ATTORNEY GENERAL OF MISSOURI

ANDREW BAILEY

May 6, 2024

Mariuxi Pintado
records@americanoversight.org

RE: Sunshine Request 23-266 - Emails between Bailey, Atkins, Divine, Green, Wagner, Corrigan, Sieren, Lewis and List of External Entities

Dear Ms. Pintado,

In response to your above-referenced request received by our custodian of records on May 31, 2023, we are enclosing a link to box.com which contains the final responsive documents. We now consider this request file complete and closed.

Box.com link: https://ago.box.com/s/k0n2e6ulip23vwou541257errq33z803

Sincerely,

/s/ Nicki Eatinger-Sprague

Nicki Eatinger-Sprague | Custodian of Records
Missouri Attorney General's Office

Supreme Court Building
207 W. High Street
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-0774
www.ago.mo.gov

AMERICAN OVERSIGHT

To: Press[Press@ago.mo.gov]; Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: O'Neil, Tyler[Tyler.ONeil@heritage.org]
Sent: Thur 1/26/2023 10:21:24 AM (UTC-06:00)
Subject: Media Request: Columbia drag show situation

Madeline,
I'm writing a story about the Columbia drag show situation, where a school reportedly took kids to a drag show without notifying parents that the event would include a drag show. I know AG Bailey sent letters to the mayor and the superintendent and I want to hear if he is planning more action on this and if either the mayor or the superintendent responded.
Best,
Tyler O'Neil
(303)956-8499

Tyler ONeil
Managing
The
214
Washington,

202-608-6046
heritage.org

AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: O'Neil, Tyler[Tyler.ONeil@heritage.org]
Sent: Tue 1/31/2023 10:01:15 AM (UTC-06:00)
Subject: Re: Media Request: Columbia drag show situation

Madeline,
I'm writing up my story today. Would the AG comment on the presence of elementary school kids and has he made any decisions?

Tyler ONeil
Managing
The
214
Washington,

202-608-6046
heritage.org

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Date: Monday, January 30, 2023 at 11:40 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation

Thanks, Madeline!
By the way, did the AG's office know that elementary students attended the overall event? I'm asking the school if any of the kids attended the drag event.
Has the AG made any more decisions about future action?

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, January 26, 2023 at 11:34 AM
To: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Subject: Re: Media Request: Columbia drag show situation

Hi Tyler,
Thanks for reaching out.
Yes, the AG sent a letter last Friday to both the superintendent and the mayor of Columbia. Columbia Public Schools Superintendent Yearwood responded with a letter to the governor, with the AG cc'ed, on Jan 22. That letter can be found in this article.https://abc17news.com/news/education/columbia-public-schools/2023/01/22/columbia-public-schools-sends-letter-to-governor-about-drag-performance/
We sent a letter back on Jan. 24 refuting his claims in the letter. I've got a tweet thread here with that letter and the main points of the letter attached.https://twitter.com/agandrewbailey/status/1618321521294049282?s=46&t=vVqAHBxFTZQOpP5v1_UsYQfar, he has called for the resignation or termination of any officials that knew, or should have known, that schoolchildren would be present at the drag show. He has also encouraged local parents to show up at the next school board meeting to register their disgust on the matter.
Attorney General Bailey is examining all legal options, and more action is forthcoming.
I will be sure to keep you updated as things unfold.
Let me know if I can clarify anything here,
Thanks very much!

Sent from my iPhone

> On Jan 26, 2023, at 10:21 AM, O'Neil, Tyler <Tyler.ONeil@heritage.org> wrote:
>
> Madeline,
> I'm writing a story about the Columbia drag show situation, where a school reportedly took kids to a drag show without notifying parents that the event would include a drag show. I know AG Bailey sent letters to the mayor and the superintendent and I want to hear if he is planning more action on this and if either the mayor or the superintendent responded.
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AMERICAN OVERSIGHT

To: Wagner, Ray[Ray.Wagner@ago.mo.gov]
From: Susan Klein[Susan.K@missourilife.org]
Sent: Fri 12/22/2023 11:59:13 AM (UTC-06:00)
Subject: Question on Video Linked Below

Ray,
Merry Christmas to you and your family!

Susan

The attached video is circulating and has gone viral on social media. was sent to us and our Kansas affiliate. KFL or MRL had anything to do with this video or what they call an investigation. KS affiliate is asking their Attorney General to look into this report and we ask if Missouri AG Bailey would do the same?

Here is the video:

Project Veritas on Instagram: "
"We never tell the parents anything." Planned Parenthood Managing Director describes transporting minors across state lines for #secretabortions. Watch the full Investigation at @project_veritas."
urldefense.proofpoint.com

Sent from my iPhone

> On Dec 14, 2023, at 2:58 PM, Wagner, Ray <Ray.Wagner@ago.mo.gov> wrote:
>
> Thanks Susan. I will route this around internally and I'm sure we will be back in touch shortly.
> Ray
>
> Raymond T. Wagner, Jr.
> Senior Advisor/Chief Counselor
> Missouri Attorney General's Office
> P.O. Box 899
> Jefferson City, Missouri 65102
> (573) 751-0531
> (573) 645-9875 (cell)
> Ray.Wagner@ago.mo.gov

Sent from my iPhone

AMERICAN OVERSIGHT

On Dec 13, 2023, at 4:43 PM, Susan Klein <Susan.K@missourilife.org> wrote:

Ray,
Attached is Missouri Right to Life's rewrite of some of the underlined language from the first draft of this proposed legislation.
All we did was tweak the language so it is effective after the U.S. Supreme Courts ruling on Dobbs and with the trigger law that went into effect in Missouri after that Dobbs decision.
Please let me know if this language is agreeable.
Thank you!
Susan Klein
Abortion defunding bill draft v.2.docx

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AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: O'Neil, Tyler[Tyler.ONeil@heritage.org]
Sent: Tue 1/17/2023 11:12:27 AM (UTC-06:00)
Subject: Re: Media Request: White House Social Media Censorship

Sure thing. Sorry, I misquoted. The headline mentions “more documents”:
Missouri Attorney General Releases More Documents Exposing White House's Social Media Censorship Scheme

Tyler ONeil
Managing
The
214
Washington,

202-608-6046
heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Tuesday, January 17, 2023 at 11:51 AM
To: Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com>
Subject: Re: Media Request: White House Social Media Censorship

Hi Tyler,
Could you point me to that part of the release?
Thanks!

Sent from my iPhone

> On Jan 17, 2023, at 10:33 AM, Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com> wrote:
>
> Madeline,
> The release from Jan. 9 says these documents represent “other documents,” alluding to a prior release. Would you forward me that release? Are there more documents coming?
>
>
> Tyler O'Neil
>
> *Managing*
>
> The
> 214
> Washington,
>
> heritage.org
>
>
> ---
>
> **From:** O'Neil, Tyler <Tyler.ONeil@heritage.org>
> **Date:** Friday, January 13, 2023 at 12:00 PM
> **To:** Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
> **Subject:** Re: Media Request: White House Social Media Censorship
>
> Madeline,
> Thanks again for this. Here’s my story: https://www.dailysignal.com/2023/01/12/not-just-misinformation-emails-white-house-facebook-admits-suppressing-often-true-content-covid-19-vaccines/
> Are there more documents coming?
>
> ---
>
> **From:** Sieren, Madeline <Madeline.Sieren@ago.mo.gov>

AMERICAN OVERSIGHT

Date: Thursday, January 12, 2023 at 11:10 AM
To: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Subject: RE: Media Request: White House Social Media Censorship

Hi Tyler,
A statement from AG Bailey: "I want to protect Missourians and the freedoms they enjoy, which is why as Attorney General, I will always defend the Constitution. This case is about the Biden Administration's blatant disregard for the First Amendment and its collusion with Big Tech social media companies to suppress speech it disagrees with. I will always fight back against unelected bureaucrats who seek to indoctrinate the people of this state by violating our constitutional right to free and open debate."
Here is a link to the press release we put out this week on the docs:
https://ago.mo.gov/home/news/2023/01/09/missouri-attorney-general-releases-more-documents-exposing-white-house's-social-media-censorship-scheme
Let me know if you need anything else.
Thanks!
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Thursday, January 12, 2023 8:04 AM
To: Press <Press@ago.mo.gov>; info@ago.mo.gov; Sunshine Request <SunshineRequest@ago.mo.gov>
Subject: Media Request: White House Social Media Censorship
Importance: High
This is Tyler O'Neil, managing editor at The Daily Signal. I'm writing a story about the new documents AG Bailey released on Monday and would like to see if the AG or his staff would provide a unique comment on them. Would he comment on Facebook's decision to assure Flaherty that the social media company has been "reducing the virality of content discouraging vaccines that does not contain actionable misinformation," including "often-true content"? Would he flag any other documents that he released previously or that he may not have yet released? What do these documents reveal about the Biden White House, in his estimation?
I am working on a quick deadline and would appreciate a prompt response.
Best,
Tyler O'Neil
(303)956-8499

Tyler ONeil

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AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: O'Neil, Tyler[Tyler.ONeil@heritage.org]
Sent: Fri 1/13/2023 11:00:55 AM (UTC-06:00)
Subject: Re: Media Request: White House Social Media Censorship

Madeline,
Thanks again for this. Here's my story: https://www.dailysignal.com/2023/01/12/not-just-misinformation-emails-white-house-facebook-admits-suppressing-often-true-content-covid-19-vaccines/
Are there more documents coming?

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Let me know if you need anything else.
Thanks!

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Thursday, January 12, 2023 8:04 AM
To: Press <Press@ago.mo.gov>; info@ago.mo.gov; Sunshine Request <SunshineRequest@ago.mo.gov>
Subject: Media Request: White House Social Media Censorship
Importance: High
This is Tyler O'Neil, managing editor at The Daily Signal. I'm writing a story about the new documents AG Bailey released on Monday and would like to see if the AG or his staff would provide a unique comment on them. Would he comment on Facebook's decision to assure Flaherty that the social media company has been "reducing the virality of content discouraging vaccines that does not contain actionable misinformation," including "often-true content"? Would he flag any other documents that he released previously or that he may not have yet released? What do these documents reveal about the Biden White House, in his estimation? I am working on a quick deadline and would appreciate a prompt response.
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To: Lewis, Jason[Jason.Lewis@ago.mo.gov]
From: Mary Catherine Martin[mcmartin@thomasmoresociety.org]
Sent: Wed 2/14/2024 2:13:38 PM (UTC-06:00)
Subject: FW: FW: Webex meeting invitation: Cole Division 4
invite.ics
Webex_meeting.ics

Mary

Senior

THOMAS

309 | Chicago,IL60606 | (312)
-1881

From: Belz, Timothy <tbelz@olblaw.com>
Date: Wednesday, February 14, 2024 at 9:46 AM
To: Mary Catherine Martin <mcmartin@thomasmoresociety.org>
Subject: Fwd: FW: Webex meeting invitation: Cole Division 4

Looks like you already got this.

---------- Forwarded message ---------
From: **Cole Division 4** <Cole.Division4@courts.mo.gov>
Date: Wed, Feb 14, 2024 at 9:32 AM
Subject: FW: Webex meeting invitation: Cole Division 4
To: tbelz@olblaw.com <tbelz@olblaw.com>, mcmartin@thomasmoresociety.com <mcmartin@thomasmoresociety.com>
Here is the WebEx link for the pre-trial conference today at 2:00pm.
-----Original Appointment-----
From: Cole Division 4 <Cole.Division4@courts.mo.gov>
Sent: Wednesday, February 14, 2024 9:29 AM
To: Cole Division 4; Rob Tillman
Subject: Webex meeting invitation: Cole Division 4
When: Wednesday, February 14, 2024 2:00 PM-3:00 PM America/Chicago.
Where: https://mocourts.webex.com/mocourts/j.php?MTID=mcbf1f4a64965ea5f77d18aac6eb0b6df

Cole Division 4 is inviting you to a scheduled Webex meeting.

Wednesday, February 14, 2024

2:00 PM:00) Central Time (US & Canada)hr

Join meeting

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More ways to join:

Join from the meeting link

https://mocourts.webex.com/mocourts/j.php?MTID=mcbf1f4a64965ea5f77d18aac6eb0b6df

Join by meeting number

Meeting number (access code): 2499 058 7504

Meeting password: DsyAwuKp323

Tap to join from a mobile device (attendees only)

+1-408-418-9388,,24990587504## United States Toll

Join by phone

+1-408-418-9388States Toll

Global call-in numbers

United States Toll Free
+1-844-487-0491

Join from a video system or application

Dial 24990587504@mocourts.webex.com

You can also dial 173.243.2.68 and enter your meeting number.

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Need help? Go to https://help.webex.com

--
Timothy Belz, Esq.
Ottsen, Leggat & Belz, L.C.
112 South Hanley, Suite 200
St. Louis, MO 63105
Voice314/726-2800
Fax314/863-3821
tbelz@olblaw.com
"We're going to get this thing turned around yet."
--Epitaph requested by Richard John Neuhaus (1936-2009)
This e-mail message, the information contained in this message and any files or attachments transmitted with it are confidential, may contain information that is privileged, attorney work product exempt from disclosure under applicable law and is intended solely for the named recipient(s) above. If the reader of this message is not the intended recipient, or an employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you receive this message in error, please notify me immediately by replying to this message and delete the message and any attachments from your computer. Thank you.

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The Missouri Bar and The Missouri Supreme Court Rules require all Missouri attorneys to notify all e-mail recipients that (1) e-mail communication is not a secure method of communication; (2) any e-mail that is sent to you or by you may be copied and held by any or all computers through which it passes as it is transmitted; and, (3) persons not participating in our communication may intercept our communications by improperly accessing either of our computers or another computer unconnected to either of us through which the e-mail is passed.I am communicating with you by e-mail at your request and with your consent.In the event you do not wish this form of communication in the future, upon your notification of same, no further e-mail communication will be forthcoming.

AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: O'Neil, Tyler[Tyler.ONeil@heritage.org]
Sent: Tue 1/31/2023 11:44:58 AM (UTC-06:00)
Subject: Re: Media Request: Columbia drag show situation

Thanks, Madeline! When do you plan to release the action? Would you offer it to me as a national news exclusive or do you already have someone set up to break it?

Tyler ONeil
Managing
The
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Washington,

202-608-6046
heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Tuesday, January 31, 2023 at 12:29 PM
To: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Subject: RE: Media Request: Columbia drag show situation

Hi Tyler,
Sorry for the delay, thanks for following up.
We've got another action coming today. Stay tuned.
"I want Missouri to be the safest state in the nation for children. The age of the children present at the drag show is not relevant to the discussion, because schoolchildren were subject to inherently sexual material without their parents' consent. My office will use every tool at our disposal to ensure Missouri children are educated, not indoctrinated, and that parents have a say in the process."
–Missouri Attorney General Bailey
Thanks!
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Tuesday, January 31, 2023 10:01 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation
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Tyler ONeil

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From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Date: Monday, January 30, 2023 at 11:40 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation

AMERICAN OVERSIGHT

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Has the AG made any more decisions about future action?

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, January 26, 2023 at 11:34 AM
To: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Subject: Re: Media Request: Columbia drag show situation

Hi Tyler,
Thanks for reaching out.
Yes, the AG sent a letter last Friday to both the superintendent and the mayor of Columbia. Columbia Public Schools Superintendent Yearwood responded with a letter to the governor, with the AG cc'ed, on Jan 22. That letter can be found in this article.https://abc17news.com/news/education/columbia-public-schools/2023/01/22/columbia-public-schools-sends-letter-to-governor-about-drag-performance/
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Attorney General Bailey is examining all legal options, and more action is forthcoming.
I will be sure to keep you updated as things unfold.
Let me know if I can clarify anything here,
Thanks very much!

Sent from my iPhone

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and destroy all copies of the original message. Thank you.

AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: O'Neil, Tyler[Tyler.ONeil@heritage.org]
Sent: Tue 1/31/2023 1:39:00 PM (UTC-06:00)
Subject: Re: Media Request: Columbia drag show situation

Thank you!

Tyler ONeil
Managing
The
214
Washington,

202-608-6046
heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Tuesday, January 31, 2023 at 2:33 PM
To: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Subject: RE: Media Request: Columbia drag show situation

Hi Tyler,
I can't grant an exclusive but I haven't shared with our press list so I am giving you a 10 Minute headstart on covering the story.
Here's the release I'm about to send out- let me know if you have questions.
Also let me know if you aren't on our official press list and I can add you!
Thanks
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Tuesday, January 31, 2023 11:45 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation
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every tool at our disposal to ensure Missouri children are educated, not indoctrinated, and that parents have a say in the process."
–Missouri Attorney General Bailey
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Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
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To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
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To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
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Best,
Tyler O'Neil
(303)956-8499

Tyler ONeil

Managing

The
214
Washington,

202-608-6046

heritage.org

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AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: O'Neil, Tyler[Tyler.ONeil@heritage.org]
Sent: Tue 1/31/2023 1:41:32 PM (UTC-06:00)
Subject: Re: Media Request: Columbia drag show situation

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Madeline.Sieren@ago.mo.gov

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"I want Missouri to be the safest state in the nation for children. The age of the children present at the drag show is not relevant to the discussion, because schoolchildren were subject to inherently sexual material without their parents' consent. My office will use

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AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: O'Neil, Tyler[Tyler.ONeil@heritage.org]
Sent: Tue 1/31/2023 2:27:13 PM (UTC-06:00)
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To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: O'Neil, Tyler[Tyler.ONeil@heritage.org]
Sent: Tue 1/31/2023 2:32:46 PM (UTC-06:00)
Subject: Re: Media Request: Columbia drag show situation

NVM, I see it's on the site. Is the one on the site right?

Tyler ONeil
Managing
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From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Date: Tuesday, January 31, 2023 at 3:31 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation

Thanks! Have you blasted the story yet? I haven't gotten the release, although I'm not certain if I'm signed up.

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Also- we caught a typo in the PDF I sent you of the letter we sent today.
Let me get you the updated one.
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AMERICAN OVERSIGHT

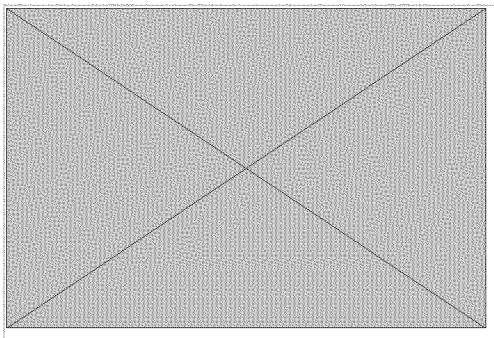
To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: Trinko, Katrina[Katrina.Trinko@heritage.org]
Sent: Thur 2/9/2023 12:34:02 PM (UTC-06:00)
Subject: Jamie Reed/Free Press

Hi Madeline,

Does Attorney General Andrew Bailey have any comment on the remarks of Jamie Reed, who formerly worked at The Washington University Transgender Center at St. Louis Children's Hospital? She says in her article today at The Free Press that "So I started writing down everything I could about my experience at the Transgender Center. Two weeks ago, I brought my concerns and documents to the attention of Missouri's attorney general. He is a Republican. I am a progressive. But the safety of children should not be a matter for our culture wars. " (https://www.thefp.com/p/i-thought-i-was-saving-trans-kids?utm_source=tfptwitter) I'm working on an op-ed about her article, and was wondering if there was any plan to use any of Reed's reportings and/or investigate the Washington University Transgender Center at St. Louis Children's Hospital and/or any other actions/response.

Thanks, and please let me know if any questions.

Best,
Katrina



I Thought I Was Saving Trans Kids. Now I'm Blowing the Whistle.
There are more than 100 pediatric gender clinics across the U.S. I worked at one. What's happening to children is morally and medically appalling.
www.thefp.com

Katrina Trinko
Director-in-Chief,
The
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202-608-6157
heritage.org

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–Missouri Attorney General Bailey
Thanks!

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Tuesday, January 31, 2023 10:01 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation
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Tyler ONeil

Managing

The
214
Washington,

202-608-6046

heritage.org

AMERICAN OVERSIGHT

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>

Date: Monday, January 30, 2023 at 11:40 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation

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Has the AG made any more decisions about future action?

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
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To: O'Neil, Tyler <Tyler.ONeil@heritage.org>
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AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: O'Neil, Tyler[Tyler.ONeil@heritage.org]
Sent: Tue 1/31/2023 2:41:27 PM (UTC-06:00)
Subject: Re: Media Request: Columbia drag show situation

I'll switch out the pdf for the corrected one once you send it.

Tyler ONeil
Managing
The
214
Washington,

202-608-6046
heritage.org

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Date: Tuesday, January 31, 2023 at 3:32 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation

NVM, I see it's on the site. Is the one on the site right?

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Date: Tuesday, January 31, 2023 at 3:31 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation

Thanks! Have you blasted the story yet? I haven't gotten the release, although I'm not certain if I'm signed up.

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Tyler ONeil

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AMERICAN OVERSIGHT

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Tuesday, January 31, 2023 at 2:57 PM
To: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Subject: RE: Media Request: Columbia drag show situation

Which one? The One of him sitting and smiling?

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Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
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Subject: Re: Media Request: Columbia drag show situation

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Subject: RE: Media Request: Columbia drag show situation

Here are a few images on our Flickr https://www.flickr.com/photos/146566231@N08/
This one from this article isn't mine but it's good. https://missouriindependent.com/2023/01/20/missouri-attorney-general-andrew-bailey-speaks-to-the-federalist-society/

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Tuesday, January 31, 2023 1:42 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation

Do you have a high-resolution photo of Bailey speaking that I can use? For some reason, Getty Images doesn't have any.

Tyler ONeil

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From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
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Subject: Re: Media Request: Columbia drag show situation
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From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
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Subject: RE: Media Request: Columbia drag show situation

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Beulah Ralph Elem Retweeted

Marekka Nickens
@TeachNickens

🤍BEU🤍 was at the Columbia Values Diversity Celebration, which honors the work of MLK and recognizes community members who walk in his footsteps. Our MAC Scholars heard messages of perseverance, effort and doing work that makes a difference 👏. #futureleaders #scholarsfirst

7:57 PM · Jan 19, 2023 · **908** Views

AMERICAN OVERSIGHT

1 Retweet **23** Likes

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: O'Neil, Tyler[Tyler.ONeil@heritage.org]
Sent: Mon 1/30/2023 10:40:43 AM (UTC-06:00)
Subject: Re: Media Request: Columbia drag show situation
Screenshot 2023-01-30 at 11.28.11 AM.png

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AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: O'Neil, Tyler[Tyler.ONeil@heritage.org]
Sent: Tue 2/21/2023 10:55:16 AM (UTC-06:00)
Subject: Re: Puberty blockers moratorium

Madeline,
Is there anything AG Bailey plans to do about this move? Will it negatively impact his investigation of the situation?

Tyler ONeil
Managing
The
214
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heritage.org

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Date: Saturday, February 18, 2023 at 9:03 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Puberty blockers moratorium

Thanks, Madeline! I'm not sure if you're monitoring this email over the weekend, but the statement did not seem to include a mention of what AG Bailey will do now that the hospital has refused to abide by the moratorium. He merely said it "calls into question how seriously they're taking their internal investigation." Is the AG considering acting on this, as well? Will this move weigh negatively in his investigation of the situation?

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Friday, February 17, 2023 at 8:03 PM
To: Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com>
Subject: RE: Puberty blockers moratorium

Hi Tyler,
We now have a response for you on their refusal to comply with our request for a moratorium. Wanted to flag it for you:
https://ago.mo.gov/home/news/2023/02/18/attorney-general-bailey's-statement-on-transgender-clinic's-refusal-to-implement-moratorium-on-puberty-blockers-for-children
Thanks!
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com>
Sent: Monday, February 13, 2023 11:16 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Puberty blockers moratorium
Importance: High
Madeline,
I'm looking into the AG's call for a moratorium on puberty blockers for kids at St. Louis Children's in the wake of the whistleblower claims, and wanted to hear from you if St. Louis Children's responded to this letter and what sort of moves the AG is considering should the hospital refuse to stop prescribing the drugs in the meantime.
https://ago.mo.gov/home/news/2023/02/10/missouri-attorney-general-andrew-bailey-calls-for-moratorium-on-puberty-blockers-for-children-pending-investigation-of-whistleblower-accusations

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AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: O'Neil, Tyler[Tyler.ONeil@heritage.org]
Sent: Tue 2/21/2023 11:48:18 AM (UTC-06:00)
Subject: Re: Puberty blockers moratorium

Thanks! I'm just looking to advance a potential story on it. I appreciate you keeping me in the loop

Tyler ONeil
Managing
The
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Washington,

202-608-6046
heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Sent: Tuesday, February 21, 2023 12:37:16 PM
To: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Subject: RE: Puberty blockers moratorium

Hi Tyler,
Thanks for following up. I will be sure to get you an update when we've got one, but for now, our investigation is ongoing and the Attorney General will not be deterred in his efforts to protect children throughout the state of Missouri.
Thanks,

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Tuesday, February 21, 2023 10:55 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Puberty blockers moratorium

Madeline,
Is there anything AG Bailey plans to do about this move? Will it negatively impact his investigation of the situation?

Tyler ONeil

Managing

The
214
Washington,

202-608-6046

heritage.org

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Date: Saturday, February 18, 2023 at 9:03 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Puberty blockers moratorium

Thanks, Madeline! I'm not sure if you're monitoring this email over the weekend, but the statement did not seem to include a mention of what AG Bailey will do now that the hospital has refused to abide by the moratorium. He merely said it "calls into question how seriously they're taking their internal investigation." Is the AG considering acting on this, as well? Will this move weigh negatively in his investigation of the situation?

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>

AMERICAN OVERSIGHT

Date: Friday, February 17, 2023 at 8:03 PM
To: Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com>
Subject: RE: Puberty blockers moratorium

Hi Tyler,
We now have a response for you on their refusal to comply with our request for a moratorium. Wanted to flag it for you:
https://ago.mo.gov/home/news/2023/02/18/attorney-general-bailey's-statement-on-transgender-clinic's-refusal-to-implement-moratorium-on-puberty-blockers-for-children
Thanks!
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com>
Sent: Monday, February 13, 2023 11:16 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Puberty blockers moratorium
Importance: High
Madeline,
I'm looking into the AG's call for a moratorium on puberty blockers for kids at St. Louis Children's in the wake of the whistleblower claims, and wanted to hear from you if St. Louis Children's responded to this letter and what sort of moves the AG is considering should the hospital refuse to stop prescribing the drugs in the meantime.
https://ago.mo.gov/home/news/2023/02/10/missouri-attorney-general-andrew-bailey-calls-for-moratorium-on-puberty-blockers-for-children-pending-investigation-of-whistleblower-accusations

Tyler O'Neil

Managing

The
214
Washington,

heritage.org

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AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: O'Neil, Tyler[Tyler.ONeil@heritage.org]
Sent: Sat 2/18/2023 8:03:09 AM (UTC-06:00)
Subject: Re: Puberty blockers moratorium

Thanks, Madeline! I'm not sure if you're monitoring this email over the weekend, but the statement did not seem to include a mention of what AG Bailey will do now that the hospital has refused to abide by the moratorium. He merely said it "calls into question how seriously they're taking their internal investigation." Is the AG considering acting on this, as well? Will this move weigh negatively in his investigation of the situation?

Tyler ONeil
Managing
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From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
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Subject: RE: Puberty blockers moratorium

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Sent: Monday, February 13, 2023 11:16 AM
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Subject: Puberty blockers moratorium
Importance: High
Madeline,
I'm looking into the AG's call for a moratorium on puberty blockers for kids at St. Louis Children's in the wake of the whistleblower claims, and wanted to hear from you if St. Louis Children's responded to this letter and what sort of moves the AG is considering should the hospital refuse to stop prescribing the drugs in the meantime.
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AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
Cc: Matt Crouch[matthew.crouch@heritageaction.com]
From: Thad Brock[Thad.Brock@heritageaction.com]
Sent: Mon 3/13/2023 2:37:31 PM (UTC-05:00)
Subject: Skype Interview with AG Bailey

Hi Madeline,
My name is Thad Brock and I am reaching out because Heritage Action is partnering with John Solomon of Just the News for a one-hour special report that will air on **Tuesday, January 31 at 6 PM E/T** on Real America's Voice.
We would like to invite Attorney General Bailey to join us for a 6-8 minute segment (filmed over Skype) over the following subjects:

- On 2/15 AG Bailey announced moratorium on Puberty Blockers for Children
- How state bills like SB 49 (SAFE Act) can protect the children of Missouri from the pediatric gender-industrial complex.

The special report will be streamed live on cable's Real America's Voice and live on Twitter, Facebook, Rumble, and Gettr. (Here is the link to a segment we did last month with TX Attorney General Ken Paxton.)
The audience is heavily conservative grassroots. If the Attorney General is available, here is the initial set of times John Solomon's team gave us for availability—do any of these times work for his schedule?

- **Wednesday, March 15th:** 9:00 AM - 10:00 AM
- **Thursday, March 16th:** 9:00 AM - 10:00 AM; 1:00 PM - 3:00 PM

If you have any questions, I would be more than happy to answer them.
Best,
--

Thad Brock
Director of Digital Advocacy
Heritage Action for America

202-680-8868
thad.brock@heritageaction.com
heritageaction.com

AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
Cc: Matt Crouch[matthew.crouch@heritageaction.com]
From: Thad Brock[Thad.Brock@heritageaction.com]
Sent: Mon 3/13/2023 2:41:50 PM (UTC-05:00)
Subject: Re: Skype Interview with AG Bailey

HI Madeline,
My apologies, but the air date of this month's special is **Tuesday, March 22 at 6 PM E/T.**

On Mon, Mar 13, 2023 at 3:37 PM Thad Brock <Thad.Brock@heritageaction.com> wrote:

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AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
Cc: Matt Crouch[matthew.crouch@heritageaction.com]
From: Thad Brock[Thad.Brock@heritageaction.com]
Sent: Mon 3/13/2023 3:20:51 PM (UTC-05:00)
Subject: Re: Skype Interview with AG Bailey

That's great to hear, Madeline!
Those times are in Eastern Time. We're big fans of the AG!

On Mon, Mar 13, 2023 at 4:19 PM Sieren, Madeline <Madeline.Sieren@ago.mo.gov> wrote:

Hi Thad,

Thanks for reaching out- we are definitely interested. Were those availability times you listed in ET or CT?

Thanks,

Madeline Sieren

Missouri Attorney General's Office

Madeline.Sieren@ago.mo.gov

From: Thad Brock <Thad.Brock@heritageaction.com>
Sent: Monday, March 13, 2023 2:42 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Cc: Matt Crouch <matthew.crouch@heritageaction.com>
Subject: Re: Skype Interview with AG Bailey

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AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: Thad Brock[Thad.Brock@heritageaction.com]
Sent: Mon 3/13/2023 3:28:30 PM (UTC-05:00)
Subject: Re: Skype Interview with AG Bailey

Could we do it at 9:15 AM? It's super short, just 6-8 minutes.

On Mon, Mar 13, 2023 at 4:26 PM Sieren, Madeline <Madeline.Sieren@ago.mo.gov> wrote:

Could we do Wednesday, March 15 from 9-10 AM ET? How long would you anticipate filming would take?

Also, my cell is 573-690-1205, feel free to text me if that is easier for coordinating purposes.

Thanks,

Madeline Sieren

Missouri Attorney General's Office

Madeline.Sieren@ago.mo.gov

From: Thad Brock <Thad.Brock@heritageaction.com>
Sent: Monday, March 13, 2023 3:21 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Cc: Matt Crouch <matthew.crouch@heritageaction.com>
Subject: Re: Skype Interview with AG Bailey

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Madeline.Sieren@ago.mo.gov

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heritageaction.com

AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: Thad Brock[Thad.Brock@heritageaction.com]
Sent: Mon 3/13/2023 3:31:15 PM (UTC-05:00)
Subject: Re: Skype Interview with AG Bailey

Yes, we can do that, too. I'll have the studio set that up and send a zoom link.
In the meantime, could you send over a high res headshot of the AG?

On Mon, Mar 13, 2023 at 4:30 PM Sieren, Madeline <Madeline.Sieren@ago.mo.gov> wrote:

9:15 AM works well. Is there any way we could use Zoom rather Skype? I have never used skype before and want to be sure everything works well.

Thanks very much!

Madeline Sieren

Missouri Attorney General's Office

Madeline.Sieren@ago.mo.gov

From: Thad Brock <Thad.Brock@heritageaction.com>
Sent: Monday, March 13, 2023 3:29 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Skype Interview with AG Bailey

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Madeline.Sieren@ago.mo.gov

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Sent: Monday, March 13, 2023 3:21 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Cc: Matt Crouch <matthew.crouch@heritageaction.com>
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AMERICAN OVERSIGHT

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Missouri Attorney General's Office

Madeline.Sieren@ago.mo.gov

From: Thad Brock <Thad.Brock@heritageaction.com>
Sent: Monday, March 13, 2023 2:42 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Cc: Matt Crouch <matthew.crouch@heritageaction.com>
Subject: Re: Skype Interview with AG Bailey

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If you have any questions, I would be more than happy to answer them.
Best,

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AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

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heritageaction.com

AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
Cc: Chad Banghart[chadabanghart@gmail.com]
From: Thad Brock[Thad.Brock@heritageaction.com]
Sent: Mon 3/13/2023 3:38:55 PM (UTC-05:00)
Subject: Re: Skype Interview with AG Bailey

As are we!
I'm looping in John Solomon's Producer, Chad Banghart, who will be coordinating with the studio and sending you the zoom link.

On Mon, Mar 13, 2023 at 4:37 PM Sieren, Madeline <Madeline.Sieren@ago.mo.gov> wrote:

Yes- here it is!

Thanks very much for arranging this. We look forward to interviewing!

Madeline Sieren

Missouri Attorney General's Office

Madeline.Sieren@ago.mo.gov

From: Thad Brock <Thad.Brock@heritageaction.com>
Sent: Monday, March 13, 2023 3:31 PM
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Thad Brock

Director of Digital Advocacy

Heritage Action for America

202-680-8868

thad.brock@heritageaction.com

heritageaction.com

AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: O'Neil, Tyler[Tyler.ONeil@heritage.org]
Sent: Mon 3/20/2023 2:53:08 PM (UTC-05:00)
Subject: Re: Missouri Attorney General Andrew Bailey Announces Emergency Regulation on Gender Transition Interventions for Minors

Thanks, Madeline! I'm taking my final week of paternity leave, but my son was born last September. I'll be back next week - and I appreciate this release.

Tyler ONeil
Managing
The
214
Washington,

202-608-6046
heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Sent: Monday, March 20, 2023 3:33:10 PM
To: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Subject: RE: Missouri Attorney General Andrew Bailey Announces Emergency Regulation on Gender Transition Interventions for Minors

Hi Tyler- just wanted to say congratulations on becoming a father! SO awesome.
Looking forward to working with you again in a few weeks,
Maddie

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Monday, March 20, 2023 1:11 PM
To: Press <Press@ago.mo.gov>
Subject: Automatic reply: Missouri Attorney General Andrew Bailey Announces Emergency Regulation on Gender Transition Interventions for Minors

Hi! You've reached me on paternity leave. I will be out until Monday, March 27. Please contact Katrina Trinko (katrina.trinko@heritage.org) in the meantime. I look forward to connecting when I'm back!

This email message, including the attachments, is from the Missouri Attorney General's Office. It is for the sole use of the intended recipient(s) and may contain confidential and privileged information, including that covered by § 32.057, RSMo. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message. Thank you.

AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: Allen, Virginia[Virginia.Allen@heritage.org]
Sent: Fri 3/17/2023 12:21:30 PM (UTC-05:00)
Subject: Re: Missouri Attorney General Andrew Bailey

Excellent. How about Wednesday, April 5 at 1pm EST?

Virginia Allen
Senior
The
214
Washington,

202-608-6149
heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, March 16, 2023 at 6:11 PM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: RE: Missouri Attorney General Andrew Bailey

Hi Virginia,
Next Wednesday afternoon is free for right now, as is Tuesday the 28 from 2-5 CT, and Wednesday April 5 all day is open. Let me know what would work for you guys and we can get it scheduled.
All the best,
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Thursday, March 16, 2023 4:36 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey
Hi Madeline,
I would love to have the Attorney General on The Daily Signal Podcast sometime in the coming weeks. Our interviews run about 20 minutes.
Could you send me a few dates and times that will work well for AG Bailey?
Best,
Virginia

Virginia Allen

Senior

The
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Washington,

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heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, March 16, 2023 at 3:34 PM
To: Bluey, Rob <rob.bluey@heritage.org>, Allen, Virginia <Virginia.Allen@heritage.org>
Subject: Missouri Attorney General Andrew Bailey

AMERICAN OVERSIGHT

Hi,
My name is Maddie Sieren, I'm the press secretary for Missouri Attorney General Andrew Bailey. I am writing to see about getting

the AG on to speak about a number of the topics that Missouri is leading the way on:

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AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: Allen, Virginia[Virginia.Allen@heritage.org]
Sent: Thur 3/16/2023 4:36:22 PM (UTC-05:00)
Subject: Re: Missouri Attorney General Andrew Bailey

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Best,
Virginia

Virginia Allen
Senior
The
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202-608-6149
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AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: Allen, Virginia[Virginia.Allen@heritage.org]
Sent: Mon 3/20/2023 4:56:38 PM (UTC-05:00)
Subject: Re: Missouri Attorney General Andrew Bailey

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If you have questions, please call Heritage Foundation/Daily Signal audio produced John Popp at 703-307-5884.
You can also reach me at 202-870-6243.
Thanks!
Best,
Virginia

Virginia Allen
Senior
The
214
Washington,

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heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Monday, March 20, 2023 at 9:01 AM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: Re: Missouri Attorney General Andrew Bailey

Hi Virginia,
Let's lock in 1 PM EST on April 5. Would this be a phone call or over zoom?
Thanks!

Sent from my iPhone

> On Mar 17, 2023, at 12:21 PM, Allen, Virginia <Virginia.Allen@heritage.org> wrote:
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> Virginia Allen
>
> *Senior*
>
> The
> 214
> Washington,
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> 202-608-6149

AMERICAN OVERSIGHT

heritage.org

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Senior

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To: Bluey, Rob <rob.bluey@heritage.org>, Allen, Virginia <Virginia.Allen@heritage.org>
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AMERICAN OVERSIGHT

From: Allen, Virginia[Virginia.Allen@heritage.org]
Attendees: Sieren, Madeline
Location: Riverside - link to come
Importance: Normal
Subject: Daily Signal Podcast Interview with Missouri Attorney General Andrew Bailey
Start Time: Wed 4/5/2023 12:00:00 PM (UTC-05:00)
End Time: Wed 4/5/2023 12:30:00 PM (UTC-05:00)
Required Attendees: Sieren, Madeline

From: Allen, Virginia <Virginia.Allen@heritage.org>
Date: Monday, March 20, 2023 at 5:56 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey

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Thanks!
Best,
Virginia

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> **Required Attendees:** Sieren, Madeline
>
> ---
> Virginia Allen
> Senior

AMERICAN OVERSIGHT

The
214
Washington,

202-608-6149

heritage.org

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Virginia Allen

Senior

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AMERICAN OVERSIGHT

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Phone Conference ID: 136 637 459#
Find a local number | Reset PIN
Learn More | Meeting options

AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: Allen, Virginia[Virginia.Allen@heritage.org]
Sent: Tue 3/21/2023 8:59:05 AM (UTC-05:00)
Subject: Re: Missouri Attorney General Andrew Bailey

Hi Madeline,
My apologies but I need to move our interview time. Does the Attorney General have any availability between 11am – 12:30pm EST on April 5th?
Best,
Virginia

Virginia Allen
Senior
The
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Thanks,

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

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AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
Cc: Samantha Hince[samantha.hince@heritageaction.com]
From: Thad Brock[Thad.Brock@heritageaction.com]
Sent: Wed 3/22/2023 10:04:16 AM (UTC-05:00)
Subject: AG Bailey on Just The News Last Night

Hi Madeline,
We really appreciate AG Bailey joining the Just The News special report last night. He did great!

I wanted to provide you a couple of links:

- Link to Download your Segment
- Link to Download Thumbnail
- Link to your Segment on Rumble
- Link to your Segment on YouTube

Thanks again, and please let me know how we can be helpful in the future!
--

Thad Brock
Director of Digital Advocacy
Heritage Action for America

202-680-8868
thad.brock@heritageaction.com
heritageaction.com

AMERICAN OVERSIGHT

From: Allen, Virginia[Virginia.Allen@heritage.org]
Attendees: Sieren, Madeline
Location: Riverside - link to come
Importance: Normal
Subject: Daily Signal Podcast Interview with Missouri Attorney General Andrew Bailey
Start Time: Wed 4/5/2023 11:00:00 AM (UTC-05:00)
End Time: Wed 4/5/2023 11:30:00 AM (UTC-05:00)
Required Attendees: Sieren, Madeline

From: Allen, Virginia <Virginia.Allen@heritage.org>
Date: Monday, March 20, 2023 at 5:56 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey

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If you have questions, please call Heritage Foundation/Daily Signal audio produced John Popp at 703-307-5884.
You can also reach me at 202-870-6243.
Thanks!
Best,
Virginia

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Monday, March 20, 2023 at 9:01 AM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: Re: Missouri Attorney General Andrew Bailey

Hi Virginia,
Let's lock in 1 PM EST on April 5. Would this be a phone call or over zoom?
Thanks!

Sent from my iPhone

> On Mar 17, 2023, at 12:21 PM, Allen, Virginia <Virginia.Allen@heritage.org> wrote:
>
> Excellent. How about Wednesday, April 5 at 1pm EST?
> **Required Attendees:** Sieren, Madeline
>
> ---
> Virginia Allen
> Senior

AMERICAN OVERSIGHT

The
214
Washington,

202-608-6149

heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, March 16, 2023 at 6:11 PM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: RE: Missouri Attorney General Andrew Bailey

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Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

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Sent: Thursday, March 16, 2023 4:36 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey
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Virginia

Virginia Allen

Senior

The
214
Washington,

202-608-6149

heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, March 16, 2023 at 3:34 PM
To: Bluey, Rob <rob.bluey@heritage.org>, Allen, Virginia <Virginia.Allen@heritage.org>
Subject: Missouri Attorney General Andrew Bailey

Hi,
My name is Maddie Sieren, I'm the press secretary for Missouri Attorney General Andrew Bailey. I am writing to see about getting the AG on to speak about a number of the topics that Missouri is leading the way on:

- Attempting to oust a Soros-backed prosecutor for refusing to prosecute criminals https://www.foxnews.com/politics/missouri-ag-moves-fire-dem-attorney-kim-gardner-refuses-resign-public-safety-outcry
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Microsoft Teams meeting

Join on your computer, mobile app or room device
Click here to join the meeting
Meeting ID: 226 499 399 804
Passcode: UyPeLs
Download Teams | Join on the web
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+1 509-904-4844,,136637459# United States, Spokane
Phone Conference ID: 136 637 459#
Find a local number | Reset PIN
Learn More | Meeting options

AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: Allen, Virginia[Virginia.Allen@heritage.org]
Sent: Wed 3/22/2023 3:20:06 PM (UTC-05:00)
Subject: Re: Missouri Attorney General Andrew Bailey

That's perfect. Thank you. Let's confirm 12 PM EST (11 AM CT) on April 5.

Virginia Allen
Senior
The
214
Washington,

202-608-6149
heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Wednesday, March 22, 2023 at 3:16 PM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: RE: Missouri Attorney General Andrew Bailey

Any time between 11 AM and 12:30 PM EST works for us on April 5. How about 12 PM EST (11AM CT) ?
Thanks very much,
Madeline Sieren
Missouri Attorney General's Office
573-690-1205
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Tuesday, March 21, 2023 8:59 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey
Hi Madeline,
My apologies but I need to move our interview time. Does the Attorney General have any availability between 11am – 12:30pm EST on April 5th?
Best,
Virginia

Virginia Allen

Senior

The
214
Washington,

202-608-6149

heritage.org

From: Allen, Virginia <Virginia.Allen@heritage.org>
Date: Monday, March 20, 2023 at 5:56 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey

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AMERICAN OVERSIGHT

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>
> *Senior*
>
> The
> 214
> Washington,
>
> 202-608-6149
>
> heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
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Missouri Attorney General's Office

AMERICAN OVERSIGHT

Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Thursday, March 16, 2023 4:36 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey

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Virginia Allen

Senior

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From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, March 16, 2023 at 3:34 PM
To: Bluey, Rob <rob.bluey@heritage.org>, Allen, Virginia <Virginia.Allen@heritage.org>
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AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: Allen, Virginia[Virginia.Allen@heritage.org]
Sent: Wed 3/22/2023 4:20:36 PM (UTC-05:00)
Subject: Re: Missouri Attorney General Andrew Bailey

Thank you!

Virginia Allen
Senior
The
214
Washington,

202-608-6149
heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Wednesday, March 22, 2023 at 4:48 PM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: RE: Missouri Attorney General Andrew Bailey

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Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

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Sent: Wednesday, March 22, 2023 3:20 PM
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Subject: Re: Missouri Attorney General Andrew Bailey

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AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

From: Allen, Virginia[Virginia.Allen@heritage.org]
Location: Riverside - link to come
Importance: High
Subject: Canceled: Daily Signal Podcast Interview with Missouri Attorney General Andrew Bailey
Start Time: Wed 4/5/2023 11:00:00 AM (UTC-05:00)
End Time: Wed 4/5/2023 11:30:00 AM (UTC-05:00)
Required Attendees: Sieren, Madeline

AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: Allen, Virginia[Virginia.Allen@heritage.org]
Sent: Wed 4/5/2023 4:06:56 PM (UTC-05:00)
Subject: Re: Missouri Attorney General Andrew Bailey

Yes, let's go ahead and confirm. Thank you!

Virginia Allen
Senior
The
214
Washington,

202-608-6149
heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Wednesday, April 5, 2023 at 4:27 PM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: RE: Missouri Attorney General Andrew Bailey

Sorry for the delay in response. Could we do 12 PM EST on Thursday, April 13?
Thanks,
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Tuesday, April 4, 2023 1:56 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey
Hi Madeline,
No problem. Yes, I am available anytime between 9am – 11am or 12pm – 1:30pm EST on Thursday, April 13.

Virginia Allen

Senior

The
214
Washington,

202-608-6149

heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Tuesday, April 4, 2023 at 2:44 PM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: RE: Missouri Attorney General Andrew Bailey

Hi Virginia,
I'm so sorry- we are going to have to reschedule tomorrow's appearance on the podcast for another day.
Is there any availability for next Wednesday, April 12 in the morning or next Thursday, April 13?
Thanks,
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>

AMERICAN OVERSIGHT

Sent: Wednesday, March 22, 2023 4:21 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey
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Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Wednesday, March 22, 2023 3:20 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey
That's perfect. Thank you. Let's confirm 12 PM EST (11 AM CT) on April 5.

Virginia Allen

Senior

The
214
Washington,

202-608-6149

heritage.org

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Madeline Sieren
Missouri Attorney General's Office
573-690-1205

AMERICAN OVERSIGHT

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Date: Thursday, March 16, 2023 at 3:34 PM
To: Bluey, Rob <rob.bluey@heritage.org>, Allen, Virginia <Virginia.Allen@heritage.org>
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- Our letter being the basis for why Walgreens agreed not to send abortion pills in the mail to pro-life states https://www.foxnews.com/politics/20-state-ags-warn-cvs-walgreens-distributing-abortion-pills-violates-state-federal-law https://www.theepochtimes.com/walgreens-wont-sell-abortion-pills-in-20-states_5099530.html?utm_medium=social&utm_source=twitter&utm_campaign=digitalsub
- Our case at the U.S. Supreme Court fighting Biden's unconstitutional student loan plan https://www.washingtonexaminer.com/restoring-america/fairness-justice/nebraska-missouri-ags-supreme-court-student-loan-case https://dailycaller.com/2023/02/28/republican-attorneys-general-supreme-court-student-loans/
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AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: Allen, Virginia[Virginia.Allen@heritage.org]
Sent: Tue 4/4/2023 1:55:57 PM (UTC-05:00)
Subject: Re: Missouri Attorney General Andrew Bailey

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- Our letter being the basis for why Walgreens agreed not to send abortion pills in the mail to pro-life states https://www.foxnews.com/politics/20-state-ags-warn-cvs-walgreens-distributing-abortion-pills-violates-state-federal-law https://www.theepochtimes.com/walgreens-wont-sell-abortion-pills-in-20-states_5099530.html?utm_medium=social&utm_source=twitter&utm_campaign=digitalsub
- Our case at the U.S. Supreme Court fighting Biden's unconstitutional student loan plan https://www.washingtonexaminer.com/restoring-america/fairness-justice/nebraska-missouri-ags-supreme-court-student-loan-case https://dailycaller.com/2023/02/28/republican-attorneys-general-supreme-court-student-loans/
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From: Allen, Virginia[Virginia.Allen@heritage.org]
Attendees: Sieren, Madeline
Location: Riverside - link to come
Importance: Normal
Subject: Daily Signal Interview with Missouri Attorney General Andrew Bailey
Start Time: Thur 4/13/2023 11:00:00 AM (UTC-05:00)
End Time: Thur 4/13/2023 11:30:00 AM (UTC-05:00)
Required Attendees: Sieren, Madeline

From: Allen, Virginia <Virginia.Allen@heritage.org>
Date: Wednesday, April 5, 2023 at 5:06 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey

Yes, let's go ahead and confirm. Thank you!

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Wednesday, April 5, 2023 at 4:27 PM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: RE: Missouri Attorney General Andrew Bailey

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- Our letter being the basis for why Walgreens agreed not to send abortion pills in the mail to pro-life states https://www.foxnews.com/politics/20-state-ags-warn-cvs-walgreens-distributing-abortion-pills-violates-state-federal-law https://www.theepochtimes.com/walgreens-wont-sell-abortion-pills-in-20-states_5099530.html?utm_medium=social&utm_source=twitter&utm_campaign=digitalsub
- Our case at the U.S. Supreme Court fighting Biden's unconstitutional student loan plan https://www.washingtonexaminer.com/restoring-america/fairness-justice/nebraska-missouri-ags-supreme-court-student-loan-case https://dailycaller.com/2023/02/28/republican-attorneys-general-supreme-court-student-loans/
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To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
Cc: Allen, Virginia[Virginia.Allen@heritage.org]
From: Popp, John[John.Popp@heritage.org]
Sent: Thur 4/13/2023 8:52:35 AM (UTC-05:00)
Subject: Interview Record Link

https://riverside.fm/studio/tds_041323_int_mo-ag-andrew-bailey?t=bae5c1f2cad94ad284a4

This is an **audio and video interview** today (4/13/23) at 12 pm/et.

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If you have questions, please call me at 703-307-5884.
Thanks!
John Popp

John Popp
Audio
The
214
Washington,

202-608-6235
heritage.org

AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: Allen, Virginia[Virginia.Allen@heritage.org]
Sent: Wed 4/5/2023 4:09:52 PM (UTC-05:00)
Subject: Re: Missouri Attorney General Andrew Bailey

Thank you! I hope you have a wonderful Easter.
Best,
Virginia

Virginia Allen
Senior
The
214
Washington,

202-608-6149
heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Wednesday, April 5, 2023 at 5:08 PM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: RE: Missouri Attorney General Andrew Bailey

Great! Thanks so much!
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Wednesday, April 5, 2023 4:07 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey
Yes, let's go ahead and confirm. Thank you!

Virginia Allen

Senior

The
214
Washington,

202-608-6149

heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Wednesday, April 5, 2023 at 4:27 PM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: RE: Missouri Attorney General Andrew Bailey

Sorry for the delay in response. Could we do 12 PM EST on Thursday, April 13?
Thanks,
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Tuesday, April 4, 2023 1:56 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>

AMERICAN OVERSIGHT

Subject: Re: Missouri Attorney General Andrew Bailey
Hi Madeline,
No problem. Yes, I am available anytime between 9am – 11am or 12pm – 1:30pm EST on Thursday, April 13.

Virginia Allen

Senior

The
214
Washington,

202-608-6149

heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Tuesday, April 4, 2023 at 2:44 PM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: RE: Missouri Attorney General Andrew Bailey

Hi Virginia,
I'm so sorry- we are going to have to reschedule tomorrow's appearance on the podcast for another day.
Is there any availability for next Wednesday, April 12 in the morning or next Thursday, April 13?
Thanks,
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Wednesday, March 22, 2023 4:21 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey
Thank you!

Virginia Allen

Senior

The
214
Washington,

202-608-6149

heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Wednesday, March 22, 2023 at 4:48 PM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: RE: Missouri Attorney General Andrew Bailey

Sounds great- thank you!
Madeline Sieren
Missouri Attorney General's Office

AMERICAN OVERSIGHT

Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Wednesday, March 22, 2023 3:20 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey

That's perfect. Thank you. Let's confirm 12 PM EST (11 AM CT) on April 5.

Virginia Allen

Senior

The
214
Washington,

202-608-6149

heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Wednesday, March 22, 2023 at 3:16 PM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: RE: Missouri Attorney General Andrew Bailey

Any time between 11 AM and 12:30 PM EST works for us on April 5. How about 12 PM EST (11AM CT) ?
Thanks very much,

Madeline Sieren
Missouri Attorney General's Office
573-690-1205
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Tuesday, March 21, 2023 8:59 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey

Hi Madeline,
My apologies but I need to move our interview time. Does the Attorney General have any availability between 11am – 12:30pm EST on April 5th?
Best,
Virginia

Virginia Allen

Senior

The
214
Washington,

202-608-6149

heritage.org

AMERICAN OVERSIGHT

From: Allen, Virginia <Virginia.Allen@heritage.org>
Date: Monday, March 20, 2023 at 5:56 PM

To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey

Excellent. We record using a platform called Riverside. My audio producer John Popp will send a session link closer to the date of the interview.

What you need to know before the interview:

- We record interviews via the podcast platform Riverside.fm.
- You need a laptop or desktop computer with a built in or external (preferred) microphone.
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Go to Riverside.fm and download the app.

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*** If we are experiencing technical difficulties connecting with you for the interview, we will record via phone. Please provide a phone number where we can reach you for back-up. *****
If you have questions, please call Heritage Foundation/Daily Signal audio produced John Popp at 703-307-5884.
You can also reach me at 202-870-6243.
Thanks!
Best,
Virginia

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Monday, March 20, 2023 at 9:01 AM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: Re: Missouri Attorney General Andrew Bailey

Hi Virginia,
Let's lock in 1 PM EST on April 5. Would this be a phone call or over zoom?
Thanks!

Sent from my iPhone

> On Mar 17, 2023, at 12:21 PM, Allen, Virginia <Virginia.Allen@heritage.org> wrote:
>
> Excellent. How about Wednesday, April 5 at 1pm EST?
>
> ---
> Virginia Allen
>
> *Senior*
>
> The
> 214
> Washington,
>
> 202-608-6149
>
> heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, March 16, 2023 at 6:11 PM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: RE: Missouri Attorney General Andrew Bailey

AMERICAN OVERSIGHT

Hi Virginia,
Next Wednesday afternoon is free for right now, as is Tuesday the 28 from 2-5 CT, and Wednesday April 5 all day is open. Let me know what would work for you guys and we can get it scheduled.
All the best,

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Thursday, March 16, 2023 4:36 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey

Hi Madeline,
I would love to have the Attorney General on The Daily Signal Podcast sometime in the coming weeks. Our interviews run about 20 minutes.
Could you send me a few dates and times that will work well for AG Bailey?
Best,
Virginia

Virginia Allen

Senior

The
214
Washington,

202-608-6149

heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, March 16, 2023 at 3:34 PM
To: Bluey, Rob <rob.bluey@heritage.org>, Allen, Virginia <Virginia.Allen@heritage.org>
Subject: Missouri Attorney General Andrew Bailey

Hi,
My name is Maddie Sieren, I'm the press secretary for Missouri Attorney General Andrew Bailey. I am writing to see about getting the AG on to speak about a number of the topics that Missouri is leading the way on:

- Attempting to oust a Soros-backed prosecutor for refusing to prosecute criminals https://www.foxnews.com/politics/missouri-ag-moves-fire-dem-attorney-kim-gardner-refuses-resign-public-safety-outcry
- Launching an investigation into an STL pediatric transgender clinic for giving children puberty blockers without proper care https://www.foxnews.com/politics/missouri-attorney-general-launches-investigation-childrens-hospitals-transgender-center
- Our case against the Biden administration with more than 1,400 facts showing that Biden has coerced and colluded with big tech social media companies to censor free speech https://dailycaller.com/2023/03/06/missouri-louisiana-preliminary-injunction-biden-admin-gov-censorship-social-media/ https://dailycaller.com/2023/01/21/andrew-bailey-missouri-root-out-biden-big-tech-censorship/
- Our letter being the basis for why Walgreens agreed not to send abortion pills in the mail to pro-life states https://www.foxnews.com/politics/20-state-ags-warn-cvs-walgreens-distributing-abortion-pills-violates-state-federal-law https://www.theepochtimes.com/walgreens-wont-sell-abortion-pills-in-20-states_5099530.html?utm_medium=social&utm_source=twitter&utm_campaign=digitalsub
- Our case at the U.S. Supreme Court fighting Biden's unconstitutional student loan plan https://www.washingtonexaminer.com/restoring-america/fairness-justice/nebraska-missouri-ags-supreme-court-student-loan-case https://dailycaller.com/2023/02/28/republican-attorneys-general-supreme-court-student-loans/

AMERICAN OVERSIGHT

- Our defense of the Second Amendment Preservation Act, the strongest law of its kind in the US
https://www.courthousenews.com/missouri-attorney-general-vows-to-appeal-ruling-against-state-gun-law/

These are only a few topics we feel would be of interest to your audience, let me know if you would be interested in interviewing the AG or if you need more info.
Thanks,

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

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AMERICAN OVERSIGHT

To: Popp, John[John.Popp@heritage.org]; Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: Allen, Virginia[Virginia.Allen@heritage.org]
Sent: Thur 4/13/2023 9:28:51 AM (UTC-05:00)
Subject: Re: Interview Record Link

Oh and I will ask right at the top of the interview for the Attorney General's reaction to the 5th Circuit's ruling on the abortion pill case.

Virginia Allen
Senior
The
214
Washington,

202-608-6149
heritage.org

From: Allen, Virginia <Virginia.Allen@heritage.org>
Date: Thursday, April 13, 2023 at 10:20 AM
To: Popp, John <John.Popp@heritage.org>, Madeline.Sieren@ago.mo.gov <Madeline.Sieren@ago.mo.gov>
Subject: Re: Interview Record Link

Thanks, John.
Madeline, I am planning on focusing on the three items below during the interview today.

1. Case against the Biden administration with more than 1,400 facts showing that Biden has coerced and colluded with big tech social media companies to censor free speech https://dailycaller.com/2023/03/06/missouri-louisiana-preliminary-injunction-biden-admin-gov-censorship-social-media/ https://dailycaller.com/2023/01/21/andrew-bailey-missouri-root-out-biden-big-tech-censorship/
2. Attempting to oust a Soros-backed prosecutor for refusing to prosecute criminals https://www.foxnews.com/politics/missouri-ag-moves-fire-dem-attorney-kim-gardner-refuses-resign-public-safety-outcry
3. Launching an investigation into an STL pediatric transgender clinic for giving children puberty blockers without proper care https://www.foxnews.com/politics/missouri-attorney-general-launches-investigation-childrens-hospitals-transgender-center

Please let me know if you have any questions or concerns.
Best,
Virginia

From: Popp, John <John.Popp@heritage.org>
Date: Thursday, April 13, 2023 at 9:52 AM
To: Madeline.Sieren@ago.mo.gov <Madeline.Sieren@ago.mo.gov>
Cc: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: Interview Record Link

https://riverside.fm/studio/tds_041323_int_mo-ag-andrew-bailey?t=bae5c1f2cad94ad284a4
This is an **audio and video interview** today (4/13/23) at 12 pm/et.
Please use the above link for the interview.
What you need to know before the interview:

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***** If we are experiencing technical difficulties connecting with you for the interview, we will record via phone. Please provide a phone number where we can reach you for back-up. *****
If you have questions, please call me at 703-307-5884.
Thanks!
John Popp

John Popp

Audio

202-608-6235

AMERICAN OVERSIGHT

To: Popp, John[John.Popp@heritage.org]; Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: Allen, Virginia[Virginia.Allen@heritage.org]
Sent: Thur 4/13/2023 9:20:21 AM (UTC-05:00)
Subject: Re: Interview Record Link

Thanks, John.
Madeline, I am planning on focusing on the three items below during the interview today.

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2. Attempting to oust a Soros-backed prosecutor for refusing to prosecute criminals https://www.foxnews.com/politics/missouri-ag-moves-fire-dem-attorney-kim-gardner-refuses-resign-public-safety-outcry
3. Launching an investigation into an STL pediatric transgender clinic for giving children puberty blockers without proper care https://www.foxnews.com/politics/missouri-attorney-general-launches-investigation-childrens-hospitals-transgender-center

Please let me know if you have any questions or concerns.
Best,
Virginia

Virginia Allen
Senior
The
214
Washington,

202-608-6149
heritage.org

From: Popp, John <John.Popp@heritage.org>
Date: Thursday, April 13, 2023 at 9:52 AM
To: Madeline.Sieren@ago.mo.gov <Madeline.Sieren@ago.mo.gov>
Cc: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: Interview Record Link

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Thanks!
John Popp

AMERICAN OVERSIGHT

John Popp

Audio

202-608-6235

AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]; Popp, John[John.Popp@heritage.org]
From: Allen, Virginia[Virginia.Allen@heritage.org]
Sent: Thur 4/13/2023 10:51:55 AM (UTC-05:00)
Subject: Re: Interview Record Link

Hi Madeline,
We have another interview finishing in our studio right at noon today so it may be one or two minutes past the hour when we join the session.

Virginia Allen
Senior
The
214
Washington,

202-608-6149
heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, April 13, 2023 at 10:48 AM
To: Allen, Virginia <Virginia.Allen@heritage.org>, Popp, John <John.Popp@heritage.org>
Subject: RE: Interview Record Link

That all works for us!
Thanks!
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Thursday, April 13, 2023 9:20 AM
To: Popp, John <John.Popp@heritage.org>; Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Interview Record Link
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2. Attempting to oust a Soros-backed prosecutor for refusing to prosecute criminals https://www.foxnews.com/politics/missouri-ag-moves-fire-dem-attorney-kim-gardner-refuses-resign-public-safety-outcry
3. Launching an investigation into an STL pediatric transgender clinic for giving children puberty blockers without proper care https://www.foxnews.com/politics/missouri-attorney-general-launches-investigation-childrens-hospitals-transgender-center

Please let me know if you have any questions or concerns.
Best,
Virginia

Virginia Allen

Senior

The
214
Washington,

202-608-6149

heritage.org

AMERICAN OVERSIGHT

From: Popp, John <John.Popp@heritage.org>
Date: Thursday, April 13, 2023 at 9:52 AM
To: Madeline.Sieren@ago.mo.gov <Madeline.Sieren@ago.mo.gov>
Cc: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: Interview Record Link

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Thanks!
John Popp

John Popp

Audio

202-608-6235

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AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: Allen, Virginia[Virginia.Allen@heritage.org]
Sent: Thur 4/13/2023 11:03:19 AM (UTC-05:00)
Subject: Re: Interview Record Link

Great. We just joined. No rush!

Virginia Allen
Senior
The
214
Washington,

202-608-6149
heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, April 13, 2023 at 12:01 PM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: Re: Interview Record Link

Us as well. No worries. Thanks!

Sent from my iPhone

> On Apr 13, 2023, at 10:52 AM, Allen, Virginia <Virginia.Allen@heritage.org> wrote:
>
> Hi Madeline,
> We have another interview finishing in our studio right at noon today so it may be one or two minutes past the hour when we join the session.
>
> Virginia Allen
>
> *Senior*
>
> The
> 214
> Washington,
>
> 202-608-6149
>
> heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, April 13, 2023 at 10:48 AM
To: Allen, Virginia <Virginia.Allen@heritage.org>, Popp, John <John.Popp@heritage.org>
Subject: RE: Interview Record Link

That all works for us!
Thanks!
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Thursday, April 13, 2023 9:20 AM
To: Popp, John <John.Popp@heritage.org>; Sieren, Madeline <Madeline.Sieren@ago.mo.gov>

AMERICAN OVERSIGHT

Subject: Re: Interview Record Link

Thanks, John.

Madeline, I am planning on focusing on the three items below during the interview today.

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2. Attempting to oust a Soros-backed prosecutor for refusing to prosecute criminals https://www.foxnews.com/politics/missouri-ag-moves-fire-dem-attorney-kim-gardner-refuses-resign-public-safety-outcry
3. Launching an investigation into an STL pediatric transgender clinic for giving children puberty blockers without proper care https://www.foxnews.com/politics/missouri-attorney-general-launches-investigation-childrens-hospitals-transgender-center

Please let me know if you have any questions or concerns.

Best,

Virginia

Virginia Allen

Senior

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Washington,

202-608-6149

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From: Popp, John <John.Popp@heritage.org>
Date: Thursday, April 13, 2023 at 9:52 AM
To: Madeline.Sieren@ago.mo.gov <Madeline.Sieren@ago.mo.gov>
Cc: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: Interview Record Link

https://riverside.fm/studio/tds_041323_int_mo-ag-andrew-bailey?t=bae5c1f2cad94ad284a4

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If you have questions, please call me at 703-307-5884.

AMERICAN OVERSIGHT

Thanks!
John Popp

John Popp

Audio

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AMERICAN OVERSIGHT

Consumer Protection Concerns with Chemical Abortion

Chemical Abortion:

Chemical abortion, also known as a medication abortion (and called a "medical abortion "by abortion advocates), occurs when a two-drug cocktail is used to bring about an abortion.[i]

Chemical abortions are typically performed by administering a two-drug combination: mifepristone followed by misoprostol, but sometimes the drug misoprostol is used solely.[ii] Mifepristone is used to cause progesterone to stop working and thus "starve" the fetus of nutrients and oxygen. Misoprostol causes the uterus to contract and expel its contents—blood, the fetus, umbilical cord, placenta and other contents.

Contraception (oral, IUD, hormone injections, patches, etc.) are not chemical abortion. Plan B—also known as the "morning after pill"—is not chemical abortion.

Problem:

Chemical abortion makes up over 50% of all abortions in Missouri, according to the imperfect data pool available as there is no National Abortion Reporting law, a percentage that falls in line with the national average of more than 50% of abortions nationwide and rising. A reported 3,391 abortions took place in Missouri, according to 2020 data, although data is insufficient to determine what percentage of those abortions were committed on women who are not Missouri residents.[iii]

Right now, in Missouri and across the nation there is a predatory abortion pill business that is advertising dangerous telemedicine abortions shipped into Missouri in a geo-targeted manner[iv] that result in harmful abortion pills sent through the mail into Missouri by JustThePill.com, Carafem, Whole Women's Health, Planned Parenthood, and Your Choices, among others,[v] or through prescription at national pharmacy chains like Walgreens and CVS.[vi]

Safety claims:

Telemedicine abortion providers contend telemedicine provision of chemical abortion is safe.[vii]

Relevant safety risks:

Provision of chemical abortion by telemedicine presents three distinct safety risks:

- *Serious Complications.* Chemical abortions carry four times the number of complications[viii] and ten times the risk of death.[ix]
- *Utilization of Emergency Services.* At least eight percent of women who took chemical abortion drugs ended up in the emergency room.[x]

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- *The risk of missing an ectopic pregnancy.* Ectopic pregnancy—the location of an embryo inside the fallopian tube—is a life-threatening condition that must be diagnosed by ultrasound and that will not be removed through chemical abortion.
- *The risk of mis-dating a pregnancy.* An ultrasound is required to correctly date a pregnancy. Chemical abortion risks rise as pregnancy progresses.
- *The risks of creating an antibody response that would lead to future miscarriage.* In certain circumstances (about 15% of all pregnancies), the combination of a woman's Rh factor status and an aborted fetus's Rh factor status can lead the woman to develop an antibody resistance that would cause future inability to carry to term. The condition can be prevented through a shot shortly before an abortion. Telemedicine abortion does not allow for Rh testing or the administration of such a shot.

The FDA recently expressed concern about the advance provision of chemical abortion;[xi] the basis for concern for that practice applies more generally to telemedicine abortion, too.

Strategy:

Out-of-state telemedicine abortion providers are making false claims about the safety and availability of telemedicine abortion, providing Missouri the opportunity under the Merchandizing Practices Act to (1) pursue civil investigative action against such providers and (2) bring actions against such providers to enjoin their provision of telemedicine abortion into Missouri and collect fines.

Legal basis:

The Missouri Unfair or Deceptive Act, Mo. Ann. Stat. § 407 et. seq.; §570 et seq. gives the Attorney General broad authority to investigate and challenge various deceptive practices, including the authority to issue civil investigative demands, Mo. Ann. Stat. § 407.040, and to bring an action to enjoin deceptive practices and collect fines. Mo. Ann. Stat. § 407.1252.

Support from Students for Life of America and Students for Life Action:

Educate pro-life community about strategy
Publicize strategy
Marketing campaign to identify victims
Student research on marketing claims

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[i] See Zhang J, Zhou K, Shan D, Luo X (May 2022). "Medical methods for first trimester abortion". *The Cochrane Database of Systematic Reviews*. **2022** (5): CD002855. doi:10.1002/14651858.CD002855.pub5. PubMed Central 9128719. PMID 35608608.

[ii] See Langer BR, Peter C, Firtion C, David E, Haberstich R (May 2004). "Second and third medical termination of pregnancy with misoprostol without mifepristone". *Fetal Diagnosis and Therapy*. **19** (3): 266–270. doi:10.1159/000076709. PMID 15067238.

[iii] See Tessa Longbons, Mia Stuepert, Abortion Reporting: Missouri (2020), Lozier Institute, Dec. 9, 2022 (available at https://lozierinstitute.org/abortion-reporting-missouri-2020// (last accessed March 28, 2023).

[iv] "Missouri: How to get abortion pills" (available at https://www.plancpills.org/states/Missouri) (screenshot below) and

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Aid Access, (available at https://aidaccess.org/en/i-need-an-abortion) (screenshot below)

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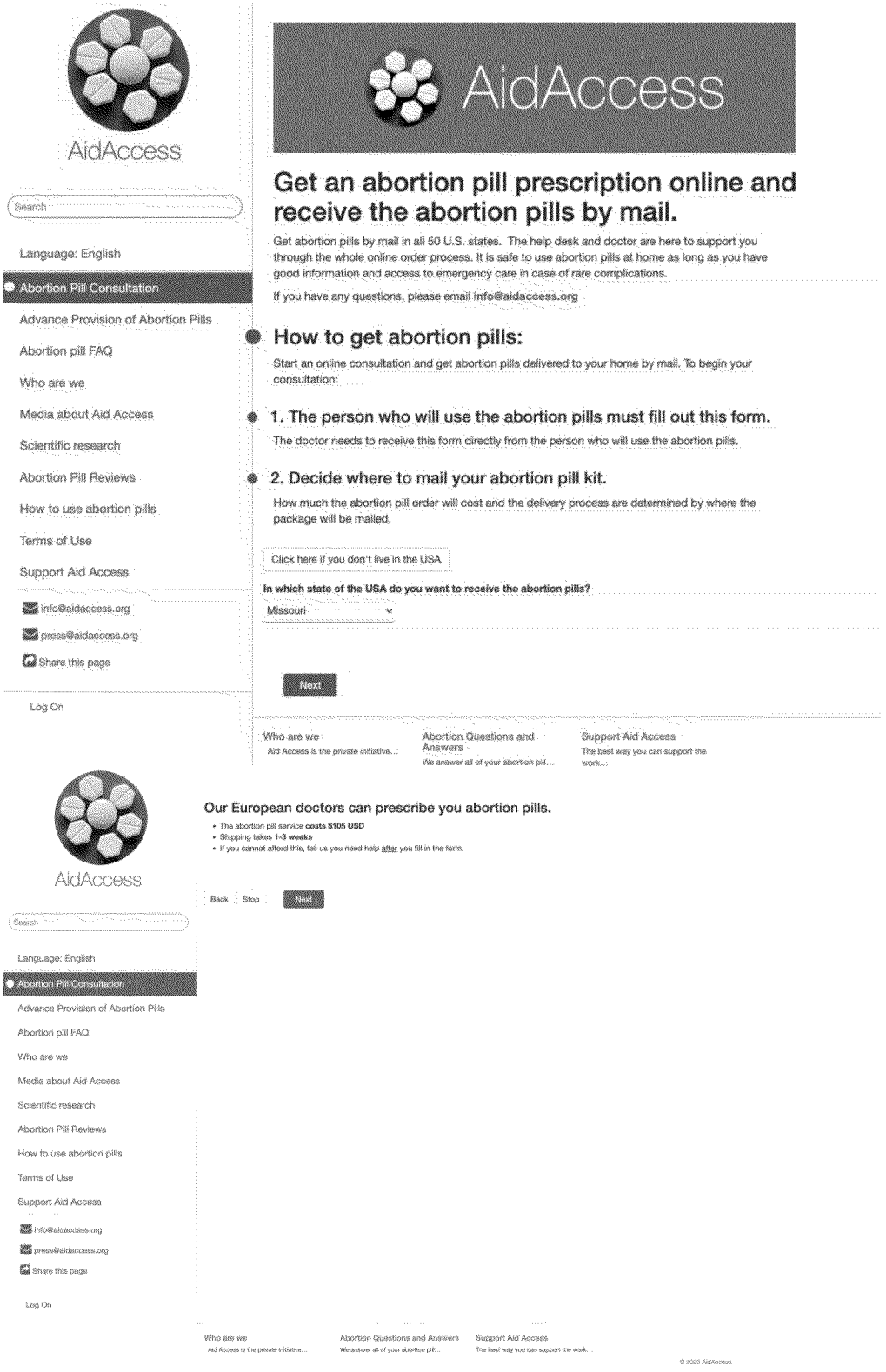

Google search “abortion pill jefferson city” or “how to get an abortion pill” showing geo-targeted ads (screenshots below)

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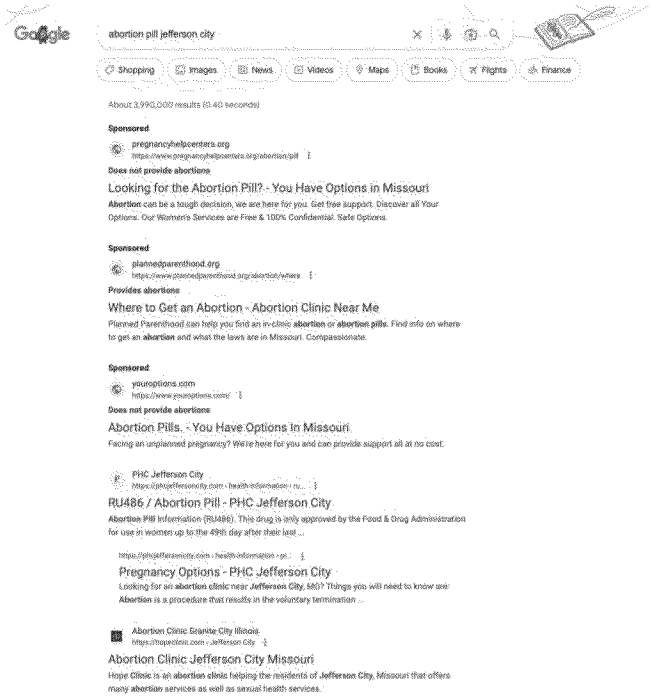

Google abortion pill jefferson city

Shopping Images News Videos Maps Books Flights Finance

About 3,990,000 results (0.40 seconds)

Sponsored

pregnancyhelpcenters.org
https://www.pregnancyhelpcenters.org/abortion/pill

Does not provide abortions

Looking for the Abortion Pill? - You Have Options in Missouri

Abortion can be a tough decision, we are here for you. Get free support. Discover all Your Options. Our Women's Services are Free & 100% Confidential. Safe Options.

Sponsored

plannedparenthood.org
https://www.plannedparenthood.org/abortion/where

Provides abortions

Where to Get an Abortion - Abortion Clinic Near Me

Planned Parenthood can help you find an in-clinic **abortion** or **abortion pills**. Find info on where to get an **abortion** and what the laws are in Missouri. Compassionate.

Sponsored

youroptions.com
https://www.youroptions.com/

Does not provide abortions

Abortion Pills. - You Have Options In Missouri

Facing an unplanned pregnancy? We're here for you and can provide support all at no cost.

PHC Jefferson City
https://phcjeffersoncity.com › health-information › ru...

RU486 / Abortion Pill - PHC Jefferson City

Abortion Pill Information (RU486). This drug is only approved by the Food & Drug Administration for use in women up to the 49th day after their last ...

https://phcjeffersoncity.com › health-information › pr...

Pregnancy Options - PHC Jefferson City

Looking for an **abortion** clinic near **Jefferson City**, MO? Things you will need to know are: **Abortion** is a procedure that results in the voluntary termination ...

Abortion Clinic Granite City Illinois
https://hopeclinic.com › Jefferson City

Abortion Clinic Jefferson City Missouri

Hope Clinic is an **abortion clinic** helping the residents of **Jefferson City**, Missouri that offers many **abortion** services as well as sexual health services.

Google how to get an abortion pill

Shopping Videos Images News Maps Books Flights Finance

About 28,800,000 results (0.41 seconds)

Sponsored

plannedparenthood.org
https://www.plannedparenthood.org/abortion/pill

Provides abortions

Abortion Pill - Planned Parenthood

Planned Parenthood can help you **find** an in-clinic **abortion** or **abortion pills**. In Missouri? **Find** out how to **get an abortion** and navigate **abortion** laws. Safe and Legal.

Sponsored

youroptions.com
https://www.youroptions.com/

Does not provide abortions

Abortion Pills. - You Have Options In Missouri

Facing an unplanned pregnancy? We're here for you and can provide support all at no cost. Learn more about your options. All our services are completely confidential and free.

Sponsored

stlouiswomens.clinic
https://www.stlouiswomens.clinic/

Does not provide abortions

The Abortion Pill - Abortion Pill Information

Take control of your **abortion** decision. See if the **abortion pill** is right for you. Call now to...

Planned Parenthood
https://www.plannedparenthood.org › learn › how-do-...

Where Can I Get The Abortion Pill & How Much Will It Cost?

It is possible to **get** the **abortion pill** for free or at a low cost. You can **get** the **pill** from a doctor, health clinic, or Planned Parenthood health center.
Planned Parenthood Keystone · How much does the abortion... · Get Care

https://www.plannedparenthood.org › learn › the-abor...

The Abortion Pill | Get the Facts About Medication ...

"**Abortion pill**" is the common name for using two different medicines to end a pregnancy: mifepristone and misoprostol. First, you **take** a ...

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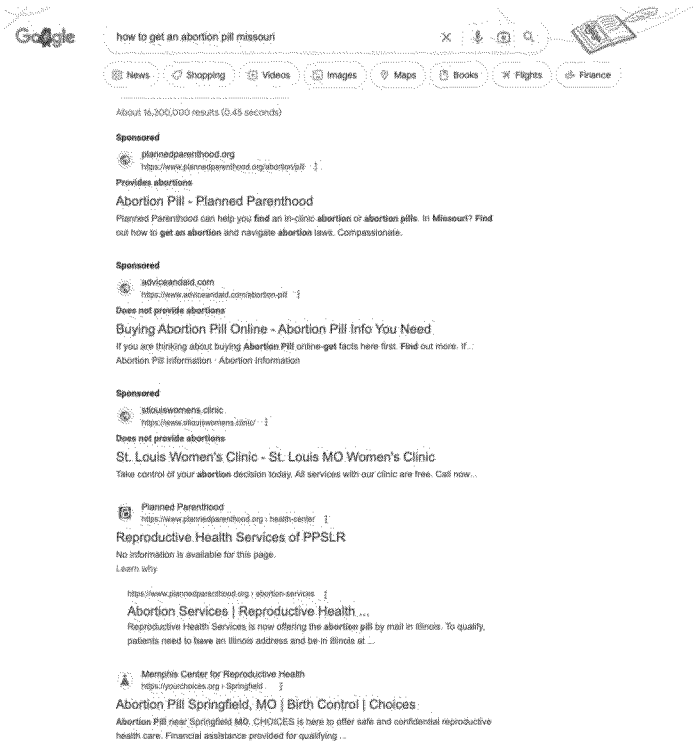

[v] "In the aftermath of Roe, telehealth startups rush to fill the abortion pill market" (Nov. 29, 2022) (discussion of complies like Choix, Carafem and others that flaunt regulations to make chemical abortions available), available at https://www.fastcompany.com/90806133/in-the-aftermath-of-roe-telehealth-startups-fill-the-abortion-pill-market (last accessed Feb. 14, 2023).

[vi] See "Walgreens, CVS say they will sell abortion pills after FDA rule change," CBS News (Jan. 5, 2023), available at https://www.cbsnews.com/news/walgreens-cvs-abortion-pill-mifepristone-fda-rule-change/ (last accessed Feb. 14, 2023).

[vii] *See* "Is it safe to do a medical abortion by yourself with pills online?," Aid Access, *available at* *https://aidaccess.org/en/page/428/is-it-safe-to-do-a-medical-abortion-by-yourself-from-pills-online* (accessed Feb. 14, 2023).

[viii] Niinimaki, et al., "Immediate complications after medical compared with surgical termination of pregnancy," National Institute of Health, Obstetrics & Gynecology (Oct. 2009), available at https://pubmed.ncbi.nlm.nih.gov/19888037/ (last accessed Feb. 14, 2023).

[ix] Creinin, et al., "Mifepristone-Misoprostol Medical Abortion Mortality," Medscape General Medicine (Apr. 2006), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1785176/ (last accessed Feb. 14, 2023).

[x] Mulligan, et al., "Mifepristone in South Australia," Australian Family Phys. (May 2011), available at https://www.racgp.org.au/download/documents/AFP/2011/May/201105mulligan.pdf (last accessed Feb. 14, 2023).

[xi] Ben Leonard, FDA says providers offering medication abortion before pregnancy have gone rogue, *Politico* Oct. 31, 2022 *available at* *https://www.politico.com/news/2022/10/31/advance-provision-fda-00064075*

AMERICAN OVERSIGHT

To: Wagner, Ray[Ray.Wagner@ago.mo.gov]
From: Tina Whittington[twhittington@studentsforlife.org]
Sent: Tue 3/28/2023 4:16:09 PM (UTC-05:00)
Subject: Chemical Abortion Memo
MO AG Meeting Memo.pdf

Attached, thank you!

Tina Whittington
Executive Vice President
O: 540.834.4600
C: 540.840.9027

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Shop Our Store

STUDENTS FOR LIFE OF AMERICA

AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: O'Neil, Tyler[Tyler.ONeil@heritage.org]
Sent: Fri 4/28/2023 11:39:05 AM (UTC-05:00)
Subject: Re: Media Request: Comment on Jazz Jennings book reading without informing parents

Yes, although we'd still welcome input.

Tyler ONeil
Managing
The
214
Washington,

202-608-6046
heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Friday, April 28, 2023 at 12:28 PM
To: Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com>
Subject: RE: Media Request: Comment on Jazz Jennings book reading without informing parents

Hi Tyler,
I was out yesterday- I apologize.
Has this story been written yet?
Thanks,
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com>
Sent: Thursday, April 27, 2023 2:09 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>; Troutman, Elizabeth <Elizabeth.Troutman@thfintern.org>
Subject: Media Request: Comment on Jazz Jennings book reading without informing parents
Importance: High

Madeline,
My coworker Elizabeth Troutman is writing a story about an elementary school that allowed a parent to read a book about transgender ideology without informing other students' parents or securing their permission. We'd like to see if AG Bailey will comment on the situation. Would your office be able to comment by 5:30 p.m. Eastern today?

1. Clark Elementary in the Webster Groves School District allowed a parent to read "I Am Jazz," a children's book about transgenderism, to a second grade class in September. The other students' parents were not informed in advance. Does this break state law requiring schools to inform parents and offer an opt-out option for any lessons concerning sexuality?
2. Will the office investigate what happened? Whose job is investigating such incidents?

Best,
Tyler O'Neil
(303)956-8499

Tyler O'Neil

Managing

The
214
Washington,

heritage.org

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AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: Olohan, Mary Margaret[MaryMargaret.Olohan@heritage.org]
Sent: Fri 4/28/2023 3:59:01 PM (UTC-05:00)
Subject: Automatic reply: Press Inquiry

I am working on a long term project and will be slow to respond to email. For urgent news tips or inquiries, please contact Tyler.Oneill@dailysignal.com.

AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: O'Neil, Tyler[Tyler.ONeil@heritage.org]
Sent: Fri 4/14/2023 3:29:48 PM (UTC-05:00)
Subject: Re: Media Request: Response to Lambda Legal, Axios report

Thanks, Madeline! Should I quote you by name or say a spokesperson?

Tyler ONeil
Managing
The
214
Washington,

202-608-6046
heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Friday, April 14, 2023 at 4:28 PM
To: Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com>
Subject: Re: Media Request: Response to Lambda Legal, Axios report

Hi Tyler,
We look forward to defending our regulation in court if we need to.
I would point these leftist reporters who are ignoring the science to our six pages of endnotes citing to scholarly studies and medical journals supporting that these transition intervention procedures are purely experimental.
Thanks!

Sent from my iPhone

> On Apr 14, 2023, at 10:28 AM, Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com> wrote:
>
> Madeline,
> Would the AG's office comment on Lambda Legal announcing its intention to combat AG Bailey's order? Would you comment on Axios' reporting emphasizing the American Medic
> al Association, American Academy of Pediatrics, Endocrine Society, and World Health Organization support for experimental transgender medical interventions? Would Bailey point to other organizations such as Do No Harm or the American College of Pediatricians on the other side of the issue? Many doctors recently testified in Florida about the experimental nature of these interventions (https://www.dailysignal.com/2023/04/11/exclusive-doctors-expose-experimental-gender-affirming-care-truly-florida-medicaid-case/).
> https://www.axios.com/2023/04/13/missouri-ag-gender-affirming-care
> I'm working on a 4 p.m. deadline and would appreciate a prompt response.
> Best,
> Tyler O'Neil
> (303)956-8499
>
> Tyler O'Neil
>
> *Managing*
>
> The
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> Washington,
>
> heritage.org

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To: Mary Margaret Olohan (Daily Signal)[MaryMargaret.Olohan@dailysignal.com]; Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: Olohan, Mary Margaret[MaryMargaret.Olohan@heritage.org]
Sent: Thur 6/8/2023 10:19:01 AM (UTC-05:00)
Subject: Re: Press Inquiry

Following up on this!

Mary Olohan
Senior
The
214
Washington,

202-608-6051
heritage.org

From: Mary Margaret Olohan (Daily Signal) <MaryMargaret.Olohan@dailysignal.com>
Date: Wednesday, June 7, 2023 at 4:10 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Press Inquiry

Hey Madeline, Hope all is well. Reaching out re the Daily Wire exposethat Telehealth groups are conspiring to commit insurance fraud. Is AG Bailey planning on enforcing the insurance regulations in your state?

https://twitter.com/MattWalshBlog/status/1666496328224890880?s=20

Thanks -- Mary Margaret

AMERICAN OVERSIGHT

To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]; Tyler O'Neil (Daily Signal)[tyler.oneil@dailysignal.com]
From: O'Neil, Tyler[Tyler.ONeil@heritage.org]
Sent: Fri 6/2/2023 9:36:53 AM (UTC-05:00)
Subject: Re: Media Request: Unique quote on 1984 comparison

Perfect! Thanks so much for this, Madeline! My story should be up early this afternoon.

Tyler ONeil
Managing
The
214
Washington,

202-608-6046
heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Friday, June 2, 2023 at 10:34 AM
To: Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com>
Subject: RE: Media Request: Unique quote on 1984 comparison

You can attribute this to me or to Bailey's office: Their answers to the judge's hypotheticals absolutely underscored the 1984 comparison and proved the judge's point.

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com>
Sent: Friday, June 2, 2023 9:06 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Unique quote on 1984 comparison

Sorry to pepper you with questions, but would you say the Biden administration's answers to the specific questions about the First Amendment underscored the 1984 comparison? Did their answers prove the judge's point?

Tyler O'Neil

Managing

The
214
Washington,

heritage.org

From: Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com>
Date: Friday, June 2, 2023 at 9:46 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Unique quote on 1984 comparison

Also, how did the administration respond on 1984? Oh, to have been a fly on the wall…

From: Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com>
Date: Friday, June 2, 2023 at 9:44 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Unique quote on 1984 comparison

Thank you! Do I quote you specifically on this (not Bailey)? Also, can you remind me which judge this is? And when was the exact date?

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>

AMERICAN OVERSIGHT

Date: Friday, June 2, 2023 at 9:28 AM
To: Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com>
Subject: RE: Media Request: Unique quote on 1984 comparison

Hi Tyler,
This vast censorship enterprise stemming from the Biden White House is absolutely Orwellian.
On background: as I mentioned before, the actual court transcript will be provided in a few weeks, so what we put out on Twitter was paraphrased unless put in quotes.
Thanks, and let me know if you have any other questions,

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com>
Sent: Friday, June 2, 2023 8:25 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Media Request: Unique quote on 1984 comparison
Importance: High

Madeline,
I'm writing a story about the judge's interaction comparing the Biden administration's censorship to 1984 and the administration suggesting that the First Amendment does not protect free speech on vaccines, gas prices, and the 2020 election. I'd like to see if Bailey's office would provide a brief unique quote on this. Would he call the administration's moves Orwellian? Did the Biden administration say something other than "it depends" on some questions? Did the judge ask about if an American says "Black Lives Matter" or something else the Biden administration agrees with?
https://twitter.com/AGAndrewBailey/status/1664286862398062595
I've given the White House until noon to comment.
Best,
Tyler O'Neil
(303)956-8499

Tyler O'Neil

Managing

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Washington,

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To: Green, Maddie[Maddie.Green@ago.mo.gov]
From: O'Neil, Tyler[Tyler.ONeil@heritage.org]
Sent: Wed 7/5/2023 12:43:26 PM (UTC-05:00)
Subject: Re: Media Request: Censorship order

Thank you! Is this from you or from AG Bailey?

Tyler ONeil
Managing
The
214
Washington,

202-608-6046
heritage.org

From: Green, Maddie <Maddie.Green@ago.mo.gov>
Date: Wednesday, July 5, 2023 at 1:25 PM
To: Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com>
Subject: RE: Media Request: Censorship order

Hi, Tyler. Please see below for comment. Thank you!
It is fitting that the judge granted a first-of-its-kind injunction on the Fourth of July because that day paved the way for our country to adopt the First Amendment. We had to fight the Revolutionary War in part because King George tried to stamp out political dissent. Now, the Biden administration is trying to censor speech he disagrees with. Fortunately, and thanks to the brave Founders on the Fourth of July, we now have the First Amendment to push back against the Biden administration's censorship regime.

Maddie McMillian Green | Deputy Attorney General for Policy
Missouri Attorney General's Office
207 West High St.
Jefferson City, MO 65101
O: (573) 751-0477
C: (573) 645-7864
Maddie.Green@ago.mo.gov

From: Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com>
Sent: Wednesday, July 5, 2023 9:15 AM
To: Green, Maddie <Maddie.Green@ago.mo.gov>
Subject: Re: Media Request: Censorship order
Importance: High

Maddie,
I got Madeline's out-of-office email, so am forwarding this to you.

Tyler O'Neil

Managing

The
214
Washington,

heritage.org

From: Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com>
Date: Wednesday, July 5, 2023 at 10:12 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Media Request: Censorship order

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Madeline,

I'm writing a story about the court order yesterday and wanted to see if I can get an additional comment from the AG's office. Would Bailey or you as a spokeswoman comment on whether this represents the first time a judge has ordered government agencies to cease contact with social media companies? Would you comment on this historic move coming on the Fourth of July? Is there an angle to the order that most media coverage has failed to notice?

My deadline on this story is 2 p.m. Eastern time today, so I would appreciate a prompt response.

Best,

Tyler

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To: Divine, Josh[Josh.Divine@ago.mo.gov]; Murrill, Elizabeth[MurrillE@ag.louisiana.gov]; Scott, Todd[Todd.Scott@ago.mo.gov]; John Sauer[John.Sauer@james-otis.com]; shortt@ag.louisiana.gov[shortt@ag.louisiana.gov]; john.vecchione@ncla.legal[john.vecchione@ncla.legal]; Winik, Daniel L. (CIV)[daniel.l.winik@usdoj.gov]; simon.c.brewer@usdoj.gov[simon.c.brewer@usdoj.gov]; daniel.tenny@usdoj.gov[daniel.tenny@usdoj.gov]
Cc: Christopher Mills[cmills@spero.law]
From: Gene Hamilton[gene.hamilton@aflegal.org]
Sent: Thur 8/3/2023 11:48:52 AM (UTC-05:00)
Subject: Amicus in Missouri v. Biden

Good afternoon,
We plan to submit an amicus brief for at least one Member of Congress in support of the Plaintiffs-Appellees in *Missouri, et al. v. Biden, et al*. Please let me know if we have your clients' consent to do so.

Thank you,

Gene

AMERICAN OVERSIGHT

ATTORNEY GENERAL OF MISSOURI
ANDREW BAILEY

April 7, 2023

Secretary John Ashcroft
600 West Main Street
Jefferson City, MO 65101

Dear Secretary Ashcroft:

I write to provide comments on these initiative petitions. As chief legal officer of the State of Missouri, it is my duty and privilege to defend Missouri, its laws, and its citizens. One of the many privileges that come with this office is the power to defend and fight for Missouri's most vulnerable. Unborn children are our state's most defenseless and vulnerable group, and they deserve extra protection and care. These young ones are unable to speak for themselves, and it is my duty and great pleasure to speak on their behalf.

It has come to my attention that there is a coordinated effort to strip away unborn children's first and most fundamental right, their right to life. The most recent attack are these eleven separate initiative petitions. Drafted by a shadowy special interest group, these petitions seek to amend our state constitution to create new, vaguely defined "reproductive freedoms" that would strip away legal protection from unborn children. The founders of our country decried the rise of these kinds of special interest groups, warning they are "united and actuated by some common impulse of passion, or of interest, *adverse to the rights of other citizens, or to the permanent and aggregate interests of the community*." Federalist No. 10. My office objects to this covert attempt to use misleading, vague language and euphemisms to overturn well-

Broadway Building
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
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www.ago.mo.gov

AMERICAN OVERSIGHT

established law and strip thousands of children each year of their fundamental right to life.

Courts have recognized that an election authority is not required to place a facially unconstitutional initiative petition on the ballot. *See Reeves v. Kander*, 462 S.W.3d 853, 858 (Mo. App. W.D. 2015). At this stage, the proposed initiative petitions appear to be likely just that – facially unconstitutional.

Even if the initiative petitions were facially constitutional, any summary statement would have to disclose the enormous changes these petitions would cause. A summary statement must "convey the 'purpose' or 'primary objective' of a proposed initiative," *Archey v. Carnahan*, 373 S.W.3d 528, 533 (Mo. App. W.D. 2012), "so that voters will not be deceived or misled," *Brown v. Carnahan*, 370 SW 3d 637, 654 (Mo. banc 2012). The summary statement "should address the 'central features,'" *Sedey v. Ashcroft*, 594 S.W.3d 256, 270 (Mo. App. W.D. 2020), and "accurately reflect the legal and probable effects of the proposed initiative." *Brown*, 370 SW 3d at 654. Here, the "central features" and "legal and probable effects" of these initiatives include the following serious issues:

- Reverses longstanding Missouri law protecting the right to life;[1]
- Eliminates antidiscrimination laws that prohibit race discrimination and sex discrimination.
- Infringes the right to religious liberty and conscience, including those of Missouri's health care professionals;
- Requires taxpayer funding of abortions;
- Requires taxpayer funding of sex-reassignment interventions without parental involvement and regardless of age.

[1] Missouri revisor of statutes - Revised statutes of Missouri, rsmo, Missouri law, Mo Law, Joint Committee on Legislative Research. (n.d.). Retrieved April 7, 2023, from https://revisor.mo.gov/main/PageSearch.aspx?tb1=Abortion&op=and&tb2=&idx=2

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- Undermines and removes parental rights and responsibilities for the care and safety of their children such as parental involvement and informed consent;
- Legalizes partial-birth abortion;
- Authorizes abortion of an unborn child up to the moment of birth;
- Creates a right to abortion beyond *Roe v. Wade*;
- Creates "reproductive freedom" as a fundamental right, which the U.S. Supreme Court has never recognized;

I encourage the Secretary of State to publish a final summary that accurately reflects the true magnitude, scope, and impact of this initiative's change to Missouri's law and culture.

For reasons set forth below this effort to undermine the legal protection for unborn children is not only repugnant to the laws of Missouri but to the very foundation of what makes us great.

1. History of abortion in Missouri

Since our state's founding, Missourians have fervently sought to protect the right to life. Although the common law had long protected life, Missouri was the first state to do so by statute.[2] The state's resolve was reinforced just a decade later when the legislature revisited the issue and again continued to protect life.[3] And again, in 1907 the legislature clarified that all children were deserving of protection, even those "pre-quickening."[4] The trend in Missouri has always been toward enhancing protections for this vulnerable class of citizens.

Even after *Roe v. Wade*, Missouri fought tooth and nail, to do everything legally possible to protect life. *See Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52

[2] 1825 Mo. Laws p. 283; see also, Mo. Rev. Stat., Art. II, §§ 10, 36 (1835) (extending liability to abortions performed by instrument and establishing differential penalties for pre- and post-quickening abortion)
[3] Shorman, J. (2022, May 13). Inside Missouri's anti-abortion history before Roe v. Wade | the Kansas ... Retrieved April 7, 2023, from https://www.kansascity.com/news/politics-government/article261377422.html
[4] *Id.*

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(1976) (Missouri defends several regulations of abortion including, requiring the physician to exercise professional care "to preserve the life and health of the fetus" and, failing such, deeming him guilty of manslaughter and making him liable in an action for damages). Before 2022, Missouri was one of the only states to successfully defend laws requiring abortionists to undertake safety measures like maintaining admitting privileges at a nearby hospital and maintaining referral agreements with other physicians. This office has continued to do so over the years, and I am committed to defending unborn children.

When *Dobbs v. Jackson Women's Health Organization* overturned *Roe v. Wade* last year Missouri was again the **first state in the nation** to protect life.[5] Missouri's leadership in the fight has made it an enticing target for those who wish to undermine this fundamental protection, as evidenced by the eleven petitions at issue today. These petitions do not reflect the will of the people, and they are an attempt by a special interest group to use misleading, vague language to abuse Missouri's initiative petition process. These proposed amendments contradict Missouri's history; they are repugnant to Missouri's life-affirming values; they are antithetical to Missouri's long-standing public policy; they sow confusion designed to undermine Missourian's values; they do violence to the health and welfare of our state; and they use misleading, vague language to thwart the will of the people who, through their duly elected representatives, have already spoken on this issue.

2. Undermining public safety and conscience

"The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation." *Barnes v. Glen Theatre*, Inc., 501 U.S. 560 (1991). In recent polls, a majority of Missourians have indicated they do not support abortion. This support for life is also

[5] Mo. AG. Op. 22-2022.

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reflected by the representatives the people chose to elect. In Missouri, 77% are religious believers.[6] And most faith traditions strongly believe that abortion is the murder of a vulnerable human being that is created in God's image and imbued with divine purpose. To force any sincere believer to pay, support, or encourage abortions with tax dollars would violate fundamental conscience rights. These proposed amendments seek to require taxpayer dollars to be used to support abortion. These proposed amendments do not even make exceptions for nurses and doctors. If enacted, these petitions would thus not only force everyday Missourians to pay for abortions, but also would force doctors and nurses to make a Hobson's choice between taking human life or losing their livelihood. That cannot stand.

The proposed amendments would not only enshrine abortion in the state's constitution but would also prohibit the state from "denying or interfering with" the newly created right to procure abortion. This language is vague, and advocates would use it to try to force the state to provide financial assistance for obtaining abortions—as other governments have been forced to do—which would be in direct conflict with the values and beliefs of most Missourians.

3. Undermining the policies of Missouri

The state has an interest in promoting life and protecting the unborn. *Dobbs*, 142 S.Ct. at 2284. That interest is clearly stated in § 1.205, RSMo. That statute, which has been in Missouri law for over 30 years, went into effect after Missouri took decisive action moments after *Dobbs*. It proclaims that "The life of each human being begins at conception; (2) Unborn children have protectable interests in life, health, and well-being; (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child." § 1.205 RSMo. All major cases addressing

[6] Pew Research Center. (2022, June 13). *Religious landscape study*. Pew Research Center's Religion & Public Life Project. Retrieved April 6, 2023, from https://www.pewresearch.org/religion/religious-landscape-study/state/missouri/

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abortion, even though most were wrongly decided, also acknowledged that the state has a legitimate interest in protecting unborn children. *See Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (holding that Missouri courts have consistently treated unborn children as persons when interpreting state criminal statutes wherein defendants may be charged with multiple counts of homicide when the victim is a pregnant mother).

The eleven proposed petitions, if enacted, would remove the state's ability to protect the interest of the unborn child, a clear interest of the state. Proposed amendments 77, 78, and 79 do not identify any gestational limit whatsoever, meaning that children could lose their lives at any time during pregnancy – moments before birth. That radical policy is opposed by nearly all Americans. These proposed amendments could also be interpreted to conflict with state and federal bans on partial-birth abortion. Proposed amendments 80, 81, 82, and 84 give a perfunctory nod to some limits past 24 weeks gestation, however, 24 weeks is well past the point when children reach viability. These proposals would remove protection for unborn babies who would otherwise survive outside the womb. Indeed, they also could be interpreted to prohibit doctors from providing lifesaving healthcare to babies who are born alive. Amendment proposals 83, 85, 86, and 87, pay mere lip service to post-viability limits, leaving the determination of viability to the discretion of the abortionist despite their clear financial conflict of interest.

Moreover, the state has an interest in regulating the practice of medicine and safeguarding its ethics. For example, we do not allow doctors to kill healthy patients and harvest their organs to save others. That would be barbaric, and the state has sound moral and policy reasons to prohibit the practice. Nevertheless, the proposed petitions, if enacted, would enable abortions for the purpose of obtaining and selling the organs of

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children. Moreover, they would place legal handcuffs on the state's ability to protect its citizens by codifying a "strict scrutiny" standard of review for any proposed medical safeguards or health-and-safety requirements surrounding abortion. Strict scrutiny is normally reserved for fundamental rights like speech and life. In this case, however, the petitions' drafters have tried to weaponize the doctrine to strip the people of their ability not only to protect life, but also to protect basic health and safety.

These proposed amendments would give primacy to a newly created right to abortion: higher than freedom of speech, freedom of religion, the right to vote, the right to be free from unreasonable searches and seizures, and the right to life. It would place the determination of what is in the people's interest not in the people, and not with the legislature, but in the hands of a medical establishment that has well-documented biases when it comes to abortion. Such a scheme does not instill much confidence as we all remember the many times widely accepted clinical standard practice turned out to be false. These proposed amendments would make it nearly impossible for the people to regulate any aspect of abortion.

Furthermore, the proposed amendments, particularly numbers 78, 80, 82, 83, and 86, would nullify Missouri's long-standing prohibition on the use of taxpayer funds to pay for abortions. § 188.205 RSMo. The remaining proposals could also undermine this prohibition by using alternative legal theories, such as equal protection, privacy, or due process, and leveraging the newly established fundamental right to abortion. Additionally, the language used by all eleven of these proposals is so all-encompassing, amorphous, and vague that it is difficult to imagine what would not be covered by this "right." By creating such a fundamental right, those pushing these petitions would gain a powerful tool to challenge any restrictions on abortion, no matter how minimal or necessary they may be. This would result in an erosion of public trust and moral values,

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as the use of taxpayer funds to support abortion would go against the beliefs of Missourians who consider it to be an immoral act.

