No. 22-11115

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MYRA BROWN; ALEXANDER TAYLOR,
Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF EDUCATION; MIGUEL CARDONA, SECRETARY, U.S. DEPARTMENT OF EDUCATION, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF EDUCATION,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas, Fort Worth Division
No. 4:22-cv-908-P

PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS

1. No. 22-11115, *Myra Brown, et al. v. U.S. Dep't of Educ., et al.*;

2. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Myra Brown

Alexander Taylor

Consovoy McCarthy PLLC

J. Michael Connolly

James F. Hasson

Matthew Pociask

Steven C. Begakis

U.S. Department of Education

Miguel Cardona, in his official capacity as the Secretary of Education

U.S. Department of Justice

Brian David Netter

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INTRODUCTION

The HEROES Act is a three-page law that passed Congress by voice vote and was designed to defer loan payments for soldiers fighting abroad. The district court correctly held that this statute does not authorize Defendants to cancel the debts of tens of millions of individuals at a cost of nearly half a *trillion* dollars. Indeed, it "strains credulity to believe that this statute grants [Defendants] the sweeping authority that [they] assert[]." *Ala. Ass'n of Realtors v. HHS*, 141 S.Ct. 2485, 2486 (2021).

Yet Defendants boldly ask this Court to stay the district court's judgment so they can immediately complete the Debt Forgiveness Program—*before* this Court rules on the merits of their appeal. There is no emergency justifying this extraordinary request.

Plaintiffs are likely to succeed on the merits because they have standing, Defendants failed to follow the proper rulemaking procedures, and they cannot enact the Program through the HEROES Act. Defendants will not suffer irreparable harm during this appeal because the Program is illegal, Defendants recently suspended payment obligations for borrowers until August 29, 2023, and the Program is already subject to a nationwide injunction by the Eighth Circuit. Plaintiffs, by contrast, would be severely harmed if Defendants completed the Program because Plaintiffs would be permanently deprived of their procedural rights. And there is no public interest in upholding illegal agency actions. The motion should be denied.

BACKGROUND

I. Defendants' Procedural Obligations and Existing Regulations

By law, Defendants must follow two procedures before adopting any rule affecting student loans. First, under the Higher Education Act of 1965, Defendants must "obtain public involvement in the development of proposed regulations." 20 U.S.C. §1098a(a)(1). Specifically, they must use "negotiated rulemaking" to develop any rule "pertaining" to Title IV of the HEA, which is the subchapter governing student loan programs. *Id.* §1098a(b)(2); Plaintiffs-Appellees' Addendum ("Add.") 2. Defendants must, among other things, "obtain the advice of and recommendations from individuals and representatives of the groups involved in student financial assistance programs," including students, universities, loan servicers, and others. 20 U.S.C. §1098a(a)(1). "If consensus is achieved, the Department uses that regulatory language in its NPRM." *The Negotiated Rulemaking Process for Title IV Regulations*, U.S. Dep't of Educ., perma.cc/2V6K-5USE; *see* 20 U.S.C. §1098a(b)(2).

Second, under the Administrative Procedure Act, Defendants must provide notice and an opportunity to comment. 5 U.S.C. §553(c); *see The Negotiated Rulemaking Process*, *supra* ("When the NPRM is published in the Federal Register, it contains a request for public comments and a deadline for submitting those comments."). By requiring notice and comment, the APA "ensure[s] that affected parties have an opportunity to participate in and influence agency decision making at an early stage,

when the agency is more likely to give real consideration to alternative ideas." *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979).

