No. 22-3179

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF NEBRASKA, et al.,

Plaintiffs-Appellants,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States of America, et al.,

Defendants-Appellees.

OPPOSITION TO EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

Plaintiffs seek an extraordinary injunction pending appeal in a suit the district court dismissed for lack of jurisdiction. Such an application "demands a significantly higher justification than a request for a stay." *Respect Me. PAC v. McKee*, 562 U.S. 996, 996 (2010) (quotation marks omitted). Plaintiffs fail to carry their heavy burden.

Congress granted the Secretary of Education broad authority to ensure that national emergencies do not financially harm student-loan borrowers. In response to the COVID-19 pandemic, Secretaries from two Administrations invoked that authority to suspend interest accrual and payments on federally held student loans. As those protections wind down, the Secretary reasonably determined it necessary to provide targeted debt relief to federal student-loan borrowers affected by the pandemic. Six States seek to enjoin the Secretary's action, but the district court correctly held they lack standing.

Plaintiffs cannot establish the need for injunctive relief. Plaintiffs do not have Article III standing, and even if they did, they are unlikely to succeed on their claims given Congress's authorization for the Secretary's action and the Secretary's explicit consideration of the relevant factors.

Plaintiffs will suffer no irreparable injury from the provision of much-needed relief to millions of Americans, but the public interest would be greatly harmed by its denial. If the Court disagrees, any injunction should be narrowly tailored to the plaintiff States.

STATEMENT

The Secretary of Education is charged with carrying out student-loan programs under Title IV of the Higher Education Act of 1965 ("Education Act"), 20 U.S.C. § 1070 *et seq*. Under the William D. Ford Federal Direct Loan Program, the federal government lends money directly to student borrowers. *Id*. §§ 1087a-1087j. Under the Federal Family Education Loan ("FFEL") Program, *id*. §§ 1071 to 1087-4, by contrast, financial institutions issued student loans guaranteed by entities that the federal government reinsures. The authority to issue new FFEL loans expired in 2010, *id*. § 1071(d); outstanding loans may be held by either a private lender or the Department of Education, *see, e.g.*, *id*. §§ 1078(c)(8), 1080(b); 34 C.F.R. § 682.409. Borrowers generally may consolidate their federal student loans into a Direct Consolidation Loan, with certain limits. *See* 34 C.F.R. § 685.220.

The Education Act gives the Secretary significant authority to administer the Department's portfolio of student loans, *see* 20 U.S.C. §§ 1082, 3441, 3471, including the 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" to administer federal student loans, *id.* § 1082(a)(6).

The Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108-76, 117 Stat. 904 (codified at 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 under the Administrative Procedure Act ("APA"). 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).

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/B7KA-W4KD. COVID-19 has killed more than one million Americans, CDC, COVID Data

Tracker, https://perma.cc/FB3W-GRPB, 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 (2020). The Trump and Biden Administrations further extended these protections under the HEROES Act. *See, e.g.*, 85 Fed. Reg. at 79,857; R. Doc. 27-1, Ex. B ("Decision Memo"). On August 24, 2022, the Secretary extended the protections one final time, through December 31, 2022. Decision Memo 2.

To "address the financial harms of the pandemic" and smooth the transition to repayment status, the Secretary further announced he would use his HEROES Act authority to provide targeted one-time debt relief to federal student-loan borrowers affected by the pandemic. Decision Memo 1. Designed to aid borrowers at highest risk of delinquencies 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). *See 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 economic analysis finding that the relief would help prevent delinquency and default among borrowers the pandemic put most at risk with respect to their student loans. *See generally* R. Doc. 27-1, Ex. A ("Supporting Analysis").

The Department's website describes the eligible federal student loans, including Direct Loans and FFEL loans held by the Department. *See* U.S. Federal Student Aid, *One-Time Student Debt Relief*, https://perma.cc/JND5-THCZ ("FAQs"). As for privately held FFEL loans, the Department announced on September 29, 2022, that, as of that date, borrowers "*cannot* obtain one-time debt relief by consolidating those loans into Direct Loans." *Id.*

Plaintiffs filed suit and moved for a preliminary injunction. The district court dismissed the case for lack of jurisdiction. This Court granted an administrative stay prohibiting the Secretary from discharging debt pending a ruling on plaintiffs' motion for an injunction pending appeal.