4. Undermining the health and welfare of Missourians

Abortion is not only morally repugnant and harmful to children, but it is also harmful to women's health. Research has shown that abortion is associated with negative physical and mental health outcomes for women.[7] In addition, abortion clinics in Missouri have a poor track record of health and safety compliance. For example, in 2018, health regulators were forced to shut down a clinic in Columbia, Missouri, ran by Colleen McNicholas because McNicholas had been inserting moldy equipment into women's wombs for months. The equipment contained a substance that her staff said was "most likely bodily fluid," as well as a separate "blackish gray substance" that McNicholas' staff identified as mold. McNicholas' staff admitted that they had "identified the problem" of mold "a couple of months previously" but that they had "continued to use the machine on patients after they identified the issue."[8] Additionally, during previous litigation, Missouri discovered that abortionists routinely violate the medical standard of care. In gynecological settings, the standard of care requires practitioners to prearrange for a physician to be available to treat a woman if she experiences post-procedure complications. Abortionists in Missouri have a documented history of neglecting this basic duty. This neglect drastically increases the risks women face from chemical-induced abortions. And it does so in ways hard to capture by statistics. In the same litigation, abortionists also admitted under oath that they have long flouted their legal duty to report complications. Bringing these clinics back, as the petitions try to do, would only endanger women.

[7] Coleman, P. (2011). Abortion and mental health: Quantitative synthesis and analysis of research published 1995–2009. The British Journal of Psychiatry, 199(3), 180-186. doi:10.1192/bjp.bp.110.077230
[8] Statement of Deficiencies, Doc. 141-1, No. 2:16-cv-04313 (W.D. Mo. 2018).

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Apart from the health cost and priceless loss of life, which would be great, there is also a substantial economic cost to Missourians should any of these proposed amendments take effect. It is expected that an increase in abortions will naturally cause a rise in abortion-related injuries and complications that will strain the healthcare system. There is also a distinct possibility that as a result of these proposed amendments Missouri could forfeit federal funds as Medicaid matching requires compliance with federal law. For example, if the state cut off funds to a religious medical institution, which it would likely be required to do if the institution refused to respect the amorphous right to "reproductive freedom," HHS would likely refuse to provide matching funds. My office has been made aware that if this scenario happens Missouri stands to lose up to $12.5 billion.[9]

Missouri is likely to incur other costs which would include the increased cost to the state by having to litigate challenges to existing abortion and reproductive healthcare laws. Ultimately, the economic cost of these proposed amendments is potentially significant and should be considered when weighing the financial, moral, and legal impact of the proposed petitions.

5. Undermining the democratic process

Finally, these proposed amendments undermine the democratic process. The initiative petition process is an important part of our democratic system, as it allows citizens to propose laws and amendments to the state constitution. However, these petitions are not the product of a grassroots movement, and they do not seek to use the initiative petition process honestly. Rather, these petitions stem from a well-funded special interest group with an agenda to force abortion on Missouri, and the language the petitions use is intentionally vague and misleading. The petitions fail to reflect the

[9] The Regulatory Review. (2021, February 25). *The fight over California's abortion coverage mandate*. The Regulatory Review. Retrieved April 6, 2023, from https://www.theregreview.org/2021/02/03/lee-fight-over-california-abortion-coverage-mandate/

AMERICAN OVERSIGHT

will of the people, as evidenced by recent polls showing that a majority of Missourians oppose abortion.

In short, we're being sold a bill of goods. While the initiative petition process, in this case, purports to be a legal process for creating a constitutional right to abortion, in reality, it is being weaponized by radical woke ideologues to subvert Missourian's voices and take away the people's right to pass the laws they find needed. Missourians have time and again elected representatives who are pro-life, who have in turn passed laws that have protected life, and they have done so transparently in a democratic way, rather than through sharp policy changes concealed in euphemisms and intentionally vague initiative petitions. Proponents of these amendments may argue, in Trojan-horse fashion, that they are trying to give the issue to the people, but the people have already spoken through their elected officials.

Furthermore, the proposed amendments set a dangerous precedent for the use of the initiative petition process by shadowy special interest groups through intentionally vague petitions. If these amendments are allowed to pass, it opens the door for well-funded special interests to use the same tactics to push for other controversial issues, bypassing the legislative process and the will of the people. This could lead to a breakdown in the democratic system and a loss of trust in the integrity of the initiative petition process. It is important to uphold the principles of democracy and allow elected representatives to fulfill their duty of representing their constituents and passing laws that reflect their values and beliefs. The initiative petition process should be reserved for truly grassroots movements, not well-funded interest groups pushing for their own agenda. The people of Missouri deserve better than to have their democratic rights undermined by these proposed amendments.

6. Conclusion

In conclusion, if any of these amendments are adopted:

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a. Abortion will become a constitutional right in Missouri regardless of the conscientious objections of people of faith, medical providers, or the majority of Missourians who wish to protect life.
b. Other "reproductive freedoms" – an amorphous and undefined term – will become constitutional rights, unmoored from broader policy considerations and subject to the interpretational whims of abortion activists.
c. The state will be severely limited on how it can regulate any vague "reproductive freedom."
d. Abortion and other "reproductive freedoms" will receive a higher level of scrutiny than other fundamental rights, like the right to life.
e. Any regulation promulgated by the state is subject to the whims of what is considered "widely accepted clinical standard of practice and evidence-based medicine and does not infringe on that person's autonomous decision-making, which essentially means no regulation of abortion or other "reproductive freedoms."

My office encourages the Secretary of State to publish a final summary that accurately reflects the shocking magnitude, scope, and impact of this initiative's change to Missouri's law and culture.

Sincerely,

ANDREW BAILEY
Attorney General

AMERICAN OVERSIGHT

To: susank@missourilife.org[susank@missourilife.org]
From: Wagner, Ray[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=F577E20AF58F4CE4AFCDDD101E8A3745-WAGNER, RAY]
Sent: Thur 5/18/2023 8:28:34 AM (UTC-05:00)
Subject: Fwd: Comment Letter to SOS
Final IP Public comment_JSA.docx

Susan

I think you asked for this a few weeks ago. This is the comment letter we sent to the SOS during the comment phase. I don't think you could locate it on the SOS site.

Ray

Sent from my iPhone

This email message, including the attachments, is from the Missouri Attorney General's Office. It is for the sole use of the intended recipient(s) and may contain confidential and privileged information, including that covered by § 32.057, RSMo. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message. Thank you.

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To: Wagner, Ray
From: postmaster@missourilife.org[postmaster@missourilife.org]
Sent: Thur 5/18/2023 8:33:23 AM (UTC-05:00)
Subject: Undeliverable: Fwd: Comment Letter to SOS
Fwd: Comment Letter to SOS

Delivery has failed to these recipients or groups:

susank@missourilife.org (susank@missourilife.org)
The email address you entered couldn't be found. Please check the recipient's email address and try to resend the message. If the problem continues, please contact your email admin.

Diagnostic information for administrators:

Generating server: exch2016.mr2l.local

susank@missourilife.org
Remote Server returned '550 5.1.10 RESOLVER.ADR.RecipientNotFound; Recipient not found by SMTP address lookup'

Original message headers:

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Resent-To: <susank@missourilife.org>
Resent-Date: Thu, 18 May 2023 13:28:46 +0000
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 header.from=ago.mo.gov header.policy=none;
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From: "Wagner, Ray" <Ray.Wagner@ago.mo.gov>
To: "susank@missourilife.org" <susank@missourilife.org>
Subject: Fwd: Comment Letter to SOS
Thread-Topic: Comment Letter to SOS
Thread-Index: AQHZiXxPfvDu37+hYUGrBrXzk8ZW4K9gBlHJ
Date: Thu, 18 May 2023 13:28:34 +0000
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Message-ID: <8E6C0861-9FB3-4CF4-A04D-9EA11C17FD6E@ago.mo.gov>
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In-Reply-To: <8D1A23A0-2F8A-4DBB-949C-27EF6AB1BA70@ago.mo.gov>
Accept-Language: en-US
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X-MS-Has-Attach: yes
X-MS-TNEF-Correlator:
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 definitions=2023-05-18_10,2023-05-17_02,2023-02-09_01
X-MDID-I: us1;at1;1684416526;D70U-0qBorvR;<Ray.Wagner@ago.mo.gov>;cc40d563efdf7c9c27ea5eb81c760bbc
Return-Path: Ray.Wagner@ago.mo.gov

AMERICAN OVERSIGHT

From: Popp, John[John.Popp@heritage.org]
Attendees: Olohan, Mary Margaret; Sieren, Madeline
Location: Microsoft Teams Meeting
Importance: Normal
Subject: TDS Interview with Missouri AG Andrew Bailey
Start Time: Mon 8/28/2023 3:00:00 PM (UTC-05:00)
End Time: Mon 8/28/2023 3:30:00 PM (UTC-05:00)
Required Attendees: Olohan, Mary Margaret; Sieren, Madeline

https://riverside.fm/studio/tds_082823_int_mo-ag-andrew-bailey?t=undefined

This is an *audio and video*today (Monday) at 4 pm/et (3 pm/ct).

Please use the above link for the interview.
What you need to know before the interview:

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- Please**wear ear buds or headphones**you have them.
- You must**use Chrome as your web browser.**sure you are not in stealth or private mode).
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- Finally, please**do not leave the sessionuntil your file is uploaded**. We will tell you when it is safe to leave the session.

***** If we are experiencing technical difficulties connecting with you for the interview, we will record via phone. Please provide a phone number where we can reach you for back-up. *****
If you have questions, please call me at 703-307-5884.
Thanks!
John Popp

Microsoft Teams meeting

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To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
Cc: Olohan, Mary Margaret[MaryMargaret.Olohan@heritage.org]
From: Popp, John[John.Popp@heritage.org]
Sent: Mon 8/28/2023 12:08:04 PM (UTC-05:00)
Subject: Re: TDS Interview with Missouri AG Andrew Bailey

Works for me!

John Popp
Audio
The
214
Washington,

202-608-6235
heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Sent: Monday, August 28, 2023 1:02 PM
To: Popp, John <John.Popp@heritage.org>
Cc: Olohan, Mary Margaret <MaryMargaret.Olohan@heritage.org>
Subject: Re: TDS Interview with Missouri AG Andrew Bailey
This will be closer to 3:10 PM CT if that's alright!

Sent from my iPhone

> On Aug 28, 2023, at 10:51 AM, Popp, John <John.Popp@heritage.org> wrote:
>
> https://nam04.safelinks.protection.outlook.com/?url=https%3A%2F%2Friverside.fm%2Fstudio%2Ftds_082823_int_mo-ag-andrew-bailey%3Ft%3Dundefined&data=05%7C01%7CJohn.Popp%40heritage.org%7C5ee48e1d46de4e8b4b5808dba7e88c92%7Ccbd93b4867ea46759ee84178b273204a%7C0%7C0%7C638288389518209621%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C3000%7C%7C%7C&sdata=ISnuYETxz5ya5OHoT0luQ%2FjXtVP5oonbnr5HpOw1SkM%3D&reserved=0<https://nam04.safelinks.protection.outlook.com/?url=https%3A%2F%2Furldefense.com%2Fv3%2F__https%3A%2F%2Friverside.fm%2Fstudio%2Ftds_082823_int_mo-ag-andrew-bailey%3Ft%3Dundefined__%3B!!EErPFA7f--AJOw!BoNIbUtYXdhtQYtfR0GReytsG2Lh9HKS-DlaIWM-ZpuiyR-9jksNw5CDyyQmFM5Ltc0pPttAL8wOH2JHa-aE-ROoXWU5%24&data=05%7C01%7CJohn.Popp%40heritage.org%7C5ee48e1d46de4e8b4b5808dba7e88c92%7Ccbd93b4867ea46759ee84178b273204a%7C0%7C0%7C638288389518209621%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C3000%7C%7C%7C&sdata=thliovSHKttKLrzWLvC71n1xCxu8j9IgkztslymQMgc%3D&reserved=0>
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> This is an audio and video interview today (Monday) at 4 pm/et (3 pm/ct).
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> Please use the above link for the interview.
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> What you need to know before the interview:
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>*You must use Chrome as your web browser. (Make sure you are not in stealth or private mode).
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>*Please silence all alerts, ringers, and sounds on your computer, phone or iPad.
>*Finally, please do not leave the session until your file is uploaded. We will tell you when it is safe to leave the session.
>
> *** If we are experiencing technical difficulties connecting with you for the interview, we will record via phone. Please provide a phone number where we can reach you for back-up. ***
>
> If you have questions, please call me at 703-307-5884.
>
> Thanks!
>
> John Popp
>
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To: Popp, John[John.Popp@heritage.org]; Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: Olohan, Mary Margaret[MaryMargaret.Olohan@heritage.org]
Sent: Mon 8/28/2023 12:33:23 PM (UTC-05:00)
Subject: Re: TDS Interview with Missouri AG Andrew Bailey

Great!

Mary Olohan
Senior
The
214
Washington,

202-608-6051
heritage.org

From: Popp, John <John.Popp@heritage.org>
Sent: Monday, August 28, 2023 1:08 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Cc: Olohan, Mary Margaret <MaryMargaret.Olohan@heritage.org>
Subject: Re: TDS Interview with Missouri AG Andrew Bailey

Works for me!

John Popp
Audio
202-608-6235

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Sent: Monday, August 28, 2023 1:02 PM
To: Popp, John <John.Popp@heritage.org>
Cc: Olohan, Mary Margaret <MaryMargaret.Olohan@heritage.org>
Subject: Re: TDS Interview with Missouri AG Andrew Bailey

This will be closer to 3:10 PM CT if that's alright!

Sent from my iPhone

> On Aug 28, 2023, at 10:51 AM, Popp, John <John.Popp@heritage.org> wrote:
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> Thanks!
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> John Popp
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SC100132

IN THE SUPREME COURT OF MISSOURI

State of Missouri ex rel. Dr. Anna Fitz-James,

Plaintiff-Respondent,

v.

Andrew Bailey, Missouri Attorney General, *et al.*,

Defendants-Appellants.

From the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Circuit Judge

BRIEF OF APPELLANT ATTORNEY GENERAL ANDREW BAILEY

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JURISDICTIONAL STATEMENT

On May 4, 2023, Respondent Dr. Anna Fitz-James (Relator below) filed her Verified Petition for Writ of Mandamus and Declaratory Judgment. Counts I and II of the Petition prayed for a writ of mandamus or declaratory judgment against the Attorney General, the State Auditor, and the Secretary of State.[1] Count III of the Petition asserted a direct challenge to the constitutionality of seven different elections statutes related to the ballot initiative process under Article III, §§ 49 and 50 of the Missouri Constitution: §§ 116.040, 116.050, 116.175, 116.180, 116.190, 116.332, and 116.334. Specifically, Respondent prayed for the Court to conclude that "any or all" of the aforementioned statutes are unconstitutional "in whole or in part . . . on their face or as applied" to Respondent.

This Court has exclusive appellate jurisdiction over this case because, under Article V, § 3 of the Missouri Constitution, this Court has "exclusive appellate jurisdiction in all cases involving the validity . . . of a statute . . . of this state." *See Alderson v. State*, 273 S.W.3d 533, 535 (Mo. banc 2009). That appellate jurisdiction also extends to situations where "any party properly raises and preserves in the trial court a real and substantial (as opposed to merely colorable) claim that a statute is unconstitutional[.]"*Boeving v. Kander*, 496 S.W.3d 498, 503 (Mo. banc 2016)

[1] The Circuit Court dismissed the Secretary of State from this lawsuit at the beginning of trial.

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(further noting that "this Court has exclusive appellate jurisdiction over any appeal in which that claim may need to be resolved.").

On June 20, 2023, the Circuit Court issued a Judgment against the Attorney General on Count I, and denied Respondent's claims in Counts II and III. The Attorney General has appealed the portion of the Circuit Court's June 20, 2023 judgment adverse to the Attorney General that issued a writ of mandamus or declaratory relief, against the Attorney General. As represented in Respondent's Petition and the Circuit Court's Judgment, the Attorney General's appeal inherently involves questions surrounding the obligations imposed on executive branch officials by various elections statutes and the relationship between those obligations and different provisions of the Missouri Constitution.

Respondent's Petition also directly challenged the validity of seven different duly enacted statutes under Article III, §§ 49 and 50 (both on the face of each statute and as applied), and this issue was repeatedly addressed by both parties throughout the litigation and ruled on by the Circuit Court. *See Collector of Revenue of the City of St. Louis v. Parcels of Land Encumbered with Delinquent Tax Liens Serial Numbers 1-047 and 1-048, et al.*, 517 S.W.2d 49, 55 (Mo. banc 1974) (stating that the Supreme Court "reviews only questions presented to the trial court."). The Attorney General's appeal of the Circuit Court's Judgment on Respondent's Petition may implicate the scope of Article III, § 49 and Article III, § 50 of the Missouri

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Constitution, as each relates to the validity of the Missouri election system under the statutes that Respondent sought to declare as unconstitutional in Count III of the Petition: §§ 116.040, 116.050, 116.175, 116.180, 116.190, 116.332, and 116.334. And Respondent has cross-appeal rights over Count III.

Accordingly, appellate jurisdiction is proper in this Court because this case involves "the validity . . . of a statute . . . of this state," Mo. Const. art. V, § 3, or at the very least it involves a properly-preserved and colorable constitutional claim that may need to be resolved on appeal, *see Boeving*, 496 S.W.3d at 503.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises the question of when the Attorney General can properly exercise the authority given to his office under Section 116.175 to "return to the [State Auditor] for revision" a fiscal note and fiscal note summary prepared for an initiative petition that does not contain the "legal content" required for those materials. § 116.175.4, .5, RSMo. The answer to that question is clear, and it comes from the very statute granting the Attorney General the authority to review the State Auditor's submissions: he can return to the Auditor for revision a fiscal note and summary that is "argumentative" or is "likely to create prejudice for or against the proposed measure." § 116.175.3, RSMo. That is exactly what the Attorney General did here. For several reasons, the Circuit Court erred in slashing the Attorney General's authority and relegating his office to merely rubber stamping the State Auditor's submissions.

First, the plain meaning of the Attorney General's and State Auditor's roles under Section 116.175 are clear. The Attorney General has the responsibility to review the Auditor's proposed fiscal note and fiscal note summary[2] and determine

[2] As discussed in the Statement of Facts, Respondent proposed 11 initiative petitions. For purposes of the issues raised in this appeal, there is no material difference between those ballot measures or between the fiscal notes and fiscal note summaries prepared for them. For that reason and in order to simplify the language in this brief, Appellant will refer to Respondent's initiative petitions and the State Auditor's fiscal note and fiscal note summaries in the singular. Appellant will differentiate between the measures when necessary.

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whether the fiscal note and fiscal note summary each satisfy the requirements of the statute. The statute commands that State Auditor shall revise his submissions if the Attorney General returns them to him. § 116.175.5, RSMo. Here, the State Auditor refused to do so. He could, and should, have done more, as Section 116.175 commands. In fact, the evidence demonstrates that for many of Respondent's proposed ballot measures, the State Auditor *did* receive additional comments from government officials that should have been incorporated into a revised fiscal note and fiscal note summary.

Second, the Attorney General correctly rejected the State Auditor's fiscal note and fiscal note summary. The only plausible interpretation of "legal content," based on that phrase's plain meaning and surrounding context in Section 116.175, is that a fiscal note or fiscal note summary that is obviously deficient on its face does *not* contain the required legal content. This is a narrow reading of "legal content" that does not justify the Circuit Court's holding that the Attorney General engaged in an unwarranted exercise of authority.

In his Opinion Letters to the State Auditor, the Attorney General described the many reasons why the State Auditor's materials lacked the required legal content. The State Auditor's fiscal note contained wildly inadequate responses based on divergent and nonsensical methodologies from local governmental entities that, on their face, cannot survive even the most forgiving review. The fiscal note

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summary, too, lacks the required legal content because it conveys the misleading—and therefore facially argumentative and prejudicial—message that it is a reliable estimate of the cost of the measure. The fiscal note summary also fails to adequately summarize all submissions the State Auditor received from "others with knowledge pertinent to the cost of the proposal." § 116.175.1, RSMo. Voters will be misled when reviewing the fiscal note and fiscal note summary, and the information contained in them will create prejudice in favor of the measure.

Third, the Circuit Court erred in entering either mandamus or declaratory relief against the Attorney General. Mandamus relief ordering the Attorney General to approve the State Auditor's materials was inappropriate because mandamus is a last-resort remedy, and there were other steps that needed to take place before a writ of mandamus could be sought. Section 116.175 allows the Attorney General's review of a fiscal note and fiscal note summary to be more than a rubber-stamp review confined to the number of words in the materials; for that reason, the Attorney General's duty is not ministerial and not one that can be enforced through mandamus. And Respondent did not demonstrate that she had a *right* to inject herself at this early stage in the ballot measure review process, which should be an exchange of materials between two statewide elected officials. Her challenge is premature.

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For these reasons, this Court should reverse the Circuit Court's judgment, and remand it to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary.

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STATEMENT OF FACTS

I. The Proposed Initiative Petitions.

On March 8, 2023, Respondent Dr. Anna Fitz-James submitted eleven initiative petitions that would amend the Missouri Constitution to the Secretary of State. (D28, at ¶2; D29 (Jt. Stip. Ex. A)). The Secretary of State assigned the following initiative numbers to the petitions: 2024-077, 2024-078, 2024-079, 2024-080, 2024-081, 2024-082, 2024-083, 2024-084, 2024-085, 2024-086, and 2024-087. (D28, ¶4). The Secretary of State sent a copy of each initiative petition's sample sheet to the Attorney General and the State Auditor. (D28, ¶6). Additionally, the text of each initiative petition was posted to the Secretary of State's website. (D28, ¶5).

The Attorney General reviewed and approved the sample sheets for each of the eleven initiative petitions as to form under Section 116.050. (D28, ¶7). Following that approval, the Secretary of State also approved each of the initiative petitions as to form. (D29, ¶8).

On March 29, 2023, the Auditor sent a proposed fiscal note and fiscal note summary for each of the eleven initiative petitions to the Attorney General. (D28, ¶9). On April 10, 2023, the Attorney General responded to each of the fiscal notes and fiscal note summaries from the Auditor with an opinion letter, stating the reasons that the proposed fiscal notes and fiscal note summaries were legally deficient under Section 116.175. (D28, ¶11; D34-D35 (Jt. Stip. Ex. C)).

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II. The Attorney General's Opinion Letters Sent to the Auditor in Response to the Fiscal Note and Fiscal Note Summaries.

In the April 10, 2023 Opinion Letters from the Attorney General to the State Auditor, the Attorney General stated that he was rejecting the State Auditor's fiscal note and fiscal note summary for lacking the required legal content and returning them to the State Auditor for revision. (D34-D35 (Jt. Stip. Ex. C)). The Attorney General's Opinion Letters detailed the reasons for his rejection, as follows. (*Id.*).

First, the Attorney General wrote that the fiscal note contains inadequate and divergent submissions from local government entities. (D34 at p.2). The Attorney General stressed the statistically insignificant small sample size of responses solicited by the State Auditor, noting "this ballot measure will affect the present and future population of Missouri. (*Id.*) Yet, while Missouri has 114 counties and one independent city, in addition to over 1,000 other cities and villages . . . only three counties and two cities responded." (*Id.*).

The Opinion Letter noted that only one local governmental entity, Greene County, made an effort to submit a reliable methodology for calculating the fiscal impact. (*Id.*) "Greene County[] understood that the measure would have the obvious effect of reducing the population of [its] citizens," and estimated that 135 future citizens would be lost in that county annually due to legalizing abortion to Missouri. It estimated nearly $51,000 in lost county revenue annually. (*Id.*). The Attorney

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General emphasized again that Greene County "was the only entity to recognize what is facially apparent from this measure." (*Id.*).

The Greene County response stated that the "substantial economic fiscal reality of abortion relating to unborn lives cannot be denied or omitted from a fiscal note to inform voters of the consequences." (*Id.* at p.3). The Attorney General reviewed the submission and informed the State Auditor that it must have "recognized that this was a reasonable assumption" and that the "fiscal note summary reflects the financial impact to Greene County." (*Id.*). The Attorney General continued by noting that, however, that the State Auditor "did not apply that same reasonable assumption when assessing the submissions from the few other entities who responded." (*Id.*). Additionally, the Attorney General wrote that the Greene County methodology should be applied to the remainder of the populous of Missouri, because it is "unreasonable for those entities to conclude that the measure will have no estimated fiscal impact[.]" (*Id.*).

Second, the Attorney General also stated the fiscal note contained inadequate submissions concerning the impact to state government operations. (*Id.*). Citing submissions submitted to the State Auditor's office by a few entities, the Attorney General wrote that the proposed initiative petitions could jeopardize federal funding for Missouri Medicaid. (*Id.* at pp.3-4). He compared Missouri's situation to another other state who recently suffered similar losses when changes were made to its

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abortion policies. (*Id.* at p.4). The Attorney General stated those submissions should not be accepted, because the potential value of the loss was not reflected in the submissions from the varying state government entities. (*Id.*).

Third, the Attorney General stated that the fiscal note summary was also legally deficient for two principal reasons. (*Id.* at pp.4-5). The first reason was that the fiscal note summary "conveys the misleading message that it is an accurate representation of the true cost to local and state governmental operations." (*Id.* at p.4). The Attorney General wrote that this was because the "only numerical figure mentioned in the fiscal note summary is . . . a sliver of the maximum (or even likely) potential financial impact" and that the "average, reasonable voter reading this summary will not know the small sample of entities" that the State Auditor had solicited for a submission. (*Id.*).

The second reason was that the fiscal note summary fails "to adequately summarize the submissions [the State Auditor's] office received." (*Id.* at p.5). The Attorney General wrote that "the fiscal note summary merely states that 'opponents estimate a potentially significant loss to state revenues.'" (*Id.*). He stated that the State Auditor "received submissions indicating that the 'potentially significant loss' could be nearly $12.5 billion dollars" and because of that potential loss, "the fiscal note summary should reflect that number." (*Id.*).

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One submission by an interested party noted "the loss of federal Medicaid dollars, which in the proposed fiscal year 2024 budget would be a loss of nearly $12.5 billion." (*Id.*; *see also* D30 at p. 15 (Jt. Stip. Ex. B)). The submission explained several examples of how this might occur. (D30 at p.15 (Jt. Stip. Ex. B)). For example, under the initiative petitions, the entity noted that hospitals might be required to perform certain procedures that are disallowed by the federal government. (*Id.*). That same submission noted that under the initiative petitions, the cost of inpatient medical procedures and emergency department services for treating "issues before childbirth with complications" has a median charge per person of $11,997 with a maximum charge of $35,345. (*Id.* at p.16). The submission noted that these procedures may ultimately be paid by taxpayers. (*Id.*). Another submission by an interested party echoed many of those same concerns and potential loss of $12.5 billion in federal Medicaid money. (D30 at p.22 (Jt. Stip. Ex. B)).

For these reasons, the Attorney General concluded that "voters reading the fiscal note summary are likely to be misled into thinking that this ballot measure will have little fiscal impact on state and local governmental entities." (D34 at p.5). Therefore, the Attorney General's Opinion Letters continued, "the fiscal note and fiscal note summary do not satisfy the requirements of § 116.175 and therefore I am returning them to you for revision." (D34 at p.5).

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III. The State Auditor Receives Additional Fiscal Impact Estimates.

Three days before the Attorney General responded with his rejection of the State Auditor's fiscal note and fiscal note summary, on April 7, 2023, the State Auditor received additional information from the Governor's Office. (D41 (Jt. Stip. Ex. I)). The Governor's Office provided a fiscal estimate for each of the 11 initiative petitions based on "additional costs identified by other agencies in regards to regulation and enforcement." (*Id.*) In addition, the Governor's Office stated that each initiative petition appears "to conflict with federal law, which may have bearing on the fiscal responsibilities of [the Governor's Office]." (*Id.*).

Each submission from the Governor's Office noted that "there will likely be litigation leading to a fiscal impact on the Legal Expense Fund (LEF) ranging from $1,500 to unknown" due to potential conflicts with the U.S. Supreme Court's decision in "*Dobbs v. Jackson Women's Health Organization* and requirements of parental consent." (*Id.*) (Italics to case citation added). In addition, for several of the initiative petitions, the Governor's Office estimated that "failing to be in compliance with federal requirements related to Medicaid and MO HealthNet could lead to a fiscal impact of up to $600M" due to an apparent conflict "with the federal policy related to the Hyde Amendment and expending public funds on abortions." (*Id.*).

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IV. The State Auditor's Response to the Attorney General's Decision to Return the Fiscal Note and Fiscal Note Summary.

On April 21, 2023, the State Auditor sent the Attorney General a letter refusing to revise the fiscal note and fiscal note summary. The State Auditor did not revise its original materials to incorporate the new information it had received from the Governor's Office. (D28, ¶13; D38 (Jt. Stip. Ex. F)). The State Auditor stated that his office is "resubmitting the unaltered fiscal note and fiscal note summary for [the Attorney General's] review and approval as to legal content and form." (D38 (Jt. Stip. Ex. F)). The State Auditor's response letter stated that the Attorney General should "return the approved fiscal note summaries within 10 days, pursuant to § 116.175.4, RSMo." (*Id.*)

Additionally, on April 21, 2023, the State Auditor sent a separate letter stating that the fiscal note and fiscal note summary contained "estimated costs to state and local government entities and the fiscal note summary further states potential significant costs are anticipated by opponents." (D37 (Jt. Stip. Ex. E)). The State Auditor did not revise the fiscal note or the fiscal note summaries because "no new information [had] been presented that warrant[ed] inclusion in the fiscal note or fiscal note summary." (*Id.*). The State Auditor's letter made no mention of the new information it received from the Governor's Office. (*See id.*).

On May 1, 2023, the Attorney General stated that because the proposed fiscal notes and fiscal note summaries remained unchanged after the previous rejection,

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they were not approved. (D28, ¶ 14; D40 (Jt. Stip. Ex. H)). The Attorney General's Office "thus concluded that we have fulfilled our response obligations under § 116.175, RSMo for initiative petitions 2024-077 through 2024-087." (*Id.*).

V. Respondent Files Litigation.

On May 4, 2023, Respondent filed a Petition against the Attorney General, State Auditor, and Secretary of State. (D2). The Petition raised three Counts. Count I was asserted only against the Attorney General and sought mandamus or declaratory relief that ultimately sought to order the Attorney General to approve the State Auditor's initial fiscal note and fiscal note summary. Count II was asserted against the State Auditor and the Secretary of State and sought mandamus or declaratory relief requiring the State Auditor to deliver to the Secretary of State the initial fiscal note and fiscal note summary for inclusion in an official ballot title. Count III was a request for declaratory relief against all three statewide officials and sought to strike as unconstitutional "any or all" of seven statutes governing the ballot initiative process in Chapter 116: Sections 116.040, 116.050, 116.175, 116.180, 116.190, 116.332, and 116.334. (*Id.*).

The case was briefed and tried on an expedited basis, and limited discovery took place also on an expedited basis. (*See generally* D1). It was ultimately tried on a joint stipulation of facts and exhibits. (D28). At the trial on June 14, 2023, the Circuit Court granted a motion to dismiss filed by the Secretary of State, leaving

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only the Attorney General and State Auditor as remaining parties. (Tr. 17:14-20). Ultimately, no witnesses testified, and counsel for Respondent, the State Auditor, and the Attorney General presented argument. (*See generally* Tr.).

On June 20, 2023, the Circuit Court issued a Judgment against the Attorney General on Count I, and denied Respondent's claims in Counts II and III. (D44). The Circuit Court entered a writ of mandamus ordering the Attorney General to "approve the legal content and form of the fiscal note summaries submitted to the Attorney General on March 29, 2023, by the Auditor" for the eleven initiative petitions. (D44, p.28; D45). Later that same day, the Attorney General filed this notice of appeal. (D47).

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POINTS RELIED ON

I. The circuit court erred in granting mandamus or declaratory relief against the Attorney General, because the Attorney General properly returned the State Auditor's fiscal note and fiscal note summary to the State Auditor for revision, in that the State Auditor's submissions lacked the required legal content under Section 116.175, RSMo.

- Section 116.175, RSMo
- *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582 (Mo. banc 2018)
- *State v. Teer*, 275 S.W.3d 258 (Mo. banc 2009)

II. The circuit court erred in granting mandamus or declaratory relief against the Attorney General, because the State Auditor was required to revise his fiscal note and fiscal note summary after the Attorney General rejected them, in that the Attorney General's rejection was proper, Section 116.175 contains a clear command to revise the materials upon rejection, and the State Auditor received additional information that should have been incorporated.

- Section 116.175, RSMo
- *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582 (Mo. banc 2018)
- *Protect Consumers' Access to Quality Home Care Coal., LLC v. Kander*, 488 S.W.3d 665 (Mo. App. W.D. 2015)

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- *Missouri Mun. League v. Carnahan*, 303 S.W.3d 573 (Mo. App. W.D. 2010)
- *Pippens v. Ashcroft*, 606 S.W.3d 689 (Mo. App. W.D. 2020)

III. The circuit court erred in granting mandamus relief against the Attorney General, because Respondent had other remedies available and the Attorney General's duty under Section 116.175 is not ministerial, in that the Auditor had not yet revised his materials before Respondent filed suit, the Attorney General has not refused to perform a ministerial duty, and the Attorney General has discretionary authority to review and determine a fiscal note and fiscal note summary's compliance under Section 116.175.

- Section 116.175, RSMo
- *State ex rel. Swoboda v. Missouri Comm'n on Hum. Rts.*, 651 S.W.3d 800 (Mo. banc 2022)
- *State v. Teer*, 275 S.W.3d 258 (Mo. banc 2009)
- *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261 (Mo. banc 1980)
- *Barnes v. Uhlich*, 592 S.W.3d 67 (Mo. App. W.D. 2019)

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IV. The circuit court erred in granting declaratory relief against the Attorney General, because the case was not yet ripe and therefore not justiciable, in that the fiscal note and fiscal note summary review and resubmission process had not yet concluded.

- Section 116.175, RSMo
- *State ex rel. Swoboda v. Missouri Comm'n on Hum. Rts.*, 651 S.W.3d 800 (Mo. banc 2022)
- *State v. Teer*, 275 S.W.3d 258 (Mo. banc 2009)
- *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261 (Mo. banc 1980)
- *Barnes v. Uhlich*, 592 S.W.3d 67 (Mo. App. W.D. 2019)

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ARGUMENT

I. The circuit court erred in granting mandamus or declaratory relief against the Attorney General, because the Attorney General properly returned the State Auditor's fiscal note and fiscal note summary to the State Auditor for revision, in that the State Auditor's submissions lacked the required legal content under Section 116.175, RSMo.

Standard of Review. This point on appeal raises a question of statutory interpretation, which is reviewed de novo on appeal. *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020).

Preservation. The Attorney General preserved this issue for appeal in his answer to Respondent's Petition (D19), in his pre-trial brief (D23), and during trial (*See* Tr.).

A. Background to Section 116.175.

Section 116.175 clearly establishes the role of the Attorney General in reviewing, and either approving or rejecting the Auditor's fiscal note and fiscal note summary prepared for an initiative petition. The process of crafting the fiscal note and fiscal note summary for an initiative petition begins with the Auditor, who prepares a proposed fiscal note and fiscal note summary for each initiative petition received from the Secretary of State's office. RSMo. § 116.175.1. The adequacy of a fiscal note and fiscal note summary are governed by Section 116.175, which

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provides, among other things, mechanisms for proponents or opponents of a measure to submit statements related to the measure and which requires that any fiscal note or fiscal note summary "state the measure's estimated cost or savings, if any, to state or local governmental entities." § 116.175.3. The fiscal note summary shall additionally "summarize the fiscal note in language neither argumentative nor likely to create prejudice either for or against the proposed measure." *Id*.

After the Auditor has "prepare[d] a fiscal note and a fiscal note summary" for a proposed initiative, the Auditor "forwards both to the attorney general" for the Attorney General's review. § 116.175.2. At that point, the plain language of Section 116.175 is clear: a review of the proposed fiscal note and fiscal note summary shifts to the Attorney General. "[W]ithin ten days of receipt of the fiscal note and the fiscal note summary," the Attorney General must either "approve the legal content and form" of the fiscal note and fiscal note summary or "determine[] that the fiscal note or fiscal note summary does not satisfy the requirements" of § 116.175.4, .5.

If the Attorney General determines that the fiscal note and fiscal note summary satisfies the requirements of Section 116.175, he "forward[s] notice of such approval to the state auditor." 116.175.4. If, on the other hand, the Attorney General "determines that the fiscal note or the fiscal note summary does not satisfy the requirements of [§ 116.175]," the Attorney General "return[s]" the fiscal note and fiscal note summary "to the auditor for revision." § 116.175.5. At that point, the

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statute commands that the Auditor must revise the proposed fiscal note and fiscal note summary and again forwards both to the Attorney General. *Id*. The statute uses the strongest language: "the fiscal note and the fiscal note summary shall be returned to the auditor for revision." *Id.*

It is only after the fiscal note and fiscal note summary are ultimately approved by the Attorney General that the Secretary of State may use the "approved fiscal note summary and fiscal note," along with the official summary statement, to certify the official ballot title. § 116.180. Section 116.180 mandates that the official ballot title contain "separate paragraphs with the fiscal note summary immediately following the summary statement of the measure[.]" Section 116.175.5 is clear that a fiscal note or fiscal note summary that the Attorney General determines does not satisfy the requirements of the statute "also shall not satisfy the requirements of section 116.180." § 116.175.5.

In summary, the Auditor first prepares fiscal notes and fiscal note summaries and forwards them to the Attorney General. The Attorney General then reviews the fiscal note and fiscal note summary to determine whether each complies with the requirements of Section 116.175, which includes a review for legal content that plainly incorporates a review for argumentative language or information that is likely to create prejudice for or against a measure. § 116.175.3. If the Attorney General determines that a proposed fiscal note or fiscal note summary does not

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comply with § 116.175, he is required by the statute to send the deficient fiscal note or fiscal note summary back for further revision. The State Auditor then revises the deficient fiscal note or summary and re-submits it to the Attorney General for review and, if the updates satisfy § 116.175, ultimately approval by the Attorney General. Once the Attorney General determines that a revised fiscal note or fiscal note summary complies with § 116.175, the Attorney General exercises his statutory authority to approve the fiscal note and fiscal note summary for the Secretary of State's use in a certified official ballot title.

B. "Legal content" is different than "form," and the Attorney General's review of the "legal content" of a fiscal note and fiscal note summary is more than just counting words and checking boxes.

A plain-text reading of Section 116.175 and surrounding context make clear that the Attorney General's review for "legal content" plainly incorporates a review for argumentative language or information that is likely to create prejudice for or against a measure. § 116.175.3. The statute does not include a definition of "legal content," but "legal content" must be distinct from "form." The statute requires the Attorney General to review a fiscal note and fiscal note summary for "legal content and form." § 116.175.4. The statute is mandatory, as it uses "shall" to describe the Attorney General's role. Courts have consistently held in statutory interpretation that "[t]he word 'shall' generally prescribes a mandatory duty." *State v. Teer*, 275 S.W.3d 258, 261 (Mo. banc 2009).

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Because form and legal content are two separate phrases in the statute, they must have two separate meanings. The legislature "is presumed to have intended every word, provision, sentence, and clause in a statute to be given effect" and "[t]he plain and ordinary meaning of the words in a statute is determined from the words' usage in the context of the entire statute." *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 585 (Mo. banc 2018) (citing *Mantia v. Mo. Dep't of Transp.*, 529 S.W.3d 804, 809 (Mo. banc 2017)).

There does not appear to be a dispute in this case about "form," as Section 116.175.3 makes clear what the "form" of a fiscal note and fiscal note summary are: "the fiscal note and fiscal note summary shall state the measure's estimated cost or savings, if any, to state or local governmental entities. The fiscal note summary shall contain no more than fifty words, excluding articles[.]" § 116.175.3. This reading of "form" is consistent with how Missouri's appellate courts construe "form" in other initiative petition contexts. For example, in *Bradshaw v. Ashcroft*, the Court of Appeals reasoned that the "form" of the initiative petition is limited to whether the measure contains the designated items that must be contained in the measure, such as certain notices, a signature sheet, specification of the county the signature page will be circulated, and space for notarization:

> Section 116.040 specifies the form of an initiative petition, and directs that the form must be "substantially" followed. The form of an initiative petition is required to include notice that it is a crime to "sign any initiative petition with

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> any name other than [one's] own, or knowingly to sign [one's] name more than once for the same measure for the same election, or to sign a petition when such person knows he or she is not a registered voter." *Id.* Section 116.040 requires the form of an initiative petition to afford a place for each person signing the petition to provide a signature, the date of signature, the signer's address including zip code, the signer's congressional district, and the signer's printed name. Section 116.040 requires the form of an initiative petition to include a circulator's affidavit swearing and affirming under penalty of perjury that persons identified on the petition "signed this page of the foregoing petition ... in my presence," and that the circulator believes each signer to be "a registered voter in the State of Missouri" in the county specified on the signature page. Section 116.040 requires the form of an initiative petition to afford a place for the circulator's affidavit to be signed by the circulator in the presence of a notary.

559 S.W.3d 79, 83 (Mo. App. W.D. 2018). Here, in the context of a fiscal note and fiscal note summary, "form" can mean only whether the fiscal note summary contains 50 or fewer words and a statement of estimated costs or savings. § 116.175.3.

In contrast, "legal content" demands more. The relevant dictionary definitions of "content" are "the topics, ideas, facts, or statements in a book, document, or letter." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 492 (3d ed. 1993). And "legal" means "of or relating to law," "conforming to or permitted by law or established rules : conforming to the procedures and methods prescribed by law." *Id.* 1290. The plain dictionary of "legal content," then, must refer to what *else* is

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required *by law* to be done when preparing, and ultimately contained in, a fiscal note and fiscal note summary. Surrounding context in Section 116.175 makes clear what the legal content of a fiscal note and fiscal note summary must include, at minimum: it must not be "argumentative," and it must not "create prejudice either for or against the proposed measure." *See Richter v. Union Pac. R. Co.*, 265 S.W.3d 294, 297 (Mo. App. E.D. 2008) ("In absence of statutory definitions, we may derive the plain and ordinary meaning from a dictionary and by considering the context of the entire statute in which it appears.") (citing *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 224 (Mo. banc 2007)). "The primary goal of statutory interpretation is to give effect to legislative intent, which is most clearly evidenced by the plain text of the statute." *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 585 (Mo. banc 2018). The Attorney General's construction of Section 116.175 achieves these fundamental canons of construction.

At first, all parties followed the process for crafting a fiscal note and fiscal note summary laid out in § 116.175. The State Auditor submitted to the Attorney General an identical proposed fiscal note and fiscal note summary for each of Respondent's eleven initiative petitions. The Attorney General reviewed each of these submissions and determined that each of the fiscal notes and fiscal note summaries "does not satisfy the requirements of [§ 116.175]." In part, the Attorney General determined that the STate Auditor's proposed fiscal note "contain[ed]

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inadequate and divergent submissions from local government entities" and "contain[ed] inadequate submissions concerning the impact to state governmental operations." The Attorney General additionally determined that the Auditor's proposed fiscal note summary is legally deficient because in part it "conveys [a] misleading message" and "fail[s] to adequately summarize" the submissions in the fiscal note. Consequently, the Attorney General determined that the fiscal note and fiscal note summary for each of Respondent's initiative petitions was inadequate and returned each to the Auditor for revision. *Id*.

The plain and reasonable intent of the legislature for each of these clauses in the statutory scheme is that the Attorney General's determination actually has meaning and acts as a review on the State Auditor. The Circuit Court's judgment relegates the Attorney General's authority to little more than a word-counter and rubber stamp. As the Circuit Court and Respondent view the statute, the Auditor could prepare a fiscal note or fiscal note summary plainly in contravention of § 116.175 and, without any effective check on his determination, could disregard the Attorney General's concerns and require the Secretary of State to certify an official ballot title with a clearly deficient fiscal note and fiscal note summary. Adoption of Respondent's interpretation would require the Court to conclude that the legislature meant to render significant portions of § 116.175 superfluous and intended that any review of the Auditor's submissions by the Attorney General is completely toothless.

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Section 116.175 reinforces the Attorney General's interpretation of § 116.180, making explicitly clear that "[a] fiscal note or fiscal note summary that does not satisfy the requirements of [§ 116.175] also shall not satisfy the requirements of section 116.180"—the official ballot title requirement statute. Respondent's and the Circuit Court's view would additionally require the Court to exercise its judicial authority to create, out of thin air and without any legislative consent, authority for another executive branch official to approve a proposed fiscal note and fiscal note summary—the State Auditor himself. But the statutory scheme is clear that the State Auditor cannot approve his own fiscal note and fiscal note summary. That role belongs only to the Attorney General. And for reasons further discussed in Point III below, the Attorney General's role *must* be more than simply ministerial when reviewing for legal content.

C. The State Auditor's fiscal note and fiscal note summary are deficient as to legal content.

The Attorney General's Opinion Letters detailed across several pages why the State Auditor's fiscal note and fiscal note summary lack the required legal content under Section 116.165. Ultimately, if voters were to see the fiscal note summary at the ballot box, they would be more likely driven to vote for the measure due to misleading language that is apparent from the face of the fiscal note. Of course, the full fiscal note is not present on the ballot itself, and so voters are left only to look at the 50-word fiscal note summary. This is more than just a dispute over whether the

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Attorney General "does not like the fiscal conclusion reached by the Auditor," as the Circuit Court held. Rather, it is apparent from the face of the fiscal note and fiscal note summary that they lack the required legal content and will create undue prejudice in favor of the measure.

First, the fiscal note contains inadequate and divergent submissions from local government entities. This goes to the heart of the "legal content" required of a fiscal note, because a fiscal note must contain adequate submissions from governmental entities. In his Opinion Letter, the Attorney General stressed the statistically insignificant small sample size of responses solicited by the State Auditor, noting "this ballot measure will affect the present and future population of Missouri. Yet, while Missouri has 114 counties and one independent city, in addition to over 1,000 other cities and villages . . . only three counties and two cities responded." Not many more were even solicited for submissions: only 12 and 14 cities.

Only one local governmental entity, Greene County, made an effort to submit a reliable methodology for calculating the fiscal impact. Greene County understood that the abortion-legalization measure would have the obvious effect of reducing population. No other entity engaged in this common-sense analysis that should be present on the face of any submission. As Greene County correctly stated, the "substantial economic fiscal reality of abortion relating to unborn lives cannot be denied or omitted from a fiscal note to inform voters of the consequences."

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However, the State Auditor did not apply that same reasonable assumption when assessing the submissions from the few other entities who responded. Instead, the fiscal note and fiscal note summary took Greene County's calculated estimated fiscal impact and purported to represent that fiscal impact as the fiscal impact for the *entire state*. Never once did Greene County purport to calculate the fiscal impact of the effects of the initiative petition on the entire state. To represent otherwise is misleading and prejudicial in favor of the initiative petitions. As the Attorney General informed the State Auditor in his Opinion Letter, the Greene County methodology should be applied to the remainder of the populous of Missouri, because it is "unreasonable for those entities to conclude that the measure will have no estimated fiscal impact[.]" (D34, p.3). In other words, it was misleading and prejudicial to represent the financial impact of the measures on Greene County as representative of all 114 counties in Missouri.

To properly apply the methodology would not raise the State Auditor's minimum responsibilities outlined by this Court in *Brown v. Carnahan*, 370 S.W.3d 637 (Mo. banc 2012). Rather, doing so would underscore *why* the State Auditor even plays a role in the process in the first place while giving proper meaning to "legal content." This Court in *Brown* noted the State Auditor "is not required to compel and second-guess reasonable submissions from entities but is able to rely on the responses submitted. Nor should the auditor wade into the policy debates

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surrounding initiative petitions, which an independent investigation would entail. . . . It is not the auditor's role to choose a winner among these opposing viewpoints by independently researching the issue himself, double-checking economic theories and assumptions, and adopting one side's view over another's in the resulting fiscal note." *Id.* at 650. *Brown* did not preclude the State Auditor from selecting *an* assumption or methodology. Any reasonable construction of "legal content" and the duties of the State Auditor require some sort of methodology, and *Brown* does not stand for the proposition that the State Auditor *must only* add and subtract numbers that entities submit.

But, in fact, the State Auditor did not even do that properly. Non-governmental entities estimated a massive possible loss to state revenues, up to a possible loss of $12.5 billion. But that figure is nowhere in the fiscal note summary. Instead, all the State Auditor did was note that "opponents estimate a potentially significant loss to state revenues." This vague language does not comply with the State Auditor's role under Section 116.175 or under *Brown*.

Section 116.175 expressly allows for consideration of figures submitted by governmental and non-governmental entities. Subsection (1) of that statute states that "The state auditor may consult with the state departments, local government entities, the general assembly ***and others with knowledge pertinent to the cost of the proposal***." § 116.175.1 (emphasis added). Furthermore, "[p]roponents or

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opponents of any proposed measure may submit to the state auditor a proposed statement of fiscal impact estimating the cost of the proposal in a manner consistent with the standards of the governmental accounting standards board and section 23.140, provided that all such proposals are received by the state auditor within ten days of his or her receipt of the proposed measure from the secretary of state." There is no dispute that the State Auditor received estimates from "others with knowledge pertinent to the cost of the proposal," who may be opponents to the measure, that those estimates were out of compliance with the appropriate fiscal standards, or that the submission were timely received. The record contains no such fact-finding or evidence to the contrary. Instead, the record contains submissions that were not expressly incorporated into the fiscal note summary. The Auditor should have done so, just as it did when it included a specific dollar figure based on Greene County's estimate.

Thus, as the Attorney General wrote in his Opinion Letter, the fiscal note summary "conveys the misleading message that it is an accurate representation of the true cost to local and state governmental operations." The only numerical figure mentioned in the fiscal note summary is a sliver of the maximum (or even likely) potential financial impact. The average, reasonable voter reading this summary will not know the small sample of entities that the State Auditor had solicited for a submission. That same voter is also much more likely to vote in favor of a measure

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that is estimated to cost approximately $50,000 than one that estimates a fiscal impact closer to what the submissions *actually received by the State Auditor* estimated the measure will cost.

To be clear: the Attorney General is advancing a narrow and appropriate reading of his authority to review a fiscal note and fiscal note summary under Section 116.175. That review must be more than a rubber stamp. And at minimum that review allows a rejection of the State Auditor's submissions if it is evident from their face that they are inaccurate, misleading, and likely to create bias for or against a measure. This Court should reverse the Circuit Court's decision, and remand the case to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary under Section 116.175.5.

II. The circuit court erred in granting mandamus or declaratory relief against the Attorney General, because the State Auditor was required to revise his fiscal note and fiscal note summary after the Attorney General rejected them, in that the Attorney General's rejection was proper, Section 116.175 contains a clear command to revise the materials upon rejection, and the State Auditor received additional information that should have been incorporated.

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Standard of Review. This point on appeal raises a question of statutory interpretation, which is reviewed de novo on appeal. *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020).

Preservation. The Attorney General preserved this issue for appeal in his answer to Respondent's Petition (D19), in his pre-trial brief (D23), and during trial (*See* Tr.).

As noted above, "The primary goal of statutory interpretation is to give effect to legislative intent, which is most clearly evidenced by the plain text of the statute." *State ex rel. Goldsworthy*, 543 S.W.3d at 585. The legislature "is presumed to have intended every word, provision, sentence, and clause in a statute to be given effect" and "[t]he plain and ordinary meaning of the words in a statute is determined from the words' usage in the context of the entire statute." *Id*. (citing *Mantia v. Mo. Dep't of Transp*., 529 S.W.3d 804, 809 (Mo. banc 2017)). "Where a statute's language is clear, courts must give effect to its plain meaning and refrain from applying the rules of construction unless there is some ambiguity." *Ross v. Dir. of Revenue*, 311 S.W.3d 732, 735 (Mo. banc 2010).

Section 116.175 could not be more clear: if the Attorney General "determines" that the Auditor's proposed fiscal note or fiscal note summary for an initiative petition does not satisfy the requirements of Section 116.175, the Attorney General "shall" return the deficient fiscal note or fiscal note summary to the Auditor "for

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revision." § 116.175.5. The Attorney General complied with his duty. The State Auditor has yet to do so.

Instead of revising each fiscal note and fiscal note summary to comply with Section 116.175, the State Auditor "decline[d] to revise the fiscal note and fiscal note summary" for each of the initiative petitions. Because the State Auditor failed to revise the fiscal notes and fiscal note summaries, and because the Attorney General determined that the proposed fiscal notes and fiscal note summaries submitted by the Auditor continue to fail to satisfy the requirements of Section 116.175, the Attorney General again returned the fiscal notes and fiscal note summaries to the Auditor for revision. *See, e.g.* Ex. D. The Auditor has, to date, failed to revise the fiscal note or fiscal note summary for any of Respondent's initiative petitions.

In crafting the text of Section 116.175, the legislature plainly laid out the scope of responsibilities for both the Auditor and the Attorney General. It is the *Attorney General's* responsibility to "determine" whether the fiscal note or fiscal note summary "does not satisfy the requirements of [§ 116.175]" and, if the Attorney General determines that a fiscal note or fiscal note summary does not satisfy those requirements, "the fiscal note and the fiscal note summary shall be returned to the auditor for revision." § 116.175.5. In the context of Section 116.175, the meaning of the requirement that the fiscal note and fiscal note summary be "returned to the

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auditor for revision" is clear. The phrase "return . . . for revision" imposes on the State Auditor a statutory duty to provide an updated or altered fiscal note and fiscal note summary for the Attorney General's review under Section 116.175. Any other meaning of the word would render the responsibility for the Attorney General to determine whether a proposed fiscal note and proposed fiscal note summary complies with § 116.175, and, consequently, whether to approve it or send it back to the Auditor for revision, superfluous. Any alternative reading of the requirement that the fiscal note and fiscal note summary shall be "returned for revision" upon a determination by the Attorney General would be contrary to this pronouncement.

This understanding of the legislature's use of the word "revision" is consistent with how the word "revision" is used by courts addressing challenges under Chapter 116. *See, e.g. Pippens v. Ashcroft*, 606 S.W.3d 689, 693 (Mo. App. W.D. 2020) (using the term "revision" to refer to the process of making changes to the official summary statement for an initiative petition); *Sedey v. Ashcroft*, 594 S.W.3d 256, 265 n. 6 (Mo. App. W.D. 2020) (using the terms "revised" and "revisions" to describe changes to the summary language of citizen initiatives). It is also consistent with how Missouri courts have traditionally used the words "revise" and "revisions." *See, e.g. Care & Treatment of Morgan v. State*, 176 S.W.3d 200, 205–06 (Mo. App. W.D. 2005) (considering the "revised" version of a statute as being a change to the legal definition of a term compared to the past definition); *McCarty v. City of Kansas*

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City, 671 S.W.2d 790, 795 (Mo. App. W.D. 1984) (using the term "revisions" to refer to "a change in existing regulations and restrictions" at issue). "[I]n construing a statute to determine legislative intent, a court must presume that the legislature acted with a full awareness and complete knowledge of the present state of the law" and Missouri court cases. *State v. Rumble*, 680 S.W.2d 939, 942 (Mo. banc 1984). Even if the plain meaning of the term "revision" was uncertain (which it is not), Missouri courts' past use and definition of the term strongly supports the Attorney General.

Both the plain meaning of the term "revision" as used in the statute and the regular use of the term by courts in analyzing both ballot title cases and other general cases makes clear: the State Auditor had a statutory duty to send to the Attorney General an *updated and modified* fiscal note or fiscal note summary for each of Respondent's initiative petitions. The Attorney General would then review the resubmitted fiscal note and fiscal note summary to determine whether the documents complied with the requirements of Section 116.175, just as he would upon receiving a first submission. Despite this clear statutory instruction, the State Auditor refused to revise the statute to address the Attorney General's concerns.[3] In fact, the State

[3] Notably, in her Petition below, the one claim Respondent did *not* bring is a request for this Court to enter a judgment declaring that the Auditor must comply with his statutory obligation under § 116.175 to "revise" the proposed fiscal notes and fiscal note summaries. As discussed in the Attorney General's other points on appeal, the Circuit Court erred in blessing Respondent's failure to ask for the relief she did

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Auditor explicitly stated instead that he "*declines to revise* the fiscal note and fiscal note summary." (D38, cleaned up, emphasis added). As the Auditor "decline[d]" to perform his statutory duties under Section 116.175, the Attorney General again returned the fiscal notes and fiscal note summaries for revision. (*See, e.g. id.*; D40).

Neither Section 116.175 nor any other statute requires the Attorney General to approve a fiscal note or fiscal note summary that he determines does not satisfy the requirements of Section 116.175 and is therefore deficient. On the contrary, Section 116.175.5 entrusts in the Attorney General *only one* nondiscretionary duty: that any fiscal note or fiscal note summary which he "determines . . . does not satisfy the requirements of [§ 116.175] . . . ***shall be*** returned to the Auditor for revision." § 116.175.5 RSMo. Courts have consistently held in statutory interpretation that "[t]he word 'shall' generally prescribes a mandatory duty." *State v. Teer*, 275 S.W.3d 258, 261 (Mo. banc 2009).

Here, the Attorney General determined that the State Auditor failed to make any revisions to the deficient proposed fiscal note and proposed fiscal note summary

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request in her lawsuit and then complain that she does not have relief available to her to resolve her claimed injury. *See State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 266 (Mo. banc 1980) (finding it "undisputed that the relators had an alternative remedy [to a writ of mandamus] available to them" when the relators also "filed an action seeking a declaratory judgment" related to the same dispute.). The proper relief here is for completion of the Attorney General and Auditor's submission, review, and resubmission process. And then if Respondent found the *final* fiscal note or fiscal note summary unfair or insufficient, she could file her own lawsuit under Section 116.190 challenging those materials.

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for each of the initiative petitions, and, consequently, complied with his statutory duty to return the drafts to the State Auditor for further revision. The Attorney General would be running afoul of the requirements of § 116.175.5 if he *did not* return fiscal notes and fiscal note summaries for further revision after a determination that they did not comply Section 116.175.5.

Section 116.175 is clear on the continuing responsibilities of both the Attorney General and the Auditor in reaching an approved fiscal note and fiscal note summary that complies with § 116.175. The General Assembly's use of the term "revision" and the requirements that a fiscal note and fiscal note summary satisfy Section 116.175 and be "approved" by the Attorney General for the purpose of Section 116.180 before the Secretary of State may certify a ballot title demonstrates that the preparation of a fiscal note is an ongoing process. The dual requirements of revision and approval create an ongoing review process that continues until an adequate fiscal note and fiscal note summary is approved. The clear text of the statute renders any additional construction unnecessary. *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 540 (Mo. banc 2012) ("When the words are clear, there is nothing to construe beyond applying the plain meaning of the law.").

Even to the extent this Court concludes that it is necessary to look beyond the plain meaning of the statute, the plain and straightforward construction of Section 116.175 is that the use of the terms "revision," "determine," and "approve" create

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continuing, time-constrained obligations on the Auditor and Attorney General to engage in the processes of Section 116.175 until the fiscal note and fiscal note summary for an initiative petition are approved. The rules of statutory construction "require this court to determine the intent of the legislature" by considering the plain and ordinary meaning and application of the text of the statute. *Owsley v. Brittain*, 186 S.W.3d 810, 815 (Mo. App. W.D. 2006).

Here, the plain and ordinary application of the text utilizes the time limit imposed on the executive branch officials—ten days—to govern any deadlines for revisions to proposed fiscal notes or fiscal note summaries. The Attorney General has ten days after receiving an iteration of a proposed fiscal note and fiscal note summary to determine whether to approve or send back for revision the fiscal note and fiscal note summary. § 116.175.4, .5. Under the most permissive interpretation of these provisions controlling executive branch officials drafting and reviewing proposed fiscal notes and fiscal note summaries, "returning" a draft "for revision" *at minimum* implies (and, in the Attorney General's view, expressly requires) that the draft will be edited and then re-submitted for potential approval under a similar statutory timeline as the initial production. Indeed, both the State Auditor and Attorney General acted under this construction of the statute—each provided communications on the proposed fiscal note and fiscal note summary within ten days of receipt. The Circuit Court's judgment effectively discards portions of the statute

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mandating a determination of when a fiscal note or fiscal note summary is insufficient—an outcome which is unlikely to be "the intent of the legislature" drafting the provision. *Owsley*, 186 S.W.3d at 815.

Second, the Circuit Court's judgment creates unnecessary statutory conflicts that ultimately render meaningless critical portions of Section 116.175. The judgment expresses concern that there could be a a parade of horribles occurs that then invites intervention from outside the relationship between statewide elected officials carefully crafted by the legislature. Not only is this legal conclusion not supported by the statute, there is no evidence that this fear is happening here. The only event that has occurred is *one* rejection of the State Auditor's initial submissions based on several grounds clearly explained in the Attorney General's Opinion Letters. At most, the present challenge is unripe, especially given that the statute specifically addresses the Attorney General's authority to review and then approve or reject a fiscal note and fiscal note summary. It cannot be the case that every time the Attorney General were to take an action expressly allowed by statute, a parade of horribles occurs that then invites intervention from outside the statewide elected officials. What is more, the solution to this problem is clear: an order requiring the State Auditor to complete his duty under the statute and revise the fiscal note and fiscal note summary. The solution is not to slash the Attorney General's authority that Section 116.175 plainly gives him.

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Finally, the record below demonstrates that the State Auditor still had more work to do. Three days before the Attorney General responded with his rejection of the State Auditor's fiscal note and fiscal note summary, on April 7, 2023, the State Auditor received additional information from the Governor's Office. The Governor's Office provided a fiscal estimate for each of the 11 initiative petitions based on "additional costs identified by other agencies in regards to regulation and enforcement." In addition, the Governor's Office stated that each initiative petition appears "to conflict with federal law, which may have bearing on the fiscal responsibilities of [the Governor's Office]."

Each submission from the Governor's Office noted that "there will likely be litigation leading to a fiscal impact on the Legal Expense Fund (LEF) ranging from $1,500 to unknown" due to potential conflicts with the U.S. Supreme Court's decision in "*Dobbs v. Jackson Women's Health Organization* and requirements of parental consent." (Italics to case citation added). In addition, for several of the measures, the Governor's Office estimated that "failing to be in compliance with federal requirements related to Medicaid and MO HealthNet could lead to a fiscal impact of up to $600M" due to a conflict between the content of the initiative petitions and "the federal policy related to the Hyde Amendment and expending public funds on abortions."

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The State Auditor has failed to incorporate these new figures, even though the State Auditor acknowledged receiving these responses and could have incorporated the responses from the Governor's office when revising his fiscal note and fiscal note summary.

For these reasons, this Court should reverse the Circuit Court's judgment, and remand it to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary under Section 116.175.5

III. The circuit court erred in granting mandamus relief against the Attorney General, because Respondent had other remedies available and the Attorney General's duty under Section 116.175 is not ministerial, in that the Auditor had not yet revised his materials before Respondent filed suit, the Attorney General has not refused to perform a ministerial duty, and the Attorney General has discretionary authority to review and determine a fiscal note and fiscal note summary's compliance under Section 116.175.

Standard of Review. This point on appeal raises a question of statutory interpretation, which is reviewed de novo on appeal. *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020).

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Preservation. The Attorney General preserved this issue for appeal in his answer to Respondent's Petition (D19), in his pre-trial brief (D23), and during trial (*See* Tr.).

A writ of mandamus may only be issued in instances where the litigant: (1) proves that "no alternative remedy exists"; (2) "proves that he has a clear, unequivocal, specific right to a thing claimed"; and (3) proves the writ relates to "a ministerial duty that one charged with the duty has refused to perform." *Barnes v. Uhlich*, 592 S.w.3d 67, 70–71 (Mo. App. W.D. 2019). Here, Respondent's Petition failed on every count. This Court should reverse the Circuit Court's finding otherwise.

A. Respondent failed to establish that a writ of mandamus is the exclusive remedy available to her.

"There is no remedy that a court can provide that is more drastic, no exercise of raw judicial power that is more awesome, than that available through the extraordinary writ of mandamus." *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 266 (Mo. banc 1980). As it is the most significant exercise of judicial power a court can perform, a "writ of mandamus issues only in a case of necessity," and if "there is any doubt of its necessity or propriety, it will not be issued." *State ex rel. University Park Building Corp. v. Henry*, 376 S.W.2d 614, 617 (Mo. App. 1964); *see also State ex rel. Kelley*, 595 S.W.2d at 266 ("Recognizing the extreme nature of the order to act in accordance with a peremptory writ of mandamus, we believe

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that the remedial writ ought to be reserved for those cases in which no alternative measure will be effective.").

Recognizing these limitations, courts have held that "[i]t is a long-established principle of law that mandamus does not issue where there is another adequate remedy available to relator." *State ex rel. Kelley*, 595 S.W.2d at 265. "In other words, 'the writ of mandamus is to be used only as a last resort on the failure of any adequate alternative remedy.'" *Beauchamp v. Monarch Fire Protection District*, 471 S.W.3d 805, 810 (Mo. App. E.D. 2015) (quoting *State ex rel. Kelley*, 595, S.W.2d at 265); *see also State ex rel. KelCor., Inc. v. Nooney Realty Tr., Inc.*, 966 S.W.2d 399, 402 (Mo. App. E.D. 1998) ("A required element of proving a right to mandamus is that there is no alternative, adequate remedy other than the issuance of the writ.").

A review the Petition below reveals that Respondent likely acknowledges that a writ of mandamus is the exclusive possible remedy. Count I of the Petition acknowledges the existence of other possible remedies and therefore, on the face of Respondent's own pleadings, bars any right to a writ of mandamus. *See Barnes*, 592 S.W.3d at 71–72 (dismissing a petition for writ of mandamus where the relator "did not allege in his petition in mandamus that he was without an adequate alternative remedy."). In briefing before the Circuit Court, Respondent even took one step past *Barnes*, acknowledging with frankness that Respondent believes "mandamus . . . is not the exclusive remedy" against the Attorney General available to her in her

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Petition. (D8 at p.5). Respondent's own admission should have been fatal to Count I of her Petition.

This Court has held that an attempt to take two bites of the same apple by requesting both a declaratory judgment and writ of mandamus per se demonstrates that mandamus is not the exclusive remedy available and, consequently, bars a court from issuing the writ in her favor. In *State ex rel. Kelley*, this Court found it "undisputed that the relators had an alternative remedy [to a writ of mandamus] available to them" when the relators also "filed an action seeking a declaratory judgment" related to the same dispute. *State ex rel. Kelley*, 595 S.W.2d at 267. The Court noted that, "[b]y filing the action for declaratory judgment seeking a judicial declaration" on the same underlying facts of the lawsuit, the relator "demonstrated his willingness to submit the controversy . . . to the judgment of the court" and was consequently barred from seeking mandamus. *Id*. Likewise here, Respondent's "alternative" request for declaratory judgment on the same facts demonstrates mandamus is not the exclusive remedy available to her. Mandamus is not a "short cut for the speedy resolution of disputes that adequately may be resolved by other means." *Id.* at 268. A writ of mandamus is an extraordinary remedy of last resort. Even now, this case is not at a last resort stage.

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B. Respondent failed to establish any clear, unequivocal, and specific right she seeks to vindicate with a writ of mandamus.

Respondent also failed to demonstrate any clearly established and presently existing right she could vindicate through mandamus. "Mandamus is a discretionary writ, not a writ of right," and it "is not appropriate to establish a legal right, but only to compel performance of a right that already exists." *State ex rel. Petti v. Goodwin-Raftery*, 190 S.W.3d 501, 506 (Mo. App. E.D. 2006). A petitioner seeking mandamus bears the burden of establishing that he or she has a "clear, unequivocal, specific right to have the act performed as well as a corresponding present, imperative, and unconditional duty on the part of the respondent to perform the action sought." *State ex rel. Lee v. City of Grain Valley*, 293 S.W.3d 104, 109 (Mo. App. W.D. 2009) (emphasis omitted). This is because "the purpose of mandamus is to execute and not to adjudicate; it coerces performance of a duty already defined by law." *State ex rel. City of Crestwood v. Lohman*, 895 S.W.2d 22, 27 (Mo. App. W.D. 1994).

Respondent did not meet her burden of establishing a clear, unequivocal, specific right to have the act performed. It is important to break down the precise "clear and unequivocal right" Respondent asserted warrants the granting of extraordinary mandamus relief. Section 116.175 relates exclusively to the interactions between the Auditor and the Attorney General in the process of drafting and reviewing proposed fiscal notes and fiscal note summaries. § 116.175. Nowhere

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in the statute is any provision that even *implies* that a member of the public has a "clear and unequivocal" right to interject themselves into the process of the Attorney General reviewing fiscal notes and fiscal note summaries. The absence of any case establishing Respondent's right to file a lawsuit while there is still more work for one state official to do is telling.

In fact, Respondent already has an alternative avenue here – to challenge an official ballot title under Section 116.190. If Respondent disagrees with the ultimately approved fiscal note or approved fiscal note summary, she is free to challenge the ballot title once the Secretary of State certifies the official ballot title. Her statutory rights under Section 116.190 does not, however, support any suggestion that she has a "clear and unequivocal" right to intervene before that time. The Circuit Court erred in holding otherwise.

To allow a party to obtain mandamus relief from generalized statements that they have a right to bring issues they deem significant under a constitutional provision, such as Article III, Section 50, would render entirely meaningless the requirement to demonstrate a clear and specific right to relief. This Court has conclusively held that one must demonstrate a "specific" right to relief before a court may rule on a request for mandamus. *See State ex rel. Swoboda v. Missouri Comm'n on Hum. Rts.*, 651 S.W.3d 800, 805 (Mo. banc 2022). A generalized pronouncement

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of a litigant's "right to bring issues they deem significant to the voters" (D8 at p.4) as Respondent argued below plainly does not satisfy this standard.

Mandamus is an extraordinary and consequential tool. It is "a hard and fast writ, and an unreasoning writ, a cast-iron writ, the right arm of the court." *State ex rel. Kelley*, 595 S.W.2d at 266 (quoting *State ex rel. Kansas City v. Kansas City Gas Co.*, 163 S.W. 854, 857 (Mo. banc 1914)). To protect against overreach of this power, courts may only exercise mandamus when a litigant has identified a "clear, unequivocal, and specific right" to the action a party seeks performed. Respondent failed to establish any such right, and the Circuit Court erred in concluding otherwise.

C. The Attorney General's statutory authority under Section 116.175 to approve or reject the State Auditor's proposed fiscal note and fiscal note summary is not ministerial and therefore not subject to a writ of mandamus.

Respondent's request for mandamus should also have failed below because she asked the Circuit Court to exercise judicial power to compel an executive branch official to reach a *particular* outcome on a *discretionary* decision. Courts have long held that a writ of "'[m]andamus will not lie to compel an act when its performance is discretionary.'" *McDonald v. City of Brentwood*, 66 S.W.3d 46, 51 (Mo. App. E.D. 2001) (quoting *State ex rel. University Park Building*, 376 S.W.2d at 617). This is because the purpose of a writ of mandamus is to "compel the performance of a ministerial duty that one charged with the duty has refused to perform." *Lemay Fire*

AMERICAN OVERSIGHT

Prot. Dist. v. St. Louis County, 340 S.W.3d 292, 294 (Mo. App. E.D. 2011) (quoting *State ex rel. Pub. Counsel v. Pub. Serv. Comm'n*, 236 S.W.3d 632, 635 (Mo. banc 2007)); *see also State ex rel. Thomas v. Neeley*, 128 S.W.3d 920, 924 ("[A] writ of mandamus cannot compel the performance of a discretionary act.") (Mo. App. S.D. 2004).

Even if Respondent were able to establish all of the other requirements for a writ of mandamus—which she failed to do—mandamus relief should have been unavailable because the Attorney General's duties to *review* ***and*** *approve or deny* a fiscal note and fiscal note summary Section 116.175 are not "ministerial." When analyzing whether a writ of mandamus may issue, courts have juxtaposed "ministerial" government actions with discretionary actions of government officials "that require[] the exercise of reason in determining how or whether the act should be performed." *State ex rel. Thomas*, 128 S.W.3d at 924. A writ of mandamus "will only issue when there is an *unequivocal showing* that the public office failed to perform a ministerial duty imposed by law." *Id*. (emphasis added).

Section 116.175 directs the Attorney General to "determine[]" whether the fiscal note and fiscal note summary satisfy the requirements of the statute, which, in turn, affects whether the Attorney General approves the proposed fiscal note and fiscal note summary or returns each to the auditor for revision. The fact that the Attorney General's determinations under the statute are more than simply

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"ministerial" is demonstrated by the explicit contemplation under the statute that the Attorney General *may* determine that the fiscal note and fiscal note summary cannot approved until further revision—all depending on his review of the proposed fiscal note and fiscal note summary. *State ex rel. Thomas*, 128 S.W.3d at 924. In the face of the plain text of the statute, Respondent did not carry her burden to make an "unequivocal showing" that the Attorney General failed to perform a ministerial duty. *Id.*

A discretionary action does not become ministerial simply because a party challenging a decision strongly believes the outcome should have been different. *State ex rel. Thomas*, 128 S.W.3d at 924. After all, it is often the case that actions by government officials can elicit strong reactions on both sides of the question. Respondent asked the Circuit Court to utilize the writ of mandamus to direct the Attorney General to exercise his discretion in a particular manner on the question of whether or not a proposed fiscal note and fiscal note summary comply with requirements of § 116.175. The Circuit Court agreed, and that decision risks creating a dangerous and unprecedented result of the exercise of judicial power over Missouri elections officials performing discretionary elections responsibilities. The very fact that the Attorney General must "determine[]" whether the "content" of a proposed fiscal note and fiscal note summary complies with a list of requirements, and then either approve the draft or return it to the State Auditor for revision, demonstrates

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that Section 116.175 entrusts in the Attorney General fundamental discretionary powers. Missouri courts have held time and again that mandamus may not be used to compel the Attorney General—or indeed, any other government official—to exercise his discretion in a particular way favored by a litigant. *E.g.*, *McDonald*, 66 S.W.3d at 51.

For these reasons, this Court should reverse the Circuit Court's judgment, and remand it to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary under Section 116.175.5.

IV. The circuit court erred in granting declaratory relief against the Attorney General, because the case was not yet ripe and therefore not justiciable, in that the fiscal note and fiscal note summary review and resubmission process had not yet concluded.

Standard of Review. This point on appeal raises a question of statutory interpretation, which is reviewed de novo on appeal. *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020).

Preservation. The Attorney General preserved this issue for appeal in his answer to Respondent's Petition (D19), in his pre-trial brief (D23), and during trial (*See* Tr.).

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For similar reasons as the Attorney General argued above why the Circuit Court erred in granting mandamus relief and why the State Auditor failed to comply with his duty under Section 116.175 to revise his fiscal note and fiscal note summary, the Circuit Court erred in granting Respondent's alternative request for declaratory relief against the Attorney General. The Circuit Court held in footnote 11 to its judgment that it would "direct the same relief by declaratory judgment" if it did not grant Respondent's request for mandamus relief. Because the Circuit Court appears to have rested an alternative declaratory judgment ruling on the same grounds as the ruling granting mandamus relief, the Attorney General incorporates his same arguments above here. The Attorney General will also elaborate on some of those points.

There was no presently existing controversy over which a court can grant relief of a conclusive character. "Ripeness, like standing, is an element of justiciability." *Calzone v. Ashcroft*, 559 S.W.3d 32, 35 (Mo. App. W.D. 2018). Ripeness is determined by whether "the parties' dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict that is presently existing, and to grant specific relief of a conclusive character." *Mo. Health Care Ass'n v. Attorney Gen. of Mo.,* 953 S.W.2d 617, 620 (Mo. banc 1997); *see also Seay v. Jones*, 439 S.W.3d 881, 888 (Mo. App. W.D. 2014) ("citizens are authorized to seek judicial review of the official ballot title… [i]n such an action, the

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challenger must 'state the reason or reasons why the summary statement portion of the official ballot title is insufficient or unfair.'").

Here, Respondent's suit is not ripe because the exchange—and review and resubmission—of materials between the Attorney General and the State Auditor had not yet concluded. There was more work left for the State Auditor to do, as the State Auditor received new submissions from the Governor's Office on a fiscal impact for the initiative petitions. Even if the State Auditor did not receive those submissions, the State Auditor still has not complied with his duty to revise the fiscal note and fiscal note summary. § 116.175.5. But his receipt of new information shows even more that there was more work to do.

Respondent's alternative request for declaratory relief—and the Circuit Court's granting of that alternative request—came too early. Of course, as discussed above, Respondent should wait until the entire process had concluded and challenge an official ballot title under Section 116.190. But at the time she filed her lawsuit and up until the time of trial, there was no real presently existing controversy between the Attorney General and Respondent. Simply because Respondent disagreed with the Attorney General's decision does not entitle her to a request for declaratory relief. Rather, the dispute must be ripe. Furthermore, in bringing her lawsuit Respondent may not attempt to challenge the Attorney General's underlying exercise of discretion in determining that the Auditor's identical proposed fiscal note

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and fiscal note summaries for Respondent's initiative petitions failed to comply with Section 116.175. And ultimately, her request for declaratory relief seems to challenge the discretion the Attorney General exercised at a pre-final dispositional stage. There is no right for Respondent to file any lawsuit and interfere in the State Auditor and Attorney General's process before it has been completed.

For these reasons, this Court should reverse the Circuit Court's judgment because it was not yet ripe and therefore non-justiciable, and remand it to the Circuit Court with instructions to dismiss the case.

CONCLUSION

For these reasons, this Court should reverse the Circuit Court's judgment, and remand it to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary under Section 116.175.5.

AMERICAN OVERSIGHT

July 5, 2023

ANDREW T. BAILEY
Attorney General

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via the Court's electronic filing system on the 3rd day of July, 2023, to all counsel of record.

I also certify that the foregoing brief complies with the limitations in Rule No. 84.06(b) and that the brief contains 13,432 words.

/s/ *Jason K. Lewis*

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To: susank@missourilife.org[susank@missourilife.org]
From: Wagner, Ray[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=F577E20AF58F4CE4AFCDDD101E8A3745-WAGNER, RAY]
Sent: Sat 7/8/2023 11:09:06 AM (UTC-05:00)
Subject: Fitz-James v. Bailey - MO Supreme Court Appellant's Brief.pdf
Fitz-James v. Bailey - MO Supreme Court Appellant's Brief.pdf

Good morning Susan. Attached is the brief and the 11 abortion petitions matter. The case is set for oral argument in the Supreme Court at 3 pm on Tuesday July 18.

Ray

Raymond T. Wagner, Jr.
First Assistant/Chief Counselor
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-0531
(573) 645-9875 (cell)
Ray.Wagner@ago.mo.gov

Sent from my iPhone
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To: Wagner, Ray
From: postmaster@missourilife.org[postmaster@missourilife.org]
Sent: Sat 7/8/2023 12:13:06 PM (UTC-05:00)
Subject: Undeliverable: Fitz-James v. Bailey - MO Supreme Court Appellant's Brief.pdf
Fitz-James v. Bailey - MO Supreme Court Appellant's Brief.pdf

Delivery has failed to these recipients or groups:

susank@missourilife.org (susank@missourilife.org)
The email address you entered couldn't be found. Please check the recipient's email address and try to resend the message. If the problem continues, please contact your email admin.

Diagnostic information for administrators:

Generating server: exch2016.mr2l.local

susank@missourilife.org
Remote Server returned '550 5.1.10 RESOLVER.ADR.RecipientNotFound; Recipient not found by SMTP address lookup'

Original message headers:

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From: "Wagner, Ray" <Ray.Wagner@ago.mo.gov>
To: "susank@missourilife.org" <susank@missourilife.org>
Subject: Fitz-James v. Bailey - MO Supreme Court Appellant's Brief.pdf
Thread-Topic: Fitz-James v. Bailey - MO Supreme Court Appellant's Brief.pdf
Thread-Index: AQHZsbaFLQVHWsydKkmaeukDIdzzsA==
Date: Sat, 8 Jul 2023 16:09:06 +0000
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Return-Path: Ray.Wagner@ago.mo.gov

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To: Lanahan, Maria[Maria.Lanahan@ago.mo.gov]
Cc: Divine, Josh[Josh.Divine@ago.mo.gov]; Freedlund, Samuel[Samuel.Freedlund@ago.mo.gov]
From: James Studnicki[jstudnicki@lozierinstitute.org]
Sent: Fri 9/15/2023 4:23:09 PM (UTC-05:00)
Subject: Re: Missouri Attorney General - affidavit possibility

Sorry for my slow response , Maria. You may call me on the 22nd. at 3:00 PM , Eastern. My mobile is 813 495 9079. I cannot make any promises as to my availability at this point , but I am happy to talk to you. Best, Jim.

Sent from my iPhone

On Sep 15, 2023, at 4:41 PM, Lanahan, Maria <Maria.Lanahan@ago.mo.gov> wrote:

Hi Dr. Studnicki,
Just wanted to reflag.Are you free for a call on Sept. 22 from 10am-1:30pm or 3-4:30pm CST?If not, what's the soonest after that you'd be able to jump on a call?
Thanks,
Maria
Maria Lanahan | Deputy Solicitor General
Missouri Attorney General's Office
815 Olive St., Suite 200
St. Louis, MO 63101
(314) 340-4978
Maria.Lanahan@ago.mo.gov

From: Lanahan, Maria
Sent: Thursday, September 14, 2023 1:46 PM
To: 'James Studnicki' <jstudnicki@lozierinstitute.org>
Cc: Divine, Josh <Josh.Divine@ago.mo.gov>; Freedlund, Samuel <Samuel.Freedlund@ago.mo.gov>
Subject: RE: Missouri Attorney General - affidavit possibility
Hi Dr. Studnicki,
We would be interested in having a call with you on September 22 or as soon thereafter as you would be free.Are you free on Sept. 22 from 10am-1:30pm or 3-4:30pm CST?
All the best,
Maria
Maria Lanahan | Deputy Solicitor General
Missouri Attorney General's Office
815 Olive St., Suite 200
St. Louis, MO 63101
(314) 340-4978
Maria.Lanahan@ago.mo.gov

From: James Studnicki <jstudnicki@lozierinstitute.org>
Sent: Thursday, September 14, 2023 9:38 AM
To: Lanahan, Maria <Maria.Lanahan@ago.mo.gov>
Subject: Re: Missouri Attorney General - affidavit possibility
Maria: I have current commitments thru the end of the month— and cannot undertake additional work before then. If you would like to schedule a call sometime after Sept. 21, I would be happy to talk with you. Best, Jim.

Sent from my iPhone
On Sep 14, 2023, at 10:03 AM, Lanahan, Maria <Maria.Lanahan@ago.mo.gov> wrote:

Hi Dr. Studnicki,
I wanted to follow up on this email and see if you might be able to provide affidavit testimony about the harms of mifepristone for a case of ours.See below for potential affidavit topics.

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All the best,
Maria

Maria Lanahan | Deputy Solicitor General
Missouri Attorney General's Office
815 Olive St., Suite 200
St. Louis, MO 63101
(314) 340-4978
Maria.Lanahan@ago.mo.gov

From: Lanahan, Maria
Sent: Tuesday, September 12, 2023 8:34 AM
To: 'jstudnicki@lozierinstitute.org' <jstudnicki@lozierinstitute.org>
Subject: FW: Missouri Attorney General - affidavit possibility

Hi Dr. Studnicki

I'm one of the Deputy Solicitors at the Missouri Attorney General's Office.I understand that you have previously provided affidavits in abortion-type cases, and I was wondering if you might be able to write an affidavit on any of the following themes about mifepristone:

- ∀Harms from FDA approval of mifepristone
  - oIncreased harm of mifepristone compared to surgical abortions
- ∀Harms from removing REMS safety protocols
  - oAllowing these pills up to 70 days (previously 49)
  - oRemoving in-person dispensing requirement (previously 3 in-person visits)
  - oRemoving requirement that a physician dispense the pill
  - oRemoving requirement to report adverse events
- ∀Dangers overall
- ∀Increased risk that individuals must present at an ER.
- ∀Are women told by staff to tell physicians they're experiencing a miscarriage?
- ∀Increased use of drug-induced abortions (vs surgical abortions) over time, especially after prices fell, because of approval of a generic version of the drug

We would appreciate any help you are able to provide.Also, happy to do a call if you would prefer.Just let me know some times that would work for you.

All the best,
Maria

Maria Lanahan | Deputy Solicitor General
Missouri Attorney General's Office
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(314) 340-4978
Maria.Lanahan@ago.mo.gov

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To: Olohan, Mary Margaret[MaryMargaret.Olohan@heritage.org]; Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: Popp, John[John.Popp@heritage.org]
Sent: Mon 8/28/2023 3:16:54 PM (UTC-05:00)
Subject: Re: TDS Interview with Missouri AG Andrew Bailey

https://riverside.fm/studio/tds_082823_int_mo-ag-andrew-bailey?t=e942e4afff5405a267b5

John Popp
Audio
The
214
Washington,

202-608-6235
heritage.org

From: Popp, John
Sent: Monday, August 28, 2023 11:51 AM
To: Olohan, Mary Margaret <MaryMargaret.Olohan@heritage.org>; Madeline.sieren@ago.mo.gov <Madeline.sieren@ago.mo.gov>
Subject: TDS Interview with Missouri AG Andrew Bailey
When: Monday, August 28, 2023 4:00 PM-4:30 PM.
Where: Microsoft Teams Meeting
https://riverside.fm/studio/tds_082823_int_mo-ag-andrew-bailey?t=undefined

This is an *audio and video*today (Monday) at 4 pm/et (3 pm/ct).

Please use the above link for the interview.
What you need to know before the interview:

- We record interviews via the podcast platform Riverside.fm.
- You need a laptop or desktop computer with a built in or external (preferred) microphone.
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***** If we are experiencing technical difficulties connecting with you for the interview, we will record via phone. Please provide a phone number where we can reach you for back-up. *****
If you have questions, please call me at 703-307-5884.
Thanks!
John Popp

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Passcode: PpBinb
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Phone Conference ID: 875 338 235#
Find a local number | Reset PIN

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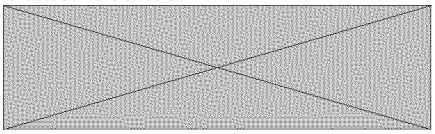
To: pjaxt@nd.gov[pjaxt@nd.gov]; Betsy.DeNardi@atg.in.gov[Betsy.DeNardi@atg.in.gov]; chris.robison@alaska.gov[chris.robison@alaska.gov]; Nicholas.Bronni@Arkansasag.Gov[Nicholas.Bronni@Arkansasag.Gov]; james.percival@myfloridalegal.com[james.percival@myfloridalegal.com]; Josh.Turner@ag.idaho.gov[Josh.Turner@ag.idaho.gov]; eric.wessan@ag.iowa.gov[eric.wessan@ag.iowa.gov]; justin.matheny@ago.ms.gov[justin.matheny@ago.ms.gov]; Divine, Josh[Josh.Divine@ago.mo.gov]; Lanahan, Maria[Maria.Lanahan@ago.mo.gov]; christian.corrigan@mt.gov[christian.corrigan@mt.gov]; brandon.f.chase@doj.nh.gov[brandon.f.chase@doj.nh.gov]; josephspate@scag.gov[josephspate@scag.gov]; chrisbates@agutah.gov[chrisbates@agutah.gov]; kgallagher@oag.state.va.us[kgallagher@oag.state.va.us]; ryan.schelhaas@wyo.gov[ryan.schelhaas@wyo.gov]
From: Matt Crapo[mcrapo@irli.org]
Sent: Mon 10/16/2023 12:37:15 PM (UTC-05:00)
Subject: Seeking consent to file an amicus brief in Indiana v. Mayorkas, No. 1:23-cv-00106 (D. N.D.)

I am writing to ask whether Plaintiffsconsent to the Immigration Law Reform Institute (IRLI) filing an amicus brief in support of(and in opposition to dismissal) in the above-referenced case.

IRLI's amicus brief will be short (underpages) and will likely addressand Defendants'processes.

If you could please let me know whether the Plaintiff Statesto the filing of the amicus brief at your earliest convenience, I would appreciate it.

Under local rules, our amicus brief is due by tomorrow.

Matt Crapo
Senior Counsel

25 Massachusetts Ave. NW, Suite 335
Washington, DC 20001
Tel: (202) 232-5590
Fax: (202) 464-3590
www.irli.org
To learn more about IRLI's national network of attorneys, clickhere.

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To: Anthony Rothert[ARothert@aclu-mo.org]; Tori Schafer[tschafer@aclu-mo.org]; Jon Schmid[jschmid@aclu-mo.org]; Leslie Korte[Leslie.Korte@auditor.mo.gov]; Rob Tillman[rob.tillman@auditor.mo.gov]; Lewis, Jason[Jason.Lewis@ago.mo.gov]; tbelz[tbelz@olblaw.com]
From: Mary Catherine Martin[mcmartin@thomasmoresociety.org]
Sent: Mon 10/2/2023 10:00:24 AM (UTC-05:00)
Subject: Consent requested: filing of Joint Stip in Cole County for Record on Appeal

Counsel,

Because our case was consolidated with another in Circuit Court, our Joint Stipulation and Exhibits, which are referenced in the Judgment, are not in the Cole County file for our case number.Since our case is still open, the Attorney General's office has agreed to go ahead and file the Stipulation and Exhibits in Cole County today, in order for us easily to include them in the Record on Appeal.

In case the timing of this filing raises any concerns for the Clerk, could you please send a reply e-mail indicating your consent to this previously stipulated filing?

Please contact me with any questions.

Many thanks,

Mary Catherine Martin
Senior Counsel
Thomas More Society
314/825-5725

Mary

Special

Thomas More SOCIETY

309 | Chicago,IL60606 | (314)-4015

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DECLARATION OF JAMES STUDNICKI, SC.D., MPH, MBA

1. I, James Studnicki, state under oath that I am of at least 18 years of age, and that I am competent to testify as follows.

BACKGROUND AND QUALIFICATIONS

2. I am Vice President and Director of Data Analytics for the Charlotte Lozier Institute. From 2006 to 2016, I was the Irwin Belk Endowed Chair in Health Services Research, and Professor of Public Health Sciences, at the University of North Carolina, Charlotte, College of Health and Human Services. I was the first Director of the Master of Health Science (M.H.S.) Program in Health Finance and Management at the Johns Hopkins School of Hygiene and Public Health, where I served as a faculty member for 13 years. Subsequently, I was Chairman, Department of Health Policy and Management, and Director, Center for Health Outcomes Research, at the University of South Florida Health Sciences Center. I have also been a senior hospital executive and President of a technology company, which was started in a University incubator.

3. My research has focused on health services research, in particular the use of large-scale databases, and associated information technology, in analyzing outcomes at the patient, hospital, and community levels. I have been a frequent contributor to the health services research and public health systems and services research literatures. My publications have appeared in some of the most influential journals in public health, medical care and information technology/sciences. I have been a winner of the Article of the Year award given annually by the Public Health Systems Research (PHSR) interest group of Academy Health.

4. My work has contributed to many important research domains: quality comparisons between U.S.-trained and foreign-trained physicians; the regionalization of complex surgical procedures; data pattern recognition strategies; sub-population analytics; racial disparity in effects

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of abortion; community health status and priority determination; hospital admissions from the emergency room; career phase, workload composition, and outcomes for general surgeons; community networks, websites, and report cards; complex adaptive systems and surgery; data warehousing in bioterrorism surveillance; rating the health status of American communities; malpractice claims against hospital defendants; intensive care, survival, and treatment of terminally ill cancer patients; excessive clinical laboratory testing; state high-risk health insurance pools; cybernetic systems and inappropriate hospital utilization; multi-hospital systems; correlation, scaling, and sensitivity of medical audits; and state Certification of Need programs.

5. I hold both Doctor of Science (Sc.D.) and Master of Public Health (M.P.H.) degrees from Johns Hopkins University and a Master of Business Administration (M.B.A.) degree from the George Washington University. A copy of my curriculum vitae is attached as Exhibit "A".

EMERGENCY ROOM UTILIZATION FOLLOWING MIFEPRISTONE ABORTION AND SURGICAL ABORTIONS

6. In 2021, I published a peer-reviewed study with seven other coauthors in *Health Services Research and Managerial Epidemiology* entitled "A Longitudinal Cohort Study of Emergency Room Utilization Following Mifepristone Chemical and Surgical Abortions, 1999–2015."

7. In this research, we completed the first (and, to our best knowledge, only) population-based longitudinal cohort study of post abortion emergency room utilization following chemical mifepristone abortions and surgical abortions.

8. A previous study "categorized whether visits were abortion related based only on information taken from the ER visit record. There was no independent confirmation from a different source that an abortion had occurred." *Id.* at 2.

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9. The 2021 study, in contrast, relied on cases in states where Medicaid paid for abortion, so there was a confirmed "code payment for mifepristone abortion, thus eliminating the need for the treating physician to recognize a complication from a chemical abortion." *Id.* at 7. The study looked at "every emergency room visit occurring within thirty days" of the abortion and "disaggregated ER visits into 3 categories: all-cause, abortion-related codes (ICD-9, 630-639) and spontaneous abortion code (ICD-9, 634)." *Id.* at 3.

10. We identified 423,000 confirmed induced abortions and 121,283 subsequent ER visits that occurred within 30 days of the procedure, in the years 1999-2015 to Medicaid-eligible women over 13 years of age with at least one pregnancy outcome, in the 17 states that provide public funding for abortion.

11. The study made two important findings. First, "Regression analysis definitively supports the hypothesis that chemical abortion is associated with more frequent emergency room visits of all kinds." *Id.* at 6. We concluded that the actual number and per-abortion rate of ER visits following any induced abortion were increasing, but chemical abortion was consistently associated with more post abortion ER visit morbidity than surgical abortion. While surgical abortions led to ER visits 4% to 5% of the time, the percentage for chemical abortions leading to ER visits was 8% to 9% between 2002 and 2013, increasing to a peak of 14.6% from 2014 to 2015. Thus, "an ER visit is significantly more likely to occur following a prior chemical abortion than following a prior surgical abortion." *Id.* at 5.

12. This increased ER rate may be because "adverse events following a mifepristone abortion are more likely to be experienced at home in the absence of a physician," *id.* at 2, and because chemical abortions are sometimes provided by clinicians who lack surgical knowledge "to handle complications after chemical abortions," *id.* at 7.

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13. Second, "Treatment in the ER miscoded as for spontaneous abortion is consistently and progressively more likely following a chemical abortion than following a surgical abortion." *Id.* at 4. "Spontaneous abortion" is another term for natural miscarriage. Because the study sample included women who were already confirmed by medical records to have received an abortion within the previous 30 days, the study was able to ascertain whether follow-up emergency room care was correctly coded as a complication from abortion or incorrectly coded as a complication from a miscarriage. The study determined, "As a percent of abortion-related visits (ICD-9, 630-639), visits miscoded for spontaneous abortion treatments (ICD-9, 634) following a confirmed mifepristone abortion averaged approximately 30% between 2003 and 2012 and increased between 2013 and 2015, reaching 60.9%." *Id.* at 4. This was "2 to 4 times as likely" as miscoding after a surgical abortion. *Id.* at 3.

14. This may help explain why "[a]bortion studies in the United States consistently report lower postabortion complication rates than are documented in the international scientific literature." *Id.* at 7. Due to miscoding, up to 60.9% of abortion complications from chemical abortions "would have been invisible to previous researchers, resulting in a large underestimation of actual mifepristone abortion complications." *Id.* "There are likely multiple reasons for this discrepancy, but among them are the miscoding of abortion-related complications by the provider and the nondisclosure of prior abortion history by the patient." *Id.* Also, "some abortion advocates encourage women to withhold information if seeking treatment for an adverse event." *Id.*

15. "These findings are especially consequential because they are derived directly from all paid medical claims records, unlike most other studies of abortion complications which involve voluntary survey reporting and/or a more limited query of a select set of treatment codes." *Id.*

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16. The 2021 study made several other findings:

a. Chemical abortions as a percentage of total abortions among the study population grew from 4.4% in 2002 to 34.1% in 2015;

b. For the entire 17-year study period (1999-2015), all three types of emergency room visits are significantly more likely to occur within 30 days of the chemical abortion procedure. Any type of visit (*i.e.* all-cause ER visit) is 1.22 times more likely to occur following chemical rather than surgical abortion. An abortion-related ER visit is 1.53 times as likely; and, a miscoded spontaneous abortion ER visit is 1.88 times more likely following a chemical abortion.

c. Between 2002 and 2015, abortion related ER visits as a percentage of total ER visits was consistently about twice as high for chemical abortions as surgical abortions, reaching 14.6% versus 6.2% in 2015.

d. ER visits miscoded as spontaneous abortion as a percentage of all ER visits, from 2005 to 2015, went from 2 to nearly 4 times as likely following a chemical rather than a surgical abortion, reaching 8.9% of total visits versus 2.4% in 2015.

e. Visits miscoded as spontaneous abortion as a percentage of abortion-related visits following chemical abortion reached 60.9% in 2015, compared to 39% following surgical abortion.

f. The surgical abortion rate of ER visits per 1,000 abortions increased from 5.3 in 2002 to 22.0 in 2015, an increase of 315%. The chemical abortion rate of ER visits per 1,000 abortions increased from 8.5 to 51.7 during the same time period, an increase of 507%.

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g. By the final observation year, 2015, more than 35% of women having any type of induced abortion were having an ER visit for some reason within 30 days of the procedure.

HIGHER HOSPITALIZATION RATES FROM MISCODING

17. In 2022, I published a peer-review study with eight other coauthors, also in *Health Services Research and Managerial Epidemiology*, entitled "A Post Hoc Exploratory Analysis: Induced Abortion Complications Mistaken for Miscarriage in the Emergency Room are a Risk Factor for Hospitalization." This paper analyzed the same data as the 2021 paper.

18. Out of 423,000 confirmed induced abortions, 121,283 abortion recipients, or 28.7%, had an ER visit within 30 days.

19. A subset of those patients were admitted to the hospital, and patients who had received chemical abortions were admitted at higher rates. "Chemical abortions are significantly more likely (OR 1.80, CL 1.38-2.35) than surgical abortions to result in an RPOC [retained products of conception] admission and chemical abortions miscoded in the ER are more likely (OR 2.18, CL 1.65-2.88) than abortions without miscoding to have a subsequent RPOC admission." *Id.* at 2.

20. In particular, chemical abortions concealed by miscoding were 2.18 times more likely to result in a subsequent hospital admission for the removal of retained products of conception (RPOC) than chemical abortions without miscoding. Chemical abortion patients also "did exhibit a striking pattern of multiple admissions (3.2 per patient) for those women who were subsequently admitted compared to 1.8 admissions per woman whose abortion was not miscoded." *Id.*

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21. The paper concluded, "It is important for emergency room personnel to obtain an accurate history when faced with an incomplete induced abortion," and "A patient's concealment of a chemical abortion, and/or the ER staffs' failure to identify the failed abortion attempt, are risk factors for multiple hospital admissions and delayed provision of necessary surgical treatment, compared with care for those whose abortion is not miscoded." *Id.* at 3.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 9/27/23.

James Studnicki

James Studnicki

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BIBLIOGRAPHY

Studnicki J, Harrison DJ, Longbons T, *et al.*, 2021. "A Longitudinal Cohort Study of Emergency Room Utilization Following Mifepristone Chemical and Surgical Abortions, 1999–2015." *Health Services Research and Managerial Epidemiology*. 2021;8. doi:10.1177/23333928211053965

Studnicki J, Longbons T, Harrison DJ, *et al.*, 2022. "A Post Hoc Exploratory Analysis: Induced Abortion Complications Mistaken for Miscarriage in the Emergency Room are a Risk Factor for Hospitalization." *Health Services Research and Managerial Epidemiology*. 2022;9. doi:10.1177/23333928221103107

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To: Divine, Josh[Josh.Divine@ago.mo.gov]
Cc: Lanahan, Maria[Maria.Lanahan@ago.mo.gov]; Freedlund, Samuel[Samuel.Freedlund@ago.mo.gov]
From: James Studnicki[jstudnicki@lozierinstitute.org]
Sent: Tue 9/26/2023 8:37:34 PM (UTC-05:00)
Subject: Signed
Scan2023-09-26_213052.pdf

As requested.

Sent from my iPhone

AMERICAN OVERSIGHT

To: Leslie Korte[Leslie.Korte@auditor.mo.gov]; Rob Tillman[rob.tillman@auditor.mo.gov]; Lewis, Jason[Jason.Lewis@ago.mo.gov]; tbelz[tbelz@olblaw.com]
From: Mary Catherine Martin[mcmartin@thomasmoresociety.org]
Sent: Mon 10/2/2023 11:49:40 AM (UTC-05:00)
Subject: Re: Consent requested: filing of Joint Stip in Cole County for Record on Appeal

Leslie and Rob,

Checking in about this. We are concerned about time for filing. Please let us know when you can.

MCM what is the

Get Outlook for iOS

Mary

Special

Thomas More SOCIETY

309 | Chicago,IL60606 | (314)-4015

From: Jon Schmid <jschmid@aclu-mo.org>
Sent: Monday, October 2, 2023 10:13:51 AM
To: Mary Catherine Martin <mcmartin@thomasmoresociety.org>; Anthony Rothert <arothert@aclu-mo.org>; Tori Schafer <tschafer@aclu-mo.org>; Leslie Korte <Leslie.Korte@auditor.mo.gov>; Rob Tillman <rob.tillman@auditor.mo.gov>; Lewis, Jason <Jason.Lewis@ago.mo.gov>; tbelz <tbelz@olblaw.com>
Subject: RE: Consent requested: filing of Joint Stip in Cole County for Record on Appeal

All,
Dr. Fitz-James consents.
Respectfully,
Jon

Jonathan Schmid
Pronouns: he/him
Voting Rights Fellow
American Civil Liberties Union of Missouri
906 Olive Street, Suite 1130, St. Louis, MO 63101
314.652.3114 ext. 407 | jschmid@aclu-mo.org

ACLU Missouri

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From: Mary Catherine Martin <mcmartin@thomasmoresociety.org>
Sent: Monday, October 2, 2023 10:00 AM
To: Anthony Rothert <arothert@aclu-mo.org>; Tori Schafer <tschafer@aclu-mo.org>; Jon Schmid <jschmid@aclu-mo.org>; Leslie Korte <Leslie.Korte@auditor.mo.gov>; Rob Tillman <rob.tillman@auditor.mo.gov>; Lewis, Jason <Jason.Lewis@ago.mo.gov>; tbelz <tbelz@olblaw.com>
Subject: Consent requested: filing of Joint Stip in Cole County for Record on Appeal

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[EXTERNAL EMAIL]

Counsel,
Because our case was consolidated with another in Circuit Court, our Joint Stipulation and Exhibits, which are referenced in the Judgment, are not in the Cole County file for our case number.Since our case is still open, the Attorney General's office has agreed to go ahead and file the Stipulation and Exhibits in Cole County today, in order for us easily to include them in the Record on Appeal.
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Please contact me with any questions.
Many thanks,
Mary Catherine Martin
Senior Counsel
Thomas More Society
314/825-5725

Mary

Special

Thomas More SOCIETY

309 | Chicago,IL60606 | (314)
-4015

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To: Sieren, Madeline[Madeline.Sieren@ago.mo.gov]
From: Lucas, Fred[Fred.Lucas@heritage.org]
Sent: Thur 10/26/2023 2:00:17 PM (UTC-05:00)
Subject: Inquiry on Americore Holdings LLC

Hello.

I am writing a story about states where Americore Holdings LLC operated. The House Oversight Committee last week released information about the $200,000 check paid to Joe Biden as a "loan repayment" the same day Americore paid James Biden that amount.

My question is whether the office of Attorney General Baily would consider investigating the Americore connection with the Bidens either a criminal or civil front?

I discussed this with one attorney from a watchdog group, who believes that states could have jurisdiction on this regarding potentially unpaid state taxes as well as possible money laundering. And the U.S. Justice Department won't likely investigate the matter.

I would appreciate if you had any thoughts for the record or on background.

I hoped to file the story by COB tomorrow.

Thank you.