In November 2016, after negotiated rulemaking and notice-and-comment, Defendants promulgated new regulations governing, among other things, the circumstances under which Defendants can forgive student loan debts. *See* Student Assistance General Provisions, 81 Fed. Reg. 75926, 75933-34, 76070 (Nov. 1, 2016). Per these regulations, *see* 34 C.F.R. §30.70(a)(1), (e)(1), Defendants may "compromise a debt" only in four circumstances: (1) where "[t]he debtor is unable to pay the full amount in a reasonable time, as verified through credit reports or other financial information"; (2) the Department is "unable to collect the debt in full within a reasonable time by enforced collection proceedings"; (3) "[t]he cost of collecting the debt does not justify the enforced collection of the full amount"; or (4) "[t]here is significant doubt concerning the Government's ability to prove its case in court." 31 C.F.R. §902.2(a). Defendants have never claimed that the Debt Forgiveness Program is permitted under their current regulations.

II. The Debt Forgiveness Program

Last summer, reports emerged that the White House was considering forgiving student loan debt for tens of millions of individuals. Dkt.1 at 7-10. But instead of promulgating a new rule through negotiated rulemaking and notice-and-comment, White House officials secretly decided the key details of the program, including which

individuals would receive debt forgiveness, how much of their debt would be forgiven, and which types of debt would qualify. *Id.*

On August 24, the White House announced that it would immediately implement the new debt forgiveness program. Under the Program, those who received a Pell Grant in college would get up to $20,000 in debt forgiveness while those who did not would get only $10,000. Add.36. In addition, although "[m]ost federal student loans" would qualify, individuals with federal loans that are commercially held and not in default would "not [be] eligible for debt relief." Add.39-41; *see* Add.2. Defendants claimed that the new program was authorized by the HEROES Act. On September 27, a month after announcing the program, the Secretary of Education sent a memorandum to two Department officials stating that he was using his HEROES Act authority to "waive[]" and "modif[y]" certain statutes and regulations that implement the student loan programs. Defendants-Appellants' Addendum ("Defs.Add.") 57. The Secretary instructed these officials to immediately implement the Debt Forgiveness Program. *Id.*

III. The Plaintiffs and Proceedings Below

Plaintiff Myra Brown has more than $17,000 in federal student loans. Add.27. But Ms. Brown is ineligible for the Debt Forgiveness Program because her student loan debt is commercially held and not in default. Add.27-28. Plaintiff Alexander Taylor has more than $35,000 in federal student loans. Add.30. But Mr. Taylor is ineligible for the full $20,000 in debt forgiveness because he did not receive a Pell Grant in college. Add.30-31. If Defendants are going to provide debt forgiveness, Plaintiffs believe that

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

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

On November 10, the district court granted Plaintiffs summary judgment and vacated the Program. The district court held, among other things, that Plaintiffs had standing and Defendants had no authority under the HEROES Act to adopt the Program. Add.11-15, 18-23. A week later, Defendants filed an emergency motion with this Court to stay the judgment pending appeal.

ARGUMENT

Staying a final judgment pending appeal "is an extraordinary remedy." *Thomas v. Bryant*, 919 F.3d 298, 303 (5th Cir. 2019). Because a stay "is an 'intrusion into the ordinary processes of administration and judicial review,'" it is "'not a matter of right, even if irreparable injury might otherwise result to the appellant.'" *Nken v. Holder*, 556 U.S. 418, 427 (2009). Defendants satisfy none of the stay factors. *Id.* at 426.

I. Defendants cannot show a strong likelihood of success on the merits.

A. Plaintiffs have standing.

As the district court correctly recognized, Plaintiffs' standing flows directly from Supreme Court and Fifth Circuit precedent. Add.11-15. A plaintiff can "show a cognizable injury if [he] has been deprived of 'a procedural right to protect [his] concrete interests.'" *Texas v. EEOC*, 933 F.3d 433, 447 (5th Cir. 2019) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009)). For example, "[a] violation of the APA's notice-and-comment requirements is … a deprivation of a procedural right." *Id.* The redressability requirement, in turn, "is lighter when the plaintiff asserts deprivation of a procedural right." *Id.* "'When a litigant is vested with a procedural right, that litigant has standing if there is *some possibility* that the requested relief will prompt the injury-causing

party to reconsider the decision that allegedly harmed the litigant.'" *Id.* (quoting *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (emphasis added)).