ARGUMENT

To obtain the extraordinary remedy of an injunction pending appeal, plaintiffs must establish that their "claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam); *see Shrink Mo. Gov't PAC v. Adams*, 151 F.3d 763, 764 (8th Cir. 1998). An injunction pending appeal "demands a significantly higher justification" than a stay because "an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." *Respect Me. PAC v. McKee*, 562 U.S. 996, 996 (2010). Plaintiffs must thus make a "strong showing" that they will prevail on the merits. *Roman Catholic Diocese*, 141 S. Ct. at 66; *see Organization for Black Struggle v. Ashcroft*, 978 F.3d 603, 607 (8th Cir. 2020) (same for stay).

A. The District Court Correctly Concluded That It Lacked Jurisdiction

Plaintiffs have not met their burden of establishing subject-matter jurisdiction, including the "irreducible constitutional minimum of standing." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998).

1. Plaintiffs' principal standing argument—based on possible financial losses to the Higher Education Loan Authority of the State of Missouri (MOHELA) "as a servicer of Direct Loans" (Mot. 8)—fails for at least two reasons.

First, as the district court held, plaintiffs have not demonstrated that they can sue on behalf of MOHELA, which has independent authority "[t]o sue and be sued." Mo. Rev. Stat. § 173.385; *see Hughes v. City of Cedar Rapids*, 840 F.3d 987, 992 (8th Cir. 2016) (plaintiff may not sue for injuries to another absent a "hindrance to the [other party's] ability to protect [its] own interests"). Plaintiffs' argument that Missouri's Attorney General can sue to protect the State's interests, *see* Mot. 10 (citing Mo. Rev. Stat. § 27.060), does not establish authority to sue on behalf of MOHELA, and it appears that Missouri has never attempted to do so before. R. Doc. 44, at 12 ("Op."). Moreover, Missouri law makes MOHELA a "self-sustaining and financially independent agency," Op. 12, whose "revenues and liabilities" were designed to be "specifically and completely independent of the State," Op. 11-12; *see, e.g.*, Mo. Rev. Stat. §§ 173.410, 173.425. Any financial harms to MOHELA cannot be imputed to Missouri and therefore cannot give plaintiffs standing.

Second, federal district courts lack jurisdiction over disputes arising from the Department's contractual relationships with loan servicers like MOHELA. *See* R. Doc. 1, at 23, ¶ 96; R. Doc. 5-1, at 350. The Contract Disputes Act ("CDA"), 41 U.S.C. § 7104, requires such disputes be brought before the Court of Federal Claims (or Board of Contract Appeals). *Texas Health Choice v. OPM*, 400 F.3d 895, 898-99 (Fed. Cir. 2005); *see also Goodin v. U.S. Postal Inspection Serv.*, 444 F.3d 998, 1000-01 (8th Cir. 2006). Thus, plaintiffs "may not predicate their standing to sue" in district court on "economic injuries" arising from MOHELA's contractual role as a loan servicer. *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 808-09 (11th Cir. 1993). They cannot evade the CDA by "recasting" their claims as a "statutory or regulatory violation," *United States v. J&E Salvage Co.*, 55 F.3d 985, 988 (4th Cir. 1995), or asking to "invalidate" an administrative action, *Texas Health Choice*, 400 F.3d at 900.

2. Plaintiffs argue (Mot. 13-15) that three States (Missouri through MOHELA, Arkansas, and Nebraska) "have experienced various harms" because, before September 29, the challenged policy "prompted the extensive consolidation—and thus elimination—of non-federally held FFEL loans" into eligible Direct Loans. But "where the plaintiffs seek declaratory and

injunctive relief, past injuries alone are insufficient to establish standing." *Frost v. Sioux City*, 920 F.3d 1158, 1162 (8th Cir. 2019). A plaintiff must demonstrate "ongoing injury" or "immediate threat of injury." *Id.*