Fred Lucas
The Daily Signal
(202) 875-9090
Twitter: @FredLucasWH
Email: Fred.Lucas@DailySignal.com

Fred Lucas
Chief News Correspondent and Manager, Investigative Reporting Project, The Daily Signal
The
The
214
Washington,
202-608-6146
heritage.org

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To: susank@missourilife.org[susank@missourilife.org]
Cc: Wagner, Ray[Ray.Wagner@ago.mo.gov]; Bagby, Karen[Karen.Bagby@ago.mo.gov]
From: Wagner, Ray[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=F577E20AF58F4CE4AFCDDD101E8A3745-WAGNER, RAY]
Sent: Mon 11/27/2023 5:09:37 AM (UTC-06:00)
Subject: Follow up meeting

Good morning Susan. I thought I would touch base with you to see if the meeting has been set up with our office. Diana was going to reach to you. I understand we had some scheduling difficulties. I am happy to give you a call to see what we can do to smooth through any schedules challenges.

Thanks!

Ray

Raymond T. Wagner, Jr.
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-0531
(573) 645-9875 (cell)
Ray.Wagner@ago.mo.gov

Sent from my iPhone
This email message, including the attachments, is from the Missouri Attorney General's Office. It is for the sole use of the intended recipient(s) and may contain confidential and privileged information, including that covered by § 32.057, RSMo. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message. Thank you.

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To: Wagner, Ray
From: postmaster@missourilife.org[postmaster@missourilife.org]
Sent: Mon 11/27/2023 6:38:03 AM (UTC-06:00)
Subject: Undeliverable: Follow up meeting
Follow up meeting

Delivery has failed to these recipients or groups:

susank@missourilife.org (susank@missourilife.org)
The email address you entered couldn't be found. Please check the recipient's email address and try to resend the message. If the problem continues, please contact your email admin.

Diagnostic information for administrators:

Generating server: exch2016.mr2l.local

susank@missourilife.org
Remote Server returned '550 5.1.10 RESOLVER.ADR.RecipientNotFound; Recipient not found by SMTP address lookup'

Original message headers:

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 2023 06:38:03 -0600
Received: from dispatch1-us1.ppe-hosted.com (67.231.154.164) by
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 15.1.2507.35 via Frontend Transport; Mon, 27 Nov 2023 06:38:03 -0600
Authentication-Results: ppe-hosted.com; spf=pass smtp.mailfrom=ago.mo.gov;
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X-Virus-Scanned: Proofpoint Essentials engine
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 6089JFBf4jJ8Byar5PN8mfnZB9P0n49n3j7H4hY0FtsHPqVDmHg3471cRZf7v1Hm6obQ EQ==
From: "Wagner, Ray" <Ray.Wagner@ago.mo.gov>
To: "susank@missourilife.org" <susank@missourilife.org>
CC: "Wagner, Ray" <Ray.Wagner@ago.mo.gov>, "Bagby, Karen"
         <Karen.Bagby@ago.mo.gov>
Subject: Follow up meeting
Thread-Topic: Follow up meeting
Thread-Index: AQHaISI15Iqpi45LOEG/uKsW+B/N0g==
Date: Mon, 27 Nov 2023 11:09:37 +0000
Message-ID: <50DB0B25-84A5-4635-BB8C-0EC30631D9C2@ago.mo.gov>
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Content-Language: en-US
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X-MS-TNEF-Correlator:
x-ms-exchange-messagesentrepresentingtype: 1
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Content-ID: <D25F881822F328409953C595B932908F@ago.mo.gov>
Content-Transfer-Encoding: base64
MIME-Version: 1.0
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 definitions=2023-11-27_09,2023-11-27_01,2023-05-22_02
X-MDID: 1701088681-ollG46TCEcQU
X-MDID-I: us1;at1;1701088681;ollG46TCEcQU;<Ray.Wagner@ago.mo.gov>;cc40d563efdf7c9c27ea5eb81c760bbc
Return-Path: Ray.Wagner@ago.mo.gov

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SC100132

IN THE SUPREME COURT OF MISSOURI

State of Missouri ex rel. Dr. Anna Fitz-James,

Plaintiff-Respondent,

v.

Andrew Bailey, Missouri Attorney General, *et al.*,

Defendants-Appellants.

From the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Circuit Judge

BRIEF OF APPELLANT ATTORNEY GENERAL ANDREW BAILEY

ANDREW BAILEY
Attorney General

Jason K. Lewis, #66725MO
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JURISDICTIONAL STATEMENT

On May 4, 2023, Respondent Dr. Anna Fitz-James (Relator below) filed her Verified Petition for Writ of Mandamus and Declaratory Judgment. Counts I and II of the Petition prayed for a writ of mandamus or declaratory judgment against the Attorney General, the State Auditor, and the Secretary of State.[1] Count III of the Petition asserted a direct challenge to the constitutionality of seven different elections statutes related to the ballot initiative process under Article III, §§ 49 and 50 of the Missouri Constitution: §§ 116.040, 116.050, 116.175, 116.180, 116.190, 116.332, and 116.334. Specifically, Respondent prayed for the Court to conclude that "any or all" of the aforementioned statutes are unconstitutional "in whole or in part . . . on their face or as applied" to Respondent.

This Court has exclusive appellate jurisdiction over this case because, under Article V, § 3 of the Missouri Constitution, this Court has "exclusive appellate jurisdiction in all cases involving the validity . . . of a statute . . . of this state." *See Alderson v. State*, 273 S.W.3d 533, 535 (Mo. banc 2009). That appellate jurisdiction also extends to situations where "any party properly raises and preserves in the trial court a real and substantial (as opposed to merely colorable) claim that a statute is unconstitutional[.]"*Boeving v. Kander*, 496 S.W.3d 498, 503 (Mo. banc 2016)

[1] The Circuit Court dismissed the Secretary of State from this lawsuit at the beginning of trial.

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(further noting that "this Court has exclusive appellate jurisdiction over any appeal in which that claim may need to be resolved.").

On June 20, 2023, the Circuit Court issued a Judgment against the Attorney General on Count I, and denied Respondent's claims in Counts II and III. The Attorney General has appealed the portion of the Circuit Court's June 20, 2023 judgment adverse to the Attorney General that issued a writ of mandamus or declaratory relief, against the Attorney General. As represented in Respondent's Petition and the Circuit Court's Judgment, the Attorney General's appeal inherently involves questions surrounding the obligations imposed on executive branch officials by various elections statutes and the relationship between those obligations and different provisions of the Missouri Constitution.

Respondent's Petition also directly challenged the validity of seven different duly enacted statutes under Article III, §§ 49 and 50 (both on the face of each statute and as applied), and this issue was repeatedly addressed by both parties throughout the litigation and ruled on by the Circuit Court. *See Collector of Revenue of the City of St. Louis v. Parcels of Land Encumbered with Delinquent Tax Liens Serial Numbers 1-047 and 1-048, et al.*, 517 S.W.2d 49, 55 (Mo. banc 1974) (stating that the Supreme Court "reviews only questions presented to the trial court."). The Attorney General's appeal of the Circuit Court's Judgment on Respondent's Petition may implicate the scope of Article III, § 49 and Article III, § 50 of the Missouri

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Constitution, as each relates to the validity of the Missouri election system under the statutes that Respondent sought to declare as unconstitutional in Count III of the Petition: §§ 116.040, 116.050, 116.175, 116.180, 116.190, 116.332, and 116.334. And Respondent has cross-appeal rights over Count III.

Accordingly, appellate jurisdiction is proper in this Court because this case involves "the validity . . . of a statute . . . of this state," Mo. Const. art. V, § 3, or at the very least it involves a properly-preserved and colorable constitutional claim that may need to be resolved on appeal, *see Boeving*, 496 S.W.3d at 503.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises the question of when the Attorney General can properly exercise the authority given to his office under Section 116.175 to "return to the [State Auditor] for revision" a fiscal note and fiscal note summary prepared for an initiative petition that does not contain the "legal content" required for those materials. § 116.175.4, .5, RSMo. The answer to that question is clear, and it comes from the very statute granting the Attorney General the authority to review the State Auditor's submissions: he can return to the Auditor for revision a fiscal note and summary that is "argumentative" or is "likely to create prejudice for or against the proposed measure." § 116.175.3, RSMo. That is exactly what the Attorney General did here. For several reasons, the Circuit Court erred in slashing the Attorney General's authority and relegating his office to merely rubber stamping the State Auditor's submissions.

First, the plain meaning of the Attorney General's and State Auditor's roles under Section 116.175 are clear. The Attorney General has the responsibility to review the Auditor's proposed fiscal note and fiscal note summary[2] and determine

[2] As discussed in the Statement of Facts, Respondent proposed 11 initiative petitions. For purposes of the issues raised in this appeal, there is no material difference between those ballot measures or between the fiscal notes and fiscal note summaries prepared for them. For that reason and in order to simplify the language in this brief, Appellant will refer to Respondent's initiative petitions and the State Auditor's fiscal note and fiscal note summaries in the singular. Appellant will differentiate between the measures when necessary.

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whether the fiscal note and fiscal note summary each satisfy the requirements of the statute. The statute commands that State Auditor shall revise his submissions if the Attorney General returns them to him. § 116.175.5, RSMo. Here, the State Auditor refused to do so. He could, and should, have done more, as Section 116.175 commands. In fact, the evidence demonstrates that for many of Respondent's proposed ballot measures, the State Auditor *did* receive additional comments from government officials that should have been incorporated into a revised fiscal note and fiscal note summary.

Second, the Attorney General correctly rejected the State Auditor's fiscal note and fiscal note summary. The only plausible interpretation of "legal content," based on that phrase's plain meaning and surrounding context in Section 116.175, is that a fiscal note or fiscal note summary that is obviously deficient on its face does *not* contain the required legal content. This is a narrow reading of "legal content" that does not justify the Circuit Court's holding that the Attorney General engaged in an unwarranted exercise of authority.

In his Opinion Letters to the State Auditor, the Attorney General described the many reasons why the State Auditor's materials lacked the required legal content. The State Auditor's fiscal note contained wildly inadequate responses based on divergent and nonsensical methodologies from local governmental entities that, on their face, cannot survive even the most forgiving review. The fiscal note

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summary, too, lacks the required legal content because it conveys the misleading—and therefore facially argumentative and prejudicial—message that it is a reliable estimate of the cost of the measure. The fiscal note summary also fails to adequately summarize all submissions the State Auditor received from "others with knowledge pertinent to the cost of the proposal." § 116.175.1, RSMo. Voters will be misled when reviewing the fiscal note and fiscal note summary, and the information contained in them will create prejudice in favor of the measure.

Third, the Circuit Court erred in entering either mandamus or declaratory relief against the Attorney General. Mandamus relief ordering the Attorney General to approve the State Auditor's materials was inappropriate because mandamus is a last-resort remedy, and there were other steps that needed to take place before a writ of mandamus could be sought. Section 116.175 allows the Attorney General's review of a fiscal note and fiscal note summary to be more than a rubber-stamp review confined to the number of words in the materials; for that reason, the Attorney General's duty is not ministerial and not one that can be enforced through mandamus. And Respondent did not demonstrate that she had a *right* to inject herself at this early stage in the ballot measure review process, which should be an exchange of materials between two statewide elected officials. Her challenge is premature.

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For these reasons, this Court should reverse the Circuit Court's judgment, and remand it to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary.

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STATEMENT OF FACTS

I. The Proposed Initiative Petitions.

On March 8, 2023, Respondent Dr. Anna Fitz-James submitted eleven initiative petitions that would amend the Missouri Constitution to the Secretary of State. (D28, at ¶2; D29 (Jt. Stip. Ex. A)). The Secretary of State assigned the following initiative numbers to the petitions: 2024-077, 2024-078, 2024-079, 2024-080, 2024-081, 2024-082, 2024-083, 2024-084, 2024-085, 2024-086, and 2024-087. (D28, ¶4). The Secretary of State sent a copy of each initiative petition's sample sheet to the Attorney General and the State Auditor. (D28, ¶6). Additionally, the text of each initiative petition was posted to the Secretary of State's website. (D28, ¶5).

The Attorney General reviewed and approved the sample sheets for each of the eleven initiative petitions as to form under Section 116.050. (D28, ¶7). Following that approval, the Secretary of State also approved each of the initiative petitions as to form. (D29, ¶8).

On March 29, 2023, the Auditor sent a proposed fiscal note and fiscal note summary for each of the eleven initiative petitions to the Attorney General. (D28, ¶9). On April 10, 2023, the Attorney General responded to each of the fiscal notes and fiscal note summaries from the Auditor with an opinion letter, stating the reasons that the proposed fiscal notes and fiscal note summaries were legally deficient under Section 116.175. (D28, ¶11; D34-D35 (Jt. Stip. Ex. C)).

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II. The Attorney General's Opinion Letters Sent to the Auditor in Response to the Fiscal Note and Fiscal Note Summaries.

In the April 10, 2023 Opinion Letters from the Attorney General to the State Auditor, the Attorney General stated that he was rejecting the State Auditor's fiscal note and fiscal note summary for lacking the required legal content and returning them to the State Auditor for revision. (D34-D35 (Jt. Stip. Ex. C)). The Attorney General's Opinion Letters detailed the reasons for his rejection, as follows. (*Id.*).

First, the Attorney General wrote that the fiscal note contains inadequate and divergent submissions from local government entities. (D34 at p.2). The Attorney General stressed the statistically insignificant small sample size of responses solicited by the State Auditor, noting "this ballot measure will affect the present and future population of Missouri. (*Id.*) Yet, while Missouri has 114 counties and one independent city, in addition to over 1,000 other cities and villages . . . only three counties and two cities responded." (*Id.*).

The Opinion Letter noted that only one local governmental entity, Greene County, made an effort to submit a reliable methodology for calculating the fiscal impact. (*Id.*) "Greene County[] understood that the measure would have the obvious effect of reducing the population of [its] citizens," and estimated that 135 future citizens would be lost in that county annually due to legalizing abortion to Missouri. It estimated nearly $51,000 in lost county revenue annually. (*Id.*). The Attorney

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General emphasized again that Greene County "was the only entity to recognize what is facially apparent from this measure." (*Id.*).

The Greene County response stated that the "substantial economic fiscal reality of abortion relating to unborn lives cannot be denied or omitted from a fiscal note to inform voters of the consequences." (*Id.* at p.3). The Attorney General reviewed the submission and informed the State Auditor that it must have "recognized that this was a reasonable assumption" and that the "fiscal note summary reflects the financial impact to Greene County." (*Id.*). The Attorney General continued by noting that, however, that the State Auditor "did not apply that same reasonable assumption when assessing the submissions from the few other entities who responded." (*Id.*). Additionally, the Attorney General wrote that the Greene County methodology should be applied to the remainder of the populous of Missouri, because it is "unreasonable for those entities to conclude that the measure will have no estimated fiscal impact[.]" (*Id.*).

Second, the Attorney General also stated the fiscal note contained inadequate submissions concerning the impact to state government operations. (*Id.*). Citing submissions submitted to the State Auditor's office by a few entities, the Attorney General wrote that the proposed initiative petitions could jeopardize federal funding for Missouri Medicaid. (*Id.* at pp.3-4). He compared Missouri's situation to another other state who recently suffered similar losses when changes were made to its

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abortion policies. (*Id.* at p.4). The Attorney General stated those submissions should not be accepted, because the potential value of the loss was not reflected in the submissions from the varying state government entities. (*Id.*).

Third, the Attorney General stated that the fiscal note summary was also legally deficient for two principal reasons. (*Id.* at pp.4-5). The first reason was that the fiscal note summary "conveys the misleading message that it is an accurate representation of the true cost to local and state governmental operations." (*Id.* at p.4). The Attorney General wrote that this was because the "only numerical figure mentioned in the fiscal note summary is . . . a sliver of the maximum (or even likely) potential financial impact" and that the "average, reasonable voter reading this summary will not know the small sample of entities" that the State Auditor had solicited for a submission. (*Id.*).

The second reason was that the fiscal note summary fails "to adequately summarize the submissions [the State Auditor's] office received." (*Id.* at p.5). The Attorney General wrote that "the fiscal note summary merely states that 'opponents estimate a potentially significant loss to state revenues.'" (*Id.*). He stated that the State Auditor "received submissions indicating that the 'potentially significant loss' could be nearly $12.5 billion dollars" and because of that potential loss, "the fiscal note summary should reflect that number." (*Id.*).

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One submission by an interested party noted "the loss of federal Medicaid dollars, which in the proposed fiscal year 2024 budget would be a loss of nearly $12.5 billion." (*Id.*; *see also* D30 at p. 15 (Jt. Stip. Ex. B)). The submission explained several examples of how this might occur. (D30 at p.15 (Jt. Stip. Ex. B)). For example, under the initiative petitions, the entity noted that hospitals might be required to perform certain procedures that are disallowed by the federal government. (*Id.*). That same submission noted that under the initiative petitions, the cost of inpatient medical procedures and emergency department services for treating "issues before childbirth with complications" has a median charge per person of $11,997 with a maximum charge of $35,345. (*Id.* at p.16). The submission noted that these procedures may ultimately be paid by taxpayers. (*Id.*). Another submission by an interested party echoed many of those same concerns and potential loss of $12.5 billion in federal Medicaid money. (D30 at p.22 (Jt. Stip. Ex. B)).

For these reasons, the Attorney General concluded that "voters reading the fiscal note summary are likely to be misled into thinking that this ballot measure will have little fiscal impact on state and local governmental entities." (D34 at p.5). Therefore, the Attorney General's Opinion Letters continued, "the fiscal note and fiscal note summary do not satisfy the requirements of § 116.175 and therefore I am returning them to you for revision." (D34 at p.5).

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III. The State Auditor Receives Additional Fiscal Impact Estimates.

Three days before the Attorney General responded with his rejection of the State Auditor's fiscal note and fiscal note summary, on April 7, 2023, the State Auditor received additional information from the Governor's Office. (D41 (Jt. Stip. Ex. I)). The Governor's Office provided a fiscal estimate for each of the 11 initiative petitions based on "additional costs identified by other agencies in regards to regulation and enforcement." (*Id.*) In addition, the Governor's Office stated that each initiative petition appears "to conflict with federal law, which may have bearing on the fiscal responsibilities of [the Governor's Office]." (*Id.*).

Each submission from the Governor's Office noted that "there will likely be litigation leading to a fiscal impact on the Legal Expense Fund (LEF) ranging from $1,500 to unknown" due to potential conflicts with the U.S. Supreme Court's decision in "*Dobbs v. Jackson Women's Health Organization* and requirements of parental consent." (*Id.*) (Italics to case citation added). In addition, for several of the initiative petitions, the Governor's Office estimated that "failing to be in compliance with federal requirements related to Medicaid and MO HealthNet could lead to a fiscal impact of up to $600M" due to an apparent conflict "with the federal policy related to the Hyde Amendment and expending public funds on abortions." (*Id.*).

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IV. The State Auditor's Response to the Attorney General's Decision to Return the Fiscal Note and Fiscal Note Summary.

On April 21, 2023, the State Auditor sent the Attorney General a letter refusing to revise the fiscal note and fiscal note summary. The State Auditor did not revise its original materials to incorporate the new information it had received from the Governor's Office. (D28, ¶13; D38 (Jt. Stip. Ex. F)). The State Auditor stated that his office is "resubmitting the unaltered fiscal note and fiscal note summary for [the Attorney General's] review and approval as to legal content and form." (D38 (Jt. Stip. Ex. F)). The State Auditor's response letter stated that the Attorney General should "return the approved fiscal note summaries within 10 days, pursuant to § 116.175.4, RSMo." (*Id.*)

Additionally, on April 21, 2023, the State Auditor sent a separate letter stating that the fiscal note and fiscal note summary contained "estimated costs to state and local government entities and the fiscal note summary further states potential significant costs are anticipated by opponents." (D37 (Jt. Stip. Ex. E)). The State Auditor did not revise the fiscal note or the fiscal note summaries because "no new information [had] been presented that warrant[ed] inclusion in the fiscal note or fiscal note summary." (*Id.*). The State Auditor's letter made no mention of the new information it received from the Governor's Office. (*See id.*).

On May 1, 2023, the Attorney General stated that because the proposed fiscal notes and fiscal note summaries remained unchanged after the previous rejection,

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they were not approved. (D28, ¶ 14; D40 (Jt. Stip. Ex. H)). The Attorney General's Office "thus concluded that we have fulfilled our response obligations under § 116.175, RSMo for initiative petitions 2024-077 through 2024-087." (*Id.*).

V. Respondent Files Litigation.

On May 4, 2023, Respondent filed a Petition against the Attorney General, State Auditor, and Secretary of State. (D2). The Petition raised three Counts. Count I was asserted only against the Attorney General and sought mandamus or declaratory relief that ultimately sought to order the Attorney General to approve the State Auditor's initial fiscal note and fiscal note summary. Count II was asserted against the State Auditor and the Secretary of State and sought mandamus or declaratory relief requiring the State Auditor to deliver to the Secretary of State the initial fiscal note and fiscal note summary for inclusion in an official ballot title. Count III was a request for declaratory relief against all three statewide officials and sought to strike as unconstitutional "any or all" of seven statutes governing the ballot initiative process in Chapter 116: Sections 116.040, 116.050, 116.175, 116.180, 116.190, 116.332, and 116.334. (*Id.*).

The case was briefed and tried on an expedited basis, and limited discovery took place also on an expedited basis. (*See generally* D1). It was ultimately tried on a joint stipulation of facts and exhibits. (D28). At the trial on June 14, 2023, the Circuit Court granted a motion to dismiss filed by the Secretary of State, leaving

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only the Attorney General and State Auditor as remaining parties. (Tr. 17:14-20). Ultimately, no witnesses testified, and counsel for Respondent, the State Auditor, and the Attorney General presented argument. (*See generally* Tr.).

On June 20, 2023, the Circuit Court issued a Judgment against the Attorney General on Count I, and denied Respondent's claims in Counts II and III. (D44). The Circuit Court entered a writ of mandamus ordering the Attorney General to "approve the legal content and form of the fiscal note summaries submitted to the Attorney General on March 29, 2023, by the Auditor" for the eleven initiative petitions. (D44, p.28; D45). Later that same day, the Attorney General filed this notice of appeal. (D47).

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POINTS RELIED ON

I. The circuit court erred in granting mandamus or declaratory relief against the Attorney General, because the Attorney General properly returned the State Auditor's fiscal note and fiscal note summary to the State Auditor for revision, in that the State Auditor's submissions lacked the required legal content under Section 116.175, RSMo.

- Section 116.175, RSMo
- *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582 (Mo. banc 2018)
- *State v. Teer*, 275 S.W.3d 258 (Mo. banc 2009)

II. The circuit court erred in granting mandamus or declaratory relief against the Attorney General, because the State Auditor was required to revise his fiscal note and fiscal note summary after the Attorney General rejected them, in that the Attorney General's rejection was proper, Section 116.175 contains a clear command to revise the materials upon rejection, and the State Auditor received additional information that should have been incorporated.

- Section 116.175, RSMo
- *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582 (Mo. banc 2018)
- *Protect Consumers' Access to Quality Home Care Coal., LLC v. Kander*, 488 S.W.3d 665 (Mo. App. W.D. 2015)

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- *Missouri Mun. League v. Carnahan*, 303 S.W.3d 573 (Mo. App. W.D. 2010)
- *Pippens v. Ashcroft*, 606 S.W.3d 689 (Mo. App. W.D. 2020)

III. The circuit court erred in granting mandamus relief against the Attorney General, because Respondent had other remedies available and the Attorney General's duty under Section 116.175 is not ministerial, in that the Auditor had not yet revised his materials before Respondent filed suit, the Attorney General has not refused to perform a ministerial duty, and the Attorney General has discretionary authority to review and determine a fiscal note and fiscal note summary's compliance under Section 116.175.

- Section 116.175, RSMo
- *State ex rel. Swoboda v. Missouri Comm'n on Hum. Rts.*, 651 S.W.3d 800 (Mo. banc 2022)
- *State v. Teer*, 275 S.W.3d 258 (Mo. banc 2009)
- *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261 (Mo. banc 1980)
- *Barnes v. Uhlich*, 592 S.W.3d 67 (Mo. App. W.D. 2019)

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IV. The circuit court erred in granting declaratory relief against the Attorney General, because the case was not yet ripe and therefore not justiciable, in that the fiscal note and fiscal note summary review and resubmission process had not yet concluded.

- Section 116.175, RSMo
- *State ex rel. Swoboda v. Missouri Comm'n on Hum. Rts.*, 651 S.W.3d 800 (Mo. banc 2022)
- *State v. Teer*, 275 S.W.3d 258 (Mo. banc 2009)
- *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261 (Mo. banc 1980)
- *Barnes v. Uhlich*, 592 S.W.3d 67 (Mo. App. W.D. 2019)

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ARGUMENT

I. The circuit court erred in granting mandamus or declaratory relief against the Attorney General, because the Attorney General properly returned the State Auditor's fiscal note and fiscal note summary to the State Auditor for revision, in that the State Auditor's submissions lacked the required legal content under Section 116.175, RSMo.

Standard of Review. This point on appeal raises a question of statutory interpretation, which is reviewed de novo on appeal. *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020).

Preservation. The Attorney General preserved this issue for appeal in his answer to Respondent's Petition (D19), in his pre-trial brief (D23), and during trial (*See* Tr.).

A. Background to Section 116.175.

Section 116.175 clearly establishes the role of the Attorney General in reviewing, and either approving or rejecting the Auditor's fiscal note and fiscal note summary prepared for an initiative petition. The process of crafting the fiscal note and fiscal note summary for an initiative petition begins with the Auditor, who prepares a proposed fiscal note and fiscal note summary for each initiative petition received from the Secretary of State's office. RSMo. § 116.175.1. The adequacy of a fiscal note and fiscal note summary are governed by Section 116.175, which

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provides, among other things, mechanisms for proponents or opponents of a measure to submit statements related to the measure and which requires that any fiscal note or fiscal note summary "state the measure's estimated cost or savings, if any, to state or local governmental entities." § 116.175.3. The fiscal note summary shall additionally "summarize the fiscal note in language neither argumentative nor likely to create prejudice either for or against the proposed measure." *Id*.

After the Auditor has "prepare[d] a fiscal note and a fiscal note summary" for a proposed initiative, the Auditor "forwards both to the attorney general" for the Attorney General's review. § 116.175.2. At that point, the plain language of Section 116.175 is clear: a review of the proposed fiscal note and fiscal note summary shifts to the Attorney General. "[W]ithin ten days of receipt of the fiscal note and the fiscal note summary," the Attorney General must either "approve the legal content and form" of the fiscal note and fiscal note summary or "determine[] that the fiscal note or fiscal note summary does not satisfy the requirements" of § 116.175.4, .5.

If the Attorney General determines that the fiscal note and fiscal note summary satisfies the requirements of Section 116.175, he "forward[s] notice of such approval to the state auditor." 116.175.4. If, on the other hand, the Attorney General "determines that the fiscal note or the fiscal note summary does not satisfy the requirements of [§ 116.175]," the Attorney General "return[s]" the fiscal note and fiscal note summary "to the auditor for revision." § 116.175.5. At that point, the

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statute commands that the Auditor must revise the proposed fiscal note and fiscal note summary and again forwards both to the Attorney General. *Id*. The statute uses the strongest language: "the fiscal note and the fiscal note summary shall be returned to the auditor for revision." *Id.*

It is only after the fiscal note and fiscal note summary are ultimately approved by the Attorney General that the Secretary of State may use the "approved fiscal note summary and fiscal note," along with the official summary statement, to certify the official ballot title. § 116.180. Section 116.180 mandates that the official ballot title contain "separate paragraphs with the fiscal note summary immediately following the summary statement of the measure[.]" Section 116.175.5 is clear that a fiscal note or fiscal note summary that the Attorney General determines does not satisfy the requirements of the statute "also shall not satisfy the requirements of section 116.180." § 116.175.5.

In summary, the Auditor first prepares fiscal notes and fiscal note summaries and forwards them to the Attorney General. The Attorney General then reviews the fiscal note and fiscal note summary to determine whether each complies with the requirements of Section 116.175, which includes a review for legal content that plainly incorporates a review for argumentative language or information that is likely to create prejudice for or against a measure. § 116.175.3. If the Attorney General determines that a proposed fiscal note or fiscal note summary does not

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comply with § 116.175, he is required by the statute to send the deficient fiscal note or fiscal note summary back for further revision. The State Auditor then revises the deficient fiscal note or summary and re-submits it to the Attorney General for review and, if the updates satisfy § 116.175, ultimately approval by the Attorney General. Once the Attorney General determines that a revised fiscal note or fiscal note summary complies with § 116.175, the Attorney General exercises his statutory authority to approve the fiscal note and fiscal note summary for the Secretary of State's use in a certified official ballot title.

B. "Legal content" is different than "form," and the Attorney General's review of the "legal content" of a fiscal note and fiscal note summary is more than just counting words and checking boxes.

A plain-text reading of Section 116.175 and surrounding context make clear that the Attorney General's review for "legal content" plainly incorporates a review for argumentative language or information that is likely to create prejudice for or against a measure. § 116.175.3. The statute does not include a definition of "legal content," but "legal content" must be distinct from "form." The statute requires the Attorney General to review a fiscal note and fiscal note summary for "legal content and form." § 116.175.4. The statute is mandatory, as it uses "shall" to describe the Attorney General's role. Courts have consistently held in statutory interpretation that "[t]he word 'shall' generally prescribes a mandatory duty." *State v. Teer*, 275 S.W.3d 258, 261 (Mo. banc 2009).

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Because form and legal content are two separate phrases in the statute, they must have two separate meanings. The legislature "is presumed to have intended every word, provision, sentence, and clause in a statute to be given effect" and "[t]he plain and ordinary meaning of the words in a statute is determined from the words' usage in the context of the entire statute." *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 585 (Mo. banc 2018) (citing *Mantia v. Mo. Dep't of Transp.*, 529 S.W.3d 804, 809 (Mo. banc 2017)).

There does not appear to be a dispute in this case about "form," as Section 116.175.3 makes clear what the "form" of a fiscal note and fiscal note summary are: "the fiscal note and fiscal note summary shall state the measure's estimated cost or savings, if any, to state or local governmental entities. The fiscal note summary shall contain no more than fifty words, excluding articles[.]" § 116.175.3. This reading of "form" is consistent with how Missouri's appellate courts construe "form" in other initiative petition contexts. For example, in *Bradshaw v. Ashcroft*, the Court of Appeals reasoned that the "form" of the initiative petition is limited to whether the measure contains the designated items that must be contained in the measure, such as certain notices, a signature sheet, specification of the county the signature page will be circulated, and space for notarization:

> Section 116.040 specifies the form of an initiative petition, and directs that the form must be "substantially" followed. The form of an initiative petition is required to include notice that it is a crime to "sign any initiative petition with

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> any name other than [one's] own, or knowingly to sign [one's] name more than once for the same measure for the same election, or to sign a petition when such person knows he or she is not a registered voter." *Id.* Section 116.040 requires the form of an initiative petition to afford a place for each person signing the petition to provide a signature, the date of signature, the signer's address including zip code, the signer's congressional district, and the signer's printed name. Section 116.040 requires the form of an initiative petition to include a circulator's affidavit swearing and affirming under penalty of perjury that persons identified on the petition "signed this page of the foregoing petition ... in my presence," and that the circulator believes each signer to be "a registered voter in the State of Missouri" in the county specified on the signature page. Section 116.040 requires the form of an initiative petition to afford a place for the circulator's affidavit to be signed by the circulator in the presence of a notary.

559 S.W.3d 79, 83 (Mo. App. W.D. 2018). Here, in the context of a fiscal note and fiscal note summary, "form" can mean only whether the fiscal note summary contains 50 or fewer words and a statement of estimated costs or savings. § 116.175.3.

In contrast, "legal content" demands more. The relevant dictionary definitions of "content" are "the topics, ideas, facts, or statements in a book, document, or letter." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 492 (3d ed. 1993). And "legal" means "of or relating to law," "conforming to or permitted by law or established rules : conforming to the procedures and methods prescribed by law." *Id.* 1290. The plain dictionary of "legal content," then, must refer to what *else* is

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required *by law* to be done when preparing, and ultimately contained in, a fiscal note and fiscal note summary. Surrounding context in Section 116.175 makes clear what the legal content of a fiscal note and fiscal note summary must include, at minimum: it must not be "argumentative," and it must not "create prejudice either for or against the proposed measure." *See Richter v. Union Pac. R. Co.*, 265 S.W.3d 294, 297 (Mo. App. E.D. 2008) ("In absence of statutory definitions, we may derive the plain and ordinary meaning from a dictionary and by considering the context of the entire statute in which it appears.") (citing *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 224 (Mo. banc 2007)). "The primary goal of statutory interpretation is to give effect to legislative intent, which is most clearly evidenced by the plain text of the statute." *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 585 (Mo. banc 2018). The Attorney General's construction of Section 116.175 achieves these fundamental canons of construction.

At first, all parties followed the process for crafting a fiscal note and fiscal note summary laid out in § 116.175. The State Auditor submitted to the Attorney General an identical proposed fiscal note and fiscal note summary for each of Respondent's eleven initiative petitions. The Attorney General reviewed each of these submissions and determined that each of the fiscal notes and fiscal note summaries "does not satisfy the requirements of [§ 116.175]." In part, the Attorney General determined that the STate Auditor's proposed fiscal note "contain[ed]

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inadequate and divergent submissions from local government entities" and "contain[ed] inadequate submissions concerning the impact to state governmental operations." The Attorney General additionally determined that the Auditor's proposed fiscal note summary is legally deficient because in part it "conveys [a] misleading message" and "fail[s] to adequately summarize" the submissions in the fiscal note. Consequently, the Attorney General determined that the fiscal note and fiscal note summary for each of Respondent's initiative petitions was inadequate and returned each to the Auditor for revision. *Id*.

The plain and reasonable intent of the legislature for each of these clauses in the statutory scheme is that the Attorney General's determination actually has meaning and acts as a review on the State Auditor. The Circuit Court's judgment relegates the Attorney General's authority to little more than a word-counter and rubber stamp. As the Circuit Court and Respondent view the statute, the Auditor could prepare a fiscal note or fiscal note summary plainly in contravention of § 116.175 and, without any effective check on his determination, could disregard the Attorney General's concerns and require the Secretary of State to certify an official ballot title with a clearly deficient fiscal note and fiscal note summary. Adoption of Respondent's interpretation would require the Court to conclude that the legislature meant to render significant portions of § 116.175 superfluous and intended that any review of the Auditor's submissions by the Attorney General is completely toothless.

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Section 116.175 reinforces the Attorney General's interpretation of § 116.180, making explicitly clear that "[a] fiscal note or fiscal note summary that does not satisfy the requirements of [§ 116.175] also shall not satisfy the requirements of section 116.180"—the official ballot title requirement statute. Respondent's and the Circuit Court's view would additionally require the Court to exercise its judicial authority to create, out of thin air and without any legislative consent, authority for another executive branch official to approve a proposed fiscal note and fiscal note summary—the State Auditor himself. But the statutory scheme is clear that the State Auditor cannot approve his own fiscal note and fiscal note summary. That role belongs only to the Attorney General. And for reasons further discussed in Point III below, the Attorney General's role *must* be more than simply ministerial when reviewing for legal content.

C. The State Auditor's fiscal note and fiscal note summary are deficient as to legal content.

The Attorney General's Opinion Letters detailed across several pages why the State Auditor's fiscal note and fiscal note summary lack the required legal content under Section 116.165. Ultimately, if voters were to see the fiscal note summary at the ballot box, they would be more likely driven to vote for the measure due to misleading language that is apparent from the face of the fiscal note. Of course, the full fiscal note is not present on the ballot itself, and so voters are left only to look at the 50-word fiscal note summary. This is more than just a dispute over whether the

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Attorney General "does not like the fiscal conclusion reached by the Auditor," as the Circuit Court held. Rather, it is apparent from the face of the fiscal note and fiscal note summary that they lack the required legal content and will create undue prejudice in favor of the measure.

First, the fiscal note contains inadequate and divergent submissions from local government entities. This goes to the heart of the "legal content" required of a fiscal note, because a fiscal note must contain adequate submissions from governmental entities. In his Opinion Letter, the Attorney General stressed the statistically insignificant small sample size of responses solicited by the State Auditor, noting "this ballot measure will affect the present and future population of Missouri. Yet, while Missouri has 114 counties and one independent city, in addition to over 1,000 other cities and villages . . . only three counties and two cities responded." Not many more were even solicited for submissions: only 12 and 14 cities.

Only one local governmental entity, Greene County, made an effort to submit a reliable methodology for calculating the fiscal impact. Greene County understood that the abortion-legalization measure would have the obvious effect of reducing population. No other entity engaged in this common-sense analysis that should be present on the face of any submission. As Greene County correctly stated, the "substantial economic fiscal reality of abortion relating to unborn lives cannot be denied or omitted from a fiscal note to inform voters of the consequences."

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However, the State Auditor did not apply that same reasonable assumption when assessing the submissions from the few other entities who responded. Instead, the fiscal note and fiscal note summary took Greene County's calculated estimated fiscal impact and purported to represent that fiscal impact as the fiscal impact for the *entire state*. Never once did Greene County purport to calculate the fiscal impact of the effects of the initiative petition on the entire state. To represent otherwise is misleading and prejudicial in favor of the initiative petitions. As the Attorney General informed the State Auditor in his Opinion Letter, the Greene County methodology should be applied to the remainder of the populous of Missouri, because it is "unreasonable for those entities to conclude that the measure will have no estimated fiscal impact[.]" (D34, p.3). In other words, it was misleading and prejudicial to represent the financial impact of the measures on Greene County as representative of all 114 counties in Missouri.

To properly apply the methodology would not raise the State Auditor's minimum responsibilities outlined by this Court in *Brown v. Carnahan*, 370 S.W.3d 637 (Mo. banc 2012). Rather, doing so would underscore *why* the State Auditor even plays a role in the process in the first place while giving proper meaning to "legal content." This Court in *Brown* noted the State Auditor "is not required to compel and second-guess reasonable submissions from entities but is able to rely on the responses submitted. Nor should the auditor wade into the policy debates

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surrounding initiative petitions, which an independent investigation would entail. . . . It is not the auditor's role to choose a winner among these opposing viewpoints by independently researching the issue himself, double-checking economic theories and assumptions, and adopting one side's view over another's in the resulting fiscal note." *Id.* at 650. *Brown* did not preclude the State Auditor from selecting *an* assumption or methodology. Any reasonable construction of "legal content" and the duties of the State Auditor require some sort of methodology, and *Brown* does not stand for the proposition that the State Auditor *must only* add and subtract numbers that entities submit.

But, in fact, the State Auditor did not even do that properly. Non-governmental entities estimated a massive possible loss to state revenues, up to a possible loss of $12.5 billion. But that figure is nowhere in the fiscal note summary. Instead, all the State Auditor did was note that "opponents estimate a potentially significant loss to state revenues." This vague language does not comply with the State Auditor's role under Section 116.175 or under *Brown*.

Section 116.175 expressly allows for consideration of figures submitted by governmental and non-governmental entities. Subsection (1) of that statute states that "The state auditor may consult with the state departments, local government entities, the general assembly ***and others with knowledge pertinent to the cost of the proposal***." § 116.175.1 (emphasis added). Furthermore, "[p]roponents or

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opponents of any proposed measure may submit to the state auditor a proposed statement of fiscal impact estimating the cost of the proposal in a manner consistent with the standards of the governmental accounting standards board and section 23.140, provided that all such proposals are received by the state auditor within ten days of his or her receipt of the proposed measure from the secretary of state." There is no dispute that the State Auditor received estimates from "others with knowledge pertinent to the cost of the proposal," who may be opponents to the measure, that those estimates were out of compliance with the appropriate fiscal standards, or that the submission were timely received. The record contains no such fact-finding or evidence to the contrary. Instead, the record contains submissions that were not expressly incorporated into the fiscal note summary. The Auditor should have done so, just as it did when it included a specific dollar figure based on Greene County's estimate.

Thus, as the Attorney General wrote in his Opinion Letter, the fiscal note summary "conveys the misleading message that it is an accurate representation of the true cost to local and state governmental operations." The only numerical figure mentioned in the fiscal note summary is a sliver of the maximum (or even likely) potential financial impact. The average, reasonable voter reading this summary will not know the small sample of entities that the State Auditor had solicited for a submission. That same voter is also much more likely to vote in favor of a measure

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that is estimated to cost approximately $50,000 than one that estimates a fiscal impact closer to what the submissions *actually received by the State Auditor* estimated the measure will cost.

To be clear: the Attorney General is advancing a narrow and appropriate reading of his authority to review a fiscal note and fiscal note summary under Section 116.175. That review must be more than a rubber stamp. And at minimum that review allows a rejection of the State Auditor's submissions if it is evident from their face that they are inaccurate, misleading, and likely to create bias for or against a measure. This Court should reverse the Circuit Court's decision, and remand the case to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary under Section 116.175.5.

II. The circuit court erred in granting mandamus or declaratory relief against the Attorney General, because the State Auditor was required to revise his fiscal note and fiscal note summary after the Attorney General rejected them, in that the Attorney General's rejection was proper, Section 116.175 contains a clear command to revise the materials upon rejection, and the State Auditor received additional information that should have been incorporated.

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Standard of Review. This point on appeal raises a question of statutory interpretation, which is reviewed de novo on appeal. *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020).

Preservation. The Attorney General preserved this issue for appeal in his answer to Respondent's Petition (D19), in his pre-trial brief (D23), and during trial (*See* Tr.).

As noted above, "The primary goal of statutory interpretation is to give effect to legislative intent, which is most clearly evidenced by the plain text of the statute." *State ex rel. Goldsworthy*, 543 S.W.3d at 585. The legislature "is presumed to have intended every word, provision, sentence, and clause in a statute to be given effect" and "[t]he plain and ordinary meaning of the words in a statute is determined from the words' usage in the context of the entire statute." *Id*. (citing *Mantia v. Mo. Dep't of Transp*., 529 S.W.3d 804, 809 (Mo. banc 2017)). "Where a statute's language is clear, courts must give effect to its plain meaning and refrain from applying the rules of construction unless there is some ambiguity." *Ross v. Dir. of Revenue*, 311 S.W.3d 732, 735 (Mo. banc 2010).

Section 116.175 could not be more clear: if the Attorney General "determines" that the Auditor's proposed fiscal note or fiscal note summary for an initiative petition does not satisfy the requirements of Section 116.175, the Attorney General "shall" return the deficient fiscal note or fiscal note summary to the Auditor "for

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revision." § 116.175.5. The Attorney General complied with his duty. The State Auditor has yet to do so.

Instead of revising each fiscal note and fiscal note summary to comply with Section 116.175, the State Auditor "decline[d] to revise the fiscal note and fiscal note summary" for each of the initiative petitions. Because the State Auditor failed to revise the fiscal notes and fiscal note summaries, and because the Attorney General determined that the proposed fiscal notes and fiscal note summaries submitted by the Auditor continue to fail to satisfy the requirements of Section 116.175, the Attorney General again returned the fiscal notes and fiscal note summaries to the Auditor for revision. *See, e.g.* Ex. D. The Auditor has, to date, failed to revise the fiscal note or fiscal note summary for any of Respondent's initiative petitions.

In crafting the text of Section 116.175, the legislature plainly laid out the scope of responsibilities for both the Auditor and the Attorney General. It is the *Attorney General's* responsibility to "determine" whether the fiscal note or fiscal note summary "does not satisfy the requirements of [§ 116.175]" and, if the Attorney General determines that a fiscal note or fiscal note summary does not satisfy those requirements, "the fiscal note and the fiscal note summary shall be returned to the auditor for revision." § 116.175.5. In the context of Section 116.175, the meaning of the requirement that the fiscal note and fiscal note summary be "returned to the

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auditor for revision" is clear. The phrase "return . . . for revision" imposes on the State Auditor a statutory duty to provide an updated or altered fiscal note and fiscal note summary for the Attorney General's review under Section 116.175. Any other meaning of the word would render the responsibility for the Attorney General to determine whether a proposed fiscal note and proposed fiscal note summary complies with § 116.175, and, consequently, whether to approve it or send it back to the Auditor for revision, superfluous. Any alternative reading of the requirement that the fiscal note and fiscal note summary shall be "returned for revision" upon a determination by the Attorney General would be contrary to this pronouncement.

This understanding of the legislature's use of the word "revision" is consistent with how the word "revision" is used by courts addressing challenges under Chapter 116. *See, e.g. Pippens v. Ashcroft*, 606 S.W.3d 689, 693 (Mo. App. W.D. 2020) (using the term "revision" to refer to the process of making changes to the official summary statement for an initiative petition); *Sedey v. Ashcroft*, 594 S.W.3d 256, 265 n. 6 (Mo. App. W.D. 2020) (using the terms "revised" and "revisions" to describe changes to the summary language of citizen initiatives). It is also consistent with how Missouri courts have traditionally used the words "revise" and "revisions." *See, e.g. Care & Treatment of Morgan v. State*, 176 S.W.3d 200, 205–06 (Mo. App. W.D. 2005) (considering the "revised" version of a statute as being a change to the legal definition of a term compared to the past definition); *McCarty v. City of Kansas*

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City, 671 S.W.2d 790, 795 (Mo. App. W.D. 1984) (using the term "revisions" to refer to "a change in existing regulations and restrictions" at issue). "[I]n construing a statute to determine legislative intent, a court must presume that the legislature acted with a full awareness and complete knowledge of the present state of the law" and Missouri court cases. *State v. Rumble*, 680 S.W.2d 939, 942 (Mo. banc 1984). Even if the plain meaning of the term "revision" was uncertain (which it is not), Missouri courts' past use and definition of the term strongly supports the Attorney General.

Both the plain meaning of the term "revision" as used in the statute and the regular use of the term by courts in analyzing both ballot title cases and other general cases makes clear: the State Auditor had a statutory duty to send to the Attorney General an *updated and modified* fiscal note or fiscal note summary for each of Respondent's initiative petitions. The Attorney General would then review the resubmitted fiscal note and fiscal note summary to determine whether the documents complied with the requirements of Section 116.175, just as he would upon receiving a first submission. Despite this clear statutory instruction, the State Auditor refused to revise the statute to address the Attorney General's concerns.[3] In fact, the State

[3] Notably, in her Petition below, the one claim Respondent did *not* bring is a request for this Court to enter a judgment declaring that the Auditor must comply with his statutory obligation under § 116.175 to "revise" the proposed fiscal notes and fiscal note summaries. As discussed in the Attorney General's other points on appeal, the Circuit Court erred in blessing Respondent's failure to ask for the relief she did

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Auditor explicitly stated instead that he "*declines to revise* the fiscal note and fiscal note summary." (D38, cleaned up, emphasis added). As the Auditor "decline[d]" to perform his statutory duties under Section 116.175, the Attorney General again returned the fiscal notes and fiscal note summaries for revision. (*See, e.g. id.*; D40).

Neither Section 116.175 nor any other statute requires the Attorney General to approve a fiscal note or fiscal note summary that he determines does not satisfy the requirements of Section 116.175 and is therefore deficient. On the contrary, Section 116.175.5 entrusts in the Attorney General *only one* nondiscretionary duty: that any fiscal note or fiscal note summary which he "determines . . . does not satisfy the requirements of [§ 116.175] . . . ***shall be*** returned to the Auditor for revision." § 116.175.5 RSMo. Courts have consistently held in statutory interpretation that "[t]he word 'shall' generally prescribes a mandatory duty." *State v. Teer*, 275 S.W.3d 258, 261 (Mo. banc 2009).

Here, the Attorney General determined that the State Auditor failed to make any revisions to the deficient proposed fiscal note and proposed fiscal note summary

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request in her lawsuit and then complain that she does not have relief available to her to resolve her claimed injury. *See State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 266 (Mo. banc 1980) (finding it "undisputed that the relators had an alternative remedy [to a writ of mandamus] available to them" when the relators also "filed an action seeking a declaratory judgment" related to the same dispute.). The proper relief here is for completion of the Attorney General and Auditor's submission, review, and resubmission process. And then if Respondent found the *final* fiscal note or fiscal note summary unfair or insufficient, she could file her own lawsuit under Section 116.190 challenging those materials.

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for each of the initiative petitions, and, consequently, complied with his statutory duty to return the drafts to the State Auditor for further revision. The Attorney General would be running afoul of the requirements of § 116.175.5 if he *did not* return fiscal notes and fiscal note summaries for further revision after a determination that they did not comply Section 116.175.5.

Section 116.175 is clear on the continuing responsibilities of both the Attorney General and the Auditor in reaching an approved fiscal note and fiscal note summary that complies with § 116.175. The General Assembly's use of the term "revision" and the requirements that a fiscal note and fiscal note summary satisfy Section 116.175 and be "approved" by the Attorney General for the purpose of Section 116.180 before the Secretary of State may certify a ballot title demonstrates that the preparation of a fiscal note is an ongoing process. The dual requirements of revision and approval create an ongoing review process that continues until an adequate fiscal note and fiscal note summary is approved. The clear text of the statute renders any additional construction unnecessary. *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 540 (Mo. banc 2012) ("When the words are clear, there is nothing to construe beyond applying the plain meaning of the law.").

Even to the extent this Court concludes that it is necessary to look beyond the plain meaning of the statute, the plain and straightforward construction of Section 116.175 is that the use of the terms "revision," "determine," and "approve" create

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continuing, time-constrained obligations on the Auditor and Attorney General to engage in the processes of Section 116.175 until the fiscal note and fiscal note summary for an initiative petition are approved. The rules of statutory construction "require this court to determine the intent of the legislature" by considering the plain and ordinary meaning and application of the text of the statute. *Owsley v. Brittain*, 186 S.W.3d 810, 815 (Mo. App. W.D. 2006).

Here, the plain and ordinary application of the text utilizes the time limit imposed on the executive branch officials—ten days—to govern any deadlines for revisions to proposed fiscal notes or fiscal note summaries. The Attorney General has ten days after receiving an iteration of a proposed fiscal note and fiscal note summary to determine whether to approve or send back for revision the fiscal note and fiscal note summary. § 116.175.4, .5. Under the most permissive interpretation of these provisions controlling executive branch officials drafting and reviewing proposed fiscal notes and fiscal note summaries, "returning" a draft "for revision" *at minimum* implies (and, in the Attorney General's view, expressly requires) that the draft will be edited and then re-submitted for potential approval under a similar statutory timeline as the initial production. Indeed, both the State Auditor and Attorney General acted under this construction of the statute—each provided communications on the proposed fiscal note and fiscal note summary within ten days of receipt. The Circuit Court's judgment effectively discards portions of the statute

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mandating a determination of when a fiscal note or fiscal note summary is insufficient—an outcome which is unlikely to be "the intent of the legislature" drafting the provision. *Owsley*, 186 S.W.3d at 815.

Second, the Circuit Court's judgment creates unnecessary statutory conflicts that ultimately render meaningless critical portions of Section 116.175. The judgment expresses concern that there could be a a parade of horribles occurs that then invites intervention from outside the relationship between statewide elected officials carefully crafted by the legislature. Not only is this legal conclusion not supported by the statute, there is no evidence that this fear is happening here. The only event that has occurred is *one* rejection of the State Auditor's initial submissions based on several grounds clearly explained in the Attorney General's Opinion Letters. At most, the present challenge is unripe, especially given that the statute specifically addresses the Attorney General's authority to review and then approve or reject a fiscal note and fiscal note summary. It cannot be the case that every time the Attorney General were to take an action expressly allowed by statute, a parade of horribles occurs that then invites intervention from outside the statewide elected officials. What is more, the solution to this problem is clear: an order requiring the State Auditor to complete his duty under the statute and revise the fiscal note and fiscal note summary. The solution is not to slash the Attorney General's authority that Section 116.175 plainly gives him.

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Finally, the record below demonstrates that the State Auditor still had more work to do. Three days before the Attorney General responded with his rejection of the State Auditor's fiscal note and fiscal note summary, on April 7, 2023, the State Auditor received additional information from the Governor's Office. The Governor's Office provided a fiscal estimate for each of the 11 initiative petitions based on "additional costs identified by other agencies in regards to regulation and enforcement." In addition, the Governor's Office stated that each initiative petition appears "to conflict with federal law, which may have bearing on the fiscal responsibilities of [the Governor's Office]."

Each submission from the Governor's Office noted that "there will likely be litigation leading to a fiscal impact on the Legal Expense Fund (LEF) ranging from $1,500 to unknown" due to potential conflicts with the U.S. Supreme Court's decision in "*Dobbs v. Jackson Women's Health Organization* and requirements of parental consent." (Italics to case citation added). In addition, for several of the measures, the Governor's Office estimated that "failing to be in compliance with federal requirements related to Medicaid and MO HealthNet could lead to a fiscal impact of up to $600M" due to a conflict between the content of the initiative petitions and "the federal policy related to the Hyde Amendment and expending public funds on abortions."

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The State Auditor has failed to incorporate these new figures, even though the State Auditor acknowledged receiving these responses and could have incorporated the responses from the Governor's office when revising his fiscal note and fiscal note summary.

For these reasons, this Court should reverse the Circuit Court's judgment, and remand it to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary under Section 116.175.5

III. The circuit court erred in granting mandamus relief against the Attorney General, because Respondent had other remedies available and the Attorney General's duty under Section 116.175 is not ministerial, in that the Auditor had not yet revised his materials before Respondent filed suit, the Attorney General has not refused to perform a ministerial duty, and the Attorney General has discretionary authority to review and determine a fiscal note and fiscal note summary's compliance under Section 116.175.

Standard of Review. This point on appeal raises a question of statutory interpretation, which is reviewed de novo on appeal. *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020).

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Preservation. The Attorney General preserved this issue for appeal in his answer to Respondent's Petition (D19), in his pre-trial brief (D23), and during trial (*See* Tr.).

A writ of mandamus may only be issued in instances where the litigant: (1) proves that "no alternative remedy exists"; (2) "proves that he has a clear, unequivocal, specific right to a thing claimed"; and (3) proves the writ relates to "a ministerial duty that one charged with the duty has refused to perform." *Barnes v. Uhlich*, 592 S.w.3d 67, 70–71 (Mo. App. W.D. 2019). Here, Respondent's Petition failed on every count. This Court should reverse the Circuit Court's finding otherwise.

A. Respondent failed to establish that a writ of mandamus is the exclusive remedy available to her.

"There is no remedy that a court can provide that is more drastic, no exercise of raw judicial power that is more awesome, than that available through the extraordinary writ of mandamus." *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 266 (Mo. banc 1980). As it is the most significant exercise of judicial power a court can perform, a "writ of mandamus issues only in a case of necessity," and if "there is any doubt of its necessity or propriety, it will not be issued." *State ex rel. University Park Building Corp. v. Henry*, 376 S.W.2d 614, 617 (Mo. App. 1964); *see also State ex rel. Kelley*, 595 S.W.2d at 266 ("Recognizing the extreme nature of the order to act in accordance with a peremptory writ of mandamus, we believe

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that the remedial writ ought to be reserved for those cases in which no alternative measure will be effective.").

Recognizing these limitations, courts have held that "[i]t is a long-established principle of law that mandamus does not issue where there is another adequate remedy available to relator." *State ex rel. Kelley*, 595 S.W.2d at 265. "In other words, 'the writ of mandamus is to be used only as a last resort on the failure of any adequate alternative remedy.'" *Beauchamp v. Monarch Fire Protection District*, 471 S.W.3d 805, 810 (Mo. App. E.D. 2015) (quoting *State ex rel. Kelley*, 595, S.W.2d at 265); *see also State ex rel. KelCor., Inc. v. Nooney Realty Tr., Inc.*, 966 S.W.2d 399, 402 (Mo. App. E.D. 1998) ("A required element of proving a right to mandamus is that there is no alternative, adequate remedy other than the issuance of the writ.").

A review the Petition below reveals that Respondent likely acknowledges that a writ of mandamus is the exclusive possible remedy. Count I of the Petition acknowledges the existence of other possible remedies and therefore, on the face of Respondent's own pleadings, bars any right to a writ of mandamus. *See Barnes*, 592 S.W.3d at 71–72 (dismissing a petition for writ of mandamus where the relator "did not allege in his petition in mandamus that he was without an adequate alternative remedy."). In briefing before the Circuit Court, Respondent even took one step past *Barnes*, acknowledging with frankness that Respondent believes "mandamus . . . is not the exclusive remedy" against the Attorney General available to her in her

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Petition. (D8 at p.5). Respondent's own admission should have been fatal to Count I of her Petition.

This Court has held that an attempt to take two bites of the same apple by requesting both a declaratory judgment and writ of mandamus per se demonstrates that mandamus is not the exclusive remedy available and, consequently, bars a court from issuing the writ in her favor. In *State ex rel. Kelley*, this Court found it "undisputed that the relators had an alternative remedy [to a writ of mandamus] available to them" when the relators also "filed an action seeking a declaratory judgment" related to the same dispute. *State ex rel. Kelley*, 595 S.W.2d at 267. The Court noted that, "[b]y filing the action for declaratory judgment seeking a judicial declaration" on the same underlying facts of the lawsuit, the relator "demonstrated his willingness to submit the controversy . . . to the judgment of the court" and was consequently barred from seeking mandamus. *Id*. Likewise here, Respondent's "alternative" request for declaratory judgment on the same facts demonstrates mandamus is not the exclusive remedy available to her. Mandamus is not a "short cut for the speedy resolution of disputes that adequately may be resolved by other means." *Id.* at 268. A writ of mandamus is an extraordinary remedy of last resort. Even now, this case is not at a last resort stage.

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B. Respondent failed to establish any clear, unequivocal, and specific right she seeks to vindicate with a writ of mandamus.

Respondent also failed to demonstrate any clearly established and presently existing right she could vindicate through mandamus. "Mandamus is a discretionary writ, not a writ of right," and it "is not appropriate to establish a legal right, but only to compel performance of a right that already exists." *State ex rel. Petti v. Goodwin-Raftery*, 190 S.W.3d 501, 506 (Mo. App. E.D. 2006). A petitioner seeking mandamus bears the burden of establishing that he or she has a "clear, unequivocal, specific right to have the act performed as well as a corresponding present, imperative, and unconditional duty on the part of the respondent to perform the action sought." *State ex rel. Lee v. City of Grain Valley*, 293 S.W.3d 104, 109 (Mo. App. W.D. 2009) (emphasis omitted). This is because "the purpose of mandamus is to execute and not to adjudicate; it coerces performance of a duty already defined by law." *State ex rel. City of Crestwood v. Lohman*, 895 S.W.2d 22, 27 (Mo. App. W.D. 1994).

Respondent did not meet her burden of establishing a clear, unequivocal, specific right to have the act performed. It is important to break down the precise "clear and unequivocal right" Respondent asserted warrants the granting of extraordinary mandamus relief. Section 116.175 relates exclusively to the interactions between the Auditor and the Attorney General in the process of drafting and reviewing proposed fiscal notes and fiscal note summaries. § 116.175. Nowhere

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in the statute is any provision that even *implies* that a member of the public has a "clear and unequivocal" right to interject themselves into the process of the Attorney General reviewing fiscal notes and fiscal note summaries. The absence of any case establishing Respondent's right to file a lawsuit while there is still more work for one state official to do is telling.

In fact, Respondent already has an alternative avenue here – to challenge an official ballot title under Section 116.190. If Respondent disagrees with the ultimately approved fiscal note or approved fiscal note summary, she is free to challenge the ballot title once the Secretary of State certifies the official ballot title. Her statutory rights under Section 116.190 does not, however, support any suggestion that she has a "clear and unequivocal" right to intervene before that time. The Circuit Court erred in holding otherwise.

To allow a party to obtain mandamus relief from generalized statements that they have a right to bring issues they deem significant under a constitutional provision, such as Article III, Section 50, would render entirely meaningless the requirement to demonstrate a clear and specific right to relief. This Court has conclusively held that one must demonstrate a "specific" right to relief before a court may rule on a request for mandamus. *See State ex rel. Swoboda v. Missouri Comm'n on Hum. Rts.*, 651 S.W.3d 800, 805 (Mo. banc 2022). A generalized pronouncement

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of a litigant's "right to bring issues they deem significant to the voters" (D8 at p.4) as Respondent argued below plainly does not satisfy this standard.

Mandamus is an extraordinary and consequential tool. It is "a hard and fast writ, and an unreasoning writ, a cast-iron writ, the right arm of the court." *State ex rel. Kelley*, 595 S.W.2d at 266 (quoting *State ex rel. Kansas City v. Kansas City Gas Co.*, 163 S.W. 854, 857 (Mo. banc 1914)). To protect against overreach of this power, courts may only exercise mandamus when a litigant has identified a "clear, unequivocal, and specific right" to the action a party seeks performed. Respondent failed to establish any such right, and the Circuit Court erred in concluding otherwise.

C. The Attorney General's statutory authority under Section 116.175 to approve or reject the State Auditor's proposed fiscal note and fiscal note summary is not ministerial and therefore not subject to a writ of mandamus.

Respondent's request for mandamus should also have failed below because she asked the Circuit Court to exercise judicial power to compel an executive branch official to reach a *particular* outcome on a *discretionary* decision. Courts have long held that a writ of "'[m]andamus will not lie to compel an act when its performance is discretionary.'" *McDonald v. City of Brentwood*, 66 S.W.3d 46, 51 (Mo. App. E.D. 2001) (quoting *State ex rel. University Park Building*, 376 S.W.2d at 617). This is because the purpose of a writ of mandamus is to "compel the performance of a ministerial duty that one charged with the duty has refused to perform." *Lemay Fire*

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Prot. Dist. v. St. Louis County, 340 S.W.3d 292, 294 (Mo. App. E.D. 2011) (quoting *State ex rel. Pub. Counsel v. Pub. Serv. Comm'n*, 236 S.W.3d 632, 635 (Mo. banc 2007)); *see also State ex rel. Thomas v. Neeley*, 128 S.W.3d 920, 924 ("[A] writ of mandamus cannot compel the performance of a discretionary act.") (Mo. App. S.D. 2004).

Even if Respondent were able to establish all of the other requirements for a writ of mandamus—which she failed to do—mandamus relief should have been unavailable because the Attorney General's duties to *review* ***and*** *approve or deny* a fiscal note and fiscal note summary Section 116.175 are not "ministerial." When analyzing whether a writ of mandamus may issue, courts have juxtaposed "ministerial" government actions with discretionary actions of government officials "that require[] the exercise of reason in determining how or whether the act should be performed." *State ex rel. Thomas*, 128 S.W.3d at 924. A writ of mandamus "will only issue when there is an *unequivocal showing* that the public office failed to perform a ministerial duty imposed by law." *Id*. (emphasis added).

Section 116.175 directs the Attorney General to "determine[]" whether the fiscal note and fiscal note summary satisfy the requirements of the statute, which, in turn, affects whether the Attorney General approves the proposed fiscal note and fiscal note summary or returns each to the auditor for revision. The fact that the Attorney General's determinations under the statute are more than simply

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"ministerial" is demonstrated by the explicit contemplation under the statute that the Attorney General *may* determine that the fiscal note and fiscal note summary cannot approved until further revision—all depending on his review of the proposed fiscal note and fiscal note summary. *State ex rel. Thomas*, 128 S.W.3d at 924. In the face of the plain text of the statute, Respondent did not carry her burden to make an "unequivocal showing" that the Attorney General failed to perform a ministerial duty. *Id.*

A discretionary action does not become ministerial simply because a party challenging a decision strongly believes the outcome should have been different. *State ex rel. Thomas*, 128 S.W.3d at 924. After all, it is often the case that actions by government officials can elicit strong reactions on both sides of the question. Respondent asked the Circuit Court to utilize the writ of mandamus to direct the Attorney General to exercise his discretion in a particular manner on the question of whether or not a proposed fiscal note and fiscal note summary comply with requirements of § 116.175. The Circuit Court agreed, and that decision risks creating a dangerous and unprecedented result of the exercise of judicial power over Missouri elections officials performing discretionary elections responsibilities. The very fact that the Attorney General must "determine[]" whether the "content" of a proposed fiscal note and fiscal note summary complies with a list of requirements, and then either approve the draft or return it to the State Auditor for revision, demonstrates

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that Section 116.175 entrusts in the Attorney General fundamental discretionary powers. Missouri courts have held time and again that mandamus may not be used to compel the Attorney General—or indeed, any other government official—to exercise his discretion in a particular way favored by a litigant. *E.g.*, *McDonald*, 66 S.W.3d at 51.

For these reasons, this Court should reverse the Circuit Court's judgment, and remand it to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary under Section 116.175.5.

IV. The circuit court erred in granting declaratory relief against the Attorney General, because the case was not yet ripe and therefore not justiciable, in that the fiscal note and fiscal note summary review and resubmission process had not yet concluded.

Standard of Review. This point on appeal raises a question of statutory interpretation, which is reviewed de novo on appeal. *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020).

Preservation. The Attorney General preserved this issue for appeal in his answer to Respondent's Petition (D19), in his pre-trial brief (D23), and during trial (*See* Tr.).

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For similar reasons as the Attorney General argued above why the Circuit Court erred in granting mandamus relief and why the State Auditor failed to comply with his duty under Section 116.175 to revise his fiscal note and fiscal note summary, the Circuit Court erred in granting Respondent's alternative request for declaratory relief against the Attorney General. The Circuit Court held in footnote 11 to its judgment that it would "direct the same relief by declaratory judgment" if it did not grant Respondent's request for mandamus relief. Because the Circuit Court appears to have rested an alternative declaratory judgment ruling on the same grounds as the ruling granting mandamus relief, the Attorney General incorporates his same arguments above here. The Attorney General will also elaborate on some of those points.

There was no presently existing controversy over which a court can grant relief of a conclusive character. "Ripeness, like standing, is an element of justiciability." *Calzone v. Ashcroft*, 559 S.W.3d 32, 35 (Mo. App. W.D. 2018). Ripeness is determined by whether "the parties' dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict that is presently existing, and to grant specific relief of a conclusive character." *Mo. Health Care Ass'n v. Attorney Gen. of Mo.,* 953 S.W.2d 617, 620 (Mo. banc 1997); *see also Seay v. Jones*, 439 S.W.3d 881, 888 (Mo. App. W.D. 2014) ("citizens are authorized to seek judicial review of the official ballot title… [i]n such an action, the

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challenger must 'state the reason or reasons why the summary statement portion of the official ballot title is insufficient or unfair.'").

Here, Respondent's suit is not ripe because the exchange—and review and resubmission—of materials between the Attorney General and the State Auditor had not yet concluded. There was more work left for the State Auditor to do, as the State Auditor received new submissions from the Governor's Office on a fiscal impact for the initiative petitions. Even if the State Auditor did not receive those submissions, the State Auditor still has not complied with his duty to revise the fiscal note and fiscal note summary. § 116.175.5. But his receipt of new information shows even more that there was more work to do.

Respondent's alternative request for declaratory relief—and the Circuit Court's granting of that alternative request—came too early. Of course, as discussed above, Respondent should wait until the entire process had concluded and challenge an official ballot title under Section 116.190. But at the time she filed her lawsuit and up until the time of trial, there was no real presently existing controversy between the Attorney General and Respondent. Simply because Respondent disagreed with the Attorney General's decision does not entitle her to a request for declaratory relief. Rather, the dispute must be ripe. Furthermore, in bringing her lawsuit Respondent may not attempt to challenge the Attorney General's underlying exercise of discretion in determining that the Auditor's identical proposed fiscal note

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and fiscal note summaries for Respondent's initiative petitions failed to comply with Section 116.175. And ultimately, her request for declaratory relief seems to challenge the discretion the Attorney General exercised at a pre-final dispositional stage. There is no right for Respondent to file any lawsuit and interfere in the State Auditor and Attorney General's process before it has been completed.

For these reasons, this Court should reverse the Circuit Court's judgment because it was not yet ripe and therefore non-justiciable, and remand it to the Circuit Court with instructions to dismiss the case.

CONCLUSION

For these reasons, this Court should reverse the Circuit Court's judgment, and remand it to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary under Section 116.175.5.

AMERICAN OVERSIGHT

July 5, 2023

ANDREW T. BAILEY
Attorney General

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via the Court's electronic filing system on the 3rd day of July, 2023, to all counsel of record.

I also certify that the foregoing brief complies with the limitations in Rule No. 84.06(b) and that the brief contains 13,432 words.

/s/ *Jason K. Lewis*

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To: susank@missourilife.org[susank@missourilife.org]
From: Wagner, Ray[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=F577E20AF58F4CE4AFCDDD101E8A3745-WAGNER, RAY]
Sent: Sun 7/9/2023 9:13:17 AM (UTC-05:00)
Subject: Fwd: Fitz-James v. Bailey - MO Supreme Court Appellant's Brief.pdf
Fitz-James v. Bailey - MO Supreme Court Appellant's Brief.pdf

Good morning Susan. Attached is the brief in the 11 abortion petitions matter. The case is set for oral argument in the Supreme Courtat 3 pm on Tuesday July 18.

Ray

Raymond T. Wagner, Jr.
First Assistant/Chief Counselor
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-0531
(573) 645-9875 (cell)
Ray.Wagner@ago.mo.gov

Sent from my iPhone

> Sent from my iPhone

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To: Wagner, Ray
From: postmaster@missourilife.org[postmaster@missourilife.org]
Sent: Sun 7/9/2023 10:45:08 AM (UTC-05:00)
Subject: Undeliverable: Fwd: Fitz-James v. Bailey - MO Supreme Court Appellant's Brief.pdf
Fwd: Fitz-James v. Bailey - MO Supreme Court Appellant's Brief.pdf

Delivery has failed to these recipients or groups:

susank@missourilife.org (susank@missourilife.org)
The email address you entered couldn't be found. Please check the recipient's email address and try to resend the message. If the problem continues, please contact your email admin.

Diagnostic information for administrators:

Generating server: exch2016.mr2l.local

susank@missourilife.org
Remote Server returned '550 5.1.10 RESOLVER.ADR.RecipientNotFound; Recipient not found by SMTP address lookup'

Original message headers:

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From: "Wagner, Ray" <Ray.Wagner@ago.mo.gov>
To: "susank@missourilife.org" <susank@missourilife.org>
Subject: Fwd: Fitz-James v. Bailey - MO Supreme Court Appellant's Brief.pdf
Thread-Topic: Fitz-James v. Bailey - MO Supreme Court Appellant's Brief.pdf
Thread-Index: AQHZsbaFLQVHWsydKkmaeukDIdzzsK+xe5ZJ
Date: Sun, 9 Jul 2023 14:13:17 +0000
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Return-Path: Ray.Wagner@ago.mo.gov

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To: Wagner, Ray[Ray.Wagner@ago.mo.gov]
From: Susan Klein[Susan.K@missourilife.org]
Sent: Wed 12/13/2023 4:42:56 PM (UTC-06:00)
Subject: Regarding Funding for Abortion Affiliated Clinics

Ray,
Attached is Missouri Right to Life's rewrite of some of the underlined language from the first draft of this proposed legislation. All we did was tweak the language so it is effective after the U.S. Supreme Courts ruling on Dobbs and with the trigger law that went into effect in Missouri after that Dobbs decision.
Please let me know if this language is agreeable.
Thank you!
Susan Klein
Abortion defunding bill draft v.2.docx

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To: Greim, Edward D.[EDGreim@gravesgarrett.com]; Divine, Josh[Josh.Divine@ago.mo.gov]; Ari Cohn[acohn@techfreedom.org]; thomas.bennett@missouri.edu[thomas.bennett@missouri.edu]
Cc: Clare Nalepa[clare.nalepa@fed-soc.org]
From: Lisa Ezell[lisa.budzynski@fed-soc.org]
Sent: Mon 12/11/2023 8:37:58 AM (UTC-06:00)
Subject: RE: FedSoc Debate Jan 19 Jeff City--planning

Thank you, all, for agreeing to participate. Our full schedule will be listed here.
If any of you need a hotel room, my colleague Clare can help make those arrangements. She's cc'd here.
Best,

Lisa Budzynski Ezell
Vice President and Director, Lawyers Chapters
The Federalist Society
1776 I Street, NW
Suite 300
Washington, DC 20006
202-810-8714 (direct)
202-257-9494 (mobile)
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From: Greim, Edward D. <EDGreim@gravesgarrett.com>
Sent: Friday, December 8, 2023 4:36 PM
To: Josh.Divine@ago.mo.gov; Ari Cohn <acohn@techfreedom.org>; thomas.bennett@missouri.edu
Cc: Lisa Ezell <lisa.budzynski@fed-soc.org>; Clare Nalepa <clare.nalepa@fed-soc.org>
Subject: FedSoc Debate Jan 19 Jeff City--planning

Josh, Ari, and Tom,

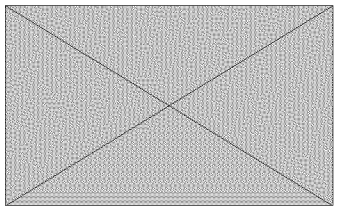
This email is to connect the three of you for our January 19 debate in Jefferson City. I will be the moderator, and the topic will be the Missouri v. Biden case. Josh will be arguing for the position that the facts of the case (and similar facts) show the government has crossed a constitutional line, and that the remedy is something like the injunction entered in the district court or 5th Circuit. Ari and Tom, I believe, are likely to hold contrary views, and for all I know those views will differ as well.

A couple of items:

1. To aid in planning, sometime before Christmas, could Tom and Ari reply to all with 1-2 sentences stating your position on (1) liability and (2) the remedy?
2. And Josh, please reply to all if I have anything wrong re your position, or if it requires further detail. Then we can figure out how to fill out our time.
3. We should try one 30-minute planning call in the second week of January. Please let me know your availability on Weds., Jan. 10, Thurs., Jan. 11, or the afternoon of Fri., January 12.

Thanks again to all three of you for agreeing to join us. Please direct logistical questions to Clare, copied here.
Eddie

Edward D. Greim
Office: (816) 256-3181 | **Direct:** (816) 256-4144



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MO-AG-23-0462-A-000323

To: Susan Klein[Susan.K@missourilife.org]
From: Wagner, Ray[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=F577E20AF58F4CE4AFCDDD101E8A3745-WAGNER, RAY]
Sent: Fri 12/22/2023 1:39:14 PM (UTC-06:00)
Subject: Re: Question on Video Linked Below

Hi Susan. I had someone send me a copy of a tweet along the lines of his video. I have forwarded it on for review to see what we can do. later.
Merry Christmas!

Ray

Raymond T. Wagner, Jr.
First Assistant/Chief Counselor
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-0531
(573) 645-9875 (cell)
Ray.Wagner@ago.mo.gov

Sent from my iPhone

> On Dec 22, 2023, at 11:59 AM, Susan Klein <Susan.K@missourilife.org> wrote:
>
> Ray,
> Merry Christmas to you and your family!
>
> Susan
>
> The attached video is circulating and has gone viral on social media. was sent to us and our Kansas affiliate. KFL or MRL had anything to do with this video or what they call an investigation. KS affiliate is asking their Attorney General to look into this report and we ask if Missouri AG Bailey would do the same?
>
> Here is the video:
> <412190447_727698015608278_8326539794081750935_n.jpg>
>
> Project Veritas on Instagram: "
> "We never tell the parents anything." Planned Parenthood Managing Director describes transporting minors across state lines for #secretabortions. Watch the full Investigation at @project_veritas."
> urldefense.proofpoint.com

Sent from my iPhone

> On Dec 14, 2023, at 2:58 PM, Wagner, Ray <Ray.Wagner@ago.mo.gov> wrote:

AMERICAN OVERSIGHT

Thanks Susan. I will route this around internally and I'm sure we will be back in touch shortly.
Ray

Raymond T. Wagner, Jr.
Senior Advisor/Chief Counselor
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-0531
(573) 645-9875 (cell)
Ray.Wagner@ago.mo.gov

Sent from my iPhone

On Dec 13, 2023, at 4:43 PM, Susan Klein <Susan.K@missourilife.org> wrote:

Ray,
Attached is Missouri Right to Life's rewrite of some of the underlined language from the first draft of this proposed legislation.
All we did was tweak the language so it is effective after the U.S. Supreme Courts ruling on Dobbs and with the trigger law that went into effect in Missouri after that Dobbs decision.
Please let me know if this language is agreeable.
Thank you!
Susan Klein
Abortion defunding bill draft v.2.docx

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To: Bennett, Thomas[thomas.bennett@missouri.edu]; Greim, Edward D.[EDGreim@gravesgarrett.com]
Cc: Ari Cohn[acohn@techfreedom.org]; Lisa Ezell[lisa.budzynski@fed-soc.org]; Clare Nalepa[clare.nalepa@fed-soc.org]
From: Divine, Josh[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9D8C0996EBF3480DB5B4F2237D9F8DBD-DIVINE, JOSHUA]
Sent: Wed 1/3/2024 8:24:59 PM (UTC-06:00)
Subject: RE: FedSoc Debate Jan 19 Jeff City--planning

I should be fairly flexible for a planning call on Jan. 11 or 12. I anticipate *not* being available on Jan. 10.

Josh Divine | Solicitor General
Missouri Attorney General's Office
207 West High St.
Jefferson City, MO 65101
(573) 751-8870
Josh.Divine@ago.mo.gov

From: Bennett, Thomas <thomas.bennett@missouri.edu>
Sent: Monday, December 25, 2023 12:15 PM
To: Greim, Edward D. <EDGreim@gravesgarrett.com>
Cc: Divine, Josh <Josh.Divine@ago.mo.gov>; Ari Cohn <acohn@techfreedom.org>; Lisa Ezell <lisa.budzynski@fed-soc.org>; Clare Nalepa <clare.nalepa@fed-soc.org>
Subject: Re: FedSoc Debate Jan 19 Jeff City--planning

Eddie,

Thanks for the invitation and for organizing, and I look forward to seeing you in a few weeks. Josh and Ari, I look forward to meeting you both and to our discussion. Below is a brief summary of my views. As for timing of a planning call, I can be generally available on the days and times you mention, at least with a few days' advance notice.

Merry Christmas and happy holidays!

Best,

Tommy

Liability: This case is fundamentally about application of law to facts rather than the appropriate legal test. I agree that when the government "significantly encourages" private action, that action can be attributed to the state. But I don't think that's what happened in this situation, which is closer to Blum v. Yaretsky, a leading case relied on by both the district court and the court of appeals, which found no state action in similar circumstances.

Remedy: The First Amendment prohibits the government from restricting speech and from issuing legal commands that are vague and chill otherwise-protected speech. But that's exactly what the district court's injunction here did. At a minimum, the injunction ought to have been substantially narrower in light of the significant free speech considerations on the other side of the ledger and larger concerns about overly broad injunctions.

On Dec 11, 2023, at 6:38 AM, Lisa Ezell <lisa.budzynski@fed-soc.org> wrote:

WARNING: This message has originated from an External Source. This may be a phishing expedition that can result in unauthorized access to our IT System. Please use proper judgment and caution when opening attachments, clicking links, or responding to this email.

Thank you, all, for agreeing to participate. Our full schedule will be listed here.

If any of you need a hotel room, my colleague Clare can help make those arrangements. She's cc'd here.

Best,

Lisa Budzynski Ezell
Vice President and Director, Lawyers Chapters
The Federalist Society
1776 I Street, NW
Suite 300
Washington, DC 20006
202-810-8714 (direct)
202-257-9494 (mobile)

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www.fed-soc.org

From: Greim, Edward D. <EDGreim@gravesgarrett.com>
Sent: Friday, December 8, 2023 4:36 PM
To: Josh.Divine@ago.mo.gov; Ari Cohn <acohn@techfreedom.org>; thomas.bennett@missouri.edu
Cc: Lisa Ezell <lisa.budzynski@fed-soc.org>; Clare Nalepa <clare.nalepa@fed-soc.org>
Subject: FedSoc Debate Jan 19 Jeff City--planning

Josh, Ari, and Tom,

This email is to connect the three of you for our January 19 debate in Jefferson City. I will be the moderator, and the topic will be the Missouri v. Biden case. Josh will be arguing for the position that the facts of the case (and similar facts) show the government has crossed a constitutional line, and that the remedy is something like the injunction entered in the district court or 5th Circuit. Ari and Tom, I believe, are likely to hold contrary views, and for all I know those views will differ as well.

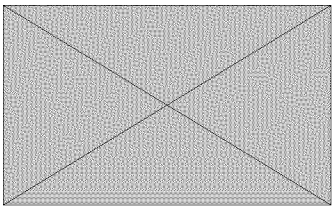
A couple of items:

1. To aid in planning, sometime before Christmas, could Tom and Ari reply to all with 1-2 sentences stating your position on (1) liability and (2) the remedy?
2. And Josh, please reply to all if I have anything wrong re your position, or if it requires further detail. Then we can figure out how to fill out our time.
3. We should try one 30-minute planning call in the second week of January. Please let me know your availability on Weds., Jan. 10, Thurs., Jan. 11, or the afternoon of Fri., January 12.

Thanks again to all three of you for agreeing to join us. Please direct logistical questions to Clare, copied here.

Eddie

Edward D. Greim
Office: (816) 256-3181 | **Direct:** (816) 256-4144



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1100 Main Street, Suite 2700
Kansas City, MO 64105

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To: 'alida.kass@fed-soc.org'[alida.kass@fed-soc.org]
From: Atkins, Jay[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=1502E6E18E4545A38D80CC0069F63728-ATKINS, JAMES]
Sent: Tue 2/6/2024 4:25:41 PM (UTC-06:00)
Subject: Introduction

Ms. Kass,
My name is Jay Atkins.I am Chief of Staff to Missouri Attorney General Andrew Bailey.I understand you had questions, or needed copies of filings in some of our pending federal litigation.Please let me know when you have a few minutes to jump on a call.I'm happy to bring you up to speed on all our initiatives and provide whatever you need.I look forward to hearing from you.
Very best,
jay

Jay Atkins | Chief of Staff
Missouri Attorney General's Office
207 West High Street
Jefferson City, MO 65101
(573) 751-7890
James.Atkins@ago.mo.gov

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To: Wagner, Ray
From: postmaster@missourilife.org[postmaster@missourilife.org]
Sent: Sun 12/10/2023 7:09:04 PM (UTC-06:00)
Subject: Undeliverable: Defunding bill
Defunding bill

Delivery has failed to these recipients or groups:

susank@missourilife.org (susank@missourilife.org)
The email address you entered couldn't be found. Please check the recipient's email address and try to resend the message. If the problem continues, please contact your email admin.

Diagnostic information for administrators:

Generating server: exch2016.mr2l.local

susank@missourilife.org
Remote Server returned '550 5.1.10 RESOLVER.ADR.RecipientNotFound; Recipient not found by SMTP address lookup'

Original message headers:

```
Received: from exch2016.mr2l.local (192.168.22.8) by exch2016.mr2l.local
 (192.168.22.8) with Microsoft SMTP Server (version=TLS1_2,
 cipher=TLS_ECDHE_RSA_WITH_AES_128_GCM_SHA256) id 15.1.2507.35; Sun, 10 Dec
 2023 19:09:04 -0600
Received: from dispatch1-us1.ppe-hosted.com (148.163.129.48) by
 exch2016.mr2l.local (192.168.22.8) with Microsoft SMTP Server
 (version=TLS1_2, cipher=TLS_ECDHE_RSA_WITH_AES_128_GCM_SHA256) id
 15.1.2507.35 via Frontend Transport; Sun, 10 Dec 2023 19:09:04 -0600
X-MDID: 1702256715-QaN0N_cZw_XT
Resent-From: "Proofpoint Essentials" <do-not-reply@proofpointessentials.com>
Resent-To: <susank@missourilife.org>
Resent-Date: Mon, 11 Dec 2023 01:05:15 +0000
Resent-Message-ID: <QaN0N_cZw_XT-w8WLz1fMPrJM@us1-mdac22-33.ut7.mdlocal>
Authentication-Results: ppe-hosted.com; spf=pass smtp.mailfrom=ago.mo.gov;
 dkim=pass header.d=ago.mo.gov header.s=20220920; dmarc=pass
 header.from=ago.mo.gov header.policy=none;
Received: from oa.mo.gov (momail3.mo.gov [168.166.15.220])
         (using TLSv1.2 with cipher ECDHE-RSA-AES256-GCM-SHA384 (256/256 bits))
         (No client certificate requested)
         by mx1-us1.ppe-hosted.com (PPE Hosted ESMTP Server) with ESMTPS id 9F9BCA8006F
         for <susank@missourilife.org>; Mon, 11 Dec 2023 01:05:14 +0000 (UTC)
Received: from pps.filterd (momail3.mo.gov [127.0.0.1])
         by momail3.mo.gov (8.17.1.5/8.17.1.5) with ESMTP id 3BALO1jF029837
         for <susank@missourilife.org>; Sun, 10 Dec 2023 18:46:18 -0600
DKIM-Signature: v=1; a=rsa-sha256; c=relaxed/relaxed; d=ago.mo.gov; h=from : to : subject :
 date : message-id : content-type : mime-version; s=20220920;
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From: "Wagner, Ray" <Ray.Wagner@ago.mo.gov>
To: "susank@missourilife.org" <susank@missourilife.org>
Subject: Defunding bill
Thread-Topic: Defunding bill
Thread-Index: AQHaK8twmVWb+1h3wUuEBB7Ij1ubhQ==
Date: Mon, 11 Dec 2023 00:46:12 +0000
```

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Message-ID: <F440E7C4-E45B-4F13-B584-E532E4942920@ago.mo.gov>
Accept-Language: en-US
Content-Language: en-US
X-MS-Has-Attach: yes
X-MS-TNEF-Correlator:
x-ms-exchange-messagesentrepresentingtype: 1
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MIME-Version: 1.0
X-Proofpoint-Virus-Version: vendor=baseguard
 engine=ICAP:2.0.272,Aquarius:18.0.997,Hydra:6.0.619,FMLib:17.11.176.26
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X-MDID-I: us1;ut7;1702256715;QaN0N_cZw_XT;<Ray.Wagner@ago.mo.gov>;cc40d563efdf7c9c27ea5eb81c760bbc
Return-Path: Ray.Wagner@ago.mo.gov

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The Supreme Court Must Protect Free Speech

By Missouri Attorney General Andrew Bailey

In a free society, the debate between opposing viewpoints should be played out in the marketplace of ideas. Enshrined in the First Amendment, our right to free speech is the bedrock of our great nation. Unfortunately, free speech is under attack by the very people sworn to protect it: government officials.

In October, the United States Supreme Court agreed to hear our bombshell censorship case, *Missouri v. Biden*, in which we alleged—and proved—a conspiracy by government officials to silence conservative speech on social media. In partnership with Louisiana, my office filed suit to combat the Biden Administration's censorship of speech that challenged the government's narrative on everything from the COVID–19 lab leak theory, to the Hunter Biden laptop story.

The Biden Administration's censorship campaign was unsparing. It targeted government officials, scientists, healthcare workers, academics, and everyday Americans. Left-leaning federal bureaucrats used both direct and implied threats to distort public debate on key issues over the course of several years. We sued to stop it, and thankfully, the Supreme Court agreed to hear the case.

The vast censorship enterprise uncovered in *Missouri v. Biden* is highly disturbing. What's worse is it's not the only example. The Supreme Court has agreed to review yet another case involving government censorship against political opponents: *NRA v. Vullo.*

Vullo goes back to 2017, when New York Governor Andrew Cuomo hatched a plot to destroy the National Rifle Association (NRA) and its ability to advocate for gun rights. Working with Maria Vullo, head of New York's Department of Financial Services (DFS), which supervises and regulates the activities of nearly 3,000 financial institutions, New York initiated a campaign of public warnings and backroom threats to financial institutions designed to hamper the NRA's ability to function.

Their message: drop the NRA, or face regulatory reprisals.

This campaign succeeded. One of the NRA's longtime insurance partners told them it had no choice but to "drop" their business for fear of losing its New York business license. The NRA's longtime corporate insurance providers withdrew from ongoing negotiations to renew coverage, saying they were unwilling to do business with the NRA at any price in light of New York's threats. A third insurance company stated in internal minutes that New York's actions had transformed the matter of doing business with the NRA into a "compliance issue."

New York's DFS followed up by announcing large fines targeted at the NRA's insurance partners for conduct it regularly excused in other contexts. DFS then issued a directive calling on all banks and insurance companies doing business in New York to "review any relationships they have with the NRA or similar gun promotion organizations, and to take prompt actions to managing these risks and promote public health and safety" in light of what it called the "social backlash" against the NRA and "the voices of the passionate, courageous, and articulate young people" denouncing the gun rights group. Governor Cuomo issued a public directive the same day which underscored the purpose of Superintendent Vullo- to drive the NRA out of New York. The NRA filed suit to end this blatant violation of its First Amendment rights.

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New York's actions are inherently unconstitutional. In the 1960s, the Supreme Court held that implicit threats of reprisal against speakers disfavored by the government violate the First Amendment. This precedent is the same that supports our lawsuit, *Missouri v. Biden*. Applying this clearly established law, the Northern District of New York held that the NRA stated a cause of action for violation of the First Amendment. On appeal, the Second Circuit wrongfully reversed. Citing a Diversity, Equity and Inclusion Consultant, it held that "this age of enhanced corporate social responsibility" justified regulatory concern about "general backlash" against a customer's political speech. Under this view, any censorship of free speech would be justified by simply claiming the government has a general regulatory interest in combatting so-called "misinformation." That is antithetical to our constitutional freedoms.

Thus, I filed a brief requesting the Supreme Court review *NRA v. Vullo*. They agreed to hear the case, and the stakes could not be higher.

Cuomo made no bones about his intentions when he posted on social media, "The regulations NY put in place are working. We're forcing the NRA into financial jeopardy. We won't stop until we shut them down." This type of government bullying and censorship cannot stand.

Regulators have enormous power over our lives—especially our finances. If speaking out on public issues in opposition to government officials means they can cut off access to financial services, our country has become little more than a dictatorship.

That's not the America I fought to defend on the battlefields of Iraq or swore to protect as Missouri's 44th Attorney General.

If the Supreme Court lets the Second Circuit's decision stand, it will set a devastating anti-free speech precedent at a time when the First Amendment is under widespread attack. The Supreme Court should correct the Second Circuit's egregious misstep and uphold our constitution.

Andrew Bailey is a combat veteran and the 44th Attorney General of Missouri.

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Bcc: 'rikki@blazemedia.com'[rikki@blazemedia.com]; 'skolk@glennbeck.com'[skolk@glennbeck.com]; 'Alyson.Mansfield@foxnews.com'[Alyson.Mansfield@foxnews.com]; 'Peter.Caterina@foxnews.com'[Peter.Caterina@foxnews.com]; 'pascarella@foxnews.com'[pascarella@foxnews.com]; 'Bragg, Christine'[Christine.DeSanctis@FOX.COM]; 'jon.costantino@foxnews.com'[jon.costantino@foxnews.com]; 'jon.decker@foxnews.com'[jon.decker@foxnews.com]; 'eric.albeen@foxnews.com'[eric.albeen@foxnews.com]; 'thebucksexton@gmail.com'[thebucksexton@gmail.com]; 'rob.bluey@heritage.org'[rob.bluey@heritage.org]; 'virginia.allen@heritage.org'[virginia.allen@heritage.org]; 'qmccarthy@salemmediachicago.com'[qmccarthy@salemmediachicago.com]; 'Anthony.rivera@siriusxm.com'[Anthony.rivera@siriusxm.com]; 'Edwin.ramirez@siriusxm.com'[Edwin.ramirez@siriusxm.com]; 'Gregory.sahakian@siriusxm.com'[Gregory.sahakian@siriusxm.com]; 'emily@thefederalist.com'[emily@thefederalist.com]; 'bookings@hughhewitt.com'[bookings@hughhewitt.com]; 'viewsandnews@icloud.com'[viewsandnews@icloud.com]; Sam Pags[Sam@joepags.com]; 'pags@joepags.com'[pags@joepags.com]; 'jjverdi@live.com'[jjverdi@live.com]; 'savagemikesavage@aol.com'[savagemikesavage@aol.com]; 'r.ocallaghan15@gmail.com'[r.ocallaghan15@gmail.com]; 'Mroczkowski, Alice'[AMroczkowski@premierenetworks.com]; 'lynda@hannity.com'[lynda@hannity.com]; 'jpauldecker@gmail.com'[jpauldecker@gmail.com]; 'Binns, Michael'[Michael.Binns@siriusxm.com]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Tue 1/16/2024 9:44:04 PM (UTC-06:00)
Subject: A Big Day for the 1A - AG Bailey
AG Bailey - Supreme Court Must Protect Free Speech.pdf

Hi,

Hope you're doing well! Today was a big day for the 1A out of Missouri.

We have not posted this publicly yet but AG Bailey filed a brief late this evening supporting the NRA in its Supreme Court case against NY state officials for utilizing pressure on private companies to violate the NRA's First Amendment rights. The brief can be viewed here: https://ago.mo.gov/wp-content/uploads/NRA-v.-Vullo-22-842-MT-Amicus-Brief-as-filed.pdf

As AG Bailey opines in this op-ed that we have yet to publish (see attached), ***NRA v. Vullo*** **very closely mirrors** ***Missouri v. Biden***, AG Bailey's case against Joe Biden for censorship on social media platforms, **which will also be heard at the Supreme Court this term.** We will be submitting our briefing to SCOTUS in the coming days.

This is especially relevant with **the DOJ admitting Hunter Biden's laptop** was real in a court filing late this evening: https://twitter.com/AGAndrewBailey/status/1747450527749726679 ***Missouri v. Biden*** **was the first case to reveal that the DOJ and FBI colluded to censor any news of the Hunter Biden laptop story (and now that same entity is admitting its veracity).**

AG Bailey is fighting to halt the Leftist assault on free speech once and for all.

This Supreme Court term is one of the most consequential in U.S. history, especially in regards to the 1A. He is happy to speak about it this week if there is any interest.

Best,

Madeline Sieren | Communications Director
Missouri Attorney General's Office
Jefferson City, MO
573-690-1205
Madeline.Sieren@ago.mo.gov

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Bcc: 'media@briankilmeade.com'[media@briankilmeade.com]; 'Alyson.Mansfield@foxnews.com'[Alyson.Mansfield@foxnews.com]; 'Peter.Caterina@foxnews.com'[Peter.Caterina@foxnews.com]; 'eric.albeen@foxnews.com'[eric.albeen@foxnews.com]; 'Allen, Virginia'[Virginia.Allen@heritage.org]; 'Rivera, Anthony'[Anthony.Rivera@siriusxm.com]; 'Ramirez, Edwin'[Edwin.Ramirez@siriusxm.com]; 'Gregory.sahakian@siriusxm.com'[Gregory.sahakian@siriusxm.com]; 'emily@thefederalist.com'[emily@thefederalist.com]; 'jon.constantino@foxnews.com'[jon.constantino@foxnews.com]; 'jon.decker@foxnews.com'[jon.decker@foxnews.com]; 'Danielle Hitchen'[bookings@hughhewitt.com]; 'pascarella@foxnews.com'[pascarella@foxnews.com]; 'sam@joepags.com'[sam@joepags.com]; 'pags@joepags.com'[pags@joepags.com]; 'viewsandnews@icloud.com'[viewsandnews@icloud.com]; 'Christine.desanctis@foxnews.com'[Christine.desanctis@foxnews.com]; 'lynda@hannity.com'[lynda@hannity.com]; 'jjverdi@live.com'[jjverdi@live.com]; 'savagemikesavage@aol.com'[savagemikesavage@aol.com]; 'r.ocallaghan15@gmail.com'[r.ocallaghan15@gmail.com]; 'hayley.silverman@siriusxm.com'[hayley.silverman@siriusxm.com]; 'jpauldecker@gmail.com'[jpauldecker@gmail.com]; 'Binns, Michael'[Michael.Binns@siriusxm.com]; 'bschrader@mercurystudios.com'[bschrader@mercurystudios.com]; Monica Wallace[Monica@joepags.com]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Sun 2/18/2024 9:03:07 PM (UTC-06:00)
Subject: AG Bailey - Leading the Way to Defend the 2A

Hello – hope you are doing well!

Wanted to put on your radar for this week:

AG Bailey has a huge argument against the Biden Admin at the Eighth Circuit Court of Appeals this Friday to defend our Second Amendment Preservation Act. The **Biden Admin claims the State of Missouri is attempting to nullify federal gun laws,** when really all the State is doing is refusing to enforce unconstitutional gun laws. **AG Bailey is fighting in court to defend SAPA, which is the most robust gun rights law in the country.** More on that here: https://www.foxnews.com/politics/us-supreme-court-keeps-missouri-law-hold-targets-federal-gun-restrictions

He is also visiting an ammunition plant in Independence, MO, this week that Democrat AGs are asking Joe Biden to shut down. **He has put Biden on notice that he will file suit if the feds try to shut it down.** More on that here: https://www.foxnews.com/politics/gop-ags-battle-blue-state-push-to-shutter-largest-ammo-manufacturer-to-punish-second-amendment-rights

AG Bailey has long maintained that **the Second Amendment is a floor, not a ceiling, for our God-given rights,** and he will do everything he can to defend them, regardless of leftist pressure.

Let me know if there is any interest in speaking with the AG on how Missouri is leading the way to defend the 2A.

All the best,

Madeline Sieren | Communications Director
Missouri Attorney General's Office
Jefferson City, MO
573-690-1205
Madeline.Sieren@ago.mo.gov

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To: O'Neil, Tyler[Tyler.ONeil@heritage.org]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Thur 1/26/2023 10:34:05 AM (UTC-06:00)
Subject: Re: Media Request: Columbia drag show situation

Hi Tyler,
Thanks for reaching out.

Yes, the AG sent a letter last Friday to both the superintendent and the mayor of Columbia. Columbia Public Schools Superintendent Yearwood responded with a letter to the governor, with the AG cc'ed, on Jan 22. That letter can be found in this article.https://abc17news.com/news/education/columbia-public-schools/2023/01/22/columbia-public-schools-sends-letter-to-governor-about-drag-performance/

We sent a letter back on Jan. 24 refuting his claims in the letter. I've got a tweet thread here with that letter and the main points of the letter attached.https://twitter.com/agandrewbailey/status/1618321521294049282?s=46&t=vVqAHBxFTZQOpP5v1_UsYQfar, he has called for the resignation or termination of any officials that knew, or should have known, that schoolchildren would be present at the drag show. He has also encouraged local parents to show up at the next school board meeting to register their disgust on the matter.

Attorney General Bailey is examining all legal options, and more action is forthcoming.

I will be sure to keep you updated as things unfold.

Let me know if I can clarify anything here,

Thanks very much!

Sent from my iPhone

> On Jan 26, 2023, at 10:21 AM, O'Neil, Tyler <Tyler.ONeil@heritage.org> wrote:
>
> Madeline,
> I'm writing a story about the Columbia drag show situation, where a school reportedly took kids to a drag show without notifying parents that the event would include a drag show. I know AG Bailey sent letters to the mayor and the superintendent and I want to hear if he is planning more action on this and if either the mayor or the superintendent responded.
> Best,
> Tyler O'Neil
> (303)956-8499
>
> ---
> Tyler ONeil
> *Managing*
> The
> 214
> Washington,
>
> 202-608-6046
> heritage.org

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AMERICAN OVERSIGHT

To: 'O'Neil, Tyler'[Tyler.ONeil@heritage.org]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Thur 1/12/2023 10:10:51 AM (UTC-06:00)
Subject: RE: Media Request: White House Social Media Censorship

Hi Tyler,
A statement from AG Bailey: "I want to protect Missourians and the freedoms they enjoy, which is why as Attorney General, I will always defend the Constitution. This case is about the Biden Administration's blatant disregard for the First Amendment and its collusion with Big Tech social media companies to suppress speech it disagrees with. I will always fight back against unelected bureaucrats who seek to indoctrinate the people of this state by violating our constitutional right to free and open debate."
Here is a link to the press release we put out this week on the docs: https://ago.mo.gov/home/news/2023/01/09/missouri-attorney-general-releases-more-documents-exposing-white-house's-social-media-censorship-scheme
Let me know if you need anything else.
Thanks!

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Thursday, January 12, 2023 8:04 AM
To: Press <Press@ago.mo.gov>; info@ago.mo.gov; Sunshine Request <SunshineRequest@ago.mo.gov>
Subject: Media Request: White House Social Media Censorship
Importance: High

This is Tyler O'Neil, managing editor at The Daily Signal. I'm writing a story about the new documents AG Bailey released on Monday and would like to see if the AG or his staff would provide a unique comment on them. Would he comment on Facebook's decision to assure Flaherty that the social media company has been "reducing the virality of content discouraging vaccines that does not contain actionable misinformation," including "often-true content"? Would he flag any other documents that he released previously or that he may not have yet released? What do these documents reveal about the Biden White House, in his estimation? I am working on a quick deadline and would appreciate a prompt response.
Best,
Tyler O'Neil
(303)956-8499

Tyler ONeil

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AMERICAN OVERSIGHT

To: 'O'Neil, Tyler'[Tyler.ONeil@heritage.org]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Tue 1/31/2023 11:28:44 AM (UTC-06:00)
Subject: RE: Media Request: Columbia drag show situation

Hi Tyler,
Sorry for the delay, thanks for following up.
We've got another action coming today. Stay tuned.
"I want Missouri to be the safest state in the nation for children. The age of the children present at the drag show is not relevant to the discussion, because schoolchildren were subject to inherently sexual material without their parents' consent. My office will use every tool at our disposal to ensure Missouri children are educated, not indoctrinated, and that parents have a say in the process."
–Missouri Attorney General Bailey
Thanks!

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Tuesday, January 31, 2023 10:01 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation
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Tyler ONeil

Managing

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From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Date: Monday, January 30, 2023 at 11:40 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation

Thanks, Madeline!
By the way, did the AG's office know that elementary students attended the overall event? I'm asking the school if any of the kids attended the drag event.
Has the AG made any more decisions about future action?

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, January 26, 2023 at 11:34 AM
To: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Subject: Re: Media Request: Columbia drag show situation

Hi Tyler,
Thanks for reaching out.
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Attorney General Bailey is examining all legal options, and more action is forthcoming.
I will be sure to keep you updated as things unfold.
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Thanks very much!

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AMERICAN OVERSIGHT

FOR IMMEDIATE RELEASE
January 31, 2023
Contact: Madeline Sieren
Cell: 573-690-1205
Email: madeline.sieren@ago.mo.gov

Attorney General Bailey Demands Missouri Schools Adopt Resolution Prohibiting Drag Shows for Schoolchildren

JEFFERSON CITY, Mo. - In an effort to enforce the laws as written and protect children throughout the state, Missouri Attorney General Andrew Bailey directed a letter to Missouri School Board Association (MSBA) Executive Director Melissa Randol, urging MSBA to call on their members to adopt a model resolution pledging to uphold Missouri law on human sexuality instruction in public schools.

"I want Missouri to be the safest state in the nation for children, which includes preventing school officials from taking schoolchildren to drag shows," **said Attorney General Bailey**. "That's why I am asking the Missouri School Board Association to call on their members to adopt a resolution pledging to uphold Missouri law on what can be taught regarding human sexuality in schools. My office will use every tool at our disposal to ensure Missouri children are educated, not indoctrinated, and that parents have a say in the process."

The letter asserts that "Adherence to the law is particularly important in the wake of recent events in which Columbia Public Schools took a group of middle school students to an event that featured a drag show performance. Drag shows are inherently sexualized performances. They are an outward expression of a desired sexuality and sexual identity. They are intended to draw attention to human sexuality in a manner that appeals to prurient interests. Drag shows have no educational value and have no place in our public schools."

Further, the letter posits that the General Assembly carefully crafted Section 170.015 to "govern the content of human sexuality education in Missouri schools." "School districts are required to, among other things, 'ensure that all instruction in human sexuality *is appropriate to the age of the students* receiving such instruction.' (emphasis added). Moreover, school boards are charged with making sure parents are kept informed and notified of the, 'basic content of the district's or school's human sexuality instruction to be provided to the student,' and of their right, 'to remove the student from any part of [such]… instruction.'"

"It is my sincerest hope that MSBA will stand with me in this fight to protect Missouri children, promote adherence to Missouri law, and ensure parents are fully informed about human sexuality instruction in Missouri schools," the letter concludes.

