at 23-24, Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020) (No. 19-454); Gov't Br. at 40-43 & n.15, Summers v. Earth Island Inst., 555 U.S. 488 (2009) (No. 07-463); Memorandum from Attorney General Jefferson B. Sessions to Heads of Civil Litigating

That understanding is consistent with the ordinary meaning of "set aside," which can "refer to a court's decision to regard a purportedly valid juridical act as ineffective." John Harrison, Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies, 37 Yale J. on Reg. Bull. 37, 43 (2020) (Harrison). Treating Section 706(2) as an instruction to disregard unlawful agency action is the only interpretation consistent with the statutory context. That provision applies in all forms of action governed by the APA, including actions for writs of "habeas corpus" and "in civil or criminal proceedings for judicial enforcement." 5 U.S.C. 703. Courts hearing such actions thus must "set aside" unlawful agency action under Section 706(2), yet no one would suggest that a court hearing a habeas petition or a criminal or civil enforcement action could vacate a regulation. In contrast, Section 706(2) fits naturally in those contexts if it is understood as an instruction to disregard unlawful agency actions, conclusions, and findings.

Of course, when a court declines to give effect to an agency action in the case before it on the ground that the action is unlawful, it may issue appropriate relief. In some circumstances, the Hobbs Act or another special statutory review provision authorizes a reviewing court -- often, a court of appeals -- to act

Components & United States Attorneys, Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions at 7 (Sept. 13, 2018) ("Universal vacatur is not contemplated by the APA.") (capitalization altered and emphasis omitted).

directly upon the challenged agency action in the way an appellate court acts upon a lower court's judgment. See 28 U.S.C. 2342. But absent such a "special statutory review proceeding," 5 U.S.C. 703 points outside the APA for the available remedies, specifying that "[t]he form of proceeding" is a traditional "form of legal action," such as "actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus." Here, if respondents had standing and were entitled to prevail on the merits, the district court should have granted appropriately tailored injunctive relief -- not a universal vacatur that blocked the application of the plan to millions of other borrowers who are not parties to this suit.

II. THE EQUITIES FAVOR A STAY

The harm to the government and the public from vacating the Secretary's action is significant. The HEROES Act reflects Congress's judgment that the Secretary must be able to act quickly and effectively to afford relief to student-loan borrowers affected by national emergencies. See pp. 8, 20-22, supra. Here, the Secretary has crafted relief to protect vulnerable borrowers from delinquency and default (and thus from wage garnishment, credit-report damage, and seizure of federal benefits, see Office of Federal Student Aid, U.S. Dep't of Educ., Student Loan Delinquency and Default, https://perma.cc/4A6N-DA5Z; D. Ct. Doc. 42, at ¶ 6 (Kvaal Decl.) (Nov. 15, 2022)). The record includes ample evidence of the severity of the problem and the consequences of

failing to act. See pp. 10-12, supra. The injunction thus frustrates the government's ability to respond to the harmful economic consequences of a devastating pandemic with the policies it has determined are necessary. See Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (barring a sovereign from "employ[ing] a duly enacted statute to help prevent * * * injuries constitutes irreparable harm"); INS v. Legalization Assistance Project of L.A. County Fed'n of Labor, 510 U.S. 1301, 1305-1306 (1993) (O'Connor, J., in chambers) (emphasizing harm from "improper intrusion by a federal court into the workings of a coordinate branch of the Government").

Indeed, the district court's vacatur (along with the Eighth Circuit's injunction) has already frustrated -- and continues to frustrate -- the Secretary's previously announced plan to resume student-loan payment obligations more broadly. The debt-relief measure was an integral component of the Secretary's simultaneous decision to restart such obligations after a lengthy period of forbearance during a devastating global pandemic. App., infra, 33a-34a; p. 10, supra. The injunction and vacatur thus placed the Secretary in an unwarranted dilemma: Restart payments as previously planned -- and thereby invite the cascade of delinquencies and defaults that prompted the Secretary to adopt the debt-relief measure in the first place -- or continue forbearance, at significant cost to the government. The Secretary ultimately determined that the latter course was preferable, announcing on November 22

his decision to extend the payment pause and suspension of interest accrual in light of the court orders blocking implementation of the plan. See p. 15, supra. So long as they remain in effect, the district court's vacatur and the Eighth Circuit's injunction undermine the government's ability to effectuate its chosen policy.

At the same time, the vacatur and injunction leave vulnerable borrowers in untenable limbo. Eligible borrowers have been told that they will be able to obtain meaningful debt relief: for the average borrower, the relief contemplated by the plan would result in \$200 to \$300 reductions in monthly payments. Kvaal Decl. ¶ 6. Those amounts are substantial to anyone attempting to responsibly manage his finances -- and all the more so for lower-income borrowers eligible for relief under the plan. App., infra, 40a-42a. Yet because of the vacatur and injunction, the borrowers most likely to default if payment obligations resume without some relief face prolonged uncertainty about the scope of their payment obligations and when those obligations will resume. So long as that uncertainty continues, many borrowers will lack information they need to decide whether they can afford to change jobs, buy a home or a car, or assume other long-term financial obligations.

On the other side of the ledger, respondents would not face any injury -- much less irreparable harm if the district court's judgment were stayed. Respondents have not even established the injury necessary for standing, see pp. 18-20, supra. And, more

fundamentally, they have never explained how they have any interest whatsoever in denying debt relief to millions of other borrowers. Indeed, the only practical consequence of the vacatur for respondents has been to deny respondent Taylor $10,000 in debt relief that he otherwise would have received. Allowing such uninjured plaintiffs to block a nationwide program based on a claim they never brought is profoundly inequitable.

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

For the foregoing reasons, this Court should stay the judgment entered by the Northern District of Texas. The Court deferred consideration of the government's application to vacate the injunction entered by the Eighth Circuit in Biden v. Nebraska, No. 22-506, instead granting certiorari before judgment and setting the case for expedited briefing and argument during the Court's February 2023 sitting, presumably because the Court believes the issues presented in that case warrant "full briefing and oral argument," Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting). Here, however, the defects in the district court's judgment are obvious and insurmountable: respondents plainly lack standing to assert -- and never in fact asserted -- the only claim on which the district court based its judgment. See pp. 16-20, supra. An immediate stay of the district court's unjustified vacatur thus is warranted here.

If, however, the Court is not prepared to grant that relief, it may wish to follow the same course it took in Nebraska by deferring consideration of the application pending oral argument, treating this application as a petition for a writ of certiorari before judgment, granting the petition, and setting this case for oral argument along with Nebraska. The government would be prepared to brief this case on a schedule that would allow it to be argued together with Nebraska during the Court's February 2023 sitting. If the Court follows that course, the government suggests that the appropriate questions presented would be (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.

A writ of certiorari before judgment under 28 U.S.C. 2101(e) is an extraordinary remedy, but -- as in Nebraska -- the issues presented by the district court's vacatur of the Secretary's plan are "of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. And considering this case along with Nebraska would allow the Court to consider the full range of challenges to the plan at once.

CONCLUSION

This Court should stay the judgment of the district court pending appeal and pending the filing and disposition of any petition for a writ of certiorari. If, however, the Court is not

prepared to grant an immediate stay, it may wish to defer consideration of this application pending oral argument, construe the application as a petition for a writ of certiorari before judgment, grant the petition, and hear this case along with Biden v. Nebraska, cert. granted, No. 22-506 (Dec. 1, 2022).

Respectfully submitted.

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