Plaintiffs do not deny that any incentive to consolidate was eliminated by the Department's decision that "[a]s of Sept. 29, 2022, borrowers with federal student loans not held by [the Department] *cannot* obtain one-time debt relief by consolidating those loans into Direct Loans." FAQs; *see* 87 Fed. Reg. 61,512, 61,514 (Oct. 12, 2022). Nor do plaintiffs contest the district court's conclusion that "[t]he lack of the ongoing incentive to consolidate" means they face no current or imminent threat of harm from consolidation. Op. 13-17. Instead, plaintiffs invoke (Mot. 15) the voluntary-cessation exception to mootness. But neither mootness nor voluntary cessation is implicated here. Because any incentive to consolidate was eliminated before this suit was filed, *see* Doc. 27-1, at 3, ¶ 4; R. Doc. 27-1, Exs. D-F, plaintiffs always have lacked standing to seek prospective relief based on alleged harms related to consolidation.

3. Plaintiffs also claim (Mot. 11-13, 15-16) other proprietary, sovereign, and quasi-sovereign interests. None supports standing. A "State does not have standing as *parens patriae* to bring an action against the Federal

Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982). Plaintiffs therefore cannot rely on purported harms to the "well-being … of [their] residents" such as diminished "educational opportunities." Mot. 16 (alteration in original); *see, e.g.*, *Government of Manitoba v. Bernhardt*, 923 F.3d 173, 179-83 (D.C. Cir. 2019). As for plaintiffs' sovereign interests, the loan-forgiveness policy does not affect any State's ability to enforce, administer, or interpret its laws, nor does it involve state borders. *See Snapp*, 458 U.S. at 601; *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 269 (4th Cir. 2011).

Nebraska, Iowa, Kansas, and South Carolina (the latter three not claiming any other injury) cite a loss of future income tax revenues they predict might occur "*after* 2025" absent the challenged debt relief. Mot. 12. A State may sue the United States only if it suffers a "direct injury" from the federal government. *Florida v. Mellon*, 273 U.S. 12, 18 (1927). But plaintiffs' theory relies on an attenuated causal chain including a recent change to the definition of federal taxable income (excluding certain student loan discharges through 2025), the States' own decision to apply that change to their tax laws, and the possible discharge of student loans years from now. In addition to being "speculative" and far from "imminent," Op. 18, such lost

tax revenues are self-inflicted, *see Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976), and have no "direct link" to the "administrative action being challenged," *Wyoming v. U.S. Dep't of Interior*, 674 F.3d 1220, 1234-35 (10th Cir. 2012) (distinguishing *Wyoming v. Oklahoma*, 502 U.S. 437 (1992)).

At bottom, plaintiffs challenge planned loan relief to third parties not before the Court, based on speculation about possible downstream economic effects. Allowing standing based on such "indirect fiscal burdens" resulting from a federal policy "would make a mockery … of the constitutional requirement of case or controversy." *Arizona v. Biden*, 40 F.4th 375, 386 (6th Cir. 2022) (Sutton, C.J.).

B. Plaintiffs' Claims Cannot Succeed On The Merits

1. The HEROES Act Authorizes The Secretary's Action

As discussed above, the HEROES 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" their student 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, 10,289 (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 protection in effect until December 31, 2022, *see* Decision Memo 2.

"This payment pause has delivered substantial relief" to borrowers. Decision Memo 1. Evidence before the Secretary, however, established 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. *See* Supporting Analysis 2. 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. *See id.* at 2-3. The Secretary also evaluated evidence that pandemic-induced inflationary pressures have diminished the financial well-being of many households. *See id.* at 3. The Secretary reasonably deemed it necessary to exercise his HEROES Act authority to prevent pandemic-induced harm to lower-income student-loan borrowers.

b. Plaintiffs urge that, because the Act permits relief "in connection with a … national emergency," the Secretary is limited to "*temporary*" measures, suggesting that a discharge of some amount does not qualify. Mot. 20. But the Act broadly authorizes 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); *see United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("the word 'any' has an expansive meaning"). The Secretary may do so, moreover, as the Secretary "*deems* necessary," 20 U.S.C. § 1098bb(a)(1) (emphasis added), language that "exudes deference," *see Webster v. Doe*, 486 U.S. 592, 600 (1988). Plaintiffs cannot add extra-textual limits to that authority. Indeed, plaintiffs did not argue below that the Secretary lacks any authority under the Act to discharge debt. R. Doc. 5, at 3, 30-34.