Here, Defendants are pursuing a program of debt forgiveness and Plaintiffs want their debts forgiven too. Add.28, 31. Under the APA and the HEA, Plaintiffs should have had an opportunity to express their views through the rulemaking process. But Defendants deprived Plaintiffs of their "'procedural right[s] to protect [their] concrete interests'" by adopting the Program without negotiated rulemaking and notice and comment. *EEOC*, 933 F.3d at 447; Add.11-13. The result is that Plaintiffs were denied "a non-illusory opportunity to pursue [the] benefit" of debt forgiveness. *Ecosystem Inv. Partners v. Crosby Dredging, LLC*, 729 F. App'x 287, 292 (5th Cir. 2018). These economic injuries are "'a quintessential injury upon which to base standing.'" *Id.* (quoting *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006)); *see also Paulsen v. Daniels*, 413 F.3d 999, 1005 (9th Cir. 2005) (prisoners denied notice-and-comment had standing to challenge a rule that "made them ineligible for a sentence reduction").

In addition, Plaintiffs' injuries are traceable to Defendants' actions because their "'lost chance'" to obtain debt forgiveness "flows directly from the Program's eligibility requirements." Add.13 (quoting *Ecosystem*, 729 F. App'x at 293). And Plaintiffs satisfy the "lighter" redressability requirements because there is at least "some possibility" that vacating the Program "could prompt [Defendants] to reconsider [their] decision" to withhold debt forgiveness from Plaintiffs. *Texas v. United States*, 787 F.3d 733, 753-54

(5th Cir. 2015). That is "all [Plaintiffs] must show when asserting a procedural right." *Id.*

Defendants never dispute that there is at least "some possibility" that, if the Program is vacated, they will go through the proper process and promulgate a rule that forgives Plaintiffs' debts. Forgiving student loan debt is one of the Administration's top priorities. *See Fact Sheet*, The White House (Aug. 24, 2022), perma.cc/4AWB-5E6W. Although Defendants cannot adopt the Program under the HEROES Act, they have repeatedly claimed "significant authority" to forgive debts on a wide scale under the HEA. Mot.2, 16-17 (citing 20 U.S.C. §§1082(a)(6), 1087hh(2)); Dkt.24 at 24-25. Multiple commentators agree and have urged Defendants to use this HEA authority. *See, e.g.*, Hunt, *Jubilee Under Textualism*, 48 J. Legis. 31, 33, 37-38 (2021); Herrine, *The Law and Political Economy of a Student Debt Jubilee*, 68 Buff. L. Rev. 281, 341-42 (2020). Defendants almost certainly avoided invoking the HEA *solely because* it would require the lengthy negotiated rulemaking and notice-and-comment process. *Supra* 2. For Ms. Brown, Defendants have repeatedly expressed interest in "expand[ing] eligibility to borrowers with privately owned federal student loans" and, until the States sued, encouraged borrowers with privately held federal loans to obtain debt forgiveness through consolidation. Add.41; Mot. 5; *see* Add.54. For Mr. Taylor, he is being arbitrarily denied $10,000 in forgiveness because he did not receive a Pell Grant in college; his level of debt forgiveness could easily increase if Defendants based eligibility on a more relevant metric, such as current income. Add.31.

Defendants argue that Plaintiffs lack standing because no "statute grant[s] them a procedural right to comment." Mot. 10. That is wrong, as explained below. But this is also a *merits* argument. The Court must "assume, for purposes of the standing analysis, that [Plaintiffs are] correct on the merits of [their] claim that the [Program] was promulgated in violation of the APA." *EEOC*, 933 F.3d at 447.