The full letter can be read here: https://ago.mo.gov/docs/default-source/press-releases/2023-01-31-melissa-randol---msba-letter.pdf?sfvrsn=e5ebbf62_2

###

AMERICAN OVERSIGHT

To: 'O'Neil, Tyler'[Tyler.ONeil@heritage.org]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Tue 1/31/2023 1:32:56 PM (UTC-06:00)
Subject: RE: Media Request: Columbia drag show situation
MSBA FINAL.pdf

Hi Tyler,
I can't grant an exclusive but I haven't shared with our press list so I am giving you a 10 Minute headstart on covering the story.
Here's the release I'm about to send out- let me know if you have questions.
Also let me know if you aren't on our official press list and I can add you!
Thanks
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Tuesday, January 31, 2023 11:45 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation
Thanks, Madeline! When do you plan to release the action? Would you offer it to me as a national news exclusive or do you already have someone set up to break it?

Tyler ONeil

Managing

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From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Tuesday, January 31, 2023 at 12:29 PM
To: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Subject: RE: Media Request: Columbia drag show situation

Hi Tyler,
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We've got another action coming today. Stay tuned.
"I want Missouri to be the safest state in the nation for children. The age of the children present at the drag show is not relevant to the discussion, because schoolchildren were subject to inherently sexual material without their parents' consent. My office will use every tool at our disposal to ensure Missouri children are educated, not indoctrinated, and that parents have a say in the process."
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AMERICAN OVERSIGHT

Tyler ONeil

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Has the AG made any more decisions about future action?

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
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Hi Tyler,
Thanks for reaching out.
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Sent: Tue 1/31/2023 2:32:16 PM (UTC-06:00)
Subject: RE: Media Request: Columbia drag show situation

Yes, I did. I will add you to the press list right now.
Thanks!
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Tuesday, January 31, 2023 2:32 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation
Thanks! Have you blasted the story yet? I haven't gotten the release, although I'm not certain if I'm signed up.

Tyler ONeil

Managing

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Washington,

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heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Tuesday, January 31, 2023 at 3:30 PM
To: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Subject: RE: Media Request: Columbia drag show situation

Also- we caught a typo in the PDF I sent you of the letter we sent today.
Let me get you the updated one.
Thanks
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Tuesday, January 31, 2023 2:27 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation
Yes, that one.

Tyler ONeil

Managing

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Washington,

202-608-6046

heritage.org

AMERICAN OVERSIGHT

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Tuesday, January 31, 2023 at 2:57 PM
To: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Subject: RE: Media Request: Columbia drag show situation

Which one? The One of him sitting and smiling?

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Tuesday, January 31, 2023 1:57 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation

Thanks, Madeline! I'm going with the official first one. Do I credit you for it?

Tyler ONeil

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Date: Tuesday, January 31, 2023 at 2:54 PM
To: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Subject: RE: Media Request: Columbia drag show situation

Here are a few images on our Flickr https://www.flickr.com/photos/146566231@N08/
This one from this article isn't mine but it's good. https://missouriindependent.com/2023/01/20/missouri-attorney-general-andrew-bailey-speaks-to-the-federalist-society/

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Tuesday, January 31, 2023 1:42 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation

Do you have a high-resolution photo of Bailey speaking that I can use? For some reason, Getty Images doesn't have any.

Tyler ONeil

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AMERICAN OVERSIGHT

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
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Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Tuesday, January 31, 2023 11:45 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation
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Tyler ONeil

Managing

The
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202-608-6046

heritage.org

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From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
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I'll switch out the pdf for the corrected one once you send it.

Tyler ONeil

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From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Date: Tuesday, January 31, 2023 at 3:32 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
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NVM, I see it's on the site. Is the one on the site right?

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Date: Tuesday, January 31, 2023 at 3:31 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
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Thanks! Have you blasted the story yet? I haven't gotten the release, although I'm not certain if I'm signed up.

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Subject: Re: Media Request: Columbia drag show situation

Thanks, Madeline!
By the way, did the AG's office know that elementary students attended the overall event? I'm asking the school if any of the kids attended the drag event.
Has the AG made any more decisions about future action?

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, January 26, 2023 at 11:34 AM
To: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Subject: Re: Media Request: Columbia drag show situation

Hi Tyler,
Thanks for reaching out.

AMERICAN OVERSIGHT

Yes, the AG sent a letter last Friday to both the superintendent and the mayor of Columbia. Columbia Public Schools Superintendent Yearwood responded with a letter to the governor, with the AG cc'ed, on Jan 22. That letter can be found in this article.https://abc17news.com/news/education/columbia-public-schools/2023/01/22/columbia-public-schools-sends-letter-to-governor-about-drag-performance/
We sent a letter back on Jan. 24 refuting his claims in the letter. I've got a tweet thread here with that letter and the main points of the letter attached.https://twitter.com/agandrewbailey/status/1618321521294049282?s=46&t=vVqAHBxFTZQOpP5v1_UsYQfar, he has called for the resignation or termination of any officials that knew, or should have known, that schoolchildren would be present at the drag show. He has also encouraged local parents to show up at the next school board meeting to register their disgust on the matter.
Attorney General Bailey is examining all legal options, and more action is forthcoming.
I will be sure to keep you updated as things unfold.
Let me know if I can clarify anything here,
Thanks very much!

Sent from my iPhone

On Jan 26, 2023, at 10:21 AM, O'Neil, Tyler <Tyler.ONeil@heritage.org> wrote:

Madeline,
I'm writing a story about the Columbia drag show situation, where a school reportedly took kids to a drag show without notifying parents that the event would include a drag show. I know AG Bailey sent letters to the mayor and the superintendent and I want to hear if he is planning more action on this and if either the mayor or the superintendent responded.
Best,
Tyler O'Neil
(303)956-8499

Tyler ONeil

Managing

The
214
Washington,

202-608-6046

heritage.org

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To: 'Trinko, Katrina'[Katrina.Trinko@heritage.org]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Thur 2/9/2023 3:20:56 PM (UTC-06:00)
Subject: RE: Jamie Reed/Free Press

Here is the release we just sent out on the matter: https://ago.mo.gov/home/news/2023/02/09/missouri-attorney-general-andrew-bailey-confirms-launch-of-multi-agency-investigation-into-st.-louis-transgender-center-for-harming-hundreds-of-children
Let me know if you need anything else from me!

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Trinko, Katrina <Katrina.Trinko@heritage.org>
Sent: Thursday, February 9, 2023 12:34 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Jamie Reed/Free Press

Hi Madeline,
Does Attorney General Andrew Bailey have any comment on the remarks of Jamie Reed, who formerly worked at The Washington University Transgender Center at St. Louis Children's Hospital? She says in her article today at The Free Press that "So I started writing down everything I could about my experience at the Transgender Center. Two weeks ago, I brought my concerns and documents to the attention of Missouri's attorney general. He is a Republican. I am a progressive. But the safety of children should not be a matter for our culture wars. " (https://www.thefp.com/p/i-thought-i-was-saving-trans-kids?utm_source=tfptwitter) I'm working on an op-ed about her article, and was wondering if there was any plan to use any of Reed's reportings and/or investigate the Washington University Transgender Center at St. Louis Children's Hospital and/or any other actions/response.
Thanks, and please let me know if any questions.
Best,
Katrina

I Thought I Was Saving Trans Kids. Now I'm Blowing the Whistle.
There are more than 100 pediatric gender clinics across the U.S. I worked at one. What's happening to children is morally and medically appalling.
www.thefp.com

Katrina Trinko

Director-in-Chief,

The
214
Washington,

202-608-6157

heritage.org

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MO AG 23-0462-A-000365

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To: 'O'Neil, Tyler'[Tyler.ONeil@heritage.org]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Tue 2/21/2023 11:37:16 AM (UTC-06:00)
Subject: RE: Puberty blockers moratorium

Hi Tyler,
Thanks for following up. I will be sure to get you an update when we've got one, but for now, our investigation is ongoing and the Attorney General will not be deterred in his efforts to protect children throughout the state of Missouri.
Thanks,
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Tuesday, February 21, 2023 10:55 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Puberty blockers moratorium
Madeline,
Is there anything AG Bailey plans to do about this move? Will it negatively impact his investigation of the situation?

Tyler ONeil

Managing

The
214
Washington,

202-608-6046

heritage.org

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Date: Saturday, February 18, 2023 at 9:03 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Puberty blockers moratorium

Thanks, Madeline! I'm not sure if you're monitoring this email over the weekend, but the statement did not seem to include a mention of what AG Bailey will do now that the hospital has refused to abide by the moratorium. He merely said it "calls into question how seriously they're taking their internal investigation." Is the AG considering acting on this, as well? Will this move weigh negatively in his investigation of the situation?

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Friday, February 17, 2023 at 8:03 PM
To: Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com>
Subject: RE: Puberty blockers moratorium

Hi Tyler,
We now have a response for you on their refusal to comply with our request for a moratorium. Wanted to flag it for you: https://ago.mo.gov/home/news/2023/02/18/attorney-general-bailey's-statement-on-transgender-clinic's-refusal-to-implement-moratorium-on-puberty-blockers-for-children
Thanks!
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com>
Sent: Monday, February 13, 2023 11:16 AM

AMERICAN OVERSIGHT

To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Puberty blockers moratorium
Importance: High

Madeline,

I'm looking into the AG's call for a moratorium on puberty blockers for kids at St. Louis Children's in the wake of the whistleblower claims, and wanted to hear from you if St. Louis Children's responded to this letter and what sort of moves the AG is considering should the hospital refuse to stop prescribing the drugs in the meantime.

https://ago.mo.gov/home/news/2023/02/10/missouri-attorney-general-andrew-bailey-calls-for-moratorium-on-puberty-blockers-for-children-pending-investigation-of-whistleblower-accusations

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Tyler O'Neil

Managing

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Washington,

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To: 'Thad Brock'[Thad.Brock@heritageaction.com]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Mon 3/13/2023 3:19:31 PM (UTC-05:00)
Subject: RE: Skype Interview with AG Bailey

Hi Thad,
Thanks for reaching out- we are definitely interested. Were those availability times you listed in ET or CT?
Thanks,

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Thad Brock <Thad.Brock@heritageaction.com>
Sent: Monday, March 13, 2023 2:42 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Cc: Matt Crouch <matthew.crouch@heritageaction.com>
Subject: Re: Skype Interview with AG Bailey

HI Madeline,
My apologies, but the air date of this month's special is**Tuesday, March 22 at 6 PM E/T.**

On Mon, Mar 13, 2023 at 3:37 PM Thad Brock <Thad.Brock@heritageaction.com> wrote:

Hi Madeline,
My name is Thad Brock and I am reaching out because Heritage Action is partnering with John Solomon of Just the News for a one-hour special report that will air on **Tuesday, January 31 at 6 PM E/T** on Real America's Voice.
We would like to invite Attorney General Bailey to join us for a 6-8 minute segment (filmed over Skype) over the following subjects:

∀On 2/15 AG Bailey announced moratorium on Puberty Blockers for Children

∀How state bills like SB 49 (SAFE Act) can protect the children of Missouri from the pediatric gender-industrial complex.

The special report will be streamed live on cable's Real America's Voice and live on Twitter, Facebook, Rumble, and Gettr. (Here is the link to a segment we did last month with TX Attorney General Ken Paxton.)
The audience is heavily conservative grassroots. If the Attorney General is available, here is the initial set of times John Solomon's team gave us for availability—do any of these times work for his schedule?

∀**Wednesday, March 15th:** 9:00 AM - 10:00 AM

∀**Thursday, March 16th:** 9:00 AM - 10:00 AM; 1:00 PM - 3:00 PM

If you have any questions, I would be more than happy to answer them.
Best,
--

Thad Brock
Director of Digital Advocacy
Heritage Action for America

202-680-8868
thad.brock@heritageaction.com
heritageaction.com

--
Thad Brock
Director of Digital Advocacy

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AMERICAN OVERSIGHT

Heritage Action for America

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From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Mon 3/13/2023 3:30:00 PM (UTC-05:00)
Subject: RE: Skype Interview with AG Bailey

9:15 AM works well. Is there any way we could use Zoom rather Skype? I have never used skype before and want to be sure everything works well.
Thanks very much!
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov
From: Thad Brock <Thad.Brock@heritageaction.com>
Sent: Monday, March 13, 2023 3:29 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Skype Interview with AG Bailey
Could we do it at 9:15 AM? It's super short, just 6-8 minutes.
On Mon, Mar 13, 2023 at 4:26 PM Sieren, Madeline <Madeline.Sieren@ago.mo.gov> wrote:
Could we do Wednesday, March 15 from 9-10 AM ET? How long would you anticipate filming would take?
Also, my cell is 573-690-1205, feel free to text me if that is easier for coordinating purposes.
Thanks,
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov
From: Thad Brock <Thad.Brock@heritageaction.com>
Sent: Monday, March 13, 2023 3:21 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Cc: Matt Crouch <matthew.crouch@heritageaction.com>
Subject: Re: Skype Interview with AG Bailey
That's great to hear, Madeline!
Those times are in Eastern Time. We're big fans of the AG!
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If you have any questions, I would be more than happy to answer them.

Best,

--

Thad Brock
Director of Digital Advocacy
Heritage Action for America

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thad.brock@heritageaction.com
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--

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--

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From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
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Madeline.Sieren@ago.mo.gov

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Sent: Monday, March 13, 2023 3:21 PM
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Best,
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Thad Brock
Director of Digital Advocacy
Heritage Action for America
202-680-8868
thad.brock@heritageaction.com

AMERICAN OVERSIGHT

heritageaction.com

--

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--

Thad Brock
Director of Digital Advocacy
Heritage Action for America

202-680-8868

thad.brock@heritageaction.com

heritageaction.com

AMERICAN OVERSIGHT

To: 'Allen, Virginia'[Virginia.Allen@heritage.org]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Thur 3/16/2023 5:11:17 PM (UTC-05:00)
Subject: RE: Missouri Attorney General Andrew Bailey

Hi Virginia,
Next Wednesday afternoon is free for right now, as is Tuesday the 28 from 2-5 CT, and Wednesday April 5 all day is open. Let me know what would work for you guys and we can get it scheduled.
All the best,

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Thursday, March 16, 2023 4:36 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey

Hi Madeline,
I would love to have the Attorney General on The Daily Signal Podcast sometime in the coming weeks. Our interviews run about 20 minutes.
Could you send me a few dates and times that will work well for AG Bailey?
Best,
Virginia

Virginia Allen

Senior

The
214
Washington,

202-608-6149

heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, March 16, 2023 at 3:34 PM
To: Bluey, Rob <rob.bluey@heritage.org>, Allen, Virginia <Virginia.Allen@heritage.org>
Subject: Missouri Attorney General Andrew Bailey

Hi,
My name is Maddie Sieren, I'm the press secretary for Missouri Attorney General Andrew Bailey. I am writing to see about getting the AG on to speak about a number of the topics that Missouri is leading the way on:

-Attempting to oust a Soros-backed prosecutor for refusing to prosecute criminals https://www.foxnews.com/politics/missouri-ag-moves-fire-dem-attorney-kim-gardner-refuses-resign-public-safety-outcry
-Launching an investigation into an STL pediatric transgender clinic for giving children puberty blockers without proper care https://www.foxnews.com/politics/missouri-attorney-general-launches-investigation-childrens-hospitals-transgender-center
-Our case against the Biden administration with more than 1,400 facts showing that Biden has coerced and colluded with big tech social media companies to censor free speech https://dailycaller.com/2023/03/06/missouri-louisiana-preliminary-injunction-biden-admin-gov-censorship-social-media/ https://dailycaller.com/2023/01/21/andrew-bailey-missouri-root-out-biden-big-tech-censorship/
-Our letter being the basis for why Walgreens agreed not to send abortion pills in the mail to pro-life states https://www.foxnews.com/politics/20-state-ags-warn-cvs-walgreens-distributing-abortion-pills-violates-state-federal-law https://www.theepochtimes.com/walgreens-wont-sell-abortion-pills-in-20-states_5099530.html?utm_medium=social&utm_source=twitter&utm_campaign=dg&ea=2

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-Our case at the U.S. Supreme Court fighting Biden's unconstitutional student loan plan
https://www.washingtonexaminer.com/restoring-america/fairness-justice/nebraska-missouri-ags-supreme-court-student-loan-case https://dailycaller.com/2023/02/28/republican-attorneys-general-supreme-court-student-loans/

-Our defense of the Second Amendment Preservation Act, the strongest law of its kind in the US
https://www.courthousenews.com/missouri-attorney-general-vows-to-appeal-ruling-against-state-gun-law/

These are only a few topics we feel would be of interest to your audience, let me know if you would be interested in interviewing the AG or if you need more info.

Thanks,

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

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To: 'rob.bluey@heritage.org'[rob.bluey@heritage.org]; 'virginia.allen@heritage.org'[virginia.allen@heritage.org]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Thur 3/16/2023 2:34:14 PM (UTC-05:00)
Subject: Missouri Attorney General Andrew Bailey

Hi,

My name is Maddie Sieren, I'm the press secretary for Missouri Attorney General Andrew Bailey. I am writing to see about getting the AG on to speak about a number of the topics that Missouri is leading the way on:

-Attempting to oust a Soros-backed prosecutor for refusing to prosecute criminals https://www.foxnews.com/politics/missouri-ag-moves-fire-dem-attorney-kim-gardner-refuses-resign-public-safety-outcry

-Launching an investigation into an STL pediatric transgender clinic for giving children puberty blockers without proper care https://www.foxnews.com/politics/missouri-attorney-general-launches-investigation-childrens-hospitals-transgender-center

-Our case against the Biden administration with more than 1,400 facts showing that Biden has coerced and colluded with big tech social media companies to censor free speech https://dailycaller.com/2023/03/06/missouri-louisiana-preliminary-injunction-biden-admin-gov-censorship-social-media/ https://dailycaller.com/2023/01/21/andrew-bailey-missouri-root-out-biden-big-tech-censorship/

-Our letter being the basis for why Walgreens agreed not to send abortion pills in the mail to pro-life states https://www.foxnews.com/politics/20-state-ags-warn-cvs-walgreens-distributing-abortion-pills-violates-state-federal-law https://www.theepochtimes.com/walgreens-wont-sell-abortion-pills-in-20-states_5099530.html?utm_medium=social&utm_source=twitter&utm_campaign=digitalsub

-Our case at the U.S. Supreme Court fighting Biden's unconstitutional student loan plan https://www.washingtonexaminer.com/restoring-america/fairness-justice/nebraska-missouri-ags-supreme-court-student-loan-case https://dailycaller.com/2023/02/28/republican-attorneys-general-supreme-court-student-loans/

-Our defense of the Second Amendment Preservation Act, the strongest law of its kind in the US https://www.courthousenews.com/missouri-attorney-general-vows-to-appeal-ruling-against-state-gun-law/

These are only a few topics we feel would be of interest to your audience, let me know if you would be interested in interviewing the AG or if you need more info.

Thanks,

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

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AMERICAN OVERSIGHT

To: 'O'Neil, Tyler'[Tyler.ONeil@heritage.org]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Mon 3/20/2023 2:33:10 PM (UTC-05:00)
Subject: RE: Missouri Attorney General Andrew Bailey Announces Emergency Regulation on Gender Transition Interventions for Minors

Hi Tyler- just wanted to say congratulations on becoming a father! SO awesome.
Looking forward to working with you again in a few weeks,
Maddie

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Monday, March 20, 2023 1:11 PM
To: Press <Press@ago.mo.gov>
Subject: Automatic reply: Missouri Attorney General Andrew Bailey Announces Emergency Regulation on Gender Transition Interventions for Minors

Hi! You've reached me on paternity leave. I will be out until Monday, March 27. Please contact Katrina Trinko (katrina.trinko@heritage.org) in the meantime. I look forward to connecting when I'm back!

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AMERICAN OVERSIGHT

AMERICAN OVERSIGHT

To: 'Thad Brock'[Thad.Brock@heritageaction.com]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Mon 3/13/2023 3:37:43 PM (UTC-05:00)
Subject: RE: Skype Interview with AG Bailey
Bailey_AGO0001.jpg

Yes- here it is!
Thanks very much for arranging this. We look forward to interviewing!
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov
From: Thad Brock <Thad.Brock@heritageaction.com>
Sent: Monday, March 13, 2023 3:31 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Skype Interview with AG Bailey
Yes, we can do that, too. I'll have the studio set that up and send a zoom link.
In the meantime, could you send over a high res headshot of the AG?
On Mon, Mar 13, 2023 at 4:30 PM Sieren, Madeline <Madeline.Sieren@ago.mo.gov> wrote:
9:15 AM works well. Is there any way we could use Zoom rather Skype? I have never used skype before and want to be sure everything works well.
Thanks very much!
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov
From: Thad Brock <Thad.Brock@heritageaction.com>
Sent: Monday, March 13, 2023 3:29 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Skype Interview with AG Bailey
Could we do it at 9:15 AM? It's super short, just 6-8 minutes.
On Mon, Mar 13, 2023 at 4:26 PM Sieren, Madeline <Madeline.Sieren@ago.mo.gov> wrote:
Could we do Wednesday, March 15 from 9-10 AM ET? How long would you anticipate filming would take?
Also, my cell is 573-690-1205, feel free to text me if that is easier for coordinating purposes.
Thanks,
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov
From: Thad Brock <Thad.Brock@heritageaction.com>
Sent: Monday, March 13, 2023 3:21 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Cc: Matt Crouch <matthew.crouch@heritageaction.com>
Subject: Re: Skype Interview with AG Bailey
That's great to hear, Madeline!
Those times are in Eastern Time. We're big fans of the AG!
On Mon, Mar 13, 2023 at 4:19 PM Sieren, Madeline <Madeline.Sieren@ago.mo.gov> wrote:
Hi Thad,
Thanks for reaching out- we are definitely interested. Were those availability times you listed in ET or CT?
Thanks,
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov
From: Thad Brock <Thad.Brock@heritageaction.com>
Sent: Monday, March 13, 2023 2:42 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Cc: Matt Crouch <matthew.crouch@heritageaction.com>
Subject: Re: Skype Interview with AG Bailey
HI Madeline,

AMERICAN OVERSIGHT

My apologies, but the air date of this month's special is **Tuesday, March 22 at 6 PM E/T.**

On Mon, Mar 13, 2023 at 3:37 PM Thad Brock <Thad.Brock@heritageaction.com> wrote:

Hi Madeline,

My name is Thad Brock and I am reaching out because Heritage Action is partnering with John Solomon of Just the News for a one-hour special report that will air on **Tuesday, January 31 at 6 PM E/T** on Real America's Voice. **We would like to invite Attorney General Bailey to join us for a 6-8 minute segment (filmed over Skype) over the following subjects:**

- On 2/15 AG Bailey announced moratorium on Puberty Blockers for Children
- How state bills like SB 49 (SAFE Act) can protect the children of Missouri from the pediatric gender-industrial complex.

The special report will be streamed live on cable's Real America's Voice and live on Twitter, Facebook, Rumble, and Gettr. (Here is the link to a segment we did last month with TX Attorney General Ken Paxton.)

The audience is heavily conservative grassroots. If the Attorney General is available, here is the initial set of times John Solomon's team gave us for availability—do any of these times work for his schedule?

- **Wednesday, March 15th:** 9:00 AM - 10:00 AM
- **Thursday, March 16th:** 9:00 AM - 10:00 AM; 1:00 PM - 3:00 PM

If you have any questions, I would be more than happy to answer them.

Best,

--

Thad Brock
Director of Digital Advocacy
Heritage Action for America

202-680-8868
thad.brock@heritageaction.com
heritageaction.com

--

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Director of Digital Advocacy
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AMERICAN OVERSIGHT

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Director of Digital Advocacy
Heritage Action for America

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thad.brock@heritageaction.com
heritageaction.com

AMERICAN OVERSIGHT

To: Chad Banghart[chadabanghart@gmail.com]
Cc: Thad Brock[Thad.Brock@heritageaction.com]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Wed 3/15/2023 8:23:44 AM (UTC-05:00)
Subject: Re: Skype Interview with AG Bailey

Received thank you. We are running about 15-20 min late- is taping this AM still possible?
Thanks for working with us. My cell is 573/690/1205 if you need to call or text me.

Thanks- Maddie

Sent from my iPhone

On Mar 14, 2023, at 9:56 AM, Chad Banghart <chadabanghart@gmail.com> wrote:

Good Morning Madeline,
John is very much looking forward to this interview with the Attorney General. Below is the Zoom information that our studio team will use tomorrow morning for his appearance.

Join Zoom Meeting:
https://us06web.zoom.us/j/87122166885?pwd=VS9NbTkzSXVZUmhxZHZFaXg5NCtQQT09
Meeting ID:2216 6885
Passcode:

I will be the point of contact to John and/or our studio team for if you need anything or have any issues with the web link above. Please let me know if you have any questions!

Thanks,
Chad

Chad A. Banghart
Executive Producer
Just The News, No Noise (Nat'l TV News)
John Solomon Reports (Nat'l Podcast)
c. 517-582-6659
o. 202-750-0269

On Mon, Mar 13, 2023 at 4:39 PM Thad Brock <Thad.Brock@heritageaction.com> wrote:

As are we!
I'm looping in John Solomon's Producer, Chad Banghart, who will be coordinating with the studio and sending you the zoom link.

On Mon, Mar 13, 2023 at 4:37 PM Sieren, Madeline <Madeline.Sieren@ago.mo.gov> wrote:

Yes- here it is!

Thanks very much for arranging this. We look forward to interviewing!

Madeline Sieren

AMERICAN OVERSIGHT

Missouri Attorney General's Office

Madeline.Sieren@ago.mo.gov

From: Thad Brock <Thad.Brock@heritageaction.com>
Sent: Monday, March 13, 2023 3:31 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Skype Interview with AG Bailey

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9:15 AM works well. Is there any way we could use Zoom rather Skype? I have never used skype before and want to be sure everything works well.

Thanks very much!

Madeline Sieren

Missouri Attorney General's Office

Madeline.Sieren@ago.mo.gov

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Madeline Sieren

Missouri Attorney General's Office

Madeline.Sieren@ago.mo.gov

From: Thad Brock <Thad.Brock@heritageaction.com>
Sent: Monday, March 13, 2023 3:21 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Cc: Matt Crouch <matthew.crouch@heritageaction.com>
Subject: Re: Skype Interview with AG Bailey

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Those times are in Eastern Time. We're big fans of the AG!

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AMERICAN OVERSIGHT

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Thanks,

Madeline Sieren

Missouri Attorney General's Office

Madeline.Sieren@ago.mo.gov

From: Thad Brock <Thad.Brock@heritageaction.com>
Sent: Monday, March 13, 2023 2:42 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Cc: Matt Crouch <matthew.crouch@heritageaction.com>
Subject: Re: Skype Interview with AG Bailey

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> Hi Madeline,
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> **We would like to invite Attorney General Bailey to join us for a 6-8 minute segment (filmed over Skype) over the following subjects:**
>
> ∀On 2/15 AG Bailey announced moratorium on Puberty Blockers for Children
>
> ∀How state bills like SB 49 (SAFE Act) can protect the children of Missouri from the pediatric gender-industrial complex.
>
> The special report will be streamed live on cable's Real America's Voice and live on Twitter, Facebook, Rumble, and Gettr. (Here is the link to a segment we did last month with TX Attorney General Ken Paxton.)
> The audience is heavily conservative grassroots. If the Attorney General is available, here is the initial set of times John Solomon's team gave us for availability—do any of these times work for his schedule?
>
> ∀**Wednesday, March 15th:** 9:00 AM - 10:00 AM
>
> ∀**Thursday, March 16th:** 9:00 AM - 10:00 AM; 1:00 PM - 3:00 PM
> If you have any questions, I would be more than happy to answer them.
> Best,
>
> --
>
> **Thad Brock**
> Director of Digital Advocacy
> Heritage Action for America
>
> 202-680-8868
>
> thad.brock@heritageaction.com
>
> heritageaction.com

AMERICAN OVERSIGHT

--

Thad Brock
Director of Digital Advocacy
Heritage Action for America

202-680-8868

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AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

To: Allen, Virginia[Virginia.Allen@heritage.org]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Mon 3/20/2023 8:01:31 AM (UTC-05:00)
Subject: Re: Missouri Attorney General Andrew Bailey

Hi Virginia,
Let's lock in 1 PM EST on April 5. Would this be a phone call or over zoom?

Thanks!

Sent from my iPhone

On Mar 17, 2023, at 12:21 PM, Allen, Virginia <Virginia.Allen@heritage.org> wrote:

Excellent. How about Wednesday, April 5 at 1pm EST?

Virginia Allen
Senior
The
214
Washington,

202-608-6149
heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, March 16, 2023 at 6:11 PM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: RE: Missouri Attorney General Andrew Bailey

Hi Virginia,
Next Wednesday afternoon is free for right now, as is Tuesday the 28 from 2-5 CT, and Wednesday April 5 all day is open. Let me know what would work for you guys and we can get it scheduled.
All the best,
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Thursday, March 16, 2023 4:36 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey
Hi Madeline,
I would love to have the Attorney General on The Daily Signal Podcast sometime in the coming weeks. Our interviews run about 20 minutes.
Could you send me a few dates and times that will work well for AG Bailey?
Best,
Virginia

Virginia Allen

Senior

The
214
Washington,

AMERICAN OVERSIGHT

heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, March 16, 2023 at 3:34 PM
To: Bluey, Rob <rob.bluey@heritage.org>, Allen, Virginia <Virginia.Allen@heritage.org>
Subject: Missouri Attorney General Andrew Bailey

Hi,
My name is Maddie Sieren, I'm the press secretary for Missouri Attorney General Andrew Bailey. I am writing to see about getting the AG on to speak about a number of the topics that Missouri is leading the way on:

- Attempting to oust a Soros-backed prosecutor for refusing to prosecute criminals https://www.foxnews.com/politics/missouri-ag-moves-fire-dem-attorney-kim-gardner-refuses-resign-public-safety-outcry
- Launching an investigation into an STL pediatric transgender clinic for giving children puberty blockers without proper care https://www.foxnews.com/politics/missouri-attorney-general-launches-investigation-childrens-hospitals-transgender-center
- Our case against the Biden administration with more than 1,400 facts showing that Biden has coerced and colluded with big tech social media companies to censor free speech https://dailycaller.com/2023/03/06/missouri-louisiana-preliminary-injunction-biden-admin-gov-censorship-social-media/ https://dailycaller.com/2023/01/21/andrew-bailey-missouri-root-out-biden-big-tech-censorship/
- Our letter being the basis for why Walgreens agreed not to send abortion pills in the mail to pro-life states https://www.foxnews.com/politics/20-state-ags-warn-cvs-walgreens-distributing-abortion-pills-violates-state-federal-law https://www.theepochtimes.com/walgreens-wont-sell-abortion-pills-in-20-states_5099530.html?utm_medium=social&utm_source=twitter&utm_campaign=digitalsub
- Our case at the U.S. Supreme Court fighting Biden's unconstitutional student loan plan https://www.washingtonexaminer.com/restoring-america/fairness-justice/nebraska-missouri-ags-supreme-court-student-loan-case https://dailycaller.com/2023/02/28/republican-attorneys-general-supreme-court-student-loans/
- Our defense of the Second Amendment Preservation Act, the strongest law of its kind in the US https://www.courthousenews.com/missouri-attorney-general-vows-to-appeal-ruling-against-state-gun-law/

These are only a few topics we feel would be of interest to your audience, let me know if you would be interested in interviewing the AG or if you need more info.
Thanks,

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

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AMERICAN OVERSIGHT

ATTORNEY GENERAL OF MISSOURI
ANDREW BAILEY

January 31, 2023

Melissa Randol
Executive Director,
Missouri School Boards' Association
2100 I-70 Drive SW
Columbia MO 65203

Dear Director Randall:

Missouri schools should be the safest place in the nation for children, and I believe your organization shares that goal.

I ask that you stand with me in calling on school districts across the state to adopt the enclosed resolution pledging to uphold both the spirit and letter of Missouri's controlling statute on human sexuality instruction, Section 170.015, RSMo. Adherence to the law is particularly important in the wake of recent events in which Columbia Public Schools took a group of middle school students to an event that featured a drag show performance. Drag shows are inherently sexualized performances. They are an outward expression of a desired sexuality and sexual identity. They are intended to draw attention to human sexuality in a manner that appeals to prurient interests. Drag shows have no educational value and have no place in our public schools.

Section 170.015, RSMo. has been carefully crafted by the General Assembly to govern the content of human sexuality education in Missouri schools. School districts are required to, among other things, "ensure that all instruction in human sexuality is *appropriate to the age of the students* receiving such instruction." (*emphasis added*). Moreover, school boards are charged with making sure parents are kept informed and notified of the, "basic content of the district's or school's human sexuality instruction to be provided to the student," and of their right, "to remove the student from any part of [such] … instruction."

I appreciate your member's commitment to faithfully adhering to Missouri law on human sexuality instruction in schools. I applaud their ongoing dedication to protecting students, and welcoming parents as full partners in their children's education. Enclosed with this correspondence is a model resolution I am asking every school board in the state to adopt. It reaffirms the commitment of Missouri's schools to advance our shared goal of protecting our children. It is my sincerest hope that MSBA will stand with me in this fight to protect Missouri children, promote adherence to Missouri law, and ensure parents are fully informed about human sexuality instruction in Missouri schools.

Sincerely,

Andrew Bailey

Broadway Building
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-0774
www.ago.mo.gov

AMERICAN OVERSIGHT

ATTORNEY GENERAL OF MISSOURI
ANDREW BAILEY

RESOLUTION

Whereas, the [DISTRICT] Board of Education wants to protect the safety and wellbeing of Missouri schoolchildren and provide a safe environment in which they can thrive, and

Whereas, our district is made up of diverse families representing a wide range of beliefs, viewpoints and experiences, and

Whereas, it is important that we stand together on those topics upon which we agree, and

Whereas, we agree that parents and guardians are the primary source of human sexuality education for their children, and

Whereas, we agree that effective human sexuality education, taught in concert with parents and guardians, helps protect the health, safety and welfare of students, and

Whereas, issues of sexual orientation, gender identity and gender expression are inextricably intertwined with human sexuality, and

Whereas, drag performances are an example of the type of sexual orientation, gender identity or gender expression included in the concept and definition of "human sexuality," and

Whereas, the foregoing comports with section 170.015 RSMo., the controlling Missouri statute on human sexuality instruction, and

Whereas, it is the desire of the [DISTRICT] Board of Education to conform its operations to Missouri law:

Now, therefore, be it resolved that we, members of the [DISTRICT] Board of Education, affirm that no student under the care, custody and control of this district shall participate in programs, or receive instruction concerning human sexuality unless such programs or instruction comport fully with section 170.015 RSMo., including, but not limited to, subsections four (4) and five (5) requiring that material be age appropriate, and that parents and guardians be given notice and the opportunity to opt their students out of such instruction or activity.

Broadway Building
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-0774
www.ago.mo.gov

AMERICAN OVERSIGHT

To: 'O'Neil, Tyler'[Tyler.ONeil@heritage.org]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Tue 1/31/2023 4:01:50 PM (UTC-06:00)
Subject: RE: Media Request: Columbia drag show situation
2023.01.31 Melissa Randol - MSBA Letter and Resolution.pdf

Here is the updated PDF. Thanks!

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Sieren, Madeline
Sent: Tuesday, January 31, 2023 2:43 PM
To: 'O'Neil, Tyler' <Tyler.ONeil@heritage.org>
Subject: RE: Media Request: Columbia drag show situation

That sounds fine!

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Tuesday, January 31, 2023 2:41 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation

I'll switch out the pdf for the corrected one once you send it.

Tyler ONeil

Managing

The
214
Washington,

202-608-6046

heritage.org

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Date: Tuesday, January 31, 2023 at 3:32 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation

NVM, I see it's on the site. Is the one on the site right?

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Date: Tuesday, January 31, 2023 at 3:31 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation

Thanks! Have you blasted the story yet? I haven't gotten the release, although I'm not certain if I'm signed up.

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Tuesday, January 31, 2023 at 3:30 PM
To: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Subject: RE: Media Request: Columbia drag show situation

AMERICAN OVERSIGHT

Also- we caught a typo in the PDF I sent you of the letter we sent today.
Let me get you the updated one.

Thanks
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Tuesday, January 31, 2023 2:27 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation
Yes, that one.

Tyler ONeil

Managing

The
214
Washington,

202-608-6046

heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Tuesday, January 31, 2023 at 2:57 PM
To: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Subject: RE: Media Request: Columbia drag show situation

Which one? The One of him sitting and smiling?
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Tuesday, January 31, 2023 1:57 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation
Thanks, Madeline! I'm going with the official first one. Do I credit you for it?

Tyler ONeil

Managing

The
214
Washington,

202-608-6046

heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
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To: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Subject: RE: Media Request: Columbia drag show situation

AMERICAN OVERSIGHT

Here are a few images on our Flickr https://www.flickr.com/photos/146566231@N08/
This one from this article isn't mine but it's good. https://missouriindependent.com/2023/01/20/missouri-attorney-general-andrew-bailey-speaks-to-the-federalist-society/

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Tuesday, January 31, 2023 1:42 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation

Do you have a high-resolution photo of Bailey speaking that I can use? For some reason, Getty Images doesn't have any.

Tyler ONeil

Managing

The
214
Washington,

202-608-6046

heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Tuesday, January 31, 2023 at 2:33 PM
To: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Subject: RE: Media Request: Columbia drag show situation

Hi Tyler,
I can't grant an exclusive but I haven't shared with our press list so I am giving you a 10 Minute headstart on covering the story.
Here's the release I'm about to send out- let me know if you have questions.
Also let me know if you aren't on our official press list and I can add you!
Thanks

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Tuesday, January 31, 2023 11:45 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation

Thanks, Madeline! When do you plan to release the action? Would you offer it to me as a national news exclusive or do you already have someone set up to break it?

Tyler ONeil

Managing

The
214
Washington,

202-608-6046

heritage.org

AMERICAN OVERSIGHT

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Tuesday, January 31, 2023 at 12:29 PM
To: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Subject: RE: Media Request: Columbia drag show situation

Hi Tyler,
Sorry for the delay, thanks for following up.
We've got another action coming today. Stay tuned.
"I want Missouri to be the safest state in the nation for children. The age of the children present at the drag show is not relevant to the discussion, because schoolchildren were subject to inherently sexual material without their parents' consent. My office will use every tool at our disposal to ensure Missouri children are educated, not indoctrinated, and that parents have a say in the process."
–Missouri Attorney General Bailey
Thanks!

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Tuesday, January 31, 2023 10:01 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation
Madeline,
I'm writing up my story today. Would the AG comment on the presence of elementary school kids and has he made any decisions?

Tyler ONeil

Managing

The
214
Washington,

202-608-6046

heritage.org

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Date: Monday, January 30, 2023 at 11:40 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation

Thanks, Madeline!
By the way, did the AG's office know that elementary students attended the overall event? I'm asking the school if any of the kids attended the drag event.
Has the AG made any more decisions about future action?

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, January 26, 2023 at 11:34 AM
To: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Subject: Re: Media Request: Columbia drag show situation

Hi Tyler,
Thanks for reaching out.
Yes, the AG sent a letter last Friday to both the superintendent and the mayor of Columbia. Columbia Public Schools Superintendent Yearwood responded with a letter to the governor, with the AG cc'ed, on Jan 22. That letter can be found in this article.https://abc17news.com/news/education/columbia-public-schools/2023/01/22/columbia-public-schools-sends-letter-to-governor-about-drag-performance/

AMERICAN OVERSIGHT

We sent a letter back on Jan. 24 refuting his claims in the letter. I've got a tweet thread here with that letter and the main points of the letter attached.https://twitter.com/agandrewbailey/status/1618321521294049282?s=46&t=vVqAHBxFTZQOpP5v1_UsYQfar, he has called for the resignation or termination of any officials that knew, or should have known, that schoolchildren would be present at the drag show. He has also encouraged local parents to show up at the next school board meeting to register their disgust on the matter.
Attorney General Bailey is examining all legal options, and more action is forthcoming.
I will be sure to keep you updated as things unfold.
Let me know if I can clarify anything here,
Thanks very much!

Sent from my iPhone

On Jan 26, 2023, at 10:21 AM, O'Neil, Tyler <Tyler.ONeil@heritage.org> wrote:

Madeline,
I'm writing a story about the Columbia drag show situation, where a school reportedly took kids to a drag show without notifying parents that the event would include a drag show. I know AG Bailey sent letters to the mayor and the superintendent and I want to hear if he is planning more action on this and if either the mayor or the superintendent responded.
Best,
Tyler O'Neil
(303)956-8499

Tyler ONeil

Managing

The
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Washington,

202-608-6046

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AMERICAN OVERSIGHT

To: 'katrina.trinko@heritage.org'[katrina.trinko@heritage.org]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Mon 3/20/2023 2:37:04 PM (UTC-05:00)
Subject: AG Update on Trans Clinic in MO

Hi Katrina,
Normally Tyler is on our press list but I see he is out on paternity leave so I wanted to flag this for you:
https://ago.mo.gov/home/news/2023/03/20/missouri-attorney-general-andrew-bailey-announces-emergency-regulation-on-gender-transition-interventions-for-minors
Thanks very much and let me know if you have any questions,

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

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AMERICAN OVERSIGHT

To: 'Allen, Virginia'[Virginia.Allen@heritage.org]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Wed 3/22/2023 2:16:16 PM (UTC-05:00)
Subject: RE: Missouri Attorney General Andrew Bailey

Any time between 11 AM and 12:30 PM EST works for us on April 5. How about 12 PM EST (11AM CT) ?
Thanks very much,

Madeline Sieren
Missouri Attorney General's Office
573-690-1205
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Tuesday, March 21, 2023 8:59 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey

Hi Madeline,
My apologies but I need to move our interview time. Does the Attorney General have any availability between 11am – 12:30pm EST on April 5th?
Best,
Virginia

Virginia Allen

Senior

The
214
Washington,

202-608-6149

heritage.org

From: Allen, Virginia <Virginia.Allen@heritage.org>
Date: Monday, March 20, 2023 at 5:56 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey

Excellent. We record using a platform called Riverside. My audio producer John Popp will send a session link closer to the date of the interview.

What you need to know before the interview:

- ∀We record interviews via the podcast platform Riverside.fm.
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- ∀You must**use Chrome as your web browser.**sure you are not in stealth or private mode).
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Go to Riverside.fm and download the app.

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If you have questions, please call Heritage Foundation/Daily Signal audio produced John Popp at 703-307-5884.
You can also reach me at 202-870-6243.
Thanks!
Best,
Virginia

AMERICAN OVERSIGHT

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>

Date: Monday, March 20, 2023 at 9:01 AM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: Re: Missouri Attorney General Andrew Bailey

Hi Virginia,
Let's lock in 1 PM EST on April 5. Would this be a phone call or over zoom?
Thanks!

Sent from my iPhone

On Mar 17, 2023, at 12:21 PM, Allen, Virginia <Virginia.Allen@heritage.org> wrote:

Excellent. How about Wednesday, April 5 at 1pm EST?

Virginia Allen

Senior

The
214
Washington,

202-608-6149

heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, March 16, 2023 at 6:11 PM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: RE: Missouri Attorney General Andrew Bailey

Hi Virginia,
Next Wednesday afternoon is free for right now, as is Tuesday the 28 from 2-5 CT, and Wednesday April 5 all day is open. Let me know what would work for you guys and we can get it scheduled.
All the best,
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Thursday, March 16, 2023 4:36 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey
Hi Madeline,
I would love to have the Attorney General on The Daily Signal Podcast sometime in the coming weeks. Our interviews run about 20 minutes.
Could you send me a few dates and times that will work well for AG Bailey?
Best,
Virginia

Virginia Allen

Senior

AMERICAN OVERSIGHT

The
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Washington,

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From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, March 16, 2023 at 3:34 PM
To: Bluey, Rob <rob.bluey@heritage.org>, Allen, Virginia <Virginia.Allen@heritage.org>
Subject: Missouri Attorney General Andrew Bailey

Hi,
My name is Maddie Sieren, I'm the press secretary for Missouri Attorney General Andrew Bailey. I am writing to see about getting the AG on to speak about a number of the topics that Missouri is leading the way on:

-Attempting to oust a Soros-backed prosecutor for refusing to prosecute criminals https://www.foxnews.com/politics/missouri-ag-moves-fire-dem-attorney-kim-gardner-refuses-resign-public-safety-outcry

-Launching an investigation into an STL pediatric transgender clinic for giving children puberty blockers without proper care https://www.foxnews.com/politics/missouri-attorney-general-launches-investigation-childrens-hospitals-transgender-center

-Our case against the Biden administration with more than 1,400 facts showing that Biden has coerced and colluded with big tech social media companies to censor free speech https://dailycaller.com/2023/03/06/missouri-louisiana-preliminary-injunction-biden-admin-gov-censorship-social-media/ https://dailycaller.com/2023/01/21/andrew-bailey-missouri-root-out-biden-big-tech-censorship/

-Our letter being the basis for why Walgreens agreed not to send abortion pills in the mail to pro-life states https://www.foxnews.com/politics/20-state-ags-warn-cvs-walgreens-distributing-abortion-pills-violates-state-federal-law https://www.theepochtimes.com/walgreens-wont-sell-abortion-pills-in-20-states_5099530.html?utm_medium=social&utm_source=twitter&utm_campaign=digitalsub

-Our case at the U.S. Supreme Court fighting Biden's unconstitutional student loan plan https://www.washingtonexaminer.com/restoring-america/fairness-justice/nebraska-missouri-ags-supreme-court-student-loan-case https://dailycaller.com/2023/02/28/republican-attorneys-general-supreme-court-student-loans/

-Our defense of the Second Amendment Preservation Act, the strongest law of its kind in the US https://www.courthousenews.com/missouri-attorney-general-vows-to-appeal-ruling-against-state-gun-law/

These are only a few topics we feel would be of interest to your audience, let me know if you would be interested in interviewing the AG or if you need more info.
Thanks,

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

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AMERICAN OVERSIGHT

To: 'Allen, Virginia'[Virginia.Allen@heritage.org]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Tue 4/4/2023 1:43:54 PM (UTC-05:00)
Subject: RE: Missouri Attorney General Andrew Bailey

Hi Virginia,
I'm so sorry- we are going to have to reschedule tomorrow's appearance on the podcast for another day.
Is there any availability for next Wednesday, April 12 in the morning or next Thursday, April 13?
Thanks,
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Wednesday, March 22, 2023 4:21 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey
Thank you!

Virginia Allen

Senior

The
214
Washington,

202-608-6149

heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Wednesday, March 22, 2023 at 4:48 PM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: RE: Missouri Attorney General Andrew Bailey

Sounds great- thank you!
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Wednesday, March 22, 2023 3:20 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey
That's perfect. Thank you. Let's confirm 12 PM EST (11 AM CT) on April 5.

Virginia Allen

Senior

The
214
Washington,

202-608-6149

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AMERICAN OVERSIGHT

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Wednesday, March 22, 2023 at 3:16 PM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: RE: Missouri Attorney General Andrew Bailey

Any time between 11 AM and 12:30 PM EST works for us on April 5. How about 12 PM EST (11AM CT) ?
Thanks very much,
Madeline Sieren
Missouri Attorney General's Office
573-690-1205
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Tuesday, March 21, 2023 8:59 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey
Hi Madeline,
My apologies but I need to move our interview time. Does the Attorney General have any availability between 11am – 12:30pm EST on April 5th?
Best,
Virginia

Virginia Allen

Senior

The
214
Washington,

202-608-6149

heritage.org

From: Allen, Virginia <Virginia.Allen@heritage.org>
Date: Monday, March 20, 2023 at 5:56 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey

Excellent. We record using a platform called Riverside. My audio producer John Popp will send a session link closer to the date of the interview.
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If you have questions, please call Heritage Foundation/Daily Signal audio produced John Popp at 703-307-5884.
You can also reach me at 202-870-6243.
Thanks!
Best,
Virginia

AMERICAN OVERSIGHT

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>

Date: Monday, March 20, 2023 at 9:01 AM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: Re: Missouri Attorney General Andrew Bailey

Hi Virginia,
Let's lock in 1 PM EST on April 5. Would this be a phone call or over zoom?
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Sent from my iPhone

On Mar 17, 2023, at 12:21 PM, Allen, Virginia <Virginia.Allen@heritage.org> wrote:

Excellent. How about Wednesday, April 5 at 1pm EST?

Virginia Allen

Senior

The
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From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
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Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Thursday, March 16, 2023 4:36 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey
Hi Madeline,
I would love to have the Attorney General on The Daily Signal Podcast sometime in the coming weeks. Our interviews run about 20 minutes.
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Virginia

Virginia Allen

Senior

AMERICAN OVERSIGHT

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202-608-6149

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From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, March 16, 2023 at 3:34 PM
To: Bluey, Rob <rob.bluey@heritage.org>, Allen, Virginia <Virginia.Allen@heritage.org>
Subject: Missouri Attorney General Andrew Bailey

Hi,
My name is Maddie Sieren, I'm the press secretary for Missouri Attorney General Andrew Bailey. I am writing to see about getting the AG on to speak about a number of the topics that Missouri is leading the way on:

-Attempting to oust a Soros-backed prosecutor for refusing to prosecute criminals https://www.foxnews.com/politics/missouri-ag-moves-fire-dem-attorney-kim-gardner-refuses-resign-public-safety-outcry

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-Our letter being the basis for why Walgreens agreed not to send abortion pills in the mail to pro-life states https://www.foxnews.com/politics/20-state-ags-warn-cvs-walgreens-distributing-abortion-pills-violates-state-federal-law https://www.theepochtimes.com/walgreens-wont-sell-abortion-pills-in-20-states_5099530.html?utm_medium=social&utm_source=twitter&utm_campaign=digitalsub

-Our case at the U.S. Supreme Court fighting Biden's unconstitutional student loan plan https://www.washingtonexaminer.com/restoring-america/fairness-justice/nebraska-missouri-ags-supreme-court-student-loan-case https://dailycaller.com/2023/02/28/republican-attorneys-general-supreme-court-student-loans/

-Our defense of the Second Amendment Preservation Act, the strongest law of its kind in the US https://www.courthousenews.com/missouri-attorney-general-vows-to-appeal-ruling-against-state-gun-law/

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Thanks,

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

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AMERICAN OVERSIGHT

To: 'Thad Brock'[Thad.Brock@heritageaction.com]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Wed 3/22/2023 10:06:18 AM (UTC-05:00)
Subject: RE: AG Bailey on Just The News Last Night

Thanks Thad! I watched last night and thought it was excellent. We will share on our social media.
Please let us know if we can ever help you out in the future. Also- would you like to be added to our press list on national actions?
Thanks!

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Thad Brock <Thad.Brock@heritageaction.com>
Sent: Wednesday, March 22, 2023 10:04 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Cc: Samantha Hince <samantha.hince@heritageaction.com>
Subject: AG Bailey on Just The News Last Night

Hi Madeline,

We really appreciate AG Bailey joining the Just The News special report last night. He did great!

I wanted to provide you a couple of links:

- Link to Download your Segment
- Link to Download Thumbnail
- Link to your Segment on Rumble
- Link to your Segment on YouTube

Thanks again, and please let me know how we can be helpful in the future!

--

Thad Brock
Director of Digital Advocacy
Heritage Action for America

202-680-8868
thad.brock@heritageaction.com
heritageaction.com

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AMERICAN OVERSIGHT

To: 'Allen, Virginia'[Virginia.Allen@heritage.org]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Wed 3/22/2023 3:47:53 PM (UTC-05:00)
Subject: RE: Missouri Attorney General Andrew Bailey

Sounds great- thank you!
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Wednesday, March 22, 2023 3:20 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
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Virginia Allen

Senior

The
214
Washington,

202-608-6149

heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
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To: Allen, Virginia <Virginia.Allen@heritage.org>
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Virginia

Virginia Allen

Senior

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No. 22-40110

In the United States Court of Appeals For the Fifth Circuit

STATE OF MISSOURI, STATE OF TEXAS,
Plaintiffs-Appellants,

v.

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

On Appeal from the United States District Court
for the Southern District of Texas, McAllen Division
Nos. 7:21-cv-272, 7:21-cv-420
The Honorable Micaela Alvarez, United States District Judge

BRIEF OF APPELLANTS STATE OF MISSOURI AND STATE OF TEXAS

Counsel Listed on Inside Cover

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Attorney General of Missouri

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Counsel for Plaintiff-Appellant State of Missouri

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Judd E. Stone II
Solicitor General

Ryan S. Baasch
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Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Counsel for Plaintiff-Appellant State of Texas

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Certificate of Interested Persons

No. 22-40110

STATE OF MISSOURI, STATE OF TEXAS,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellants, as governmental parties, need not furnish a certificate of interested persons.

/s/ *D. John Sauer*

Counsel for Plaintiff-Appellant State of Missouri

/s/ *Ryan S. Baasch*

Counsel for Plaintiff-Appellant State of Texas

AMERICAN OVERSIGHT

Statement Regarding Oral Argument

The Court has ordered oral argument on this case for May 11, 2022. The States will participate in oral argument.

AMERICAN OVERSIGHT

MO-AG-23-0462-A-000424

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Introduction

During the Trump administration, the Department of Homeland Security (DHS) concluded that "walls work" in securing the border and, consistent with that policy, built them. Congress concurred, and provided funds for construction. On the first day of the Biden administration, the federal government declared that walls don't work, and DHS—consistent with that policy—canceled all construction contracts and diverted the funds Congress provided to everything *but* border-barrier construction.

Besides a new administration, what justifies that new position? Moreover, was DHS's policy shift justified in light of any reliance by Missouri and Texas on a policy of building border walls—that is, a policy of securing the border? Was the shift in policy even legal, given that Congress appropriated funds expressly for border-barrier construction? DHS is free to change its policy; it is not free to do so without answering those questions. Its failure to do so is textbook arbitrary and capricious agency action.

It is also unlawful and unconstitutional action. When Congress appropriated funds for border wall construction, it *mandated* that those

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funds go towards border wall construction. DHS is not doing that. That violates the appropriations and the Impoundment Control Act, and it violates constitutional principles of the separation of powers and the executive's duty to take care that the laws "be faithfully executed."

This case is another example of the administration's unreasoned, unlawful switch from policies that secure the border to policies that do not. *See, e.g.*, *Texas v. Biden (Texas II)*, 20 F.4th 928 (5th Cir. 2021). Those changes—as this Court and others have recognized time and again—harm States like Missouri and Texas, for it is the States that primarily bear the burden of increased illegal migration. That is not to say that those harms bar the federal government from instituting less restrictive border policies. It is to say that before the federal government inflicts those harms, it must—at a minimum—engage in a decision-making process that acknowledges those concerns and addresses them, or seek to convince Congress of the wisdom of its policies. Because that did not happen here, DHS acted arbitrarily and capriciously, as well as unlawfully and unconstitutionally.

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Statement of Jurisdiction

The States of Missouri and Texas brought claims arising under the Constitution and federal statutes; jurisdiction was proper pursuant to 28 U.S.C. §§ 1331, 1361, and 2201(a). ROA.1065.

Briefing on the States' preliminary injunction motion was complete on December 17, 2021. ROA.8. On February 22, 2022, the district court stayed consideration of the motion pending the Supreme Court's decision in *Biden v. Texas*, No. 21-954. ROA.1026. The district court's order has "the practical effect of … denying" the States' request for an injunction and has "'serious, perhaps irreparable, consequences.'" *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287–88 (1988) (second quotations omitted) (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981) (quoting another source)). The States timely noticed this appeal on February 25, 2022. ROA.1027. This Court has jurisdiction 28 U.S.C. § 1292(a)(1). *See id.*; *see also infra* Arg. § I.

Statement of the Issues

This case originates in the Department of Homeland Security's (DHS) December 2018 conclusion—repeated in 2020—that "walls work." Consistent with that conclusion, Congress appropriated funds

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exclusively for border-barrier construction in the Consolidated Appropriations Act, 2020, and the Consolidated Appropriations Act, 2021. Before January 20, 2021, DHS was using those funds to construct border barriers.

On the first day of the current administration—January 20, 2021—President Biden issued a Proclamation (the January 20 Proclamation) declaring that border wall construction "is not a serious policy solution" and unilaterally pausing all new construction. He also ordered DHS to create a plan to redirect funding away from wall construction. Thus directed, DHS ended border-wall construction. The issues on appeal are:

1) Whether this Court has appellate jurisdiction.

2) Whether the States are entitled to a nationwide preliminary injunction prohibiting the federal government from enforcing and implementing the January 20 Proclamation and requiring the government to spend funds that Congress appropriated for border-barrier construction *for border-barrier construction*, as set forth in the FY2020 and FY2021 appropriations.

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Statement of the Case

I. 2018–2021: "Walls Work"

A. DHS's assessment and wall-building policy.

"Walls Work," DHS concluded in December 2018. ROA.1265. "When it comes to stopping … illegal aliens from crossing our borders, border walls have proven to be extremely effective." ROA.1267. "For example, when we installed a border wall in the Yuma sector, we have seen border apprehensions decrease by 90 percent." ROA.1267–68

DHS affirmed that conclusion in 2020, stating that border barriers "have proved to be a critical component in gaining operational control of the border." ROA.1270. For example, in the Yuma Sector: (1) "Illegal entries in areas with new border wall system plummeted over 87% in FY 20 compared to FY 19"; (2) "[i]n FY 19, CBP deployed a temporary barrier, which it has replaced with a permanent system, at the Sanchez Canal, which resulted in illegal entries decreasing in this area by more than 1,000 per month"; and (3) "[i]n FY 19, in areas of older existing border fencing or barriers, Yuma Sector apprehended 12 large groups (over a 100 persons) compared to zero large groups in FY 20 with new border wall system." ROA.1271.

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Likewise, in the Rio Grande Valley (RGV) Sector, DHS saw (1) a "79% decrease in apprehensions in this area (Zone 1) since the completion of border wall system," and (2) "a 26% decrease in narcotics seizures since the completion of border wall system in this area." ROA.1272. The "El Paso Sector … experienced a significant reduction in drug and smuggling activities in areas where the new border wall system was built. Most notably, in Zones 14 and 15 of the Santa Teresa (STN) AOR where apprehensions have decreased by 60% and 81% respectively … . El Paso Station has experienced similar results from the new border wall in Zones 20–23, with a reduction in apprehensions of 70% during the same timeframe." ROA.1272.

DHS also found that border barriers provided enforcement efficiencies by allowing the agency to redeploy manpower and by channeling smuggling and illegal crossings into areas where DHS was better able to detect and interdict them. *See* ROA.1271–72.

"The results," DHS remarked, "speak for themselves: illegal drug, border crossings, and human smuggling activities have decreased in areas where barriers are deployed." ROA.1271. "Destroying the wall," DHS presciently found, "would put needless strain on DHS resources,

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lead to increases in crime, and make it nearly impossible for us to determine who is coming into our country." ROA.1272.

B. Congress provides funding for walls.

Congress agreed with DHS, and twice appropriated over $1 billion specifically for wall construction. For fiscal year 2020, "[o]f the total amount made available under 'U.S. Customs and Border Protection—Procurement, Construction, and Improvements', $1,904,468,000 *shall*be available *only* as follows: (1) $1,375,000,000 for the construction of barrier system along the southwest border." Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, Div. D, § 209(a)(1), 133 Stat. 2317, 2511 (2019) (emphases added).[1] (For shorthand, "FY2020 appropriations" refers to this section of the Consolidated Appropriations Act, 2020). Those funds are available to DHS for five years. *See* 133 Stat. at 2506.

Congress doubled down the next year. For fiscal year 2021, Congress gave DHS another $1.375 billion, saying those funds "*shall* be made available *for the same purposes*" as the FY2020 appropriations—*i.e.*, for "construction of barrier system along the southwest border."

[1] A copy of the text of the relevant law is at ROA.1275-76.

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Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, Div. F, § 210, 134 Stat. 1182, 1456–57 (2020) (emphases added).[2] (For shorthand, "FY2021 appropriations" refers to this section of the Consolidated Appropriations Act, 2021). Like the FY2020 funds, those funds are also available for five years. *See* 133 Stat. at 1452.

DHS used those funds. From the FY2020 appropriations, DHS awarded two contracts to construct approximately thirty-one miles of border wall in the Laredo Sector and entered into an Economy Act agreement with the U.S. Army Corps of Engineers for thirty-seven more. *See* ROA.352. Those contracts obligated approximately $1.3 billion of the FY2020 appropriation. *Id.* The contracts were still in their preliminary stage—specifically, DHS was working to acquire land on which to build, *see* ROA.352–53—when the Biden administration stopped work.

FY2021 appropriations became effective on December 27, 2020, *see* ROA.355, and so DHS did not obligate any of those funds prior to the Biden administration's freeze on border wall construction. *See infra* Statement of the Case § II.[3]

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[2] A copy of the text of the appropriation's text is at ROA1278–79.

[3] In parallel with DHS, the Department of Defense used its own unobligated funds for border-wall construction. *See* ROA.342. The

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II. 2021-Present: "Walls [Don't] Work"

The new administration immediately reversed course without any reasoned justification. On January 20, 2021, President Biden proclaimed—with no evidence or analysis—"building a massive wall that spans the entire southern border is not a serious policy solution" but "a waste of money that diverts attention from genuine threats to our homeland." Termination of Emergency with Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction, 86 Fed. Reg. 7,225, 7,225 (Jan. 20, 2021) (in-text: "January 20 Proclamation" or "Proclamation").

The Proclamation ordered DHS to "pause work on each construction project on the southern border wall" and "the obligation of funds related to construction of the southern border wall, to the extent permitted by law." *Id.* The Proclamation also required DHS to "develop a plan for the redirection of funds concerning the southern border wall, as appropriate and consistent with applicable law. The process of developing the plan shall include consideration of terminating or repurposing contracts with

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Department of the Treasury also provided DHS $601 million from the Treasury Forfeiture Fund for border-wall construction. ROA.346.

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private contractors engaged in wall construction, while providing for the expenditure of any funds that the Congress expressly appropriated for wall construction, consistent with their appropriated purpose." *Id.* at 7,226.

On June 11, 2021, DHS issued its so-called "Border Wall Plan" pursuant to the January 20 Proclamation. See ROA.364–68. Per the plan, DHS will use FY2020 border-wall appropriations for projects the agency deems "needed to address life, safety, environmental, or other remediation requirements," ROA.365; *see also* ROA.1285–86, and to "engage in a thorough review and replanning process, to include standard environmental planning including taking actions consistent with [NEPA] and other environmental planning statutes and robust and substantive consultation with stakeholders," ROA.350; *see also* ROA.354, 365–66. None of those funds will be used for their appropriated purpose of constructing border barriers.

As for the FY2021 appropriations, the Plan earmarks those for "contingency funding for barrier projects funded by the fiscal year 2017 through fiscal year 2020 barrier appropriations and to address the existing site conditions at the former Department of Defense ('DoD')

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border barrier project sites, including, among other things, completing site drainage features and finishing the construction of patrol, maintenance, and access roads." ROA.351; *see also* ROA.366–68. That includes "an additional $275 million in cost overrun due to the existing suspension of contract performance for construction as well as design changes." ROA.367. Any remaining funds "will be used to begin sequential project planning for the next highest priority barrier segments identified by DHS." ROA.351; *see also* ROA.368. Again, under the Plan, no FY2021 appropriations will be used for their appropriated purpose of constructing border barriers. To the contrary, the Plan says "[n]o new barrier construction work will occur on the DoD projects," and for project planning, DHS would start the planning with a NEPA environmental analysis. ROA.367–68.

In short, DHS's Border Wall Plan contains no plan to construct border barriers. That was by design; DHS created the plan to be "consistent with President Biden's commitment that 'no more American taxpayer dollars [should] be diverted to construct a border wall." ROA.364 (alteration in original); *see* 86 Fed. Reg. at 7,225 (saying the

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same). In announcing its plan, DHS called "on Congress to cancel funds it previously appropriated for border barrier projects . . . ." ROA.1286.

DHS has not backed down from that position. Consistent with the Plan, in September and October 2021, DHS terminated or modified and removed the construction portions of all contracts for border wall construction in the Laredo sector. *See* ROA.354, ROA.1315.

III. Procedural Background

The Executive Branch's decision not to use the FY2020 and FY2021 appropriations to build the southwest border wall means that the border will be less secure. A less secure border means that some illegal aliens will not be prevented or deterred from coming to the United States, will be admitted or enter the interior, and will inevitably reside in Texas and Missouri and seek driver's licenses, education, and healthcare. *See* ROA.1324–43, 1358–1423.

To prevent that, the States sued the United States, President Biden, DHS and its subunit, Customs and Border Protection, and DHS officials (collectively, the "federal government") after DHS cancelled the border-barrier construction contracts. The States' seven-count complaint, brought under the Administrative Procedure Act and the

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federal courts' inherent equitable authority, alleged that DHS's actions were unconstitutional, unlawful, and arbitrary and capricious. *See* ROA.1053–89.[4]

The States moved for a preliminary injunction and completed briefing on December 17, 2021. *See* ROA.8 (ECF 30). Instead of ruling on the motion, however, the district court waited two months and then stayed consideration of the motion pending the Supreme Court's decision in *Biden v. Texas*, No. 21-954. *See* ROA.1026. The district court's rationale was that *Texas* "pertains to crucial aspects of this case including … standing and the judicial reviewability, under administrative law, of the federal agency actions and statements regarding the United States-Mexico border policy at issue in this case." *Id.*; *see also* Opinion and Order at 3, *Missouri v. Biden*, No. 7:21-cv-420 (S.D. Tex. Mar. 15, 2022), ECF No. 47. But the Supreme Court has not granted certiorari to review any "standing and reviewability" issues in *Biden v. Texas*, No. 21-594, *see* Pet. for Writ of Certiorari *in* No. 21-494, at I (Questions Presented). Since the district court's indefinite stay

[4] Their case was consolidated with a similar lawsuit brought by the Texas General Land Office. *See* ROA.262.

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decision was effectively a denial of a preliminary injunction, *see infra* Arg. § I, Missouri and Texas appealed. ROA.1027.

Summary of the Argument

I. There is appellate jurisdiction under 28 U.S.C. § 1292(a)(1). Two months after preliminary-injunction briefing finished, the district court stayed proceedings pending the Supreme Court's decision in *Biden v. Texas*, No. 21-954—a case reviewing this Court's decision in *Texas v. Biden (Texas II)*, 20 F.4th 928 (5th Cir. 2021). The district court's reason: The Supreme Court's decision would affect its jurisdictional and reviewability analysis.

But there was no need to wait for the Supreme Court to decide *Biden v. Texas* because the Supreme Court did not take that case to answer jurisdictional or reviewability questions. Moreover, unless and until the Supreme Court reverses *Texas II*, that precedent is binding—notwithstanding the Supreme Court's grant of certiorari.

Thus, the district court had all it needed to rule on the States' preliminary-injunction motion. Its decision to stay proceedings effectively denied that motion, and imposed hardship on the States by denying them an injunction to which they are entitled—and which is

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necessary to prevent the States from suffering irreparable harm—and by further delaying construction border wall construction, which risks undermining the efficacy of any relief the States may receive. As a result, the district court's stay order is effectively a denial of the States' preliminary injunction and appealable under § 1292(a)(1).

II. The States are entitled to a preliminary injunction because they have shown they are likely to succeed on the merits, they will suffer irreparable harm absent relief, and the equities favor relief

First, the States are likely to succeed on the merits:

To start, there are no obstacles to reaching the merits. For one, the States have standing. Because DHS has decided not to construct border barriers, it has chosen to leave the borders less secure. As the agency's own assessments show, that means illegal immigration will increase. And as this Court has recognized time and again, that causes irrecoverable pocketbook harms to the States in the form of higher costs to process driver's license requests and greater education and healthcare expenditures.

Nor are there any obstacles to reviewing the States' APA claims. DHS's actions are reviewable because the agency is using appropriations

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that Congress specifically stated must be used for border wall construction for non-wall building activity. That is, this case does not involve lump-sum appropriations; there is law to apply; and so DHS's actions are reviewable. Furthermore, DHS's decision not to build any more border barriers is final agency action.

Next, the States are likely to succeed on the merits. As to the States' claim that DHS acted arbitrarily and capriciously, the agency is trying to hide its real decision not to build border barriers by saying it is using FY2020 and FY2021 appropriations consistent with Congress's commands. But review of the agency's Border Wall Plan, DHS's actions, and statements from the administration make plain that DHS does not intend to build another foot of border wall. That pretext is enough to establish that Missouri and Texas are likely to succeed on their arbitrary and capricious claim. Underscoring that fact is that DHS failed to provide any explanation for its decision not to build border barriers, much less an explanation that addresses the States' reliance on the agency securing the border; the agency's past conclusion that walls work; and the legal implications of not using the FY2020 and FY2021

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appropriations to build border barriers even though that is the express reason Congress provided DHS those funds.

Furthermore, the States are likely to succeed on the merits of their statutory and constitutional claims. The plain text of the FY2020 and FY2021 appropriations require DHS to build walls, but DHS is not doing that. And the executive's failure to comply with the Impoundment Control Act means the cancellation of that funding is unlawful. Furthermore, since only Congress may decide how to spend federal funds, and because the President must take care to faithfully execute the laws, the Constitution prohibits the President and DHS from using funds Congress appropriated to build border walls to *not* build border walls.

Second, the equities justify injunctive relief. The harms the States will suffer from DHS's failure to secure the border are the same as those that support standing: increased expenditures for processing driver's license requests and for providing educational and healthcare services to illegal aliens who would not be present in the States but for DHS's failure to build border barriers. Those costs are non-compensable and thus irreparable—and also vastly outweigh the government's non-existent interest in engaging in unlawful activity. Furthermore, an injunction

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requiring DHS to stop implementing its no-construction policy would serve the public interest in ensuring that the government follows the law and in preventing illegal immigration.

Third, because the States' requested injunction affects immigration policy, nationwide relief is proper.

Standard of Review

A district court's decision to deny a preliminary injunction is reviewed for an abuse of discretion. *See, e.g.*, *City of Dallas v. Delta Air Lines, Inc.*, 847 F.3d 279, 286 (5th Cir. 2017).

Argument

I. There is appellate jurisdiction because the district court effectively denied the States' preliminary injunction.

Under 28 U.S.C. § 1292(a)(1), orders denying an injunction are immediately appealable. That includes "orders that have the practical effect of ... denying injunctions and have 'serious, perhaps irreparable, consequences.'" *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287–88 (1988) (second quotations omitted) (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981) (quoting another source)); *see also Reed Migraine Ctrs. of Tex. P.L.L.C. v. Chapman*, 987 F.3d 138, 141 (5th Cir. 2021). This Court has jurisdiction for that reason here.

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First, a stay can have "the effect of denying an injunction ... when a court stays proceedings in which one party seeks a preliminary injunction." *Rauscher Pierce Refsnes, Inc. v. Birenbaum*, 860 F.2d 169, 171 (5th Cir. 1988). That is what happened here. The States sought a preliminary injunction and the district court subsequently stayed proceedings pending the Supreme Court's resolution of *Texas v. Biden*. *See* ROA.1026. That decision cannot be justified as necessary to "study ... the record and the applicable law ... ." *NAACP v. Thompson*, 321 F.2d 199, 202 (5th Cir. 1963); *see also Overton v. City of Austin*, 748 F.2d 941, 951–52 (5th Cir. 1984). That is so because the district court's rationale—that a stay was necessary because *Biden v. Texas* "pertains to crucial aspects of this case including ... standing and the judicial reviewability, under administrative law, of the federal agency actions and statements ... at issue in this case," ROA.1026—is incorrect. It is incorrect because this Court's precedents are binding "even when the Supreme Court grants certiorari on an issue." *United States v. Lopez-Velasquez*, 526 F.3d 804, 808 n.1 (5th Cir. 2008). And it is wrong because the Supreme Court did not grant certiorari in *Biden v. Texas* to resolve jurisdictional or reviewability issues. *See* Petition for Writ of Certiorari

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at I, *Biden v. Texas*, No. 21-954. Thus, the Fifth Circuit's opinion in *Texas v. Biden* will remain binding law on "standing and reviewability" issues, regardless of the outcome of the merits appeal in the Supreme Court.

Therefore, the district court had all it needed to issue a decision; there was no need to wait for the Supreme Court's decision in *Biden v. Texas*. Since no other circumstances warranted a stay, the district court's stay order was an effective denial of the States' request.

Second, the district court's refusal to rule on the States' preliminary injunction motion carries "serious, perhaps irreparable, consequence[s]." *Birenbaum*, 860 F.2d at 171. That harm is the same harm that establishes standing and irreparable harm, *see infra* Arg. §§ II.A.1, II.C. *See, e.g.*, *Carson*, 450 U.S. at 88–89; *McCoy v. La. State Bd. of Educ.*, 332 F.2d 915, 917 (5th Cir. 1964). Indeed, that the district court refused to provide relief to which the States are entitled is sufficient. *See NAACP v. Thompson*, 321 F.2d 199, 200 (5th Cir. 1963).

Further, the delay jeopardizes the States' ability to receive effective relief. FY2020 appropriations expire in September 2024—a little over two years away. *See* 133 Stat. at 2506. As the federal government represented to the district court, "[t]he planning and execution required

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for large-scale barrier construction projects can be a complex and time-consuming process." ROA.280. For example, when DHS was building border walls under the prior administration, construction took nine months. ROA.1265. The time needed before construction can start means that delays increase the risk that the border-wall appropriations will expire before they can be obligated, thus undermining the efficacy of any relief the States would receive.

II. The States are entitled to a preliminary injunction.

To receive a preliminary injunction, the States must show "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs., Inc. v. Kauffman*, 981 F.3d 347, 353 (5th Cir. 2020) (en banc) (quoting another source). Where, as here, the non-moving party is the federal government, the last two factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Those factors justify relief here.

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A. The States are likely to succeed in showing their claims are reviewable.

There are no jurisdictional or procedural barriers to judicial review. The States have standing; they challenge final agency action that is not committed to agency discretion; and they fall within the zone of interests of the relevant statutes—the Consolidated Appropriations Act, 2020, the Consolidated Appropriations Act, 2021 (together, the "Appropriations Acts"), and the Impoundment Control Act (ICA).

1. The States have standing.

Standing requires (1) "an injury in fact that is concrete, particularized, and actual or imminent," (2) that the defendant "likely caused" the injury, and (3) "that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). Where, as here, States are asserting a procedural right under the APA and the challenged acts affect their quasi-sovereign interests, they "are entitled to 'special solicitude' in the standing analysis." *Texas v. Biden (Texas I)*, 10 F.4th 538, 549 (5th Cir. 2021) (per curiam) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007)). "[I]f nothing else, that means imminence and redressability are easier to establish here than usual." *Texas v. Biden (Texas II)*, 20 F.4th 928, 970 (5th Cir. 2021).

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Furthermore, since the issues here involve a "large-scale policy that's amendable to challenge using large-scale statistics and figures," the States may use "big-picture" evidence of the sort that they have provided to establish standing. *Id.* at 971.

Injury in fact: Here, the States will suffer financial harm due to DHS's decision not to construct the border wall, which establishes an injury in fact. *See*, *e.g.*, *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017). The agency's failure to secure the border means that the number of illegal aliens in both States will increase, which means both States will have to pay to process driver's license requests and to provide educational and healthcare services to forthose aliens.

Driver's License Costs: Missouri and Texas will incur costs in their driver's license programs. Such harm is a well-established basis for Article III standing. *See*, *e.g.*, *Texas v. United States (DAPA II)*, 809 F.3d 134, 155 (5th Cir. 2015). As the States showed, "each granted license (and each *reviewed application* for a license, even if not granted) costs … money." *Texas II*, 20 F.4th at 970–71. For example, in Texas, the addition of just 10,000 more "driver license customers" would impose "biennial cost[s] of" over $2 million. ROA.1391. In Missouri, the

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Department of Revenue must pay fifty cents per application "to verify individuals' lawful immigration status," and another fifty cents "for any additional inquiries." ROA.1330.

In short, the federal government does not (and cannot) dispute that the States pay costs for processing driver's licenses. And, as this Court has noted, it is "hardly speculative that individuals would apply for driver's licenses upon becoming eligible to do so." *Texas II*, 20 F.4th at 968 (quotation marks omitted). This rationale is more than sufficient to satisfy the injury-in-fact requirement.

Education Costs: Similarly, "[t]he total costs to Texas (and Missouri) of providing public education for illegal alien children will rise in the future as the number of illegal alien children present in the State increases." *Texas v. Biden*, 554 F. Supp. 3d 818, 838 (N.D. Tex. 2021).

That is so because the Supreme Court has interpreted the Constitution to require States to provide public education to illegal alien children. *Plyler v. Doe*, 457 U.S. 202, 205, 230 (1982). Thus, some aliens and the children of those aliens will receive education benefits from the States at taxpayer expense. For Texas, those costs were tens of millions of dollars each year from FY 2016 through FY 2019, more than $112

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million in FY 2020, almost $27 million in FY 2021, and more than $151 million projected for FY 2022. ROA.1403–04. It is also a cost that will increase, per the Associate Commissioner for School Finance/Chief School Finance Officer at the Texas Education Agency, "to the extent that the number of [unaccompanied alien children] enrolled in the State's public school system increases." ROA.1404. Missouri is similarly injured. A significant subset of illegal aliens entering the United States end up residing in Missouri. A 2018 study shows that 3,000 illegal alien school-aged children were enrolled in Missouri schools. ROA.1320. And Missouri spent an average of $10,654 per student in school year 2019-2020 regardless of immigration status. ROA.1332.

Those facts—which the federal government has not contradicted—"provide [an] equally strong [basis] for finding cognizable, imminent injury." *Texas I*, 10 F.4th at 547–48.

Healthcare Costs: Additionally, some aliens unlawfully present in the United States "will use state-funded healthcare services or benefits in Texas and Missouri." *Texas*, 554 F. Supp. 3d at 838. In particular, Texas's Emergency Medicaid Program, Family Violence Program, and Texas Children's Health Insurance Program "require significant

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expenditures to cover illegal aliens." *Id.* at 838–39; *see* ROA.1415–18 (summarizing those expenses). Likewise, Missouri provides healthcare services to illegal aliens. *See* ROA.1331.

Like with education spending, those facts are not in dispute. Indeed, the federal government has previously "concede[d] the obvious—that *if* the total number of in-State aliens increases, the States *will* spend more on healthcare." *Texas II*, 20 F.4th at 969 (second emphasis added). Thus, like spending on driver's licenses and educations, increased State spending on healthcare "provide[s] [an] equally strong [basis] for finding cognizable, imminent injury." *Texas I*, 10 F.4th at 547–48.

Causation: The States also have shown causation, also called traceability. "To show traceability, a plaintiff must allege that his injury is 'connected with the conduct about which he complains.'" *Glen v. Am. Airlines, Inc.*, 7 F.4th 331, 335 (5th Cir. 2021) (alteration omitted) (quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018)). That is, there must be "a causal connection between the plaintiff's injury and the defendant's challenged conduct." *Id.* (quoting *Inclusive Cmtys. Project, Inc. v. Dep't of Treasury*, 946 F.3d 649, 655 (5th Cir. 2019)).

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Here, causation turns on "simple causal inference[s] based on simple change[s] in incentives." *Texas II*, 20 F.4th at 973; *see also Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (permitting standing based "on the predictable effect of Government action on the decisions of third parties"). DHS's assessments establish that border barriers prevent, deter, and slow illegal immigration. *See* ROA.1265–72. Those assessments show the converse is also true—areas without border barriers experience an increase in illegal migration. *See* ROA.1267; *see also* ROA.1267–72 (providing statistics showing border apprehensions dropped in areas with border barriers).

Thus, DHS's failure to construct border walls means that illegal immigration will be higher relative to the world where there is a wall. At least some of those aliens will end up in Texas—which is a border state—and "[s]tatistically, for every 1,000 aliens who remain unlawfully in the United States, fifty-six end up residing in Missouri." *Texas*, 554 F. Supp. 3d at 838; *see also* ROA.1327–28 (providing evidence of the illegal alien population in Missouri and Texas); ROA.1375 (detailing foreign migration into Texas).

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Thus, as a result of DHS's decision not to construct border barriers, the population of illegal aliens in Missouri and Texas will increase. It is "obvious" that will increase demand for a State's services. *See Texas II*, 20 F.4th at 969. "[A]t least some" aliens who come to the States because of the lack of border barriers "will certainly seek educational and healthcare services from the" States. *Texas I*, 10 F.4th at 548. Likewise, "because driving is a practical necessity" in Missouri and Texas, "there is little doubt" that those who enter the States from the border will apply for driver's licenses. *DAPA II*, 809 F.3d at 156; *see also Texas II*, 20 F.4th at 972. Thus, DHS's decision not to construct border barriers means that the States will have expenses they otherwise would not related to their driver's license, education, and healthcare programs.

Redressability: Lastly, requiring DHS to comply with its obligation to construct border barriers will, at the very least, "*slow* or *reduce*" illegal migration, which establishes redressability. *Massachusetts*, 549 U.S. at 525; *see Texas II*, 20 F.4th at 973 (alleviating harm is sufficient). Again, the causal chain is logical and obvious—and based on DHS's own assessments. As DHS concluded, looking at data where border barriers were constructed, walls work—they caused very

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substantial reductions in illegal crossing. ROA.1267. That conclusion stands undisputed. Not even the January 20 Proclamation attacked DHS's prior empirical assessments—it disagreed only with the resulting policy. *See* 86 Fed. Reg. at 7,225 (saying building walls "is not a serious policy solution" and "is a waste of money that diverts attention from genuine threats").

Furthermore, DHS's past assessments show redressability exists even if wall construction occurs in States besides Texas. Per DHS, walls do more than just prevent illegal border crossings in a specific area. They allow redeployment of agency assets—thus increasing border-security across the system—and channel illegal crossing to areas where they are easier to detect and interdict. *See* ROA.1271–72. Thus, construction of border barriers in one sector has positive spillover effects in other sectors.

In sum, requiring DHS to construct border walls will result in fewer illegal crossings, and thus fewer illegal aliens living in Missouri and Texas, than would currently be the case. Since that eliminates—or, at least, lessens—the expenses the States would incur from providing social services to those aliens, it redresses the States' harms.

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* * *

In short, the States have shown standing here based on injuries and chains of causation that this Court has held provide standing in numerous, factually similar cases—most recently, and most on-point, in *Texas II*. *See also DAPA II*, 809 F.3d at 150–62. There is no need to deviate from those well-reasoned and authoritative opinions here.

2. The States' APA claims are reviewable.

Furthermore, the States' APA claims are amendable to judicial review.[5] No party has claimed a statute precludes judicial review. 5 U.S.C. § 701(a)(1). Furthermore, DHS's decision not to use the FY2020 or FY2021 appropriations for border construction is not a decision committed to agency discretion by law, § 701(a)(2), and its decision not to build new border walls is final agency action.

DHS's decision not to build the border wall is not committed to agency discretion: The APA "embodies the basic presumption of judicial review . . . ." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967).

[5] While the States may challenge unlawful agency action under the APA, their constitutional claims are not subject to the APA's limitations. *See*, *e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 701–02 (1949).

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Thus, "[e]stablishing unreviewability is a 'heavy burden' and 'where substantial doubt about congressional intent exists, the general presumption favoring judicial review of administrative action is controlling.'" *DAPA II*, 809 F.3d at 164 (*Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984)).

The APA carves out a narrow exception to judicial review for "those rare administrative decisions traditionally left to agency discretion." *Dep't of Homeland Sec. v Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (quotations omitted); *see* 5 U.S.C. § 701(a)(2). Such decisions are ones "where the relevant statue is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Hawkins v. Dep't of Housing & Urban Dev.*, 16 F.4th 147, 153 (5th Cir. 2021) (quoting *New York*, 139 S. Ct. at 2568). How an agency allocates "funds from a *lump-sum* appropriation" is one such decision applying one such statute. *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (emphasis added).

The FY2020 and FY2021 appropriations are not, however, lump-sum appropriations. Instead, the appropriations provide a "statutory reference point" that forecloses any argument for unreviewable

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discretion. *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 752 (D.C. Cir. 2002). Congress clearly said the FY2020 and FY2021 appropriations "*shall* be available *only* ... for the construction of barrier system along the southwest border." Use of that "quintessential mandatory language" therefore means that how DHS spends the money "is not a decision committed to agency discretion by law and is therefore reviewable." *Hawkins*, 16 F.4th at 155, 156.

Final agency action: Next, the States seek review of final agency action. *See* 5 U.S.C. § 704.

Agency action is "final" if two conditions are met: "First, the action must mark the consummation of the agency's decision making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (quotation marks omitted).

Here, the States challenge DHS's decision not to construct any new border barrier; that decision is clearly the consummation of DHS's decision-making process. *See U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590, 597–98 (2016) (discussing why approved jurisdictional

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determinations meet this prong); *cf. Texas II*, 20 F.4th at 950–51 ("The States are challenging the *Termination Decision*—not the June 1 Memorandum, the October 29 Memoranda, or any other memo.").

The Border Wall Plan is evidence of that. DHS issued the plan pursuant to the January 20 Proclamation mandate that it "develop a plan for the redirection of funds concerning the southern border wall," 86 Fed. Reg. at 7226. ROA.364. So, too, is cancelling or modifying the border-barrier construction contracts to end construction. *See* ROA.354. That is, the agency has implemented its decision not to construct border barriers, which "demonstrates DHS's decision … is final." *Texas v. United States (Removal Pause)*, 524 F. Supp. 3d 598, 642 (S.D. Tex. 2021).

Likewise, DHS's decision not to construct border barriers "'alters the legal regime, binds the entity, and thus qualifies as final agency action' under the APA." *Texas II*, 20 F.4th at 948 (quoting *Texas v. EEOC*, 933 F.3d 433, 442 (5th Cir. 2019)). Here, DHS's decision forecloses the agency and its staff from pursuing border-barrier construction—which satisfies this requirement. *See id.*; *see also EEOC*, 933 F.3d at 441 (binding an agency and its staff "to a legal position produce[s] legal consequences or determines rights and obligations").

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The significant "mandatory language" in the Border Wall Plan demonstrates this. *EEOC*, 933 F.3d at 441. For example, DHS "will undertake a thorough review and replanning process," which includes a long list of actions, with the FY2020 appropriations. ROA.365–66. Likewise, cost overruns "will be funded through existing FY 2021 appropriations." ROA.367. And the document clearly mandates that FY2021 appropriations will go to remediation at sites where the Department of Defense was constructing border barriers. *See* ROA.367–68. There is also language "that retract[s] an agency's discretion," *EEOC*, 993 F.3d at 442: "No new barrier construction work will occur on the DoD projects." ROA.367.

3. The States fall within the zone of interests of the Appropriations Acts and the Impoundment Control Act.

Finally, the States are within the zone of interests of the Consolidated Appropriations Act, 2020 , the Consolidated Appropriations Act, 2021, and the ICA. Notably, the States bring *ultra vires* and constitutional challenges to DHS's actions, *see* ROA.1073–81, 1086–87, as well as APA claims, ROA.1083–84. That means the zone of interests analysis is largely academic. Since the States are "alleging that the government is" violating federal law, they do "not have to show that

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[their] interests fall within the zone of interests of the statutes and regulations in order to" make their *ultra vires* challenge. *Chiles v. Thornburgh*, 865 F.2d 1197, 1210 (11th Cir. 1989); *see also Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987) ("Appellants need not, however, show that their interests fall within the zones of interests of the constitutional and statutory powers invoked by the President in order to establish their standing to challenge the interdiction program as *ultra vires*.").

In any event, all the States need to show is that they come within the zone of interests of the statutes for the purpose of bringing an APA challenge, which is not an "especially demanding" test. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014) (quoting *Match-E-Be-Nash-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (quoting another source)). "To satisfy the test, the States must show only that their asserted interest is 'arguably within the zone of interests to be protected or regulated by' the statutes they claim have been violated." *Texas II*, 20 F.4th at 975 (quoting *Patchak*, 567 U.S. 224–25). By contrast, "the test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes

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implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* (alteration omitted) (quoting *Patchack*, 567 U.S. at 225 (quoting another source)). "That lenient approach is an appropriate means of preserving the flexibility of the APA's omnibus judicial-review provision, which permits suit for violations of numerous statutes of varying character that do not themselves include causes of action for judicial review." *Lexmark*, 572 U.S. at 130.

This Court's precedents establish that the States fall within the zone of interests of the Appropriations Acts. Those Appropriations Acts must be read together with the law permitting DHS to construct barriers—the INA. *See* 8 U.S.C. § 1103 note. One of the purposes of the INA—and, by extension, the appropriations that fund implementation of the law—is protecting the States from the costs of illegal immigration. *See Texas II*, 20 F.4th at 975. Thus, the States are within the zone of interests of the Appropriations Acts, to the extent that they fund DHS's wall-building activities under the INA. *Id.*

Likewise, the States' interest in seeing DHS spend the FY2020 and FY2021 appropriations on border walls is within the zone of interests

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protected by the ICA. The ICA may well be "enacted to safeguard Congress' interests." *Public Citizen v. Stockman*, 528 F. Supp. 824, 830 n.1 (D.D.C. 1981). Like the Appropriations Clause, however, it is equally "a restraint on Executive Branch officers." *U.S. Dep't of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012). It thus protects the interests of those who benefit from a particular appropriation. Here, that is the States. *See Arizona v. United States*, 567 U.S. 387, 397 (2012) (noting that the States "bear[] many of the consequences of unlawful immigration").

B. The States are likely to succeed on the merits of their claims.

1. The States are likely to succeed in showing that DHS acted arbitrarily and capriciously.

Under the APA, courts "shall … hold unlawful and set aside agency action … found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. That standard "requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). In particular, the agency must have "reasonably considered the relevant issues and reasonably explained the decision." *Id.* Conversely, agency

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action that is "premised on reasoning that fails to account for 'relevant factors' or evinces a 'clear error of judgment'" is arbitrary and capricious and subject to vacatur. *Wages & White Lion Invs., L.L.C. v. F.D.A.*, 16 F.4th 1130, 1136 (5th Cir. 2021).

In determining whether an agency acted reasonably and reasonably explained its actions, courts "consider only the reasoning 'articulated by the agency itself.'" *Texas II*, 20 F.4th at 989 (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 50 (1983)). And while judicial review does not weigh the merits of an agency's policy, it "is not toothless" but, "after *Regents*, … has serious bite." *Wages & White Lion Invs., L.L.C.*, 16 F.4th at 1136; *see also Texas II*, 20 F.4th at 989.

The challenged agency action and DHS's pretext: Here, the States challenge DHS's decision to implement the January 20 Proclamation by not constructing any new border barriers—made manifest by the agency's Border Wall Plan and culminating in the termination of the construction contracts. That is, this is not a challenge to how DHS is prioritizing its use of FY2020 and FY2021 appropriations. It is a challenge to the agency's decision to forego all new construction.

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And that is the agency's policy. DHS, to be sure, has recited that it intends "to use," and is using "the [FY2020 and FY2021 appropriations] consistent with their appropriated purposes." *See*, *e.g.*, ROA.1285, 1315–16; *cf.* 86 Fed. Reg. at 7,226 (requiring agencies to use border wall funds "as appropriate and consistent with applicable law"). The statement seems to imply that the agency will, or at least may, build some border barriers. But all the evidence, including its own statements, shows that it will not build another inch of border wall—and there is no need to look further than the agency's Border Wall Plan, which says it is "consistent with President Biden's commitment that 'no more American taxpayer dollars [should] be diverted to construct a border wall.'" ROA.364 (alteration in original) (quoting the January 20 Proclamation).

Furthermore, the agency has persistently asked Congress to cancel the FY2020 and FY2021 appropriations. *See*, *e.g.*, ROA.1286, 1315–16. Congress has not granted that request. *See* Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, Div. F, Title V, § 544(b) (2022). So DHS is instead trying to achieve the same result indirectly, by re-allocating the FY2020 and FY2021 appropriations to time-consuming activities besides barrier construction—such as environmental analyses and site

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remediation, *see*, *e.g.*, ROA.351–56 (discussing DHS's plan); ROA.365–68 (DHS's plan)—that will likely not be complete before the appropriations expire. *See* Executive Office of the President, Council on Environmental Quality, *Environmental Impact Statement Timelines (2010-2018)*, at p.1 (June 12, 2020), https://bit.ly/3xu2RbV ("[T]he average EIS completion time was 4.5 years.") (parentheticals omitted); *cf.* ROA.353 (anticipating that "environmental planning and stakeholder engagement will take approximately 12-16 months to complete").

The clear implication of DHS's commitment to the January 20 Proclamation, its public calling for the cancelling of the FY2020 and FY2021 appropriations, and diversion of those appropriations to time-consuming preparatory work is that the agency is running out the clock and expending funds on non-construction expenses—many of which are incurred *because of* the administration's decision to end border construction, *see* ROA.367 ($275 million for cost overruns "due to the existing suspension of contract performance for construction"); ROA.367–68 (costs of remediating Department of Defense sites turned over to DHS after the Department of Defense ended border wall construction)—to ensure it, as practical matter, cannot construct any border barriers. That

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is no different from expressly saying that DHS's policy is not to construct border walls.

Indeed, in other contexts, that policy has been made express. In September 2021, when "[a]sked why the administration did not build a barrier, such as a wall, to keep migrants out, [DHS Secretary] Mayorkas replied: 'It is not the policy of this administration. We do not agree with the building of a wall.'" Teaganne Finn, *Homeland Security Chief Mayorkas Defends Biden Administration Over Treatment of Haitian Migrants*, NBC NEWS (Sept. 26, 2021), https://tinyurl.com/y2y9uz82. During congressional testimony on March 29, 2022, the Director of the Office of Management and Budget (OMB) was asked what the Administration was obligating border wall funds to; she answered "environmental restoration" and "community consultation"—not wall-building. *The President's Fiscal Year 2023 Budget: Hearing Before the H. Comm. on the Budget*, 117th Cong. (2022) (testimony of OMB Director Shalanda Young), https://bit.ly/3iYnvbv. As Senator Murphy summarized after Congress did not cancel the FY2020 and FY2021 appropriations: That money will "continue to be what it is now, right? It's an unspent balance and it will continue to be an unspent

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balance. ... Biden's been clear he's not building any new border wall." Rebecca Beitsch et al., *Democrats, Republicans Struggle to Compromise on Border, Immigration Funds*, THE HILL (Mar. 11, 2022), https://bit.ly/3iRMb5D.

This court need not ignore that reality. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (courts "are not required to exhibit a naiveté from which ordinary citizens are free.") (quotations omitted). Nor need it ignore *why* DHS will not admit in court what it openly admits in public—*i.e.*, its policy not to build any border walls violates Congress's stated purpose for the FY2020 and FY2021 appropriations.

Congress did not provide those funds for environmental planning, site remediation, or paying costs for *cancelling* border-barrier construction. Rather, as set forth in the FY2020 appropriations, Congress said those funds "*shall* be available only … for the construction of border activities." 133 Stat. at 2,511 (emphasis added). "The first sign that the statute impose[s] an obligation is its mandatory language: 'shall.'" *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020). "Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." *Id.* (quoting *Kingdomware*

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Techs., Inc. v. United States, 136 S. Ct. 1969, 1977 (2016)); *see also Brown v. Viegelahn (In re Brown)*, 960 F.3d 711, 716 (5th Cir. 2020) ("'Shall' is a mandatory word indicating a command."). Congress's purpose in providing the FY2020 and FY2021 appropriations is plainly that DHS build border barriers. DHS is doing anything but.

The GAO, to be sure, concluded otherwise. *See In re OMB & U.S. Dep't of Homeland Security-Pause of Border Barrier Constr. & Obligations (In re Border Barrier Construction)*, B-333110, 2021 WL 2451823, at *8 (Comp. Gen. June 15, 2021). That decision, however, does not bind this court. *See Nevada v. Dep't of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005). In any event, it is not clear that GAO analyzed whether DHS was hiding its actual policy, and GAO clearly did not consider all the evidence the States now provide. For example, the fact DHS terminated the construction contracts post-dates GAO's analysis. Furthermore, even GAO expressed concerns about DHS's use of the FY2021 appropriations. *See In re Border Barrier Constr.*, 2021 WL 2451823, at *8. (noting the absence of a spending timeframes and suggesting Congress require them to "help assure Congress that executive action is aligned with the policies and priorities it established in the legislative process").

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In sum, the facts belie DHS's claim that its use of the FY2020 and FY2021 appropriations is "consistent with their appropriated purposes." ROA.1315–16. That claim is therefore a pretext for DHS's decision not to construct any border barriers. *See New York*, 139 S. Ct. at 2575–76. From that, numerous conclusions follow, all of which establish the States' entitlement to relief:

First, DHS's decision not to construct border barriers "must be set aside . . . ." *Id.* at 2573.

Second, DHS is acting unlawfully by not complying with Congress's appropriation. That also justifies relief; courts shall "hold unlawful and set aside agency action" that is "not in accordance with law." 5 U.S.C. § 706(a)(2)(A); *see also* § 706(a)(2)(C).

Third, it means the States succeed on their Appropriations Acts claims. *See also infra* Argument § II.B.2.

Fourth, it firmly shows that DHS acted arbitrarily and capriciously:

Arbitrary and capricious agency action: In deciding not to build any border barriers, DHS failed to account for four relevant factors:

First—and the main reason why DHS acted arbitrarily and capriciously—DHS provided no explanation for why the agency went

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from saying that border barriers work and the agency will build them, to saying that border barriers do not work and the agency will not construct them. That alone justifies relief. "[A]gency action is lawful only if it rests 'on a consideration of the relevant factors.'" *Michigan v. E.P.A.*, 576 U.S. 743, 750 (2015) (quoting *State Farm*, 463 U.S. at 43). Here, there is no evidence DHS considered anything.

To be sure, the federal government provided the district court with a declaration noting the benefits that consultation and environmental planning would provide. *See* ROA.357–60. But the declaration does not say that DHS considered those reasons as justifications for its new policy. Thus, the declaration is improper *post hoc* rationalization. *See*, *e.g.*, *Michigan*, 576 U.S. at 758 ("[A] court may uphold agency action only on the grounds that the agency invoked when it took the action."); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (refusing "[d]eference to what appears to be nothing more than an agency's convenient litigating position" "where the agency itself has articulated no position on the question"). If anything, the after-the-fact declaration highlights DHS's *failure* to engage in reasoned decision-making.

Second, "DHS 'failed to address whether there was legitimate

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reliance" by the States on the federal government securing the border by constructing border barriers. *Texas II*, 20 F.4th at 989 (quoting *Regents*, 140 S. Ct. at 1913). "That alone is fatal." *Id.* Where, as here, "an agency changes course … it must 'be cognizant that longstanding policies may have engendered serious reliance interest that must be taken into account.'" *Regents*, 140 S. Ct. at 1913 (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

Nowhere does the federal government mention the costs to the States of changing policy to be less protective of the borders. States "bear[] many of the consequences of unlawful immigration," and "[t]he problems posed to the State[s] by illegal immigration must not be underestimated." *Arizona*, 567 U.S. at 397–98. So if the federal government shifts policies, as it did here, from a stricter border control policy to a less strict one, it must consider the fact that States have relied on the stricter regime. That happened here. DHS's rejection of border barrier construction was one of the reasons for a special session of the Texas legislature where it passed House Bill 9, which allocates $1.8

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billion in funding for border security personnel, equipment, jail space, and border-wall construction. HB 9, 87th Leg., 2d Spec. Sess. (Tex. 2021).

Further underscoring DHS's failure to consider reliance interests is an agreement between Texas and the agency where "DHS explicitly acknowledged … that Texas would be 'irreparably damaged' by DHS policy changes that relaxed strictures on illegal border crossings." *Texas II*, 20 F.4th at 990. That agreement "*both* demonstrates DHS's prior knowledge of the States' reliance interests *and* affirmatively created reliance interests all its own. DHS's failure to consider those interests when it" changed course on border-barrier construction is "arbitrary and capricious." *Id.* at 989–90.

Third, "DHS failed to reasonably consider its own factual findings regarding the benefits" of border-barrier construction. *Texas II*, 20 F.4th 990–91. When an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," it must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Fox Television Stations, Inc.*, 556 U.S. at 515. "In such cases it is not that further justification is demanded by the mere fact of policy change[,] but that a reasoned explanation is needed for

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disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* at 515–16; *see also Encino Motorcars, LLC*, 579 U.S. at 221 ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.").

In 2018 and again in 2020, DHS laid out the benefits of border walls. Specifically, DHS found that "border walls have proven to be extremely effective" at "stopping drugs and illegal aliens from crossing" into the United States. ROA.1267; *see also* ROA.1270–72. For example, in 2018, DHS found that "border apprehensions decrease[d] by 90 percent" in areas where a wall was installed. ROA.1268. In 2020, DHS documented decreases in "illegal drug, border crossings, and human smuggling activities . . . in areas where barriers are deployed." *See* ROA.1271–72. DHS also catalogued other benefits from walls, such being able to redeploy agency assets, *see* ROA.1271, and protection of migrants and U.S. residents from potentially hazardous interactions, *see* ROA.1272 ("[P]rior to construction of the border wall system it was common to see illegal aliens running across a heavily traveled road, putting themselves and members of the community at risk.").

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DHS never addressed those findings. And the closest thing to an explanation for the reversal isn't even from the agency; it appears inthe January 20 Proclamation, where the President said no more than that building a border wall "is not a serious policy solution" and "a waste of money[.]" 86 Fed. Reg. at 7,225. That conclusory statement—even if the agency had made it—is insufficient. *See*, *e.g.*, *Wages & White Lion Invs., L.L.C.*, 16 F.4th at 1137.

In short, the Administration began its decision to end wall construction "by disclaiming its earlier conclusion that" walls work. *Texas II*, 20 F.4th at 991. "Given that setup, one might expect DHS to address its prior factual findings—explaining why they were mistaken, misguided, or the like. … DHS nonetheless failed to discuss *any* of its prior factual findings—much less explain why they were wrong. That failure provides another basis for [the] conclusion that" the agency's decision was arbitrary and capricious." *Id.*

Fourth, "DHS also failed to consider the legal implications of" not building the border walls. *Texas II*, 20 F.4th at 992. As discussed above, the FY2020 and FY2021 appropriations say that DHS "shall" spend those funds on the "construction of a barrier system along the southwest

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border." As noted above, Congress's use of the word "shall" imposes an obligation with which DHS must comply.

There is, however, no evidence DHS squared its decision not to construct border barriers with that command—and the agency knew it had to. DHS admitted (at least twice) that it is legally obligated to use the FY2020 and FY2021 appropriations for Congress's specified purposes. ROA.1285–86, 1315–16. The agency's failure to consider how to order its actions to comply with Congress's mandate—more, to claim it was using FY2020 and FY2021 appropriations "consistent with their appropriated purposes," ROA.1315–16—is a failure to grapple with the legal ramifications of deciding not to construct border barriers.

* * *

In short, DHS's decision not to construct border barriers is deficient under the APA for any number of reasons. The agency attempts to mask its policy reversal with a claim that it is actually complying with the FY2020 and FY2021 appropriations. It is not—which leads to a host of reasons why the States are likely to succeed on that claim.

But setting all that aside, DHS cannot escape the fact it failed to "reasonably consider[] the relevant issues and reasonably explain[] [its]

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decision." *Prometheus Radio Project*, 141 S. Ct. at 1158. The agency did not provide any explanation—much less one that addresses the States' reasonable reliance on its old policy, why the agency disregarded its prior finding that walls work and are good policy, and the legal ramifications of disregarding Congress's clear command in the FY2020 and FY2021 appropriations.

As a result, the States are likely to succeed on their APA claims.

2. The States are likely to succeed on their statutory claims.

Missouri and Texas claim that the actions of the President and DHS violate federal statutes, which are enforceable under the APA and the federal courts' inherent equitable jurisdiction. *See* ROA.1076–81, 1083–84, 1086–87. The States are likely to succeed on these claims.

Consolidated Appropriations Acts, 2020 and 2021: The Consolidated Appropriations Act of 2021, read together with the Consolidated Appropriations Act of 2020, mandates—through the use of "shall"—the "construction of barrier system along the southwest border". *See, e.g.*, *In re Brown*, 960 F.3d at 716. DHS is not doing that. Rather, as detailed above, DHS is spending the FY2020 and FY2021 appropriations on time-consuming and expensive projects—none of

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which involve border-wall construction—to wait for the appropriations to expire or to be used up. Congress did not provide the appropriations for activities intended to avoid building border walls; it provided them for wall-building. DHS's actions are thus unlawful under the Appropriations Acts. *See* 31 U.S.C. § 1301(a) ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law").