Contrary to plaintiffs' arguments (Mot. 19-21), the Secretary's action is likewise calculated to "ensure" an enumerated objective of the Act: that borrowers "are not placed in a worse position financially in relation to" their loans "because of their status as affected individuals." 20 U.S.C. § 1098bb(a)(2)(A). Plaintiffs assert that eligible borrowers are not "affected individuals." Mot. 21. The Act's definition of "affected individuals," however, includes 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). The vast majority of student-loan borrowers therefore qualify as "affected individuals" based on where they live and work: the States, the District of Columbia, and all permanently populated United States territories have been designated as COVID-19 disaster areas. *See supra* p. 4. And although plaintiffs observe that some eligible borrowers live and work outside the United States, Mot. 21, "affected individuals" also includes individuals who have "suffered direct economic hardship as a direct result of a … national emergency, as determined by the Secretary." 20 U.S.C. § 1098ee(2)(D). The once-in-a-century pandemic has inflicted global economic harms, and the Secretary could reasonably "determine[]," *id.*, that all federal student-loan borrowers

are "affected individuals" regardless of their residence. Indeed, each previous invocation of the HEROES Act to pause payment obligations and interest accrual during the COVID-19 pandemic—which plaintiffs do not challenge—treated all borrowers of Direct federal loans as "affected individuals." *See, e.g.*, 85 Fed. Reg. at 79,857; 87 Fed. Reg. at 61,513.

The Secretary limited the debt-relief action to loans held by a subclass of "affected individuals" whom the Secretary deemed at highest risk of delinquency and default when the payment pause ends, and therefore most at risk of being in a "worse position financially in relation to" their student loans as a result of their "status as affected individuals," *see* 20 U.S.C. § 1098bb(a)(2)(A)—namely, individual borrowers making less than $125,000 a year ($250,000 per household). Contrary to plaintiffs' bare assertion, the evidence before the Secretary demonstrated that the targeted debt-relief action would help keep these "eligible borrowers out of trouble." Mot. 19-20. Evidence showed that the proposal adopted by the Secretary will reduce the median borrower's monthly payments by 38%, permitting many vulnerable borrowers to enter repayment with significantly reduced monthly payments. *See* Supporting Analysis 6. Plaintiffs' argument (Mot. 19-20) that reducing borrowers' principal—and therefore their monthly payments—is not

calculated to "ensure" that they are not put in a "worse position" in relation to their student loans, 20 U.S.C. § 1098bb(a)(2)(A), is incorrect.

Plaintiffs assert that some borrowers who qualify for relief may not be at risk of facing a worse financial position as they enter repayment. Mot. 20. But the Act makes clear 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). Moreover, Congress authorized the Secretary to take action "as may be necessary to *ensure*" that affected individuals are not worse off with respect to their student loans. *Id.* § 1098bb(a)(2) (emphasis added); *see Ensure*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/ensure (last visited Oct. 24, 2022) (defining "ensure" as "to make sure, certain, or safe"). By authorizing the Secretary to act on a class-wide basis as may be necessary to make "sure" or "certain" affected individuals are not placed in a worse position financially, Congress anticipated some degree of imprecision in the allocated relief. *See Weinberger v. Salfi*, 422 U.S. 749, 776-77 (1975) (Congress can rationally conclude "that the expense and other difficulties of individual determinations justif[y] the inherent imprecision of a prophylactic rule.").

Plaintiffs' assertion (Mot. 21) that qualifying borrowers are not at risk of being in a worse financial position "*because of*" the COVID-19 pandemic is similarly mistaken. "Because of" typically requires but-for causation. *See* OLC Op. at *14 (collecting cases). The administrative-forbearance period was implemented and extended because of the unprecedented pandemic, and the Secretary properly considered the pandemic's cumulative economic effects, evidence suggesting that borrowers exiting a forbearance period after a natural disaster face higher risk of delinquency and default, and that those risks may be particularly acute in light of current economic pressures—including "COVID-induced" inflationary pressures. *See* Supporting Analysis 3.

c. Plaintiffs' reliance (Mot. 17) on the major-questions doctrine casts no doubt on this conclusion. 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). 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, related 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 "delegat[e]" to an agency a question's resolution, *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. Since Congress enacted the Education Act in 1965, the Secretary has 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 has repeatedly been invoked to provide broad relief to groups of borrowers, and since March 2020, it has been the basis for broad student-debt relief to all borrowers, without any challenge. *See supra* pp. 4-5; *see also* 68 Fed. Reg. 69,312, 69,314

