No. 22-11115

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MYRA BROWN, et al.
Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF EDUCATION, *et al.*,
Defendants-Appellants.

DEFENDANTS-APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

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INTRODUCTION AND SUMMARY

Plaintiffs are individual borrowers who allege they were denied an opportunity to comment on the Secretary of Education's decision to provide targeted student-loan debt relief to others. Plaintiffs' sole claim is that they have a procedural right to advocate for the expansion of the debt-relief program so that their loans would be forgiven too (or in a more substantial amount). The district court held that the Secretary followed the required procedures but nevertheless vacated the debt-relief program after concluding that it was not authorized by statute. Thus, in response to plaintiffs' claimed desire to benefit more fully from the Secretary's debt-relief program, the district court voided the program entirely, ensuring that no borrower could benefit.

This Court should stay that order pending appeal. The Secretary's debt-relief action is lawful, and the district court's contrary holding ignores the statute's plain terms. More fundamentally, the district court lacked jurisdiction to enter an order—on an unpleaded claim—that does not redress plaintiffs' alleged procedural harms. Plaintiffs have no greater ability to comment on the Secretary's action and advocate for broader loan forgiveness than they had before. A stay would leave plaintiffs in the same position and would avoid significant harm to millions of Americans who need student-debt relief.

The government will be filing an application with the Supreme Court to vacate a separate injunction against the Secretary's action entered by the Eighth Circuit

earlier this week. In light of the significant interests involved, the government respectfully requests a ruling on this motion by December 1, 2022, to allow the government to seek relief from the Supreme Court in this case if this Court declines to stay the district court's judgment. To facilitate that schedule, the government respectfully requests that plaintiffs' response be due by November 25 and the government's reply by November 29.

STATEMENT

1. The Secretary of Education is charged with administering student-loan programs under Title IV of the Higher Education Act of 1965 ("Education Act"), 20 U.S.C. § 1070 *et seq*. Among these is the William D. Ford Federal Direct Loan Program, which authorizes the federal government to lend money directly to student borrowers. *Id*. §§ 1087a-1087j. The Education Act gives the Secretary significant authority to administer the Department's student-loan portfolio, *see id*. §§ 1082, 1087hh, 3441, 3471; including the authority to "compromise, waive, or release" any "right, title, claim, lien, or demand" acquired in the Secretary's administration of federal student loans, *id*. §§ 1082(a)(6), 1087hh(2).

The Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108-76, 117 Stat. 904 (20 U.S.C. §§ 1098aa-1098ee) ("HEROES Act" or "Act"), provides that, "[n]otwithstanding any other provision of law," the Secretary may "waive or modify any statutory or regulatory provision applicable to" federal student-loan programs "as the Secretary deems necessary in connection with a … national

emergency to" accomplish certain goals. 20 U.S.C. § 1098bb(a)(1). As relevant here, the Secretary may act "as may be necessary to ensure" that covered financial-aid recipients "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]ffected individual[s]" include anyone who "resides or is employed in" a disaster area declared "in connection with a national emergency" or who "suffered direct economic hardship as a direct result of a … national emergency, as determined by the Secretary." *Id.* § 1098ee(2).

The Act exempts the Secretary's actions from otherwise applicable procedural requirements, including notice-and-comment rulemaking. 20 U.S.C. § 1098bb(b)(1). And the Secretary "is not required to exercise the waiver or modification authority under this section on a case-by-case basis." *Id.* § 1098bb(b)(3). The Department previously has exercised this authority to provide categorical relief to borrowers affected by national emergencies. *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 *4-5 (Aug. 23, 2022) ("OLC Op."); 87 Fed. Reg. 52,943, 52,944 n.2 (Aug. 30, 2022).