Impoundment Control Act: The federal government's decision not to use the FY2020 and FY2021 appropriations for border wall construction also does not comply with the ICA.

The ICA provides the sole statutory basis by which the President and DHS could have canceled the border wall funding. The law, however, is inapplicable where, as here, Congress mandates the obligation or expenditure of funds. *See* 2 U.S.C. § 681(4) ("Nothing contained in this Act, or in any amendments made by this Act, shall be construed as … superseding any provision of law which *requires* the obligation of budget authority or the making of outlays thereunder.") (emphasis added). "The plain and unambiguous language of" § 681(4) "makes clear" that the ICA "shall not apply to any other act which *mandates* the

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obligation or expenditure of funds[.]" *Maine v. Goldschmidt*, 494 F. Supp. 93, 98–99 (D. Me. 1980) (emphasis added). Thus, the ICA "cannot provide an independent statutory basis" for the President's authority to withhold funds. *Id.* at 99.

Moreover, even if the President could use the ICA to delay or rescind the FY2020 and FY2021 appropriations, nothing indicates he complied with the ICA's procedures for doing so. *See* 2 U.S.C. §§ 683(a), 684(a), 685.

3. The States are likely to succeed on their constitutional claims.

Lastly, the States are likely to succeed on their claims that, in refusing to spend FY2020 and FY2021 appropriations funds to build a border wall, the federal government violated the separation of powers and the Take Care clause.

Separation of powers: DHS's actions implementing the January 20 Proclamation are contrary to the constitutional guarantee of the separation of powers.

The Constitution vests in Congress, via the Appropriations Clause, the "exclusive power over the federal purse." *U.S. Dep't of Navy*, 665 F.3d at 1346 (quoting *Rochester Pure Waters Dist. v. EPA*, 960 F.2d 180, 185

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(D.C. Cir. 1992)). The clause is "a bulwark of the Constitution's separation of powers" and a "particularly important restraint on Executive Branch officials." *Id.* Thus, "[a]side from the power of veto, the President is without authority to thwart congressional will by canceling appropriations passed by Congress." *City and County of San Francisco v. Trump*, 897 F.3d 1225, 1232 (9th Cir. 2018).

In refusing to spend the FY2020 and FY2021 appropriations on border construction, "[n]ot only has the [Biden] Administration claimed for itself Congress's exclusive spending power, it has also attempted to coopt Congress's power to legislate." *Id.* at 1234. "Absent congressional authorization, the Administration may not . . . withhold properly appropriated funds in order to effectuate its own policy goals." *Id.* at 1235. Doing so—as the federal government did here—"violates the constitutional principle of the Separation of Powers." *Id.*

Take Care Clause: DHS's actions in violating both the Appropriation Acts and the ICA also violate the Take Care Clause, because DHS is deliberately flouting the Executive's obligation to take care that the laws be faithfully executed. DHS's actions implementing the January 20 Proclamation are contrary to the Take Care Clause of the

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Constitution, the constitutional obligation that the President and his subordinates "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. That constitutional limitation is binding on agencies and officers exercising executive power. *See* U.S. CONST. art. II, § 1, cl. 1 (vesting "[t]he executive Power" in the President).

Furthermore, the Take Care Clause extends to complying with congressional appropriations. "Because Congress's legislative power is inextricable from its spending power, the President's duty to enforce the laws necessarily extends to appropriations." *San Francisco*, 897 F.3d at 1233–34. "[T]he President and federal agencies may not ignore statutory mandates or prohibitions merely because of policy disagreement with Congress." *In re Aiken County*, 725 F.3d 255, 260 (D.C. Cir. 2013).

Yet that is what DHS and the administration did here. DHS is not refusing to construct new border barriers because this administration believes that the FY2020 or FY2021 appropriations—or wall-building generally—are unconstitutional. *See id.* at 261 (opinion of Kavanaugh, J.). It is refusing to construct border barriers because President Biden believes "building a massive wall that spans the entire southern border is not a serious policy solution." 86 Fed. Reg. at 7,225. True or not, what

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matters is that Congress thought it is a serious policy solution, and so mandated that FY2020 and FY2021 appropriations be used to construct that wall.

"Under Article II of the Constitution . . . , the President must follow statutory *mandates* so long as there is appropriated money available . . . ." *In re Aiken County*, 725 F.3d at 259. That is not occurring here, and so the States are likely to succeed on their Take Care Clause claim.

C. The equitable factors justify injunctive relief.

The States are likely to succeed on the merits of their claims. Thus, an injunction is warranted if there is " a substantial threat of irreparable injury if the injunction is not issued," *Planned Parenthood of Greater Texas*, 981 F.3d at 353, and the factors of harm to the federal government and the public interest favor an injunction, *see Nken*, 556 U.S. at 435.

Irreparable harm: "To show irreparable injury if threatened action is not enjoined, it is not necessary to demonstrate that harm is inevitable and irreparable." *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390, 1394 (5th Cir. 1986). Instead, "[t]he plaintiff need show only a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair

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the harm." *Id.* (footnote omitted).

The States easily make that showing. As the standing analysis shows, DHS's failure to secure the border imposes significant costs on the States. That will irreparably harm the States because they cannot recover the money from the federal government. *See Texas I*, 10 F.4th at 559 ("The district court concluded that the States have suffered, and will continue to suffer, harms as a result of the termination of MPP. We agree. A stay 'would enable' aliens released into the interior 'to apply for driver's licenses and other benefits, and it would be difficult for the states to retract those benefits or recoup their costs even if they won on the merits.'") (citations omitted) (quoting *Texas v. United States (DAPA I)*, 787 F.3d 733, 768 (5th Cir. 2015)); *Removal Pause*, 524 F. Supp. 3d at 663 ("[N]o Party has suggested that Texas could recover any of its likely financial injury here, and the Court cannot conceive of any path for Texas to pierce the federal government's usual sovereign immunity or contrive a remedial cause of action sufficient to recover from its budgetary harm."); *Texas v. United States*, 328 F. Supp. 3d 662, 737 (S.D. Tex. 2018) (noting a State's financial injury was irreparable because "there is no source of recompense").

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Furthermore, as the federal government said in the district court, "[t]he planning and execution required for large-scale barrier construction projects can be a complex and time-consuming process." ROA.280. Even moving quickly under the prior administration, border-barrier construction took nine months. ROA.1265. Thus, further delay in relief increases the likelihood that the FY2020 and FY2021 appropriations will expire and the federal government will accomplish its goal—no further construction of the border wall—despite acting unlawfully and arbitrarily and capriciously.

Harm to the government and the public interest: The threat of injury to Missouri and Texas outweighs any potential harm to DHS and the federal government. In fact, the federal government faces no cognizable harm from a preliminary injunction. "Any interest [DHS or the federal government generally] may claim in enforcing an unlawful (and likely unconstitutional) [action] is illegitimate." *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021); *see also League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("There is generally no public interest in the perpetuation of unlawful agency action.") (cited in *Texas I*, 10 F.4th at 560); *N.Y. Progress & Prot. PAC v.*

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Walsh, 733 F.3d 483, 488 (2d Cir. 2013) (recognizing that government officials "do[] not have an interest in the enforcement of an unconstitutional law") (quoting *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003)).

But even if Defendants have a legitimate interest in implementing the January 20 Proclamation, they face no substantial prejudice from a delayed implementation. Nor do they face injury from expending funds to construct border barriers in accord with Congress's unambiguous instructions—indeed, they are prohibited from using those funds for any other purpose.

Further, the public interest strongly favors Plaintiffs. First, the public interest is served "in having governmental agencies abide by the federal laws that govern their existence and operations." *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994) (cited in *Texas I*, 10 F.4th at 559–60). That includes the APA, the FY2020 and FY2021 appropriations, the ICA, the Take Care Clause, and the principle separation of powers. Put another way, "the public is served when the law is followed, and the public will indeed be served if DHS is enjoined from suspending the law." *Removal Pause*, 524 F. Supp. 3d at 665

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(quoting *Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 585 (5th Cir. 2013)).

Second, "the public interest favors Plaintiffs because the public has an 'interest in stemming the flow of illegal immigration.'" *Texas*, 554 F. Supp. 3d at 856 (quoting *United States v. Escobar*, 2017 WL 5749620 at *2 (S.D. Tex. Nov. 28, 2017) (citing *United States v. Martinez–Fuerte*, 428 U.S. 543, 556–58 (1976)). As DHS acknowledged in both 2018 and 2020, border walls remove a powerful incentive in favor of illegal border crossings. The States' requested injunction furthers that interest.

D. A nationwide injunction is appropriate.

Finally, a nationwide injunction is proper. As DHS has acknowledged, border walls prevent illegal border crossings. *See* ROA.1265–72. This case is thus about immigration policy, notwithstanding the fact that appropriations are also involved. Nationwide relief is therefore necessary to preserve "the integrated scheme of regulation created by Congress" and to ensure the efficacy of the court's order by illegal border crossings in areas not subject to the injunction. *See DAPA II*, 809 F.3d at 188 (quoting *Arizona*, 567 U.S. at 402) (quoting another source)).

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Conclusion

For the foregoing reasons, the States respectfully ask the Court to reverse the district court's *de facto* denial of their preliminary injunction and remand with instructions to enter the States' requested injunction.

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Certificate of Service

On April 18, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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No. 22-40110

THE GENERAL LAND OFFICE OF THE STATE OF TEXAS, ET AL.,

Plaintiffs,

versus

PRESIDENT JOSEPH R. BIDEN, ET AL.,

Defendants,

STATE OF MISSOURI; STATE OF TEXAS,

Plaintiffs—Appellants,

versus

JOSEPH R. BIDEN, JR., *in his official capacity as* PRESIDENT OF THE UNITED STATES OF AMERICA; UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, *in his official capacity as* SECRETARY OF THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY A. MILLER, *in his official capacity as* ACTING COMMISSIONER OF THE UNITED STATES CUSTOMS AND BORDER PROTECTION; UNITED STATES CUSTOMS AND BORDER PROTECTION,

Defendants—Appellees.

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Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:21-CV-272
USDC No. 7:21-CV-420

Before HIGGINBOTHAM, DENNIS, and GRAVES, *Circuit Judges*.

PER CURIAM:*

In October 2021, Missouri and Texas (collectively, the "States") filed a lawsuit challenging an announcement by the Department of Homeland Security (DHS) of new spending priorities for certain funds Congress allocated to construct a barrier system along the nation's southwest border. Specifically, the States alleged that DHS's plan to conduct environmental reviews, engage in stakeholder consultation, and study how to minimize the use of eminent domain violated the terms of Congress's appropriations statutes, the Administrative Procedure Act, the Impoundment Control Act, and the Constitution. The States moved for a preliminary injunction, the case was consolidated with a similar one filed by the Texas General Land Office, and the defendants filed a motion to dismiss. Once briefing was complete, the district court stayed the case until the Supreme Court ruled in *Biden v. Texas*, No. 21-954. The States sought to immediately appeal the stay, characterizing it as a practical denial of their motion for a preliminary injunction. *See Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981). They also moved in this court for an injunction pending appeal which a motions panel carried with the case.

After an expedited hearing before this court and while the case was under advisement, the Supreme Court issued its opinion in *Biden v. Texas*, No. 21-954 (June 30, 2022). By its own terms the district court's stay order

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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expired. The parties submitted post-stay briefing in the district court, and based on the docket activity below, the district court is currently considering the States' pending motion for a preliminary injunction.

In light of the stay's expiration, we directed the parties to submit supplemental briefing or motions addressing whether the States' appeal was moot. The defendants filed a motion to dismiss, arguing that though there never was appellate jurisdiction in this case, the case is also now moot because we cannot grant any effective relief as to an order that is no longer in effect. The States maintain that the district court as a practical matter denied them a preliminary injunction, even without the stay in place, and thus we can grant them effective relief by "reversing" the district court's *de facto* denial of their motion and entering a preliminary injunction ourselves. At the same time, the States are urging the district court to grant their pending motion for a preliminary injunction—the same injunction which they tell us has already been denied.

* * *

"An interlocutory appeal from a temporary stay no longer in effect, like an interlocutory appeal from a since-expired or vacated temporary restraining order, is the paradigm of a moot appeal." *Video Tutorial Servs., Inc. v. MCI Telecommunications Corp.*, 79 F.3d 3, 5 (2d Cir. 1996). "With the conditions underlying the stay having now passed, there is no relief for us to order[.]" *Meierhenry Sargent LLP v. Williams*, 992 F.3d 661, 664 (8th Cir. 2021); *see also 303 Creative LLC v. Elenis*, 746 F. App'x 709, 711–12 (10th Cir. 2018) (unpublished) (appeal from stay assumed to have practical effect of denying injunction moot once stay was lifted); *Muscolino v. Turner*, 104 F. App'x 422, 423 (5th Cir. 2004) (unpublished, per curiam) (appeal from order holding case in abeyance moot because order is no longer in effect). As demonstrated by both the district court's original order and the States'

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actions in the district court, the district court's stay is no longer in effect. We can therefore grant no relief with respect to the expired order. Nor can we review a decision on the States' preliminary injunction that the district court has yet to make. It is clear that the district court will rule on the States' motion in due course, at which point they may seek to appeal any adverse ruling.

We GRANT the defendants' motion and DISMISS AS MOOT the States' appeal. We DENY the States' motion for an injunction pending appeal. THE MANDATE SHALL ISSUE FORTHWITH.

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MO-AG-23-0462-A-000499

No. 22-40110

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF MISSOURI, STATE OF TEXAS,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas

OPPOSITION TO MOTION FOR INJUNCTION PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS

Under Fifth Circuit Rule 28.2.1, the United States, as a governmental party, need not submit a certificate of interested persons.

/s/ Anne Murphy
Anne Murphy, Attorney

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INTRODUCTION

Congress appropriated funds to the Department of Homeland Security (DHS) to construct barriers along the southwest border for fiscal years 2020 and 2021, but left to the discretion of DHS how to spend those funds. DHS initially planned to spend the 2020 funds on a project in Laredo, Texas, and the 2021 funds on a project in California. In January 2021, President Biden issued a proclamation directing DHS to reassess its barrier-spending policies. 86 Fed. Reg. 7225 (Jan. 27, 2021). The proclamation recognized that, because Congress had appropriated funds (including for fiscal years 2020 and 2021) for barrier construction, any spending plan would have to "provid[e] for the expenditure" of those funds "consistent with their appropriated purpose." *Id.* at 7226. When the proclamation was issued, neither the Laredo project nor the California project had advanced to a point where construction was imminent. Indeed, the government had not yet finalized construction plans or acquired the property on which the projects were to be built.

DHS's revised spending plan reflects the proclamation's directive to comply with the 2020 and 2021 border-barrier appropriations statutes. DHS is using its 2020 funds to modify the Laredo project to ensure that the project complies with federal law. DHS is using its 2021 funds to repair and improve conditions at incomplete barrier project sites that were previously funded by the Department of Defense (DoD).

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Many months after the President's proclamation and DHS's plan were issued, Missouri and Texas sued and sought to preliminarily enjoin DHS's spending decisions on a nationwide basis. The district court deferred decision on the injunction motion until the Supreme Court could decide whether to overrule a decision of this Court on which the States had heavily relied. The States filed this interlocutory appeal and are now seeking to enjoin DHS's spending decisions pending the appeal's resolution. The States' motion does not dispute that those decisions are consistent with the 2020 and 2021 appropriations statutes and with federal appropriations law generally. The motion merely argues that the decisions are arbitrary and capricious under the Administrative Procedure Act (APA).

The States' motion should be denied. This Court lacks jurisdiction over the States' interlocutory appeal because the district court's order deferring decision on the States' preliminary-injunction motion is not appealable as of right. Nor does the order have the practical effect of denying injunctive relief, as the States have failed to explain how they could be injured—much less imminently and irreparably injured—by DHS's decision to revise the as-yet-incomplete Laredo project and to remediate existing but incomplete barrier projects. Those injuries are insufficient even to support the States' standing to sue. DHS's spending decisions are also not subject to APA review because they are committed to DHS's discretion by law. And DHS's implementation plan is both reasonable and reasonably explained.

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The other injunction factors favor DHS as well. As noted, the States have failed to show any injury sufficient to support their standing to sue, much less to support the extraordinary remedy of an injunction pending appeal. Moreover, their requested relief would not address their alleged harms and would risk interfering with DHS's lawful exercise of its spending authorities. This Court should reject the States' invitation to second-guess DHS's construction spending decisions pending resolution of the States' appeal.

STATEMENT

1. Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) authorizes the Secretary of Homeland Security to "take such actions as may be necessary to install additional physical barriers and roads . . . in the vicinity of the United States border." Pub. L. No. 104-208, div. C, tit. I, § 102(a), 110 Stat. 3009, 3009-554 (1996) (codified as amended at 8 U.S.C. § 1103 note). The statute vests the Secretary with considerable discretion. He may determine "where fencing would be most practical and effective." 8 U.S.C. § 1103 note (Improvement of Barriers at Border). He also has "sole discretion" to decide whether to waive certain "legal requirements," including environmental assessments required by federal law, "to ensure expeditious construction." *Id.* "In carrying out" section 102, the Secretary "shall consult with" various stakeholders "to minimize the impact" of barrier construction "on the environment, culture, commerce, and quality of life." *Id.*

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2. For fiscal year 2020, Congress appropriated $1.375 billion to DHS "for the construction of barrier system along the southwest border." Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, div. D, tit. II, § 209(a), 133 Stat. 2317, 2511 (2019). For fiscal year 2021, Congress appropriated a further $1.375 billion to DHS for the same purpose. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. F, tit. II, § 210, 134 Stat. 1182, 1456-57 (2020).

In addition to these appropriations to DHS, several border-barrier projects were previously carried out by DoD. *See* 84 Fed. Reg. 4949, 4949 (Feb. 20, 2019). The DoD projects were supported by funds reallocated to barrier construction from DoD's counter-drug account, *see* 10 U.S.C. § 284, and from DoD's military-construction appropriations pursuant to a 2019 declaration of a national emergency at the border, *see id.* § 2808.

3. On January 20, 2021, the President issued a proclamation terminating the 2019 national emergency. The proclamation stated that, although the "United States has a right and a duty to secure its borders and protect its people against threats," "building a massive wall that spans the entire southern border is not a serious policy solution." 86 Fed. Reg. at 7225. The proclamation directed DHS and DoD to pause ongoing construction pending a thorough assessment of extant projects. *Id.* The proclamation also directed the agencies to develop a "plan for the redirection of funds concerning the southern border wall, as appropriate and consistent with applicable law." *Id.* at 7226. The proclamation recognized, however, that Congress

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has "expressly appropriated" certain funds "for wall construction." *Id.* The proclamation made clear that any plan must "provid[e] for the expenditure" of such funds "consistent with their appropriated purpose." *Id.*

In April 2021, after conducting the required assessment, the Deputy Secretary of Defense canceled all of its ongoing barrier projects and ordered the transfer of barrier infrastructure to DHS. App. 41-42.[1] DHS issued its spending plan on June 9, 2021. Under the plan, DHS would use the 2020 appropriation to fund construction projects at border-barrier sites as necessary "to address life, safety, environmental, or other remediation requirements." App. 59. Given the urgency with which such work would need to be undertaken, DHS would proceed under previously issued IIRIRA waivers. App. 58-59. For any new barrier construction, however, DHS would "undertake a thorough review and replanning process" of those projects consistent with federal law, including with federal environmental-planning statutes. *Id.* DHS would also attempt to reduce the extent to which the projects relied on acquiring private land through "adverse eminent domain proceedings." App. 60. DHS would use its 2021 appropriation to address unforeseen costs arising from DoD's transfer of incomplete barrier projects to DHS and to make plans to construct additional barrier segments. App. 60.

[1] Citations in this format refer to the appendix to this response.

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DHS is in the process of implementing its plan. Originally, DHS had dedicated nearly all of its 2020 appropriation to four contracts to build a new barrier system near Laredo, Texas. App. 47. When the January 2021 proclamation was issued, the Laredo project was still in the planning stage. App. 47-48. No land had been acquired, no plans had been finalized, and no ground had been broken. Consistent with the plan, DHS decided to engage in additional environmental planning and consultation with stakeholders (which are necessarily incident to border-barrier construction) before continuing the project. In light of that decision, two contracts were modified and two were canceled, and the contractors' incomplete designs were transferred to the government. App. 49. DHS is currently revising the Laredo project using the 2020 funds. App. 49.

DHS is likewise using the 2021 funds for barrier-construction activities. As DHS explained, the transferred DoD barrier projects are "in various stages of completion," and additional remediation work is required at the project sites. App. 61. For example, many projects still lack sufficient drainage, erosion controls, and access roads. App. 61. DHS is using the 2021 funds to improve those existing sites and to cover potential cost overruns and "other delay costs." App. 61. DHS will use any remaining funds to plan for its next highest priority barrier segments. App. 62.

4. Several members of Congress asked the Government Accountability Office (GAO) to investigate whether the new DHS spending plan violated federal appropriations law. *See* App. 17 n.8. GAO is a nonpartisan independent agency that

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works for Congress. GAO concluded that the plan was fully consistent with the 2020 and 2021 appropriations statutes and with federal appropriations law more generally. *See generally* App. 23-30.

5. Missouri and Texas filed this lawsuit in October 2021, several months after the Texas General Land Office (an agency of Texas) filed a related lawsuit in July 2021. On November 8, 2021, the States moved for a preliminary injunction. The district court consolidated the cases, and briefing on the States' motion concluded in December 2021. In February 2022, the district court issued an order deferring consideration of the pending motion. App. 64. The States appealed the order on February 25. Dkt. No. 44. More than two weeks later, they moved for an injunction pending appeal in district court. Dkt. No. 46. The district court denied the motion "without prejudice to [their] pending motion for a preliminary injunction." App. 67.

ARGUMENT

To obtain the extraordinary remedy of an injunction pending appeal, movants must show a "strong likelihood" of success on the merits, "irreparable injury in the absence of an injunction," a balance of harms that "weighs in their favor," and that "the public interest" favors an injunction. *Whole Woman's Health v. Jackson*, 13 F.4th 434, 441 (5th Cir. 2021) (per curiam). The States have failed to clear that high bar.

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I. The States Have Failed To Show A Substantial Likelihood Of Success On The Merits.

A. The States' Arguments Fail at the Threshold.

The States are unlikely to prevail in this appeal for at least two threshold reasons.

First, this Court lacks jurisdiction over the States' appeal from a district court order staying consideration of their preliminary-injunction motion. Interlocutory appeals may be taken from orders "granting, continuing, modifying, refusing[,] or dissolving [an] injunction[]." 28 U.S.C. § 1292(a)(1). The challenged order does none of those things. It merely defers the district court's consideration of the States' motion until after the Supreme Court decides *Biden v. Texas*, No. 21-954, which will presumably happen no later than late June or early July of this year. The court has indicated that it will address the States' motion expeditiously once *Texas* is decided. *See* App. 64 (requiring the parties to file briefs within 14 days of the decision). The order is thus not appealable under § 1292(a)(1).

The States contend (Mot. 1-6) that the order has the practical effect of an order denying an injunction. But that doctrine applies solely to orders with "serious, perhaps irreparable, consequence[s]" that can be effectively challenged only through immediate appeal. *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981) (quoting *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 181 (1955)). The States' motion does not cite this standard, much less explain how the district court's order might satisfy it.

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Nor could any such argument succeed. The States' sole alleged injury (Mot. 24) is that, as a result of DHS's decision to undertake additional planning for the Laredo barrier project, the States might have to "subsidize" an unspecified amount of "driver's license and healthcare costs" for an unspecified number of undocumented individuals who would otherwise not have entered the country if a border barrier were constructed on a faster schedule. But any such expenditure would not be the result of the President's proclamation or the DHS spending plan. When the proclamation was issued, DHS had not yet "acquired any of the permanent interests in real property necessary to support construction" of the Laredo project. App. 48. And the project designs were "incomplete." App. 49. The States have failed to explain how they could possibly be injured—much less imminently and irreparably injured—by DHS's decision to engage in additional planning for a barrier project that had not yet broken ground.

The mismatch between the States' alleged injury and their requested relief further underscores the lack of urgency. The States have asked (Mot. 9) for an injunction prohibiting DHS from "implementing the January 20 Proclamation" with respect to the 2020 and 2021 DHS appropriations. They have also asked this Court to require DHS to comply with the 2020 and 2021 appropriations statutes. *Id.* But the States' motion does not dispute that DHS is using funds appropriated under those provisions in a manner consistent with the statutory requirements and with federal appropriations law—as GAO has independently concluded. And DHS would remain

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free to use those funds in exactly the same manner whether or not this Court grants the States' motion. The States' proposed injunction would therefore accomplish nothing except signal disagreement with DHS's concededly lawful spending decisions. That the States' requested relief cannot prevent their purportedly imminent injuries confirms that the district court's deferral order has no "serious, perhaps irreparable consequence[s]." *Carson*, 450 U.S. at 84 (quoting *Baltimore Contractors*, 348 U.S. at 181).

Second, the States' appeal is unlikely to succeed because DHS's barrier-funding decisions are committed to agency discretion by law. *See* 5 U.S.C. § 701(a)(2). "[A]n agency's allocation of funds" from an appropriation "requires 'a complicated balancing of a number of factors which are peculiarly within its expertise,'" such as "whether its 'resources are best spent' on one program or another; whether it 'is likely to succeed' in fulfilling its statutory mandate; [and] whether a particular program 'best fits the agency's overall policies[.]'" *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993). Such choices are not susceptible to judicial second-guessing under the APA. *Id.*; *accord Milk Train, Inc. v. Veneman*, 310 F.3d 747, 751-52 (D.C. Cir. 2002).

The 2020 and 2021 appropriations supply no judicially manageable standards to evaluate DHS's exercise of discretion. They merely appropriate funds for the construction of border-barrier projects. As GAO has concluded, the statutes do not speak to whether DHS should break ground on new projects by waiving otherwise applicable federal laws or whether DHS should comply with those laws before breaking ground. *See generally* App. 23-30. To the contrary, § 102(c) of IIRIRA vests

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sole discretion in the Secretary to decide whether otherwise applicable federal laws should be waived. And the States' motion does not argue that DHS is violating the 2020 and 2021 appropriations statutes by complying with federal planning laws or by dedicating funds to remediating existing barrier-project sites.

B. DHS's Actions Are Not Arbitrary or Capricious.

1. The States are also unlikely to prevail on the merits of their APA claim. The States have not argued that the January 2021 proclamation or the DHS plan violates any substantive provision of law. The States' sole argument is that DHS's actions are arbitrary and capricious. But under that "deferential" standard, "a court may not substitute its own policy judgment for that of the agency." *Federal Commc'ns Comm'n v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). "A court [must] simply ensure[] that the agency has . . . reasonably considered the relevant issues and reasonably explained [its] decision." *Id.* Here, DHS's explanations more than satisfy the "minimal standards of rationality" that the APA imposes. *See Luminant Generation Co. LLC v. U.S. EPA*, 714 F.3d 841, 850 (5th Cir. 2013) (quoting *Texas Oil & Gas Ass'n v. U.S. EPA*, 161 F.3d 923, 934 (5th Cir. 1998)).

As the DHS plan makes clear, DHS is continuing to use funds that Congress appropriated "for the construction of barrier system along the southwest border" for barrier-system construction activities along the southwest border. DHS had originally obligated the vast majority of the 2020 appropriation to four contracts that were intended to lead to the construction of border barriers near Laredo, Texas. But those

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contracts were awarded without DHS having taken certain preparatory steps that DHS now deems critical. For example, DHS decided to "review . . . existing construction plans to determine whether they can be modified to reduce" their reliance on "adverse eminent domain proceedings." App. 60. In DHS's view, it is preferable to "obtain real estate interests on a voluntary basis" than to initiate condemnation actions against private landowners. App. 60. DHS likewise determined that is preferable to engage in a more robust project-planning and outreach process notwithstanding its authority to waive certain planning requirements under IIRIRA, *see* App. 60, which vests in the Secretary of Homeland Security sole discretion to decide whether a waiver should be issued. DHS explained that this additional pre-construction work "will inform environmental planning and execution of the border wall projects." App. 60. Finally, DHS explained that its barrier designs should be more significantly informed by the views of stakeholders. App. 60. Such consultations will give DHS insight into how to "minimize the impact" of a completed barrier "on the environment, culture, commerce, and quality of life." *See* App. 19. Once these initial steps are complete, DHS intends to issue contracts "to cover both the completion of the design of barrier system proposed for the . . . Laredo Sector and its actual construction." App. 54-55.

With respect to the 2021 appropriation, DHS explained that it must now "absorb some potentially significant costs" to remedy issues related to incomplete border-barrier projects that DoD had transferred to DHS. App. 61. For example,

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some projects lack erosion-control measures necessary to ensure "safe[ty] and stab[ility]." App. 61. Other projects lack completed roads, which are needed to ensure that DHS can patrol and maintain the barriers. App. 60. DHS has thus devoted the 2021 appropriation to these mission-critical tasks, which are necessary to ensure that the incomplete barrier projects are safe and effective. App. 60; *see* App. 50. DHS will also use the 2021 appropriation to cover any "contingency funding" needs arising from "delay and change costs." App. 61. If any funds remain, DHS will use them to begin the "planning process for the next highest priority barrier segments identified by DHS." App. 62. It was entirely lawful and reasonable for DHS to spend funds on making existing barriers safe and usable rather than on building new barriers where the States want them to be.

2. The States urge (Mot. 14) the Court to disregard these reasoned explanations as *post hoc* rationalizations. But the DHS plan sets forth the agency's reasoning plainly. *See* App. 59-62. The States also assert (Mot. 11-14) that DHS's explanations are pretextual. But the Supreme Court has held that, when reviewing agency action, courts may not inquire into "the mental processes of administrative decisionmakers" absent a "strong showing of bad faith or improper behavior." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2573-74 (2019) (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)). The States have failed to make any such showing.

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The States argue (Mot. 13) that DHS is acting in bad faith because DHS is not using the 2020 and 2021 appropriations to build new border barriers as quickly as the States would prefer. But Congress did not mandate any specific new construction or any particular timetable. The 2020 and 2021 appropriations statutes merely require DHS to expend appropriated funds on a barrier system along the southwest border, which is exactly what DHS is doing. And DHS may lawfully use funds appropriated for a barrier system on "expenses necessarily incident to accomplishing that object," such as compliance with pre-construction project-planning requirements. *See U.S. Dep't of the Navy v. Federal Labor Relations Auth.*, 665 F.3d 1339, 1349 (D.C. Cir. 2012) (Kavanaugh, J.) (quotation omitted). Indeed, GAO found "nothing to indicate that" DHS "is attempting to override congressional intent that these funds be used for constructing barriers at the southern border." App. 29.

The States also emphasize (Mot. 11-12) that the January 2021 proclamation directs that spending authorities that do not specifically authorize barrier construction will no longer be used for that purpose. 86 Fed. Reg. at 7225 (stating that funds will not "be *diverted* to construct a border wall" (emphasis added)). But no statute requires the Executive to divert funds appropriated for non-barrier purposes to build border barriers. By contrast, when Congress has "expressly appropriated [funds] for wall construction," as it did in the 2020 and 2021 appropriations, the proclamation requires DHS to "ensure that funds appropriated by the Congress fulfill their intended purpose" by "expend[ing]" them in a manner "consistent with their

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appropriated purpose." *Id.* at 7226. Indeed, the proclamation envisions that DHS will "take all appropriate steps to resume . . . projects" as appropriate. *Id.*

Finally, the States cite (Mot. 12-13) statements by the President and the Secretary of Homeland Security casting doubt on the efficacy of border barriers. But "a court may not set aside an agency's policymaking decision solely because it might have been . . . prompted by an Administration's priorities." *New York*, 139 S. Ct. at 2573. Nor can a court "reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons." *Id.* DHS's lawful use of appropriated funds is consistent with Administration policies. But that is further reason to uphold the agency's spending plan, not a basis for an injunction against it.

3. The States separately argue that DHS failed to consider certain pertinent factors. They contend (Mot. 14-15) that DHS was required to explain why it departed from prior statements describing the benefits of border-barrier construction. But DHS has not disavowed border-barrier construction activities altogether. DHS has dedicated the 2021 appropriation to ensuring the safety and efficacy of existing barrier projects. And DHS has dedicated the 2020 appropriation to conducting a "thorough review and replanning process"—consistent with federal legal requirements. App. 59. The efficacy *vel non* of border barriers is irrelevant to those decisions.

The States contend (Mot. 19-20) that DHS failed to explain why it departed from the prior Administration's intended uses for the 2020 and 2021 appropriations.

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But the DHS plan clearly explained why the agency had decided to alter course: because DHS was now required to cover "some potentially significant costs" related to incomplete border-barrier projects initially funded by DoD, App. 61, and because DHS had determined that the Laredo barrier project should be revised in light of certain preparatory planning activities that DHS had not previously undertaken, App. 60.

The States contend (Mot. 20-22) that DHS was required to explain why its barrier-funding decisions were lawful. But DHS is complying fully with the 2020 and 2021 appropriations, and the States' motion does not argue otherwise. And the APA does not require an agency to address every argument "thought conceivable by the mind of man," particularly when those arguments are meritless. *See Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978).

The States contend (Mot. 17-19) that DHS was required to account for the States' reliance interests. But the States' motion has failed to identify a single decision that they made in reliance on DHS's prior spending plans. Nor would any such reliance have been reasonable, given that DHS was not close to breaking ground on a single border-barrier project funded by the 2020 and 2021 appropriations. This case is therefore far different from *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1913 (2020), which involved the Deferred Action for Childhood Arrivals program—on which hundreds of thousands of people had relied to maintain a particular immigration status.

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In a footnote, the States contend (Mot. 17 n.2) that DHS was required to solicit their views before issuing the plan. No authority supports that argument. The DHS plan is not a rule subject to the APA's notice-and-comment provisions, and the States' motion does not contend otherwise. And *Consumers Union of United States, Inc. v. Consumer Product Safety Commission*, 491 F.2d 810 (2d Cir. 1974), says only that an agency may not "ignore evidence placed before it by interested parties" when conducting a notice-and-comment rulemaking. *Id.* at 812. As for IIRIRA's consultation provision, that provision simply directs DHS to seek views that would help DHS "minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which" border barriers are "to be constructed." IIRIRA § 102(b)(1)(C)(i). The States do not argue that they have any insights into those issues that DHS should be considering, and nothing prevents them from offering such insights to DHS now—especially because such consultations remain ongoing.

II. The Remaining Injunction Factors Decisively Favor The Federal Government.

The States' motion should also be denied because the States have failed to show that they will suffer imminent and irreparable harm. The States' sole allegation of harm (Mot. 24) is that, because of DHS's decision to revise the Laredo project, the States will be forced to pay an unspecified amount of money to subsidize undocumented immigrants that the Laredo project would otherwise have prevented

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from entering the country. Such speculation is not sufficient even to support their standing to sue, much less to justify the extraordinary remedy of an injunction pending appeal.

To support their allegations, the States rely (Mot. 24) on declarations noting that their social-services agencies have incurred immigration-related costs. *See* Dkt. No. 19-1, at 72-74, 131-135 (No. 7:21-cv-420). Those declarations do not, and indeed could not, link an increase in such costs to any given DHS spending decision. *See El Paso County, Texas v. Trump*, 982 F.3d 332, 344 (5th Cir. 2020) (holding that a plaintiff lacked standing to challenge border-barrier construction because plaintiff had failed to link their alleged harms to a particular construction project). No construction had taken place pursuant to the 2020 and 2021 Appropriations statutes when the January 2021 proclamation and DHS's subsequent spending plan were issued. App. 46-47, 50. And the record is devoid of any evidence that DHS's decision to take additional planning steps before breaking ground on as-yet-hypothetical construction projects would have reduced the States' social-services costs. The States speculate (Mot. 23) that DHS's spending policies might encourage increased migration to the United States, but accepting claims of harm predicated on "slight[] increases" in the "risk of injury" would "drain the 'actual or imminent' requirement" of the standing inquiry "of meaning." *E.T. v. Paxton*, 19 F.4th 760, 766 (5th Cir. 2021) (quoting *Shrimpers & Fishermen of the RGV v. Texas Comm'n on Envtl. Quality*, 968 F.3d 419, 424 (5th Cir. 2020)).

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That apprehensions of undocumented individuals declined at particular sections of the Nation's border-barrier system (Mot. 24) does not prove that new barriers constructed at different locations would have a similar overall net effect on undocumented immigration generally. Nor does the data demonstrate that the decline was caused by—as opposed to merely correlated with—border-barrier construction. Even if the data supported the States' allegations (which they do not), no evidence suggests that the States' alleged injuries are traceable to the DHS plan or could be remedied by their requested relief. *See supra* pp. 9-10.

The States' litigation strategy confirms the weakness of their arguments. The States are seeking to enjoin the enforcement and implementation of a presidential proclamation issued in January 2021. DHS released its plan for implementing the proclamation in June 2021. Yet the States waited until October 2021 to file their lawsuit and until November 2021 to move for a preliminary injunction in district court. When the district court deferred decision on that motion, the States waited nearly three more weeks before seeking an injunction pending appeal. These dilatory tactics should be "taken as an indication that" the States' asserted harms are "not . . . serious enough to justify" the extraordinary relief that they seek. *See* 11A Charles A. Wright, Arthur R. Miller, *Federal Practice and Procedure* § 2948.1, Westlaw (database updated Apr. 2021).

Finally, the equities weigh strongly against the relief that plaintiffs seek. DHS—and, by extension, the public—has a significant interest in DHS's continued

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ability to implement the DHS plan. As the plan makes clear, DHS has devoted the 2021 Appropriation to addressing critical deficiencies in incomplete border-barrier projects that would threaten life and safety if not addressed. DHS has devoted the 2020 Appropriation to statutory requirements that are necessary to ensure that DHS "has a complete understanding of the potential impacts" of the Laredo Barrier Project. App. 52. Compliance with these requirements will help DHS adapt barrier projects in the Laredo area to the "urban and rural environments where [they] would be situated," minimize adverse impacts on critical infrastructure such as "power lines" and "irrigation lines," and ensure that the projects do not "create or exacerbate flooding hazards." App. 52-53. Although the States dismiss (Mot. 26-27) these harms as pretextual, they have supplied no legitimate basis for disputing them. And the States' assertion (Mot. 25-26) that an injunction is necessary to force DHS to follow the law is belied by the fact that DHS is fully complying with the 2020 and 2021 Appropriations and with federal appropriations law more generally.

III. The Requested Injunction Is Impermissibly Broad.

Even if the States were entitled to some form of relief, their requested injunction is impermissibly broad.

First, the States are not entitled to a nationwide injunction because such relief would not be tailored to their particular injury. *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). There is nothing anomalous about border-barrier projects occurring in some States but not in others. The States' sole reason (Mot. 9) for extending the injunction

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to the entire Nation is their assertion that immigration policy must be uniform across the country. But this case relates not to the application of federal immigration law but to DHS's authority to spend appropriated funds on certain border-barrier projects as opposed to others.

Second, the States are not entitled to an injunction instructing DHS to implement the 2020 and 2021 Appropriations statutes in good faith. The States' motion does not dispute that DHS is complying with all relevant appropriations statutes, as the January Proclamation directed DHS to do. It is therefore unclear what if anything the injunction would require of DHS—meaning that the injunction is precisely the sort of "obey the law" injunction that this Court and others have rejected as incapable of providing fair notice to the enjoined party. *E.g.*, *Payne v. Travenol Labs., Inc.*, 565 F.2d 895, 898 (5th Cir. 1978); *see SEC v. Goble*, 682 F.3d 934, 949 (11th Cir. 2012); *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 144 (2d Cir. 2011).

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CONCLUSION

This Court should deny the motion for an injunction pending appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This opposition complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,130 words. This opposition 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 14-point Garamond, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth 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/ Anne Murphy
Anne Murphy

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No. 22-40110

In the United States Court of Appeals For the Fifth Circuit

STATE OF MISSOURI, STATE OF TEXAS,
Plaintiffs-Appellants,

v.

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

On Appeal from the United States District Court
for the Southern District of Texas, McAllen Division
The Honorable Micaela Alvarez, United States District Judge

MOTION FOR INJUNCTION PENDING APPEAL

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Certificate of Interested Persons

No. 22-40110

STATE OF MISSOURI, STATE OF TEXAS,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellants, as governmental parties, need not furnish a certificate of interested persons.

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Jurisdictional Statement

This is an appeal of the functional denial of a preliminary injunction under 28 U.S.C. 1292(a)(1). The district court styled its denial as a "stay" of proceedings, but that characterization is substantively inaccurate for the following reasons.

In October 2021, the States of Missouri and Texas challenged the Biden Administration's point-blank refusal to spend funds that Congress appropriated in two consecutive years "only … for the construction of barrier system along the southwest border[.]" ECF 1, at 15-17. The lawsuit was filed promptly after the Department of Homeland Security—pursuant to the President's January 20 Proclamation—announced earlier that same month that it would be terminating all remaining contracts for border wall construction and would not be engaging in "any construction of new border barrier or permanent land acquisition." ECF 19-1, App.055. This final agency action ensured that border wall construction will not resume during President Biden's tenure. Nor could it; the Administration has unequivocally stated that "[i]t shall be [its] policy … that no more

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American taxpayer dollars be diverted to construct a border wall[,]" because such construction is "not a serious policy solution" and "a waste of money[.]" ECF 19-1, App.021.

The States then moved for a preliminary injunction in early November 2021. ECF 19. Over the States' objection, the district court extended Defendants' deadline to respond to the motion from November 29 to December 8. ECF 24. While the States' preliminary injunction motion was pending, the district court—over the States' objection—consolidated the underlying case with another case purportedly raising similar issues. ECF 32.

Although consolidation did not alter the deadlines for preliminary injunction briefing, it did slow things down. Despite briefing having been completed on the preliminary injunction motion by mid-December 2021, briefing on a motion to dismiss filed in the separate consolidated case was not complete. *Id.* The non-state plaintiffs' filing of an amended complaint—later stricken by the district court—did not speed things up. ECF 25-26. In fact, the district court called this filing an "unexpected development in [a] case that has been pending for five months without resolution of the most preliminary issue of whether Plaintiffs state a claim[.]"

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ECF 26, at 2. The court went as far as calling the pleading "dilatory" in light of the States' "conten[tion] that urgent issues are involved" here "that call for prompt resolution." *Id.* at 3.

Nevertheless, shortly after briefing on the States' motion for preliminary injunction had concluded, the district court entered a revised scheduling order that required motion to dismiss briefing in the separate consolidated case to be completed by February 14, 2022. ECF 33, at 3. Thereafter, with still no ruling on the States' preliminary injunction motion, Defendants—despite representing to the States' counsel that it would be "inefficient" to do so while the preliminary injunction motion was pending—moved to dismiss the States' Complaint. ECF 35. This motion was "almost identical" to Defendants' lengthy opposition to the States' request for preliminary injunctive relief filed earlier. ECF 24; ECF 37, at 1. 2021 ended with still no ruling on the States' motion for preliminary injunction.

The States, without extensions, timely opposed Defendants' motion to dismiss in mid-January 2022, which largely "incorporate[d] … by reference their extensive briefing on the Motion for Preliminary Injunction." *Id.* By the end of January 2022, briefing on the motion to dismiss was

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complete, but the States still had no ruling from the district court on their motion for preliminary injunction filed in early November 2021.

Eight days after the completion of briefing on the motion to dismiss filed in the separate consolidated case, the district court, *sua sponte*, stayed consideration of the States' pending motion for preliminary injunction in light of the Supreme Court granting certiorari in an unrelated case involving the same States. ECF 43 (citing *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021), *cert. granted*, 2022 WL 497412 (U.S. Feb. 18, 2022)). This notwithstanding that this Court has clearly stated its precedents control "even after the Supreme Court grants certiorari in another case on the relevant issue." *Kelly v. Quarterman*, 296 F. App'x 381, 382 (5th Cir. 2008) (per curiam) (citing *United States v. Lopez-Velasquez*, 526 F.3d 804, 808 n.1 (5th Cir.2008) (per curiam) (collecting cases)).

The district court explained that a stay was appropriate because the parties had "repeatedly debated" in their briefing this Court's holdings in *Texas* on Article III standing and reviewability under the Administrative Procedure Act. ECF 43, at 2. The Supreme Court, however, granted certiorari only on two discrete merits questions that *do not pertain to either*

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standing or reviewability. Pet. for Writ of Cert., *Biden v. Texas*, 2021 WL 6206109, at I.

The Supreme Court's cert. grant solely on unrelated merits questions and not jurisdiction is consistent with its August 2021 ruling denying the federal government's application for a stay of the district court's permanent injunction. There, the Court reviewed the merits and expressly noted that the government had "failed to show a likelihood of success on the claim that the memorandum rescinding the Migrant Protection Protocols was not arbitrary and capricious." *Biden v. Texas*, 142 S. Ct. 926 (2021) (citing *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020)). Standing and reviewability, therefore, do not appear to be in reasonable dispute. Thus, *Texas* will remain good law on those issues in the Fifth Circuit regardless of the outcome at the Supreme Court.

Because the district court's stay is in effect "until after the Supreme Court issues its opinion[,]" and no ruling will be issued until after the completion of supplemental briefing, ECF 43, at 2, the order effectively means that the States' request for preliminary injunctive relief—filed in

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early November 2021—will be deferred until late June 2022 at the earliest.

In light of the States' claims of ongoing irreparable injury, *see, e.g.*, ECF 19-1, App.003, 064-83, 098-163, the States promptly noticed an appeal of the district court's order staying consideration of—and thus effectively denying—their motion for preliminary injunction. ECF 44 (citing *Rauscher Pierce Refsnes, Inc. v. Birenbaum*, 860 F.2d 169, 171 (5th Cir. 1988) (stay order appealable under 28 U.S.C. § 1292(a)(1) when it constitutes effective denial of preliminary injunction)); *see* 11A Wright & Miller, Fed. Prac. & Proc. § 2962 (noting mootness "risk" when interlocutory appeal is not taken, "particularly … in the preliminary injunction context since plaintiff typically is attempting to obtain relief against an immediate threat").

The States promptly moved first at the district court level for an injunction pending appeal, Fed. R. App. P. 8(a)(1)(C), which the court denied yesterday. ECF 47, at 3. The court held that "a stay" was "still warranted," *id.*, further confirming the constructive denial of preliminary relief.

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Introduction

After the publication of two internal DHS assessments finding physical border barriers "extremely effective" at deterring illegal immigration, Congress twice appropriated billions of dollars "only … for the construction of barrier system along the southwest border[.]" ECF 19-1, App.007-08, 010-012, 015-16, 018-19. Defendants repeatedly claimed below that this border-wall construction will happen, but not before they complete environmental activities that take an average of almost five years to complete. *See* EXECUTIVE OFFICE OF THE PRESIDENT, COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL IMPACT STATEMENT TIMELINES (2010-2018), at p.1 (June 12, 2020). By then, absent a waiver, the five-year appropriations at issue will have expired (one in 2024 and another in 2025). Once they lapse, Defendants will have successfully avoided border wall construction altogether.

Not building a single foot of border wall fulfills a campaign promise made by then-presidential candidate Joe Biden. ECF 19, at 3. President Biden proclaimed on Inauguration Day his "policy … that no more American taxpayer dollars be diverted to construct a border wall" because such construction is "not a serious policy solution" and "a waste of money[.]"

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ECF 19-1, App.021. He also directed DHS to immediately pause the obligation of funds appropriated by Congress "related to construction of the southern border wall" as well as ongoing construction projects. ECF 19-1, App.021-22.

Since then, DHS has faithfully implemented the January 20 Proclamation, leaving hundreds of miles of planned and funded—but unfinished—wall along the southwest border. This despite DHS acknowledging that it is "legally required to use" the funds "consistent with their appropriated purpose." ECF 19-1, App.025. That's why the Biden Administration has repeatedly "call[ed] on Congress to cancel remaining border wall funding[.]" ECF 24-3, at 24, 28; ECF 19-1, App.026. "Until and unless Congress cancels those funds," DHS openly admitted, "the law requires DHS to use the funds consistent with their appropriated purpose[.]" ECF 19-1, App.055-56.

Defendants have no intention to construct any physical barriers using congressionally-appropriated funds. Even the district court recently acknowledged this in passing: "a preliminary injunction … could force the Federal Government to resume border barrier construction against the present policy choices of the Executive Branch." ECF 47, at 3. Their

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invocation of environmental planning activities prior to construction is pure pretext—the hallmark of unlawful agency action. *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 614 (5th Cir. 2021). Their actions are thus arbitrary and capricious.

The States respectfully request an injunction, during the pendency of this appeal: (1) prohibiting Defendants from implementing the January 20 Proclamation, as applied to the Department of Homeland Security Appropriations Act of 2020, P.L. 116-93, 133 Stat. 2511, Div. D, § 209(a)(1), (b); (2) prohibiting Defendants from implementing the January Proclamation, as applied to the Department of Homeland Security Appropriations Act of 2021, P.L. 116-260, 134 Stat. 1182, Div. F, § 210; and (3) ordering Defendants to enforce and implement the "construction of barrier system along the southwest border" *in good faith*. *Cf. Texas v. Biden*, 10 F.4th 538, 559 (5th Cir. 2021) (per curiam) (denying stay of permanent injunction requiring "good faith [compliance] while the appeal proceeds"), *denying stay pending appeal*, 142 S. Ct. at 927. Nationwide relief is warranted because, as Defendants conceded below, spending on border infrastructure *is* immigration policy, ECF 24-3, at 2, and that policy must be uniform. *Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015).

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Argument

"To obtain an injunction pending appeal pursuant to Federal Rule of Appellate Procedure 8(a)(2)(A)(i)," the States "must show (1) a strong likelihood of success on the merits; (2) irreparable injury in the absence of an injunction; (3) that the balance of hardships weighs in their favor if injunctive relief is granted; and (4) that the public interest favors such relief." *Whole Woman's Health v. Jackson*, 13 F.4th 434, 441 (5th Cir. 2021) (per curiam). The States need only establish likelihood of success on the merits on "any one of their claims," *Richland/Wilkin Joint Powers Auth. v. United States Army Corps of Engineers*, 826 F.3d 1030, 1040 (8th Cir. 2016) (cleaned up), and likelihood of irreparable injury. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The States satisfy all four requirements.

I. The States Are Likely to Succeed on the Merits of their Arbitrary and Capricious Claim.

The States are likely to succeed on the merits because DHS's implementation of the January 20 Proclamation is arbitrary and capricious, in violation of the APA.

This Court's review under the APA for arbitrary and capricious agency action "is not toothless" and, "in fact, after *Regents*, it has serious

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bite." *Texas*, 20 F.4th at 989 (cleaned up). Applying that standard here, Defendants' implementation of the January 20 Proclamation fails to pass muster under the APA.

A. Defendants' explanation for termination of border wall construction is both pretextual and post-hoc rationalization.

Defendants argued below that their "decision to engage in thorough environmental review and stakeholder consultation before engaging in any new construction" is not arbitrary and capricious agency action. ECF 24, at 31. In other words, Defendants say that border wall construction *will* happen, but not before these analyses are complete. There are at least three fundamental problems with this argument.

First, Defendants' argument directly conflicts with their own prior statements. The President stated in his Proclamation that new construction of a border wall (1) is "not a serious policy solution," (2) is "a waste of money," and thus (3) "no more American taxpayer dollars" will be spent on such construction. ECF 19-1, App.021. Moreover, the President's Budget for Fiscal Year 2022 proposed the cancellation of *all* unobligated prior year border barrier construction funding. *See* U.S. Gov't Accountability Office, *Matter of Off. of Mgmt. & Budget & U.S. Dep't of Homeland Sec.-Pause of Border Barrier Constr. & Obligations*, B-333110.1, 2021 WL

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2451823 (Comp. Gen. June 15, 2021). That proposal was rejected with respect to the two appropriations at issue here in the recently-enacted budget. Consolidated Appropriations Act of 2022, H.R. 2471, 117th Cong., Div. F, Title V, § 544(b) (2022).

Further, when asked last year why the current Administration "did not build a barrier, such as a wall, to keep [Haitian] migrants out," Secretary Mayorkas replied that "[i]t is not the policy of this administration" because "[w]e do not agree with the building of a wall." ECF 30, at 21. DHS has expressed its intention to "end wall expansion[.]" ECF 19-1, App.025.

Second, Defendants' actions confirm that they have no plans to build a wall. The June 9, 2021, DHS Border Wall Plan outlines activities that are "consistent with President Biden's commitment that 'no more American taxpayer dollars [should] be diverted to construct a border wall.' " ECF 24-2, at 1 (alteration in original). Indeed, those projects, according to DHS, "do not involve building new border barriers[.]" ECF 24-3, at 23. To that end, DHS (1) has modified contracts awarded during the prior Administration to "remove the construction portion of the contracts," (2) has outright cancelled all remaining construction contracts,

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(3) has returned land acquired for construction of the border wall, and (4) for other prior projects, intends to "fill[ ] exposed trenches, cut[ ] exposed rebar, and remov[e] materials from the project sites." ECF 24-3, at 7-8, 28-29; ECF 30, at 22.

All of these statements and actions, taken individually and collectively, demonstrate that the Administration has no intention to build another foot of barrier at the southwest border.

"In reviewing agency pronouncements, courts need not turn a blind eye to the statements of those issuing such pronouncements." *BST Holdings*, 17 F.4th at 614 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). "In fact, courts have an affirmative duty *not* to do so." *Id.* Defendants thus cannot ignore their own prior statements—*i.e.*, no wall will be built—simply because they prefer to contrive a new justification—*i.e.*, the wall will be built *later*. Such blatant pretext renders Defendants' actions arbitrary and capricious. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575-76 (2019); *see also BST Holdings*, 17 F.4th at 614 (identifying pretext as a "hallmark[] of unlawful agency actions"). Indeed, these kinds of "sudden[] revers[als]" of course "create[] the plausible inference that political pressure may have caused the agency to take

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action it was not otherwise planning to take." *Connecticut v. Dep't of Interior*, 363 F. Supp. 3d 45, 64-65 (D.D.C. 2019).

Third, even accepting at face value Defendants' explanation that a wall will be built later, that's the kind of post-hoc rationalization the APA prohibits. *See, e.g.*, *Regents*, 140 S. Ct. at 1907, 1909 (holding that it is a "foundational principle of administrative law" to reject an agency's "impermissible *post hoc* rationalizations"). As this Court held in *Texas v. Biden*, courts "can consider only the reasoning articulated by the agency itself" when it acted and thus "cannot consider *post hoc* rationalizations." 20 F.4th at 989 (cleaned up). As explained above, the current Administration has made it abundantly clear that no wall will be built. *See supra* Part I.A. Defendants' arguments in this litigation can only be seen as *post hoc* rationalization "for a decision … made many months earlier[.]" *Texas v. Biden*, 10 F.4th 538, 559 (5th Cir. 2021) (per curiam). Their arguments are thus "not a good faith explanation for [the] decision[.]" *Id.*

B. Defendants' change in course from walls are "extremely effective" to walls are "not a serious policy solution" without any explanation is arbitrary and capricious.

Defendants conceded below that DHS previously found a causal

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connection between building physical barriers and decreases in apprehensions. ECF 24, at 31-32. Defendants, however, tried to explain away the internal materials the States have cited, arguing that any reduction in illegal activity due to past construction projects has no bearing over whether any *new* construction will have a similar effect. *See id.* There are two problems with this argument.

First, other than repeating the January 20 Proclamation's "commitment that 'no more American taxpayer dollars [should] be diverted to construct a border wall[,]' " ECF 24-3, at 17 (first alteration in original)—a Proclamation that simply dismissed such construction as a "waste of money" and "not a serious policy solution[,]" ECF 19-1, App.021—Defendants didn't provide any justification to explain *why* they were halting new construction—much less the explanation they give now in litigation. That alone makes Defendants' actions here arbitrary and capricious under the APA. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (rejecting "[d]eference

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to what appears to be nothing more than an agency's convenient litigating position" as "entirely inappropriate" especially "where the agency itself has articulated no position on the question").

Because Defendants failed to provide reasoned grounds for their actions, they are precluded from asserting new ones before this Court.

Second, where, as here, "an agency changes course, … it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters." *Regents*, 140 S. Ct. at 1913 (cleaned up).[1]

States "bear[] many of the consequences of unlawful immigration," and "[t]he problems posed to the State by illegal immigration must not be underestimated." *Arizona v. United States*, 567 U.S. 387, 397-98

[1] Defendants claimed below that *Regents* doesn't apply here because they are "not trying to undo previous construction projects" and are instead "deferring new construction" pending environmental review and thus the States "cannot claim reliance interests based on future construction activities" that haven't happened but will. ECF 24, at 33. But as explained above, *supra* Part I.A, this deferral is merely a pretext for not building the wall, as the current Administration's prior statements clearly show.

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(2012). Thus, the States here were entitled to rely on DHS's prior findings that building walls results in decreases in apprehensions—particularly where such effective border security measures are directly tied to the States' costs for providing social services to illegal aliens. *Accord Texas*, 20 F.4th at 990 (Supreme Court in *Regents* "faulted" DHS for ignoring States' reliance interests in losing tax revenue due to change in immigration policy).[2]

Defendants conceded below that the costs the States have alleged here are "factors relevant to border wall construction[.]" ECF 24, at 33. But they "ignore[d] such matters[,]" *Regents*, 140 S. Ct. at 1913 (cleaned up), opting to forge ahead with implementing a policy that "no more American taxpayer dollars be diverted to construct a border wall." ECF 19-1, App.021 (cited in ECF 24-3, at 17). Defendants' failure to consider

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[2] Defendants' actions are also arbitrary and capricious for an additional reason: they changed course without consulting the States. Defendants know consultation is essential in this context; indeed, it will consult with certain stakeholders—none of which include States and all of whom likely oppose further construction—during the environmental planning phase. ECF 24-2, at 3. Defendants' decision to exclusively hear from "interested parties" likely opposed to further border wall construction, while completely "ignor[ing] evidence" from interested parties in favor of further construction, is impermissible. *Consumers Union of U. S., Inc. v. Consumer Prod. Safety Comm'n*, 491 F.2d 810, 812 (2d Cir. 1974).

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the States' reliance interests here is particularly troubling in light of the current Administration's statements in the Proclamation calling construction of a border wall a "waste of money" and "not a serious policy solution." *Id.*

As this Court just held last year, "any" agency "action premised on reasoning that fails to account for relevant factors" "must [be] set aside" under the APA. *Texas*, 20 F.4th at 989. Even if Defendants concluded that "other interests and policy concerns"—environmental review and stakeholder consultation—"outweigh" fiscal burdens on States, such costs were still relevant factors the agency had to consider but didn't—even though it was its job to do so. *Texas v. Biden*, --- F.Supp.3d ----, 2021 WL 3603341, at *19 (N.D. Tex. Aug. 13, 2021) (citing *Regents*, 140 S. Ct. at 1914), *aff'd*, *Texas*, 20 F.4th at 944, 1004, *cert. granted on other grounds*, 2022 WL 497412, at *1.

Defendants' departure from the prior policy is especially problematic here in light of their failure to consider DHS's own prior assessments before changing course. DHS failed to consider whether "there was 'legitimate reliance' on the" prior Administration's method of using border barriers as an "extremely effective" tool in "stopping drugs and illegal

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aliens from crossing" into the United States. *Regents*, 140 S. Ct. at 1913 (quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996)); *e.g.*, ECF 19-1, App.007-08. Whether or not Defendants agreed with those prior assessments, their total failure to consider them, standing alone, was also arbitrary and capricious. *See Texas*, 20 F.4th at 991 (DHS's failure to consider prior assessment highlighting the benefits of prior Administration's immigration policy was arbitrary and capricious because DHS simply changed policies without "a more detailed justification") (cleaned up).

Defendants argued below that "[i]mplicit" in the choice to undergo environmental planning activities before construction is their "awareness" that they're changing course "with respect to the border wall" and that "there are good reasons for the new policy." ECF 24, at 32. But any "implicit" consideration by the agency is, by definition, a concession that it failed to "expressly mention, let alone meaningfully discuss," its decision to change course. *Texas*, 10 F.4th at 554; *see also Fox*, 556 U.S. at 515 ("An agency may not … depart from a prior policy *sub silentio*[.]"). Indeed, Defendants' *sub silentio* departure from the prior policy is *per se*

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arbitrary and capricious agency action, "particularly when the prior policy has engendered serious reliance interests." *BST Holdings*, 17 F.4th at 614 (cleaned up). As this Court has aptly put it, Defendants must "show [their] work and actually consider[ ] the factor[s] on paper." *Texas*, 20 F.4th at 993.

One troubling aspect about Defendants' arguments below is that they recognized that, under *Regents*, they *have* an obligation to consider the States' reliance interests. ECF 24, at 33. Defendants, however, cabin that obligation to the environmental review phase, and completely ignore that it applies to their actions implementing the January 20 Proclamation. Defendants cannot choose to comply with the APA when it's convenient and choose to ignore the APA when it's not. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part & dissenting in part) (an agency must act "within the bounds established by Congress," and "may not choose not to enforce laws of which it does not approve, or to ignore statutory standards in carrying out its regulatory functions").

Finally, Defendants "also failed to consider the legal implications of

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terminating" border wall construction. *Texas*, 20 F.4th at 992. DHS previously admitted (twice) that it is *legally obligated* to expend the appropriated funds for Congress's specified sole purpose of construction of barrier system along the southwest border. ECF 19-1, App.025, 055-56. And Defendants conceded below that unauthorized delays in spending funds Congress appropriated "constitutes an unlawful impoundment" and that deferrals of funds "based on policy disagreements with Congress … are prohibited[.]" ECF 24, at 41. Yet DHS moved forward with termination anyway.

The States' Complaint—filed the same month construction contracts were cancelled—"put DHS on notice of these issues[.]" *Texas*, 20 F.4th at 992. "One would think the natural response to this newly identified problem would be to consider the problem—perhaps explaining why DHS thought terminating [construction contracts] comported with" the plain language of the appropriations at issue. *Id.* (quotation marks omitted). "But DHS [didn't]," and "that's one more reason for [the] conclusion that DHS's action was not the product of reasoned decisionmaking." *Id.* at 993 (quotation marks omitted).

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To be sure, Defendants now claim that pre-construction environmental planning activities "comport with" the DHS appropriations. "But it is a fundamental precept of administrative law that an administrative agency cannot make its decision first and explain it later." *Id.* (citation omitted). "DHS cannot omit any discussion of" its legal obligation to construct border barriers using appropriated funds solely for that purpose "and then cure those deficiencies by offering *post hoc* rationalizations" now. *Id.* (quotation marks omitted).

For all these reasons, Defendants' implementation of the January 20 Proclamation is arbitrary and capricious. Because the States are likely to succeed on the merits of this claim, the Court need not reach the States' other claims. *BST Holdings*, 17 F.4th at 611.

II. The States Are Likely to Suffer Irreparable Injury in the Absence of an Injunction.

"This case is indistinguishable" from *Texas v. Biden*, 20 F.4th at 968, 1001-02, where these same States were able to show irreparable harm with similar evidence for purposes of a permanent injunction. They can readily show the likelihood of irreparable harm for a temporary injunction here. For this same reason, the States have Article III standing.

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Defendants conceded below that spending on border infrastructure *is* immigration policy. Construction of border infrastructure—such as a barrier system—is "necessary to deter and prevent illegal entry on the southern border." ECF 24-3, at 2. That concession is consistent with DHS's own prior assessments highlighting the direct causal link between border infrastructure and decreased border apprehensions. *See, e.g.*, ECF 19-1, App.011 ("[B]order crossings … have decreased in areas where barriers are deployed."); *id.* at 007-08 ("When it comes to stopping drugs and illegal aliens from crossing our borders, border walls have proven to be extremely effective."); *id.* at 010 (citing empirical data and concluding that border walls "have proved to be a critical component in gaining operational control of the border"); *id.* at 011 (in one location alone "that has never had any border infrastructure," "apprehensions have decreased since the construction of the border wall system"); *id.* at 012 (noting almost 80% "decrease in apprehensions" in one area alone "since the completion of border wall system").

Given DHS's own prior assessments that border barriers are "extremely effective" in deterring illegal immigration, ECF 19-1, App.007-08, 011-12, it is "plausible" that at least some aliens would be prevented

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from crossing the border through the construction of new border barriers. *Texas*, 20 F.4th at 966 (upholding reliance on "DHS's own publications" in determining that the "termination of MPP has increased the total number of aliens paroled into the United States").

Defendants do not (and cannot) dispute that the States subsidize driver's license and healthcare costs. *See id.* at 968-69; *see also* ECF 19-1, App.003, 064-83, 098-163. It is "hardly speculative that individuals would apply for driver's licenses upon becoming eligible to do so." *Texas*, 20 F.4th at 968 (quotation marks omitted). And the federal government has previously "concede[d] the obvious—that *if* the total number of in-State aliens increases, the States will spend more on healthcare." *Id.* at 969.

Termination of border wall construction thus imposes unrecoverable increased costs on the States, thereby causing "imminent and actual harm" to the States' fisc. *Id.* at 975, 1001-02. Because the States enjoy special solicitude in the standing analysis, "imminence and redressability are easier to establish here than usual." *Id.* at 970. And here an injunction would "help to alleviate" the States' "driver's license- and healthcare-based injuries." *Id.* at 973.

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III. The Equities and Public Interest Overwhelmingly Favor the States.

The States have satisfied "the first two factors," and they can readily satisfy the last two—which call for "assessing the harm to the opposing party and weighing the public interest." *Nken v. Holder*, 556 U.S. 418, 435 (2009). "These factors merge when the Government is the opposing party." *Id.*

The threat of injury to the States outweighs any potential harm to Defendants. In fact, Defendants face no cognizable harm from a temporary injunction.

"There is generally no public interest in the perpetuation of unlawful agency action." *Texas*, 20 F.4th at 1002 (cleaned up). In fact, the public interest is served by "having governmental agencies abide by the federal laws that govern their existence and operations." *Id.* (cleaned up). That includes following the APA by engaging in reasoned decisionmaking. It also includes ensuring that the President is upholding his affirmative "duty to enforce the laws," which "necessarily extends to appropriations" because "Congress's legislative power is inextricable from its spending power." *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1233-34

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(9th Cir. 2018) (cleaned up). The "failure to act" here constitutes "an abdication of the President's constitutional role," *id.*, and there is simply no public interest in abdicating statutory obligations. *Cf. Texas*, 20 F.4th at 982.

At bottom, "the public is served when the law is followed," *Daniels Health Scis., LLC. v. Vascular Health Scis., LLC*, 710 F.3d 579, 585 (5th Cir. 2013), and the public will indeed be served if DHS is enjoined from suspending the law. Because "[t]here is always a public interest in prompt" enforcement of the law, *Nken*, 556 U.S. at 436, that interest would be served by granting temporary injunctive relief here.

An injunction also furthers the public interest "because the public has an interest in stemming the flow of illegal immigration." *Texas*, 2021 WL 3603341, at *26 (quotation marks omitted). As DHS has twice acknowledged, border walls remove a powerful incentive in favor of illegal border crossings.

Defendants claimed below that environmental planning and stakeholder consultation before further construction means these factors favor them. ECF 24, at 53-54. Not so. These activities are pretextual and

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should thus not be afforded any weight. *See Texas*, 20 F.4th at 1002 (citing *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2490 (2021) (per curiam) ("[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends.")); *BST Holdings*, 17 F.4th at 614 (identifying pretext as a "hallmark[] of unlawful agency actions"). Even if Congress allowed appropriated funds for border wall construction to be spent *by* a certain time, the salient point is that Congress required the funds to *be* spent on such construction—something Defendants have no intention of doing.

Defendants also argued below that the States' "equities in this case are limited to [their] fiscal harms" and thus their interests "are only remotely connected to the policy at issue in this case[.]" ECF 24, at 54. But this argument is simply a "rehash" of Defendants' "failed standing arguments," which were soundly rejected by this Court in *Texas v. Biden*. 20 F.4th at 976. So too here.

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Conclusion

The Court should grant the States' motion.

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Certificate of Conference

On March 16, 2022, counsel for Appellants conferred with counsel for Appellees, who represented that Appellees oppose this motion. 5th Cir. R. 27.4.

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Certificate of Service

On March 16, 2022, this motion was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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Certificate of Compliance

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,200 words, excluding the parts of the motion exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word (the same program used to calculate the word count).

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No. 22-40110

In the United States Court of Appeals For the Fifth Circuit

STATE OF MISSOURI, STATE OF TEXAS,
Plaintiffs-Appellants,

v.

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

On Appeal from the United States District Court
for the Southern District of Texas, McAllen Division
Nos. 7:21-cv-272, 7:21-cv-420
The Honorable Micaela Alvarez, United States District Judge

REPLY BRIEF OF APPELLANTS STATE OF MISSOURI AND STATE OF TEXAS

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Introduction

The federal government's brief is telling for what it does not say. It does not say that DHS will ever build another foot of border wall. The government's enumeration of DHS's actual plans (at 1–2, 8–9) provides an impressive list of preparatory work: "comply[ing] with [NEPA] and other federal laws," "reassess[ing] the amount of land to be acquired through eminent domain," pursuing a "more robust planning process," "erosion and drainage control," "safety work along border roads," "improv[ing] existing sites," "provid[ing] contingency funding," "environmental planning," and "consultation with stakeholders." "Building barriers" is not listed. Building walls does not appear in DHS's future plans.

The government never directly contends that DHS will build any more barriers, because DHS has a made a firm decision not to do so. DHS plans to be always preparing but never building. The government never directly denies that this fixed policy exists, and all objective evidence indicates that it does—most notably, the Administration's statement that "building [the border wall] is not a serious policy solution" and "a waste of money."

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The existence of this firm, considered decision not to build barriers undermines virtually all of the federal government's arguments. DHS's no-wall-building policy injures the States in a manner that a good-faith policy of building barriers would redress. The decision constitutes a final agency action under the APA. It violates the APA because it constitutes a radical shift from DHS's former policy that "walls work," and it was adopted without any reasoned justification or consideration of reliance interests. It flouts Congress's directive to construct a barrier system on the southern border. It violates the Executive's duties under the Constitution and other laws. And the balance of equities and the public interest overwhelmingly favor compelling DHS to comply with the Constitution, the Administrative Procedure Act, the Impoundment Control Act, and the plain language of Congress's appropriation bills—especially in the midst of a historic, prolonged border crisis.

Expressing two years of frustration over General McClellan's policy of endlessly preparing for battle but never fighting, President Lincoln famously asked him, "Is it your purpose not to go into action?" The federal government should answer the same question here.

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Argument

I. The Court has appellate jurisdiction.

The federal government (at 15) argues that this Court lacks appellate jurisdiction because the district court merely "stay[ed] the preliminary injunction proceedings for the brief period until the Supreme Court decides *Biden v. Texas*, No. 21-954." But it does not deny that the district court's stay effectively denied the States' requested injunction, nor does it seriously defend the district court's rationale for the stay. And any such a defense would make no sense. The Supreme Court did not grant certiorari in *Biden v. Texas* to resolve standing and reviewability issues and, in any event, this Court's opinion in *Texas v. Biden (Texas II)*, 20 F.4th 928 (5th Cir. 2021), will remain binding law on those issues regardless of the outcome of the merits appeal in the Supreme Court.[1]

[1] On May 2, 2022, the Supreme Court ordered the parties in *Biden v. Texas* "to file supplemental briefs addressing the following questions: (1) Whether 8 U.S.C. § 1252(f)(1) imposes any jurisdictional or remedial limitations on the entry of injunctive relief, declaratory relief, or relief under 5 U.S.C. § 706. (2) Whether such limitations are subject to forfeiture. (3) Whether this Court has jurisdiction to consider the merits of the questions presented in this case." Section 1252(f)(1) applies to the authority of courts "to enjoin or restrain the operation of the provisions of part IV" of the INA, and this case does not involve those provisions, so the Court's consideration of these issues will not likely apply to this case.

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Therefore, the district court had all it needed to issue a decision; there was no need to wait for the Supreme Court's decision in *Biden v. Texas*. Since no other circumstances warranted a stay, the district court's stay order was an effective denial of the States' request.

The government contends (at 16–17) that the States have failed to show that the district court's refusal to rule on the States' preliminary injunction motion carries ongoing irreparable harm, but that argument merely rehashes their misguided arguments on standing and irreparable harm. That harm is the same harm that establishes standing and irreparable harm. *See* Br. Appellants 22–26, 56–58. That the district court refused to provide relief to which the States are entitled establishes irreparable harm and the need for appellate review. *See NAACP v. Thompson*, 321 F.2d 199, 202 (5th Cir. 1963).

In any event, the harms to which the States point "show both that irreparable harms will accrue between now and the time when the district court is likely to rule on their preliminary injunctive motion—a period of a few months at most." Gov't Br. 15–16 (citing *Sherri A.D. v. Kirby*, 975 F.2d 193, 203–04 (5th Cir. 1992)). The federal government does not, for it cannot, contend that the costs the States will suffer from

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a lack of a border wall are recoverable. Each month's delay in building the wall means an extra month of unrecoverable cost to the States—both currently, by not limiting incentives for illegal immigration, and in the future, by resulting in fewer border barriers later in time.

The last point is what the federal government misses in saying that "the States have not shown that an injunction would lead to any additional completed border-barrier segments" (at 16–17). As the States pointed out, *see* Br. Appellants 20–21, the FY2020 appropriations expire in September 2024. As the government said, border-barrier construction "can be a complex and time-consuming process." *Id.* at 21 (quoting ROA.280). Thus a delay of a few months is not harmless but greatly increases the risk that the States will receive no effectual relief at all.

II. The States have standing.

The federal government (at 18-24) contests the States' standing to sue. But nowhere in its brief does it cite, much less discuss, the fact that "[t]his case is indistinguishable" from numerous cases where States used basically the same evidence to establish irreparable harm and standing. *E.g.*, *Texas II*, 20 F.4th at 968, 1001–02.

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The government does not dispute that the States have suffered an injury-in-fact. Instead, the federal government claims that the States have not shown traceability and redressability (at 18–23). But the government's argument misconstrues the States' case. The States do not challenge *just* the decision not to build border-barriers at Laredo or the Proclamation or DHS's Border Wall Plan (at 19–20). The States challenge the federal government's decision not to build border barriers anywhere—and they do so because, in DHS's own words, "[w]alls work." ROA.1265. And walls work, not just by preventing migration in the place where there are barriers, but by freeing up resources for border enforcement and control in other areas as well. *See* ROA.1271–72. Border walls, therefore, have system-wide (*i.e.*, border-wide) benefits.

The States are not merely speculating about that link. They rely on DHS's own assessments, *see* Br. Appellants 27, 29, to show "the relevant cause-and-effect." *Texas II*, 20 F.4th at 972. In response, the federal government says that border apprehensions doubled between 2018 and 2019 (at 20–21). But that evidence (which the federal government does not say it provided the district court) does not disprove that walls reduce illegal migration, since the federal government does not

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provide what migration would have looked like in a world without walls. DHS's prior analysis, which compared areas with walls to those without, was more rigorous and found that walls limited illegal migration and allowed redeployment of DHS assets to secure the border. *See* ROA.1265–72. That last point is particularly salient, as the benefits to building walls are exponential, in that as more border barriers go up, the more assets DHS can redeploy other areas. In all events, the "big-picture evidence" the States provide is wholly appropriate, and perfectly sufficient, to establish standing. *Texas II*, 20 F.4th at 971.

That evidence fully answers the federal government's argument (at 21) that the States' standing rests on the actions of third parties. Border barriers *prevent* those who have decided to attempt unlawful entry from entering the country, and increase their chance of apprehension. So while a strong border-security policy also deters illegal migration, the States' standing does not rest on that fact alone. In any event, the deterrent effect of border barriers on illegal migrants is a straightforwardly "predictable effect of Government action on the decisions of third parties." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). Border barriers making it harder to enter will result

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in fewer attempts at unlawful entry. "Because Article III 'requires no more than de facto causality,' traceability is satisfied here" based on the deterrent effect of border barriers as well. *Id.* (quoting *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.)).

Indeed, the States' evidence is more than sufficient. Whatever the exact magnitude of the change, border-barriers prevent and deter at least some significant portion of illegal migration, as DHS's own documents both conclude and empirically justify. Even a "small incremental step" toward ameliorating the States' injuries satisfies traceability, and the States have exceeded that here. *See Massachusetts v. EPA*, 549 U.S. 497, 524 (2007). Indeed, the States' showing far exceeds the showing that was upheld in *Massachusetts v. EPA*, where the States' standing rested on predictions of the effects of relatively minor reductions in the global mix of greenhouse-gas emissions on centimeters of Massachusetts' coastline over 100 years. *See id.*

The States' evidence is also sufficient for redressability. *See id.* at 525 (finding redressability for remedies that "*slow* or *reduce*" global warming); Br. Appellants 28–29; *see also Texas v. Biden (Texas I)*, 10 F.4th 538, 549 (5th Cir. 2021) (per curiam) (noting that the States

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enjoy "special solicitude in the standing inquiry," which "means redressability is easier to establish"). The federal government's argument on this front (at 23–24) is that it is spending the funds consistent with the Appropriations Acts. That is wrong, for the reasons discussed below, and it conflates standing and the merits. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975).

III. The States are likely to prevail on the merits.

A. The States are likely to succeed on their APA claims.

1. The APA claims are reviewable.

The federal government claims (at 25–32) that their refusal to construct border barriers is committed to agency discretion. In the same breath, they question whether the States have challenged final agency action. Neither contention has merit.

First, unlike an appropriation given to an agency for financial assistance "in a manner determined appropriate by the Secretary," *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 750–51 (D.C. Cir. 2002), the appropriations at issue "*shall* be available *only* … for the construction of barrier system along the southwest border." Consolidated Appropriations Act, 2020, 133 Stat. 2317, 2511 (2019) (emphases added); *see also* Consolidated Appropriations Act, 2021, 134 Stat. 1182, 145–57

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(2020). The federal government elides the word "only" and ignores recent binding Fifth Circuit precedent on this critical point: By phrasing the law "in mandatory terms," Congress "provided guidelines for the agency to follow," and DHS's actions are reviewable. *Texas II*, 20 F.4th at 988 (quotations omitted); *see Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (Agencies are "not free simply to disregard statutory responsibilities").[2]

It is irrelevant that border barriers can be more than walls, and funding can go to preparatory work as well as concrete slabs, as the federal government notes (at 27–30). DHS is not using the FY2020 and FY2021 Appropriations for non-physical barriers or as preparation to build border barriers. As its own plan make clear, *see* ROA.364–68, DHS's policy is to only prepare and never build. Whatever discretion DHS has, it does not extend to using the appropriations for everything *but* barrier construction. To put it another way, DHS may do preparatory

[2] On April 28, 2022, the Court withdrew its opinion in *Hawkins v. Department of Housing and Urban Development*, 16 F.4th 147 (5th Cir. 2021), *see* 2022 WL 1262100 (5th Cir. Apr. 28, 2022), which the States cited in their opening brief. The unpublished order, however, did not criticize the panel's original conclusion that the presence of mandatory language provides a standard by which courts may analyze an agency's use of appropriations. *See* 16 F.4th at 156.

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work, but it must actually intend the work to *prepare for border-barrier construction*. That limit on DHS's discretion permits judicial review.

Second, the federal government claims (at 30–32) that the States have not challenged a final agency action. As in *Texas II*, the federal government "misunderstands the nature of the challenged action." 20 F.4th at 950. The States are challenging DHS's decision not to construct border barriers. *See* Br. Appellants 32–34. That the agency has implemented the Administration's decision not to construct border barriers unquestionably "demonstrates DHS's decision … is final." *Texas v. United States (Removal Pause)*, 524 F. Supp. 3d 598, 642 (S.D. Tex. 2021); *see* Br. Appellants 33–34 (providing evidence of that fact).

So whatever DHS's policy may be on how to expend appropriations in order to *avoid* using them for wall construction (at 31), the fact remains that it *has* decided not to build any more border barriers, and it has bound its agency and staff to that decision. That is final agency action. *See Texas II*, 20 F.4th at 950–51; *Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019). Indeed, the federal government essentially concedes the point when it wrongly claims (at 50) the States delayed in seeking relief. Delay

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implies there was a final agency action to challenge—*i.e.*, DHS's decision not to build border barriers.

2. The States are likely to succeed on the merits of their APA claims.

As to the substantive APA challenge, the federal government's argument is an impressive exercise in question-begging. DHS is not acting arbitrary and capriciously—so it says—because the agency is using the FY2020 and FY2021 Appropriations "on items or services that are 'reasonably necessary to accomplish the agency's mission'" (at 37) (quoting *U.S. Dep't of the Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1349 (D.C. Cir. 2012)). If DHS's mission was environmental analysis (*see id.* at 33–34 (discussing NEPA)), stakeholder consultation (*see id.* at 34),[3] real-estate deals (*see id.* at 34–35), or land remediation (*see id.* at 36–37), the government might have a point.

They are not, however. DHS's mission is border security. And, under the FY2020 and FY2021 Appropriations, DHS's specific mission is to build the border wall. *See* 133 Stat. at 2511 (providing that the funds

[3] DHS's claim NEPA analysis and stakeholder consultation are "required by federal law" (at 12), is misleading; DHS may waive those requirements. *See* 8 U.S.C. § 1103 note.

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"shall be available only … for the construction of [a] barrier system along the southwest border"). What DHS is doing with the funds are, to be sure, congressionally approved *methods* for accomplishing the act. *See* 8 U.S.C. § 1103 note. But they are not the congressionally approved *mission*. DHS has no intention to comply with what Congress actually instructed it to do: build a border wall.

Illustrating that is the federal government's claim (at 35–36) that "[o]nce review, planning and design are complete, DHS intends to issue contracts 'to cover both the complete of the design of barrier system proposed for the … Laredo Sector and its actual construction.'" That claim, however, relies on selectively quoting from the record. In full, the provided citation says, "Finally, in light of the contract actions that have already been taken, CBP *would have* to take additional contract actions before it could start construction on the Laredo Barrier Projects. CBP *would likely* have to compete and award new contracts. The contracts *will need* to cover both the completion of the design of barrier system proposed for the USBP Laredo Sector and its actual construction." ROA.359–60 (emphases added). Saying what DHS (CBP is a sub-agency

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in the department) *would* have to do if it decides to build border barriers does not evidence an intent to build border barriers.

But misstating the record is the federal government's only option. It is obvious this administration's policy is not to build another foot of border wall. The States have provided numerous acts and statements—not just the Proclamation from the President, contra the federal government (at 40), but also from DHS, high-ranking members of the administration, and congressional allies that DHS will not build the wall. *See* Br. Appellants 39–42. To name perhaps the most obvious one: NEPA analyses take, on average, roughly five years to complete—that is, far more than the entire period during which the appropriations at issue are available. *See* Executive Office of the President, Council on Environmental Quality, Environmental Impact Statement Timelines (2010-2018), at 1 (June 12, 2020), https://bit.ly/3xu2RbV. And there is no doubt that DHS will take its time with such analysis. That fact, coupled with all the other evidence that States provide, establishes that DHS's

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true policy is to run the clock out on the FY2020 and FY2021 appropriations instead of constructing border barriers.[4]

This Court need not ignore that reality. *New York*, 139 S. Ct. at 2575. "The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise." *Id.* at 2575–76. DHS's carefully couched claims that it is using the FY2020 and FY2021 Appropriations to prepare for future border-wall construction are "incongruent with what the record reveals about the agency's priorities and decisionmaking process"—that it has no intention to build the wall in the future. *Id.* at 2575. To the extent DHS has said, or indicated otherwise, that is pretext, *see id.* at 2575–76; *see also BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 614 (5th Cir. 2021), and a *post hoc* rationalization, *see Motor Vehicle Manufacturers Association v. State Farm Automobile Insurance Co.*, 463 U.S. 29, 50 (1983). Since the justifications the federal government provides here for

[4] This also means the GAO report is not persuasive, since GAO did not address that fact. *See* Br. Appellants 43.

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DHS's decision assume the agency will build border barriers, they all collapse and cannot support the rationality of the agency's action. They are certainly insufficient to counter the reasons the States provide for why DHS acted arbitrary and capriciously. *See* Br. Appellants 44–51.

That includes the States' reliance interests, contra the federal government (at 39). The government's argument relies, first, on the claim that DHS has not changed "its policy to be less protective of its borders." That is wrong, as the States have demonstrated. In any event, the federal government's claim that any reliance was unreasonable, *see* Br. Appellants 45–47, fails because the States' reliance on DHS constructing the border wall is no more unreasonable than the reliance of DACA recipients in *Regents*, which involved a program that expressly "'conferred no substantive rights' . . . ." *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020). In any event, the idea that the federal government need not address the States' reliance interests—even if to say they are unreasonable—is "not what *Regents* said. The Court was clear that agencies must consider reliance interests, and that failure to do so is arbitrary and capricious." *Texas II*, 20 F.4th at 990.

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* * *

Congress gave DHS money in the FY2020 and FY2021 Appropriations to build border walls—a security measure that, prior to 2021, DHS said worked, based on compelling empirical justifications. In 2021, DHS—with no explanation—changed course, asserted that walls do not work, and will not build a foot of new border-barrier. The reasons DHS and the federal government provide—that the agency is using the money for preparatory and remediation work to eventually build the wall—are manifest pretext. Thus, DHS failed to explain why, in 2020, walls work, and so it built them, and then why, in 2021, walls don't work, and so it will not build them. The Supreme Court's case law "teaches that when an agency rescinds a prior policy," it must provide a reasoned justification for that change, and "its reasoned analysis must consider" both reliance interests and alternatives within the ambit of the existing policy, among other things. *Regents*, 140 S. Ct. at 1913. DHS failed to do so here.

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B. The States are likely to succeed on their statutory and constitutional challenges.

1. The zone-of-interest test does not bar the States' claims.

The federal government first argues (at 41–43, 46) that the States are not within the zone of interests of the FY2020 and FY2021 Appropriations, the ICA, and the constitutional provisions. That does not matter for the States' *ultra vires* claims. *See* Br. Appellants 34–35 (citing cases). The test "applies to all *statutorily created* causes of action." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (emphasis added). *Ultra vires* claims, however, are "creation[s] of courts of equity," and do not arise from a statutory or constitutional cause of action. *Armstrong v. Exceptional Child Ctr.*, 575 U.S. 320, 327 (2015).

In any event, the States are within the zone of interests of the Appropriations Acts and the Constitution. That is, the States are "suitable challenger[s] to enforce the statute[s]" and constitutional provisions at issue because their "interests are sufficiently congruent with those of the intended beneficiaries that the [States] are not more likely to frustrate than to further … statutory objectives." *Scheduled Airlines Traffic Offices, Inc. v. Dep't of Def.*, 87 F.3d 1356, 1359 (D.C. Cir. 1996) (quotations omitted).

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As to the Appropriations Act, contra the federal government (at 42–43), building border barriers obviously benefits the States because it protects them from the costs of illegal immigration, which the Supreme Court has emphasized as real and significant. *See Arizona v. United States*, 567 U.S. 387, 397 (2012). Thus, it is important to read the Appropriations Act in conjunction with the INA, *see* Br. Appellants 36, since, in this case, the FY2020 and FY2021 Appropriations fund DHS activity under the INA—as the federal government concedes.

The brief statement in *Trump v. Sierra Club*, 140 S. Ct. 1 (2021), that plaintiffs there likely lacked a cause of action under § 8005 of the Department of Defense Appropriations Act of 2019, is not to the contrary—contra the federal government (at 43). Section 8005 empowered the Secretary of Defense to transfer appropriations between uses. *See* Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018). The appropriations here contain no similar language; rather, they mandate that DHS build border barriers on the southwest border. *See* 133 Stat. 2511. And the statute in *Sierra Club* did not fund a regulatory scheme that served the interest of any third parties; here the appropriations fund border construction in the INA. *See Texas II*, 20 F.4th at 975.

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As to the ICA, the federal government does not contest that it, like the Appropriations Clause generally, functions as "a restraint on Executive Branch officers." Br. Appellants 37 (quoting *U.S. Dep't of Navy*, 665 F.3d at 1347). So where, as here, a plaintiff directly benefits from the appropriations, its interests are among those the ICA protects. *See Bennett v. Spear*, 520 U.S. 154, 163 (1997) (looking to "the provisions of the law at issue" to determine the interests protected).

The analysis for the States' constitutional claims, assuming a zone-of-interest test even applies, is similar. The States' interest in the government's construction of border barriers and the subsequent benefit of border security—which derive from the Appropriations Acts—give them an interest in seeing the executive branch follow that law.

The States also have an interest in separation-of-powers principles since those principles not only "protect each branch of [the federal] government from incursion by the others," but also the "the integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 564 U.S. 211, 221, 222 (2011). Indeed, the States have a special interest in vindicating the federal separation of powers, because that principle was adopted in large part to protect the States from federal overreach.

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"Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The States are within the "zone of interests" of a separation-of-powers claim when a primary purpose of the separation of powers was to defend the States' prerogatives.

2. The States are likely to succeed on the merits of their statutory and constitutional claims.

Statutory Claims: The federal government does not dispute (at 44–45) that the States' statutory claims turn, ultimately, on whether DHS is using the FY2020 and FY2021 Appropriations for border-barrier construction. *See* Br. Appellants 51–53. Furthermore, the government does not dispute that the ICA was not followed. *See id.* at 52–53.

Instead, the federal government argues (at 44) that there is just a "delay" as DHS makes "reasonable" "expenditures" "before the agency can begin construction." As set forth above and in the States' opening brief, that is not the case; DHS has no intention—for it is not the policy of this administration—to build a foot of border wall. It has adopted a

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firm policy not to do so, as is obvious to any rational observer. The entire basis of the government's statutory argument thus falls away—like the Government's APA claims, it is based on transparent pretext and *post hoc* rationalization.

Constitutional claims: Contrary to Defendants' argument (at 46-48, citing *Dalton v. Specter*, 511 U.S. 462, 471 (1994)), the States' constitutional claims are not merely that the President is acting "in excess of his statutory authority" but "that the President's actions affirmatively displaced a congressional[] mandate . . . ." *Make the Rd. N.Y. v. Pompeo*, 475 F. Supp. 3d 232, 258 (S.D.N.Y. 2020). They therefore implicate "constitutional separation of powers concerns not present in *Dalton*" and should be "appropriately considered as constitutional claims subject to judicial review." *Id.* at 258-59; *see also City and County of San Francisco v. Trump*, 897 F.3d 1225, 1232 (9th Cir. 2018) (noting the President "may not decline to follow a statutory mandate . . . simply because of policy objections") (quoting *In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2013)). And so, "[u]nder Article II . . . the President must follow statutory *mandates*"—like Congress's command to build border

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barriers—"so long as there is appropriated money available"—as there is for border-barrier construction. *In re Aiken County*, 725 F.3d at 259.

In any event, the federal government's argument (at 46–48) again wrongly assumes compliance with the Appropriations Act because DHS is *not* "executing its border wall plan pursuant to" statutory authority. It has diverted those funds to everything *but* border-barrier construction. And, as noted above, the federal government's brief to this Court carefully avoids stating that DHS will build another foot of border barrier, at any time in the future.

That was the point of the January 20 Proclamation. The Proclamation declares—contrary to Congress's policy as set forth in the Appropriations Acts—that "building [the border wall] is not a serious policy solution" and is "a waste of money." Termination of Emergency with Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction, 86 Fed. Reg. 7,225, 7,225 (Jan. 20, 2021). And, contra the federal government, the Proclamation did much more than "end the diversion of military funding for border-barrier construction," (at 40 (emphasis omitted)). It ordered DHS to pause construction and assess "the administrative and contractual

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consequences of ceasing each wall construction project," and explicitly covers "wall projects funded by direct appropriations." 86 Fed. Reg. at 7,225–26. As the President undoubtedly intended, DHS complied with the policy and, because the consequences of admitting it was ceasing wall construction was to admit it was acting unlawfully, decided to dissipate the funds on preparatory processes Congress approved but not on the end product Congress mandated. That violates both the letter and the spirit of the appropriations.

In short, the Proclamation announced a policy that this administration will not build border barriers, *see also* Br. Appellants 39–42, and thus fulfilled a promise President Biden made while campaigning: That "[t]here will not be another foot of wall constructed on my administration[.]" Barbara Sprunt, *Biden Would End Border Wall Construction, But Wouldn't Tear Down Trump's Additions*, NPR (Aug. 5, 2020), https://tinyurl.com/3pzstmdj. The Proclamation therefore "does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President," and *contrary* to Congress's instructions. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952). So

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the President's actions necessarily turn on whether he has "inherent constitutional power" to refuse to spend funds as Congress commanded. *Dalton*, 511 U.S. at 473. Since he does not—and the federal government does not declare otherwise—the States have established their constitutional claims.

Furthermore, and contrary to the federal government (at 47) *Mississippi v. Johnson* does not preclude review because the States do not seek an order directing the President's "exercise of judgment." 71 U.S. (4 Wall.) 475, 499 (1867). Instead, the States seek an injunction prohibiting implementation of unlawful agency action. Because Congress has removed any discretion the Executive Branch might have previously had to build or not build, there is no "exercise of judgment" with which an injunction could interfere.

Indeed, courts can and do enforce the presidential duty to faithfully execute congressional commands through relief granted against his subordinates. Because the termination of border wall construction violates the law, terminating construction is a claim to "a dispensing power, which has no countenance for its support in any part of the constitution." *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.)

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524, 613 (1838). "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." *Id.*; *see Texas II*, 20 F.4th at 982.

IV. The equities justify relief.

Irreparable Harm: The federal government first claims (at 49) that the States are not harmed by DHS's decision not to construct any border barriers because no construction was underway at the time of the Proclamation. That view is too narrow. DHS's decision not to construct border barriers is a decision to leave the border unsecured, and that will result in increased illegal migration with its attendant harms—harms an injunction will alleviate. *See* Br. Appellants 23–28, 57–58. And contra the government (at 49), the States "demonstrate [a] link between the agency's plan and the increase in illegal migration . . . ." In particular, the States can make that showing because DHS said there was, providing a compelling empirical justification for its conclusion. *See* ROA.1265–72. The federal government does nothing to show why DHS's previous conclusions were wrong—which fatally undermines its irreparable-harm

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arguments and underscores that DHS's decision not to construct border-barriers is arbitrary and capricious.

Similarly unpersuasive is the federal government's claim (at 50) that any harm is far into the future because "[t]he threat of these funds lapsing and becoming unavailable for obligation is many years off, and cannot constitute irreparable harm now." That ignores the government's own statement in the district court that border-barrier construction "can be a complex and time-consuming process." ROA.280. Thus, the ability of the States to get effective relief will end well before the appropriations run out. The fact that construction "can be a complex and time-consuming process," combined with the fact that the FY2020 Appropriations expire in September 2024, renders it imperative for the States to receive injunctive relief as soon as possible, to avoid a situation where DHS runs out the clock and no relief is available.

Finally, the federal government wrongly claims (at 50) that the States delayed in seeking relief and so cannot have suffered irreparable harm. First, Defendants fault the States for filing their lawsuit in October 2021 and seeking relief in November 2021, when the President's proclamation happened in January 2021 and DHS released the Border

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Wall Plan in June. That ignores that the States promptly filed suit after it became clear DHS was not going to build any more border barriers, which occurred when it cancelled the construction contracts in September and October 2021. *See* ROA.354. It was not unreasonable for the States to wait to see if DHS was going to end construction before acting—that is, to see if the DHS would flout Congress's intent.

The federal government also claims (at 50) "the States waited an additional three weeks before seeking an injunction pending appeal." But the States couldn't move faster; the district court did not certify the record on appeal until March 7, 2022, and this Court didn't docket the States' appeal until March 9, 2022.

Given those circumstances, the States acted with eminently reasonable promptness. *See Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 297 (5th Cir. 2012) (looking at the circumstances surrounding a four-month delay in concluding it did not undermine the showing of irreparable harm).

Harm to the government and the public interest: The government launches its arguments about the remaining equitable factors by saying (at 50) that considering "the environmental effects of

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planned construction projects and conversations with stakeholders prior to breaking ground are both statutorily required and serve the government's and the public's interest." Again, if DHS had any intent to engage in construction projects or break ground, the government might have a point. Since DHS does not, the government does not. Thus, the States' arguments remain unrefuted. *See* Br. Appellants 58–60.

And the federal government's position is a red herring. Environmental analysis and stakeholder conversations can be waived. *See* 8 U.S.C. § 1103 note. So whatever interests they support, they fall away in the face of a congressional mandate to construct border barriers.

Lastly, the federal government claims (at 51) "this is a case about congressional appropriations, not the immigration laws." That argument is incomplete and misleading. This is a case about congressional appropriations that Congress mandated to be spent a border walls, which DHS had previously found secured the border. *See* ROA.1265–72. So this case is about border security, and about ensuring that the executive branch complies with Congress's policy choices about how to secure the border and to what degree. That is not micromanagement of federal

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agencies' spending, as the government claims (at 51); that is vindicating Congress's statutory purposes and the constitutional structure.

V. Nationwide relief is proper.

The crux of the federal government's argument (at 52) that nationwide relief is inappropriate is that "this case is not about the application of federal immigration law; the States' suit challenges DHS's authority to spend appropriated funds on certain border-barrier projects." Not so. This case is about DHS's decision not to use congressional funds for their mandated purpose—namely, to construct a border wall which DHS said limits illegal migration. *See* ROA.1265–72. This case is therefore about immigration policy, despite the fact that appropriations are involved, so all the reasons that justify nationwide relief in that context apply here. *See Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015).

Conclusion

For the foregoing reasons, the States respectfully ask the Court to reverse the district court's *de facto* denial of their preliminary injunction and remand with instructions to enter the States' requested injunction.

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Certificate of Service

On May 4, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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No. 22-40110

In the United States Court of Appeals
For the Fifth Circuit

STATE OF MISSOURI, STATE OF TEXAS,
Plaintiffs-Appellants,

v.

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

On Appeal from the United States District Court
for the Southern District of Texas, McAllen Division
The Honorable Micaela Alvarez, United States District Judge

REPLY IN SUPPORT OF MOTION FOR INJUNCTION PENDING APPEAL

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Introduction

Defendants' opposition rests on one claim: that DHS will build the border wall after it has completed preparatory and remedial work. But DHS will not complete that work until after appropriations for border wall construction expire. DHS's proffered explanation is thus a pretext, hiding its actual policy of not constructing another foot of border wall—a policy that DHS and the administration have repeatedly affirmed and that is common knowledge. Indeed, nowhere in their opposition do Defendants say that DHS *will* build any portion of the border wall.

Thus, DHS has gone from concluding that border-barriers are effective and constructing them, to concluding that border-barriers are bad policy, and thus not building a single foot of border wall. But the agency never explained its reversal, nor its justification for violating the plain language of Congress's appropriation bills. DHS has acted arbitrarily and capriciously.

I. The States Are Likely to Succeed on the Merits of Their Arbitrary and Capricious Claim.

A. There are no barriers to reaching the merits.

Defendants raise two threshold arguments. Neither has merit.

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First, Defendants claim that this Court lacks jurisdiction. *See* Opp'n 8–9. Under 28 U.S.C. § 1292(a)(1), the States may appeal any order refusing an injunction. That includes "orders that have the practical effect of … denying injunctions and have 'serious, perhaps irreparable, consequences.'" *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287–88 (1988) (second quotations omitted) (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981) (quoting another source)); *see also Reed Migraine Ctrs. of Tex. P.L.L.C. v. Chapman*, 987 F.3d 138, 141 (5th Cir. 2021); Mot. 6.

A "stay has the effect of denying an injunction … when a court stays proceedings in which one party seeks a preliminary injunction." *Rauscher Pierce Refsnes, Inc. v. Birenbaum*, 860 F.2d 169, 171 (5th Cir. 1988). That is what happened here.

Contra Defendants, Opp'n 8, the district court did not defer a decision on the States' motion. The district court had all it needed to issue a decision; there was no need to wait for the Supreme Court's decision in *Texas v. Biden* to resolve jurisdictional issues because the Supreme Court's grant of certiorari in *Texas* did not involve such questions. *See* Mot. 4–5. Defendants do not claim otherwise.

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Thus, the stay is not necessary to "study … the record and the applicable law … ." *NAACP v. Thompson*, 321 F.2d 199, 202 (5th Cir. 1963); *see also Overton v. City of Austin*, 748 F.2d 941, 951–52 (5th Cir. 1984). Rather, the States were "clearly entitled to have a ruling from the trial judge," and the stay is the same as refusing to issue an injunction. *See United States v. Lynd*, 301 F.2d 818, 822 (5th Cir. 1962) (delaying a preliminary injunction hearing for eight months, then granting a thirty-day stay for defendants to gather evidence while ignoring a request for an injunction, was an effective denial).

It is also a refusal that carries "serious, perhaps irreparable, consequence[s]." *Birenbaum*, 860 F.2d at 171. That harm is the same irreparable harm the States will suffer absent relief, *see* Mot. 6, 22–24; *infra*. *See*, *e.g.*, *Carson*, 450 U.S. at 88–89; *McCoy v. La. State Bd. of Educ.*, 332 F.2d 915, 917 (5th Cir. 1964). Indeed, any time a party is refused an injunction to which it would be otherwise entitled, it suffers such harm. *See Thompson*, 321 F.2d at 200.

Second, Defendants claim that "'[a]n agency's allocation of funds' from an appropriation" is an agency decision committed to agency discretion by law. Opp'n 10 (alteration omitted) (quoting *Lincoln v. Vigil*, 508

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U.S. 182, 193 (1993)). *Lincoln*, however, involved "an agency's allocation of funds from a *lump-sum* appropriation," 508 U.S. at 193 (alteration omitted) (emphasis added), and this case does not involve lump-sum appropriations. Nor does the statutory language leave to DHS's "sole judgment" how to spend border-wall funds. *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 751 (D.C. Cir. 2002). Instead, Congress clearly said these appropriations "*shall* be available only … for the construction of barrier system along the southwest border." ECF 19-1, App.015, 019.[1] By phrasing the law "in mandatory terms," Congress "provided guidelines for the agency to follow" and DHS's actions are reviewable. *Texas v. Biden*, 20 F.4th 928, 988 (5th Cir. 2021), *cert. granted* 142 S. Ct. 1098 (2022).

B. DHS's actions are arbitrary and capricious.

On the merits, the States' argument is simple: DHS has inexplicably gone from saying border-barriers work and the agency will build them to border barriers do not work and the agency will not construct them. Defendants counter that DHS has not decided to end all new border-wall construction. Rather, they say, the agency will construct border barriers

[1] Filed in case 7:21-cv-00420.

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after it completes preparatory and remediation work. *See*, *e.g.*, Opp'n 11–13, 14. That is pretext.

Essentially, Defendants' argument is that DHS has not expressly ruled out new border-barrier construction. Perhaps (though that's questionable), but as the States point out, *see* Mot. 7, and as Defendants do not dispute, by the time DHS completes its preparatory work for building the Laredo section, the congressional appropriation for border-barrier construction will have expired. DHS need not explicitly disavow border-barrier construction, *see* Opp'n 15, because it has instituted a policy that has the same effect.

DHS's Border Wall Plan supports that conclusion. The Plan canceled existing construction contracts, returned land acquired for border-wall construction, and removed material that was going to be used to build the wall. *See* Mot. 12–13. And the Plan says it seeks to fulfill "President Biden's commitment that no more American taxpayer dollars should be diverted to construct a border wall." App. 58 (alteration and quotation omitted).[2]

[2] "App." refers to the Appendix to Defendants' opposition.

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Then there are the administration's statements—starting with the January Proclamation and including statements from DHS Secretary Mayorkas, *see* Mot. 11–13—that DHS will not build border-barriers. Indeed, as recently as March 29, 2022, when asked what the administration was obligating border wall funds to, the OMB director answered "environmental restoration" and "community consultation"—not wall-building. *The President's Fiscal Year 2023 Budget: Hearing Before the H. Comm. on the Budget*, 117th Cong. (2022) (testimony of OMB Director Shalanda Young), https://bit.ly/3iYnvbv.