(Dec. 12, 2003) (eliminating liability related to overpayment). If the scope of the current policy is unusual, that reflects the pandemic's unprecedented scope, not any previous understanding of the Act's limits. *See Missouri v. Biden*, 142 S. Ct. 647, 653 (2022) (per curiam) (recognizing agency went "further than what the Secretary has done in the past" because agency had "never had to address an infection problem of [the] scale and scope [of COVID-19] before").

Even if the major-questions doctrine applied, it would not support plaintiffs' claim. Congress hardly could have expressed more clearly its intent to give the Secretary maximum flexibility to ensure borrowers are not worse off financially because of a national emergency, and the Secretary complied with the Act's plain terms, as discussed *supra* p. 12-18. It also cannot be said that Congress could not have foreseen such an outcome: Congress itself 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).[1]

[1] Plaintiffs' purported "ultra vires" claim cannot be brought where an APA claim is available and in any event is subject to a higher standard of review and thus fails for the reasons above. *See Federal Express Corp. v. U.S. Dep't of Commerce*, 39 F.4th 756, 764-65 (D.C. Cir. 2022).

2. The Secretary's Action Is Not Arbitrary Or Capricious

Plaintiffs' arbitrary-and-capricious challenge fails because the Secretary "examined the relevant considerations and articulated a satisfactory explanation for [his] action, including a rational connection between the facts found and the choice made." *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 292 (2016) (alterations omitted). Because this case was dismissed at a preliminary stage, the administrative record that would form the basis for arbitrary-and-capricious review has not been certified. *See Biden v. Texas*, 142 S. Ct. 2528, 2546 (2022). But even the limited documents already in the record—the Decision Memo and Supporting Analysis—demonstrate plaintiffs are unlikely to succeed.

The Secretary did not fail to consider reasonable alternatives. An agency need not consider "every alternative device and thought conceivable by the mind of man," *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020), including those "that are contrary to the pertinent statutory goals or do not fulfill a project's purpose," *Central S. Dakota Coop. Grazing Dist. v. Secretary of U.S. Dep't of Agric.*, 266 F.3d 889, 897 (8th Cir. 2001) (citation omitted). The Secretary not only considered "continu[ing] forbearance," Mot. 22, he *did* continue forbearance. But he reasonably

determined that additional targeted action was necessary to address the unique difficulties borrowers will face as the pandemic ends and their payments resume. Decision Memo 2. "[L]engthening repayment periods," Mot. 22, would have undermined the pertinent statutory goals, as it would subject borrowers to increased financial burdens, such as accumulating additional interest.

Nor did the Secretary ignore legally cognizable reliance interests in deciding to relieve certain federal borrowers of their obligation to repay certain debts to the Department. Mot. 23-24. Plaintiffs have no cognizable interest at all in this action, *see supra* pp. 7-12, let alone "serious" or "significant reliance interests." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016); *see also Solenex LLC v. Bernhardt*, 962 F.3d 520, 529 (D.C. Cir. 2020) ("[U]nproven reliance interests are not a valid basis on which to undo agency action."). This case bears no resemblance to *Regents*, where the agency failed to address reliance interests in *rescinding* a benefit that recipients had relied upon to "embark[] on careers," "purchase[] homes, and even marr[y] and [have] children." 140 S. Ct. at 1914.

Contrary to plaintiffs' assertion (Mot. 23), the Secretary also considered the relevant statutory factors in determining the program's

scope. Evidence demonstrated that borrowers with individual incomes under $125,000 are more likely to experience financial hardship in making loan payments. Supporting Analysis 6-12. And given that the COVID-19 disaster declaration began in 2020 and continued throughout 2021, it was reasonable to consider borrowers' incomes from both years. *See, e.g.*, *id.* at 10 (discussing evidence that lower-income borrowers were disproportionately affected over the course of the pandemic). The Secretary has "wide discretion in making [such] line-drawing decisions." *National Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 214-15 (D.C. Cir. 2013) (quotation marks omitted).