2. In March 2020, the President declared a national emergency to contain and combat COVID-19. 85 Fed. Reg. 15,337 (Mar. 18, 2020). That declaration remains in effect, and the federal 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/F93R-CGY6. COVID-19 has killed more than one million Americans, CDC, COVID Data Tracker, https://perma.cc/3AUP-2DG5, and disrupted all aspects of life. Even now, COVID-19 kills more than 300 Americans daily. *Id.*

The federal government has taken significant action during the pandemic to provide relief to borrowers with Department-held loans. In March 2020, the Secretary invoked the HEROES Act to pause repayment obligations and suspend interest accrual on such loans. 85 Fed. Reg. 79,856, 79,857 (Dec. 11, 2020). Congress extended these policies through September 2020. Pub. L. No. 116-136, § 3513, 134 Stat. 281, 404-05 (2020). The Trump and Biden Administrations further extended these protections under the HEROES Act. *See, e.g.*, 85 Fed. Reg. at 79,857; Add. 54-55. On August 24, 2022, the Secretary adopted a final extension through December 31, 2022. Add. 55.

To address the financial harms of the pandemic and smooth the transition to repayment, the Secretary exercised his HEROES Act authority to provide targeted debt relief to certain federal student-loan borrowers affected by the pandemic. Add. 54-55. Designed to aid borrowers at highest risk of delinquency or default once payments resume, the Department's plan offers up to $10,000 in student-loan debt relief to eligible borrowers making less than $125,000 ($250,000 per household). *Id.* Borrowers who received a Pell Grant can receive up to $20,000 in relief. *Id.* The Secretary's action was based on, among other things, an analysis finding that the relief

would help prevent delinquency and default among borrowers the pandemic placed most at risk with respect to their student loans. *See generally* Add. 40-52. Privately held loans are not covered by the debt-relief program, but the Department is assessing alternative pathways to help borrowers with such loans. *See* Fed. Student Aid, *One-Time Student Debt Relief*, https://studentaid.gov/manage-loans/forgiveness-cancellation/debt-relief-info (last visited Nov. 16, 2022).

2. Plaintiffs Myra Brown and Alexander Taylor are individual student-loan borrowers. Ms. Brown alleges that she "does not qualify for debt forgiveness" under the Secretary's plan because she has only "commercially held loans" not covered by the program. Add. 59. Mr. Taylor qualifies for $10,000 of loan forgiveness, but "he is ineligible for the full $20,000" benefit because he "never received a Pell Grant." Add. 60-61. Plaintiffs believe that "their student loan debt should be forgiven too," and they "want[] an opportunity to present [these] views to the Department." Add. 59-60, Add. 69. Plaintiffs assert a single claim under the Administrative Procedure Act (APA), 5 U.S.C. § 706, alleging that the "Department adopted the program without publishing prior notice and affording Plaintiffs … an opportunity to submit written comments." Add. 70-71.

Plaintiffs moved for a preliminary injunction, which the district court converted to a motion for summary judgment. Add. 8. Although the government objected to proceeding to summary judgment because the administrative record had not been compiled and the government had no "opportunity to conduct jurisdictional

discovery" regarding plaintiffs' stated desire to comment on expanding the debt-relief program, the district court held "those issues are not material to standing or the merits." Add. 9.

The district court granted summary judgment in favor of plaintiffs. The court held plaintiffs had established Article III standing based on the alleged "deprivation of their procedural right under the APA" to comment on the Department's loan-forgiveness action. Add. 11-12.

But on the merits of that claim, the district court held that "the Program did not violate the APA's procedural requirements." Add. 18. The court observed that the HEROES Act explicitly provides that "the Secretary may waive or modify" provisions relating to the federal student-loan programs "without notice and comment." Add. 18; *see* 20 U.S.C. § 1098bb(b)(1). All the statute "requires is that the Secretary publish the modifications" in the Federal Register, "which the Secretary has done here." Add. 18.

The district court then turned to a "different" question: whether the HEROES Act authorizes the Secretary's debt-relief program. Add. 18. The court reasoned that the major-questions doctrine applies because the program is economically significant and because Congress had "considered and rejected" legislation relating to loan forgiveness. Add. 19-20. The court held that the HEROES Act does not clearly authorize loan forgiveness for three reasons: first, the Act "allows the Secretary only to 'waive or modify,'" not to "rewrite," statutory provisions governing student loans;

second, it is "unclear" whether the COVID-19 pandemic "still" qualifies as a "national emergency under the Act"; and third, the Department previously "has not relied on the HEROES Act" or other authority to offer "blanket or mass cancellation … of student loan principal balances" or "material change of repayment amounts or terms." Add. 21-23.