Thus, what DHS calls "programmatic delays," *In re OMB & U.S. Department of Homeland Security-Pause of Border Barrier Construction and Obligations*, B-333110, 2021 WL 2451823, at *8 (Comp. Gen. June 15, 2021); Opp'n 12–13, 15,[3] represent an overt, *de facto* policy of refusing to use the 2020 and 2021 appropriations to construct border barriers. That fact is common knowledge. As Senator Murphy summarized: Funds appropriated for the border wall will "continue to be what [they

[3] This Court is not bound by GAO's opinion that DHS did not impound the appropriations at issue. *See Nevada v. Dep't of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005). Nor did GAO analyze whether DHS acted arbitrarily or capriciously, so its analysis is irrelevant here.

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are] now … an unspent balance … . Biden's been clear he's not building any new border wall." Rebecca Beitsch et al., *Democrats, Republicans Struggle to Compromise on Border, Immigration Funds*, THE HILL (Mar. 11, 2022), https://bit.ly/3iRMb5D. To ignore that reality because this is an APA case requires "a naiveté from which ordinary citizens," and the courts, "are free." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977)).

This is thus not a case where DHS acted for stated and unstated reasons or altered course "influenced by political considerations or prompted by an Administration's policies." *See* Opp'n 15 (quoting *New York*, 139 S. Ct. at 2573). This is a case where the "explanation for agency action"—that DHS is pausing construction for preparatory work and remediation, *see* Opp'n 11–13, 17—"is incongruent with what the record reveals about the agency's priorities and decisionmaking process"—that DHS's policy is not to construct new border barriers. *New York*, 139 S. Ct. at 2575. The agency's proffered reasoning is pretext, *see id.* at 2575–76; *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 614 (5th Cir. 2021), and Defendants' arguments are impermissible *post hoc* rationalization, *see*

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Motor Vehicle Manufacturers Association v. State Farm Automobile Insurance Co., 463 U.S. 29, 50 (1983).

That pretext infects Defendants' defense on the merits. For example, Defendants say that DHS need not have considered "why it departed from prior statements describing the benefits of border-barrier construction," Opp'n 15, or the legal ramifications of terminating construction, *see id.* at 16, because "DHS has not disavowed border-barrier construction activities altogether," *id.* at 15; *see also id.* at 16 ("DHS is complying fully with the 2020 and 2021 appropriations."). Since DHS has disavowed border-barrier construction activities in practice, Defendants' argument collapses.

Defendants dismiss the States' reliance interest by saying that the States do not point to a decision they made in reliance on DHS's old policy and that reliance was not reasonable. *See* Opp'n 16. This Court has already rejected this argument. "[A]gencies must assess the strength of reliance interests … in the first instance"—especially here, because DHS has a formal agreement with Texas acknowledging the State "would be irreparably damaged by DHS policy changes that relaxed strictures on illegal border crossings." *Texas*, 20 F.4th at 990 (quotations omitted).

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DHS's Border Wall Plan "didn't directly mention any reliance interests, and certainly not those of the States"—something "one would expect a 'reasonable and reasonably explained' [plan] to mention . . . ." *Id.* at 989 (quoting *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021)).

Defendants claim that they need not have consulted the States before deciding not to engage in new border-wall construction, *see* Opp'n 17, is of the same ilk. Whether DHS must consult the states under IIRIRA has no bearing on whether the agency's failure to do so before reversing its policy of constructing border barriers was arbitrary and capricious. Given the importance of border security to the States, it is. *See*, *e.g.*, *Texas*, 20 F.4th at 989.

* * *

Defendants' contrived and *post hoc* justifications undermine "[t]he reasoned explanation requirement of administrative law [that] ensure[s] that agencies offer genuine justifications for important decisions," and so they render the agency's decisions arbitrary and capricious. *New York*, 139 S. Ct. at 2575–76.

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Here, because its justifications are pretextual and *post hoc*, DHS's actions are arbitrary and capricious. They are also unlawful and unconstitutional. *See*, *e.g.*, ECF 1 ¶¶ 76–114, 139–44.[4] The States, to be sure, do not press all their claims now—as Defendants note, *see*, *e.g.*, Opp'n 2, 16. But they do not need to. Rather, all they need to do is show a likelihood of success on one claim, *see Richland/Wilkin Joint Powers Authority v. U.S. Army Corps of Engineers*, 826 F.3d 1030, 1040 (8th Cir. 2016), which they have. And by focusing on the arbitrary and capricious nature of DHS's actions, the States have respected the rule that courts should avoiding deciding cases on "broad principles when narrow grounds are available." *McCowin v. Scott*, 67 F.3d 100, 102 (5th Cir. 1995).

Thus, the States are likely to succeed on their arbitrary and capricious claim.

II. The Equities Justify Relief.

Irreparable Harm: As for irreparable harm, Defendants do not discuss the fact that "[t]his case is indistinguishable" from *Texas v. Biden* and other cases where states used similar evidence as here to establish

[4] Filed in case 7:21-cv-00420.

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irreparable harm and standing. *See* Mot. 22 (quoting *Texas*, 20 F.4th at 968, 1001–02). Rather, they claim that the States' harm is speculative.

But as the States pointed out, DHS's decision not to construct border-barriers is a decision to leave the border unsecured,[5] and that will result in continued illegal migration with its attendant harms—harms an injunction will alleviate. *See* Mot. 23–24. Defendants counter that the States' evidence to that effect is observational, and so does not show causation. *See* Opp'n 19. But it was DHS, not the States, that made the causal connection. *See* ECF 19-1, App.007–08, 011–12. The reversal here on what the data says underscores DHS's reversal on border-barrier construction policy.

Defendants also claim that the States delayed in seeking relief and so cannot have suffered irreparable harm. *See* Opp'n 19. First, Defendants fault the States for filing their lawsuit in October 2021 and seeking relief in November when the President's proclamation happened in January 2021 and DHS released the Border Wall Plan in June. Opp'n 19.

[5] Defendants focus on individual construction projects, *see* Opp'n 18, thus looks at the wrong thing; what matters is the harm from leaving the border unsecured.

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That ignores that the key agency action here is the cancellation of the construction contracts—which happened in September and October 2021. *See* ECF 24-3, ¶¶ 26–27. It was not unreasonable for the States to wait to see if DHS was going to end construction before acting—had they not, Defendants likely would have argued there was no final agency action. *See Sackett v. EPA*, 566 U.S. 120, 127 (2012) (discussing finality).

Next, Defendants point to the fact the States filed this motion three weeks after the district court stayed proceedings. Opp'n 19. But the States couldn't move faster; the District Court did not certify the record on appeal until March 7, 2022, and this Court didn't docket the States' appeal until March 9, 2022, *see* Briefing Notice, Mar. 9, 2022. Furthermore, the States filed this motion the day after President Biden signed the Consolidated Appropriations Act, 2022, H.R. 2471, which kept the funding for border-barrier construction and thus reimposed Congress's mandate that the funds be used for border-barrier construction. *See id.* § 544(b). Waiting to see if Congress would acquiesce to President Biden's request to cancel border wall funding (which it did not)—that is, waiting to see if current events would materially affect this case—is prudence, not undue delay.

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Given those facts, the States acted promptly. *See Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 297 (5th Cir. 2012) (looking at the circumstances surrounding a four-month delay in concluding it did not undermine the showing of irreparable harm).

Harm to Defendants and the Public Interest: Defendants' argument that the equities favor denial rests on the view that DHS is following the law and complying with the 2020 and 2021 appropriations. *See* Opp'n 19–20. Since that is not so, *see supra*; Mot. 11–14, this argument is meritless.

III. The States' Requested Injunction Is Not Impermissibly Broad.

Finally, Defendants argue the States' requested remedy is not tailored to the States' injury and is an "obey the law" injunction. Opp'n 20–21. As to the latter, DHS is arbitrarily and capriciously refusing to construct new border wall, as discussed above and in the States' motion. That violates the law by violating the plain language of Congress's appropriation bills and the requirement of reasoned decisionmaking.

As to the former, Defendants say this case is not about immigration law. *Id.* at 21. But DHS has acknowledged that border walls prevent illegal border crossings. *See* ECF 19-1, App.007–08, 011–12. The fact

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that appropriations are involved here does not change the fact that this case is about immigration policy, so all the reasons that justify nationwide relief in that context apply here. *See Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015).

Conclusion

The States respectfully ask the Court to grant their motion.

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Certificate of Service

On April 4, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2,582 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word (the same program used to calculate the word count).

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MO-AG-23-0462-A-000629

No. 22-40110

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE GENERAL LAND OFFICE OF THE STATE OF TEXAS, *et al.*,

Plaintiffs,

versus

PRESIDENT JOSEPH R. BIDEN, *et al.*,

Defendants

STATE OF MISSOURI; STATE OF TEXAS,

Plaintiffs-Appellants,

versus

JOSEPH R. BIDEN, Jr., *in his official capacity as President of the United States of America*; UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, *in his official capacity as Secretary of the United States Department of Homeland Security*; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY A. MILLER, *in his official capacity as Acting Commissioner of the United States Customs and Border Protection*; UNITED STATES CUSTOMS AND BORDER PROTECTION,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas

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CERTIFICATE OF INTERESTED PERSONS

No. 22-40110

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Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 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.

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State of Texas

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STATEMENT REGARDING ORAL ARGUMENT

This case is scheduled for oral argument on May 11, 2022.

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INTRODUCTION

Congress in 2020 and 2021 appropriated lump sums of $1.375 billion to the Department of Homeland Security (DHS) "for the construction of barrier system along the southwest border." Under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), DHS has authority to spend those appropriated funds on a wide range of activities within the scope of barrier-system construction. In accordance with those statutory directives and the terms of the appropriations, DHS is spending the 2020 funds on a barrier project near Laredo, Texas, and the 2021 funds primarily on urgent work to ensure that barrier projects formerly undertaken by the Department of Defense (DoD) are safe and effective.

At the conclusion of 2020, DoD was engaged in various barrier construction projects using military funding. By contrast, the Laredo project, funded by the DHS 2020 appropriation, was still in its planning stages. DHS had not acquired the land needed for that project, and the plans were incomplete. In January 2021, President Biden issued a proclamation directing DoD and DHS to reassess their barrier-spending policies. 86 Fed. Reg. 7225 (Jan. 27, 2021). The agencies did so, and DoD canceled its barrier projects and transferred them to DHS. DHS's own barrier contracts had been awarded without DHS having taken critical preparatory steps. DHS therefore determined that it will comply with the National Environmental Policy Act (NEPA) and other federal laws, strengthen stakeholder consultation, and reassess the amount of land to be acquired through eminent domain before proceeding with

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the additional border-barrier project construction plans. To that end, DHS canceled some of its existing construction contracts and modified others to allow for that more robust planning process.

Missouri and Texas challenge both the policy change announced in the President's proclamation and DHS's plan for spending the 2020 and 2021 funds appropriated for barrier-system construction. This case does not turn on the government's immigration policies, the efficacy of border barriers, or the government's approach to border security more generally. Rather, the States ask the Court to direct how DHS will spend its appropriations from Congress, such as what steps to take in what order and how quickly, within the broad category of activities contemplated by the appropriations statutes.

The district court did not deny the States' preliminary injunction motion but merely stayed proceedings pending a Supreme Court decision due later this Term. That case-management order is not appealable. But in any event, the States are fundamentally wrong about the premises of their claims. DHS *is* complying with Congress's direction to use appropriated funds "for the construction of barrier system along the southwest border," and the statutes give DHS—not the States—discretion to make decisions about what steps to take, including how to comply with federal law. The States' disagreement with public statements of the President and policymakers is not a basis for a lawsuit, let alone an injunction. Indeed, the States' claims are not justiciable. The States cannot show that they are injured, let alone irreparably and

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immediately injured, by DHS's decision to revise the incomplete Laredo project and to remediate existing but incomplete barrier projects. DHS's spending decisions are not subject to Administrative Procedure Act (APA) review, and the States have no separate constitutional cause of action to challenge DHS spending.

Even if the States could challenge the government's policies, DHS would prevail on the merits. Environmental review and planning are necessary steps in barrier-system construction, as are acquiring land, completing drainage systems, stabilizing barriers, and completing access and patrol roads. The States cannot compel DHS to exercise the agency's discretionary authority under IIRIRA to waive environmental laws, undertake barrier-system construction to meet any particular deadline, or to plan and carry out barrier projects in any particular manner. The U.S. Government Accountability Office (GAO), an independent arm of Congress, investigated claims similar to the States' and found "nothing to indicate" that "DHS is attempting to override congressional intent that these [2020 and 2021] funds be used for constructing barriers at the southern border." ROA.1302. This Court should reject the States' invitation to second-guess spending decisions that Congress has committed exclusively to DHS, and should hold that the States' request for injunctive relief is unsupported.

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STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court under 28 U.S.C. § 1331. ROA.1065. The district court lacked Article III jurisdiction over the underlying claims. *See infra* pp. 18-25.

This Court lacks appellate jurisdiction over this interlocutory appeal from the district court's order staying proceedings. *See infra* pp. 14-18.

Plaintiffs filed their notice of appeal on February 25, 2022, three days after the district court issued its order staying proceedings pending the outcome of a case before the Supreme Court. ROA.10; Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES

I. Whether the States' appeal fails at the outset because this Court lacks appellate jurisdiction and the States' claims are not justiciable.

II. Whether the States are unlikely to succeed on the merits because DHS is spending its appropriation for barrier-system construction as Congress directed.

III. Whether the States have failed to demonstrate that their proposed preliminary injunction would be appropriate relief.

STATEMENT OF THE CASE

A. Legal Background

1. Section 102 of IIRIRA authorizes the Secretary of Homeland Security to "take such actions as may be necessary to install additional physical barriers and roads . . . in the vicinity of the United States border." Pub. L. No. 104-208, div. C, tit. I,

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§ 102(a), 110 Stat. 3009, 3009-554 (1996) (codified as amended at 8 U.S.C. § 1103 note). Congress gave the Secretary broad discretion over such projects. The Secretary may determine "where fencing would be most practical and effective." 8 U.S.C. § 1103 note (Improvement of Barriers at Border). And he has "sole discretion" to decide whether to waive certain "legal requirements," including environmental assessments required by federal law, "to ensure expeditious construction." *Id.* Congress provided, moreover, that "[i]n carrying out" Section 102, the Secretary "shall consult with" various stakeholders, including "States, local governments, Indian tribes, and property owners," to "minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which such fencing is to be constructed." *Id.*

2. For fiscal year 2020, Congress appropriated $1.375 billion to DHS "for the construction of barrier system along the southwest border." Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, div. D, tit. II, § 209(a), 133 Stat. 2317, 2511 (2019) (CAA 2020). For fiscal year 2021, Congress appropriated a further $1.375 billion to DHS for the same purpose. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. F, tit. II, § 210, 134 Stat. 1182, 1456-57 (2020) (CAA 2021).

In addition to these appropriations to DHS, several border-barrier projects had previously been undertaken by DoD. *See* 84 Fed. Reg. 4949, 4949 (Feb. 20, 2019). The DoD projects were supported not by direct appropriations for barrier construction, but by funds transferred from other DoD appropriations into DoD's

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counter-drug account for constructing fences, roads and lighting at the border, *see* 10 U.S.C. § 284, and by using unobligated DoD military-construction appropriations pursuant to a 2019 declaration of a national emergency at the border, *see id.* § 2808.

3. On January 20, 2021, the President issued a proclamation terminating the 2019 national emergency and ending the diversion of military funds. 86 Fed. Reg. at 7225. The proclamation reaffirmed that while the "United States has a right and a duty to secure its borders and protect its people against threats," constructing "a massive wall that spans the entire southern border is not a serious policy solution" for targeting and addressing "genuine threats to our homeland security." *Id.* The President directed "a careful review" of "all resources appropriated" to DHS or diverted by DoD for border-barrier construction, and ordered a pause of DHS and DoD activities at the border during that review. *Id.* DHS and DoD were directed to develop "a plan for the redirection of funds concerning the southern border wall, as appropriate and consistent with applicable law." *Id.* at 7226.

Under the proclamation, the agencies' plans for redirecting funds must "provid[e] for the expenditure of any funds that the Congress expressly appropriated for wall construction, consistent with their appropriated purpose." 86 Fed. Reg. at 7226. In other words, Congress appropriated funds for fiscal years 2020 and 2021 for the construction of a border-barrier system, and the proclamation reaffirmed that DHS must expend those funds consistently with that purpose. Further, the proclamation authorized DHS and DoD to make exceptions to the pause on

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construction activities "to ensure that funds appropriated by the Congress fulfill their intended purpose." *Id.*

B. Factual Background

1. DoD conducted the assessments required by the proclamation, and in April 2021, the Deputy Secretary of Defense canceled all of DoD's ongoing barrier projects and ordered the transfer of barrier infrastructure to DHS. ROA.743-744. DHS issued its spending plan on June 9, 2021. ROA.747-751. The plan indicated the agency's intention to spend its remaining 2020 appropriations on the Laredo project, subject to NEPA and with robust consultation with stakeholders and landowners, and to spend its 2021 appropriations on work necessary to "address life, safety, environmental, and other remediation requirements" at former DoD barrier-system projects, and on new projects in the "next highest priority barrier segments." ROA.748-751.

DHS had originally obligated nearly all of its 2020 appropriation to four contracts to build a new barrier system near Laredo, Texas. ROA.352. When the January 2021 proclamation was issued, the Laredo project was still in the planning stage. ROA.352-53. No land had been acquired; rather, DHS was still "in the process of acquiring temporary rights of entry" for preliminary surveys and appraisals. ROA.353. No plans had been finalized, and no ground had been broken.

Because DHS determined that environmental review and stakeholder consultation were necessary for the Laredo projects, it modified or canceled the

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contracts to allow for additional planning. ROA.353, 357. DHS will receive the contractors' incomplete designs for the barrier system. ROA.354. It will undertake the necessary environmental review and consultation with stakeholders, a process that is expected to take 12-16 months. *See* ROA.353.[1] Where necessary, DHS will "initiate robust landowner engagement" before acquiring land. ROA.354. DHS's implementation of its 2020 appropriation is "consistent with the language of the appropriation and the Plan." ROA.354. The 2020 appropriation "remains available for obligation until September 30, 2024." ROA.351.

Because DHS has become responsible for "multiple barrier projects, previously executed" by DoD, DHS is using its 2021 appropriation, as its plan envisions, primarily to cover costs associated with those projects, which were transferred "in various states of completion." ROA.355. DHS will prioritize "those remediation projects that are needed to address life and safety," such as urgent erosion and drainage control, and "safety work along border roads." ROA.356. DHS will use additional 2021 funds to improve those existing sites, and to provide contingency funding for existing DHS barrier projects. ROA.355. With its remaining funds, DHS plans to begin work on "its next highest priority barrier segments, which are located in the [United States Border Patrol (USBP)] El Centro Sector in California," starting with environmental planning and consultation with stakeholders, and it has awarded a

[1] *See also* https://www.cbp.gov/document/environmental-assessments/border-barrier-environmental-planning-webb-county-and-zapata

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contract for that purpose. ROA.355. DHS's implementation of its 2021 appropriation is consistent with the language of the appropriation and the plan. The 2021 appropriation "remains available for obligation until September 30, 2025." ROA.355.

3. Several members of Congress asked GAO to investigate whether the new DHS spending plan violated federal appropriations law. *See* ROA.1290. GAO is a nonpartisan independent agency that works for Congress. GAO concluded that the plan was fully consistent with the 2020 and 2021 appropriations statutes and with federal appropriations law more generally. *See generally* ROA.1288-1313.

In particular, GAO concluded that "neither the [p]roclamation nor its implementation violate" the Congressional Budget and Impound Control Act (ICA). ROA.1289 (citing 2 U.S.C. § 686). GAO acknowledged that DHS's decision to comply with federal environmental laws and engage in consultation to "minimize the impact on border communities" would delay project completion. ROA.1289. But "[d]elays associated with meeting statutory prerequisites and determining funding needs in light of changed circumstances" do not violate the ICA. ROA.1289.

C. Prior Proceedings

Missouri and Texas filed this lawsuit in October 2021, several months after the Texas General Land Office (an agency of Texas) filed a related lawsuit in July 2021. *See* ROA.5, 1049. On November 8, 2021, the States moved for a preliminary injunction. The district court consolidated the cases, *see* ROA.1052, and briefing on

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the States' motion concluded in December 2021, *see* ROA.8. The government then moved to dismiss the suits filed by the States and the Texas General Land Office. ROA.677, 754.

In February 2022, the district court issued an order deferring consideration of the pending motion. ROA.1026. The court explained that the Supreme Court's grant of certiorari in *Biden v. Texas*, No. 21-954, a case that "pertains to crucial aspects of this case" would "inevitably impact this case." ROA.1026. The court canceled the impending pretrial and scheduling conference, deferred the parties' deadline for filing their joint case management plan, and stayed its consideration of the preliminary injunction motion and the government's motions to dismiss. ROA.1026. It directed the parties to file supplemental briefs "within fourteen days after the issuance of the Supreme Court's opinion in *Biden v. Texas*." ROA.1026.

The States appealed the district court's order and moved for an injunction pending appeal in district court. *See* ROA.1027; ECF 47. The district court denied the motion "without prejudice to Plaintiffs' pending motion for a preliminary injunction." ECF 47, at 3. The States then moved for an injunction pending appeal in this Court. Doc. 00516242259 (Mar. 16, 2022). On April 13, this Court ordered that the motion be carried with the case. Doc. 00516278677, at 2.

SUMMARY OF ARGUMENT

Congress has appropriated lump-sum funds "for the construction of barrier system along the southwest border." DHS will spend those funds for a wide range of

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activities within the scope of that legislative directive, including critical measures such as drainage control, stabilization and road construction at existing sites, and necessary preliminary steps, such as environmental reviews and stakeholder consultation, at sites where new construction is planned. The States ask this Court to enter an ill-defined, nationwide order in an apparent effort to micromanage the statutory discretion given to DHS to spend those funds. That request fails both at the outset because the States cannot surmount a number of threshold jurisdictional hurdles, and on the merits because the States cannot satisfy any of the factors necessary to obtain injunctive relief.

First, the district court's order is not appealable. The States seek review of a routine case-management order directing a brief stay of proceedings in district court, an order that has caused no imminent harm, and from which they have no right of immediate appeal.

The States cannot prevail in any event because their claims are not justiciable. They lack standing to challenge DHS's spending policies because they cannot show that these decisions have injured their interests or that an injunction would have any effect on their budgets. Their APA, statutory, and constitutional claims are also unreviewable. An agency's choices about spending appropriations within the broad parameters established by Congress is a matter committed to agency discretion by law, and even if it were not, the government policies the States' challenge—the President's proclamation and DHS's plan—are not final agency action.

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The States likewise cannot sue to enforce the appropriations laws, the Take Care Clause, or the Constitution's separation of powers because they are not within the zone of interests of these statutes or constitutional guarantees.

Second, even apart from these threshold obstacles, the States' APA, statutory, and constitutional claims all fail on the merits. DHS's decision to pause construction activities while it conducts environmental reviews and stakeholder consultation, as required by federal law, was not arbitrary or capricious in violation of the APA. Nor is it arbitrary and capricious for DHS to address the imminent needs of the projects it has acquired from DoD by building drainage systems, controlling harmful erosion, completing access and patrol roads and taking other steps to ensure that the projects are safe and effective, and function as intended. These measures are reasonable and necessary expenses that are part of barrier-system construction, and DHS's expenditures are in accordance with the terms of the statutory appropriations.

The States' argument that DHS's planning activities are pretext for discontinuing border-barrier construction mistakenly conflates the termination of *military* funding for border-barrier construction—which is not at issue in this case—with DHS's continued use of its *own* barrier-construction funds, which are being used for the purposes Congress intended. The temporary delay caused by the agency's pause on construction also does not constitute an unlawful impoundment under the ICA; rather, it is a legitimate programmatic step in service of the agency's duties to spend appropriated funds on the construction of a border-barrier system. Finally, the

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States' constitutional claims fail for the same reasons as their statutory claims: because the government has acted lawfully in spending its appropriated funds, the States cannot show that the government has violated the separation of powers or the Constitution's Take Care Clause.

Finally, although the failure to demonstrate a likelihood of success on the merits is fatal to the States' request, the other injunction factors similarly weigh in favor of the government. In particular, the States are not harmed—let alone irreparably or immediately harmed—by a temporary pause in border-barrier construction while DHS conducts environmental reviews and stakeholder consultations, or by DHS's construction activities at incomplete projects acquired from DoD. Not only are those activities consistent with federal law, but they benefit the public, as they ensure that the border-barrier projects mitigate potentially harmful impacts on the community, and provide the benefits they were designed to offer. Those benefits to the public interest far outweigh the States' interests in minimizing conjectural downstream expenditures on social services for noncitizens. The States cannot meet the equitable standard required for an extraordinary injunctive order directing DHS to forgo these activities in favor of an alternate approach to spending the agency's appropriations, and they are certainly not entitled to nationwide relief.

STANDARD OF REVIEW

The questions of standing and appellate jurisdiction under 28 U.S.C. § 1292 are legal issues subject to de novo review. *See In re Dean*, 18 F.4th 842, 844 (5th Cir. 2021)

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(standing); *National Shipping Co. of Saudi Arabia v. Valero Mktg. & Supply Co.*, 963 F.3d 479, 481 (5th Cir. 2020) (appellate jurisdiction).

Any denial of an injunction is reviewed for abuse of discretion. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

ARGUMENT

This Court should dismiss the States' appeal for lack of appellate jurisdiction. Alternatively, the Court should conclude that the case as a whole should be dismissed on justiciability grounds. If this Court were to reach the merits, it should reject the States' request for a preliminary injunction because DHS is lawfully spending its 2020 and 2021 appropriations and because the balance of harms favors the government.

I. The States' Appeal Fails At The Outset Because This Court Lacks Appellate Jurisdiction And The States' Claims Are Not Justiciable

This Court can resolve this appeal on any of several threshold grounds. This Court lacks appellate jurisdiction, the States lack standing to challenge DHS's spending decisions without evidence that those decisions will affect the States' financial interests, and the spending choices the States challenge under the APA are committed to agency discretion by law and in any event do not constitute final agency action.

A. This Court Lacks Appellate Jurisdiction

The States have no right to appeal because the district court's order staying proceedings and reserving ruling on the States' motion is not an appealable order.

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Appeals may be taken from orders "granting, continuing, modifying, refusing[,] or dissolving injunctions." 28 U.S.C. § 1292(a)(1). The district court's order here does none of these things, but only stays the preliminary injunction proceedings for the brief period until the Supreme Court decides *Biden v. Texas*, No. 21-954. An order "by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)." *Rauscher Pierce Refsnes, Inc. v. Birenbaum*, 860 F.2d 169, 171 (5th Cir. 1988) (quotation marks omitted). Here, the district court determined that the grant of certiorari in *Texas* is an "important development which will inevitably impact this case," imposed a brief stay, and indicated that it will promptly address the States' preliminary-injunction motion by directing the parties to file briefs within 14 days after the Supreme Court decides *Texas*, by early July at the latest. ROA.1026. The stay order makes efficient use of the district court's limited resources. It is not appealable under § 1292(a)(1).

The States are mistaken (Br. 18-20) to the extent they contend that the district court's order is immediately appealable merely because it "stay[ed] proceedings in which one party seeks a preliminary injunction." Br. 19 (quoting *Rauscher*, 860 F.2d at 171). That is only part of the test for interlocutory appealability. A party can appeal an order that does not "explicitly affect[] the availability of injunctive relief," only if it can show *both* that the order "presents a threat of serious, perhaps irreparable consequences," and that those consequences "may be effectively addressed only by an

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immediate appeal." *Sherri A.D. v. Kirby*, 975 F.2d 193, 203-04 (5th Cir. 1992) (applying *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981)); *see also Rauscher*, 860 F.2d at 171 (holding that stay order falling short of this standard was not immediately appealable). Thus, to appeal the district court's order staying proceedings, the States would have to show both that irreparable harms will accrue between now and the time when the district court is likely to rule on their preliminary injunctive motion—a period of a few months at most—and that those harms are so serious that only an immediate appeal will provide relief. The States cannot meet that high bar.

As explained more fully in parts I.B and III, *infra*, the States have failed to show that the brief delay of district court proceedings will cause them "serious or irreparable harm." *Carson*, 450 U.S. at 86. They allege a single (speculative) harm—increased social services costs from noncitizens who would have otherwise been deterred by a border wall. Br. 23-26. But this argument is premised on the incorrect assumption that DHS is refusing to expend funds on construction of a border-barrier system. *See infra* pp. 32-39.

Further, the States have not shown that an injunction would lead to any additional completed border-barrier segments—let alone any meaningful reduction in the number of noncitizens entering the plaintiff States—during the brief period before the district court resolves the motion for a preliminary injunction. The States' argument misleadingly implies that construction of new barriers along the border had been well underway when the President issued the proclamation. But DHS had yet to

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commence construction on the only new project DHS was funding with its 2020 appropriations—the Laredo barrier project. DHS had not "acquired any of the permanent interests in real property necessary to support construction," ROA.353, and the project designs were "incomplete," ROA.354. As for DHS's expenditures to address the barrier construction projects inherited from DoD, for example by completing work on critical elements such as roads and erosion-control and drainage systems, those expenditures could only benefit the States by making the project sites safe and effective. Apart from existing projects formerly undertaken by DoD, and the Laredo project which had yet to begin, there was no other project site where DHS could promptly begin using its 2020 or 2021 appropriations. The States have therefore not met their burden to show that the district court's brief stay of proceedings will cause them *any* harm, let alone irreparable harm, during the few months that proceedings are stayed.

For the same reason, the States have not shown why only immediate appeal, a departure from "the general congressional policy against piecemeal review," can address their asserted harms. *Carson*, 450 U.S. at 84. The States have identified no harm that will occur before the time when the district court is likely to rule on their preliminary injunction motion, but instead cite "the risk that the border-wall appropriations will expire before they can be obligated," years from now in 2024 and 2025. Br. 20-21. Appellate review, in the ordinary course, of the district court's ruling

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on the preliminary injunction motion would fully address the States' allegations of harm. Immediate appeal is unwarranted.

B. The States Lack Standing To Sue

In any event, plaintiffs' underlying claims are not justiciable. Plaintiffs have the burden to demonstrate standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). The States must show that they "(i) suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). The States jointly allege a single type of injury flowing from what they characterize as "DHS's failure to construct border walls": costs associated with providing driver's licenses and social services to some noncitizens.[2] Br. 23-26, 27. That alleged injury provides no basis for standing.

[2] In district court, Texas also claimed it was injured by a potential decrease in franchise tax revenue and costs associated with Texas's independent border wall construction efforts. On appeal, Texas no longer relies on these alleged injuries, and that issue "is deemed waived." *United States v. Pompa*, 434 F.3d 800, 806 n.4 (5th Cir. 2005). In any event, this Court and others have routinely rejected attempts to rely on reduced tax revenue to support standing, *see, e.g.*, *El Paso County, Texas v. Trump*, 982 F.3d 332, 339 (5th Cir. 2020); *Iowa ex rel. Miller v. Block*, 771 F.2d 347, 353 (8th Cir. 1985). Given the government's commitment to spend appropriated funds consistent with their purpose, Texas's alleged mitigation costs are similarly insufficient to support standing, because a plaintiff "cannot manufacture standing by incurring costs in anticipation of non-imminent harm." *Clapper*, 568 U.S. at 422.

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First, the States have not shown that increased costs associated with providing driver's licenses and social services are fairly traceable to the challenged government policies. The States mistakenly focus their causation arguments on whether the existence of a border barrier will affect migration rates. Br. 26-27. They contend that they have satisfied the traceability test because the "failure to construct border walls means that illegal immigration will be higher relative to the world where there is a wall." Br. 27. But that is not the relevant causal inquiry. The States have the burden of showing a "causal connection" between their asserted financial harms "and the defendant's challenged conduct," *Glen v. American Airlines, Inc.*, 7 F.4th 331, 335 (5th Cir. 2021) (quotation marks omitted), and the challenged conduct here is DHS's decision to undertake environmental review and consultation at the Laredo project, and the additional work DHS is undertaking to ensure the former DoD sites are safe and effective. Insofar as the States contend that DHS's plan implementation will *delay* new construction, they make no effort to establish whether or how much delay would have occurred if the government had decided to forgo these activities, or whether the benefits of improved planning, design and construction will outweigh the disadvantages, if any, of delay. The government had not begun its barrier construction at Laredo prior to the President's proclamation—it had not acquired the necessary land and the designs were incomplete. The States fail to mention these critical facts, and they cannot reasonably rely on speculation regarding the eventual

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completion of those segments of border barriers to support their theory of traceability.

The States speculate that the proclamation and DHS plan will cause more noncitizens to enter the United States illegally and avail themselves of social services at the States' expense. Although the States gesture to general figures for "illegal alien population in Missouri and Texas" and "foreign migration into Texas," Br. 27, those figures say nothing about the effect that the *proclamation or plan* has had on migration levels, let alone the prospect that an injunction would redress those speculative injuries. And the States vastly overstate any conceivable effect of DHS's expenditure of its 2020 and 2021 funds. Hundreds of miles of the southern border remain unfenced, and completion of the planned barriers at the Laredo and former DoD project sites would at best leave an incomplete barrier at the border. The States offer only speculation that this less-incomplete version of the border wall would reduce overall migration levels, let alone result in costs savings for their social services agencies. Noncitizens may choose to cross the border in other, unfenced sectors. Further, because many factors may influence an individual's attempt to enter the United States, causation cannot be established through fragmentary statistical evidence. The States nowhere mention, for example, that between 2018 and 2019, when DHS and DoD were actively constructing barriers, Border Patrol's

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apprehensions on the southwest border nevertheless more than doubled,[3] suggesting that while border barriers might deter crossings in *some* areas, that is not enough to support general conclusions about overall migration. *See, e.g., Arizona v. Mayorkas,* No. CV-21-00617-PHX-DWL, 2022 WL 357348, at *8 (D. Ariz. Feb. 7, 2022).

Where assertions—like the States'—"rest on speculation about the decisions of independent actors," such as sovereign nations or noncitizens themselves, courts are especially "reluctan[t]" to find standing. *Clapper*, 568 U.S. at 414; *see also California v. Texas*, 141 S. Ct. 2104, 2117 (2021) ("[W]here a causal relation between injury and challenged action depends upon the decision of an independent third party," standing is "ordinarily substantially more difficult to establish." (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)); *Little v. KPMG LLP*, 575 F.3d 533, 540 (5th Cir. 2009) ("A claim of injury generally is too conjectural or hypothetical to confer standing when the injury's existence depends on the decisions of third parties not before the court."); *Arizona v. Biden*, No. 22-3272, 2022 WL 1090176, at *3-*4 (6th Cir. Apr. 12, 2022) (rejecting standing where States' injuries hinged on the activities of third parties). Indeed, theories that particular government polices "entice" individuals to cross the border in greater numbers have been squarely rejected by other courts. *See Arpaio v. Obama*, 797 F.3d 11, 19-24 (D.C. Cir. 2015) (rejecting standing on theory

[3] USBP, https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/US59B8~1.PDF

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that third parties from other countries will be induced to enter the country by promises of benefits under DACA and DAPA, even though the polices do not apply to them).

The States are not helped by the "driver's license rationale" of standing articulated in *Texas v. United States* (*Texas I*), 809 F.3d 134 (5th Cir. 2015), and *Texas v. Biden* (*Texas II*), 10 F.4th 538 (5th Cir. 2021). In both cases, this Court held that plaintiffs had standing because "[t]he causal chain [was] easy to see": there was a clear link between the government action—the moratorium on deportations in *Texas I,* and the decision to parole noncitizens instead of return them to Canada or Mexico during removal proceedings in *Texas II*—and the increased migration that plaintiffs alleged would cause them harm. *Texas II*, 10 F.4th at 546-48; *Texas I*, 809 F.3d at 155-62. The States here have demonstrated no such link: they have not shown that DHS's decisions about its 2020 and 2021 border-barrier appropriations will cause more noncitizens to cross the border illegally than would have crossed under DHS's original plan for those funds. Without that necessary causal connection, none of the additional costs the States claim they will incur can be considered fairly traceable to the policies challenged here. *See Arizona*, 2022 WL 1090176, at *3-*4 (noting that States' alleged injuries stemming from "the increased cost of public services . . . requires showing . . . that the [challenged government policy] would be the cause" and holding that the States failed to demonstrate that link); *Arizona v. Mayorkas,* 2022 WL 357348, at *9.

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The States have likewise failed to demonstrate that their asserted injuries are redressable. The States asked the district court for an order prohibiting the government "from enforcing and implementing" the proclamation. ROA.1426. But the States' legal claims challenge only the manner in which DHS is spending its 2020 and 2021 appropriation. Notably, the States do not—and could not—challenge the principal provisions of the proclamation—those that terminate the earlier declaration of an emergency and that end the diversion of military funding to border-barrier construction. *See* 86 Fed. Reg. at 7225. The proclamation directs DHS to spend its own appropriated funds in a manner "consistent with their appropriated purpose," *id.* at 7226, the very outcome the States purport to seek.

In any event, DHS does not dispute that it must spend its appropriation according to the terms set by Congress, and the States' proposed judicial order, merely parroting the statutory language by directing DHS "to enforce and implement the 'construction of barrier system along the southwest border,'" ROA.1426-27, would thus add nothing to the mandate imposed by the statute itself. The States do not dispute that DHS's discretionary decision to comply with NEPA and other federal statutes is unreviewable and therefore could not be the subject of an injunction. And they cannot seriously contest that remediation and completion of work at former DoD construction sites, such as stabilizing the underlying land, installing necessary drainage, and completing the roads necessary to maintain and patrol the barrier, is not within the scope of Congress's mandate appropriating funds for "construction of

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border barrier system." The States have not shown that compelling DHS to rescind the cancellation of DHS's contracts with third parties could provide them any relief from immediate or imminent harm when they lack standing to sue and when, under the original contracts, the government had not yet even acquired the land, let alone completed designs or broken ground.

The States cannot evade the requirements of standing by asserting that they are entitled to "special solicitude" as described in *Massachusetts v. EPA*, 549 U.S. 497 (2007). Rather, as the Sixth Circuit recently explained, they must show an imminent injury-in-fact traceable to the government's conduct that could be redressed by the Court, but have failed to do so. *See Arizona*, 2022 WL 1090176, at *4 (quoting 549 U.S. at 520).

The States' theory of standing, moreover, lacks any limiting principle. It is not enough for States to allege that they may incur additional costs at some point in the future as an indirect result of a federal policy choice, rather than showing specific and redressable harm resulting from that choice. That relaxation of traditional requirements would turn routine disagreements between the State and federal governments over national policy choices into questions for the courts. "[T]he Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts." *Lujan*, 504 U.S. at 559–60. The standing doctrine is an important

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element of that mechanism, *see id.* at 560, and this Court should reject the States' invitation to lessen its force.

C. The States' APA Claims Are Unreviewable

1. DHS's barrier-funding decisions are committed to DHS's discretion by law

The States are unlikely to succeed on their claim for injunctive relief because they challenge funding decisions by DHS that are committed to the agency's discretion by law. *See* 5 U.S.C. § 701(a)(2). In appropriating funds "for construction of border barrier system" Congress gave DHS broad discretion to decide when and how to spend funds consistent with that purpose. Congress's appropriation provides no standards "against which to judge the agency's exercise of discretion" in choosing how to acquire the land for construction, how to engage in stakeholder consultation and environmental review, what weight to give to concomitant federal interests in protecting environmental and cultural resources, and whether to prioritize actions at border-barrier projects that pose an immediate safety threat over future construction needs. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Pursuant to Congress's broad mandate, as explained *infra* pp. 32-40, DHS is conducting necessary planning activities in connection with anticipated construction projects, and remediation activities in connection with projects yet to be completed. DHS has unreviewable discretion to make these choices.

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Relying on *Milk Train, Inc. v. Veneman*, 310 F.3d 747 (D.C. Cir. 2002), the States respond that DHS's spending decisions are reviewable because Congress provided a "statutory reference point" mandating that the appropriated funds "*shall* be available *only* . . . for the construction of barrier system along the southwest border." Br. 31-32 (first quoting *Milk Train*, 310 F.3d at 752; and then quoting CAA 2020, § 209(a), (a)(1)). But *Milk Train* supports the government's position. There, the D.C. Circuit considered a challenge to the Secretary of Agriculture's implementation of a subsidy program for milk producers, where the agency received an appropriation "to provide assistance directly to . . . dairy producers, in a manner determined appropriate by the Secretary" "to compensate dairy producers for economic losses incurred during 1999." 310 F.3d at 750, 751. Plaintiffs challenged the agency's method for calculating how much money a milk producer should receive, but the court held that the statutory appropriations language "left to the Secretary the decision about *how* the moneys for 1999 economic losses could best be distributed," and that decision was unreviewable. *Id.* at 751-52 (emphasis added).

To be sure, *Milk Train* concluded that plaintiffs could challenge the Secretary's calculation insofar as it compensated dairy producers for the wrong year. But that was because Congress had specified that compensation must be for "economic losses incurred during 1999." 310 F.3d at 752. In that regard, "Congress limited the Secretary's authority to disburse funds." *Id.* No similar limitation exists here:

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Congress merely appropriated funds for "construction of border barrier system"—it did not further delineate how or when the agency must comply with that mandate.

Rather, the appropriations acts identify only the broad purpose for which spending is authorized. The relevant sections of the statutes read: "Of the total amount made available under 'U.S. Customs and Border Protection—Procurement, Construction, and Improvements', $1,904,468,000 shall be available only as follows: (1) $1,375,000,000 for the construction of barrier system along the southwest border." CAA 2020, § 209(a), (a)(1). Congress's use of "shall . . . only" merely directs DHS to allocate a specific portion of its overall appropriation for procurement and construction to the construction of the border-barrier system, as opposed to, say, facilities maintenance. That statutory language does not speak to *how* DHS should spend its lump-sum appropriation for barrier-system construction—a matter that is committed to the agency's discretion by law. *See Lincoln v. Vigil*, 508 U.S. 182, 192 (1993).

Notably as well, Congress appropriated funds for "construction of barrier system." Congress recognized that "a physical barrier is but one component of a border security system," and an effective system will incorporate other elements, such as "appropriate sensor technology, including fiber optics and camera systems, with[in] the barrier system." S. Rep. No. 116-125, at 44 (Sept. 16, 2019). This confirms that DHS may spend funds not only erecting barriers, but for other system elements as well. And it underscores the fundamental error in the States' implied premise that

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every dollar of 2020 and 2021 appropriation must be spent on actually raising a physical barrier. Br. 42.

Plaintiffs also complain that DHS is spending its appropriations on what they call preparatory work. Br. 10 (asserting that "[n]one of [the] funds" obligated towards "environmental planning" and "substantive consultation with stakeholders" are being "used for their appropriated purpose of constructing border barriers"). But any construction of border barriers necessarily entails more than merely pouring concrete or erecting bollards. Planning, including compliance with existing laws that have not been waived, is an integral step in the process of barrier-system construction. So are many related steps that make the system safe and effective. Federal law and simple practicality require expenditures not only on planning, but also on design, land acquisition, road construction, drainage, and other steps. Were it otherwise, DHS could not spend its appropriations on acquiring land or obtaining design plans for construction projects. *Cf. In re Border Infrastructure Envtl. Litig.*, 915 F.3d 1213, 1223 (9th Cir. 2019) (analyzing the text of IIRIRA § 102(a) and stating "[t]o suggest that Congress would authorize DHS to build new border barriers but (impliedly) prohibit the maintenance, repair, and replacement of existing ones makes no practical sense"). Congress did not appropriate separate line item amounts for land acquisition, planning, design, compliance with environmental laws, road construction, and maintenance of the barrier system, but appropriated a lump sum "for the construction of barrier system." DHS's decision to comply with NEPA, IIRIRA, and other federal

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statutes is well within the capacious scope of Congress's appropriations mandate, as is the remediation work at former DoD construction sites. And it is consistent with the federal fiscal-law principle that funds appropriated for a particular purpose may be spent on expenses reasonably necessary for accomplishing that purpose. *See infra* p. 37.

The agency's decision to comply with federal laws such as NEPA is an exercise of unreviewable discretion that cannot be challenged as arbitrary and capricious under the APA. 5 U.S.C. § 701(a), (a)(2). The States do not dispute that IIRIRA vests the Secretary of DHS with the "*sole* discretion" to decide whether to waive "legal requirements," including those imposed by environmental laws, when it deems such waivers necessary to expedite border-barrier construction. IIRIRA § 102(c)(1) (emphasis added). This statutory commitment of authority "fairly exudes deference to" the Secretary, *Webster v. Doe*, 486 U.S. 592, 600 (1988), and provides no standards against which the exercise of secretarial discretion may be measured. *See Federal Deposit Ins. Corp. v. Bank of Coushatta*, 930 F.2d 1122, 1129 (5th Cir. 1991) (holding that judicial review was foreclosed when the "language of the statute" gave the court no "meaningful standard against which to judge the agency's exercise of its discretion.").

The States seek an injunction ordering DHS to "obligate and spend" funds Congress has appropriated for constructing a border-barrier system, that would presumably direct the agency to change specific contractual arrangements for ongoing border-construction work. *See* ROA.1426-27. But this is the very sort of second-

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guessing that the APA deems unreviewable. Congress's broad mandate demonstrates that it authorized DHS to "meet its statutory responsibilities in what it sees as the most effective or desirable way," *Lincoln,* 508 U.S. at 192. Ultimately, "[t]he allocation of funds from a lump-sum appropriation is an[] administrative decision traditionally regarded as committed to agency discretion." *Id.* Although the States resist classifying the appropriations here as "lump-sum," they cannot dispute that DHS's decisions about how best to spend its funds "requires 'a complicated balancing of a number of factors which are peculiarly within its expertise,'" and the "agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Id.* at 193 (quoting *Heckler*, 470 U.S. at 831-32).

2. The States have not challenged any final agency action

Only final agency action, which "mark[s] the 'consummation' of the agency's decisionmaking process" and "from which 'legal consequences will flow,'" is subject to judicial review under the APA. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Plaintiffs challenge the proclamation and DHS's plan but neither represents final action under the APA with respect to DHS's own appropriations. The proclamation does not constitute agency action at all, because it is an action by the President, who is "not an 'agency' within the meaning of the APA." *Dalton v. Specter*, 511 U.S. 462, 469 (1994); *cf.* Br. 32-33.

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Nor is the DHS plan final agency action; it merely sets forth statements of intent about as yet undetermined future spending. "An agency action that merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion . . . —is a general statement of policy." *National Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) (Kavanaugh, J.). The DHS plan is a non-final statement of policy about DHS's proposed disposition of its appropriation for barrier-system construction. *See e.g.,* ROA.748 ("DHS intends to engage in standard environmental planning"); *cf.* Br. 33. The States have identified nothing in the plan that represents the consummation of DHS's process of determining how to spend its 2020 and 2021 appropriations on constructing a barrier system at the southwest border. Nor could they: the Laredo project, where DHS will spend the bulk of its 2020 appropriation, remains in the planning stage, and DHS is likewise still in the process of assessing the barrier projects transferred from DoD and making decisions as to how best to address those projects. *See In re Border Infrastructure Envtl. Litig.*, 915 F.3d at 1225-26 (declining to review challenge to DHS's "plans to replace the secondary [border] fencing" as unreviewable because it was not yet "'final' agency action[]").

The States assert that, as a result of the plan, DHS canceled existing construction contracts, but they expressly do not challenge the cancellation of those contracts, contending only that cancelation is "evidence of" finality. Br. 33. But

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DHS's decision to cancel construction contracts does not transform the plan itself into final agency action.

II. The States Are Unlikely To Succeed On The Merits Because DHS Is Spending Its Appropriation For Barrier-System Construction As Congress Directed

A. DHS's Actions Were Not Arbitrary Or Capricious

The President's proclamation was clear and expressly consistent with legislative mandates: DHS must provide "for the expenditure of any funds that the Congress expressly appropriated for wall construction, consistent with their appropriated purpose." 86 Fed. Reg. at 7226. DHS's plan and its implementation of this directive are faithful to the terms of DHS's appropriation "for the construction of barrier system along the southwest border." In particular, DHS will use funds for late-stage remediation and construction work at the incomplete DoD sites; as it continues the planning process for additional construction projects along the southwest border, DHS will also use its funds to comply with NEPA and other environmental statutes, to consult with stakeholders in project areas, and to obtain land through voluntary measures, rather than through condemnation proceedings. All of these choices fall well within the agency's statutory discretion, and they are not arbitrary or capricious.

The arbitrary-and-capricious standard of review is "deferential" to the agency charged with administering the statute, and the "court may not substitute its own policy judgment for that of the agency." *Federal Commc'ns Comm'n v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). Rather, the court must "simply ensure[] that the

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agency has . . . reasonably considered the relevant issues and reasonably explained [its] decision." *Id.* DHS's explanations for its border-barrier expenditures here more than satisfy the "minimal standards of rationality" that the APA imposes. *See Luminant Generation Co. v. U.S. EPA*, 714 F.3d 841, 850 (5th Cir. 2013) (quoting *Texas Oil & Gas Ass'n v. U.S. EPA*, 161 F.3d 923, 934 (5th Cir. 1998)).

First, the Secretary does not act arbitrarily or capriciously by choosing to comply with NEPA and other federal statutes. Congress has made clear through legislation that environmental concerns carry weight, sometimes compelling weight, in decisions about border-barrier construction. Congress has prohibited DHS from constructing barriers in certain environmentally sensitive areas. *See, e.g.,* Consolidated Appropriations Act 2019, Pub. L. No. 116-6, § 231, 133 Stat. 13, 28 (CAA 2019) (prohibiting DHS from spending funds to construct fencing in certain refuges and parks); CAA 2020, § 210, 133 Stat. at 2512 (same). DHS's authority under IIRIRA to construct barriers directs DHS to take actions "to minimize the impact on the environment." IIRIRA § 102(b)(1)(C)(i). Congress has also directed that the spending plans DHS submits annually to Congress must address "the environmental impacts, including on wildlife, of the construction and placement of physical barriers planned along the Southwest border." Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. F, tit. II, § 231(a)(1), 132 Stat. 348, 617-18; CAA 2020, § 209(e), 133 Stat. at 2512 (CAA 2018) (requiring plan updates). These statutes confirm that the Secretary has discretion to choose to comply with environmental laws in

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constructing border-barrier projects, and the Secretary's decision whether to waive compliance with those laws is an unreviewable exercise of the Secretary's discretion. *See supra* pp. 29-30; *In re Border Infrastructure Envtl. Litig.*, 915 F.3d at 1224-25.

Second, DHS's determination that "robust and substantive consultation" with stakeholders must inform the design and construction of the border barrier, ROA.749, is not only reasonable but consistent with the statutory directive in IIRIRA. Congress has mandated that DHS "*shall* consult with" stakeholders to "minimize the impact" of the border-barrier system "on the environment, culture, commerce, and quality of life" of individuals and communities "located near the sites at which such fencing is to be constructed." IIRIRA § 102(b)(1)(c)(i) (emphasis added). DHS acts consistently with this congressional directive by giving federal, state and local authorities, local community groups, and landowners opportunities to share their views on the "design and alignment" of the proposed Laredo barrier projects. ROA.358; *see also* CAA 2020, § 209(b)(1)(B), 133 Stat. at 2512 (authorizing DHS to adapt barrier design "based on consultation with jurisdictions within which barrier system will be constructed"). To comply with these congressional policies, DHS must consult with affected and protected groups, and it is not arbitrary and capricious for the agency to do so.

Third, DHS has determined that acquiring land for border-barrier construction should be undertaken primarily through voluntary transfers of interests in real estate, rather than condemnation. *See* ROA.749. Congress in IIRIRA gave DHS broad

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authority to acquire land by contract or condemnation "when the Attorney General deems the land essential to control and guard the boundaries and borders of the United States." IIRIRA § 102(d), 110 Stat. 3009-555. DHS is required under IIRIRA to "consult with . . . property owners" to minimize the impact of border-barrier construction. IIRIRA § 102(b)(1)(C)(i). And in acquiring land for barrier construction, DHS has also chosen to "be guided by the Uniform Relocation Assistance and Real Property Acquisition Policies Act." ROA.749. These choices are informed by congressional determinations and by common sense, and they fall squarely within the agency's discretion.

Significantly, Congress gave DHS time to take these preparatory steps before the agency undertakes the groundbreaking and barrier-building stages of the project. Unlike most appropriations, which require the agency to obligate its funds within a single fiscal year, *see* 1 U.S.C. § 105; 31 U.S.C. § 1301(c), (c)(2), the appropriation "for the construction of barrier system" gives DHS a full five years to obligate the appropriated funds. *See* CAA 2020, 133 Stat. at 2506 (stating that fiscal year 2020 funds "shall remain available until September 30, 2024"); CAA 2021, 134 Stat. at 1452 (stating that fiscal year 2021 funds "shall remain available until September 30, 2025"). Congress imposed no constraints on the pace at which DHS should obligate its funds for constructing the barrier system, or how it should prioritize spending. Those matters are left to DHS's discretion. Once review, planning and design are complete, DHS intends to issue contracts "to cover both the completion of the design of barrier

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system proposed for the . . . Laredo Sector and its actual construction." ROA.359-360. DHS accordingly acted reasonably when it canceled or modified contracts to allow for necessary environmental review, stakeholder consultation and engagement with landowners.[4] *See* ROA.354, 750-751.

Fourth, the agency also acted reasonably in its spending decisions with respect to the DoD projects it inherited. DHS will use a portion of its appropriations for remediation and construction work at former DoD border-barrier sites, which were "in various states of completion at the time of their cancellation." ROA.355. As the agency explained, such expenditures are necessary for critical tasks such as installing drainage, stabilizing sites "to ensure constructed assets are safe and stable for their expected life cycle," and completing roads. ROA.750. DHS will also close gaps that remain open from prior DoD construction activities and remediate incomplete gates.[5] DHS also determined that it will, when warranted, undertake environmental review and stakeholder consultation in connection with these projects. *See* ROA.354, 750-751. All of these activities fall well within the bounds of Congress's appropriations mandates.

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[4] DHS provided a declaration describing the benefits of these steps. The States mistakenly portray DHS's declaration as a "*post hoc* rationalization" of the plan itself. Br. 45. But the declaration does not justify or explain the decisions announced in the plan, but only describes how DHS is putting the plan into place. *See* ROA.357-362.

[5] https://www.dhs.gov/news/2021/12/20/dhs-address-life-safety-environmental-and-remediation-requirements-border-barrier

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The States mistakenly contend that DHS's expenses do not qualify as expenditures "for the construction of barrier system along the southwest border." Br. 39-40. But the States' theory that DHS can spend its funds only on the single stage of construction that involves erecting physical barriers is manifestly incorrect: it would prevent DHS from using its appropriation to acquire the land for the project, or to survey for building purposes, or to build the roads needed to maintain and patrol the barrier. The discretionary waiver authority, as well as the statutory directives, in IIRIRA Section 102 confirm that Congress intended the agency's authority to include all the stages of constructing a border-barrier system.

In any event, an expenditure meets permissible statutory objectives when the agency uses its appropriated funds on items or services that are "reasonably necessary to accomplish the agency's mission." *U.S. Dep't of the Navy v. Federal Labor Relations Auth.*, 665 F.3d 1339, 1349 (D.C. Cir. 2012) (Kavanaugh, J.). Whether an expense is reasonably necessary is "in the first instance, is a matter of agency discretion." *Id.* That broad discretion is exceeded only when "the expenditure's 'relationship to an authorized purpose or function'" becomes 'so attenuated as to take it beyond th[e] range'" of the agency's permissible choices. *Id.* (quotation omitted); *see also* GAO, *Principles of Federal Appropriations Law,* 3-16 (4th ed. 2017) (explaining that a necessary expense "must bear a logical relationship to the appropriation sought to be charged").

Here, remediation of incomplete barrier construction, road-building, environmental planning, stakeholder consultation, and consultation with landowners

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are directly and closely related to DHS's mission of constructing a border-barrier system that "protect[s] national and border security," ROA.747. Remediating incomplete border-barrier projects allows the projects to function safely and effectively, as they were intended. As for projects in their design phase, consultation with local stakeholders allows DHS to identify and avoid "existing critical infrastructure such as power lines, irrigation lines, or other municipal infrastructure," as well as "vehicle and train bridges" and historic sites; to place gates where border patrol agents, first responders and landowners need them; and to comply with the United States' transboundary and water treaty obligations with Mexico and mitigate the risk of flooding. ROA.357-358. Consultation with landowners allows DHS to "minimize or avoid impacts" of border-barrier construction on those landowners. ROA.359. Many of these steps are not even discretionary for DHS, but are required by federal law. The States do not specifically challenge the spending on border-barrier completion, and there is no merit to the States' argument that funds spent on "environmental planning, site remediation, or paying costs for *cancelling* border-barrier construction," Br. 42, are not legitimate expenditures on barrier-system construction projects. *See, e.g.*, 48 C.F.R. pt. 49, subpt. 49.2 (regulations governing certain mandatory costs for contract cancellation). The GAO rejected these same arguments because DHS was entitled to undertake environmental review and consultation "in light of changed circumstances," including new policy priorities. ROA.1302.

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The States are further mistaken in suggesting that DHS was required to consider whether the States had any "reliance interests" on the prior Administration's immigration policy prerogatives. Br. 46-47. There is no analogue in this case to the reliance interests in *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020). That case challenged the termination of a program that provided immigration benefits to a specific group of individuals brought to the United States as children, and the Court recognized the reliance interests of those beneficiaries. *See id.* at 1914. The States allege no particular benefit that would be conferred on them, individually, by DHS's previously planned construction of barriers near Laredo or in California. They certainly cannot claim reasonable reliance on the border-barrier project funded by the 2020 appropriation because DHS was not close to breaking ground, while the 2021 appropriation is being spent primarily to render partially completed projects safe and effective for their intended purpose. It would be unreasonable in any event for States to develop "reliance interests" on particular border-security measures or on particular levels of migration to the United States, when the number of displaced people is affected by war, political disruption, and other unpredictable variables. And unlike in *Texas II*, where Texas sought to rely on "a binding and enforceable commitment," 10 F.4th at 554, no such putative agreement exists here. In any event, the States are simply wrong to suggest that the federal government has changed its "policy to be less protective of the borders." Br. 46.

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The States respond that DHS's explanations of its spending choices are "pretext" for the government's supposedly true motivation to avoid building any border barriers. Br. 38. In support, they lean heavily on the President's commitment that taxpayer dollars will not "be *diverted* to construct a border wall." Br. 39 (emphasis added) (quoting ROA.364). But the President's reference to "diverted" funds was a commitment that there would be no future diversion of military funds from *DoD* for construction of a border barrier. The States' argument thus conflates President Biden's decision to end the diversion of *military* funding for border-barrier construction—which the States do not and cannot challenge—with decisions about how DHS should spend *congressionally appropriated* DHS funds on barrier-system construction. Indeed, the proclamation directed DHS to use its barrier-system construction funds "consistent with their appropriated purpose." 86 Fed. Reg. at 7226.

The States similarly proceed from a mistaken premise in arguing that DHS's plan should have explained why "border barriers do not work and the agency will not construct them." Br. 45. But again: DHS has not refused to construct a border-barrier system; it is addressing unfinished projects, and engaging in necessary preliminary planning steps for new construction. DHS therefore had no cause to address whether border barriers are an effective means of enforcing the Executive's border-security policy. *See* ROA.364-368.

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The States' remaining contentions are equally unpersuasive. The fact that DHS has asked Congress to cancel its 2020 and 2021 appropriations is irrelevant, *cf.* Br. 39-40, because DHS continues to spend the appropriated funds as directed. And the States' asserted concern that the appropriations will expire before construction can take place is ill-founded. The States acknowledge that review and consultation for the Laredo project "will take approximately 12-16 months to complete." Br. 40 (quoting ROA.353). Congress gave DHS five years to spend its appropriation, with two years left to run for 2020 funding and three years for 2021 funds. Construction does not need to be completed within that timeframe if the funds are obligated, for example, by agreement to pay contractors to complete their contractual obligations. Nor do the States consider the possibility that a future Congress will appropriate additional funds to DHS for border-barrier projects, as it did in 2020 and 2021, and has in the past. *See, e.g.*, CAA 2019, § 230, 133 Stat. at 28; CAA 2018, § 230, 132 Stat. at 616.

B. The States' Claims Under The Consolidated Appropriations Acts And The Impoundment Control Act Fail

The States' statutory claims also fail. First, the States face an additional threshold problem: they do not even arguably "fall within the zone of interests protected by the [appropriations statutes] invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129-130 (2014). That limitation reflects the common-sense intuition that Congress does not intend to extend a cause of action to "plaintiffs who might technically be injured in an Article III sense but whose interests are

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unrelated to the statutory prohibitions" they seek to enforce. *Thompson v. North Am. Stainless, LP*, 562 U.S. 170, 178 (2011).

When a plaintiff brings an APA cause of action to challenge the government's compliance with another statute, the "interest he asserts must be 'arguably within the zone of interests to be protected or regulated by the statute' that he says was violated." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012). But where a plaintiff's "interests are so marginally related to . . . the purposes implicit in the statute," it "cannot reasonably be assumed that Congress intended to permit" the plaintiff's suit. *Id.* at 225 (quoting *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987)); *see also Moses v. Banco Mortg. Co.*, 778 F.2d 267, 271 (5th Cir. 1985) (explaining that "parties who receive only unintended or incidental benefits from statutes or regulations are outside the zone of interests to be protected").

The States are not proper parties to enforce the Consolidated Appropriations Acts of 2020 and 2021 (CAAs) or the ICA. Nothing in the text or the "the purposes implicit" in those statutes, *Patchak*, 567 U.S. at 225 (quoting *Clarke*, 479 U.S. at 399), suggests that Congress intended to protect any interests besides those of *DHS* and *Congress* in the federal spending and appropriations process. There is no indication that Congress contemplated suits seeking to advance the interests of a state who asserts that federal spending decisions indirectly harm its tax revenue or budget; the

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CAAs do not require DHS to consider the impact on state budgets or tax revenue or constrain DHS's spending discretion in order to protect a state's interests.

The States identify no case in which a state government was found to be within the zone of interests protected by a federal appropriations statute. To the contrary, in *Trump v. Sierra Club*, 140 S. Ct. 1 (2019), the Supreme Court held that "the Government ha[d] made a sufficient showing" that the parties challenging DoD's border-barrier spending "have no cause of action to obtain review" of actions taken under DoD's appropriations statute, and accordingly stayed the district court's permanent injunction pending the government's appeal. *Patchak* forecloses their contention, Br. 36, that this Court should consider interests under the Immigration and Nationality Act. *See* 567 U.S. at 224 (plaintiff must fall within zone of interests of the statute "that he says was violated"). And contrary to the States' suggestions, *see* Br. 35, the zone-of-interests test "is a 'requirement of general application'" that "always applies and is never negated." *Lexmark*, 572 U.S. at 129 (emphasis in original) (quoting *Bennett*, 520 U.S. at 163–64).

Nor can the States enforce the ICA. That statute ensures that the Executive Branch incurs obligations in accordance with congressional appropriations and does not impound funds absent appropriate congressional oversight. *See* 2 U.S.C. §§ 683-685. Only the Comptroller General is empowered to enforce it. *Id.* § 687. The statute thus regulates the relationship between the Executive and Congress, and States alleging that they must provide benefits to migrants because of federal immigration

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policy are not "reasonable" or "predictable" challengers under the ICA. *Patchak*, 567 U.S. at 227-28.

The States' statutory claims fail on the merits as well. Not every delay in obligating or spending funds violates the ICA. Rather, "[l]egitimate programmatic delays may occur when the agency is taking reasonable and necessary steps to implement a program, even though funds temporarily go unobligated." Congressional Committees, B-329092, 2017 WL 6335684, at *1 n.6 (Comp. Gen. Dec. 12, 2017); *see also City of New Haven v. United States*, 809 F.2d 900, 901 (D.C. Cir. 1987). As discussed *supra*, Part II.A, DHS's expenditures are reasonable before the agency can begin construction.

The GAO agrees. When members of Congress asked GAO to assess whether DHS's plan, which announced a "replanning process" that anticipates modifications to existing contracts, *see* ROA.343, would violate the ICA, GAO found "nothing to indicate that . . . DHS is attempting to override congressional intent that these funds be used for constructing barriers at the southern border." ROA.1302. Rather, GAO concluded that "[p]rior year funding for border fencing or barriers remains obligated for construction projects, and continues to be spent," and that DHS had "met [its] burden" of showing that "meeting the conditions of applicable laws, absent their waiver, must precede obligation of funds for new projects." ROA.1299, 1302. As the States have previously acknowledged, ROA.1211, GAO's views are entitled to "special weight" in light of "its accumulated experience and expertise in the field of

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government appropriations." *Nevada v. Department of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005) (quoting *International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984)). And contrary to the States' assertions, Br. 43-44, the GAO decision establishes that DHS has not unlawfully withheld its fiscal year 2020 appropriations from obligation or expended these funds in a way that contravenes its statutory budget authority. *See also supra* pp. 32-40 (explaining that DHS is spending its appropriation correctly).

The States are equally mistaken, Br. 52-53, in suggesting that DHS has unlawfully delayed obligating fiscal year 2021 funds. Congress has given DHS five years to appropriate these funds, *see supra* p. 35, and the ICA "does not impose any specific requirements on the Executive Branch as to the rate at which budget authority must be obligated or expended." In re Henry M. Jackson, United States Senate, B-200685, 1980 WL 14499, at *2 (Comp. Gen. Dec. 23, 1980). Nor is there any legal requirement that funds be "fully obligated as soon as they first become available, regardless of any necessary programmatic or administrative considerations." In re James R. Jones, House of Representatives, B-203057 L/M, 1981 WL 23385, at *4 (Comp. Gen. Sept. 15, 1981). DHS will obligate funds for ground-breaking construction activities after it has completed necessary environmental planning, stakeholder consultation and land acquisition.

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C. DHS Did Not Violate The Constitution

The States' claims alleging violations of the separation of powers and the Take Care Clause likewise fail. As with their statutory claims, the States cannot satisfy the zone-of-interests requirement for these claims. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (plaintiffs' complaint must "fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question'"); *cf.* Br. 34-35. The States' asserted financial injuries are entirely unrelated to the interests protected by the Constitution's requirement that the President "take Care that the Laws be faithfully executed," U.S. Const. art. 2, § 3, or by the Constitution's separation-of-powers doctrine.

On the merits, the States cannot succeed by repackaging their statutory claims as alleged constitutional violations. Not "every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution." *Dalton v. Specter*, 511 U.S. 462, 472 (1994). Indeed, "claims simply alleging that the President has exceeded his statutory authority are *not* 'constitutional' claims." *Id.* at 473 (emphasis added). Instead, the Constitution is implicated only if executive officers rely on it as an independent source of authority to act, or if the officers rely on an unconstitutional statute. *Id.* at 473 & n.5.

Neither situation applies here. The States do not contend that either the CAAs or the ICA are unconstitutional. And DHS is executing its border wall plan pursuant to IIRIRA and the CAAs, not independent Article II authority. The States' glancing

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separation-of-powers argument, Br. 54, turns entirely on whether DHS's plan is in accordance with the terms of the CAAs and the ICA, and does not require application of constitutional principles. The States' claim under the Take Care Clause is likewise predicated entirely on allegations that DHS has refused to follow Congress's mandate in the CAAs. Accordingly, under *Dalton*, this case concerns whether DHS has "exceeded [its] statutory authority," a non-constitutional "issue[] of statutory interpretation." *Dalton*, 511 U.S. at 473-74, 474 n.6. The States' reliance on *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1234 (9th Cir. 2018), is misplaced. Plaintiffs there alleged that an Executive Order violated the Constitution, but not any federal statute, and *Dalton* did not bar the claim.

The States' Take Care Clause claim fails for the additional reason that the States identify no precedent for using the Take Care Clause as a mechanism to obtain affirmative relief against the President or Executive Branch agencies. Rather, the Supreme Court has recognized that "the duty of the President in the exercise of the power to see that the laws are faithfully executed" "is purely executive and political" and not subject to judicial direction. *Mississippi v. Johnson*, 71 U.S. 475, 499 (1866). Accordingly, it is well settled that federal courts lack jurisdiction to "enjoin the President in the performance of his official duties." *Id.* at 501. The States' alternative approach—which would require the Judicial Branch to superintend the exercise of the President's Executive power—would raise serious separation-of-powers concerns. *See Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (plurality opinion); *Swan v.*

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Clinton, 100 F.3d 973, 978 (D.C. Cir. 1996) (observing that "the President, like Congress, is a coequal branch of government, and for the President to be ordered to perform particular executive . . . acts at the behest of the Judiciary[] at best creates an unseemly appearance of constitutional tension and at worst risks a violation of the constitutional separation of powers" (first alteration in original) (quotation marks omitted)).

In any event, the President and DHS have satisfied their obligations under the Take Care Clause. As explained above, the proclamation emphasizes that DHS must comply with the CAAs by expending funds "appropriated for wall construction, consistent with their appropriated purpose." 86 Fed. Reg. at 7226. And DHS, consistent with the President's policy objectives and the congressional mandate, is presently spending its appropriations "for the construction of barrier system along the southwest border" in furtherance of that purpose.

III. The States Have Failed To Demonstrate That Their Proposed Preliminary Injunction Would Be Appropriate Relief

The States likewise fail to establish that the remaining preliminary injunction considerations—likelihood of irreparable harm, the public interest, and the balance of equities—all weigh against injunctive relief. Further, the proposed injunction the States are seeking would be both ineffectual and overbroad. For these reasons as well, their action fails.

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A. To begin, the States cannot show that they are likely to suffer any injury as a result of the policy changes with respect to border-barrier construction, much less the sort of substantial and immediate injury that would justify entry of an injunction. *See supra* pp. 19-22. The States contend that DHS's decision to delay construction pending environmental review will result in many more migrants illegally crossing the border to Texas and consuming social services at state expense. Br. 58-60. But this argument overlooks the fact that none of the construction projects that were initially planned were even close to being underway by the time the proclamation and plan were issued. The record is entirely devoid of evidence that DHS's decision to take additional planning steps as required by statutes before breaking ground will increase the States' social-services costs. As explained above, *supra* p. 19-22 (standing analysis), the States cannot demonstrate any link between the agency's plan and the increase in illegal migration they hypothesize.

Moreover, DHS has until 2024 and 2025 to obligate appropriated funds from CAA 2020 and CAA 2021, respectively. The threat of these funds lapsing and becoming unavailable for obligation is many years off, and cannot constitute irreparable harm now. The States identify no law that would impose a duty on DHS to construct a border barrier at a faster pace when the agency is faithfully complying with Congress's directive to spend its appropriations by engaging in necessary preparatory steps, and by taking action to ensure that unfinished projects are safe and effective. *See* Br. 58.

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The States' own delay in seeking relief demonstrates that they face no imminent or irreparable harm. The President issued his proclamation in January 2021, and DHS issued its plan for implementing the proclamation in June 2021. The States then waited many months to file suit in October 2021 and to move for a preliminary injunction in November 2021. When the district court deferred a decision on that motion until after the Supreme Court decides *Biden v. Texas*, the States waited an additional three weeks before seeking an injunction pending appeal. Dilatory tactics such as these are "an indication that" the States' asserted harms are "not . . . serious enough to justify" the relief they seek. 11A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.1, Westlaw (database updated Apr. 2022).

The final two injunction factors—balance of equities and the public interest—"merge when the government is the opposing party," *Nken v. Holder*, 556 U.S. 418, 435 (2009), and weigh heavily in the government's favor here. Consideration of the environmental effects of planned construction projects and conversations with stakeholders prior to breaking ground are both statutorily required and serve both the government's and the public's interest. *See supra* pp. 33-35. These interests in ensuring that the border-barrier projects mitigate potentially harmful impacts on the environment, border communities, and landowners outweigh the States' interests in minimizing expenditures on social services for a hypothetical increase in the number of noncitizens who are unlawfully present.

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The States do not acknowledge these important public interests. They concede that "the public interest is served in having governmental agencies abide by the federal laws that govern their existence and operations," Br. 59 (quotation marks omitted), but their arguments in support of injunctive relief entirely ignore the public interests that are achieved when DHS abides by the requirements of NEPA and other federal laws before continuing construction projects at the border. And while the States maintain that the public has an interest in "stemming the flow of illegal immigration," Br. 60 (quotation marks omitted), this case is about congressional appropriations, not the immigration laws. The public interest is not served by lawsuits in which States demand that the Judicial Branch step in to micromanage federal agencies' spending decisions.

B. Further, the requested injunction is overbroad. The States seek an order directing DHS to "to enforce and implement the 'construction of barrier system along the southwest border.'" ROA.1426-1427; *see* Br. 17-18. But that does nothing more than restate the terms of the appropriations statutes. The States are not entitled to this type of "obey the law" injunction. Numerous courts—including this one—have rejected such requests for relief as incapable of providing fair notice to the enjoined party of what conduct is required. *See, e.g.*, *Payne v. Travenol Labs., Inc.*, 565 F.2d 895, 898 (5th Cir. 1978); *SEC v. Goble*, 682 F.3d 934, 949 (11th Cir. 2012); *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 144 (2d Cir. 2011).

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And even if the States could demonstrate any basis for an equitable remedy, they would not be entitled to a sweeping nationwide injunction. Article III requires that injunctive relief "be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). Equitable principles likewise require that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Plaintiffs must identify particularized injuries capable of meaningful legal redress, and they must tailor any remedy they seek to those specific injuries. They have failed to do so, and that failure is a sufficient basis to deny a request for equitable relief.

For similar reasons, courts have recognized that nationwide injunctions are improper unless plaintiffs can demonstrate that a narrower injunction would not redress their injuries. *E.g.*, *Virginia Soc'y for Human Life, Inc. v. Federal Election Comm'n*, 263 F.3d 379, 393 (4th Cir. 2001); *see also Arizona*, 2022 WL 1090176, at *10-12 (Sutton, J., concurring). The States offer no reasonable basis for extending the relief they seek to the entire country. Relying on *Texas I*, 809 F.3d at 188, the States contend that "a nationwide injunction is" "necessary" to ensure uniform immigration policy. Br. 60. But this case is not about the application of federal immigration law; the States' suit challenges DHS's authority to spend appropriated funds on certain border-barrier projects. A narrow injunction applicable solely to the parties before

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this Court would be sufficient to redress the States' asserted harms. *Accord Arizona,* 2022 WL 1090176, at *11-12 (Sutton, J., concurring).

CONCLUSION

For the foregoing reasons, this Court should dismiss the appeal or affirm the district court's decision.

Respectfully submitted,

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April 2022

AMERICAN OVERSIGHT

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2022, I electronically filed the foregoing answering brief with the Clerk of the Court for the United States Court of Appeals for the Fifth 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/Anne Murphy
Anne Murphy, Trial Attorney

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,792 words. This brief 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 Garamond 14-point font, a proportionally spaced typeface.

s/Anne Murphy
Anne Murphy, Trial Attorney

AMERICAN OVERSIGHT

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 29, 2022
Lyle W. Cayce
Clerk

No. 22-40110

THE GENERAL LAND OFFICE OF THE STATE OF TEXAS, *Et al.*,

Plaintiffs,

versus

PRESIDENT JOSEPH R. BIDEN, *Et al.*,

Defendants,

STATE OF MISSOURI; STATE OF TEXAS,

Plaintiffs—Appellants,

versus

JOSEPH R. BIDEN, JR., *in his official capacity as President of the United States of America*; UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, *in his official capacity as Secretary of the United States Department of Homeland Security*; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY A. MILLER, *in his official capacity as Acting Commissioner of the United States Customs and Border Protection*; UNITED STATES CUSTOMS AND BORDER PROTECTION,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:21-CV-272
USDC No. 7:21-CV-420

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Before HIGGINBOTHAM, DENNIS, and GRAVES, *Circuit Judges*.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the appeal is DISMISSED as moot.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

Certified as a true copy and issued as the mandate on Jul 29, 2022

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

AMERICAN OVERSIGHT

United States Court of Appeals for the Fifth Circuit

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AMERICAN OVERSIGHT

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for the Southern District of Texas
USDC No. 7:21-CV-272
USDC No. 7:21-CV-420

Before HIGGINBOTHAM, DENNIS, and GRAVES, *Circuit Judges*.

PER CURIAM:*

In October 2021, Missouri and Texas (collectively, the "States") filed a lawsuit challenging an announcement by the Department of Homeland Security (DHS) of new spending priorities for certain funds Congress allocated to construct a barrier system along the nation's southwest border. Specifically, the States alleged that DHS's plan to conduct environmental reviews, engage in stakeholder consultation, and study how to minimize the use of eminent domain violated the terms of Congress's appropriations statutes, the Administrative Procedure Act, the Impoundment Control Act, and the Constitution. The States moved for a preliminary injunction, the case was consolidated with a similar one filed by the Texas General Land Office, and the defendants filed a motion to dismiss. Once briefing was complete, the district court stayed the case until the Supreme Court ruled in *Biden v. Texas*, No. 21-954. The States sought to immediately appeal the stay, characterizing it as a practical denial of their motion for a preliminary injunction. *See Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981). They also moved in this court for an injunction pending appeal which a motions panel carried with the case.

After an expedited hearing before this court and while the case was under advisement, the Supreme Court issued its opinion in *Biden v. Texas*, No. 21-954 (June 30, 2022). By its own terms the district court's stay order

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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expired. The parties submitted post-stay briefing in the district court, and based on the docket activity below, the district court is currently considering the States' pending motion for a preliminary injunction.

In light of the stay's expiration, we directed the parties to submit supplemental briefing or motions addressing whether the States' appeal was moot. The defendants filed a motion to dismiss, arguing that though there never was appellate jurisdiction in this case, the case is also now moot because we cannot grant any effective relief as to an order that is no longer in effect. The States maintain that the district court as a practical matter denied them a preliminary injunction, even without the stay in place, and thus we can grant them effective relief by "reversing" the district court's *de facto* denial of their motion and entering a preliminary injunction ourselves. At the same time, the States are urging the district court to grant their pending motion for a preliminary injunction—the same injunction which they tell us has already been denied.

* * *

"An interlocutory appeal from a temporary stay no longer in effect, like an interlocutory appeal from a since-expired or vacated temporary restraining order, is the paradigm of a moot appeal." *Video Tutorial Servs., Inc. v. MCI Telecommunications Corp.*, 79 F.3d 3, 5 (2d Cir. 1996). "With the conditions underlying the stay having now passed, there is no relief for us to order[.]" *Meierhenry Sargent LLP v. Williams*, 992 F.3d 661, 664 (8th Cir. 2021); *see also 303 Creative LLC v. Elenis*, 746 F. App'x 709, 711–12 (10th Cir. 2018) (unpublished) (appeal from stay assumed to have practical effect of denying injunction moot once stay was lifted); *Muscolino v. Turner*, 104 F. App'x 422, 423 (5th Cir. 2004) (unpublished, per curiam) (appeal from order holding case in abeyance moot because order is no longer in effect). As demonstrated by both the district court's original order and the States'

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actions in the district court, the district court's stay is no longer in effect. We can therefore grant no relief with respect to the expired order. Nor can we review a decision on the States' preliminary injunction that the district court has yet to make. It is clear that the district court will rule on the States' motion in due course, at which point they may seek to appeal any adverse ruling.

We GRANT the defendants' motion and DISMISS AS MOOT the States' appeal. We DENY the States' motion for an injunction pending appeal. THE MANDATE SHALL ISSUE FORTHWITH.

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United States Court of Appeals

FIFTH CIRCUIT
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No. 22-40110 State of Missouri v. Biden
USDC No. 7:21-CV-272
USDC No. 7:21-CV-420

Dear Mr. Ochsner,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Nancy F. Dolly, Deputy Clerk
504-310-7683

cc: Mr. Ryan Baasch
Mr. H. Thomas Byron III
Ms. Amanda Mundell
Ms. Anne M. Murphy
Mr. Dean John Sauer
Mr. Michael Shih
Mr. Judd Edward Stone II
Mr. Michael Everett Talent
Mr. Ryan Daniel Walters

AMERICAN OVERSIGHT

No. 22-40110

In the United States Court of Appeals
For the Fifth Circuit

STATE OF MISSOURI, STATE OF TEXAS,
Plaintiffs-Appellants,

v.

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

On Appeal from the United States District Court
for the Southern District of Texas, McAllen Division
The Honorable Micaela Alvarez, United States District Judge

OPPOSITION TO MOTION TO DISMISS APPEAL

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AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

Introduction

The government's motion to dismiss this appeal is meritless and underscores (1) that this case is not moot, (2) that appellate jurisdiction exists, and (3) that the States are entitled to relief. The Court should deny the motion and reverse the district court's refusal to grant the States' preliminary relief.

I. This appeal is not moot.

The government first argues that the appeal is moot. *See* Mot. Dismiss Appeal ¶ 2. The government is wrong.

An appeal is moot if "it is impossible for a court to grant any effectual relief whatever to the" States. *Spell v. Edwards*, 962 F.3d 175, 179 (5th Cir. 2020) (quoting *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012) (quotations omitted)). In the context of interlocutory appeals from grants or denials of preliminary injunctions, the question is whether an "order of this Court could affect the parties' rights with respect to the injunction [the Court is] called upon to review." *NCNB Tex. Nat'l Bank v. Southwold Assocs.*, 909 F.2d 128, 129 (5th Cir. 1990) (quoting *Marilyn T., Inc. v. Evans*, 803 F.2d 1383 (5th Cir. 1986) (quoting another source)).

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This Court can provide the States relief. The States have appealed the district court's constructive denial of their preliminary injunction request. *See* Br. Appellants 18–21. That denial remains in effect. Thus, the harms that prompted this lawsuit and the States' request for relief—the government's refusal to construct border barriers—remains. Reversal will therefore provide the States "effectual relief." *See*, *e.g.*, *Spell*, 962 F.3d at 179.

The government's position rests on its view that the district court's order denying the States' preliminary injunction motion "has now expired by its own terms" because the Supreme Court issued *Biden v. Texas*, 142 S. Ct. 2528 (2022). Mot. Dismiss Appeal ¶¶ 1–2. That makes no sense; denials, by their nature, do not "expire."

Thus, the government's cases are inapposite, for they deal with appeals from orders *granting* injunctions—that is, orders requiring the appellant to do or not do something. *See Video Tutorial Servs., Inc. v. MCI Telecomms. Corp.*, 79 F.3d 3, 5 (2d Cir. 1996) (per curiam) (dismissing an appeal from a district court's order staying the arbitration until the parties had engaged in mediation proceedings); *Hardin v. Ardoin*, 2021 WL 4843709, at *1 (5th Cir. May 17, 2021) (per curiam) (dismissing an appeal

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from a preliminary injunction ordering "the State of Louisiana to continue several COVID-19 emergency voting measures"); *Hi-Line Elec. Co. v. Dowco Elec. Products*, 765 F.2d 1359, 1363 (5th Cir. 1985) (dismissing an appeal from an injunction prohibiting a party "from contacting or selling products to the customers" of another party where the injunction "expired by its own terms"). Such appeals can become moot if "the terms of the injunction … have been fully and irrevocably carried out." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 393–94 (1981); *see also Honig v. Students of Cal. Sch. for the Blind*, 471 U.S. 148, 149 (1985) (per curiam); *Brown v. New Orleans Clerks & Checkers Union Local 1497*, 590 F.2d 161, 164 (5th Cir. 1979). That cannot happen where, as here, the appeal involves a *denial* for injunctive relief. A denial has no terms to carry out and no expiration date. Thus, this appeal is not moot.

II. There is appellate jurisdiction because the district court constructively denied the States' preliminary injunction.

The government next re-argues that this Court lacks appellate jurisdiction.[1] Mot. Dismiss Appeal ¶ 3. Because the district court's order has

[1] The government says "subject-matter jurisdiction" when it means appellate jurisdiction. *See* Mot. Dismiss Appeal ¶ 3. The two are distinct.

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"expired," so the government says, "plaintiffs have no plausible argument that the expired order will cause them any harm whatsoever." *Id.*

The government provides no authority for the proposition that events that occur after the filing of a notice of appeal render an otherwise appealable decision un-appealable. It is unsurprising that no such authority exists. The jurisdictional question in such circumstances is not whether the circuit court has appellate jurisdiction—which turns on the application of a statutory grant of appellate jurisdiction like 28 U.S.C. § 1291 or § 1292(a) and of Appellate Rules 3 and 4—but whether the appeal is moot. Thus, for example, a final judgment on the merits moots an appeal from a preliminary injunction; it does not render a decision that is appealable under 28 U.S.C. § 1292(a)(1) un-appealable. *See Capriole v. Uber Techs., Inc.*, 991 F.3d 339, 343 (1st Cir. 2021).

Thus, the government's argument on this point re-hashes its arguments that this Court lacks appellate jurisdiction and that the appeal is

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See, e.g., *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884) ("On every writ of error or appeal the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes."); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). So what the government calls "subject-matter jurisdiction," the States will refer to as "appellate jurisdiction."

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moot by conflating the two. As to the former, this Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1) for the reasons the States set out in their briefs. *See* Br. Appellants 18–21; Reply Br. 3–5. As to the latter, this appeal is not moot for the reasons discussed above and in the States' letter brief filed on July 12, 2022.

III. The government's amended border wall plan definitively establishes that DHS has *no* intention of building another foot of border wall and that the States are entitled to relief.

Finally, the government says dismissal is proper because "DHS announced that it will alter the spending plan whose lawfulness plaintiffs are contesting" and "this decision is consistent with the" FY2020 and FY2021 Appropriations. Mot. Dismiss Appeal ¶ 4. But the government does not say why that is supposedly the case, so it is an insufficient basis on which to decide the appeal. *See*, *e.g.*, *Sanders v. Unum Life Ins. Co. of Am.*, 553 F.3d 922, 926 (5th Cir. 2008) ("A party waives an issue if he fails to adequately brief it on appeal. Merely mentioning a claim does not constitute a supported argument or adequate briefing.") (quotations omitted); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam).

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Again, the government's failure to flesh out its argument is not surprising, because the opposite conclusion is true. The amended plan does not justify dismissal; it justifies ruling in the States' favor. That is because, first, the government concedes that the States were right all along: There is *no* plan to construct another foot of border wall, and there is a definitive decision by DHS *not* to do so. *See*, *e.g.*, Br. Appellants 1, 16, 38, 40, 44–45; Reply Br. 13–15. Instead of engaging in any actual barrier construction, under the amended plan, DHS will now "spend its remaining funds on [1] continued remediation activities for border barrier projects previously executed by the Department of Defense and [2] on border-barrier system *attributes* (such as cameras, flood lighting, and other detection technologies) in areas where physical barriers *have already been constructed*." Mot. Dismiss Appeal ¶ 3 (emphasis added). There is no intention to engage in border-*barrier* construction.

Thus, the amended plan contradicts the government's previous representations that "DHS intends to issue contracts 'to cover both the completion of the design of barrier system proposed for the … Laredo Sector and *its actual construction*.'" Br. Appellees 35–36 (emphasis added)

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(quoting ROA.359–60).[2] DHS has no such intention, and its claims to the contrary are clearly pretext and *post hoc* rationalizations. *See* Br. Appellants 38–44, 45. Its unexplained reversal in policy is arbitrary and capricious; the reversal is also contrary to the Constitution, to the rules relating to the executive's use of congressional appropriations, and to Congress's direct mandate in the FY2020 and FY2021 appropriations for the government to *build border barriers*.

Further underscoring that an injunction is warranted is the fact that DHS's amended plan implicitly acknowledges that walls work. According to the amended plan, border barrier system attributes "will *enhance* the functionality of previously constructed barrier." U.S. Dep't of Homeland Security, *DHS Update on Border Wall Remediation Efforts* (July 11, 2022), https://perma.cc/NRA6-ZU4Z (emphasis added). Some of that improved "functionality" comes in the form of greater "domain awareness for Border Patrol agents and awareness when breaching activity is detected." *Id.* That is—as the government's filing about the amended plan

[2] Not only does DHS's amended plan undermine this statement, but the quote the government provides in its brief misstates the record. The full quote supports the States' position. *See* Reply Br. 13–14.

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in the district court says—border barrier system attributes provide "agents with the ability to [*inter alia*] track and respond to *illicit cross-border activity* more effectively . . . ." Ex. A, at 7 ¶ 14 (ECF 52-1) (emphasis added).[3] Thus, in its amended plan, the government effectively admits that walls *do* prevent "illicit cross-border activity," *id.*—most notably, illegal border crossings.

Furthermore, the government admits that barrier system attributes "*enhance* the functionality of previously constructed barrier" to prevent illegal border crossings. That statement concedes the ability of border walls to prevent illegal border-crossings on their own because "enhance" requires some preexisting level of ability. *See Enhance*, Am. Heritage Dictionary (5th ed. 2018) (defining "enhance" as "[t]o improve or augment, especially in *effectiveness*, value, or attractiveness") (emphasis added). Thus, DHS's rationale for spending FY2020 and FY2021 funds on barrier system attributes concedes a key aspect of the States' case:

[3] The contents of court filings are subject to judicial notice. *See, e.g.*, *United States ex rel. Long v. GSDMIdea City, L.L.C.*, 798 F.3d 265, 274 & n.7 (5th Cir. 2015) (citing, *inter alia*, *Johnson v. Deutsche Bank Nat'l Trust Co.*, 2013 WL 3810715, at *8 (N.D. Tex. July 23, 2013)).

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walls work. DHS's failure to address that fact when it decided *not* to build border walls underscores that its decision is manifestly arbitrary and capricious. *See*, *e.g.*, Br. Appellants 50–51; Reply Br. 2.[4]

Conclusion

For those reasons, the States respectfully request that the Court deny the government's motion to dismiss and reverse the district court's denial of their preliminary injunction.

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[4] The government also says that "[t]o the extent that plaintiffs nevertheless wish to challenge the altered plan, their claims must be presented to the district court in the first instance." Mot. Dismiss Appeal ¶ 3. It is unclear what the government means by that, and so—again—it provides no basis for dismissing the appeal. *See*, *e.g.*, *Sanders*, 553 F.3d at 926.

Regardless, that the amended plan is—by the government's admission—"consistent with the principles of DHS'[s] spending plan," Mot. Dismiss Appeal ¶ 3 (quotations omitted), means that that the amended plan is part and parcel of DHS's original plan for the FY2020 and FY2021 appropriations. Thus, DHS has not looked at "the problem afresh by taking new agency action," *Biden v. Texas*, 142 S. Ct. 2528, 2544 (2022) (quotations and emphasis omitted), and so there is no reason why the amended plan must be first addressed by the district court, *see Akiachack Native Community v. U.S. Department of Interior*, 827 F.3d 100, 113 (D.C. Cir. 2016) (noting that mootness occurrs only "when an agency has *rescinded* and *replaced* a challenged regulation") (emphases added).

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AMERICAN OVERSIGHT

MO-AG-23-0462-A-000716

Certificate of Service

On July 22, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ *Michael E. Talent*
Counsel for Appellants

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,897 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word (the same program used to calculate the word count).

/s/ *Michael E. Talent*
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AMERICAN OVERSIGHT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF MISSOURI, 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.

No. 22-40110

REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL

Pursuant to Fed. R. App. P. 27(a)(4), defendants-appellees respectfully submit this reply in support of their motion to dismiss the States' appeal.

1. As the dismissal motion explained, the States' appeal is moot. The only order on appeal is the district court's order temporarily deferring ruling on the States' request for injunctive relief. That order expired on June 30, 2022, when the Supreme Court decided *Biden v. Texas*, 142 S. Ct. 2528 (2022), and the parties subsequently filed supplemental briefs on the Court's decision in district court. Because the district court's temporary stay of proceedings is no longer in effect, and because the court is now considering the States' request for injunctive relief, the issue on appeal—whether the district court improperly denied the States relief—is "no longer 'live.'" *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

The States' sole rejoinder is that a "denial[]" cannot "expire" and that the

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court's "constructive denial" of the States' "preliminary injunction request . . . remains in effect." Response 2. But that misunderstands the district court's order. The district court did not "constructive[ly] den[y]" the States' request for a preliminary injunction, *see* Gov. Br. 14-18 and *infra*. And even if it had, the order is no longer in effect, so there is nothing left for this Court to review. The district court is currently considering the States' request for injunctive relief in light of the parties' supplemental briefs, and the States have failed to identify any persuasive reason why this Court should pretermit the district court's ability to do so.

2. As the dismissal motion further explained, this Court should alternatively dismiss the appeal because the States have failed to demonstrate that the district court's order was appealable under 28 U.S.C. § 1292(a)(1). In response, the States simply assert that the district court's order was "an otherwise appealable decision." Response 4. But even if that were true when the order was issued (and it was not, *see* Gov. Br. 14-18), the States have failed to explain how the district court's order could possibly "present[] a threat of serious[or] irreparable consequences" when the order has expired by its own terms, or why those consequences "may be effectively addressed only by an immediate appeal" instead of by the district court in the first instance. *Sherri A.D. v. Kirby*, 975 F.2d 193, 203-04 (5th Cir. 1992); *see also Rauscher Pierce Refsnes, Inc. v. Birenbaum*, 860 F.2d 169, 171 (5th Cir. 1988).

3. The remainder of the States' response is devoted to attacking the agency's amendment to its spending plan and arguing why they should still succeed on

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the merits of their motion for an injunction pending appeal. Response 5-9. Insofar as the States wish to raise new arguments pertaining to the amendment, *see* Response 5-6, those arguments should be addressed by the district court in the first instance, with the benefit of the supplemental briefs the parties filed on July 14. This Court should not grant the States' request for an injunction when the plan they seek to enjoin has materially changed.

For these reasons, the Court should dismiss the States' appeal.

Respectfully submitted,

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JULY 2022

AMERICAN OVERSIGHT

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2022, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the CM/ECF system.

Amanda L. Mundell
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CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this motion complies with the word limitations of Fed. R. App. P. 27(d)(2)(A) because it contains 528 words, according to the count of Microsoft Word 2016.

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AMERICAN OVERSIGHT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF MISSOURI, 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.

No. 22-40110

MOTION TO DISMISS APPEAL

Pursuant this Court's order of July 5, 2022, which directed the parties to submit either a letter brief or a motion for appropriate relief, defendants-appellees respectfully move to dismiss plaintiffs' appeal as moot or, in the alternative, for want of subject-matter jurisdiction. On July 11, counsel for the government sought the States' position on this motion but have not received a response.

1. This case concerns the Department of Homeland Security's (DHS) plan for spending funds appropriated by Congress "for the construction of barrier system along the southwest border" in Fiscal Years 2020 and 2021. *See* Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, div. D, tit. II, 133 Stat. 2317 (2019); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. F, tit. II, 134 Stat. 1182 (2020). In January 2021, President Biden issued a proclamation directing DHS

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to reassess its barrier-spending policies. 86 Fed. Reg. 7225 (Jan. 27, 2021). In June 2021, DHS issued the spending plan at issue.

In October 2021, Missouri and Texas filed this lawsuit challenging the policies announced in the President's proclamation and DHS's spending plan. ROA.5. The States sought a preliminary injunction directing the government to spend its appropriations on the construction of physical border barriers at the States' preferred locations. ROA.8. The district court deferred consideration of that motion pending the Supreme Court's decision in *Biden v. Texas*, No. 21-954, which the court stated would "inevitably impact this case." ROA.1026. The deferral order directed the parties to file supplemental briefs "within fourteen days after the issuance of the Supreme Court's opinion in *Biden v. Texas*." *Id.* The States appealed the deferral order and sought an injunction pending appeal. This Court ordered that the motion be carried with the case and heard oral argument on May 11, 2022, following briefing on both the motion and the merits.

On June 30, 2022, the Supreme Court decided *Texas*. The district court's deferral has therefore expired, and supplemental briefing is now underway. The parties' briefs are due on July 14, 2022.

2. This Court should dismiss the States' appeal as moot. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). The deferral order temporarily stayed consideration of plaintiffs' preliminary-injunction motion

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until the Supreme Court decided *Texas*. That order has now expired by its own terms. The parties are currently engaged in supplemental briefing on plaintiffs' preliminary-injunction motion, which will conclude on July 14—two days from today. Accordingly, no live controversy remains for this Court to resolve. *See, e.g.*, *Video Tutorial Servs., Inc. v. MCI Telecommunications Corp.*, 79 F.3d 3, 5 (2d Cir. 1996) ("An interlocutory appeal from a temporary stay no longer in effect, like an interlocutory appeal from a since-expired or vacated temporary restraining order, is the paradigm of a moot appeal."); *Harding v. Ardoin*, No. 20-30632, 2021 WL 4843709, at *1 (5th Cir. May 17, 2021) (per curiam) (appeal moot where preliminary injunction "expired by its own terms"); *Hi-Line Elec. Co. v. Dowco Elec. Prods.*, 765 F.2d 1359, 1364 (5th Cir. 1985) (holding that the "appeal is moot because the injunction which it attacks has expired").

3. In the alternative, the Court should dismiss this appeal for want of subject-matter jurisdiction because the district court's now-expired order was not appealable under 28 U.S.C. § 1292(a)(1). *See Steel Co. v. Citizens for a Better Environ.*, 523 U.S. 83, 105 (1998) (holding that courts may choose between threshold jurisdictional grounds when dismissing a case).

As we have explained, § 1292(a)(1) permits an appeal from orders "granting, continuing, modifying, refusing[,] or dissolving injunctions." Gov. Br. 14-18. The district court's order did none of those things; it merely stayed consideration of the States' preliminary-injunction motion pending the Supreme Court's decision in *Texas*.

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The order was therefore an archetypal case-management order pertaining "only to the conduct or progress of litigation before [the] court." *Rauscher Pierce Refsnes, Inc. v. Birenbaum*, 860 F.2d 169, 171 (5th Cir. 1988) (quotation marks omitted).

Such orders are appealable only if the appealing party can show both that the order "presents a threat of serious, perhaps irreparable consequences," and that those consequences "may be effectively addressed only by an immediate appeal." *Sherri A.D. v. Kirby*, 975 F.2d 193, 203-04 (5th Cir. 1992) (applying *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981)); *see also Rauscher*, 860 F.2d at 171 (holding that a stay order falling short of this standard was not immediately appealable). Plaintiffs could not make such a showing even before the order expired. Gov. Br. 16-17. But now that the order has expired and briefing on plaintiffs' preliminary-injunction motion will conclude in two days, plaintiffs have no plausible argument that the expired order will cause them any harm whatsoever, to say nothing of the "serious or irreparable harm" that *Carson* requires as a predicate to treating a temporary stay as the practical equivalent of the denial of injunctive relief. *Carson*, 450 U.S. at 86.

4. Recent developments further underscore why plaintiffs' appeal should be dismissed. On July 11, 2022, DHS announced that it will alter the spending plan whose lawfulness plaintiffs are contesting. U.S. Dep't of Homeland Security, *DHS Update on Border Wall Remediation Efforts*, https://perma.cc/NRA6-ZU4Z (July 11, 2022). As the announcement explained, DHS has determined that previous "incomplete border barrier construction projects" continue to present "significant life,

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safety, and environmental hazards" that will require "long-term environmental remediation and mitigation" and entail "higher-than-expected remediation costs." *Id.* Additionally, DHS has determined that "complet[ing] the installation of border barrier system attributes (lights, cameras, and detection technology), as previously planned and funded, in locations where physical barrier has already been constructed," "will enhance the functionality of previously constructed barrier," "provide . . . domain awareness for Border Patrol agents . . . when breaching activity is detected," and is consistent with the principles of" of DHS' spending plan. *Id.* DHS will therefore spend its remaining funds on continued remediation activities for border barrier projects previously executed by the Department of Defense and on border-barrier system attributes (such as cameras, flood lighting, and other detection technologies) in areas where physical barriers have already been constructed. As the announcement states, this decision is consistent with the Consolidated Appropriations Acts of 2020 and 2021, which allocate funding for "the construction of barrier system" generally and not for the construction of physical barriers specifically. Public Law 116-93, Div. D, Tit. II, § 209(a)(1) (Dec. 20, 2019); Public Law 116-260, Div. F, Tit. II, § 210 (Dec.

AMERICAN OVERSIGHT

27, 2020). To the extent that plaintiffs nevertheless wish to challenge the altered plan, their claims must be presented to the district court in the first instance.

For these reasons, the Court should dismiss this appeal.

Respectfully submitted,

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JULY 2022

AMERICAN OVERSIGHT

MO-AG-23-0462-A-000727

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2022, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the CM/ECF system.

Amanda L. Mundell
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I hereby certify that this motion complies with the requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this motion complies with the word limitations of Fed. R. App. P. 27(d)(2)(A) because it contains 1,134 words, according to the count of Microsoft Word 2016.

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AMERICAN OVERSIGHT

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May 31, 2022

VIA CM/ECF
Lyle W. Cayce
Clerk, United States Court of Appeals for the Fifth Circuit
F. Edward Herbert Building
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: *Missouri v. Biden*, No. 22-40110 (5th Cir.) (Argued May 11, 2022)

Dear Mr. Cayce:

Pursuant to FRAP 28(j), we write to inform the Court that on May 27, 2022, the U.S. Department of Homeland Security (DHS) issued a press release addressing upcoming projects that will be funded with DHS's appropriations for Fiscal Years 2017, 2018, and 2021.

As described in the press release, the Secretary of Homeland Security has authorized the use of appropriations, including funds from Fiscal Year 2021, for, among other things, "[c]onstructing" or "[c]ompleting" gates at existing sites along the border, and closing gaps in the barrier at certain sites. U.S. Dep't of Homeland Security, *DHS to Address Life, Safety, Environmental, and Operational Considerations for Border Barrier Projects in California, Arizona, and Texas*, https://www.dhs.gov/news/2022/05/27/dhs-address-life-safety-environmental-and-operational-considerations-border-barrier (May 27, 2022). The agency has also "begun environmental planning . . . for not yet completed projects in accordance with the Department's plan." *Id.* With respect to the remaining appropriations, DHS announced that it is "assess[ing] . . . whether those funds would be most effective if used in certain locations to install barrier system attributes." *Id.* Unless that assessment results in a different plan for expenditures or "Congress . . . cancel[s] remaining appropriations," the agency will "continue[] to follow the plan" it previously adopted. *Id.*

AMERICAN OVERSIGHT

Sincerely,

/s/ *Amanda L. Mundell*
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Counsel for Appellees

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2022, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Fifth 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/ Amanda L. Mundell
AMANDA L. MUNDELL

CERTIFICATE OF COMPLIANCE

I certify that this letter complies with the word limitations of Fed. R. App. P. 28(j) because it contains 206 words.

/s/ Amanda L. Mundell
AMANDA L. MUNDELL

AMERICAN OVERSIGHT

Homeland Security

U.S. Department of Homeland Security

DHS to Address Life, Safety, Environmental, and Operational Considerations for Border Barrier Projects in California, Arizona, and Texas

Release Date: May 27, 2022

WASHINGTON – Secretary of Homeland Security Alejandro N. Mayorkas authorized U.S. Customs and Border Protection (CBP) to move forward with projects in the San Diego, El Centro, Yuma, El Paso, and Rio Grande Valley Sectors to address life, safety, environmental, or other remediation requirements in accordance with the Department's plan (https://www.dhs.gov/news/2021/06/11/dhs-releases-plan-use-border-barrier-funds) for the use of border barrier funds.

These projects address operational impacts, as well as immediate life and safety risks, and will be funded with DHS's Fiscal Year 2017, 2018, and 2021 appropriations. Work is estimated to begin quickly through existing contracting vehicles.

The projects include:

- Replacing an existing dilapidated train gate with a modernized train gate in El Centro to address current life and safety risks posed to Agents and migrants due to regular train operations.
- Constructing retractable gates underneath an existing bridge across the New River in Imperial County, California to address risks associated with the extremely hazardous river waters.
- Constructing a train and vehicle gate in the El Paso Sector to address current life and safety risks posed to Agents and migrants due to regular train operations.
- Replacing deteriorated barrier located adjacent to Friendship Circle in Imperial Beach, California that has not been properly treated to withstand corrosion from nearby ocean waters and currently poses safety risks to Border Patrol Agents, community members, and migrants.
- Closing a gap by constructing a vertical lift gate system over the Tijuana River to address safety concerns resulting from the polluted conditions of the river channel.
- Closing a small gap in the Yuma Sector that remains as a result of previous border barrier construction activities and poses a life and safety risk to Agents and the community.
- Completing 17 gates and conducting site clean-up work in the Rio Grande Valley Sector that currently makes it difficult for Border Patrol Agents to efficiently access certain areas and for first responders to respond to incidents.