That Plaintiffs have procedural injuries doesn't strip them of standing to "vacate[] the [Program] for lack of statutory authorization." Mot. 8-9; *see* Add.11-15. Plaintiffs have shown "concrete injury" and if their "objections carry the day, the [Program] will be struck down and their injury redressed." *Mozilla Corp. v. FCC*, 940 F.3d 1, 46-47 (D.C. Cir. 2019); *see EEOC*, 933 F.3d at 447, 451 (Texas had standing because it "suffered a procedural injury" and it prevailed on the merits because the agency had no "statutory authority [to] issu[e] the Guidance"). Nor is there a "disconnect" between Plaintiffs' procedural injuries and the district court's remedy. Mot. 9. "Failure to provide the required notice and to invite public comment" is a "fundamental flaw that normally requires vacatur of the rule." *NRDC v. Wheeler*, 955 F.3d 68, 85 (D.C. Cir. 2020) (cleaned up). And Plaintiffs are unquestionably in a "better position with respect to their procedural rights." Mot. 9-10. Vacating the Program "could prompt [Defendants] to reconsider [their] decision" to withhold debt forgiveness from Plaintiffs, which is "all [Plaintiffs] must show." *Texas*, 787 F.3d at 753-54; *infra* 18-19.

B. Defendants violated the APA.

1. Because the baseline rules are that Defendants must engage in negotiated rulemaking and notice-and-comment—and it is undisputed that Defendants did not take these steps—Defendants must point to another statute that excuses them from their rulemaking obligations. Defendants have sought refuge in the HEROES Act. But as the district court correctly held, Defendants "lack[] the authority to implement the Program under the HEROES Act." Add.18-23. With no other statute to rely on, the baseline rules apply and so Defendants' failure to use negotiated rulemaking and provide notice-and-comment violated the APA.

Defendants have never disputed that the Program is a "rule" under the APA. 5 U.S.C. §551(4). The Program "grant[s] rights" by promising to eliminate individuals' debt; it "impose[s] obligations" on Defendants to forgive debt; and it produces "significant effects on private interests." *W&T Offshore, Inc. v. Bernhardt*, 946 F.3d 227, 237 (5th Cir. 2019). The Program also effectively amends or repeals Defendants' existing regulations that permit debt forgiveness only in limited circumstances. *See U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005). Defendants also have never denied that the Program "pertain[s]" to Title IV of the HEA, the subchapter governing student loans. 20 U.S.C. §1098a(b)(2); Add.2. Defendants thus recognize that negotiated rulemaking and notice-and-comment are "otherwise applicable procedural requirements." Mot. 3.

Defendants believe they can ignore these rulemaking procedures merely by *saying* that they are acting pursuant to the HEROES Act, even if the Program is not *actually* authorized by the HEROES Act. Mot. 10. But "[a]gencies have never been able to avoid notice and comment simply by mislabeling their substantive pronouncements." *Azar v. Allina Health Servs.*, 139 S.Ct. 1804, 1812 (2019). The Court must "look[] to the *contents* of the agency's action, not the agency's self-serving *label,* when deciding whether statutory notice-and-comment [and negotiated-rulemaking] demands apply." *Id.* (emphasis in original). Congress would never create such obvious loopholes to the rulemaking process. *Id.*; *see Bauer v. DeVos*, 325 F. Supp. 3d 74, 97 (D.D.C. 2018) (exceptions to notice-and-comment and negotiated rulemaking must be "'narrowly construed and only reluctantly countenanced'").

The provisions that Defendants point to confirm this principle. Defendants rely on §1098bb(d) of the HEROES Act for the proposition that they need not engage in negotiated rulemaking. Mot. 10. But that provision states that 20 U.S.C. §1098a (the HEA section requiring negotiated rulemaking) "shall not apply to the waivers and modifications *authorized* or *required* by [the HEROES Act]." 20 U.S.C. §1098bb(d) (emphasis added). Thus, if the Program is not "authorized" or "required" by the HEROES Act, then negotiated rulemaking still applies. Defendants also point to §1098bb(b)(1). But that provision similarly excuses notice-and-comment only for the actions "authorized" in the prior section. *See id.* §1098bb(a)(1)-(2); *Matter of Lopez*, 897 F.3d 663, 670 n.5 (5th Cir. 2018) ("[W]e ought to 'consider the entire text, in view of

its structure and of the physical and logical relation of its many parts.'"). Simply put, if the Program is not authorized by the HEROES Act, the statute's relaxed procedures do not apply.