The district court held that vacatur of the debt-relief action was the "default" remedy provided by the APA for unlawful agency action, even though nationwide injunctive relief would not be justified. Add. 23-24.

3. The government moved in district court for a stay pending appeal on November 15, 2022, and requested a decision by 12:00 PM Central Time on November 17, 2022. The court has not yet acted on the government's motion. In light of the significant interests at stake, the government now seeks a stay from this Court.

ARGUMENT

A motion for stay pending appeal is governed by the four-factor test in *Nken v. Holder*, 556 U.S. 418, 426 (2009). Each factor supports the government.

I. The Government Has a Strong Likelihood of Prevailing on Appeal

A. Plaintiffs Lack Article III Standing

"[T]he law of Article III standing … serves to prevent the judicial process from being used to usurp the powers of the political branches, and confines the federal courts to a properly judicial role." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). To

establish standing, plaintiffs must prove that they "have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.*

The district court held that plaintiffs had standing to pursue their claim that the debt-relief program violated the APA's notice-and-comment requirements. Add. 11. The court reasoned that the Secretary's alleged failure to provide a "notice-and-comment period" injured plaintiffs because it deprived them of the "opportunity to advocate for" expansion of the program to provide plaintiffs with "greater debt forgiveness," and that injury was redressable because requiring notice and comment might prompt the Secretary to reconsider the program's boundaries. Add. 13-14 (internal quotation marks omitted).

1. Even assuming the district court were correct with respect to plaintiffs' alleged procedural injury, *but see infra* p. 10, that injury would not justify the order ultimately entered by the district court, which vacated the debt-relief program for lack of statutory authorization, regardless of the procedures followed. *See* Add. 23-24. In granting that remedy, the district court recognized that it was addressing the "APA's substantive requirements," a "different" question than whether the action "violate[d] the APA's procedural requirements." Add. 18.

But plaintiffs did not assert a "substantive" APA claim, and in fact they lack standing to do so. The Secretary's decision to grant discretionary debt relief to other borrowers, by itself, causes plaintiffs no concrete harm. Ms. Brown's student-debt

obligations would remain unchanged, and Mr. Taylor would owe $10,000 less under the Secretary's action. Add. 69-70. Plaintiffs allege only that they are harmed from the absence of an opportunity to advocate for an expansion of the debt-relief program that would result in greater loan forgiveness for themselves. *See id.* That alleged injury does not support standing to seek an order holding the agency lacks authority to take the action *at all*—an order that would not redress the alleged procedural harms. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) ("[S]tanding 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.").

The district court's order reflects this disconnect. A procedural injury is remedied by remanding to the agency to follow the required procedures. But the district court's order prevents the Secretary from soliciting comment on debt relief under the HEROES Act because it holds any such plan unlawful. And to the extent that plaintiffs want to urge the Secretary to offer other relief under a different statutory authority, their ability to petition the Secretary to undertake a rulemaking, *see* 5 U.S.C. § 553(e), is unaffected by any debt relief under the HEROES Act. The district court's order thus places plaintiffs in no better position with respect to their procedural rights. It merely prevents *other* borrowers from obtaining a benefit, which does not redress plaintiffs' alleged injuries. *See Henderson v. Stalder*, 287 F.3d 374, 381 (5th Cir. 2002) (plaintiff's injury from being unable to "express her pro-choice view"

on a license plate was not redressable by an order that "would merely function to prevent other motor vehicle drivers from expressing their choose-life point of view").

2. That the district court's order does not redress plaintiffs' only asserted injury is alone sufficient to demonstrate the government's likelihood of success. The court also erred, however, in holding that plaintiffs' injuries would support standing to bring a procedural APA claim.

Plaintiffs cannot establish procedural harm based on an agency decision that, as the district court recognized, Add. 18, Congress explicitly exempted from the APA's notice-and-comment requirements. *See* 20 U.S.C. § 1098bb(b)(1), (d); *see also* 5 U.S.C. § 559 (APA requirements superseded by other statutes' express provisions). Where "a plaintiff's claim of injury in fact depends on legal rights conferred by statute, it is the particular statute and the rights it conveys that guide the standing determination." *Wendt v. 24 Hour Fitness USA, Inc.*, 821 F.3d 547, 552 (5th Cir. 2016). The HEROES Act requires only publication in the Federal Register, which was done here. Add. 18.