DHS continues to review other paused border barrier projects presenting life, safety, environmental, or other remediation needs and has begun environmental planning, to include planning consistent with the National Environmental Policy Act (NEPA), for not yet completed projects in accordance with the Department's plan.

In addition, as DHS moves forward with the projects announced today, it continues to call on Congress to cancel remaining appropriations for barrier system construction and instead specifically fund smart border security measures, like border technology at and between ports of entry, that are proven to be more effective at improving safety and security at the border. DHS also continues to assess how to best utilize the previously appropriated barrier system funding, including whether those funds would be most effective if used in certain locations to install barrier system attributes. DHS currently continues to follow the plan announced on June 9, 2021.

Keywords

SECRETARY ALEJANDRO MAYORKAS (/KEYWORDS/SECRETARY-ALEJANDRO-MAYORKAS)

Last Updated: 05/27/2022

AMERICAN OVERSIGHT

ATTORNEY GENERAL OF MISSOURI
ERIC SCHMITT

July 12, 2022

VIA CM/ECF

Mr. Lyle W. Cayce
Clerk of Court
U.S. Court of Appeals for the Fifth Circuit
600 Camp St.
New Orleans, LA 70130

RE: *State of Missouri, State of Texas v. Biden, et al.*, No. 22-40110
Appellants' Supplemental Letter Brief

Dear Mr. Cayce:

On February 22, 2022, the district court stayed consideration of the States' preliminary injunction motion "until after the Supreme Court issues its opinion in *Biden v. Texas*" and after the parties provided briefing on the effect of *Biden v. Texas* on pending motions. ROA.1026. The district court's stay decision, as the States noted, constituted a constructive denial of their motion for a preliminary injunction and therefore gave rise to appellate jurisdiction under 28 U.S.C. § 1292(a)(1). *See* Br. Appellants 3, 18–21. On June 30, 2022, the Supreme Court issued its opinion in *Biden v. Texas*, 2022 WL 2347211. On July 5, 2022, this Court asked for supplemental letter briefs on whether the Supreme Court's decision in *Biden v. Texas* meant "this appeal has become moot." The case has not become moot. Appellants pursued an appeal because the district court had not ruled on their motion for preliminary injunction, and its failure to rule constituted a *de facto* denial of the motion. The district court still has not ruled on that motion, and so the controversy remains live.

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* * *

An appeal is moot if "it is impossible for a court to grant any effectual relief whatever to the" Appellants. *Spell v. Edwards*, 962 F.3d 175, 179 (5th Cir. 2020) (quoting *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012) (quotations omitted)). In the context of interlocutory appeals from grants or denials of preliminary injunctions, the question is whether an "order of this Court could affect the parties' rights with respect to the injunction [the Court is] called upon to review." *NCNB Tex. Nat'l Bank v. Southwold Assocs.*, 909 F.2d 128, 129 (5th Cir. 1990) (quoting *Marilyn T., Inc. v. Evans*, 803 F.2d 1383 (5th Cir. 1986) (quoting another source)).

For example, courts have found interlocutory appeals involving injunctions moot where the injunction at issue involved a challenged a law or regulation that was repealed or expired. *See*, *e.g.*, *Ramsek v. Beshear*, 989 F.3d 494, 499 (6th Cir. 2021) (finding a case involving a COVID-19 order moot "[w]ith the lifting of the Order"); *Ohio v. EPA*, 969 F.3d 306, 308 (6th Cir. 2020) ("The problem for the States, for purposes of mootness, is that as a practical matter the Agencies have already provided the States that relief—by formally repealing the 2015 Rule and then replacing it with another. … [A] preliminary injunction against the 2015 Rule's enforcement in Ohio and Tennessee would lack any practical effect upon the rights asserted here."); *Medlock v. Trustees of Ind. Univ.*, 683 F.3d 880, 882 (7th Cir. 2012) (finding an appeal from denial of a preliminary injunction "to prevent enforcement of an academic suspension" moot since "[t]he term of the suspension" expired during the appeal); *cf. Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (noting an appeal is not moot if litigants "remain under constant threat that government officials will use their power to reinstate the challenged restrictions") (quotations omitted). "Once the law is off the books, there is nothing injuring the plaintiff and, consequently, nothing for the court to do." *Spell*, 962 F.3d at 179.

Subsequent events that resolve the parties' rights and duties to each other with respect to the at-issue injunction may also moot an appeal. *See NCNB Tex.*, 909 F.2d at 129 (holding that an appeal over a preliminary injunction was moot where a third party had foreclosed on the property and thus "extinguish[ed] the interests of both sides to this dispute"); *Marilyn T.*, 803 F.2d at 1385 (finding a later, final revocation of a license mooted an appeal seeking an injunction relating to its initial suspension). Similarly, an appeal is moot if "the terms of the injunction … have been fully and irrevocably carried out." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 393–94 (1981) (finding an appeal moot where a party fully complied with positive injunctions before the appeal's resolution); *see also Honig v. Students of Cal. Sch. for the Blind*, 471 U.S. 148, 149 (1985) (per curiam); *Brown v. New Orleans Clerks & Checkers*

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Union Local 1497, 590 F.2d 161, 164 (5th Cir. 1979). And adjudication of the case on the merits typically moots an appeal "because the district court's [decision regarding the preliminary injunction] merges with the final judgment." *Capriole v. Uber Techs., Inc.*, 991 F.3d 339, 343 (1st Cir. 2021).

Nothing similar has happened here. The district court, to be sure, said it was staying consideration of the States' preliminary injunction motion "until after the Supreme Court issues its opinion in *Biden v. Texas*." ROA.1026. But, as noted above and in the States' briefs, *see* Br. Appellants 3, 18–21, that stay was a constructive denial of the motion, and that denial remains in effect so long as the district court has not ruled on the motion. Moreover, the district court is not poised to issue another decision on the States' injunction imminently. By the terms of its stay order, the court intends to receive more briefing and then rule at some unidentified future date, *see* ROA.1026; it has not yet ruled. Furthermore, the conduct that the States are challenging and are seeking to enjoin—the government's refusal to construct border-barriers—continues. *Biden v. Texas* did not alter the policy the States challenge in this case.

Thus, the Supreme Court's decision in *Biden v. Texas* has not affected this Court's jurisdiction or the merits of the case. The *status quo* is the same, and the harms that spurred the States to bring this suit and to seek preliminary relief continue. As a result, "the issue before the" Court—"whether the District Court had abused its discretion" in denying the States preliminary relief—is still live. *Camenisch*, 451 U.S. at 393. Reversing the district court and remanding with instructions to enter a preliminary injunction—as the States have requested—will still "grant effectual relief" to the States. *Spell*, 962 F.3d at 179 (quotations omitted). This appeal is not moot.

Finally, the government just filed a motion to dismiss the appeal as moot or, in the alternative, for want of subject-matter jurisdiction. The States note their opposition and will respond in due course.

AMERICAN OVERSIGHT

Respectfully submitted:

ERIC S. SCHMITT
Attorney General of Missouri

/s/ *D. John Sauer*
D. John Sauer
Solicitor General
John.Sauer@ago.mo.gov

Michael E. Talent
Deputy Solicitor General
Michael.Talent@ago.mo.gov

Maddie McMillian Green
Assistant Attorney General
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Jefferson City, Missouri 65102
Tel.: (573) 751-1800
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Counsel for Plaintiff-Appellant State of Missouri

KEN PAXTON
Attorney General of Texas

Brent Webster
First Assistant Attorney General

Judd E. Stone II
Solicitor General

/s/ *Ryan S. Baasch*
Ryan S. Baasch

Assistant Solicitor General
Ryan.Baasch@oag.texas.gov

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Counsel for Plaintiff-Appellant State of Texas

cc: Counsel for Appellees (via electronic filing)

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2022, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the CM/ECF system, which serve all counsel of record.

/s/ *D. John Sauer*

AMERICAN OVERSIGHT

MO-AG-23-0462-A-000737

To: 'alida.kass@fed-soc.org'[alida.kass@fed-soc.org]
From: Atkins, Jay[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=1502E6E18E4545A38D80CC0069F63728-ATKINS, JAMES]
Sent: Wed 2/14/2024 8:31:14 AM (UTC-06:00)
Subject: Missouri - Standing - Border Wall
22-40110 - Opening Brief.pdf
22-40110 - Opinion.pdf
22-40110 - Opposition to PI Motion.pdf
22-40110 - PI Motion.pdf
22-40110 - Reply Brief.pdf
22-40110 - Reply ISO PI Motion.pdf
22-40110 Response Brief.pdf
Mandate.pdf
Motion to Dismiss - Opposition.pdf
Motion to Dismiss - Reply ISO.pdf
Motion to Dismiss Appeal.pdf
Supplemental Authorities Filed by Appellees.pdf
Supplemental Brief Letter - Appellants.pdf

Ms. Kass,
Please find attached relevant papers in Missouri's ongoing Border Wall case in the 5th Circuit.Please let me know if you have any questions.
Very Best,
Jay

Jay Atkins | Chief of Staff
Missouri Attorney General's Office
207 West High Street
Jefferson City, MO 65101
(573) 751-7890
James.Atkins@ago.mo.gov

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AMERICAN OVERSIGHT

To: Allen, Virginia[Virginia.Allen@heritage.org]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Thur 4/13/2023 11:01:33 AM (UTC-05:00)
Subject: Re: Interview Record Link

Us as well. No worries. Thanks!

Sent from my iPhone

On Apr 13, 2023, at 10:52 AM, Allen, Virginia <Virginia.Allen@heritage.org> wrote:

Hi Madeline,
We have another interview finishing in our studio right at noon today so it may be one or two minutes past the hour when we join the session.

Virginia Allen
Senior
The
214
Washington,

202-608-6149
heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, April 13, 2023 at 10:48 AM
To: Allen, Virginia <Virginia.Allen@heritage.org>, Popp, John <John.Popp@heritage.org>
Subject: RE: Interview Record Link

That all works for us!
Thanks!
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Thursday, April 13, 2023 9:20 AM
To: Popp, John <John.Popp@heritage.org>; Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Interview Record Link
Thanks, John.
Madeline, I am planning on focusing on the three items below during the interview today.

1. Case against the Biden administration with more than 1,400 facts showing that Biden has coerced and colluded with big tech social media companies to censor free speech https://dailycaller.com/2023/03/06/missouri-louisiana-preliminary-injunction-biden-admin-gov-censorship-social-media/ https://dailycaller.com/2023/01/21/andrew-bailey-missouri-root-out-biden-big-tech-censorship/
2. Attempting to oust a Soros-backed prosecutor for refusing to prosecute criminals https://www.foxnews.com/politics/missouri-ag-moves-fire-dem-attorney-kim-gardner-refuses-resign-public-safety-outcry
3. Launching an investigation into an STL pediatric transgender clinic for giving children puberty blockers without proper care https://www.foxnews.com/politics/missouri-attorney-general-launches-investigation-childrens-hospitals-transgender-center

Please let me know if you have any questions or concerns.
Best,
Virginia

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Virginia Allen

Senior

The
214
Washington,

202-608-6149

heritage.org

From: Popp, John <John.Popp@heritage.org>
Date: Thursday, April 13, 2023 at 9:52 AM
To: Madeline.Sieren@ago.mo.gov <Madeline.Sieren@ago.mo.gov>
Cc: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: Interview Record Link

https://riverside.fm/studio/tds_041323_int_mo-ag-andrew-bailey?t=bae5c1f2cad94ad284a4
This is an **audio and video interview** today (4/13/23) at 12 pm/et.
Please use the above link for the interview.
What you need to know before the interview:

- We record interviews via the podcast platform Riverside.fm.
- You need a laptop or desktop computer with a built in or external (preferred) microphone.
- Please**wear ear buds or headphones**you have them.
- You must**use Chrome as your web browser.**sure you are not in stealth or private mode).
- There is also a Riverside app that will work with an iPhone or iPad.

  Go to
  Riverside.fm and download the app.
- Please silence all alerts, ringers, and sounds on your computer, phone or iPad.
- Finally, please**do not leave the sessionuntil your file is uploaded**. We will tell you when it is safe to leave the session.

***** If we are experiencing technical difficulties connecting with you for the interview, we will record via phone. Please provide a phone number where we can reach you for back-up. *****
If you have questions, please call me at 703-307-5884.
Thanks!
John Popp

John Popp

Audio

202-608-6235

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To: O'Neil, Tyler[Tyler.ONeil@heritage.org]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Fri 4/14/2023 3:31:33 PM (UTC-05:00)
Subject: Re: Media Request: Response to Lambda Legal, Axios report

Feel free to do whatever you feel is best for your article!
I've been named quite a bit though so I don't mind.

Also my cell is 573-690-1205 if you ever need it.

Thanks!

Sent from my iPhone

> On Apr 14, 2023, at 3:30 PM, O'Neil, Tyler <Tyler.ONeil@heritage.org> wrote:
>
> Thanks, Madeline! Should I quote you by name or say a spokesperson?
>
> Tyler ONeil
> *Managing*
> The
> 214
> Washington,
>
> 202-608-6046
> heritage.org
>
> **From:** Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
> **Date:** Friday, April 14, 2023 at 4:28 PM
> **To:** Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com>
> **Subject:** Re: Media Request: Response to Lambda Legal, Axios report
>
> Hi Tyler,
> We look forward to defending our regulation in court if we need to.
> I would point these leftist reporters who are ignoring the science to our six pages of endnotes citing to scholarly studies and medical journals supporting that these transition intervention procedures are purely experimental.
> Thanks!
>
> Sent from my iPhone
>
> > On Apr 14, 2023, at 10:28 AM, Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com> wrote:
> >
> > Madeline,
> > Would the AG's office comment on Lambda Legal announcing its intention to combat AG Bailey's order?
> > Would you comment on Axios' reporting emphasizing the American Medic
> > al Association, American Academy of Pediatrics, Endocrine Society, and World Health Organization support for experimental transgender medical interventions? Would Bailey point to other organizations such as Do No Harm or the American College of Pediatricians on the other side of the issue? Many doctors recently testified in Florida about the experimental nature of these interventions (https://www.dailysignal.com/2023/04/11/exclusive-doctors-expose-experimental-gender-affirming-care-truly-florida-medicaid-case/).
> > https://www.axios.com/2023/04/13/missouri-ag-gender-affirming-care
> > I'm working on a 4 p.m. deadline and would appreciate a prompt response.
> > Best,

AMERICAN OVERSIGHT

Tyler O'Neil
(303)956-8499

Tyler O'Neil

Managing

The
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Washington,

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To: 'Allen, Virginia'[Virginia.Allen@heritage.org]; Popp, John[John.Popp@heritage.org]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Thur 4/13/2023 9:48:52 AM (UTC-05:00)
Subject: RE: Interview Record Link

That all works for us!
Thanks!

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Thursday, April 13, 2023 9:20 AM
To: Popp, John <John.Popp@heritage.org>; Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Interview Record Link

Thanks, John.
Madeline, I am planning on focusing on the three items below during the interview today.

1. Case against the Biden administration with more than 1,400 facts showing that Biden has coerced and colluded with big tech social media companies to censor free speech https://dailycaller.com/2023/03/06/missouri-louisiana-preliminary-injunction-biden-admin-gov-censorship-social-media/ https://dailycaller.com/2023/01/21/andrew-bailey-missouri-root-out-biden-big-tech-censorship/
2. Attempting to oust a Soros-backed prosecutor for refusing to prosecute criminals https://www.foxnews.com/politics/missouri-ag-moves-fire-dem-attorney-kim-gardner-refuses-resign-public-safety-outcry
3. Launching an investigation into an STL pediatric transgender clinic for giving children puberty blockers without proper care https://www.foxnews.com/politics/missouri-attorney-general-launches-investigation-childrens-hospitals-transgender-center

Please let me know if you have any questions or concerns.
Best,
Virginia

Virginia Allen

Senior

The
214
Washington,

202-608-6149

heritage.org

From: Popp, John <John.Popp@heritage.org>
Date: Thursday, April 13, 2023 at 9:52 AM
To: Madeline.Sieren@ago.mo.gov <Madeline.Sieren@ago.mo.gov>
Cc: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: Interview Record Link

https://riverside.fm/studio/tds_041323_int_mo-ag-andrew-bailey?t=bae5c1f2cad94ad284a4
This is an **audio and video interview** today (4/13/23) at 12 pm/et.
Please use the above link for the interview.
What you need to know before the interview:

- We record interviews via the podcast platform Riverside.fm.
- You need a laptop or desktop computer with a built in or external (preferred) microphone.
- Please **wear ear buds or headphones** you have them.
- You must **use Chrome as your web browser.** sure you are not in stealth or private mode)

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- There is also a Riverside app that will work with an iPhone or iPad.

  Go to
  Riverside.fm and download the app.
- Please silence all alerts, ringers, and sounds on your computer, phone or iPad.
- Finally, please**do not leave the sessionuntil your file is uploaded**. We will tell you when it is safe to leave the session.

***** If we are experiencing technical difficulties connecting with you for the interview, we will record via phone. Please provide a phone number where we can reach you for back-up. *****
If you have questions, please call me at 703-307-5884.
Thanks!
John Popp

John Popp

Audio

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To: 'Allen, Virginia'[Virginia.Allen@heritage.org]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Wed 4/5/2023 5:34:46 PM (UTC-05:00)
Subject: RE: Missouri Attorney General Andrew Bailey

You too!! Thanks!
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Wednesday, April 5, 2023 4:10 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey

Thank you! I hope you have a wonderful Easter.
Best,
Virginia

Virginia Allen

Senior

The
214
Washington,

202-608-6149

heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Wednesday, April 5, 2023 at 5:08 PM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: RE: Missouri Attorney General Andrew Bailey

Great! Thanks so much!
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Wednesday, April 5, 2023 4:07 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey

Yes, let's go ahead and confirm. Thank you!

Virginia Allen

Senior

The
214
Washington,

202-608-6149

heritage.org

AMERICAN OVERSIGHT

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Wednesday, April 5, 2023 at 4:27 PM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: RE: Missouri Attorney General Andrew Bailey

Sorry for the delay in response. Could we do 12 PM EST on Thursday, April 13?
Thanks,
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Tuesday, April 4, 2023 1:56 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey
Hi Madeline,
No problem. Yes, I am available anytime between 9am – 11am or 12pm – 1:30pm EST on Thursday, April 13.

Virginia Allen

Senior

The
214
Washington,

202-608-6149

heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Tuesday, April 4, 2023 at 2:44 PM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: RE: Missouri Attorney General Andrew Bailey

Hi Virginia,
I'm so sorry- we are going to have to reschedule tomorrow's appearance on the podcast for another day.
Is there any availability for next Wednesday, April 12 in the morning or next Thursday, April 13?
Thanks,
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Wednesday, March 22, 2023 4:21 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey
Thank you!

Virginia Allen

Senior

The
214
Washington,

202-608-6149

AMERICAN OVERSIGHT

heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Wednesday, March 22, 2023 at 4:48 PM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: RE: Missouri Attorney General Andrew Bailey

Sounds great- thank you!
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Wednesday, March 22, 2023 3:20 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey
That's perfect. Thank you. Let's confirm 12 PM EST (11 AM CT) on April 5.

Virginia Allen

Senior

The
214
Washington,

202-608-6149

heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Wednesday, March 22, 2023 at 3:16 PM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: RE: Missouri Attorney General Andrew Bailey

Any time between 11 AM and 12:30 PM EST works for us on April 5. How about 12 PM EST (11AM CT) ?
Thanks very much,
Madeline Sieren
Missouri Attorney General's Office
573-690-1205
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Tuesday, March 21, 2023 8:59 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey
Hi Madeline,
My apologies but I need to move our interview time. Does the Attorney General have any availability between 11am – 12:30pm EST on April 5th?
Best,
Virginia

Virginia Allen

Senior

The

AMERICAN OVERSIGHT

214
Washington,

202-608-6149

heritage.org

From: Allen, Virginia <Virginia.Allen@heritage.org>
Date: Monday, March 20, 2023 at 5:56 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey

Excellent. We record using a platform called Riverside. My audio producer John Popp will send a session link closer to the date of the interview.

What you need to know before the interview:

- ∀We record interviews via the podcast platform Riverside.fm.
- ∀You need a laptop or desktop computer with a built in or external (preferred) microphone.
- ∀Please**wear ear buds or headphones**you have them.
- ∀You must**use Chrome as your web browser.**sure you are not in stealth or private mode).
- ∀There is also a Riverside app that will work with an iPhone or iPad.

Go to Riverside.fm and download the app.

- ∀Please silence all alerts, ringers, and sounds on your computer, phone or iPad.
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*** If we are experiencing technical difficulties connecting with you for the interview, we will record via phone. Please provide a phone number where we can reach you for back-up. *****

If you have questions, please call Heritage Foundation/Daily Signal audio produced John Popp at 703-307-5884.
You can also reach me at 202-870-6243.
Thanks!
Best,
Virginia

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Monday, March 20, 2023 at 9:01 AM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: Re: Missouri Attorney General Andrew Bailey

Hi Virginia,
Let's lock in 1 PM EST on April 5. Would this be a phone call or over zoom?
Thanks!

Sent from my iPhone

> On Mar 17, 2023, at 12:21 PM, Allen, Virginia <Virginia.Allen@heritage.org> wrote:
>
> Excellent. How about Wednesday, April 5 at 1pm EST?
>
> ---
>
> Virginia Allen
>
> *Senior*
>
> The
> 214
> Washington,
>
> 202-608-6149
>
> heritage.org

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From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, March 16, 2023 at 6:11 PM
To: Allen, Virginia <Virginia.Allen@heritage.org>
Subject: RE: Missouri Attorney General Andrew Bailey

Hi Virginia,
Next Wednesday afternoon is free for right now, as is Tuesday the 28 from 2-5 CT, and Wednesday April 5 all day is open. Let me know what would work for you guys and we can get it scheduled.
All the best,
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: Allen, Virginia <Virginia.Allen@heritage.org>
Sent: Thursday, March 16, 2023 4:36 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Missouri Attorney General Andrew Bailey
Hi Madeline,
I would love to have the Attorney General on The Daily Signal Podcast sometime in the coming weeks. Our interviews run about 20 minutes.
Could you send me a few dates and times that will work well for AG Bailey?
Best,
Virginia

Virginia Allen

Senior

The
214
Washington,

202-608-6149

heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, March 16, 2023 at 3:34 PM
To: Bluey, Rob <rob.bluey@heritage.org>, Allen, Virginia <Virginia.Allen@heritage.org>
Subject: Missouri Attorney General Andrew Bailey

Hi,
My name is Maddie Sieren, I'm the press secretary for Missouri Attorney General Andrew Bailey. I am writing to see about getting the AG on to speak about a number of the topics that Missouri is leading the way on:

-Attempting to oust a Soros-backed prosecutor for refusing to prosecute criminals https://www.foxnews.com/politics/missouri-ag-moves-fire-dem-attorney-kim-gardner-refuses-resign-public-safety-outcry
-Launching an investigation into an STL pediatric transgender clinic for giving children puberty blockers without proper care https://www.foxnews.com/politics/missouri-attorney-general-launches-investigation-childrens-hospitals-transgender-center
-Our case against the Biden administration with more than 1,400 facts showing that Biden has coerced and colluded with big tech social media companies to censor free speech https://dailycaller.com/2023/03/06/missouri-louisiana-preliminary-injunction-biden-admin-gov-censorship-social-media/ https://dailycaller.com/2023/01/21/andrew-bailey-missouri-root-out-biden-big-tech-censorship/
-Our letter being the basis for why Walgreens agreed not to send abortion pills in the mail to pro-life states https://www.foxnews.com/politics/20-state-ags-warn-cvs-walgreens-distributing-abortion-pills-violates-state-

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federal-law https://www.theepochtimes.com/walgreens-wont-sell-abortion-pills-in-20-states_5099530.html?utm_medium=social&utm_source=twitter&utm_campaign=digitalsub

-Our case at the U.S. Supreme Court fighting Biden's unconstitutional student loan plan https://www.washingtonexaminer.com/restoring-america/fairness-justice/nebraska-missouri-ags-supreme-court-student-loan-case https://dailycaller.com/2023/02/28/republican-attorneys-general-supreme-court-student-loans/

-Our defense of the Second Amendment Preservation Act, the strongest law of its kind in the US https://www.courthousenews.com/missouri-attorney-general-vows-to-appeal-ruling-against-state-gun-law/

These are only a few topics we feel would be of interest to your audience, let me know if you would be interested in interviewing the AG or if you need more info.

Thanks,

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

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To: 'O'Neil, Tyler'[Tyler.ONeil@heritage.org]
From: Green, Maddie[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C60F962FBD5146489D22328FB86106E8-MCMILLIAN, MADDIE]
Sent: Wed 7/5/2023 12:57:55 PM (UTC-05:00)
Subject: RE: Media Request: Censorship order

General Bailey. Thank you!

Maddie McMillian Green | Deputy Attorney General for Policy
Missouri Attorney General's Office
207 West High St.
Jefferson City, MO 65101
O: (573) 751-0477
C: (573) 645-7864
Maddie.Green@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Wednesday, July 5, 2023 12:43 PM
To: Green, Maddie <Maddie.Green@ago.mo.gov>
Subject: Re: Media Request: Censorship order

Thank you! Is this from you or from AG Bailey?

Tyler ONeil

Managing

The
214
Washington,

202-608-6046

heritage.org

From: Green, Maddie <Maddie.Green@ago.mo.gov>
Date: Wednesday, July 5, 2023 at 1:25 PM
To: Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com>
Subject: RE: Media Request: Censorship order

Hi, Tyler. Please see below for comment. Thank you!

It is fitting that the judge granted a first-of-its-kind injunction on the Fourth of July because that day paved the way for our country to adopt the First Amendment. We had to fight the Revolutionary War in part because King George tried to stamp out political dissent. Now, the Biden administration is trying to censor speech he disagrees with. Fortunately, and thanks to the brave Founders on the Fourth of July, we now have the First Amendment to push back against the Biden administration's censorship regime.

Maddie McMillian Green | Deputy Attorney General for Policy
Missouri Attorney General's Office
207 West High St.
Jefferson City, MO 65101
O: (573) 751-0477
C: (573) 645-7864
Maddie.Green@ago.mo.gov

From: Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com>
Sent: Wednesday, July 5, 2023 9:15 AM
To: Green, Maddie <Maddie.Green@ago.mo.gov>
Subject: Re: Media Request: Censorship order
Importance: High

Maddie,

I got Madeline's out-of-office email, so am forwarding this to you.

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Tyler O'Neil

Managing

The
214
Washington,

heritage.org

From: Tyler O'Neil (Daily Signal) <tyler.oneil@dailysignal.com>
Date: Wednesday, July 5, 2023 at 10:12 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Media Request: Censorship order

Madeline,
I'm writing a story about the court order yesterday and wanted to see if I can get an additional comment from the AG's office. Would Bailey or you as a spokeswoman comment on whether this represents the first time a judge has ordered government agencies to cease contact with social media companies? Would you comment on this historic move coming on the Fourth of July? Is there an angle to the order that most media coverage has failed to notice?
My deadline on this story is 2 p.m. Eastern time today, so I would appreciate a prompt response.
Best,
Tyler
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ATTORNEY GENERAL OF MISSOURI
ANDREW BAILEY

April 7, 2023

Secretary John Ashcroft
600 West Main Street
Jefferson City, MO 65101

Dear Secretary Ashcroft:

I write to provide comments on these initiative petitions. As chief legal officer of the State of Missouri, it is my duty and privilege to defend Missouri, its laws, and its citizens. One of the many privileges that come with this office is the power to defend and fight for Missouri's most vulnerable. Unborn children are our state's most defenseless and vulnerable group, and they deserve extra protection and care. These young ones are unable to speak for themselves, and it is my duty and great pleasure to speak on their behalf.

It has come to my attention that there is a coordinated effort to strip away unborn children's first and most fundamental right, their right to life. The most recent attack are these eleven separate initiative petitions. Drafted by a shadowy special interest group, these petitions seek to amend our state constitution to create new, vaguely defined "reproductive freedoms" that would strip away legal protection from unborn children. The founders of our country decried the rise of these kinds of special interest groups, warning they are "united and actuated by some common impulse of passion, or of interest, *adverse to the rights of other citizens, or to the permanent and aggregate interests of the community*." Federalist No. 10. My office objects to this covert attempt to use misleading, vague language and euphemisms to overturn well-

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established law and strip thousands of children each year of their fundamental right to life.

Courts have recognized that an election authority is not required to place a facially unconstitutional initiative petition on the ballot. *See Reeves v. Kander*, 462 S.W.3d 853, 858 (Mo. App. W.D. 2015). At this stage, the proposed initiative petitions appear to be likely just that – facially unconstitutional.

Even if the initiative petitions were facially constitutional, any summary statement would have to disclose the enormous changes these petitions would cause. A summary statement must "convey the 'purpose' or 'primary objective' of a proposed initiative," *Archey v. Carnahan*, 373 S.W.3d 528, 533 (Mo. App. W.D. 2012), "so that voters will not be deceived or misled," *Brown v. Carnahan*, 370 SW 3d 637, 654 (Mo. banc 2012). The summary statement "should address the 'central features,'" *Sedey v. Ashcroft*, 594 S.W.3d 256, 270 (Mo. App. W.D. 2020), and "accurately reflect the legal and probable effects of the proposed initiative." *Brown*, 370 SW 3d at 654. Here, the "central features" and "legal and probable effects" of these initiatives include the following serious issues:

- Reverses longstanding Missouri law protecting the right to life;[1]
- Eliminates antidiscrimination laws that prohibit race discrimination and sex discrimination.
- Infringes the right to religious liberty and conscience, including those of Missouri's health care professionals;
- Requires taxpayer funding of abortions;
- Requires taxpayer funding of sex-reassignment interventions without parental involvement and regardless of age.

[1] Missouri revisor of statutes - Revised statutes of Missouri, rsmo, Missouri law, Mo Law, Joint Committee on Legislative Research. (n.d.). Retrieved April 7, 2023, from https://revisor.mo.gov/main/PageSearch.aspx?tb1=Abortion&op=and&tb2=&idx=2

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- Undermines and removes parental rights and responsibilities for the care and safety of their children such as parental involvement and informed consent;
- Legalizes partial-birth abortion;
- Authorizes abortion of an unborn child up to the moment of birth;
- Creates a right to abortion beyond *Roe v. Wade*;
- Creates "reproductive freedom" as a fundamental right, which the U.S. Supreme Court has never recognized;

I encourage the Secretary of State to publish a final summary that accurately reflects the true magnitude, scope, and impact of this initiative's change to Missouri's law and culture.

For reasons set forth below this effort to undermine the legal protection for unborn children is not only repugnant to the laws of Missouri but to the very foundation of what makes us great.

1. History of abortion in Missouri

Since our state's founding, Missourians have fervently sought to protect the right to life. Although the common law had long protected life, Missouri was the first state to do so by statute.[2] The state's resolve was reinforced just a decade later when the legislature revisited the issue and again continued to protect life.[3] And again, in 1907 the legislature clarified that all children were deserving of protection, even those "pre-quickening."[4] The trend in Missouri has always been toward enhancing protections for this vulnerable class of citizens.

Even after *Roe v. Wade*, Missouri fought tooth and nail, to do everything legally possible to protect life. *See Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52

[2] 1825 Mo. Laws p. 283; see also, Mo. Rev. Stat., Art. II, §§ 10, 36 (1835) (extending liability to abortions performed by instrument and establishing differential penalties for pre- and post-quickening abortion)
[3] Shorman, J. (2022, May 13). Inside Missouri's anti-abortion history before Roe v. Wade | the Kansas ... Retrieved April 7, 2023, from https://www.kansascity.com/news/politics-government/article261377422.html
[4] *Id.*

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(1976) (Missouri defends several regulations of abortion including, requiring the physician to exercise professional care "to preserve the life and health of the fetus" and, failing such, deeming him guilty of manslaughter and making him liable in an action for damages). Before 2022, Missouri was one of the only states to successfully defend laws requiring abortionists to undertake safety measures like maintaining admitting privileges at a nearby hospital and maintaining referral agreements with other physicians. This office has continued to do so over the years, and I am committed to defending unborn children.

When *Dobbs v. Jackson Women's Health Organization* overturned *Roe v. Wade* last year Missouri was again the **first state in the nation** to protect life.[5] Missouri's leadership in the fight has made it an enticing target for those who wish to undermine this fundamental protection, as evidenced by the eleven petitions at issue today. These petitions do not reflect the will of the people, and they are an attempt by a special interest group to use misleading, vague language to abuse Missouri's initiative petition process. These proposed amendments contradict Missouri's history; they are repugnant to Missouri's life-affirming values; they are antithetical to Missouri's long-standing public policy; they sow confusion designed to undermine Missourian's values; they do violence to the health and welfare of our state; and they use misleading, vague language to thwart the will of the people who, through their duly elected representatives, have already spoken on this issue.

2. Undermining public safety and conscience

"The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation." *Barnes v. Glen Theatre*, Inc., 501 U.S. 560 (1991). In recent polls, a majority of Missourians have indicated they do not support abortion. This support for life is also

[5] Mo. AG. Op. 22-2022.

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reflected by the representatives the people chose to elect. In Missouri, 77% are religious believers.[6] And most faith traditions strongly believe that abortion is the murder of a vulnerable human being that is created in God's image and imbued with divine purpose. To force any sincere believer to pay, support, or encourage abortions with tax dollars would violate fundamental conscience rights. These proposed amendments seek to require taxpayer dollars to be used to support abortion. These proposed amendments do not even make exceptions for nurses and doctors. If enacted, these petitions would thus not only force everyday Missourians to pay for abortions, but also would force doctors and nurses to make a Hobson's choice between taking human life or losing their livelihood. That cannot stand.

The proposed amendments would not only enshrine abortion in the state's constitution but would also prohibit the state from "denying or interfering with" the newly created right to procure abortion. This language is vague, and advocates would use it to try to force the state to provide financial assistance for obtaining abortions—as other governments have been forced to do—which would be in direct conflict with the values and beliefs of most Missourians.

3. Undermining the policies of Missouri

The state has an interest in promoting life and protecting the unborn. *Dobbs*, 142 S.Ct. at 2284. That interest is clearly stated in § 1.205, RSMo. That statute, which has been in Missouri law for over 30 years, went into effect after Missouri took decisive action moments after *Dobbs*. It proclaims that "The life of each human being begins at conception; (2) Unborn children have protectable interests in life, health, and well-being; (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child." § 1.205 RSMo. All major cases addressing

[6] Pew Research Center. (2022, June 13). *Religious landscape study*. Pew Research Center's Religion & Public Life Project. Retrieved April 6, 2023, from https://www.pewresearch.org/religion/religious-landscape-study/state/missouri/

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abortion, even though most were wrongly decided, also acknowledged that the state has a legitimate interest in protecting unborn children. *See Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (holding that Missouri courts have consistently treated unborn children as persons when interpreting state criminal statutes wherein defendants may be charged with multiple counts of homicide when the victim is a pregnant mother).

The eleven proposed petitions, if enacted, would remove the state's ability to protect the interest of the unborn child, a clear interest of the state. Proposed amendments 77, 78, and 79 do not identify any gestational limit whatsoever, meaning that children could lose their lives at any time during pregnancy – moments before birth. That radical policy is opposed by nearly all Americans. These proposed amendments could also be interpreted to conflict with state and federal bans on partial-birth abortion. Proposed amendments 80, 81, 82, and 84 give a perfunctory nod to some limits past 24 weeks gestation, however, 24 weeks is well past the point when children reach viability. These proposals would remove protection for unborn babies who would otherwise survive outside the womb. Indeed, they also could be interpreted to prohibit doctors from providing lifesaving healthcare to babies who are born alive. Amendment proposals 83, 85, 86, and 87, pay mere lip service to post-viability limits, leaving the determination of viability to the discretion of the abortionist despite their clear financial conflict of interest.

Moreover, the state has an interest in regulating the practice of medicine and safeguarding its ethics. For example, we do not allow doctors to kill healthy patients and harvest their organs to save others. That would be barbaric, and the state has sound moral and policy reasons to prohibit the practice. Nevertheless, the proposed petitions, if enacted, would enable abortions for the purpose of obtaining and selling the organs of

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children. Moreover, they would place legal handcuffs on the state's ability to protect its citizens by codifying a "strict scrutiny" standard of review for any proposed medical safeguards or health-and-safety requirements surrounding abortion. Strict scrutiny is normally reserved for fundamental rights like speech and life. In this case, however, the petitions' drafters have tried to weaponize the doctrine to strip the people of their ability not only to protect life, but also to protect basic health and safety.

These proposed amendments would give primacy to a newly created right to abortion: higher than freedom of speech, freedom of religion, the right to vote, the right to be free from unreasonable searches and seizures, and the right to life. It would place the determination of what is in the people's interest not in the people, and not with the legislature, but in the hands of a medical establishment that has well-documented biases when it comes to abortion. Such a scheme does not instill much confidence as we all remember the many times widely accepted clinical standard practice turned out to be false. These proposed amendments would make it nearly impossible for the people to regulate any aspect of abortion.

Furthermore, the proposed amendments, particularly numbers 78, 80, 82, 83, and 86, would nullify Missouri's long-standing prohibition on the use of taxpayer funds to pay for abortions. § 188.205 RSMo. The remaining proposals could also undermine this prohibition by using alternative legal theories, such as equal protection, privacy, or due process, and leveraging the newly established fundamental right to abortion. Additionally, the language used by all eleven of these proposals is so all-encompassing, amorphous, and vague that it is difficult to imagine what would not be covered by this "right." By creating such a fundamental right, those pushing these petitions would gain a powerful tool to challenge any restrictions on abortion, no matter how minimal or necessary they may be. This would result in an erosion of public trust and moral values,

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as the use of taxpayer funds to support abortion would go against the beliefs of Missourians who consider it to be an immoral act.

4. Undermining the health and welfare of Missourians

Abortion is not only morally repugnant and harmful to children, but it is also harmful to women's health. Research has shown that abortion is associated with negative physical and mental health outcomes for women.[7] In addition, abortion clinics in Missouri have a poor track record of health and safety compliance. For example, in 2018, health regulators were forced to shut down a clinic in Columbia, Missouri, ran by Colleen McNicholas because McNicholas had been inserting moldy equipment into women's wombs for months. The equipment contained a substance that her staff said was "most likely bodily fluid," as well as a separate "blackish gray substance" that McNicholas' staff identified as mold. McNicholas' staff admitted that they had "identified the problem" of mold "a couple of months previously" but that they had "continued to use the machine on patients after they identified the issue."[8] Additionally, during previous litigation, Missouri discovered that abortionists routinely violate the medical standard of care. In gynecological settings, the standard of care requires practitioners to prearrange for a physician to be available to treat a woman if she experiences post-procedure complications. Abortionists in Missouri have a documented history of neglecting this basic duty. This neglect drastically increases the risks women face from chemical-induced abortions. And it does so in ways hard to capture by statistics. In the same litigation, abortionists also admitted under oath that they have long flouted their legal duty to report complications. Bringing these clinics back, as the petitions try to do, would only endanger women.

[7] Coleman, P. (2011). Abortion and mental health: Quantitative synthesis and analysis of research published 1995–2009. The British Journal of Psychiatry, 199(3), 180-186. doi:10.1192/bjp.bp.110.077230
[8] Statement of Deficiencies, Doc. 141-1, No. 2:16-cv-04313 (W.D. Mo. 2018).

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Apart from the health cost and priceless loss of life, which would be great, there is also a substantial economic cost to Missourians should any of these proposed amendments take effect. It is expected that an increase in abortions will naturally cause a rise in abortion-related injuries and complications that will strain the healthcare system. There is also a distinct possibility that as a result of these proposed amendments Missouri could forfeit federal funds as Medicaid matching requires compliance with federal law. For example, if the state cut off funds to a religious medical institution, which it would likely be required to do if the institution refused to respect the amorphous right to "reproductive freedom," HHS would likely refuse to provide matching funds. My office has been made aware that if this scenario happens Missouri stands to lose up to $12.5 billion.[9]

Missouri is likely to incur other costs which would include the increased cost to the state by having to litigate challenges to existing abortion and reproductive healthcare laws. Ultimately, the economic cost of these proposed amendments is potentially significant and should be considered when weighing the financial, moral, and legal impact of the proposed petitions.

5. Undermining the democratic process

Finally, these proposed amendments undermine the democratic process. The initiative petition process is an important part of our democratic system, as it allows citizens to propose laws and amendments to the state constitution. However, these petitions are not the product of a grassroots movement, and they do not seek to use the initiative petition process honestly. Rather, these petitions stem from a well-funded special interest group with an agenda to force abortion on Missouri, and the language the petitions use is intentionally vague and misleading. The petitions fail to reflect the

[9] The Regulatory Review. (2021, February 25). *The fight over California's abortion coverage mandate*. The Regulatory Review. Retrieved April 6, 2023, from https://www.theregreview.org/2021/02/03/lee-fight-over-california-abortion-coverage-mandate/

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will of the people, as evidenced by recent polls showing that a majority of Missourians oppose abortion.

In short, we're being sold a bill of goods. While the initiative petition process, in this case, purports to be a legal process for creating a constitutional right to abortion, in reality, it is being weaponized by radical woke ideologues to subvert Missourian's voices and take away the people's right to pass the laws they find needed. Missourians have time and again elected representatives who are pro-life, who have in turn passed laws that have protected life, and they have done so transparently in a democratic way, rather than through sharp policy changes concealed in euphemisms and intentionally vague initiative petitions. Proponents of these amendments may argue, in Trojan-horse fashion, that they are trying to give the issue to the people, but the people have already spoken through their elected officials.

Furthermore, the proposed amendments set a dangerous precedent for the use of the initiative petition process by shadowy special interest groups through intentionally vague petitions. If these amendments are allowed to pass, it opens the door for well-funded special interests to use the same tactics to push for other controversial issues, bypassing the legislative process and the will of the people. This could lead to a breakdown in the democratic system and a loss of trust in the integrity of the initiative petition process. It is important to uphold the principles of democracy and allow elected representatives to fulfill their duty of representing their constituents and passing laws that reflect their values and beliefs. The initiative petition process should be reserved for truly grassroots movements, not well-funded interest groups pushing for their own agenda. The people of Missouri deserve better than to have their democratic rights undermined by these proposed amendments.

6. Conclusion

In conclusion, if any of these amendments are adopted:

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a. Abortion will become a constitutional right in Missouri regardless of the conscientious objections of people of faith, medical providers, or the majority of Missourians who wish to protect life.
b. Other "reproductive freedoms" – an amorphous and undefined term – will become constitutional rights, unmoored from broader policy considerations and subject to the interpretational whims of abortion activists.
c. The state will be severely limited on how it can regulate any vague "reproductive freedom."
d. Abortion and other "reproductive freedoms" will receive a higher level of scrutiny than other fundamental rights, like the right to life.
e. Any regulation promulgated by the state is subject to the whims of what is considered "widely accepted clinical standard of practice and evidence-based medicine and does not infringe on that person's autonomous decision-making, which essentially means no regulation of abortion or other "reproductive freedoms."

My office encourages the Secretary of State to publish a final summary that accurately reflects the shocking magnitude, scope, and impact of this initiative's change to Missouri's law and culture.

Sincerely,

ANDREW BAILEY
Attorney General

AMERICAN OVERSIGHT

To: susank@missourilife.org[susank@missourilife.org]
From: Wagner, Ray[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=F577E20AF58F4CE4AFCDDD101E8A3745-WAGNER, RAY]
Sent: Thur 5/18/2023 8:28:34 AM (UTC-05:00)
Subject: Fwd: Comment Letter to SOS
Final IP Public comment_JSA.docx

Susan

I think you asked for this a few weeks ago. This is the comment letter we sent to the SOS during the comment phase. I don't think you could locate it on the SOS site.

Ray

Sent from my iPhone

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SC100132

IN THE SUPREME COURT OF MISSOURI

State of Missouri ex rel. Dr. Anna Fitz-James,

Plaintiff-Respondent,

v.

Andrew Bailey, Missouri Attorney General, *et al.*,

Defendants-Appellants.

From the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Circuit Judge

BRIEF OF APPELLANT ATTORNEY GENERAL ANDREW BAILEY

ANDREW BAILEY
Attorney General

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Counsel for Appellant Andrew Bailey, in his capacity as Missouri Attorney General

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JURISDICTIONAL STATEMENT

On May 4, 2023, Respondent Dr. Anna Fitz-James (Relator below) filed her Verified Petition for Writ of Mandamus and Declaratory Judgment. Counts I and II of the Petition prayed for a writ of mandamus or declaratory judgment against the Attorney General, the State Auditor, and the Secretary of State.[1] Count III of the Petition asserted a direct challenge to the constitutionality of seven different elections statutes related to the ballot initiative process under Article III, §§ 49 and 50 of the Missouri Constitution: §§ 116.040, 116.050, 116.175, 116.180, 116.190, 116.332, and 116.334. Specifically, Respondent prayed for the Court to conclude that "any or all" of the aforementioned statutes are unconstitutional "in whole or in part . . . on their face or as applied" to Respondent.

This Court has exclusive appellate jurisdiction over this case because, under Article V, § 3 of the Missouri Constitution, this Court has "exclusive appellate jurisdiction in all cases involving the validity . . . of a statute . . . of this state." *See Alderson v. State*, 273 S.W.3d 533, 535 (Mo. banc 2009). That appellate jurisdiction also extends to situations where "any party properly raises and preserves in the trial court a real and substantial (as opposed to merely colorable) claim that a statute is unconstitutional[.]"*Boeving v. Kander*, 496 S.W.3d 498, 503 (Mo. banc 2016)

[1] The Circuit Court dismissed the Secretary of State from this lawsuit at the beginning of trial.

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(further noting that "this Court has exclusive appellate jurisdiction over any appeal in which that claim may need to be resolved.").

On June 20, 2023, the Circuit Court issued a Judgment against the Attorney General on Count I, and denied Respondent's claims in Counts II and III. The Attorney General has appealed the portion of the Circuit Court's June 20, 2023 judgment adverse to the Attorney General that issued a writ of mandamus or declaratory relief, against the Attorney General. As represented in Respondent's Petition and the Circuit Court's Judgment, the Attorney General's appeal inherently involves questions surrounding the obligations imposed on executive branch officials by various elections statutes and the relationship between those obligations and different provisions of the Missouri Constitution.

Respondent's Petition also directly challenged the validity of seven different duly enacted statutes under Article III, §§ 49 and 50 (both on the face of each statute and as applied), and this issue was repeatedly addressed by both parties throughout the litigation and ruled on by the Circuit Court. *See Collector of Revenue of the City of St. Louis v. Parcels of Land Encumbered with Delinquent Tax Liens Serial Numbers 1-047 and 1-048, et al.*, 517 S.W.2d 49, 55 (Mo. banc 1974) (stating that the Supreme Court "reviews only questions presented to the trial court."). The Attorney General's appeal of the Circuit Court's Judgment on Respondent's Petition may implicate the scope of Article III, § 49 and Article III, § 50 of the Missouri

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Constitution, as each relates to the validity of the Missouri election system under the statutes that Respondent sought to declare as unconstitutional in Count III of the Petition: §§ 116.040, 116.050, 116.175, 116.180, 116.190, 116.332, and 116.334. And Respondent has cross-appeal rights over Count III.

Accordingly, appellate jurisdiction is proper in this Court because this case involves "the validity . . . of a statute . . . of this state," Mo. Const. art. V, § 3, or at the very least it involves a properly-preserved and colorable constitutional claim that may need to be resolved on appeal, *see Boeving*, 496 S.W.3d at 503.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises the question of when the Attorney General can properly exercise the authority given to his office under Section 116.175 to "return to the [State Auditor] for revision" a fiscal note and fiscal note summary prepared for an initiative petition that does not contain the "legal content" required for those materials. § 116.175.4, .5, RSMo. The answer to that question is clear, and it comes from the very statute granting the Attorney General the authority to review the State Auditor's submissions: he can return to the Auditor for revision a fiscal note and summary that is "argumentative" or is "likely to create prejudice for or against the proposed measure." § 116.175.3, RSMo. That is exactly what the Attorney General did here. For several reasons, the Circuit Court erred in slashing the Attorney General's authority and relegating his office to merely rubber stamping the State Auditor's submissions.

First, the plain meaning of the Attorney General's and State Auditor's roles under Section 116.175 are clear. The Attorney General has the responsibility to review the Auditor's proposed fiscal note and fiscal note summary[2] and determine

[2] As discussed in the Statement of Facts, Respondent proposed 11 initiative petitions. For purposes of the issues raised in this appeal, there is no material difference between those ballot measures or between the fiscal notes and fiscal note summaries prepared for them. For that reason and in order to simplify the language in this brief, Appellant will refer to Respondent's initiative petitions and the State Auditor's fiscal note and fiscal note summaries in the singular. Appellant will differentiate between the measures when necessary.

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whether the fiscal note and fiscal note summary each satisfy the requirements of the statute. The statute commands that State Auditor shall revise his submissions if the Attorney General returns them to him. § 116.175.5, RSMo. Here, the State Auditor refused to do so. He could, and should, have done more, as Section 116.175 commands. In fact, the evidence demonstrates that for many of Respondent's proposed ballot measures, the State Auditor *did* receive additional comments from government officials that should have been incorporated into a revised fiscal note and fiscal note summary.

Second, the Attorney General correctly rejected the State Auditor's fiscal note and fiscal note summary. The only plausible interpretation of "legal content," based on that phrase's plain meaning and surrounding context in Section 116.175, is that a fiscal note or fiscal note summary that is obviously deficient on its face does *not* contain the required legal content. This is a narrow reading of "legal content" that does not justify the Circuit Court's holding that the Attorney General engaged in an unwarranted exercise of authority.

In his Opinion Letters to the State Auditor, the Attorney General described the many reasons why the State Auditor's materials lacked the required legal content. The State Auditor's fiscal note contained wildly inadequate responses based on divergent and nonsensical methodologies from local governmental entities that, on their face, cannot survive even the most forgiving review. The fiscal note

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summary, too, lacks the required legal content because it conveys the misleading—and therefore facially argumentative and prejudicial—message that it is a reliable estimate of the cost of the measure. The fiscal note summary also fails to adequately summarize all submissions the State Auditor received from "others with knowledge pertinent to the cost of the proposal." § 116.175.1, RSMo. Voters will be misled when reviewing the fiscal note and fiscal note summary, and the information contained in them will create prejudice in favor of the measure.

Third, the Circuit Court erred in entering either mandamus or declaratory relief against the Attorney General. Mandamus relief ordering the Attorney General to approve the State Auditor's materials was inappropriate because mandamus is a last-resort remedy, and there were other steps that needed to take place before a writ of mandamus could be sought. Section 116.175 allows the Attorney General's review of a fiscal note and fiscal note summary to be more than a rubber-stamp review confined to the number of words in the materials; for that reason, the Attorney General's duty is not ministerial and not one that can be enforced through mandamus. And Respondent did not demonstrate that she had a *right* to inject herself at this early stage in the ballot measure review process, which should be an exchange of materials between two statewide elected officials. Her challenge is premature.

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For these reasons, this Court should reverse the Circuit Court's judgment, and remand it to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary.

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STATEMENT OF FACTS

I. The Proposed Initiative Petitions.

On March 8, 2023, Respondent Dr. Anna Fitz-James submitted eleven initiative petitions that would amend the Missouri Constitution to the Secretary of State. (D28, at ¶2; D29 (Jt. Stip. Ex. A)). The Secretary of State assigned the following initiative numbers to the petitions: 2024-077, 2024-078, 2024-079, 2024-080, 2024-081, 2024-082, 2024-083, 2024-084, 2024-085, 2024-086, and 2024-087. (D28, ¶4). The Secretary of State sent a copy of each initiative petition's sample sheet to the Attorney General and the State Auditor. (D28, ¶6). Additionally, the text of each initiative petition was posted to the Secretary of State's website. (D28, ¶5).

The Attorney General reviewed and approved the sample sheets for each of the eleven initiative petitions as to form under Section 116.050. (D28, ¶7). Following that approval, the Secretary of State also approved each of the initiative petitions as to form. (D29, ¶8).

On March 29, 2023, the Auditor sent a proposed fiscal note and fiscal note summary for each of the eleven initiative petitions to the Attorney General. (D28, ¶9). On April 10, 2023, the Attorney General responded to each of the fiscal notes and fiscal note summaries from the Auditor with an opinion letter, stating the reasons that the proposed fiscal notes and fiscal note summaries were legally deficient under Section 116.175. (D28, ¶11; D34-D35 (Jt. Stip. Ex. C)).

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II. The Attorney General's Opinion Letters Sent to the Auditor in Response to the Fiscal Note and Fiscal Note Summaries.

In the April 10, 2023 Opinion Letters from the Attorney General to the State Auditor, the Attorney General stated that he was rejecting the State Auditor's fiscal note and fiscal note summary for lacking the required legal content and returning them to the State Auditor for revision. (D34-D35 (Jt. Stip. Ex. C)). The Attorney General's Opinion Letters detailed the reasons for his rejection, as follows. (*Id.*).

First, the Attorney General wrote that the fiscal note contains inadequate and divergent submissions from local government entities. (D34 at p.2). The Attorney General stressed the statistically insignificant small sample size of responses solicited by the State Auditor, noting "this ballot measure will affect the present and future population of Missouri. (*Id.*) Yet, while Missouri has 114 counties and one independent city, in addition to over 1,000 other cities and villages . . . only three counties and two cities responded." (*Id.*).

The Opinion Letter noted that only one local governmental entity, Greene County, made an effort to submit a reliable methodology for calculating the fiscal impact. (*Id.*) "Greene County[] understood that the measure would have the obvious effect of reducing the population of [its] citizens," and estimated that 135 future citizens would be lost in that county annually due to legalizing abortion to Missouri. It estimated nearly $51,000 in lost county revenue annually. (*Id.*). The Attorney

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General emphasized again that Greene County "was the only entity to recognize what is facially apparent from this measure." (*Id.*).

The Greene County response stated that the "substantial economic fiscal reality of abortion relating to unborn lives cannot be denied or omitted from a fiscal note to inform voters of the consequences." (*Id.* at p.3). The Attorney General reviewed the submission and informed the State Auditor that it must have "recognized that this was a reasonable assumption" and that the "fiscal note summary reflects the financial impact to Greene County." (*Id.*). The Attorney General continued by noting that, however, that the State Auditor "did not apply that same reasonable assumption when assessing the submissions from the few other entities who responded." (*Id.*). Additionally, the Attorney General wrote that the Greene County methodology should be applied to the remainder of the populous of Missouri, because it is "unreasonable for those entities to conclude that the measure will have no estimated fiscal impact[.]" (*Id.*).

Second, the Attorney General also stated the fiscal note contained inadequate submissions concerning the impact to state government operations. (*Id.*). Citing submissions submitted to the State Auditor's office by a few entities, the Attorney General wrote that the proposed initiative petitions could jeopardize federal funding for Missouri Medicaid. (*Id.* at pp.3-4). He compared Missouri's situation to another other state who recently suffered similar losses when changes were made to its

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abortion policies. (*Id.* at p.4). The Attorney General stated those submissions should not be accepted, because the potential value of the loss was not reflected in the submissions from the varying state government entities. (*Id.*).

Third, the Attorney General stated that the fiscal note summary was also legally deficient for two principal reasons. (*Id.* at pp.4-5). The first reason was that the fiscal note summary "conveys the misleading message that it is an accurate representation of the true cost to local and state governmental operations." (*Id.* at p.4). The Attorney General wrote that this was because the "only numerical figure mentioned in the fiscal note summary is . . . a sliver of the maximum (or even likely) potential financial impact" and that the "average, reasonable voter reading this summary will not know the small sample of entities" that the State Auditor had solicited for a submission. (*Id.*).

The second reason was that the fiscal note summary fails "to adequately summarize the submissions [the State Auditor's] office received." (*Id.* at p.5). The Attorney General wrote that "the fiscal note summary merely states that 'opponents estimate a potentially significant loss to state revenues.'" (*Id.*). He stated that the State Auditor "received submissions indicating that the 'potentially significant loss' could be nearly $12.5 billion dollars" and because of that potential loss, "the fiscal note summary should reflect that number." (*Id.*).

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One submission by an interested party noted "the loss of federal Medicaid dollars, which in the proposed fiscal year 2024 budget would be a loss of nearly $12.5 billion." (*Id.*; *see also* D30 at p. 15 (Jt. Stip. Ex. B)). The submission explained several examples of how this might occur. (D30 at p.15 (Jt. Stip. Ex. B)). For example, under the initiative petitions, the entity noted that hospitals might be required to perform certain procedures that are disallowed by the federal government. (*Id.*). That same submission noted that under the initiative petitions, the cost of inpatient medical procedures and emergency department services for treating "issues before childbirth with complications" has a median charge per person of $11,997 with a maximum charge of $35,345. (*Id.* at p.16). The submission noted that these procedures may ultimately be paid by taxpayers. (*Id.*). Another submission by an interested party echoed many of those same concerns and potential loss of $12.5 billion in federal Medicaid money. (D30 at p.22 (Jt. Stip. Ex. B)).

For these reasons, the Attorney General concluded that "voters reading the fiscal note summary are likely to be misled into thinking that this ballot measure will have little fiscal impact on state and local governmental entities." (D34 at p.5). Therefore, the Attorney General's Opinion Letters continued, "the fiscal note and fiscal note summary do not satisfy the requirements of § 116.175 and therefore I am returning them to you for revision." (D34 at p.5).

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III. The State Auditor Receives Additional Fiscal Impact Estimates.

Three days before the Attorney General responded with his rejection of the State Auditor's fiscal note and fiscal note summary, on April 7, 2023, the State Auditor received additional information from the Governor's Office. (D41 (Jt. Stip. Ex. I)). The Governor's Office provided a fiscal estimate for each of the 11 initiative petitions based on "additional costs identified by other agencies in regards to regulation and enforcement." (*Id.*) In addition, the Governor's Office stated that each initiative petition appears "to conflict with federal law, which may have bearing on the fiscal responsibilities of [the Governor's Office]." (*Id.*).

Each submission from the Governor's Office noted that "there will likely be litigation leading to a fiscal impact on the Legal Expense Fund (LEF) ranging from $1,500 to unknown" due to potential conflicts with the U.S. Supreme Court's decision in "*Dobbs v. Jackson Women's Health Organization* and requirements of parental consent." (*Id.*) (Italics to case citation added). In addition, for several of the initiative petitions, the Governor's Office estimated that "failing to be in compliance with federal requirements related to Medicaid and MO HealthNet could lead to a fiscal impact of up to $600M" due to an apparent conflict "with the federal policy related to the Hyde Amendment and expending public funds on abortions." (*Id.*).

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IV. The State Auditor's Response to the Attorney General's Decision to Return the Fiscal Note and Fiscal Note Summary.

On April 21, 2023, the State Auditor sent the Attorney General a letter refusing to revise the fiscal note and fiscal note summary. The State Auditor did not revise its original materials to incorporate the new information it had received from the Governor's Office. (D28, ¶13; D38 (Jt. Stip. Ex. F)). The State Auditor stated that his office is "resubmitting the unaltered fiscal note and fiscal note summary for [the Attorney General's] review and approval as to legal content and form." (D38 (Jt. Stip. Ex. F)). The State Auditor's response letter stated that the Attorney General should "return the approved fiscal note summaries within 10 days, pursuant to § 116.175.4, RSMo." (*Id.*)

Additionally, on April 21, 2023, the State Auditor sent a separate letter stating that the fiscal note and fiscal note summary contained "estimated costs to state and local government entities and the fiscal note summary further states potential significant costs are anticipated by opponents." (D37 (Jt. Stip. Ex. E)). The State Auditor did not revise the fiscal note or the fiscal note summaries because "no new information [had] been presented that warrant[ed] inclusion in the fiscal note or fiscal note summary." (*Id.*). The State Auditor's letter made no mention of the new information it received from the Governor's Office. (*See id.*).

On May 1, 2023, the Attorney General stated that because the proposed fiscal notes and fiscal note summaries remained unchanged after the previous rejection,

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they were not approved. (D28, ¶ 14; D40 (Jt. Stip. Ex. H)). The Attorney General's Office "thus concluded that we have fulfilled our response obligations under § 116.175, RSMo for initiative petitions 2024-077 through 2024-087." (*Id.*).

V. Respondent Files Litigation.

On May 4, 2023, Respondent filed a Petition against the Attorney General, State Auditor, and Secretary of State. (D2). The Petition raised three Counts. Count I was asserted only against the Attorney General and sought mandamus or declaratory relief that ultimately sought to order the Attorney General to approve the State Auditor's initial fiscal note and fiscal note summary. Count II was asserted against the State Auditor and the Secretary of State and sought mandamus or declaratory relief requiring the State Auditor to deliver to the Secretary of State the initial fiscal note and fiscal note summary for inclusion in an official ballot title. Count III was a request for declaratory relief against all three statewide officials and sought to strike as unconstitutional "any or all" of seven statutes governing the ballot initiative process in Chapter 116: Sections 116.040, 116.050, 116.175, 116.180, 116.190, 116.332, and 116.334. (*Id.*).

The case was briefed and tried on an expedited basis, and limited discovery took place also on an expedited basis. (*See generally* D1). It was ultimately tried on a joint stipulation of facts and exhibits. (D28). At the trial on June 14, 2023, the Circuit Court granted a motion to dismiss filed by the Secretary of State, leaving

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only the Attorney General and State Auditor as remaining parties. (Tr. 17:14-20). Ultimately, no witnesses testified, and counsel for Respondent, the State Auditor, and the Attorney General presented argument. (*See generally* Tr.).

On June 20, 2023, the Circuit Court issued a Judgment against the Attorney General on Count I, and denied Respondent's claims in Counts II and III. (D44). The Circuit Court entered a writ of mandamus ordering the Attorney General to "approve the legal content and form of the fiscal note summaries submitted to the Attorney General on March 29, 2023, by the Auditor" for the eleven initiative petitions. (D44, p.28; D45). Later that same day, the Attorney General filed this notice of appeal. (D47).

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POINTS RELIED ON

I. The circuit court erred in granting mandamus or declaratory relief against the Attorney General, because the Attorney General properly returned the State Auditor's fiscal note and fiscal note summary to the State Auditor for revision, in that the State Auditor's submissions lacked the required legal content under Section 116.175, RSMo.

- Section 116.175, RSMo
- *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582 (Mo. banc 2018)
- *State v. Teer*, 275 S.W.3d 258 (Mo. banc 2009)

II. The circuit court erred in granting mandamus or declaratory relief against the Attorney General, because the State Auditor was required to revise his fiscal note and fiscal note summary after the Attorney General rejected them, in that the Attorney General's rejection was proper, Section 116.175 contains a clear command to revise the materials upon rejection, and the State Auditor received additional information that should have been incorporated.

- Section 116.175, RSMo
- *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582 (Mo. banc 2018)
- *Protect Consumers' Access to Quality Home Care Coal., LLC v. Kander*, 488 S.W.3d 665 (Mo. App. W.D. 2015)

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- *Missouri Mun. League v. Carnahan*, 303 S.W.3d 573 (Mo. App. W.D. 2010)
- *Pippens v. Ashcroft*, 606 S.W.3d 689 (Mo. App. W.D. 2020)

III. The circuit court erred in granting mandamus relief against the Attorney General, because Respondent had other remedies available and the Attorney General's duty under Section 116.175 is not ministerial, in that the Auditor had not yet revised his materials before Respondent filed suit, the Attorney General has not refused to perform a ministerial duty, and the Attorney General has discretionary authority to review and determine a fiscal note and fiscal note summary's compliance under Section 116.175.

- Section 116.175, RSMo
- *State ex rel. Swoboda v. Missouri Comm'n on Hum. Rts.*, 651 S.W.3d 800 (Mo. banc 2022)
- *State v. Teer*, 275 S.W.3d 258 (Mo. banc 2009)
- *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261 (Mo. banc 1980)
- *Barnes v. Uhlich*, 592 S.W.3d 67 (Mo. App. W.D. 2019)

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IV. The circuit court erred in granting declaratory relief against the Attorney General, because the case was not yet ripe and therefore not justiciable, in that the fiscal note and fiscal note summary review and resubmission process had not yet concluded.

- Section 116.175, RSMo
- *State ex rel. Swoboda v. Missouri Comm'n on Hum. Rts.*, 651 S.W.3d 800 (Mo. banc 2022)
- *State v. Teer*, 275 S.W.3d 258 (Mo. banc 2009)
- *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261 (Mo. banc 1980)
- *Barnes v. Uhlich*, 592 S.W.3d 67 (Mo. App. W.D. 2019)

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ARGUMENT

I. The circuit court erred in granting mandamus or declaratory relief against the Attorney General, because the Attorney General properly returned the State Auditor's fiscal note and fiscal note summary to the State Auditor for revision, in that the State Auditor's submissions lacked the required legal content under Section 116.175, RSMo.

Standard of Review. This point on appeal raises a question of statutory interpretation, which is reviewed de novo on appeal. *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020).

Preservation. The Attorney General preserved this issue for appeal in his answer to Respondent's Petition (D19), in his pre-trial brief (D23), and during trial (*See* Tr.).

A. Background to Section 116.175.

Section 116.175 clearly establishes the role of the Attorney General in reviewing, and either approving or rejecting the Auditor's fiscal note and fiscal note summary prepared for an initiative petition. The process of crafting the fiscal note and fiscal note summary for an initiative petition begins with the Auditor, who prepares a proposed fiscal note and fiscal note summary for each initiative petition received from the Secretary of State's office. RSMo. § 116.175.1. The adequacy of a fiscal note and fiscal note summary are governed by Section 116.175, which

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provides, among other things, mechanisms for proponents or opponents of a measure to submit statements related to the measure and which requires that any fiscal note or fiscal note summary "state the measure's estimated cost or savings, if any, to state or local governmental entities." § 116.175.3. The fiscal note summary shall additionally "summarize the fiscal note in language neither argumentative nor likely to create prejudice either for or against the proposed measure." *Id*.

After the Auditor has "prepare[d] a fiscal note and a fiscal note summary" for a proposed initiative, the Auditor "forwards both to the attorney general" for the Attorney General's review. § 116.175.2. At that point, the plain language of Section 116.175 is clear: a review of the proposed fiscal note and fiscal note summary shifts to the Attorney General. "[W]ithin ten days of receipt of the fiscal note and the fiscal note summary," the Attorney General must either "approve the legal content and form" of the fiscal note and fiscal note summary or "determine[] that the fiscal note or fiscal note summary does not satisfy the requirements" of § 116.175.4, .5.

If the Attorney General determines that the fiscal note and fiscal note summary satisfies the requirements of Section 116.175, he "forward[s] notice of such approval to the state auditor." 116.175.4. If, on the other hand, the Attorney General "determines that the fiscal note or the fiscal note summary does not satisfy the requirements of [§ 116.175]," the Attorney General "return[s]" the fiscal note and fiscal note summary "to the auditor for revision." § 116.175.5. At that point, the

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statute commands that the Auditor must revise the proposed fiscal note and fiscal note summary and again forwards both to the Attorney General. *Id*. The statute uses the strongest language: "the fiscal note and the fiscal note summary shall be returned to the auditor for revision." *Id.*

It is only after the fiscal note and fiscal note summary are ultimately approved by the Attorney General that the Secretary of State may use the "approved fiscal note summary and fiscal note," along with the official summary statement, to certify the official ballot title. § 116.180. Section 116.180 mandates that the official ballot title contain "separate paragraphs with the fiscal note summary immediately following the summary statement of the measure[.]" Section 116.175.5 is clear that a fiscal note or fiscal note summary that the Attorney General determines does not satisfy the requirements of the statute "also shall not satisfy the requirements of section 116.180." § 116.175.5.

In summary, the Auditor first prepares fiscal notes and fiscal note summaries and forwards them to the Attorney General. The Attorney General then reviews the fiscal note and fiscal note summary to determine whether each complies with the requirements of Section 116.175, which includes a review for legal content that plainly incorporates a review for argumentative language or information that is likely to create prejudice for or against a measure. § 116.175.3. If the Attorney General determines that a proposed fiscal note or fiscal note summary does not

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comply with § 116.175, he is required by the statute to send the deficient fiscal note or fiscal note summary back for further revision. The State Auditor then revises the deficient fiscal note or summary and re-submits it to the Attorney General for review and, if the updates satisfy § 116.175, ultimately approval by the Attorney General. Once the Attorney General determines that a revised fiscal note or fiscal note summary complies with § 116.175, the Attorney General exercises his statutory authority to approve the fiscal note and fiscal note summary for the Secretary of State's use in a certified official ballot title.

B. "Legal content" is different than "form," and the Attorney General's review of the "legal content" of a fiscal note and fiscal note summary is more than just counting words and checking boxes.

A plain-text reading of Section 116.175 and surrounding context make clear that the Attorney General's review for "legal content" plainly incorporates a review for argumentative language or information that is likely to create prejudice for or against a measure. § 116.175.3. The statute does not include a definition of "legal content," but "legal content" must be distinct from "form." The statute requires the Attorney General to review a fiscal note and fiscal note summary for "legal content and form." § 116.175.4. The statute is mandatory, as it uses "shall" to describe the Attorney General's role. Courts have consistently held in statutory interpretation that "[t]he word 'shall' generally prescribes a mandatory duty." *State v. Teer*, 275 S.W.3d 258, 261 (Mo. banc 2009).

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Because form and legal content are two separate phrases in the statute, they must have two separate meanings. The legislature "is presumed to have intended every word, provision, sentence, and clause in a statute to be given effect" and "[t]he plain and ordinary meaning of the words in a statute is determined from the words' usage in the context of the entire statute." *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 585 (Mo. banc 2018) (citing *Mantia v. Mo. Dep't of Transp.*, 529 S.W.3d 804, 809 (Mo. banc 2017)).

There does not appear to be a dispute in this case about "form," as Section 116.175.3 makes clear what the "form" of a fiscal note and fiscal note summary are: "the fiscal note and fiscal note summary shall state the measure's estimated cost or savings, if any, to state or local governmental entities. The fiscal note summary shall contain no more than fifty words, excluding articles[.]" § 116.175.3. This reading of "form" is consistent with how Missouri's appellate courts construe "form" in other initiative petition contexts. For example, in *Bradshaw v. Ashcroft*, the Court of Appeals reasoned that the "form" of the initiative petition is limited to whether the measure contains the designated items that must be contained in the measure, such as certain notices, a signature sheet, specification of the county the signature page will be circulated, and space for notarization:

> Section 116.040 specifies the form of an initiative petition, and directs that the form must be "substantially" followed. The form of an initiative petition is required to include notice that it is a crime to "sign any initiative petition with

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> any name other than [one's] own, or knowingly to sign [one's] name more than once for the same measure for the same election, or to sign a petition when such person knows he or she is not a registered voter." *Id.* Section 116.040 requires the form of an initiative petition to afford a place for each person signing the petition to provide a signature, the date of signature, the signer's address including zip code, the signer's congressional district, and the signer's printed name. Section 116.040 requires the form of an initiative petition to include a circulator's affidavit swearing and affirming under penalty of perjury that persons identified on the petition "signed this page of the foregoing petition ... in my presence," and that the circulator believes each signer to be "a registered voter in the State of Missouri" in the county specified on the signature page. Section 116.040 requires the form of an initiative petition to afford a place for the circulator's affidavit to be signed by the circulator in the presence of a notary.

559 S.W.3d 79, 83 (Mo. App. W.D. 2018). Here, in the context of a fiscal note and fiscal note summary, "form" can mean only whether the fiscal note summary contains 50 or fewer words and a statement of estimated costs or savings. § 116.175.3.

In contrast, "legal content" demands more. The relevant dictionary definitions of "content" are "the topics, ideas, facts, or statements in a book, document, or letter." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 492 (3d ed. 1993). And "legal" means "of or relating to law," "conforming to or permitted by law or established rules : conforming to the procedures and methods prescribed by law." *Id.* 1290. The plain dictionary of "legal content," then, must refer to what *else* is

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required *by law* to be done when preparing, and ultimately contained in, a fiscal note and fiscal note summary. Surrounding context in Section 116.175 makes clear what the legal content of a fiscal note and fiscal note summary must include, at minimum: it must not be "argumentative," and it must not "create prejudice either for or against the proposed measure." *See Richter v. Union Pac. R. Co.*, 265 S.W.3d 294, 297 (Mo. App. E.D. 2008) ("In absence of statutory definitions, we may derive the plain and ordinary meaning from a dictionary and by considering the context of the entire statute in which it appears.") (citing *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 224 (Mo. banc 2007)). "The primary goal of statutory interpretation is to give effect to legislative intent, which is most clearly evidenced by the plain text of the statute." *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 585 (Mo. banc 2018). The Attorney General's construction of Section 116.175 achieves these fundamental canons of construction.

At first, all parties followed the process for crafting a fiscal note and fiscal note summary laid out in § 116.175. The State Auditor submitted to the Attorney General an identical proposed fiscal note and fiscal note summary for each of Respondent's eleven initiative petitions. The Attorney General reviewed each of these submissions and determined that each of the fiscal notes and fiscal note summaries "does not satisfy the requirements of [§ 116.175]." In part, the Attorney General determined that the STate Auditor's proposed fiscal note "contain[ed]

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inadequate and divergent submissions from local government entities" and "contain[ed] inadequate submissions concerning the impact to state governmental operations." The Attorney General additionally determined that the Auditor's proposed fiscal note summary is legally deficient because in part it "conveys [a] misleading message" and "fail[s] to adequately summarize" the submissions in the fiscal note. Consequently, the Attorney General determined that the fiscal note and fiscal note summary for each of Respondent's initiative petitions was inadequate and returned each to the Auditor for revision. *Id*.

The plain and reasonable intent of the legislature for each of these clauses in the statutory scheme is that the Attorney General's determination actually has meaning and acts as a review on the State Auditor. The Circuit Court's judgment relegates the Attorney General's authority to little more than a word-counter and rubber stamp. As the Circuit Court and Respondent view the statute, the Auditor could prepare a fiscal note or fiscal note summary plainly in contravention of § 116.175 and, without any effective check on his determination, could disregard the Attorney General's concerns and require the Secretary of State to certify an official ballot title with a clearly deficient fiscal note and fiscal note summary. Adoption of Respondent's interpretation would require the Court to conclude that the legislature meant to render significant portions of § 116.175 superfluous and intended that any review of the Auditor's submissions by the Attorney General is completely toothless.

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Section 116.175 reinforces the Attorney General's interpretation of § 116.180, making explicitly clear that "[a] fiscal note or fiscal note summary that does not satisfy the requirements of [§ 116.175] also shall not satisfy the requirements of section 116.180"—the official ballot title requirement statute. Respondent's and the Circuit Court's view would additionally require the Court to exercise its judicial authority to create, out of thin air and without any legislative consent, authority for another executive branch official to approve a proposed fiscal note and fiscal note summary—the State Auditor himself. But the statutory scheme is clear that the State Auditor cannot approve his own fiscal note and fiscal note summary. That role belongs only to the Attorney General. And for reasons further discussed in Point III below, the Attorney General's role *must* be more than simply ministerial when reviewing for legal content.

C. The State Auditor's fiscal note and fiscal note summary are deficient as to legal content.

The Attorney General's Opinion Letters detailed across several pages why the State Auditor's fiscal note and fiscal note summary lack the required legal content under Section 116.165. Ultimately, if voters were to see the fiscal note summary at the ballot box, they would be more likely driven to vote for the measure due to misleading language that is apparent from the face of the fiscal note. Of course, the full fiscal note is not present on the ballot itself, and so voters are left only to look at the 50-word fiscal note summary. This is more than just a dispute over whether the

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Attorney General "does not like the fiscal conclusion reached by the Auditor," as the Circuit Court held. Rather, it is apparent from the face of the fiscal note and fiscal note summary that they lack the required legal content and will create undue prejudice in favor of the measure.

First, the fiscal note contains inadequate and divergent submissions from local government entities. This goes to the heart of the "legal content" required of a fiscal note, because a fiscal note must contain adequate submissions from governmental entities. In his Opinion Letter, the Attorney General stressed the statistically insignificant small sample size of responses solicited by the State Auditor, noting "this ballot measure will affect the present and future population of Missouri. Yet, while Missouri has 114 counties and one independent city, in addition to over 1,000 other cities and villages . . . only three counties and two cities responded." Not many more were even solicited for submissions: only 12 and 14 cities.

Only one local governmental entity, Greene County, made an effort to submit a reliable methodology for calculating the fiscal impact. Greene County understood that the abortion-legalization measure would have the obvious effect of reducing population. No other entity engaged in this common-sense analysis that should be present on the face of any submission. As Greene County correctly stated, the "substantial economic fiscal reality of abortion relating to unborn lives cannot be denied or omitted from a fiscal note to inform voters of the consequences."

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However, the State Auditor did not apply that same reasonable assumption when assessing the submissions from the few other entities who responded. Instead, the fiscal note and fiscal note summary took Greene County's calculated estimated fiscal impact and purported to represent that fiscal impact as the fiscal impact for the *entire state*. Never once did Greene County purport to calculate the fiscal impact of the effects of the initiative petition on the entire state. To represent otherwise is misleading and prejudicial in favor of the initiative petitions. As the Attorney General informed the State Auditor in his Opinion Letter, the Greene County methodology should be applied to the remainder of the populous of Missouri, because it is "unreasonable for those entities to conclude that the measure will have no estimated fiscal impact[.]" (D34, p.3). In other words, it was misleading and prejudicial to represent the financial impact of the measures on Greene County as representative of all 114 counties in Missouri.

To properly apply the methodology would not raise the State Auditor's minimum responsibilities outlined by this Court in *Brown v. Carnahan*, 370 S.W.3d 637 (Mo. banc 2012). Rather, doing so would underscore *why* the State Auditor even plays a role in the process in the first place while giving proper meaning to "legal content." This Court in *Brown* noted the State Auditor "is not required to compel and second-guess reasonable submissions from entities but is able to rely on the responses submitted. Nor should the auditor wade into the policy debates

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surrounding initiative petitions, which an independent investigation would entail. . . . It is not the auditor's role to choose a winner among these opposing viewpoints by independently researching the issue himself, double-checking economic theories and assumptions, and adopting one side's view over another's in the resulting fiscal note." *Id.* at 650. *Brown* did not preclude the State Auditor from selecting *an* assumption or methodology. Any reasonable construction of "legal content" and the duties of the State Auditor require some sort of methodology, and *Brown* does not stand for the proposition that the State Auditor *must only* add and subtract numbers that entities submit.

But, in fact, the State Auditor did not even do that properly. Non-governmental entities estimated a massive possible loss to state revenues, up to a possible loss of $12.5 billion. But that figure is nowhere in the fiscal note summary. Instead, all the State Auditor did was note that "opponents estimate a potentially significant loss to state revenues." This vague language does not comply with the State Auditor's role under Section 116.175 or under *Brown*.

Section 116.175 expressly allows for consideration of figures submitted by governmental and non-governmental entities. Subsection (1) of that statute states that "The state auditor may consult with the state departments, local government entities, the general assembly ***and others with knowledge pertinent to the cost of the proposal***." § 116.175.1 (emphasis added). Furthermore, "[p]roponents or

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opponents of any proposed measure may submit to the state auditor a proposed statement of fiscal impact estimating the cost of the proposal in a manner consistent with the standards of the governmental accounting standards board and section 23.140, provided that all such proposals are received by the state auditor within ten days of his or her receipt of the proposed measure from the secretary of state." There is no dispute that the State Auditor received estimates from "others with knowledge pertinent to the cost of the proposal," who may be opponents to the measure, that those estimates were out of compliance with the appropriate fiscal standards, or that the submission were timely received. The record contains no such fact-finding or evidence to the contrary. Instead, the record contains submissions that were not expressly incorporated into the fiscal note summary. The Auditor should have done so, just as it did when it included a specific dollar figure based on Greene County's estimate.

Thus, as the Attorney General wrote in his Opinion Letter, the fiscal note summary "conveys the misleading message that it is an accurate representation of the true cost to local and state governmental operations." The only numerical figure mentioned in the fiscal note summary is a sliver of the maximum (or even likely) potential financial impact. The average, reasonable voter reading this summary will not know the small sample of entities that the State Auditor had solicited for a submission. That same voter is also much more likely to vote in favor of a measure

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that is estimated to cost approximately $50,000 than one that estimates a fiscal impact closer to what the submissions *actually received by the State Auditor* estimated the measure will cost.

To be clear: the Attorney General is advancing a narrow and appropriate reading of his authority to review a fiscal note and fiscal note summary under Section 116.175. That review must be more than a rubber stamp. And at minimum that review allows a rejection of the State Auditor's submissions if it is evident from their face that they are inaccurate, misleading, and likely to create bias for or against a measure. This Court should reverse the Circuit Court's decision, and remand the case to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary under Section 116.175.5.

II. The circuit court erred in granting mandamus or declaratory relief against the Attorney General, because the State Auditor was required to revise his fiscal note and fiscal note summary after the Attorney General rejected them, in that the Attorney General's rejection was proper, Section 116.175 contains a clear command to revise the materials upon rejection, and the State Auditor received additional information that should have been incorporated.

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Standard of Review. This point on appeal raises a question of statutory interpretation, which is reviewed de novo on appeal. *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020).

Preservation. The Attorney General preserved this issue for appeal in his answer to Respondent's Petition (D19), in his pre-trial brief (D23), and during trial (*See* Tr.).

As noted above, "The primary goal of statutory interpretation is to give effect to legislative intent, which is most clearly evidenced by the plain text of the statute." *State ex rel. Goldsworthy*, 543 S.W.3d at 585. The legislature "is presumed to have intended every word, provision, sentence, and clause in a statute to be given effect" and "[t]he plain and ordinary meaning of the words in a statute is determined from the words' usage in the context of the entire statute." *Id*. (citing *Mantia v. Mo. Dep't of Transp*., 529 S.W.3d 804, 809 (Mo. banc 2017)). "Where a statute's language is clear, courts must give effect to its plain meaning and refrain from applying the rules of construction unless there is some ambiguity." *Ross v. Dir. of Revenue*, 311 S.W.3d 732, 735 (Mo. banc 2010).

Section 116.175 could not be more clear: if the Attorney General "determines" that the Auditor's proposed fiscal note or fiscal note summary for an initiative petition does not satisfy the requirements of Section 116.175, the Attorney General "shall" return the deficient fiscal note or fiscal note summary to the Auditor "for

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revision." § 116.175.5. The Attorney General complied with his duty. The State Auditor has yet to do so.

Instead of revising each fiscal note and fiscal note summary to comply with Section 116.175, the State Auditor "decline[d] to revise the fiscal note and fiscal note summary" for each of the initiative petitions. Because the State Auditor failed to revise the fiscal notes and fiscal note summaries, and because the Attorney General determined that the proposed fiscal notes and fiscal note summaries submitted by the Auditor continue to fail to satisfy the requirements of Section 116.175, the Attorney General again returned the fiscal notes and fiscal note summaries to the Auditor for revision. *See, e.g.* Ex. D. The Auditor has, to date, failed to revise the fiscal note or fiscal note summary for any of Respondent's initiative petitions.

In crafting the text of Section 116.175, the legislature plainly laid out the scope of responsibilities for both the Auditor and the Attorney General. It is the *Attorney General's* responsibility to "determine" whether the fiscal note or fiscal note summary "does not satisfy the requirements of [§ 116.175]" and, if the Attorney General determines that a fiscal note or fiscal note summary does not satisfy those requirements, "the fiscal note and the fiscal note summary shall be returned to the auditor for revision." § 116.175.5. In the context of Section 116.175, the meaning of the requirement that the fiscal note and fiscal note summary be "returned to the

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auditor for revision" is clear. The phrase "return . . . for revision" imposes on the State Auditor a statutory duty to provide an updated or altered fiscal note and fiscal note summary for the Attorney General's review under Section 116.175. Any other meaning of the word would render the responsibility for the Attorney General to determine whether a proposed fiscal note and proposed fiscal note summary complies with § 116.175, and, consequently, whether to approve it or send it back to the Auditor for revision, superfluous. Any alternative reading of the requirement that the fiscal note and fiscal note summary shall be "returned for revision" upon a determination by the Attorney General would be contrary to this pronouncement.

This understanding of the legislature's use of the word "revision" is consistent with how the word "revision" is used by courts addressing challenges under Chapter 116. *See, e.g. Pippens v. Ashcroft*, 606 S.W.3d 689, 693 (Mo. App. W.D. 2020) (using the term "revision" to refer to the process of making changes to the official summary statement for an initiative petition); *Sedey v. Ashcroft*, 594 S.W.3d 256, 265 n. 6 (Mo. App. W.D. 2020) (using the terms "revised" and "revisions" to describe changes to the summary language of citizen initiatives). It is also consistent with how Missouri courts have traditionally used the words "revise" and "revisions." *See, e.g. Care & Treatment of Morgan v. State*, 176 S.W.3d 200, 205–06 (Mo. App. W.D. 2005) (considering the "revised" version of a statute as being a change to the legal definition of a term compared to the past definition); *McCarty v. City of Kansas*

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City, 671 S.W.2d 790, 795 (Mo. App. W.D. 1984) (using the term "revisions" to refer to "a change in existing regulations and restrictions" at issue). "[I]n construing a statute to determine legislative intent, a court must presume that the legislature acted with a full awareness and complete knowledge of the present state of the law" and Missouri court cases. *State v. Rumble*, 680 S.W.2d 939, 942 (Mo. banc 1984). Even if the plain meaning of the term "revision" was uncertain (which it is not), Missouri courts' past use and definition of the term strongly supports the Attorney General.

Both the plain meaning of the term "revision" as used in the statute and the regular use of the term by courts in analyzing both ballot title cases and other general cases makes clear: the State Auditor had a statutory duty to send to the Attorney General an *updated and modified* fiscal note or fiscal note summary for each of Respondent's initiative petitions. The Attorney General would then review the resubmitted fiscal note and fiscal note summary to determine whether the documents complied with the requirements of Section 116.175, just as he would upon receiving a first submission. Despite this clear statutory instruction, the State Auditor refused to revise the statute to address the Attorney General's concerns.[3] In fact, the State

[3] Notably, in her Petition below, the one claim Respondent did *not* bring is a request for this Court to enter a judgment declaring that the Auditor must comply with his statutory obligation under § 116.175 to "revise" the proposed fiscal notes and fiscal note summaries. As discussed in the Attorney General's other points on appeal, the Circuit Court erred in blessing Respondent's failure to ask for the relief she did

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Auditor explicitly stated instead that he "*declines to revise* the fiscal note and fiscal note summary." (D38, cleaned up, emphasis added). As the Auditor "decline[d]" to perform his statutory duties under Section 116.175, the Attorney General again returned the fiscal notes and fiscal note summaries for revision. (*See, e.g. id.*; D40).

Neither Section 116.175 nor any other statute requires the Attorney General to approve a fiscal note or fiscal note summary that he determines does not satisfy the requirements of Section 116.175 and is therefore deficient. On the contrary, Section 116.175.5 entrusts in the Attorney General *only one* nondiscretionary duty: that any fiscal note or fiscal note summary which he "determines . . . does not satisfy the requirements of [§ 116.175] . . . ***shall be*** returned to the Auditor for revision." § 116.175.5 RSMo. Courts have consistently held in statutory interpretation that "[t]he word 'shall' generally prescribes a mandatory duty." *State v. Teer*, 275 S.W.3d 258, 261 (Mo. banc 2009).

Here, the Attorney General determined that the State Auditor failed to make any revisions to the deficient proposed fiscal note and proposed fiscal note summary

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request in her lawsuit and then complain that she does not have relief available to her to resolve her claimed injury. *See State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 266 (Mo. banc 1980) (finding it "undisputed that the relators had an alternative remedy [to a writ of mandamus] available to them" when the relators also "filed an action seeking a declaratory judgment" related to the same dispute.). The proper relief here is for completion of the Attorney General and Auditor's submission, review, and resubmission process. And then if Respondent found the *final* fiscal note or fiscal note summary unfair or insufficient, she could file her own lawsuit under Section 116.190 challenging those materials.

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for each of the initiative petitions, and, consequently, complied with his statutory duty to return the drafts to the State Auditor for further revision. The Attorney General would be running afoul of the requirements of § 116.175.5 if he *did not* return fiscal notes and fiscal note summaries for further revision after a determination that they did not comply Section 116.175.5.

Section 116.175 is clear on the continuing responsibilities of both the Attorney General and the Auditor in reaching an approved fiscal note and fiscal note summary that complies with § 116.175. The General Assembly's use of the term "revision" and the requirements that a fiscal note and fiscal note summary satisfy Section 116.175 and be "approved" by the Attorney General for the purpose of Section 116.180 before the Secretary of State may certify a ballot title demonstrates that the preparation of a fiscal note is an ongoing process. The dual requirements of revision and approval create an ongoing review process that continues until an adequate fiscal note and fiscal note summary is approved. The clear text of the statute renders any additional construction unnecessary. *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 540 (Mo. banc 2012) ("When the words are clear, there is nothing to construe beyond applying the plain meaning of the law.").

Even to the extent this Court concludes that it is necessary to look beyond the plain meaning of the statute, the plain and straightforward construction of Section 116.175 is that the use of the terms "revision," "determine," and "approve" create

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continuing, time-constrained obligations on the Auditor and Attorney General to engage in the processes of Section 116.175 until the fiscal note and fiscal note summary for an initiative petition are approved. The rules of statutory construction "require this court to determine the intent of the legislature" by considering the plain and ordinary meaning and application of the text of the statute. *Owsley v. Brittain*, 186 S.W.3d 810, 815 (Mo. App. W.D. 2006).

Here, the plain and ordinary application of the text utilizes the time limit imposed on the executive branch officials—ten days—to govern any deadlines for revisions to proposed fiscal notes or fiscal note summaries. The Attorney General has ten days after receiving an iteration of a proposed fiscal note and fiscal note summary to determine whether to approve or send back for revision the fiscal note and fiscal note summary. § 116.175.4, .5. Under the most permissive interpretation of these provisions controlling executive branch officials drafting and reviewing proposed fiscal notes and fiscal note summaries, "returning" a draft "for revision" *at minimum* implies (and, in the Attorney General's view, expressly requires) that the draft will be edited and then re-submitted for potential approval under a similar statutory timeline as the initial production. Indeed, both the State Auditor and Attorney General acted under this construction of the statute—each provided communications on the proposed fiscal note and fiscal note summary within ten days of receipt. The Circuit Court's judgment effectively discards portions of the statute

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mandating a determination of when a fiscal note or fiscal note summary is insufficient—an outcome which is unlikely to be "the intent of the legislature" drafting the provision. *Owsley*, 186 S.W.3d at 815.

Second, the Circuit Court's judgment creates unnecessary statutory conflicts that ultimately render meaningless critical portions of Section 116.175. The judgment expresses concern that there could be a a parade of horribles occurs that then invites intervention from outside the relationship between statewide elected officials carefully crafted by the legislature. Not only is this legal conclusion not supported by the statute, there is no evidence that this fear is happening here. The only event that has occurred is *one* rejection of the State Auditor's initial submissions based on several grounds clearly explained in the Attorney General's Opinion Letters. At most, the present challenge is unripe, especially given that the statute specifically addresses the Attorney General's authority to review and then approve or reject a fiscal note and fiscal note summary. It cannot be the case that every time the Attorney General were to take an action expressly allowed by statute, a parade of horribles occurs that then invites intervention from outside the statewide elected officials. What is more, the solution to this problem is clear: an order requiring the State Auditor to complete his duty under the statute and revise the fiscal note and fiscal note summary. The solution is not to slash the Attorney General's authority that Section 116.175 plainly gives him.

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Finally, the record below demonstrates that the State Auditor still had more work to do. Three days before the Attorney General responded with his rejection of the State Auditor's fiscal note and fiscal note summary, on April 7, 2023, the State Auditor received additional information from the Governor's Office. The Governor's Office provided a fiscal estimate for each of the 11 initiative petitions based on "additional costs identified by other agencies in regards to regulation and enforcement." In addition, the Governor's Office stated that each initiative petition appears "to conflict with federal law, which may have bearing on the fiscal responsibilities of [the Governor's Office]."

Each submission from the Governor's Office noted that "there will likely be litigation leading to a fiscal impact on the Legal Expense Fund (LEF) ranging from $1,500 to unknown" due to potential conflicts with the U.S. Supreme Court's decision in "*Dobbs v. Jackson Women's Health Organization* and requirements of parental consent." (Italics to case citation added). In addition, for several of the measures, the Governor's Office estimated that "failing to be in compliance with federal requirements related to Medicaid and MO HealthNet could lead to a fiscal impact of up to $600M" due to a conflict between the content of the initiative petitions and "the federal policy related to the Hyde Amendment and expending public funds on abortions."

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The State Auditor has failed to incorporate these new figures, even though the State Auditor acknowledged receiving these responses and could have incorporated the responses from the Governor's office when revising his fiscal note and fiscal note summary.

For these reasons, this Court should reverse the Circuit Court's judgment, and remand it to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary under Section 116.175.5

III. The circuit court erred in granting mandamus relief against the Attorney General, because Respondent had other remedies available and the Attorney General's duty under Section 116.175 is not ministerial, in that the Auditor had not yet revised his materials before Respondent filed suit, the Attorney General has not refused to perform a ministerial duty, and the Attorney General has discretionary authority to review and determine a fiscal note and fiscal note summary's compliance under Section 116.175.

Standard of Review. This point on appeal raises a question of statutory interpretation, which is reviewed de novo on appeal. *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020).

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Preservation. The Attorney General preserved this issue for appeal in his answer to Respondent's Petition (D19), in his pre-trial brief (D23), and during trial (*See* Tr.).

A writ of mandamus may only be issued in instances where the litigant: (1) proves that "no alternative remedy exists"; (2) "proves that he has a clear, unequivocal, specific right to a thing claimed"; and (3) proves the writ relates to "a ministerial duty that one charged with the duty has refused to perform." *Barnes v. Uhlich*, 592 S.w.3d 67, 70–71 (Mo. App. W.D. 2019). Here, Respondent's Petition failed on every count. This Court should reverse the Circuit Court's finding otherwise.

A. Respondent failed to establish that a writ of mandamus is the exclusive remedy available to her.

"There is no remedy that a court can provide that is more drastic, no exercise of raw judicial power that is more awesome, than that available through the extraordinary writ of mandamus." *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 266 (Mo. banc 1980). As it is the most significant exercise of judicial power a court can perform, a "writ of mandamus issues only in a case of necessity," and if "there is any doubt of its necessity or propriety, it will not be issued." *State ex rel. University Park Building Corp. v. Henry*, 376 S.W.2d 614, 617 (Mo. App. 1964); *see also State ex rel. Kelley*, 595 S.W.2d at 266 ("Recognizing the extreme nature of the order to act in accordance with a peremptory writ of mandamus, we believe

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that the remedial writ ought to be reserved for those cases in which no alternative measure will be effective.").

Recognizing these limitations, courts have held that "[i]t is a long-established principle of law that mandamus does not issue where there is another adequate remedy available to relator." *State ex rel. Kelley*, 595 S.W.2d at 265. "In other words, 'the writ of mandamus is to be used only as a last resort on the failure of any adequate alternative remedy.'" *Beauchamp v. Monarch Fire Protection District*, 471 S.W.3d 805, 810 (Mo. App. E.D. 2015) (quoting *State ex rel. Kelley*, 595, S.W.2d at 265); *see also State ex rel. KelCor., Inc. v. Nooney Realty Tr., Inc.*, 966 S.W.2d 399, 402 (Mo. App. E.D. 1998) ("A required element of proving a right to mandamus is that there is no alternative, adequate remedy other than the issuance of the writ.").

A review the Petition below reveals that Respondent likely acknowledges that a writ of mandamus is the exclusive possible remedy. Count I of the Petition acknowledges the existence of other possible remedies and therefore, on the face of Respondent's own pleadings, bars any right to a writ of mandamus. *See Barnes*, 592 S.W.3d at 71–72 (dismissing a petition for writ of mandamus where the relator "did not allege in his petition in mandamus that he was without an adequate alternative remedy."). In briefing before the Circuit Court, Respondent even took one step past *Barnes*, acknowledging with frankness that Respondent believes "mandamus . . . is not the exclusive remedy" against the Attorney General available to her in her

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Petition. (D8 at p.5). Respondent's own admission should have been fatal to Count I of her Petition.

This Court has held that an attempt to take two bites of the same apple by requesting both a declaratory judgment and writ of mandamus per se demonstrates that mandamus is not the exclusive remedy available and, consequently, bars a court from issuing the writ in her favor. In *State ex rel. Kelley*, this Court found it "undisputed that the relators had an alternative remedy [to a writ of mandamus] available to them" when the relators also "filed an action seeking a declaratory judgment" related to the same dispute. *State ex rel. Kelley*, 595 S.W.2d at 267. The Court noted that, "[b]y filing the action for declaratory judgment seeking a judicial declaration" on the same underlying facts of the lawsuit, the relator "demonstrated his willingness to submit the controversy . . . to the judgment of the court" and was consequently barred from seeking mandamus. *Id*. Likewise here, Respondent's "alternative" request for declaratory judgment on the same facts demonstrates mandamus is not the exclusive remedy available to her. Mandamus is not a "short cut for the speedy resolution of disputes that adequately may be resolved by other means." *Id.* at 268. A writ of mandamus is an extraordinary remedy of last resort. Even now, this case is not at a last resort stage.

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B. Respondent failed to establish any clear, unequivocal, and specific right she seeks to vindicate with a writ of mandamus.

Respondent also failed to demonstrate any clearly established and presently existing right she could vindicate through mandamus. "Mandamus is a discretionary writ, not a writ of right," and it "is not appropriate to establish a legal right, but only to compel performance of a right that already exists." *State ex rel. Petti v. Goodwin-Raftery*, 190 S.W.3d 501, 506 (Mo. App. E.D. 2006). A petitioner seeking mandamus bears the burden of establishing that he or she has a "clear, unequivocal, specific right to have the act performed as well as a corresponding present, imperative, and unconditional duty on the part of the respondent to perform the action sought." *State ex rel. Lee v. City of Grain Valley*, 293 S.W.3d 104, 109 (Mo. App. W.D. 2009) (emphasis omitted). This is because "the purpose of mandamus is to execute and not to adjudicate; it coerces performance of a duty already defined by law." *State ex rel. City of Crestwood v. Lohman*, 895 S.W.2d 22, 27 (Mo. App. W.D. 1994).

Respondent did not meet her burden of establishing a clear, unequivocal, specific right to have the act performed. It is important to break down the precise "clear and unequivocal right" Respondent asserted warrants the granting of extraordinary mandamus relief. Section 116.175 relates exclusively to the interactions between the Auditor and the Attorney General in the process of drafting and reviewing proposed fiscal notes and fiscal note summaries. § 116.175. Nowhere

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in the statute is any provision that even *implies* that a member of the public has a "clear and unequivocal" right to interject themselves into the process of the Attorney General reviewing fiscal notes and fiscal note summaries. The absence of any case establishing Respondent's right to file a lawsuit while there is still more work for one state official to do is telling.

In fact, Respondent already has an alternative avenue here – to challenge an official ballot title under Section 116.190. If Respondent disagrees with the ultimately approved fiscal note or approved fiscal note summary, she is free to challenge the ballot title once the Secretary of State certifies the official ballot title. Her statutory rights under Section 116.190 does not, however, support any suggestion that she has a "clear and unequivocal" right to intervene before that time. The Circuit Court erred in holding otherwise.

To allow a party to obtain mandamus relief from generalized statements that they have a right to bring issues they deem significant under a constitutional provision, such as Article III, Section 50, would render entirely meaningless the requirement to demonstrate a clear and specific right to relief. This Court has conclusively held that one must demonstrate a "specific" right to relief before a court may rule on a request for mandamus. *See State ex rel. Swoboda v. Missouri Comm'n on Hum. Rts.*, 651 S.W.3d 800, 805 (Mo. banc 2022). A generalized pronouncement

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of a litigant's "right to bring issues they deem significant to the voters" (D8 at p.4) as Respondent argued below plainly does not satisfy this standard.

Mandamus is an extraordinary and consequential tool. It is "a hard and fast writ, and an unreasoning writ, a cast-iron writ, the right arm of the court." *State ex rel. Kelley*, 595 S.W.2d at 266 (quoting *State ex rel. Kansas City v. Kansas City Gas Co.*, 163 S.W. 854, 857 (Mo. banc 1914)). To protect against overreach of this power, courts may only exercise mandamus when a litigant has identified a "clear, unequivocal, and specific right" to the action a party seeks performed. Respondent failed to establish any such right, and the Circuit Court erred in concluding otherwise.

C. The Attorney General's statutory authority under Section 116.175 to approve or reject the State Auditor's proposed fiscal note and fiscal note summary is not ministerial and therefore not subject to a writ of mandamus.

Respondent's request for mandamus should also have failed below because she asked the Circuit Court to exercise judicial power to compel an executive branch official to reach a *particular* outcome on a *discretionary* decision. Courts have long held that a writ of "'[m]andamus will not lie to compel an act when its performance is discretionary.'" *McDonald v. City of Brentwood*, 66 S.W.3d 46, 51 (Mo. App. E.D. 2001) (quoting *State ex rel. University Park Building*, 376 S.W.2d at 617). This is because the purpose of a writ of mandamus is to "compel the performance of a ministerial duty that one charged with the duty has refused to perform." *Lemay Fire*

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Prot. Dist. v. St. Louis County, 340 S.W.3d 292, 294 (Mo. App. E.D. 2011) (quoting *State ex rel. Pub. Counsel v. Pub. Serv. Comm'n*, 236 S.W.3d 632, 635 (Mo. banc 2007)); *see also State ex rel. Thomas v. Neeley*, 128 S.W.3d 920, 924 ("[A] writ of mandamus cannot compel the performance of a discretionary act.") (Mo. App. S.D. 2004).

Even if Respondent were able to establish all of the other requirements for a writ of mandamus—which she failed to do—mandamus relief should have been unavailable because the Attorney General's duties to *review* ***and*** *approve or deny* a fiscal note and fiscal note summary Section 116.175 are not "ministerial." When analyzing whether a writ of mandamus may issue, courts have juxtaposed "ministerial" government actions with discretionary actions of government officials "that require[] the exercise of reason in determining how or whether the act should be performed." *State ex rel. Thomas*, 128 S.W.3d at 924. A writ of mandamus "will only issue when there is an *unequivocal showing* that the public office failed to perform a ministerial duty imposed by law." *Id*. (emphasis added).

Section 116.175 directs the Attorney General to "determine[]" whether the fiscal note and fiscal note summary satisfy the requirements of the statute, which, in turn, affects whether the Attorney General approves the proposed fiscal note and fiscal note summary or returns each to the auditor for revision. The fact that the Attorney General's determinations under the statute are more than simply

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"ministerial" is demonstrated by the explicit contemplation under the statute that the Attorney General *may* determine that the fiscal note and fiscal note summary cannot approved until further revision—all depending on his review of the proposed fiscal note and fiscal note summary. *State ex rel. Thomas*, 128 S.W.3d at 924. In the face of the plain text of the statute, Respondent did not carry her burden to make an "unequivocal showing" that the Attorney General failed to perform a ministerial duty. *Id.*

A discretionary action does not become ministerial simply because a party challenging a decision strongly believes the outcome should have been different. *State ex rel. Thomas*, 128 S.W.3d at 924. After all, it is often the case that actions by government officials can elicit strong reactions on both sides of the question. Respondent asked the Circuit Court to utilize the writ of mandamus to direct the Attorney General to exercise his discretion in a particular manner on the question of whether or not a proposed fiscal note and fiscal note summary comply with requirements of § 116.175. The Circuit Court agreed, and that decision risks creating a dangerous and unprecedented result of the exercise of judicial power over Missouri elections officials performing discretionary elections responsibilities. The very fact that the Attorney General must "determine[]" whether the "content" of a proposed fiscal note and fiscal note summary complies with a list of requirements, and then either approve the draft or return it to the State Auditor for revision, demonstrates

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that Section 116.175 entrusts in the Attorney General fundamental discretionary powers. Missouri courts have held time and again that mandamus may not be used to compel the Attorney General—or indeed, any other government official—to exercise his discretion in a particular way favored by a litigant. *E.g.*, *McDonald*, 66 S.W.3d at 51.