2. The key question, then, is whether the Program is authorized by the HEROES Act. If it isn't, then Defendants violated the APA by failing to follow the proper procedures and by acting without statutory authority.[1]

The district court correctly held that Defendants have no authority to adopt the Program under the HEROES Act. Add.18-23. To begin, "this is a major questions case." *W. Virginia v. EPA*, 142 S.Ct. 2587, 2610 (2022). The Program has "vast 'economic and political significance.'" *Utility Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014). It would allow Defendants to wipe away the debts of tens of millions of borrowers at a cost of more than 400 *billion* dollars. Add.20; Dkt.1 at 11. And loan forgiveness is unquestionably "one of today's most hotly debated political issues." *BST*

[1] Defendants wrongly argue that the district court couldn't grant summary judgment to Plaintiffs based on "inadequate statutory authority." Mot. 11-12. Plaintiffs brought suit under the APA and asked the district court to vacate the Program. Dkt.1 at 4, 14. From day one, Plaintiffs have argued that Defendants "lack[] the authority to implement the Program under the HEROES Act." Add.6; Dkt.4 at 16-22. This lack of authority is why Defendants had to employ negotiated rulemaking and notice-and-comment. Dkt.1 at 10-11, 13-14; Dkt.4 at 16, 22. That Plaintiffs did not plead Section 706(2)(C) as a separate count or "legal theory" is irrelevant. *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 11 (2014); *Koger v. Dart*, 950 F.3d 971, 974 (7th Cir. 2020) ("Complaints plead *grievances*, not legal theories."). Nor can Defendants "assert any prejudice" from this alleged deficiency. *Quinones v. City of Binghamton*, 997 F.3d 461, 469 (2d Cir. 2021). Indeed, there is no question that "the court and the defendants [were not] largely in the dark" about Plaintiffs' claims. *Bye v. MGM Resorts*, 49 F.4th 918, 926 (5th Cir. 2022).

Holdings, LLC v. OSHA, 17 F.4th 604, 617 (5th Cir. 2021); Add.20. Defendants also adopted a Program "that Congress had conspicuously and repeatedly declined to enact itself." *W. Virginia*, 142 S.Ct. at 2610; *see* Add.2, 20 (describing failed legislation).

Congress never could have fathomed that the HEROES Act would be used to justify an agency action like the Program. The HEROES Act passed by unanimous voice vote in the Senate and with only one dissenting voice in the House, 149 Cong. Rec. S10866 (July 31, 2003); *id.* at H2553-54 (Apr. 1, 2003). The Act was uncontroversial because Congress thought it was doing little more than relieving active-duty military from "making student loan payments for a period of time while they are away." *Id.* at H2522 (Apr. 1, 2003) (Rep. Garrett); *id.* at H2524 (Rep. Ryan) (the Act gives the Secretary "the opportunity to forbear a loan as our servicemen and servicewomen are activated" so that they will not have "to pay on their student loans for the time that they are active"); *see also id.* at H2522-27 (numerous legislators making similar statements).

Despite the September 11 attacks and multiple wars, the Department has *never* used the HEROES Act to cancel a single student's debts. Indeed, the Department's previous view was that it had no such authority. Add.23. Defendants identify not one legislator who believed that the HEROES Act authorized Defendants to cancel debts—let alone to cancel nearly half a trillion dollars in debt for millions of borrowers. Defendants also can't identify any other agency action of similar size, scale, and importance that was lawfully created through the stroke of a pen, without notice and

comment or any other similar process. That is because the baseline presumption is that important and consequential agency actions should be "tested via exposure to diverse public comment." *Int'l Union v. MSHA*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