Absent any statute granting them a procedural right to comment, plaintiffs lack a "plausible procedural injury in fact." *Missouri v. Biden*, 52 F.4th 362, 371 (8th Cir. 2022); *see In re Endangered Species Act Section 4 Deadline Litig.-MDL No. 2165*, 704 F.3d 972, 979 (D.C. Cir. 2013) (no injury from "denial of [the] right to comment" where statute did not "require the [agency] to invite comment"); *Utah v. Babbitt*, 137 F.3d 1193, 1207-10 (10th Cir. 1998) (similar); *see also E.T. v. Paxton*, 41 F.4th 709, 717 (5th

Cir. 2022) (opinion of Oldham, J.) (no injury where the relevant statutes did not "creat[e the] legally protected interest" plaintiffs asserted).

B. The Debt-Relief Program Is Lawful

Even if plaintiffs could establish standing, the government is likely to demonstrate the district court erred on the merits.

1. This Court has "repeatedly emphasized" that a "claim which is not raised in the complaint but, rather, is raised only" in summary judgment proceedings "is not properly before the court." *Bye v. MGM Resorts Int'l, Inc.*, 49 F.4th 918, 925 (5th Cir. 2022). That rule reflects a key feature of "our adversarial system of adjudication," namely that courts must "rely on the parties to frame the issues for decision" and remain "essentially passive instruments of government." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). Here, the district court violated that "principle of party presentation," *id.*, by improperly granting summary judgment on a claim of inadequate statutory authority when plaintiffs' complaint presented only a claim of improper procedure.

In their complaint, plaintiffs presented a single claim: the debt-relief program should be "held unlawful and set aside" because it "did not go through the proper procedures." Add. 70-71. The district court agreed with the government that this procedural claim was meritless. Add. 18. But the court proceeded to grant plaintiffs summary judgment because it concluded the HEROES Act does not authorize the Secretary's action—a question the district court recognized went to the "APA's

substantive requirements," rather than its procedural requirements. Add. 18; *see* 5 U.S.C. § 706(2)(C), (D) (distinguishing between questions of procedure and statutory authority). The rule against considering unpleaded claims forbids that grant of relief based on a claim that, if raised at all, was raised only by motion and substantially differed from the sole claim in the complaint. *See Bye*, 49 F.4th at 925. This error was especially grave because it led the Court to grant a form of relief that does not remedy plaintiffs' only alleged injury.

2. Regardless, the district court erred in holding that the Secretary exceeded his authority under the HEROES Act. That Act authorizes the Secretary to "waive or modify any statutory or regulatory provision" applicable to the federal student-loan program "as the Secretary deems necessary in connection with a … national emergency" to accomplish statutory objectives, including to "ensure" that student-loan recipients "are not placed in a worse position financially in relation to" those loans "because of their status as affected individuals." 20 U.S.C. § 1098bb(a)(1), (2)(A). The Secretary's action fits within this statutory text.

a. 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, 10,2898 (Feb. 23, 2022). Both the Trump and Biden Administrations invoked the HEROES Act to suspend payments and interest accrual on Department-held loans, *see, e.g.*, 85 Fed. Reg. at 79,857—a benefit plaintiffs do not challenge.

"This payment pause has delivered substantial relief" to borrowers. Add. 54. The Secretary found, however, that many borrowers who benefitted from the payment pause "will be at a heightened risk of loan delinquency and default" and "experience challenges in the transition" once loan payments resume. *Id.* Evidence showed, for example, that borrowers' transitions to repayment after similar, natural-disaster-related payment pauses were correlated with "documented spikes in student loan defaults"—with Pell Grant recipients being especially vulnerable. Add. 41 (describing twentyfold increase). Evidence also showed that many lower-income borrowers expected to have greater difficulty making full payments after the pandemic than they had before it—expectations corroborated by other government agencies' research. Add. 41-42. The Secretary also evaluated evidence that pandemic-induced inflationary pressures have diminished the financial well-being of many households. Add. 42-43. The Secretary reasonably deemed it necessary to exercise his HEROES Act authority to prevent pandemic-induced harm to lower-income student-loan borrowers.