Plaintiffs' assertion that the Secretary's decision was pretextual (Mot. 22-23) finds no support in the cases it cites and falls far short of a "strong showing of bad faith or improper behavior." *Biden*, 142 S. Ct. at 2546-47. The Secretary's action is amply supported by the contemporaneously provided explanation. That it is also consistent with "the President's goal" is both unsurprising and legally irrelevant. *See Department of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019).[2]

[2] Plaintiffs purport to challenge the Secretary's decision to deny relief to borrowers with FFEL loans who applied for consolidation after

Continued on next page.

C. Plaintiffs Cannot Satisfy The Remaining Requirements

Plaintiffs also fail to demonstrate "the absence of any substantial harm to other interested parties if an injunction is granted," "the absence of any harm to the public interest," and "the likelihood of irreparable injury … absent an injunction." *Shrink Mo.*, 151 F.3d at 764.

1. Enjoining the Secretary's action would harm the public interest. The HEROES Act reflects Congress's judgment that the public will benefit if the Secretary can act quickly to protect student-loan borrowers affected by national emergencies. Here, the Secretary has acted to protect tens of millions of borrowers from delinquency and default (and, by consequence, from wage garnishment, credit report damage, and seizure of federal benefits, *see* Federal Student Aid, *Student Loan Delinquency and Default*, https://perma.cc/9T5Y-7Q9L). These determinations deserve solicitude. *See Golden Gate Rest. Ass'n v. City & Cty. of San Francisco*, 512 F.3d 1112, 1126-27 (9th Cir. 2008). The harm to the public interest from frustrating the Secretary's policy is especially significant because it would represent "not merely an erroneous adjudication of a lawsuit between private litigants, but

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September 29, 2022 (Mot. 24), but plaintiffs plainly are not injured by that decision which, under their theory, *benefitted* them.

an improper intrusion by a federal court into the workings of a coordinate branch of the Government." *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").

2. On the other side of the ledger, plaintiffs have not shown *any* concrete injury from the Secretary's action, let alone *irreparable* injury. If MOHELA thinks itself aggrieved from its contractual relationship with the Department, it can seek damages pursuant to the contract dispute clause. R. Doc. 5-1, at 350; *see* 41 U.S.C. § 7103. Plaintiffs' claims about lost revenue from Direct Loan servicing therefore assert nothing "more than reparable, economic damage"—to a nonparty. *Padda v. Becerra*, 37 F.4th 1376, 1385 (8th Cir. 2022). Plaintiffs' claims about future losses of tax revenue, future incentives to consolidate, and "promoting higher education," Mot. 25-26, are far too "vague and speculative" to justify extraordinary relief, *Padda*, 37 F.4th at 1384; *see supra* pp. 9-12. Plaintiffs have not carried their burden of establishing likely irreparable harm that is both "certain and great." *Packard Elevator v. ICC*, 782 F.2d 112, 115 (8th Cir. 1986).

Nor could plaintiffs' asserted financial injuries justify injunctive relief now. Borrowers with Department-held loans have been subject to a payment pause for more than two and a half years—and eligible FFEL borrowers who consolidated into Department-held loans would have been eligible to receive this benefit the entire time. No States, loan holders, or loan servicers ever challenged the payment pause. Plaintiffs can hardly claim now that any peripheral economic harms they are allegedly suffering warrant extraordinary relief.

D. Any Relief Must Be Narrowly Tailored

Assuming *arguendo* that any relief were appropriate, both constitutional and equitable principles would require that it be no broader than necessary to remedy demonstrated irreparable 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). Universal relief is irreconcilable with these limitations and creates other practical and legal problems, *see, e.g.*, *DHS v. New York*, 140 S. Ct. 599, 600-01 (2020) (Gorsuch, J., concurring), including pretermitting challenges to the debt-relief policy pending in courts around the country. Plaintiffs make no effort to establish

that they would be entitled to an injunction pending appeal that prohibits debt relief to borrowers with no connection to the plaintiff States.

CONCLUSION

The motion for an injunction pending appeal should be denied and the administrative stay immediately vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5194 words. This response also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in CenturyExpd BT 14-point font, a proportionally spaced typeface.

s/ Sarah Carroll
Sarah Carroll

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2022, I electronically filed the foregoing response with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Sarah Carroll
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