Defendants' arguments for avoiding the major-questions doctrine easily fail. Actions that "involve[] the disbursement of a federal benefit," Mot. 16, are not exempt from the major-questions doctrine, Add.20-21. The Program's price tag and political history plainly distinguish it from mine-run agency actions with "political[]" or "economic[]" consequences. Mot. 17; *see* Add.19-21. Congress's actions postdating the statute at issue are highly relevant under the major questions doctrine. *See, e.g.*, *W. Virginia*, 142 S.Ct. at 2610; *Ala. Ass'n of Realtors*, 141 S.Ct. at 2490. And Congress didn't "fores[ee]" that the Program was possible through a section of the American Rescue Plan Act, Mot. 18, a provision that exempts *all* debt discharges from taxation and never references the HEROES Act, *see* Pub. L. 117-2, §9675, 135 Stat. 4, 185-86 (Mar. 11, 2021).

The district court correctly found no "clear congressional authorization" to implement the Program, Add.21-23, and Defendants barely argue otherwise. Yet Defendants lack authority even without the major-questions doctrine. Defendants rely on their ability to "waive" or "modify" certain provisions. 20 U.S.C. §1098bb(a)(1). But these "modest words" do not authorize debt *cancellation*. *W. Virginia*, 142 S.Ct. at 2609. Under the Act, Defendants' waivers or modifications can do nothing more than ensure that borrowers "are not placed in a *worse* position financially in relation to [their]

financial assistance." 20 U.S.C. §1098bb(a)(2)(A) (emphasis added). But cancelling debt places individuals in a *better* position. *E.g.*, Defs.Add.31 (noting that 18 million individuals will "have their federal student loans discharged in their entirety"). Moreover, Congress has adopted multiple laws explicitly authorizing Defendants to cancel student loan debt in other circumstances. *See, e.g.*, 20 U.S.C. §1087ee ("[l]oans shall be canceled" for certain individuals engaging in public service); *see also* 20 U.S.C. §1087j(a)-(b); *id.* §1078-11. But the HEROES Act "does not mention loan forgiveness." Add.21. "Where Congress knows how to say something but chooses not to, its silence is controlling." *Animal Legal Def. Fund v. USDA*, 789 F.3d 1206, 1217 (11th Cir. 2015). The Act's legislative history also confirms this understanding. *See* 149 Cong. Rec. at H2522-27.

But even if the HEROES Act allows some form of debt cancellation, the Program's scope is far too broad and untailored to fit within the HEROES Act. Individuals must "suffer[] *direct* economic hardship as a *direct* result of a … national emergency." 20 U.S.C. §1098ee(2)(D) (emphasis added). Defendants argue that the pandemic caused "many borrowers" to be "'at a heightened risk of loan delinquency and default' … once loan payments resume." Mot. 13. Even if true, the Program is not remotely tailored to these borrowers. Individuals with household income up to $250,000—everyone except "the top 5% of incomes"—are eligible for loan forgiveness. *Fact Sheet*, *supra*. Nor do Defendants provide evidence that the Program is "necessary" (*i.e.*, "essential") to prevent the 40 million individuals receiving debt forgiveness from

defaulting or becoming delinquent on their loans. 20 U.S.C. §1098bb(a)(2)(A); *Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City*, 685 F.3d 917, 923 (10th Cir. 2012) (Gorsuch, J.); Defs.Add.28. And the Program is not limited to those who "reside[d] or [were] employed in an area that is declared a disaster area," 20 U.S.C. §1098ee(2)(C), because individuals who were living abroad during the pandemic (about nine million) are eligible for debt forgiveness, *see Consular Affairs by the Numbers*, U.S. Dep't of State (Jan. 2020), perma.cc/L8PN-BCX4. These are not minor imprecisions that inevitably occur when providing "categorical relief." Mot. 3. They are fatal flaws showing that Defendants made no serious attempt to comply with the HEROES Act's express limitations.