b. The district court stated that the HEROES Act does not authorize "loan forgiveness" because it "allows the Secretary only to 'waive or modify' provisions." Add. 21. That ignores the plain meaning of the terms "waive" or "modify." *See Waive*, Black's Law Dictionary (11th ed. 2019) ("To abandon, renounce or surrender … to give up … [t]o refrain from insisting on"); *Modify*, Black's Law Dictionary ("to reduce in degree or extent; to limit, qualify, or moderate"). And it ignores the context

in which those terms appear. Congress broadly authorized the Secretary to "waive or modify *any* statutory or regulatory provision applicable to the student financial assistance programs," 20 U.S.C. § 1098bb(a)(1) (emphasis added), and to do so as the Secretary "*deems* necessary," *id.* (emphasis added)—language that "exudes deference," *Webster v. Doe*, 486 U.S. 592, 600 (1988). *See* 87 Fed. Reg. 61,512, 61,514 (Oct. 12, 2022) (modifying certain provisions governing the discharge of student loan debts and the procedures for obtaining such discharges).

The district court also questioned whether the Secretary could "rely on the COVID-19 pandemic," which has been declared an emergency for "almost three years." *See* Add. 22. But the court acknowledged that "the COVID-19 pandemic falls within the HEROES Act's definition of an emergency," *id.* (citing 20 U.S.C. § 1098ee(4)), as the declaration has not been rescinded. The Secretary's action is plainly "in connection with" that emergency. 20 U.S.C. § 1098bb(a)(1). The administrative-forbearance period was implemented and extended because of the unprecedented pandemic, and the Secretary adopted the challenged debt-relief program to ensure that lower-income borrowers are not put in a "worse position" financially with respect to their student loans as the pandemic ends and their payments resume. *Id.* § 1098bb(a)(2)(A). In making that determination, the Secretary properly considered the pandemic's cumulative economic effects, evidence suggesting that borrowers exiting a forbearance period face higher risk of delinquency and default, and that those risks might be particularly acute in light of current economic

conditions—including "COVID-induced" inflationary pressures. Add. 41-42. The district court ignored all of this.

Finally, the district court reasoned that the Secretary exceeded his authority because the Department has not relied previously on the HEROES Act or other authority to offer "blanket or mass cancellation … of student loan principal balances, and/or the material change of repayment amounts or terms." Add. 23 (omission in original). Even if that were correct, it would not invalidate the Secretary's action taken in accordance with the HEROES Act's plain terms. *See National Ass'n of Mfrs. v. Department of Def.*, 138 S. Ct. 617, 631 (2018) (analysis of agency's authority "begins with the statutory text" and, when the text is clear, it "ends there as well").

In any event, the HEROES Act has been invoked repeatedly to provide broad and substantial relief to groups of borrowers. Since March 2020, both the Trump and Biden Administrations have relied on the HEROES Act to suspend loan payments and interest accrual on Department-held loans, which saved the average borrower approximately $233 a month—comparable to the $200-300 reduction in monthly payments estimated to result from the challenged plan. *See* Add 44-45. In December 2020, the Secretary invoked the HEROES Act to expand eligibility for borrower defense to repayment, 85 Fed. Reg. at 79,862-79,863, which "will almost certainly reduce the amount of principal repaid by borrowers," OLC Op. at *12. And in 2003, the Secretary invoked the HEROES Act to waive the requirement that affected

borrowers return overpayments of certain grant funds. *See* 68 Fed. Reg. 69,312, 69,314 (Dec. 12, 2003).

c. Rather than rely on the statute's plain text, the district court invoked the "major-questions" doctrine to hold the Secretary's action unlawful. Add. 19-23. The district court misapplied that doctrine. In a few "extraordinary cases," the Supreme Court has explained that "separation of powers principles and a practical understanding of legislative intent" may require that an agency "point to 'clear congressional authorization' for the power it claims." *West Virginia v. EPA*, 142 S. Ct. 2587, 2607-09 (2022). For several reasons, that doctrine has no application here.

The Secretary's action is not an exercise of "regulatory authority" over private parties, *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)—it involves the disbursement of a federal benefit, relating to loans held by the federal government. Nor does this case implicate the principle that "ancillary," *West Virginia*, 142 S. Ct. at 2602, or "cryptic" statutory provisions should not be read to "delegate" important determinations to an agency, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). The HEROES Act, on its face, authorizes the Secretary to waive or modify federal student-loan provisions in "response to military contingencies and national emergencies," 20 U.S.C. § 1098bb, and the Secretary relied on that core provision to accomplish Congress's explicit objectives. The Secretary likewise has not relied on a "long-extant statute" to claim "transformative" and "unheralded power," *Utility Air*, 573 U.S. at 324. The Secretary has long had broad authority to "release"

student loan debts, and regularly does so in substantial amounts. *See, e.g.*, 20 U.S.C. § 1082(a)(6); Press Release, *Secretary DeVos Cancels Student Loans* (Nov. 8, 2019), https://perma.cc/FRT6-WAWS. The HEROES Act itself has repeatedly been invoked to provide significant relief to groups of borrowers. OLC Op. at *4-5.

The district court's only stated basis for applying the major-questions doctrine was that the debt-relief action is economically and politically significant. Add. 19-20. But if that alone sufficed to invoke the doctrine, it would not be reserved for "extraordinary cases." *West Virginia*, 142 S. Ct. at 2607-09. Agencies frequently take politically controversial or economically significant actions; the Supreme Court has never suggested the doctrine applies in all such cases. *See Missouri v. Biden*, 142 S. Ct. 647, 653 (2022) (per curiam) (upholding COVID-19 vaccination requirement for healthcare facilities receiving Medicare and Medicaid funds without applying the doctrine). Nor does the fact that "Congress has introduced," but not enacted, "multiple bills" relating to student-loan relief make this an extraordinary case. Add. 20. "A bill can be proposed … or rejected" for "any number of reasons," *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001), and "several equally tenable inferences may be drawn from such inaction," *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994); *see id.* ("Congressional inaction lacks persuasive significance….").

In any event, even if the major-questions doctrine applied, it would not support the district court's holding. Congress clearly expressed its intent to give the Secretary

maximum flexibility to ensure borrowers are not worse off financially because of a national emergency, and the Secretary acted in accordance with the Act's plain terms. And Congress foresaw that such action was possible: it recently created a "Special Rule for Discharges in 2021 Through 2025," making student-loan discharges tax-free in pandemic-related relief legislation. *See* Pub. L. No. 117-2, § 9675, 135 Stat. 4, 185-86 (2021).

II. The Equitable Factors Overwhelmingly Favor a Stay

The district court's order threatens significant and irreparable harm to the combined interests of the government and public, *see Nken*, 556 U.S. at 435, without preventing any injury to plaintiffs.

A. The HEROES Act reflects Congress's judgment that the public benefits when the Secretary acts quickly to protect student-loan borrowers affected by national emergencies. Here, the Secretary concluded—based on unrebutted evidence—that millions of federal student loan borrowers will be at a heightened risk of delinquency and default once the current payment pause ends (and therefore face wage garnishment, credit report damage, and seizure of federal benefits, *see* Fed. Student Aid, *Student Loan Delinquency and Default*, https://studentaid.gov/manage-loans/default (last visited Nov. 17, 2022)). Add. 28-30. The district court's order prevents the Secretary from providing relief to lower-income borrowers that the Secretary determined would help guard against those risks.

The judgment also inflicts irreparable harm on the government by putting it to an unnecessarily perilous choice: restarting payments as previously planned—and initiating the cascade of harms that justified the debt-relief—or considering other options that would impose their own costs. For instance, extending the payment pause would cost the government several billion dollars per month in foregone payments. Add. 31. And this is to say nothing of the district court's "improper intrusion … into the workings of a coordinate branch." *INS v. Legalization Assistance Project of L.A. Cty. Fed'n of Labor*, 510 U.S. 1301, 1305-06 (1993) (O'Connor, J., in chambers); *see Maryland v. King*, 567 U.S. 1301, 1303 (2012) (barring a sovereign from "employ[ing] a duly enacted statute to help prevent … injuries constitutes irreparable harm").