II. Defendants will not suffer irreparable harm absent a stay.

Defendants claim they will suffer irreparable harm without a stay because they cannot "provid[e] relief to lower-income borrowers" who are at a "heightened risk of delinquency and default." Mot. 18. This argument fails for multiple reasons. Because Defendants have no authority under the HEROES Act to implement the Program, their inability to carry out an illegal activity is not irreparable harm. *Ala. Ass'n of Realtors*, 141 S.Ct. at 2490. Any "institutional injury" is not irreparable because Defendants "'may yet pursue and vindicate [their] interests in the full course of this litigation.'" *Doe #1 v. Trump*, 957 F.3d 1050, 1059 (9th Cir. 2020). "[M]onetary injury to third parties" is a "weak[] justification for a finding of 'irreparable harm'" because the standard is "'whether the *applicant[s]* will be irreparably injured absent a stay.'" *Id.* at 1060 (quoting

Nken, 556 U.S. at 426). And the risks of delinquency and default identified in an untested, lightly sourced, 13-page memorandum are the thinnest of reeds to justify a stay. Defs.Add.40-52.

In any event, Defendants' recent actions confirm that no emergency exists. Since March 2020, Defendants have paused repayment obligations and suspended interest accrual. Mot. 4. Last Tuesday, after filing their motion, Defendants announced that they were "exten[ding] … the pause on student loan repayment, interest, and collections" until either 60 days after this case and *Nebraska v. Biden* are resolved or August 29, 2023, whichever comes first. *Press Release*, U.S. Dep't of Educ. (Nov. 22, 2022), perma.cc/S8VL-UA5R. This freeze, according to Defendants, will "give the Supreme Court an opportunity to resolve the case[s] during its current term." *Id.*

This extended repayment pause is dispositive here. The "relevant question is whether [Defendants] will be irreparably harmed *during the pendency of the appeal*." *State v. Biden*, 10 F.4th 538, 559 (5th Cir. 2021) (emphasis in original). Because no debts will be due or interest accrued for more than *nine months*, there is "no reason" why Defendants "cannot comply with the district court's [judgment] while the appeal proceeds." *Id.*

Defendants criticize their decision to extend the repayment pause because it will "cost the government several billion dollars per month in foregone payments." Mot. 19. But these payments are merely being "paused," not lost forever. *Id.* Defendants' spending concerns also ring hollow given their intention to permanently forgive 400 *billion* dollars in debts. Regardless, any injuries from the "perilous choice," Mot. 19,

Defendants faced were "self-inflicted and therefore do not count," *Biden*, 10 F.4th at 558.

Finally, "from a practical perspective," the Program "is already subject to a nationwide injunction out of" the Eighth Circuit. *Kentucky v. Biden*, 23 F.4th 585, 611 (6th Cir. 2022); *see Nebraska v. Biden*, —F.4th—, 2022 WL 16912145, at *3 (8th Cir. Nov. 14, 2022). Thus, "even if [the Court] thought the district court's" decision was wrong, staying the judgment "could not revive the [Program] and prevent [Defendants'] allegedly irreparable injuries." *Kentucky*, 23 F.4th at 611.

III. The balance of harms weighs strongly in Plaintiffs' favor.

Plaintiffs, by contrast, will suffer severe and irreparable harms if this Court stays the judgment and the Eighth Circuit's injunction is vacated. Defendants seek to stay the judgment so they can complete the Program *before* this Court resolves their appeal. Defs.Add.28. But this would permanently deprive Plaintiffs of their procedural rights. Add.6; *see Eli Lilly & Co. v. Cochran*, 526 F. Supp. 3d 393, 408-09 (S.D. Ind. 2021) ("'[M]any courts have found that a preliminary injunction may be issued solely on the grounds that a regulation was promulgated in a procedurally defective manner'" because "the purpose of the notice and comment requirement is to permit regulated entities to influence rulemaking at the beginning of the process and not simply after rules are already in place, at which point the agency 'is far less likely to be receptive to comments.'"). Indeed, Defendants have promised to do nationwide debt forgiveness

only "one time." Add.49. If Plaintiffs are not included in the Program, they will be left out by Defendants' own admission.