B. It is especially inequitable to inflict these harms on the government and public when a stay would not injure plaintiffs. As discussed above, plaintiffs have no greater opportunity to provide comments on the loan forgiveness program than before, and Mr. Taylor *loses* $10,000 of loan forgiveness under the district court's order. A stay of that decision would not injure plaintiffs, nor would it prevent plaintiffs from potentially obtaining greater loan relief in the future. As discussed above, the Department is still reviewing means by which it could provide student-loan relief to other borrowers, including Ms. Brown. *See supra* p. 5.

When a district court judgment threatens harm to millions, provides benefit to none, and inflicts demonstrable harm on plaintiffs' only concrete interest, the balance

of equities is clear. This Court should not permit the elimination of debt relief to so many Americans in need based solely on two individuals' claim that the program did not go far enough.

III. The District Court's Remedy Is Overbroad

Relying on this Court's cases articulating a "default rule" that vacatur is the appropriate remedy under 5 U.S.C. § 706 for unlawful agency action, the district court vacated the challenged policy. Add. 23-24 (citing *Data Mktg. P'ship v. U.S. Dep't of Labor*, 45 F.4th 846, 859-60 (5th Cir. 2022)). But Section 706(2) does not authorize such relief; indeed, it does not pertain to remedies at all, which are governed by Section 703. Rather, Section 706(2) is a rule of decision directing the reviewing court to disregard unlawful agency action in resolving the case before it. *See* 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, 42-46 (2020); *see also Webster's New International Dictionary of the English Language* 2291 (2d ed. 1958) (defining "set aside" as a: "To put to one side; discard; dismiss" and b: "To reject from consideration; overrule"). Where, as here, no special review proceeding applies, Section 703 provides that "[t]he form of proceeding" under the APA is a traditional "form of legal action," such as "actions for declaratory judgments or writs of prohibitory or mandatory injunction."

The district court recognized that a nationwide injunction would not be appropriate in a traditional legal action. Add. 23. But universal vacatur has much the

same effect, violating the principle that remedies "ordinarily operate with respect to specific parties," rather than "on legal rules in the abstract." *California v. Texas*, 141 S. Ct. 2104, 2115 (2021). Indeed, reading Section 706(2) to authorize hundreds of district judges around the Nation to grant universal relief in every APA case would perpetuate the now-familiar problems with nationwide injunctions. *See, e.g., DHS v. New York*, 140 S. Ct. 599, 599-601 (2020) (Gorsuch, J., concurring); *Trump v. Hawaii*, 138 S. Ct. 2392, 2425-2429 (2019) (Thomas, J., concurring); *see also Arizona v. Biden*, 40 F.4th 375, 396-97 (6th Cir. 2022) (Sutton, C.J., concurring) (doubting that the APA's "unremarkable language" was meant to "upset the bedrock practice of case-by-case judgments with respect to the parties in each case").

Assuming *arguendo* that any relief were appropriate, both constitutional and equitable principles would require that it be no broader than necessary to remedy demonstrated harm to these plaintiffs. *See, e.g.*, *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Thus, if this Court concludes that the Department's debt-forgiveness policy inflicts cognizable harm on these two plaintiffs, it should narrow the district court's judgment to set that policy aside as to them and permit the policy to take effect as to others. *See Louisiana v. Becerra*, 20 F.4th 260, 264 (5th Cir. 2021) (per curiam) (narrowing nationwide injunction where the challenged policy was "an issue of great significance currently being litigated" in other district courts across the country). To the extent that that

proves difficult, it only underscores the failings in plaintiffs' theories of standing and irreparable harm.

CONCLUSION

For the foregoing reasons, the district court's order should be stayed pending appeal.

Respectfully submitted,

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NOVEMBER 2022

CERTIFICATE OF SERVICE

I hereby certify that, on November 17, 2022, I electronically filed the foregoing motion with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

/s/ Courtney L. Dixon
Courtney L. Dixon
Counsel for Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 5,156 words according to the count of Microsoft Word. I further certify that this emergency motion complies with the requirements of 5th Cir. R. 27.3 because it was preceded by telephone calls to the Clerk's Office and to the offices of opposing counsel on November 16, 2022, advising of the intent to file this emergency motion. I further certify that the facts supporting emergency consideration of this motion are true and complete.

/s/ Courtney L. Dixon
Courtney L. Dixon
Counsel for Appellants