Nor is "petition[ing] the Secretary to undertake a rulemaking" an acceptable substitute. Mot. 9. The government's capacity for debt forgiveness is surely limited. After nearly half a trillion dollars in student loan debts are cancelled, the odds of Plaintiffs being treated fairly after "[t]he egg has been scrambled" are slim to none. *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002). If the judgment is stayed and the Program is completed, Plaintiffs will "'never have an equivalent opportunity to influence'" the scope of Defendants' debt forgiveness. *Ass'n of Cmty. Cancer Ctrs. v. Azar*, 509 F. Supp. 3d 482, 501 (D. Md. 2020). This "difficulty of restoring the *status quo ante*" weighs strongly against a stay. *Texas*, 809 F.3d at 187.

IV. A stay would disserve the public interest.

The "public interest is in having governmental agencies abide by the federal laws that govern their existence and operations." *Biden*, 10 F.4th at 559 (cleaned up). And there is "no public interest in the perpetuation of unlawful agency action." *Wages & White Lion Invest. v. FDA*, 16 F.4th 1130, 1143 (5th Cir. 2021). Although individuals "who may be reaping [debt] recoveries" under the Program may favor a stay, their interests are "outweighed by the potential loss" to Plaintiffs and others who might qualify for forgiveness under a program that was lawfully created. *In re Deepwater Horizon*, 732 F.3d 326, 345 (5th Cir. 2013). Finally, countless individuals, universities, companies, governments, and others have an interest in participating in the rulemaking process,

and these rights will be lost forever if the Program is completed before Defendants' appeal is resolved.

V. The district court's remedy was proper.

Defendants' argument that the APA doesn't authorize vacatur is foreclosed by precedent. When an agency violates the APA, the "default rule is that vacatur is the appropriate remedy." *Data Mktg. P'ship v. DOL*, 45 F.4th 846, 859 (5th Cir. 2022). Indeed, "[v]acatur is the only statutorily prescribed remedy for a successful APA challenge." *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 374-75 (5th Cir. 2022). Nor does vacatur raise the same concerns as nationwide injunctions. Vacatur is a "'less drastic remedy,'" as it "neither compels nor restrains further agency decision-making." *Texas v. United States*, 40 F.4th 205, 219-20 (5th Cir. 2022). Vacatur "does nothing but re-establish the status quo absent the unlawful agency action." *Id.*

The district court's remedy was correct and certainly not an "abuse of discretion." *Thomas*, 919 F.3d at 313; *e.g.*, *Wheeler*, 955 F.3d at 85. Defendants ask the Court to "narrow the district court's judgment to set that policy aside as to them and permit the policy to take effect as to others." Mot. 21. But this request "is both at odds with settled precedent and difficult to comprehend." *O.A. v. Trump*, 404 F. Supp. 3d 109, 153 (D.D.C. 2019). When a court holds agency regulations unlawful, "'the ordinary result is that the rules are vacated—*not that their application to the individual petitioners is proscribed*.'" *Id.* (quoting *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (emphasis in original)).

Regardless, vacatur limited to just Plaintiffs wouldn't redress their injuries. Defendants would forgive the debts of tens of millions of individuals and then shut down the Program. Defendants would never conduct new rulemaking proceedings to determine whether two individuals should have their loans forgiven. Such a remedy would also contradict Congress's command that the Department's regulations be "uniformly applied and enforced throughout the 50 States." 20 U.S.C. §1232(c); *Texas v. United States*, 50 F.4th 498, 531 (5th Cir. 2022). Vacating the Program was the proper remedy.

CONCLUSION

The motion should be denied.

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CERTIFICATE OF SERVICE

On November 25, 2022, I filed a true and correct copy of this brief with the Clerk of this Court via the CM/ECF system, which will notify all counsel.

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CERTIFICATE OF COMPLIANCE

This document complies with Rule 27(d)(2)(A) because it contains 5,194 words, excluding the parts that can be excluded. This brief also complies with Rule 27(d)(1)(E) because it has been prepared in a proportionally spaced font (14-point Garamond) using Microsoft Word version 16.66.1, the same program used to calculate the word count.

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