For these reasons, this Court should reverse the Circuit Court's judgment, and remand it to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary under Section 116.175.5.

IV. The circuit court erred in granting declaratory relief against the Attorney General, because the case was not yet ripe and therefore not justiciable, in that the fiscal note and fiscal note summary review and resubmission process had not yet concluded.

Standard of Review. This point on appeal raises a question of statutory interpretation, which is reviewed de novo on appeal. *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020).

Preservation. The Attorney General preserved this issue for appeal in his answer to Respondent's Petition (D19), in his pre-trial brief (D23), and during trial (*See* Tr.).

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For similar reasons as the Attorney General argued above why the Circuit Court erred in granting mandamus relief and why the State Auditor failed to comply with his duty under Section 116.175 to revise his fiscal note and fiscal note summary, the Circuit Court erred in granting Respondent's alternative request for declaratory relief against the Attorney General. The Circuit Court held in footnote 11 to its judgment that it would "direct the same relief by declaratory judgment" if it did not grant Respondent's request for mandamus relief. Because the Circuit Court appears to have rested an alternative declaratory judgment ruling on the same grounds as the ruling granting mandamus relief, the Attorney General incorporates his same arguments above here. The Attorney General will also elaborate on some of those points.

There was no presently existing controversy over which a court can grant relief of a conclusive character. "Ripeness, like standing, is an element of justiciability." *Calzone v. Ashcroft*, 559 S.W.3d 32, 35 (Mo. App. W.D. 2018). Ripeness is determined by whether "the parties' dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict that is presently existing, and to grant specific relief of a conclusive character." *Mo. Health Care Ass'n v. Attorney Gen. of Mo.,* 953 S.W.2d 617, 620 (Mo. banc 1997); *see also Seay v. Jones*, 439 S.W.3d 881, 888 (Mo. App. W.D. 2014) ("citizens are authorized to seek judicial review of the official ballot title… [i]n such an action, the

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challenger must 'state the reason or reasons why the summary statement portion of the official ballot title is insufficient or unfair.'").

Here, Respondent's suit is not ripe because the exchange—and review and resubmission—of materials between the Attorney General and the State Auditor had not yet concluded. There was more work left for the State Auditor to do, as the State Auditor received new submissions from the Governor's Office on a fiscal impact for the initiative petitions. Even if the State Auditor did not receive those submissions, the State Auditor still has not complied with his duty to revise the fiscal note and fiscal note summary. § 116.175.5. But his receipt of new information shows even more that there was more work to do.

Respondent's alternative request for declaratory relief—and the Circuit Court's granting of that alternative request—came too early. Of course, as discussed above, Respondent should wait until the entire process had concluded and challenge an official ballot title under Section 116.190. But at the time she filed her lawsuit and up until the time of trial, there was no real presently existing controversy between the Attorney General and Respondent. Simply because Respondent disagreed with the Attorney General's decision does not entitle her to a request for declaratory relief. Rather, the dispute must be ripe. Furthermore, in bringing her lawsuit Respondent may not attempt to challenge the Attorney General's underlying exercise of discretion in determining that the Auditor's identical proposed fiscal note

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and fiscal note summaries for Respondent's initiative petitions failed to comply with Section 116.175. And ultimately, her request for declaratory relief seems to challenge the discretion the Attorney General exercised at a pre-final dispositional stage. There is no right for Respondent to file any lawsuit and interfere in the State Auditor and Attorney General's process before it has been completed.

For these reasons, this Court should reverse the Circuit Court's judgment because it was not yet ripe and therefore non-justiciable, and remand it to the Circuit Court with instructions to dismiss the case.

CONCLUSION

For these reasons, this Court should reverse the Circuit Court's judgment, and remand it to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary under Section 116.175.5.

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July 5, 2023

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via the Court's electronic filing system on the 3rd day of July, 2023, to all counsel of record.

I also certify that the foregoing brief complies with the limitations in Rule No. 84.06(b) and that the brief contains 13,432 words.

/s/ *Jason K. Lewis*

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Good morning Susan. Attached is the brief and the 11 abortion petitions matter. The case is set for oral argument in the Supreme Court at 3 pm on Tuesday July 18.

Ray

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SC100132

IN THE SUPREME COURT OF MISSOURI

State of Missouri ex rel. Dr. Anna Fitz-James,

Plaintiff-Respondent,

v.

Andrew Bailey, Missouri Attorney General, *et al.*,

Defendants-Appellants.

From the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Circuit Judge

BRIEF OF APPELLANT ATTORNEY GENERAL ANDREW BAILEY

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JURISDICTIONAL STATEMENT

On May 4, 2023, Respondent Dr. Anna Fitz-James (Relator below) filed her Verified Petition for Writ of Mandamus and Declaratory Judgment. Counts I and II of the Petition prayed for a writ of mandamus or declaratory judgment against the Attorney General, the State Auditor, and the Secretary of State.[1] Count III of the Petition asserted a direct challenge to the constitutionality of seven different elections statutes related to the ballot initiative process under Article III, §§ 49 and 50 of the Missouri Constitution: §§ 116.040, 116.050, 116.175, 116.180, 116.190, 116.332, and 116.334. Specifically, Respondent prayed for the Court to conclude that "any or all" of the aforementioned statutes are unconstitutional "in whole or in part . . . on their face or as applied" to Respondent.

This Court has exclusive appellate jurisdiction over this case because, under Article V, § 3 of the Missouri Constitution, this Court has "exclusive appellate jurisdiction in all cases involving the validity . . . of a statute . . . of this state." *See Alderson v. State*, 273 S.W.3d 533, 535 (Mo. banc 2009). That appellate jurisdiction also extends to situations where "any party properly raises and preserves in the trial court a real and substantial (as opposed to merely colorable) claim that a statute is unconstitutional[.]"*Boeving v. Kander*, 496 S.W.3d 498, 503 (Mo. banc 2016)

[1] The Circuit Court dismissed the Secretary of State from this lawsuit at the beginning of trial.

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(further noting that "this Court has exclusive appellate jurisdiction over any appeal in which that claim may need to be resolved.").

On June 20, 2023, the Circuit Court issued a Judgment against the Attorney General on Count I, and denied Respondent's claims in Counts II and III. The Attorney General has appealed the portion of the Circuit Court's June 20, 2023 judgment adverse to the Attorney General that issued a writ of mandamus or declaratory relief, against the Attorney General. As represented in Respondent's Petition and the Circuit Court's Judgment, the Attorney General's appeal inherently involves questions surrounding the obligations imposed on executive branch officials by various elections statutes and the relationship between those obligations and different provisions of the Missouri Constitution.

Respondent's Petition also directly challenged the validity of seven different duly enacted statutes under Article III, §§ 49 and 50 (both on the face of each statute and as applied), and this issue was repeatedly addressed by both parties throughout the litigation and ruled on by the Circuit Court. *See Collector of Revenue of the City of St. Louis v. Parcels of Land Encumbered with Delinquent Tax Liens Serial Numbers 1-047 and 1-048, et al.*, 517 S.W.2d 49, 55 (Mo. banc 1974) (stating that the Supreme Court "reviews only questions presented to the trial court."). The Attorney General's appeal of the Circuit Court's Judgment on Respondent's Petition may implicate the scope of Article III, § 49 and Article III, § 50 of the Missouri

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Constitution, as each relates to the validity of the Missouri election system under the statutes that Respondent sought to declare as unconstitutional in Count III of the Petition: §§ 116.040, 116.050, 116.175, 116.180, 116.190, 116.332, and 116.334. And Respondent has cross-appeal rights over Count III.

Accordingly, appellate jurisdiction is proper in this Court because this case involves "the validity . . . of a statute . . . of this state," Mo. Const. art. V, § 3, or at the very least it involves a properly-preserved and colorable constitutional claim that may need to be resolved on appeal, *see Boeving*, 496 S.W.3d at 503.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises the question of when the Attorney General can properly exercise the authority given to his office under Section 116.175 to "return to the [State Auditor] for revision" a fiscal note and fiscal note summary prepared for an initiative petition that does not contain the "legal content" required for those materials. § 116.175.4, .5, RSMo. The answer to that question is clear, and it comes from the very statute granting the Attorney General the authority to review the State Auditor's submissions: he can return to the Auditor for revision a fiscal note and summary that is "argumentative" or is "likely to create prejudice for or against the proposed measure." § 116.175.3, RSMo. That is exactly what the Attorney General did here. For several reasons, the Circuit Court erred in slashing the Attorney General's authority and relegating his office to merely rubber stamping the State Auditor's submissions.

First, the plain meaning of the Attorney General's and State Auditor's roles under Section 116.175 are clear. The Attorney General has the responsibility to review the Auditor's proposed fiscal note and fiscal note summary[2] and determine

[2] As discussed in the Statement of Facts, Respondent proposed 11 initiative petitions. For purposes of the issues raised in this appeal, there is no material difference between those ballot measures or between the fiscal notes and fiscal note summaries prepared for them. For that reason and in order to simplify the language in this brief, Appellant will refer to Respondent's initiative petitions and the State Auditor's fiscal note and fiscal note summaries in the singular. Appellant will differentiate between the measures when necessary.

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whether the fiscal note and fiscal note summary each satisfy the requirements of the statute. The statute commands that State Auditor shall revise his submissions if the Attorney General returns them to him. § 116.175.5, RSMo. Here, the State Auditor refused to do so. He could, and should, have done more, as Section 116.175 commands. In fact, the evidence demonstrates that for many of Respondent's proposed ballot measures, the State Auditor *did* receive additional comments from government officials that should have been incorporated into a revised fiscal note and fiscal note summary.

Second, the Attorney General correctly rejected the State Auditor's fiscal note and fiscal note summary. The only plausible interpretation of "legal content," based on that phrase's plain meaning and surrounding context in Section 116.175, is that a fiscal note or fiscal note summary that is obviously deficient on its face does *not* contain the required legal content. This is a narrow reading of "legal content" that does not justify the Circuit Court's holding that the Attorney General engaged in an unwarranted exercise of authority.

In his Opinion Letters to the State Auditor, the Attorney General described the many reasons why the State Auditor's materials lacked the required legal content. The State Auditor's fiscal note contained wildly inadequate responses based on divergent and nonsensical methodologies from local governmental entities that, on their face, cannot survive even the most forgiving review. The fiscal note

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summary, too, lacks the required legal content because it conveys the misleading—and therefore facially argumentative and prejudicial—message that it is a reliable estimate of the cost of the measure. The fiscal note summary also fails to adequately summarize all submissions the State Auditor received from "others with knowledge pertinent to the cost of the proposal." § 116.175.1, RSMo. Voters will be misled when reviewing the fiscal note and fiscal note summary, and the information contained in them will create prejudice in favor of the measure.

Third, the Circuit Court erred in entering either mandamus or declaratory relief against the Attorney General. Mandamus relief ordering the Attorney General to approve the State Auditor's materials was inappropriate because mandamus is a last-resort remedy, and there were other steps that needed to take place before a writ of mandamus could be sought. Section 116.175 allows the Attorney General's review of a fiscal note and fiscal note summary to be more than a rubber-stamp review confined to the number of words in the materials; for that reason, the Attorney General's duty is not ministerial and not one that can be enforced through mandamus. And Respondent did not demonstrate that she had a *right* to inject herself at this early stage in the ballot measure review process, which should be an exchange of materials between two statewide elected officials. Her challenge is premature.

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For these reasons, this Court should reverse the Circuit Court's judgment, and remand it to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary.

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MO-AG-23-0462-A-000842

STATEMENT OF FACTS

I. The Proposed Initiative Petitions.

On March 8, 2023, Respondent Dr. Anna Fitz-James submitted eleven initiative petitions that would amend the Missouri Constitution to the Secretary of State. (D28, at ¶2; D29 (Jt. Stip. Ex. A)). The Secretary of State assigned the following initiative numbers to the petitions: 2024-077, 2024-078, 2024-079, 2024-080, 2024-081, 2024-082, 2024-083, 2024-084, 2024-085, 2024-086, and 2024-087. (D28, ¶4). The Secretary of State sent a copy of each initiative petition's sample sheet to the Attorney General and the State Auditor. (D28, ¶6). Additionally, the text of each initiative petition was posted to the Secretary of State's website. (D28, ¶5).

The Attorney General reviewed and approved the sample sheets for each of the eleven initiative petitions as to form under Section 116.050. (D28, ¶7). Following that approval, the Secretary of State also approved each of the initiative petitions as to form. (D29, ¶8).

On March 29, 2023, the Auditor sent a proposed fiscal note and fiscal note summary for each of the eleven initiative petitions to the Attorney General. (D28, ¶9). On April 10, 2023, the Attorney General responded to each of the fiscal notes and fiscal note summaries from the Auditor with an opinion letter, stating the reasons that the proposed fiscal notes and fiscal note summaries were legally deficient under Section 116.175. (D28, ¶11; D34-D35 (Jt. Stip. Ex. C)).

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II. The Attorney General's Opinion Letters Sent to the Auditor in Response to the Fiscal Note and Fiscal Note Summaries.

In the April 10, 2023 Opinion Letters from the Attorney General to the State Auditor, the Attorney General stated that he was rejecting the State Auditor's fiscal note and fiscal note summary for lacking the required legal content and returning them to the State Auditor for revision. (D34-D35 (Jt. Stip. Ex. C)). The Attorney General's Opinion Letters detailed the reasons for his rejection, as follows. (*Id.*).

First, the Attorney General wrote that the fiscal note contains inadequate and divergent submissions from local government entities. (D34 at p.2). The Attorney General stressed the statistically insignificant small sample size of responses solicited by the State Auditor, noting "this ballot measure will affect the present and future population of Missouri. (*Id.*) Yet, while Missouri has 114 counties and one independent city, in addition to over 1,000 other cities and villages . . . only three counties and two cities responded." (*Id.*).

The Opinion Letter noted that only one local governmental entity, Greene County, made an effort to submit a reliable methodology for calculating the fiscal impact. (*Id.*) "Greene County[] understood that the measure would have the obvious effect of reducing the population of [its] citizens," and estimated that 135 future citizens would be lost in that county annually due to legalizing abortion to Missouri. It estimated nearly $51,000 in lost county revenue annually. (*Id.*). The Attorney

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General emphasized again that Greene County "was the only entity to recognize what is facially apparent from this measure." (*Id.*).

The Greene County response stated that the "substantial economic fiscal reality of abortion relating to unborn lives cannot be denied or omitted from a fiscal note to inform voters of the consequences." (*Id.* at p.3). The Attorney General reviewed the submission and informed the State Auditor that it must have "recognized that this was a reasonable assumption" and that the "fiscal note summary reflects the financial impact to Greene County." (*Id.*). The Attorney General continued by noting that, however, that the State Auditor "did not apply that same reasonable assumption when assessing the submissions from the few other entities who responded." (*Id.*). Additionally, the Attorney General wrote that the Greene County methodology should be applied to the remainder of the populous of Missouri, because it is "unreasonable for those entities to conclude that the measure will have no estimated fiscal impact[.]" (*Id.*).

Second, the Attorney General also stated the fiscal note contained inadequate submissions concerning the impact to state government operations. (*Id.*). Citing submissions submitted to the State Auditor's office by a few entities, the Attorney General wrote that the proposed initiative petitions could jeopardize federal funding for Missouri Medicaid. (*Id.* at pp.3-4). He compared Missouri's situation to another other state who recently suffered similar losses when changes were made to its

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abortion policies. (*Id.* at p.4). The Attorney General stated those submissions should not be accepted, because the potential value of the loss was not reflected in the submissions from the varying state government entities. (*Id.*).

Third, the Attorney General stated that the fiscal note summary was also legally deficient for two principal reasons. (*Id.* at pp.4-5). The first reason was that the fiscal note summary "conveys the misleading message that it is an accurate representation of the true cost to local and state governmental operations." (*Id.* at p.4). The Attorney General wrote that this was because the "only numerical figure mentioned in the fiscal note summary is . . . a sliver of the maximum (or even likely) potential financial impact" and that the "average, reasonable voter reading this summary will not know the small sample of entities" that the State Auditor had solicited for a submission. (*Id.*).

The second reason was that the fiscal note summary fails "to adequately summarize the submissions [the State Auditor's] office received." (*Id.* at p.5). The Attorney General wrote that "the fiscal note summary merely states that 'opponents estimate a potentially significant loss to state revenues.'" (*Id.*). He stated that the State Auditor "received submissions indicating that the 'potentially significant loss' could be nearly $12.5 billion dollars" and because of that potential loss, "the fiscal note summary should reflect that number." (*Id.*).

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One submission by an interested party noted "the loss of federal Medicaid dollars, which in the proposed fiscal year 2024 budget would be a loss of nearly $12.5 billion." (*Id.*; *see also* D30 at p. 15 (Jt. Stip. Ex. B)). The submission explained several examples of how this might occur. (D30 at p.15 (Jt. Stip. Ex. B)). For example, under the initiative petitions, the entity noted that hospitals might be required to perform certain procedures that are disallowed by the federal government. (*Id.*). That same submission noted that under the initiative petitions, the cost of inpatient medical procedures and emergency department services for treating "issues before childbirth with complications" has a median charge per person of $11,997 with a maximum charge of $35,345. (*Id.* at p.16). The submission noted that these procedures may ultimately be paid by taxpayers. (*Id.*). Another submission by an interested party echoed many of those same concerns and potential loss of $12.5 billion in federal Medicaid money. (D30 at p.22 (Jt. Stip. Ex. B)).

For these reasons, the Attorney General concluded that "voters reading the fiscal note summary are likely to be misled into thinking that this ballot measure will have little fiscal impact on state and local governmental entities." (D34 at p.5). Therefore, the Attorney General's Opinion Letters continued, "the fiscal note and fiscal note summary do not satisfy the requirements of § 116.175 and therefore I am returning them to you for revision." (D34 at p.5).

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III. The State Auditor Receives Additional Fiscal Impact Estimates.

Three days before the Attorney General responded with his rejection of the State Auditor's fiscal note and fiscal note summary, on April 7, 2023, the State Auditor received additional information from the Governor's Office. (D41 (Jt. Stip. Ex. I)). The Governor's Office provided a fiscal estimate for each of the 11 initiative petitions based on "additional costs identified by other agencies in regards to regulation and enforcement." (*Id.*) In addition, the Governor's Office stated that each initiative petition appears "to conflict with federal law, which may have bearing on the fiscal responsibilities of [the Governor's Office]." (*Id.*).

Each submission from the Governor's Office noted that "there will likely be litigation leading to a fiscal impact on the Legal Expense Fund (LEF) ranging from $1,500 to unknown" due to potential conflicts with the U.S. Supreme Court's decision in "*Dobbs v. Jackson Women's Health Organization* and requirements of parental consent." (*Id.*) (Italics to case citation added). In addition, for several of the initiative petitions, the Governor's Office estimated that "failing to be in compliance with federal requirements related to Medicaid and MO HealthNet could lead to a fiscal impact of up to $600M" due to an apparent conflict "with the federal policy related to the Hyde Amendment and expending public funds on abortions." (*Id.*).

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IV. The State Auditor's Response to the Attorney General's Decision to Return the Fiscal Note and Fiscal Note Summary.

On April 21, 2023, the State Auditor sent the Attorney General a letter refusing to revise the fiscal note and fiscal note summary. The State Auditor did not revise its original materials to incorporate the new information it had received from the Governor's Office. (D28, ¶13; D38 (Jt. Stip. Ex. F)). The State Auditor stated that his office is "resubmitting the unaltered fiscal note and fiscal note summary for [the Attorney General's] review and approval as to legal content and form." (D38 (Jt. Stip. Ex. F)). The State Auditor's response letter stated that the Attorney General should "return the approved fiscal note summaries within 10 days, pursuant to § 116.175.4, RSMo." (*Id.*)

Additionally, on April 21, 2023, the State Auditor sent a separate letter stating that the fiscal note and fiscal note summary contained "estimated costs to state and local government entities and the fiscal note summary further states potential significant costs are anticipated by opponents." (D37 (Jt. Stip. Ex. E)). The State Auditor did not revise the fiscal note or the fiscal note summaries because "no new information [had] been presented that warrant[ed] inclusion in the fiscal note or fiscal note summary." (*Id.*). The State Auditor's letter made no mention of the new information it received from the Governor's Office. (*See id.*).

On May 1, 2023, the Attorney General stated that because the proposed fiscal notes and fiscal note summaries remained unchanged after the previous rejection,

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they were not approved. (D28, ¶ 14; D40 (Jt. Stip. Ex. H)). The Attorney General's Office "thus concluded that we have fulfilled our response obligations under § 116.175, RSMo for initiative petitions 2024-077 through 2024-087." (*Id.*).

V. Respondent Files Litigation.

On May 4, 2023, Respondent filed a Petition against the Attorney General, State Auditor, and Secretary of State. (D2). The Petition raised three Counts. Count I was asserted only against the Attorney General and sought mandamus or declaratory relief that ultimately sought to order the Attorney General to approve the State Auditor's initial fiscal note and fiscal note summary. Count II was asserted against the State Auditor and the Secretary of State and sought mandamus or declaratory relief requiring the State Auditor to deliver to the Secretary of State the initial fiscal note and fiscal note summary for inclusion in an official ballot title. Count III was a request for declaratory relief against all three statewide officials and sought to strike as unconstitutional "any or all" of seven statutes governing the ballot initiative process in Chapter 116: Sections 116.040, 116.050, 116.175, 116.180, 116.190, 116.332, and 116.334. (*Id.*).

The case was briefed and tried on an expedited basis, and limited discovery took place also on an expedited basis. (*See generally* D1). It was ultimately tried on a joint stipulation of facts and exhibits. (D28). At the trial on June 14, 2023, the Circuit Court granted a motion to dismiss filed by the Secretary of State, leaving

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only the Attorney General and State Auditor as remaining parties. (Tr. 17:14-20). Ultimately, no witnesses testified, and counsel for Respondent, the State Auditor, and the Attorney General presented argument. (*See generally* Tr.).

On June 20, 2023, the Circuit Court issued a Judgment against the Attorney General on Count I, and denied Respondent's claims in Counts II and III. (D44). The Circuit Court entered a writ of mandamus ordering the Attorney General to "approve the legal content and form of the fiscal note summaries submitted to the Attorney General on March 29, 2023, by the Auditor" for the eleven initiative petitions. (D44, p.28; D45). Later that same day, the Attorney General filed this notice of appeal. (D47).

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POINTS RELIED ON

I. The circuit court erred in granting mandamus or declaratory relief against the Attorney General, because the Attorney General properly returned the State Auditor's fiscal note and fiscal note summary to the State Auditor for revision, in that the State Auditor's submissions lacked the required legal content under Section 116.175, RSMo.

- Section 116.175, RSMo
- *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582 (Mo. banc 2018)
- *State v. Teer*, 275 S.W.3d 258 (Mo. banc 2009)

II. The circuit court erred in granting mandamus or declaratory relief against the Attorney General, because the State Auditor was required to revise his fiscal note and fiscal note summary after the Attorney General rejected them, in that the Attorney General's rejection was proper, Section 116.175 contains a clear command to revise the materials upon rejection, and the State Auditor received additional information that should have been incorporated.

- Section 116.175, RSMo
- *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582 (Mo. banc 2018)
- *Protect Consumers' Access to Quality Home Care Coal., LLC v. Kander*, 488 S.W.3d 665 (Mo. App. W.D. 2015)

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- *Missouri Mun. League v. Carnahan*, 303 S.W.3d 573 (Mo. App. W.D. 2010)
- *Pippens v. Ashcroft*, 606 S.W.3d 689 (Mo. App. W.D. 2020)

III. The circuit court erred in granting mandamus relief against the Attorney General, because Respondent had other remedies available and the Attorney General's duty under Section 116.175 is not ministerial, in that the Auditor had not yet revised his materials before Respondent filed suit, the Attorney General has not refused to perform a ministerial duty, and the Attorney General has discretionary authority to review and determine a fiscal note and fiscal note summary's compliance under Section 116.175.

- Section 116.175, RSMo
- *State ex rel. Swoboda v. Missouri Comm'n on Hum. Rts.*, 651 S.W.3d 800 (Mo. banc 2022)
- *State v. Teer*, 275 S.W.3d 258 (Mo. banc 2009)
- *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261 (Mo. banc 1980)
- *Barnes v. Uhlich*, 592 S.W.3d 67 (Mo. App. W.D. 2019)

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IV. The circuit court erred in granting declaratory relief against the Attorney General, because the case was not yet ripe and therefore not justiciable, in that the fiscal note and fiscal note summary review and resubmission process had not yet concluded.

- Section 116.175, RSMo
- *State ex rel. Swoboda v. Missouri Comm'n on Hum. Rts.*, 651 S.W.3d 800 (Mo. banc 2022)
- *State v. Teer*, 275 S.W.3d 258 (Mo. banc 2009)
- *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261 (Mo. banc 1980)
- *Barnes v. Uhlich*, 592 S.W.3d 67 (Mo. App. W.D. 2019)

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ARGUMENT

I. The circuit court erred in granting mandamus or declaratory relief against the Attorney General, because the Attorney General properly returned the State Auditor's fiscal note and fiscal note summary to the State Auditor for revision, in that the State Auditor's submissions lacked the required legal content under Section 116.175, RSMo.

Standard of Review. This point on appeal raises a question of statutory interpretation, which is reviewed de novo on appeal. *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020).

Preservation. The Attorney General preserved this issue for appeal in his answer to Respondent's Petition (D19), in his pre-trial brief (D23), and during trial (*See* Tr.).

A. Background to Section 116.175.

Section 116.175 clearly establishes the role of the Attorney General in reviewing, and either approving or rejecting the Auditor's fiscal note and fiscal note summary prepared for an initiative petition. The process of crafting the fiscal note and fiscal note summary for an initiative petition begins with the Auditor, who prepares a proposed fiscal note and fiscal note summary for each initiative petition received from the Secretary of State's office. RSMo. § 116.175.1. The adequacy of a fiscal note and fiscal note summary are governed by Section 116.175, which

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provides, among other things, mechanisms for proponents or opponents of a measure to submit statements related to the measure and which requires that any fiscal note or fiscal note summary "state the measure's estimated cost or savings, if any, to state or local governmental entities." § 116.175.3. The fiscal note summary shall additionally "summarize the fiscal note in language neither argumentative nor likely to create prejudice either for or against the proposed measure." *Id*.

After the Auditor has "prepare[d] a fiscal note and a fiscal note summary" for a proposed initiative, the Auditor "forwards both to the attorney general" for the Attorney General's review. § 116.175.2. At that point, the plain language of Section 116.175 is clear: a review of the proposed fiscal note and fiscal note summary shifts to the Attorney General. "[W]ithin ten days of receipt of the fiscal note and the fiscal note summary," the Attorney General must either "approve the legal content and form" of the fiscal note and fiscal note summary or "determine[] that the fiscal note or fiscal note summary does not satisfy the requirements" of § 116.175.4, .5.

If the Attorney General determines that the fiscal note and fiscal note summary satisfies the requirements of Section 116.175, he "forward[s] notice of such approval to the state auditor." 116.175.4. If, on the other hand, the Attorney General "determines that the fiscal note or the fiscal note summary does not satisfy the requirements of [§ 116.175]," the Attorney General "return[s]" the fiscal note and fiscal note summary "to the auditor for revision." § 116.175.5. At that point, the

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statute commands that the Auditor must revise the proposed fiscal note and fiscal note summary and again forwards both to the Attorney General. *Id*. The statute uses the strongest language: "the fiscal note and the fiscal note summary shall be returned to the auditor for revision." *Id.*

It is only after the fiscal note and fiscal note summary are ultimately approved by the Attorney General that the Secretary of State may use the "approved fiscal note summary and fiscal note," along with the official summary statement, to certify the official ballot title. § 116.180. Section 116.180 mandates that the official ballot title contain "separate paragraphs with the fiscal note summary immediately following the summary statement of the measure[.]" Section 116.175.5 is clear that a fiscal note or fiscal note summary that the Attorney General determines does not satisfy the requirements of the statute "also shall not satisfy the requirements of section 116.180." § 116.175.5.

In summary, the Auditor first prepares fiscal notes and fiscal note summaries and forwards them to the Attorney General. The Attorney General then reviews the fiscal note and fiscal note summary to determine whether each complies with the requirements of Section 116.175, which includes a review for legal content that plainly incorporates a review for argumentative language or information that is likely to create prejudice for or against a measure. § 116.175.3. If the Attorney General determines that a proposed fiscal note or fiscal note summary does not

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comply with § 116.175, he is required by the statute to send the deficient fiscal note or fiscal note summary back for further revision. The State Auditor then revises the deficient fiscal note or summary and re-submits it to the Attorney General for review and, if the updates satisfy § 116.175, ultimately approval by the Attorney General. Once the Attorney General determines that a revised fiscal note or fiscal note summary complies with § 116.175, the Attorney General exercises his statutory authority to approve the fiscal note and fiscal note summary for the Secretary of State's use in a certified official ballot title.

B. "Legal content" is different than "form," and the Attorney General's review of the "legal content" of a fiscal note and fiscal note summary is more than just counting words and checking boxes.

A plain-text reading of Section 116.175 and surrounding context make clear that the Attorney General's review for "legal content" plainly incorporates a review for argumentative language or information that is likely to create prejudice for or against a measure. § 116.175.3. The statute does not include a definition of "legal content," but "legal content" must be distinct from "form." The statute requires the Attorney General to review a fiscal note and fiscal note summary for "legal content and form." § 116.175.4. The statute is mandatory, as it uses "shall" to describe the Attorney General's role. Courts have consistently held in statutory interpretation that "[t]he word 'shall' generally prescribes a mandatory duty." *State v. Teer*, 275 S.W.3d 258, 261 (Mo. banc 2009).

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Because form and legal content are two separate phrases in the statute, they must have two separate meanings. The legislature "is presumed to have intended every word, provision, sentence, and clause in a statute to be given effect" and "[t]he plain and ordinary meaning of the words in a statute is determined from the words' usage in the context of the entire statute." *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 585 (Mo. banc 2018) (citing *Mantia v. Mo. Dep't of Transp.*, 529 S.W.3d 804, 809 (Mo. banc 2017)).

There does not appear to be a dispute in this case about "form," as Section 116.175.3 makes clear what the "form" of a fiscal note and fiscal note summary are: "the fiscal note and fiscal note summary shall state the measure's estimated cost or savings, if any, to state or local governmental entities. The fiscal note summary shall contain no more than fifty words, excluding articles[.]" § 116.175.3. This reading of "form" is consistent with how Missouri's appellate courts construe "form" in other initiative petition contexts. For example, in *Bradshaw v. Ashcroft*, the Court of Appeals reasoned that the "form" of the initiative petition is limited to whether the measure contains the designated items that must be contained in the measure, such as certain notices, a signature sheet, specification of the county the signature page will be circulated, and space for notarization:

> Section 116.040 specifies the form of an initiative petition, and directs that the form must be "substantially" followed. The form of an initiative petition is required to include notice that it is a crime to "sign any initiative petition with

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> any name other than [one's] own, or knowingly to sign [one's] name more than once for the same measure for the same election, or to sign a petition when such person knows he or she is not a registered voter." *Id.* Section 116.040 requires the form of an initiative petition to afford a place for each person signing the petition to provide a signature, the date of signature, the signer's address including zip code, the signer's congressional district, and the signer's printed name. Section 116.040 requires the form of an initiative petition to include a circulator's affidavit swearing and affirming under penalty of perjury that persons identified on the petition "signed this page of the foregoing petition ... in my presence," and that the circulator believes each signer to be "a registered voter in the State of Missouri" in the county specified on the signature page. Section 116.040 requires the form of an initiative petition to afford a place for the circulator's affidavit to be signed by the circulator in the presence of a notary.

559 S.W.3d 79, 83 (Mo. App. W.D. 2018). Here, in the context of a fiscal note and fiscal note summary, "form" can mean only whether the fiscal note summary contains 50 or fewer words and a statement of estimated costs or savings. § 116.175.3.

In contrast, "legal content" demands more. The relevant dictionary definitions of "content" are "the topics, ideas, facts, or statements in a book, document, or letter." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 492 (3d ed. 1993). And "legal" means "of or relating to law," "conforming to or permitted by law or established rules : conforming to the procedures and methods prescribed by law." *Id.* 1290. The plain dictionary of "legal content," then, must refer to what *else* is

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required *by law* to be done when preparing, and ultimately contained in, a fiscal note and fiscal note summary. Surrounding context in Section 116.175 makes clear what the legal content of a fiscal note and fiscal note summary must include, at minimum: it must not be "argumentative," and it must not "create prejudice either for or against the proposed measure." *See Richter v. Union Pac. R. Co.*, 265 S.W.3d 294, 297 (Mo. App. E.D. 2008) ("In absence of statutory definitions, we may derive the plain and ordinary meaning from a dictionary and by considering the context of the entire statute in which it appears.") (citing *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 224 (Mo. banc 2007)). "The primary goal of statutory interpretation is to give effect to legislative intent, which is most clearly evidenced by the plain text of the statute." *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 585 (Mo. banc 2018). The Attorney General's construction of Section 116.175 achieves these fundamental canons of construction.

At first, all parties followed the process for crafting a fiscal note and fiscal note summary laid out in § 116.175. The State Auditor submitted to the Attorney General an identical proposed fiscal note and fiscal note summary for each of Respondent's eleven initiative petitions. The Attorney General reviewed each of these submissions and determined that each of the fiscal notes and fiscal note summaries "does not satisfy the requirements of [§ 116.175]." In part, the Attorney General determined that the STate Auditor's proposed fiscal note "contain[ed]

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inadequate and divergent submissions from local government entities" and "contain[ed] inadequate submissions concerning the impact to state governmental operations." The Attorney General additionally determined that the Auditor's proposed fiscal note summary is legally deficient because in part it "conveys [a] misleading message" and "fail[s] to adequately summarize" the submissions in the fiscal note. Consequently, the Attorney General determined that the fiscal note and fiscal note summary for each of Respondent's initiative petitions was inadequate and returned each to the Auditor for revision. *Id*.

The plain and reasonable intent of the legislature for each of these clauses in the statutory scheme is that the Attorney General's determination actually has meaning and acts as a review on the State Auditor. The Circuit Court's judgment relegates the Attorney General's authority to little more than a word-counter and rubber stamp. As the Circuit Court and Respondent view the statute, the Auditor could prepare a fiscal note or fiscal note summary plainly in contravention of § 116.175 and, without any effective check on his determination, could disregard the Attorney General's concerns and require the Secretary of State to certify an official ballot title with a clearly deficient fiscal note and fiscal note summary. Adoption of Respondent's interpretation would require the Court to conclude that the legislature meant to render significant portions of § 116.175 superfluous and intended that any review of the Auditor's submissions by the Attorney General is completely toothless.

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Section 116.175 reinforces the Attorney General's interpretation of § 116.180, making explicitly clear that "[a] fiscal note or fiscal note summary that does not satisfy the requirements of [§ 116.175] also shall not satisfy the requirements of section 116.180"—the official ballot title requirement statute. Respondent's and the Circuit Court's view would additionally require the Court to exercise its judicial authority to create, out of thin air and without any legislative consent, authority for another executive branch official to approve a proposed fiscal note and fiscal note summary—the State Auditor himself. But the statutory scheme is clear that the State Auditor cannot approve his own fiscal note and fiscal note summary. That role belongs only to the Attorney General. And for reasons further discussed in Point III below, the Attorney General's role *must* be more than simply ministerial when reviewing for legal content.

C. The State Auditor's fiscal note and fiscal note summary are deficient as to legal content.

The Attorney General's Opinion Letters detailed across several pages why the State Auditor's fiscal note and fiscal note summary lack the required legal content under Section 116.165. Ultimately, if voters were to see the fiscal note summary at the ballot box, they would be more likely driven to vote for the measure due to misleading language that is apparent from the face of the fiscal note. Of course, the full fiscal note is not present on the ballot itself, and so voters are left only to look at the 50-word fiscal note summary. This is more than just a dispute over whether the

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Attorney General "does not like the fiscal conclusion reached by the Auditor," as the Circuit Court held. Rather, it is apparent from the face of the fiscal note and fiscal note summary that they lack the required legal content and will create undue prejudice in favor of the measure.

First, the fiscal note contains inadequate and divergent submissions from local government entities. This goes to the heart of the "legal content" required of a fiscal note, because a fiscal note must contain adequate submissions from governmental entities. In his Opinion Letter, the Attorney General stressed the statistically insignificant small sample size of responses solicited by the State Auditor, noting "this ballot measure will affect the present and future population of Missouri. Yet, while Missouri has 114 counties and one independent city, in addition to over 1,000 other cities and villages . . . only three counties and two cities responded." Not many more were even solicited for submissions: only 12 and 14 cities.

Only one local governmental entity, Greene County, made an effort to submit a reliable methodology for calculating the fiscal impact. Greene County understood that the abortion-legalization measure would have the obvious effect of reducing population. No other entity engaged in this common-sense analysis that should be present on the face of any submission. As Greene County correctly stated, the "substantial economic fiscal reality of abortion relating to unborn lives cannot be denied or omitted from a fiscal note to inform voters of the consequences."

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However, the State Auditor did not apply that same reasonable assumption when assessing the submissions from the few other entities who responded. Instead, the fiscal note and fiscal note summary took Greene County's calculated estimated fiscal impact and purported to represent that fiscal impact as the fiscal impact for the *entire state*. Never once did Greene County purport to calculate the fiscal impact of the effects of the initiative petition on the entire state. To represent otherwise is misleading and prejudicial in favor of the initiative petitions. As the Attorney General informed the State Auditor in his Opinion Letter, the Greene County methodology should be applied to the remainder of the populous of Missouri, because it is "unreasonable for those entities to conclude that the measure will have no estimated fiscal impact[.]" (D34, p.3). In other words, it was misleading and prejudicial to represent the financial impact of the measures on Greene County as representative of all 114 counties in Missouri.

To properly apply the methodology would not raise the State Auditor's minimum responsibilities outlined by this Court in *Brown v. Carnahan*, 370 S.W.3d 637 (Mo. banc 2012). Rather, doing so would underscore *why* the State Auditor even plays a role in the process in the first place while giving proper meaning to "legal content." This Court in *Brown* noted the State Auditor "is not required to compel and second-guess reasonable submissions from entities but is able to rely on the responses submitted. Nor should the auditor wade into the policy debates

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surrounding initiative petitions, which an independent investigation would entail. . . . It is not the auditor's role to choose a winner among these opposing viewpoints by independently researching the issue himself, double-checking economic theories and assumptions, and adopting one side's view over another's in the resulting fiscal note." *Id.* at 650. *Brown* did not preclude the State Auditor from selecting *an* assumption or methodology. Any reasonable construction of "legal content" and the duties of the State Auditor require some sort of methodology, and *Brown* does not stand for the proposition that the State Auditor *must only* add and subtract numbers that entities submit.

But, in fact, the State Auditor did not even do that properly. Non-governmental entities estimated a massive possible loss to state revenues, up to a possible loss of $12.5 billion. But that figure is nowhere in the fiscal note summary. Instead, all the State Auditor did was note that "opponents estimate a potentially significant loss to state revenues." This vague language does not comply with the State Auditor's role under Section 116.175 or under *Brown*.

Section 116.175 expressly allows for consideration of figures submitted by governmental and non-governmental entities. Subsection (1) of that statute states that "The state auditor may consult with the state departments, local government entities, the general assembly ***and others with knowledge pertinent to the cost of the proposal***." § 116.175.1 (emphasis added). Furthermore, "[p]roponents or

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opponents of any proposed measure may submit to the state auditor a proposed statement of fiscal impact estimating the cost of the proposal in a manner consistent with the standards of the governmental accounting standards board and section 23.140, provided that all such proposals are received by the state auditor within ten days of his or her receipt of the proposed measure from the secretary of state." There is no dispute that the State Auditor received estimates from "others with knowledge pertinent to the cost of the proposal," who may be opponents to the measure, that those estimates were out of compliance with the appropriate fiscal standards, or that the submission were timely received. The record contains no such fact-finding or evidence to the contrary. Instead, the record contains submissions that were not expressly incorporated into the fiscal note summary. The Auditor should have done so, just as it did when it included a specific dollar figure based on Greene County's estimate.

Thus, as the Attorney General wrote in his Opinion Letter, the fiscal note summary "conveys the misleading message that it is an accurate representation of the true cost to local and state governmental operations." The only numerical figure mentioned in the fiscal note summary is a sliver of the maximum (or even likely) potential financial impact. The average, reasonable voter reading this summary will not know the small sample of entities that the State Auditor had solicited for a submission. That same voter is also much more likely to vote in favor of a measure

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that is estimated to cost approximately $50,000 than one that estimates a fiscal impact closer to what the submissions *actually received by the State Auditor* estimated the measure will cost.

To be clear: the Attorney General is advancing a narrow and appropriate reading of his authority to review a fiscal note and fiscal note summary under Section 116.175. That review must be more than a rubber stamp. And at minimum that review allows a rejection of the State Auditor's submissions if it is evident from their face that they are inaccurate, misleading, and likely to create bias for or against a measure. This Court should reverse the Circuit Court's decision, and remand the case to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary under Section 116.175.5.

II. The circuit court erred in granting mandamus or declaratory relief against the Attorney General, because the State Auditor was required to revise his fiscal note and fiscal note summary after the Attorney General rejected them, in that the Attorney General's rejection was proper, Section 116.175 contains a clear command to revise the materials upon rejection, and the State Auditor received additional information that should have been incorporated.

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Standard of Review. This point on appeal raises a question of statutory interpretation, which is reviewed de novo on appeal. *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020).

Preservation. The Attorney General preserved this issue for appeal in his answer to Respondent's Petition (D19), in his pre-trial brief (D23), and during trial (*See* Tr.).

As noted above, "The primary goal of statutory interpretation is to give effect to legislative intent, which is most clearly evidenced by the plain text of the statute." *State ex rel. Goldsworthy*, 543 S.W.3d at 585. The legislature "is presumed to have intended every word, provision, sentence, and clause in a statute to be given effect" and "[t]he plain and ordinary meaning of the words in a statute is determined from the words' usage in the context of the entire statute." *Id*. (citing *Mantia v. Mo. Dep't of Transp*., 529 S.W.3d 804, 809 (Mo. banc 2017)). "Where a statute's language is clear, courts must give effect to its plain meaning and refrain from applying the rules of construction unless there is some ambiguity." *Ross v. Dir. of Revenue*, 311 S.W.3d 732, 735 (Mo. banc 2010).

Section 116.175 could not be more clear: if the Attorney General "determines" that the Auditor's proposed fiscal note or fiscal note summary for an initiative petition does not satisfy the requirements of Section 116.175, the Attorney General "shall" return the deficient fiscal note or fiscal note summary to the Auditor "for

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revision." § 116.175.5. The Attorney General complied with his duty. The State Auditor has yet to do so.

Instead of revising each fiscal note and fiscal note summary to comply with Section 116.175, the State Auditor "decline[d] to revise the fiscal note and fiscal note summary" for each of the initiative petitions. Because the State Auditor failed to revise the fiscal notes and fiscal note summaries, and because the Attorney General determined that the proposed fiscal notes and fiscal note summaries submitted by the Auditor continue to fail to satisfy the requirements of Section 116.175, the Attorney General again returned the fiscal notes and fiscal note summaries to the Auditor for revision. *See, e.g.* Ex. D. The Auditor has, to date, failed to revise the fiscal note or fiscal note summary for any of Respondent's initiative petitions.

In crafting the text of Section 116.175, the legislature plainly laid out the scope of responsibilities for both the Auditor and the Attorney General. It is the *Attorney General's* responsibility to "determine" whether the fiscal note or fiscal note summary "does not satisfy the requirements of [§ 116.175]" and, if the Attorney General determines that a fiscal note or fiscal note summary does not satisfy those requirements, "the fiscal note and the fiscal note summary shall be returned to the auditor for revision." § 116.175.5. In the context of Section 116.175, the meaning of the requirement that the fiscal note and fiscal note summary be "returned to the

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auditor for revision" is clear. The phrase "return . . . for revision" imposes on the State Auditor a statutory duty to provide an updated or altered fiscal note and fiscal note summary for the Attorney General's review under Section 116.175. Any other meaning of the word would render the responsibility for the Attorney General to determine whether a proposed fiscal note and proposed fiscal note summary complies with § 116.175, and, consequently, whether to approve it or send it back to the Auditor for revision, superfluous. Any alternative reading of the requirement that the fiscal note and fiscal note summary shall be "returned for revision" upon a determination by the Attorney General would be contrary to this pronouncement.

This understanding of the legislature's use of the word "revision" is consistent with how the word "revision" is used by courts addressing challenges under Chapter 116. *See, e.g. Pippens v. Ashcroft*, 606 S.W.3d 689, 693 (Mo. App. W.D. 2020) (using the term "revision" to refer to the process of making changes to the official summary statement for an initiative petition); *Sedey v. Ashcroft*, 594 S.W.3d 256, 265 n. 6 (Mo. App. W.D. 2020) (using the terms "revised" and "revisions" to describe changes to the summary language of citizen initiatives). It is also consistent with how Missouri courts have traditionally used the words "revise" and "revisions." *See, e.g. Care & Treatment of Morgan v. State*, 176 S.W.3d 200, 205–06 (Mo. App. W.D. 2005) (considering the "revised" version of a statute as being a change to the legal definition of a term compared to the past definition); *McCarty v. City of Kansas*

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City, 671 S.W.2d 790, 795 (Mo. App. W.D. 1984) (using the term "revisions" to refer to "a change in existing regulations and restrictions" at issue). "[I]n construing a statute to determine legislative intent, a court must presume that the legislature acted with a full awareness and complete knowledge of the present state of the law" and Missouri court cases. *State v. Rumble*, 680 S.W.2d 939, 942 (Mo. banc 1984). Even if the plain meaning of the term "revision" was uncertain (which it is not), Missouri courts' past use and definition of the term strongly supports the Attorney General.

Both the plain meaning of the term "revision" as used in the statute and the regular use of the term by courts in analyzing both ballot title cases and other general cases makes clear: the State Auditor had a statutory duty to send to the Attorney General an *updated and modified* fiscal note or fiscal note summary for each of Respondent's initiative petitions. The Attorney General would then review the resubmitted fiscal note and fiscal note summary to determine whether the documents complied with the requirements of Section 116.175, just as he would upon receiving a first submission. Despite this clear statutory instruction, the State Auditor refused to revise the statute to address the Attorney General's concerns.[3] In fact, the State

[3] Notably, in her Petition below, the one claim Respondent did *not* bring is a request for this Court to enter a judgment declaring that the Auditor must comply with his statutory obligation under § 116.175 to "revise" the proposed fiscal notes and fiscal note summaries. As discussed in the Attorney General's other points on appeal, the Circuit Court erred in blessing Respondent's failure to ask for the relief she did

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Auditor explicitly stated instead that he "*declines to revise* the fiscal note and fiscal note summary." (D38, cleaned up, emphasis added). As the Auditor "decline[d]" to perform his statutory duties under Section 116.175, the Attorney General again returned the fiscal notes and fiscal note summaries for revision. (*See, e.g. id.*; D40).

Neither Section 116.175 nor any other statute requires the Attorney General to approve a fiscal note or fiscal note summary that he determines does not satisfy the requirements of Section 116.175 and is therefore deficient. On the contrary, Section 116.175.5 entrusts in the Attorney General *only one* nondiscretionary duty: that any fiscal note or fiscal note summary which he "determines . . . does not satisfy the requirements of [§ 116.175] . . . ***shall be*** returned to the Auditor for revision." § 116.175.5 RSMo. Courts have consistently held in statutory interpretation that "[t]he word 'shall' generally prescribes a mandatory duty." *State v. Teer*, 275 S.W.3d 258, 261 (Mo. banc 2009).

Here, the Attorney General determined that the State Auditor failed to make any revisions to the deficient proposed fiscal note and proposed fiscal note summary

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request in her lawsuit and then complain that she does not have relief available to her to resolve her claimed injury. *See State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 266 (Mo. banc 1980) (finding it "undisputed that the relators had an alternative remedy [to a writ of mandamus] available to them" when the relators also "filed an action seeking a declaratory judgment" related to the same dispute.). The proper relief here is for completion of the Attorney General and Auditor's submission, review, and resubmission process. And then if Respondent found the *final* fiscal note or fiscal note summary unfair or insufficient, she could file her own lawsuit under Section 116.190 challenging those materials.

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for each of the initiative petitions, and, consequently, complied with his statutory duty to return the drafts to the State Auditor for further revision. The Attorney General would be running afoul of the requirements of § 116.175.5 if he *did not* return fiscal notes and fiscal note summaries for further revision after a determination that they did not comply Section 116.175.5.

Section 116.175 is clear on the continuing responsibilities of both the Attorney General and the Auditor in reaching an approved fiscal note and fiscal note summary that complies with § 116.175. The General Assembly's use of the term "revision" and the requirements that a fiscal note and fiscal note summary satisfy Section 116.175 and be "approved" by the Attorney General for the purpose of Section 116.180 before the Secretary of State may certify a ballot title demonstrates that the preparation of a fiscal note is an ongoing process. The dual requirements of revision and approval create an ongoing review process that continues until an adequate fiscal note and fiscal note summary is approved. The clear text of the statute renders any additional construction unnecessary. *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 540 (Mo. banc 2012) ("When the words are clear, there is nothing to construe beyond applying the plain meaning of the law.").

Even to the extent this Court concludes that it is necessary to look beyond the plain meaning of the statute, the plain and straightforward construction of Section 116.175 is that the use of the terms "revision," "determine," and "approve" create

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continuing, time-constrained obligations on the Auditor and Attorney General to engage in the processes of Section 116.175 until the fiscal note and fiscal note summary for an initiative petition are approved. The rules of statutory construction "require this court to determine the intent of the legislature" by considering the plain and ordinary meaning and application of the text of the statute. *Owsley v. Brittain*, 186 S.W.3d 810, 815 (Mo. App. W.D. 2006).

Here, the plain and ordinary application of the text utilizes the time limit imposed on the executive branch officials—ten days—to govern any deadlines for revisions to proposed fiscal notes or fiscal note summaries. The Attorney General has ten days after receiving an iteration of a proposed fiscal note and fiscal note summary to determine whether to approve or send back for revision the fiscal note and fiscal note summary. § 116.175.4, .5. Under the most permissive interpretation of these provisions controlling executive branch officials drafting and reviewing proposed fiscal notes and fiscal note summaries, "returning" a draft "for revision" *at minimum* implies (and, in the Attorney General's view, expressly requires) that the draft will be edited and then re-submitted for potential approval under a similar statutory timeline as the initial production. Indeed, both the State Auditor and Attorney General acted under this construction of the statute—each provided communications on the proposed fiscal note and fiscal note summary within ten days of receipt. The Circuit Court's judgment effectively discards portions of the statute

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mandating a determination of when a fiscal note or fiscal note summary is insufficient—an outcome which is unlikely to be "the intent of the legislature" drafting the provision. *Owsley*, 186 S.W.3d at 815.

Second, the Circuit Court's judgment creates unnecessary statutory conflicts that ultimately render meaningless critical portions of Section 116.175. The judgment expresses concern that there could be a a parade of horribles occurs that then invites intervention from outside the relationship between statewide elected officials carefully crafted by the legislature. Not only is this legal conclusion not supported by the statute, there is no evidence that this fear is happening here. The only event that has occurred is *one* rejection of the State Auditor's initial submissions based on several grounds clearly explained in the Attorney General's Opinion Letters. At most, the present challenge is unripe, especially given that the statute specifically addresses the Attorney General's authority to review and then approve or reject a fiscal note and fiscal note summary. It cannot be the case that every time the Attorney General were to take an action expressly allowed by statute, a parade of horribles occurs that then invites intervention from outside the statewide elected officials. What is more, the solution to this problem is clear: an order requiring the State Auditor to complete his duty under the statute and revise the fiscal note and fiscal note summary. The solution is not to slash the Attorney General's authority that Section 116.175 plainly gives him.

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Finally, the record below demonstrates that the State Auditor still had more work to do. Three days before the Attorney General responded with his rejection of the State Auditor's fiscal note and fiscal note summary, on April 7, 2023, the State Auditor received additional information from the Governor's Office. The Governor's Office provided a fiscal estimate for each of the 11 initiative petitions based on "additional costs identified by other agencies in regards to regulation and enforcement." In addition, the Governor's Office stated that each initiative petition appears "to conflict with federal law, which may have bearing on the fiscal responsibilities of [the Governor's Office]."

Each submission from the Governor's Office noted that "there will likely be litigation leading to a fiscal impact on the Legal Expense Fund (LEF) ranging from $1,500 to unknown" due to potential conflicts with the U.S. Supreme Court's decision in "*Dobbs v. Jackson Women's Health Organization* and requirements of parental consent." (Italics to case citation added). In addition, for several of the measures, the Governor's Office estimated that "failing to be in compliance with federal requirements related to Medicaid and MO HealthNet could lead to a fiscal impact of up to $600M" due to a conflict between the content of the initiative petitions and "the federal policy related to the Hyde Amendment and expending public funds on abortions."

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The State Auditor has failed to incorporate these new figures, even though the State Auditor acknowledged receiving these responses and could have incorporated the responses from the Governor's office when revising his fiscal note and fiscal note summary.

For these reasons, this Court should reverse the Circuit Court's judgment, and remand it to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary under Section 116.175.5

III. The circuit court erred in granting mandamus relief against the Attorney General, because Respondent had other remedies available and the Attorney General's duty under Section 116.175 is not ministerial, in that the Auditor had not yet revised his materials before Respondent filed suit, the Attorney General has not refused to perform a ministerial duty, and the Attorney General has discretionary authority to review and determine a fiscal note and fiscal note summary's compliance under Section 116.175.

Standard of Review. This point on appeal raises a question of statutory interpretation, which is reviewed de novo on appeal. *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020).

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Preservation. The Attorney General preserved this issue for appeal in his answer to Respondent's Petition (D19), in his pre-trial brief (D23), and during trial (*See* Tr.).

A writ of mandamus may only be issued in instances where the litigant: (1) proves that "no alternative remedy exists"; (2) "proves that he has a clear, unequivocal, specific right to a thing claimed"; and (3) proves the writ relates to "a ministerial duty that one charged with the duty has refused to perform." *Barnes v. Uhlich*, 592 S.w.3d 67, 70–71 (Mo. App. W.D. 2019). Here, Respondent's Petition failed on every count. This Court should reverse the Circuit Court's finding otherwise.

A. Respondent failed to establish that a writ of mandamus is the exclusive remedy available to her.

"There is no remedy that a court can provide that is more drastic, no exercise of raw judicial power that is more awesome, than that available through the extraordinary writ of mandamus." *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 266 (Mo. banc 1980). As it is the most significant exercise of judicial power a court can perform, a "writ of mandamus issues only in a case of necessity," and if "there is any doubt of its necessity or propriety, it will not be issued." *State ex rel. University Park Building Corp. v. Henry*, 376 S.W.2d 614, 617 (Mo. App. 1964); *see also State ex rel. Kelley*, 595 S.W.2d at 266 ("Recognizing the extreme nature of the order to act in accordance with a peremptory writ of mandamus, we believe

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that the remedial writ ought to be reserved for those cases in which no alternative measure will be effective.").

Recognizing these limitations, courts have held that "[i]t is a long-established principle of law that mandamus does not issue where there is another adequate remedy available to relator." *State ex rel. Kelley*, 595 S.W.2d at 265. "In other words, 'the writ of mandamus is to be used only as a last resort on the failure of any adequate alternative remedy.'" *Beauchamp v. Monarch Fire Protection District*, 471 S.W.3d 805, 810 (Mo. App. E.D. 2015) (quoting *State ex rel. Kelley*, 595, S.W.2d at 265); *see also State ex rel. KelCor., Inc. v. Nooney Realty Tr., Inc.*, 966 S.W.2d 399, 402 (Mo. App. E.D. 1998) ("A required element of proving a right to mandamus is that there is no alternative, adequate remedy other than the issuance of the writ.").

A review the Petition below reveals that Respondent likely acknowledges that a writ of mandamus is the exclusive possible remedy. Count I of the Petition acknowledges the existence of other possible remedies and therefore, on the face of Respondent's own pleadings, bars any right to a writ of mandamus. *See Barnes*, 592 S.W.3d at 71–72 (dismissing a petition for writ of mandamus where the relator "did not allege in his petition in mandamus that he was without an adequate alternative remedy."). In briefing before the Circuit Court, Respondent even took one step past *Barnes*, acknowledging with frankness that Respondent believes "mandamus . . . is not the exclusive remedy" against the Attorney General available to her in her

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Petition. (D8 at p.5). Respondent's own admission should have been fatal to Count I of her Petition.

This Court has held that an attempt to take two bites of the same apple by requesting both a declaratory judgment and writ of mandamus per se demonstrates that mandamus is not the exclusive remedy available and, consequently, bars a court from issuing the writ in her favor. In *State ex rel. Kelley*, this Court found it "undisputed that the relators had an alternative remedy [to a writ of mandamus] available to them" when the relators also "filed an action seeking a declaratory judgment" related to the same dispute. *State ex rel. Kelley*, 595 S.W.2d at 267. The Court noted that, "[b]y filing the action for declaratory judgment seeking a judicial declaration" on the same underlying facts of the lawsuit, the relator "demonstrated his willingness to submit the controversy . . . to the judgment of the court" and was consequently barred from seeking mandamus. *Id*. Likewise here, Respondent's "alternative" request for declaratory judgment on the same facts demonstrates mandamus is not the exclusive remedy available to her. Mandamus is not a "short cut for the speedy resolution of disputes that adequately may be resolved by other means." *Id.* at 268. A writ of mandamus is an extraordinary remedy of last resort. Even now, this case is not at a last resort stage.

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B. Respondent failed to establish any clear, unequivocal, and specific right she seeks to vindicate with a writ of mandamus.

Respondent also failed to demonstrate any clearly established and presently existing right she could vindicate through mandamus. "Mandamus is a discretionary writ, not a writ of right," and it "is not appropriate to establish a legal right, but only to compel performance of a right that already exists." *State ex rel. Petti v. Goodwin-Raftery*, 190 S.W.3d 501, 506 (Mo. App. E.D. 2006). A petitioner seeking mandamus bears the burden of establishing that he or she has a "clear, unequivocal, specific right to have the act performed as well as a corresponding present, imperative, and unconditional duty on the part of the respondent to perform the action sought." *State ex rel. Lee v. City of Grain Valley*, 293 S.W.3d 104, 109 (Mo. App. W.D. 2009) (emphasis omitted). This is because "the purpose of mandamus is to execute and not to adjudicate; it coerces performance of a duty already defined by law." *State ex rel. City of Crestwood v. Lohman*, 895 S.W.2d 22, 27 (Mo. App. W.D. 1994).

Respondent did not meet her burden of establishing a clear, unequivocal, specific right to have the act performed. It is important to break down the precise "clear and unequivocal right" Respondent asserted warrants the granting of extraordinary mandamus relief. Section 116.175 relates exclusively to the interactions between the Auditor and the Attorney General in the process of drafting and reviewing proposed fiscal notes and fiscal note summaries. § 116.175. Nowhere

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in the statute is any provision that even *implies* that a member of the public has a "clear and unequivocal" right to interject themselves into the process of the Attorney General reviewing fiscal notes and fiscal note summaries. The absence of any case establishing Respondent's right to file a lawsuit while there is still more work for one state official to do is telling.

In fact, Respondent already has an alternative avenue here – to challenge an official ballot title under Section 116.190. If Respondent disagrees with the ultimately approved fiscal note or approved fiscal note summary, she is free to challenge the ballot title once the Secretary of State certifies the official ballot title. Her statutory rights under Section 116.190 does not, however, support any suggestion that she has a "clear and unequivocal" right to intervene before that time. The Circuit Court erred in holding otherwise.

To allow a party to obtain mandamus relief from generalized statements that they have a right to bring issues they deem significant under a constitutional provision, such as Article III, Section 50, would render entirely meaningless the requirement to demonstrate a clear and specific right to relief. This Court has conclusively held that one must demonstrate a "specific" right to relief before a court may rule on a request for mandamus. *See State ex rel. Swoboda v. Missouri Comm'n on Hum. Rts.*, 651 S.W.3d 800, 805 (Mo. banc 2022). A generalized pronouncement

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of a litigant's "right to bring issues they deem significant to the voters" (D8 at p.4) as Respondent argued below plainly does not satisfy this standard.

Mandamus is an extraordinary and consequential tool. It is "a hard and fast writ, and an unreasoning writ, a cast-iron writ, the right arm of the court." *State ex rel. Kelley*, 595 S.W.2d at 266 (quoting *State ex rel. Kansas City v. Kansas City Gas Co.*, 163 S.W. 854, 857 (Mo. banc 1914)). To protect against overreach of this power, courts may only exercise mandamus when a litigant has identified a "clear, unequivocal, and specific right" to the action a party seeks performed. Respondent failed to establish any such right, and the Circuit Court erred in concluding otherwise.

C. The Attorney General's statutory authority under Section 116.175 to approve or reject the State Auditor's proposed fiscal note and fiscal note summary is not ministerial and therefore not subject to a writ of mandamus.

Respondent's request for mandamus should also have failed below because she asked the Circuit Court to exercise judicial power to compel an executive branch official to reach a *particular* outcome on a *discretionary* decision. Courts have long held that a writ of "'[m]andamus will not lie to compel an act when its performance is discretionary.'" *McDonald v. City of Brentwood*, 66 S.W.3d 46, 51 (Mo. App. E.D. 2001) (quoting *State ex rel. University Park Building*, 376 S.W.2d at 617). This is because the purpose of a writ of mandamus is to "compel the performance of a ministerial duty that one charged with the duty has refused to perform." *Lemay Fire*

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Prot. Dist. v. St. Louis County, 340 S.W.3d 292, 294 (Mo. App. E.D. 2011) (quoting *State ex rel. Pub. Counsel v. Pub. Serv. Comm'n*, 236 S.W.3d 632, 635 (Mo. banc 2007)); *see also State ex rel. Thomas v. Neeley*, 128 S.W.3d 920, 924 ("[A] writ of mandamus cannot compel the performance of a discretionary act.") (Mo. App. S.D. 2004).

Even if Respondent were able to establish all of the other requirements for a writ of mandamus—which she failed to do—mandamus relief should have been unavailable because the Attorney General's duties to *review* ***and*** *approve or deny* a fiscal note and fiscal note summary Section 116.175 are not "ministerial." When analyzing whether a writ of mandamus may issue, courts have juxtaposed "ministerial" government actions with discretionary actions of government officials "that require[] the exercise of reason in determining how or whether the act should be performed." *State ex rel. Thomas*, 128 S.W.3d at 924. A writ of mandamus "will only issue when there is an *unequivocal showing* that the public office failed to perform a ministerial duty imposed by law." *Id*. (emphasis added).

Section 116.175 directs the Attorney General to "determine[]" whether the fiscal note and fiscal note summary satisfy the requirements of the statute, which, in turn, affects whether the Attorney General approves the proposed fiscal note and fiscal note summary or returns each to the auditor for revision. The fact that the Attorney General's determinations under the statute are more than simply

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"ministerial" is demonstrated by the explicit contemplation under the statute that the Attorney General *may* determine that the fiscal note and fiscal note summary cannot approved until further revision—all depending on his review of the proposed fiscal note and fiscal note summary. *State ex rel. Thomas*, 128 S.W.3d at 924. In the face of the plain text of the statute, Respondent did not carry her burden to make an "unequivocal showing" that the Attorney General failed to perform a ministerial duty. *Id.*

A discretionary action does not become ministerial simply because a party challenging a decision strongly believes the outcome should have been different. *State ex rel. Thomas*, 128 S.W.3d at 924. After all, it is often the case that actions by government officials can elicit strong reactions on both sides of the question. Respondent asked the Circuit Court to utilize the writ of mandamus to direct the Attorney General to exercise his discretion in a particular manner on the question of whether or not a proposed fiscal note and fiscal note summary comply with requirements of § 116.175. The Circuit Court agreed, and that decision risks creating a dangerous and unprecedented result of the exercise of judicial power over Missouri elections officials performing discretionary elections responsibilities. The very fact that the Attorney General must "determine[]" whether the "content" of a proposed fiscal note and fiscal note summary complies with a list of requirements, and then either approve the draft or return it to the State Auditor for revision, demonstrates

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that Section 116.175 entrusts in the Attorney General fundamental discretionary powers. Missouri courts have held time and again that mandamus may not be used to compel the Attorney General—or indeed, any other government official—to exercise his discretion in a particular way favored by a litigant. *E.g.*, *McDonald*, 66 S.W.3d at 51.

For these reasons, this Court should reverse the Circuit Court's judgment, and remand it to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary under Section 116.175.5.

IV. The circuit court erred in granting declaratory relief against the Attorney General, because the case was not yet ripe and therefore not justiciable, in that the fiscal note and fiscal note summary review and resubmission process had not yet concluded.

Standard of Review. This point on appeal raises a question of statutory interpretation, which is reviewed de novo on appeal. *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020).

Preservation. The Attorney General preserved this issue for appeal in his answer to Respondent's Petition (D19), in his pre-trial brief (D23), and during trial (*See* Tr.).

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For similar reasons as the Attorney General argued above why the Circuit Court erred in granting mandamus relief and why the State Auditor failed to comply with his duty under Section 116.175 to revise his fiscal note and fiscal note summary, the Circuit Court erred in granting Respondent's alternative request for declaratory relief against the Attorney General. The Circuit Court held in footnote 11 to its judgment that it would "direct the same relief by declaratory judgment" if it did not grant Respondent's request for mandamus relief. Because the Circuit Court appears to have rested an alternative declaratory judgment ruling on the same grounds as the ruling granting mandamus relief, the Attorney General incorporates his same arguments above here. The Attorney General will also elaborate on some of those points.

There was no presently existing controversy over which a court can grant relief of a conclusive character. "Ripeness, like standing, is an element of justiciability." *Calzone v. Ashcroft*, 559 S.W.3d 32, 35 (Mo. App. W.D. 2018). Ripeness is determined by whether "the parties' dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict that is presently existing, and to grant specific relief of a conclusive character." *Mo. Health Care Ass'n v. Attorney Gen. of Mo.,* 953 S.W.2d 617, 620 (Mo. banc 1997); *see also Seay v. Jones*, 439 S.W.3d 881, 888 (Mo. App. W.D. 2014) ("citizens are authorized to seek judicial review of the official ballot title… [i]n such an action, the

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challenger must 'state the reason or reasons why the summary statement portion of the official ballot title is insufficient or unfair.'").

Here, Respondent's suit is not ripe because the exchange—and review and resubmission—of materials between the Attorney General and the State Auditor had not yet concluded. There was more work left for the State Auditor to do, as the State Auditor received new submissions from the Governor's Office on a fiscal impact for the initiative petitions. Even if the State Auditor did not receive those submissions, the State Auditor still has not complied with his duty to revise the fiscal note and fiscal note summary. § 116.175.5. But his receipt of new information shows even more that there was more work to do.

Respondent's alternative request for declaratory relief—and the Circuit Court's granting of that alternative request—came too early. Of course, as discussed above, Respondent should wait until the entire process had concluded and challenge an official ballot title under Section 116.190. But at the time she filed her lawsuit and up until the time of trial, there was no real presently existing controversy between the Attorney General and Respondent. Simply because Respondent disagreed with the Attorney General's decision does not entitle her to a request for declaratory relief. Rather, the dispute must be ripe. Furthermore, in bringing her lawsuit Respondent may not attempt to challenge the Attorney General's underlying exercise of discretion in determining that the Auditor's identical proposed fiscal note

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and fiscal note summaries for Respondent's initiative petitions failed to comply with Section 116.175. And ultimately, her request for declaratory relief seems to challenge the discretion the Attorney General exercised at a pre-final dispositional stage. There is no right for Respondent to file any lawsuit and interfere in the State Auditor and Attorney General's process before it has been completed.

For these reasons, this Court should reverse the Circuit Court's judgment because it was not yet ripe and therefore non-justiciable, and remand it to the Circuit Court with instructions to dismiss the case.

CONCLUSION

For these reasons, this Court should reverse the Circuit Court's judgment, and remand it to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary under Section 116.175.5.

AMERICAN OVERSIGHT

July 5, 2023

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via the Court's electronic filing system on the 3rd day of July, 2023, to all counsel of record.

I also certify that the foregoing brief complies with the limitations in Rule No. 84.06(b) and that the brief contains 13,432 words.

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Fitz-James v. Bailey - MO Supreme Court Appellant's Brief.pdf

Good morning Susan. Attached is the brief in the 11 abortion petitions matter. The case is set for oral argument in the Supreme Courtat 3 pm on Tuesday July 18.

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AMERICAN OVERSIGHT

CASE NO. 22-3179

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 the President of the United States of America, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Missouri
The Honorable District Court Judge Henry E. Autrey
Case No. 4:22-cv-1040-HEA

EMERGENCY MOTION FOR ADMINISTRATIVE STAY OF AGENCY ACTION PENDING RULING ON MOTION FOR INJUNCTION PENDING APPEAL AND REQUEST FOR EXPEDITED BRIEFING ON THAT MOTION

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MO-AG-23-0462-A-000893

Yesterday, on October 20, 2022, the district court declined to enjoin the Biden Administration's Mass Debt Cancellation, R. Doc. 44, which will erase over $400 billion of the $1.6 trillion in outstanding federal student loan debt. *See* CBO Sept. 26, 2022 Letter at 3, https://tinyurl.com/2p95x8kk. The district court acknowledged that Plaintiffs-Appellants States of Nebraska, Missouri, Arkansas, Iowa, Kansas, and South Carolina (collectively the "States") raised "important and significant challenges to the debt relief plan." R. Doc. No. 44, at 18. But the court declined to grant injunctive relief because it said that the States all lacked standing. *Id.* It reached that conclusion even though the Cancellation program will (1) reduce by millions of dollars the revenue of a Missouri state entity charged with the "essential public function[]" of ensuring "post-secondary education students have access to student loans," *Id.* at 10–11 (quoting Mo. Rev. Stat. § 173.360), (2) threaten the investments of Arkansas and Nebraska state entities, and (3) impose enormous tax revenue losses on Nebraska, Iowa, Kansas, and South Carolina.

Because the district court erred in dismissing the States' case and declining to enjoin the unlawful Cancellation program, the States have

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filed a motion for an injunction pending appeal concurrently with this motion. But Defendants-Appellees Joseph R. Biden, in his official capacity as the President of the United States; Miguel Cardona, in his official capacity as Secretary of the United States Department of Education (the Secretary); and the United States Department of Education (the Department) (collectively the "Administration") say that they will start cancelling student loan debt under the program as early as *October 23*, which is just two days away. *See* R. Doc. 27-1, at 4, ¶5. To ensure that does not happen before this Court can consider the States' motion for an injunction pending appeal, the States respectfully request that, by 9:00 AM Central Saturday October 22, the Court temporarily stay the Administration from discharging any student loan debt under the Cancellation program until this Court rules on that motion. *See* Fed. R. App. P. 27(a)(1). The States also ask the Court to set an expedited briefing schedule on the motion for an injunction pending appeal. The States have asked the Administration for its position on these requests, but as of the time of this filing, they have not received a response.

Last night, the States asked the district court to enter an injunction pending appeal or a temporary administrative stay barring the

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Administration from discharging any student loan debt under the Cancellation until this Court rules on the concurrently filed motion for an injunction pending appeal. *See* R. Doc. 48, at 5. The district court denied that request just before the States filed this motion. R. Doc. 50.[1]

ARGUMENT

1. For the reasons set out in the concurrently filed motion for an injunction pending appeal, the States are entitled to an injunction prohibiting the Administration from discharging student loan debt under the Cancellation program during the pendency of this appeal. As that motion explains, the States will suffer irreparable harm from the discharge of that debt, and the district court was wrong to conclude that the States lack standing to pursue their claims.

According to the Administration, the debt discharge might begin in just two days. *See* R. Doc. 27-1, at 4, ¶5 (telling the district court that the Department "will not discharge any student loan debt … prior to *October 23, 2022*") (emphasis added). Given the incredibly short timeframe

[1] In the motion for an injunction pending appeal that the States filed with this Court, they indicated that the district court had yet to rule on the motion for temporary relief pending appeal that the States filed with that court. The district court has now denied that motion.

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between the district court's decision and the apparent commencement of debt discharge under the Cancellation—and the fact that October 23 is a Sunday—the States' request for a temporary administrative stay of agency action is an appropriate way to maintain the status quo while giving "the court sufficient opportunity to consider the merits of the" States' motion for an injunction pending appeal. *Brady v. NFL*, 638 F.3d 1004, 1005 (8th Cir. 2011); *see also Redmond v. United States*, 507 F.2d 1007, 1011 (5th Cir. 1975) (granting "a stay of [administrative] enforcement of the period of disqualification pending the final outcome of this cause on appeal"); Order, *Cobell v. Norton* 391 F.3d 251 (D.C. Cir. 2004), 2004 WL 603456, at *1 (granting an administrative stay "to give the court sufficient opportunity to consider the merits of the motion").

The equities also support this request. The States propose a briefing schedule on their motion for an injunction pending appeal that concludes by the middle of the day on Wednesday October 26—thus drastically minimizing the duration of this temporary stay of agency action and any potential harm that the Administration could conceivably claim. Because the Department's Cancellation program appears slated to run to at least December 31, 2023, *see* R. Doc. 31-1, at 5, postponing

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discharges by a few days will not materially hinder the program. Indeed, granting this request will not prevent the Department from continuing to accept discharge applications while awaiting a ruling on the motion for an injunction pending appeal. Finally, the Department has paused loan payments through December 31, 2022, for those eligible to receive cancellation, *see* 87 Fed. Reg. 61512, 61514 (Oct. 12, 2022), so borrowers will not be harmed by granting this request.

On the other hand, the imminent discharge of student loan debt inflicts irreparable harm to the States, as set out in the concurrently filed motion for an injunction pending appeal. Each day that the Department cancels debt directly reduces revenue to State entities like MOHELA, financial support for State higher education, and future tax revenue to the States under operation of current law. In addition, each day of debt discharge impairs the States' sovereign and quasi-sovereign interests.

Such harms are likely to be significant, and to occur rapidly. As of Monday October 17, more than eight million borrowers had applied for debt cancellation, according to the Administration. *See* Alex Gangitano and Brett Samuels, *White House Says 8 Million Americans Have Applied for Student Loan Debt Forgiveness*, The Hill (Oct. 17, 2022),

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https://tinyurl.com/bdhcajdt. That number has surely grown since then. Also, on Monday, the Administration promised to "mov[e] as quickly as possible to provide relief to as many as possible." *Id.* Because eight million borrowers account for roughly 20 percent of the total borrowers who are eligible for the Cancellation, *see* R. Doc. 31-1, at 24, the Administration could erase roughly $80 billion to $100 billion in student loans as soon as this Sunday. To ensure that does not happen before this Court can review what the district court acknowledged are "important and significant challenges to the debt relief plan," R. Doc. No. 44, at 18, this Court should enter the requested administrative stay by 9:00 AM Central Saturday October 22.

2. In order to facilitate the expeditious review of the States' motion for an injunction pending appeal, the States respectfully request that the Court order the following expedited briefing schedule on that motion, *see* Fed. R. App. P. 27(a)(3)–(4) (providing timelines and stating that the Court may shorten the time for a response):

- Defendants-Appellees' opposition due on or before 5:00 PM Central, Monday, October 24, 2022.

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- Plaintiffs-Appellants' reply, if any, due on or before 12:00 PM Central, Wednesday, October 26, 2022.

CONCLUSION

The States respectfully request that this Court maintain the status quo by entering—before 9:00 AM Central on Saturday October 22—an administrative stay prohibiting the Administration from discharging any student loan debt under the challenged Cancellation program until this Court rules on the States' motion for an injunction pending appeal.

The States further request that the Court set the following briefing schedule on their motion for an injunction pending appeal:

- Defendants-Appellees' opposition due on or before 5:00 PM Central, Monday, October 24, 2022.
- Plaintiffs-Appellants' reply, if any, due on or before 12:00 PM Central, Wednesday, October 26, 2022.

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Dated: October 21, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts exempted by Fed. R. App. P. 32(f), it contains 1,342 words as determined by the word-counting feature of Microsoft Word 2016.

This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word 2016 in 14-point proportionally spaced Century Schoolbook font.

And this motion complies with the electronic-filing requirements of Local Rule 28A(h)(2) because it was scanned for viruses using Windows Defender and no virus was detected.

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CERTIFICATE OF SERVICE

I certify that on October 21, 2022, I electronically filed the foregoing motion with the Clerk of the Court by using the CM/ECF system, and that the CM/ECF system will accomplish service on all parties represented by counsel who are registered CM/ECF users. I also certify that a copy of the foregoing motion was served by electronic mail on counsel for Defendants-Appellees who have consented in writing to electronic mail service at the following addresses:

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MO-AG-23-0462-A-000904

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.

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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.

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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

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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

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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

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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.

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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).

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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.

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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

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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

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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

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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

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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

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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.

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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

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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

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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.").

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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);

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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

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(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).

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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

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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

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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

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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.

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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).

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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

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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.

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s/ Sarah Carroll
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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
Sarah Carroll

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CASE NO. 22-3179

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 the President of the United States of America, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Missouri
The Honorable District Court Judge Henry E. Autrey
Case No. 4:22-cv-1040-HEA

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INTRODUCTION

The Department barely defends the district court's standing analysis. It apparently realizes that the States have standing, so the Court will reach the merits. Once there, the case isn't close. The Department's contrived reasons for rejecting the major-questions doctrine do not override the clear evidence confirming that it applies. And the agency's baseless reading of the HEROES Act places practically no limits on the Secretary's power to discharge debt during or after national emergencies. The Court should enjoin this clearly unauthorized agency action.

ARGUMENT

I. The States have a strong likelihood of success on appeal.

A. The States have standing.

1. Missouri has standing.

The Department wisely abandons the district court's sovereign-immunity-based analysis because those principles do not govern standing and this Court's caselaw indicates that Missouri entities like MOHELA are likely arms of the State. *See Pub. Sch. Ret. Sys. of Mo. v. State St. Bank & Tr. Co.*, 640 F.3d 821, 826–30 (8th Cir. 2011) (concluding that a

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similarly constituted Missouri entity is an arm of the State despite its authority "to sue and be sued").

The Department instead insists (at 8) that "financial harms to MOHELA" do not affect Missouri. But stripping MOHELA of revenue harms Missouri's interests in many ways. It limits MOHELA's ability to contribute to the Missouri Department of Higher Education and Workforce Development's financial aid programs. *See* MOHELA FY 2022 Financial Statement at 9–10, 19, https://tinyurl.com/4chp295x. It also undermines MOHELA's ability to pay the $105.1 million it owes to the State Treasury's Lewis and Clark Discovery Fund, *id.* at 20, which supports "capital projects" at Missouri's "public colleges and universities," Mo. Rev. Stat. §173.392.2. And it hinders MOHELA in carrying out its "essential public function" of ensuring that Missouri "students have access to student loans." §173.360.

Because MOHELA is a state entity, helps fund state programs, and performs essential public functions for the State, Missouri has numerous interests in MOHELA's financial health. State law authorizes the Missouri Attorney General to sue "in the name and on the behalf of the state … to protect" these "interests." Mo. Rev. Stat. §27.060; *see Missouri ex*

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rel. Hawley v. Pilot Travel Ctr., 558 S.W.3d 22, 30 (Mo. banc 2018) (permitting suit under § 27.060 to vindicate "the legislature's statutory purposes"). Other cases considering similar state laws and theories of injury have allowed States to sue for harms to their constituent entities. *E.g.*, *Arkansas v. Texas*, 346 U.S. 368, 370–71 (1953); *Alaska v. Chevron Chem. Co.*, 669 F.2d 1299, 1301–02 (9th Cir. 1982). Missouri can do the same here.

The Contract Disputes Act (CDA) does not require Missouri to file this case in the Court of Federal Claims. *Contra* Opp'n 9. Missouri is not alleging a breach of contract but challenging a new agency rule under the APA. "[T]he proper method" to "challenge the validity of a regulation"—even one affecting federal contracting—"is to bring an action in federal district court under the [APA]." *Southfork Sys., Inc. v. United States*, 141 F.3d 1124, 1135 (Fed. Cir. 1998). The Court of Federal Claims "does not have jurisdiction to review the validity of regulations pursuant to the [APA]." *Boeing Co. v. United States*, --- Fed. Cl. ----, 2022 WL 4364180, at *4 (Fed. Cl. Sept. 21, 2022) (collecting cases and distinguishing the Department's cited caselaw).

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2. The direct tax losses create standing.

The "causal chain" that the Department identifies (at 11) for the States' tax harms is not "attenuated" but clear and inevitable. First, the definition of federal and state taxable income is established by law. *See* Mot. 11–12. Second, federal law provides that student loans will be discharged in upcoming years. *E.g.*, 34 C.F.R. § 685.221(f) (directing forgiveness for certain loans). Third, if the Cancellation occurs, there will be fewer future loan discharges for the States to tax. That chain is far more direct than the standing theories the Supreme Court and others have accepted in census lawsuits. *E.g.*, *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565–66 (2019); *Iowa ex rel. Miller v. Block*, 771 F.2d 347, 353–54 (8th Cir. 1985) (discussing *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (per curiam)).

Nor does the Department's argument (at 12) that the States' tax injuries are "self-inflicted" defeat standing. "Courts regularly entertain actions brought by states … that face economic injury, even though [they] theoretically could avoid the injury by enacting new legislation." *California v. Azar*, 911 F.3d 558, 574 (9th Cir. 2018). *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976), on which the Department relies, is

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inapposite. First, Pennsylvania did not sue "in response to a significant change in the defendants' policies," but the States here did, proving their "injury is not self-inflicted." *Texas v. United States*, 809 F.3d 134, 158 (5th Cir. 2015), *aff'd by an equally divided court*, 579 U.S. 547 (2016). Second, Pennsylvania "could have achieved [its] policy goal in myriad ways," while the States here would have been forced to "surrender[]" their "permissible policy goal" of linking state and federal taxable income. *See id.* at 158–59 & n.65. Because the Cancellation directly reduces the amount of debt discharge available to tax, this case mirrors *Wyoming v. Oklahoma*, 502 U.S. 437, 447–48 (1992)—not *Pennsylvania*—and the States have standing.

3. The consolidation harms create standing.

The Department dismisses the voluntary-cessation exception to mootness (at 10) because the agency allegedly started to change its rule on FFEL consolidation the night before this case began. But what matters is when reviewable agency action occurs—not when internal agency discussions happen. *See Biden v. Texas*, 142 S. Ct. 2528, 2545 (2022) (rejecting the idea that agency action occurs "apart from" implementation). Reviewable action occurred here when the website changed

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on September 29 or the HEROES Act waiver was published on October 12. *See* R. Doc. 37, at 39–40 (stating the Department's view that "the formal act … authoriz[ing] the forgiveness" was "the publication"). Because those events happened after this suit began, mootness (not standing) rules apply. *See Davis v. FEC*, 554 U.S. 724, 734 (2008) (standing focuses on "when the suit was filed"). Moreover, the Department doesn't deny that "an immediate injunction preventing the [agency] from discharging debt preserves the chance for a permanent injunction remedying some of the consolidation harms." Mot. 15. Thus, a current, redressable controversy remains over the consolidation harms.

4. The States' sovereign and quasi-sovereign interests create standing.

The Department argues at (10–11) that the States lack *parens patriae* standing against the federal government. That bar applies only to States' suits brought "purely on behalf of their own citizens' interests." *Kentucky v. Biden*, 23 F.4th 585, 596 (6th Cir. 2022). Here, the States rely on sovereign and quasi-sovereign interests that do not rest on purely private interests, *see* Mot. 16, and thus they have standing. *See Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007); *Kentucky*, 23 F.4th at 598–99 (gathering cases).

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B. The States are likely to prevail on their APA exceeding-authority claim.

1. The major-questions doctrine applies.

The Department's silence on key major-questions factors confirms the doctrine's application. The agency conceded below that this is "a case of economic and political significance," R. Doc. 27, at 41, and it doesn't dispute that Congress has "conspicuously and repeatedly declined to enact" legislation achieving what the Cancellation would, *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022). These factors suffice because courts "presume that Congress does not delegate its authority to settle or amend major social and economic policy decisions." *Id.* at 2613.

The Department seeks to dismiss the major-questions doctrine (at 18) because this case involves federal services rather than "'regulatory authority' over private parties." But courts have applied the doctrine to the COVID-19 vaccine mandate for federal contractors—entities that provide federal services. *E.g.*, *Kentucky*, 23 F.4th at 606–08; *Georgia v. President of the U.S.*, 46 F.4th 1283, 1295–96 (11th Cir. 2022).

The Department also contends (at 19) that the Cancellation is not an "unheralded power'" under the HEROES Act. Yet nowhere does the Department claim that the Act has ever been used to discharge debt.

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Indeed, the Department argues (at 18) that the alleged harm it seeks to address through the Cancellation occurs after every emergency-induced payment pause, but the agency has never implemented anything like the Cancellation. Rather than cite that Act, the Department says that it has used a *different* provision in the Higher Education Act (HEA)—20 U.S.C. §1082(a)(6)—to cancel debt. But the lone example of debt discharged under that statute involves borrowers who attended a specific association of schools—a targeted action that hardly resembles the global Cancellation.

Nor does the section of the American Rescue Plan Act (ARPA) "making student-loan discharges tax-free" until 2025 mean that Congress endorsed this use of the HEROES Act. *Contra* Opp'n 20. That ARPA provision exempts a broad category of debt discharges (not just the federally held debt at issue here) and makes no reference to the HEROES Act. *See* Pub. L. 117-2, §9675, 135 Stat. 4, 185–86 (Mar. 11, 2021).

2. No clear congressional authorization exists.

The Department does not deny that the Cancellation "seeks to place [borrowers] in a *better* position," rather than simply preventing them

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"from slipping into a worse position." Mot. 19. This alone proves that the Department has exceeded its statutory authority.

The Department advocates for a breathtakingly broad reading of the HEROES Act. It claims (at 14) that the phrase "deems necessary" "exudes deference" to the Secretary, citing a case—*Webster v. Doe*, 486 U.S. 592, 600 (1988)—that precluded judicial review altogether. But *Webster* construed the statutory phrase "deem … necessary *or advisable*," *id.* (emphasis added), which is significantly more deferential than "deems necessary." Also, while the first sentence of the HEROES Act includes the phrase "deems necessary," 20 U.S.C. §1098bb(a)(1), the most relevant part says that the action must "be necessary to ensure" the statutory goals are met, §1098bb(a)(2). That language requires meaningful judicial review of the Department's actions—not the judicial pass the agency seeks. *See Kentucky*, 23 F.4th at 607 n.14 (noting the non-delegation concerns raised by a similarly broad statutory reading).

The Department also argues (at 18) that the HEROES Act authorizes any action for which a national emergency is a but-for cause. Because the but-for "consequences of an act go forward to eternity," *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 266 n.10 (1992), that

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interpretation produces absurd results, permitting COVID-19 to justify the mass elimination of debt for years to come. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (counseling against absurd interpretations). Read correctly, the statute demands proximate or direct causation, meaning COVID-19 must be the "cause that directly produces" the need for relief. *Proximate Cause*, Black's Law Dictionary (11th ed. 2019); *see, e.g.*, *Holmes*, 503 U.S. at 265–68 (interpreting the phrase "by reason of" in the federal RICO statute to require proximate causation). The Department has not shown that here.

Lastly, the Department says (at 17) that because the Secretary need not act "on a case-by-case basis," he is allowed some "imprecision." But this is not a case of minor imprecision. The Secretary has wholly failed to justify core eligibility requirements, *see* Mot. 23, and drafted a rule that does not come close to complying with the HEROES Act's text.

C. The States are likely to prevail on their APA arbitrary-and-capricious claim.

The Department argues at (21) that it considered the option of continuing forbearance because it extended forbearance until the end of 2022. But the Department did not consider whether to extend forbearance beyond 2022. That renders its action arbitrary.

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The Department also contends (at 23–24 n.2) that the States lack an interest in challenging the arbitrary distinction between FFEL borrowers who consolidated before September 29 and those who did not. Yet the States are directly harmed by FFEL consolidation, so they may challenge the inclusion of borrowers who consolidated. The Department is desperate to avoid this issue because the agency has no reasonable explanation for its shifting treatment of FFEL consolidation.

II. The remaining equitable factors favor the States.

Public Interest and No Harm to the Department. The Department (at 24–25) does not deny that if the Cancellation is unlawful, the injunction is in the public interest, and the agency will not be harmed by it. *See* Mot. 26–27. The Department thus concedes that these factors justify relief if the States are likely to succeed on the merits.

Irreparable Harm. The Department's irreparable-harm arguments (at 25) simply repackage its standing arguments and are meritless for the same reasons. The Department also intimates (at 26) that the payment pause somehow undermines the States' irreparable harm. Yet forbearance did not erase loan accounts like the Cancellation does. The harms at issue here are thus different than those caused by forbearance.

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III. The Court should enjoin the entire Cancellation program.

"[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998). Indeed, the APA itself—which permits courts to "set aside" unlawful agency action, 5 U.S.C. § 706(2)—"contemplates nationwide relief from invalid agency action." *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2412 n.28 (2020) (Ginsburg, J., dissenting). "Courts across the country interpret the APA [this] way." *Texas v. United States*, No. 6:21-CV-00016, 2022 WL 2109204, at *46 (S.D. Tex. June 10, 2022), *cert. granted*, No. 22A17 (U.S. July 21, 2022) (collecting cases). The injunction requested here would temporarily set aside the Secretary's HEROES Act waiver, thereby prohibiting implementation of the Cancellation. Such programmatic relief is consistent with the Supreme Court's order staying the entire OSHA COVID-19 vaccine mandate pending full review. *See NFIB v. OSHA*, 142 S. Ct. 661, 666–67 (2022) (per curiam).

Additionally, an injunction limited to certain States or borrowers would fail "to provide complete relief to the plaintiffs." *Madsen v.*

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Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994). MOHELA services accounts for borrowers nationwide, *see* Mot. 2, so a state-specific injunction will not prevent the harms to Missouri through MOHELA. Nor would an injunction confined to loans serviced by MOHELA. The Department could easily skirt that relief by transferring loans eligible for the Cancellation to other servicers. *See Who's My Student Loan Servicer*, U.S. Dep't of Educ., https://tinyurl.com/2p9xkya8 (listing nine servicers).

There is also "a substantial likelihood that a geographically-limited injunction would be ineffective because" borrowers and accounts "move among states." *Texas*, 809 F.3d at 188; *see also Pennsylvania v. President U.S.*, 930 F.3d 543, 576 (3d Cir. 2019), *rev'd on other grounds*, *Little Sisters*, 140 S. Ct. 2367 (2020). Regarding the States' tax harms, interstate migration means that a borrower living in California with a loan serviced in Wisconsin may reside in Iowa in 2026, so cancelling that debt inflicts injury on Iowa. And as for the consolidation harms, FFEL consolidations injure the States even if the borrowers live beyond their borders.

CONCLUSION

The Court should enter an injunction pending appeal that stops further implementation of the Cancellation. If the Court denies that

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request or enters a narrow injunction, the States ask that the temporary administrative stay remain in place for one week after this Court's forthcoming order so that they can seek relief from the Supreme Court.

Dated: October 25, 2022

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This reply complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(C) because, excluding the parts exempted by Fed. R. App. P. 32(f), it contains 2,579 words as determined by the word-counting feature of Microsoft Word 2016.

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/s/ James A. Campbell
James A. Campbell

AMERICAN OVERSIGHT
Appellate Case: 22-3179 Page: 18 Date Filed: 10/25/2022 Entry ID: 5214454
MO-AG-23-0462-A-000959

CERTIFICATE OF SERVICE

I certify that on October 25, 2022, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system, and that the CM/ECF system will accomplish service on all parties represented by counsel who are registered CM/ECF users.

/s/ James A. Campbell
James A. Campbell

AMERICAN OVERSIGHT
Appellate Case: 22-3179 Page: 19 Date Filed: 10/25/2022 Entry ID: 5214454
MO-AG-23-0462-A-000960

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
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St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

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November 14, 2022

Mr. James A. Campbell
ATTORNEY GENERAL'S OFFICE
2115 State Capitol
P.O. Box 98920
Lincoln, NE 68509-0000

RE: 22-3179 State of Nebraska, et al v. Joseph Biden, Jr., et al

Dear Counsel:

The court today issued an opinion in this case.

Michael E. Gans
Clerk of Court

CRJ

Enclosure(s)

cc: Honorable Henry Edward Autrey
Mr. Simon Christopher Brewer
Ms. Sarah Carroll
Mr. Mark Chenowith
Ms. Courtney Dixon
Mr. Theodore H. Frank
Ms. Shannon Marie Grammel
Mr. Dylan L. Jacobs
Mr. Cody Taylor Knapp
Mr. Samuel Paul Langholz
Ms. Sheng Li
Mr. Gregory J. Linhares
Mr. Robert Charles Merritt
Mr. Brian David Netter
Mr. Michael David Pepson
Mr. Thomas Pulham
Mr. Michael Raab
Mr. Samuel Rebo
Mr. Dean John Sauer
Mr. J. Emory Smith Jr.

AMERICAN OVERSIGHT

MO-AG-23-0462-A-000961

Mr. Michael E. Talent
Mr. John Julian Vecchione

District Court/Agency Case Number(s): 4:22-cv-01040-HEA

AMERICAN OVERSIGHT

MO-AG-23-0462-A-000962

United States Court of Appeals
For The Eighth Circuit
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November 14, 2022

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RE: 22-3179 State of Nebraska, et al v. Joseph Biden, Jr., et al

Dear Sir or Madam:

An opinion was filed today in the above case.

Counsel who represented the appellants was James A. Campbell, Solicitor General, of Lincoln, NE., Dean John Sauer, Solicitor General, of Jefferson City, MO., Michael E. Talent, Deputy Solicitor General, of Saint Louis, MO.

Counsel who represented the appellees was Sarah Carroll, USDOJ, CIVIL, of Washington, DC., Michael Raab, USDOJ, CIVIL, of Washington, DC., Simon Christopher Brewer, USDOJ, CIVIL, of Washington, DC., Courtney Dixon, USDOJ, CIVIL, of Washington, DC., Thomas Pulham, USDOJ, CIVIL, of Washington, DC.

Counsel who represented the amicus group Hamilton Lincoln Law Institute, was Theodore H. Frank, of Washingon, DC.

Counsel who represented the amicus group Americans for Prosperity Foundation, was Michael David Pepson, of Arlington, VA.

Counsel who represented the amicus group New Civil Liberties Alliance, was Mark Chenowith, of Washington, DC., Sheng Li, of Washington, DC., John Julian Vecchione, of Washington, DC.

The judge who heard the case in the district court was Honorable Henry Edward Autrey. The judgment of the district court was entered on October 20, 2022.

If you have any questions concerning this case, please call this office.

Michael E. Gans
Clerk of Court

CRJ

AMERICAN OVERSIGHT

MO-AG-23-0462-A-000963

Enclosure(s)

cc: Lois Law
MO Lawyers Weekly

District Court/Agency Case Number(s): 4:22-cv-01040-HEA

AMERICAN OVERSIGHT

MO-AG-23-0462-A-000964

United States Court of Appeals
For the Eighth Circuit

No. 22-3179

State of Nebraska; State of Missouri; State of Arkansas; State of Iowa; State of Kansas; State of South Carolina

Plaintiffs - Appellants

v.

Joseph R. Biden, Jr., in his official capacity as the President of the United States of America; Miguel Cardona, in his official capacity as Secretary, United States Department of Education; United States Department of Education

Defendants - Appellees

Hamilton Lincoln Law Institute; Americans for Prosperity Foundation; New Civil Liberties Alliance

Amici on Behalf of Appellants

Appeal from United States District Court
for the Eastern District of Missouri

Submitted: October 24, 2022
Filed: November 14, 2022
[Published]

Before SHEPHERD, ERICKSON, and GRASZ, Circuit Judges.

AMERICAN OVERSIGHT

MO-AG-23-0462-A-000965

PER CURIAM.

Whatever the eventual outcome of this case, it will affect the finances of millions of Americans with student loan debt as well as those Americans who pay taxes to finance the government and indeed everyone who is affected by such far-reaching fiscal decisions. As such, we approach the motion before us with great care.

This case centers on the plaintiff States' request to preliminarily enjoin the United States Secretary of Education ("Secretary") from implementing a plan to discharge student loan debt under 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"). *See* Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program), 87 Fed. Reg. 61,512, 61,514 (Oct. 12, 2022) (to be codified at 34 C.F.R. pts. 674, 682, 685). The States contend the student loan debt relief plan contravenes the separation of powers and violates the Administrative Procedure Act because it exceeds the Secretary's authority and is arbitrary and capricious.

The district court denied the States' motion for a preliminary injunction and dismissed the case for lack of jurisdiction after determining none of the States had standing to bring the lawsuit. Key to the district court's rationale was its conclusion that the State of Missouri could not rely on any harm the Missouri Higher Education Loan Authority ("MOHELA") might suffer on account of the Secretary's cancellation of debt. The States appealed and moved for a preliminary injunction pending appeal. We grant the motion for the following reasons.

"In ruling on a request for an injunction pending appeal, the court must engage in the same inquiry as when it reviews the grant or denial of a preliminary injunction." *Walker v. Lockhart*, 678 F.2d 68, 70 (8th Cir. 1982). This inquiry includes "balancing the equities between the parties." *Id.* We ask "whether the

AMERICAN OVERSIGHT
Appellate Case: 22-3179 Page: 2 Date Filed: 11/14/2022 Entry ID: 5217471
MO-AG-23-0462-A-000966

balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 370 (8th Cir. 1991) (quoting *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc)). In circumstances "where the movant has raised a substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less." *Dataphase*, 640 F.3d at 113; *see also Fennell v. Butler*, 570 F.2d 263, 264 (8th Cir. 1978) ("If the balance tips decidedly towards the plaintiffs and the plaintiffs have raised questions serious enough to require litigation, ordinarily the injunction should issue.").

The district court's analysis began and ended with standing. Standing is a threshold issue since it is essential to our jurisdiction. *United States v. One Lincoln Navigator 1998*, 328 F.3d 1011, 1013 (8th Cir. 2003). We begin by examining the standing of the State of Missouri and, like the district court, focus on MOHELA. MOHELA's unique mix of legal attributes and authority have led to differing opinions as to whether it is an "arm of the state" of Missouri for purposes of being entitled to sovereign immunity. The core issue before this court, however, is whether the alleged harm from the Secretary's debt discharge plan, considering the role of MOHELA, is sufficient to meet the requirements for Article III standing for Missouri.

The relationship between MOHELA and the State of Missouri is relevant to the standing analysis. MOHELA was created by the General Assembly of Missouri. *See* Mo. Rev. Stat. § 173.360. It is governed by a seven-member board composed of five members appointed by the Governor of Missouri, as well as the Missouri State Commissioner of Higher Education and a member of the Missouri State Coordinating Board of Higher Education. *Id.* After its creation, the Missouri General Assembly expanded MOHELA's purpose to include "support[ing] the efforts of public colleges and universities to create and fund capital projects." *Id.* Relatedly, the General Assembly established the Lewis and Clark Discovery Fund ("LCD Fund") from which the General Assembly may annually appropriate

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moneys for certain purposes, including "funding of capital projects at public colleges and universities." *Id.* § 173.392. Most significantly, Missouri law, *id.* § 173.385.2, specifically directs MOHELA to distribute $350 million "into a fund in the State Treasury" for this program. MOHELA FY 2022 Financial Statements, at 20, available at https://tinyurl.com/4chp295x. MOHELA has met part of its obligation to the State treasury, but the "remaining unfunded amount . . . was $105.1 million as of June 30, 2022." *Id.*

Given this statutory framework, MOHELA may well be an arm of the State of Missouri under the reasoning of our precedent. *See Pub. Sch. Ret. Sys. of Mo. v. St. Bank & Trust Co.*, 640 F.3d 821, 826–27, 833 (8th Cir. 2011) (applying the test to determine whether sovereign immunity applies and holding Missouri public school employment retirement systems were arms of the state). In fact, a number of district courts have concluded that MOHELA is an arm of the state. *See, e.g.*, *Good v. U.S. Dep't of Educ.*, No. 21-CV-2539-JAR-ADM, 2022 WL 2191758, at *4 (D. Kan. June 16, 2022); *Gowens v. Capella Univ., Inc.*, No. 4:19-CV-362-CLM, 2020 WL 10180669, at *4 (N.D. Ala. June 1, 2020); *see also In re Stout*, 231 B.R. 313, 316–17 (Bankr. W.D. Mo. 1999). *But see Dykes v. Mo. Higher Educ. Loan Auth.*, No. 4:21-CV-00083-RWS, 2021 WL 3206691, at *4 (E.D. Mo. July 29, 2021); *Perkins v. Equifax Info. Servs., LLC*, No. SA-19-CA-1281-FB (HJB), 2020 WL 13120600, at *5 (W.D. Tex. May 1, 2020).

But even if MOHELA is not an arm of the State of Missouri, the financial impact on MOHELA due to the Secretary's debt discharge threatens to independently impact Missouri through the LCD Fund. It is alleged MOHELA obtains revenue from the accounts it services, and the total revenue MOHELA recovers will decrease if a substantial portion of its accounts are no longer active under the Secretary's plan. This unanticipated financial downturn will prevent or delay Missouri from funding higher education at its public colleges and universities. After all, MOHELA contributes to the LCD Fund but has not yet met its statutory obligation.

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Due to MOHELA's financial obligations to the State treasury, the challenged student loan debt cancellation presents a threatened financial harm to the State of Missouri. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019); *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017). Consequently, we conclude Missouri has shown a likely injury in fact that is concrete and particularized, and which is actual or imminent, traceable to the challenged action of the Secretary, and redressable by a favorable decision. Missouri, therefore, likely has legal standing to bring its claim. And since at least one party likely has standing, we need not address the standing of the other States. *See Nat'l Wildlife Fed'n v. Agric. Stabilization & Conservation Serv.*, 955 F.2d 1199, 1203 (8th Cir. 1992). Likewise, we need not decide whether the Secretary's standing argument as to harm alleged to Arkansas and Nebraska is actually better viewed as a mootness argument. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022) (discussing the importance of the distinction and the heavy burden of establishing mootness once a live case has allegedly become moot due to voluntary cessation of conduct).

Having addressed the threshold standing issue, we turn to the balancing of the equities and the probability of success on the merits. Not only do the "merits of the appeal before this court involve substantial questions of law which remain to be resolved," *Walker*, 678 F.2d at 71, but the equities strongly favor an injunction considering the irreversible impact the Secretary's debt forgiveness action would have as compared to the lack of harm an injunction would presently impose. Among the considerations is the fact that collection of student loan payments as well as accrual of interest on student loans have both been suspended. We conclude "the equities of this case require the court to intervene to preserve the status quo pending the outcome" of the States' appeal, *id.*, and that the States have satisfied the standard for injunctive relief pending review, *see D.M. by Bao Xiong v. Minn. State High Sch. League*, 917 F.3d 994, 999–1001 (8th Cir. 2019) (discussing the standard for preliminary injunctive relief).

Finally, we have carefully considered the Secretary's request that we limit the scope of any temporary relief. "Crafting a preliminary injunction is an exercise of

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discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam). As the Supreme Court has explained, "one of the 'principles of equity jurisprudence' is that 'the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.'" *Rodgers v. Bryant*, 942 F.3d 451, 458 (8th Cir. 2019) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). Part of our consideration is whether the injunctive relief is "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994), and "workable," *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (per curiam).

We conclude that, at this stage of the litigation, an injunction limited to the plaintiff States, or even more broadly to student loans affecting the States, would be impractical and would fail to provide complete relief to the plaintiffs. MOHELA is purportedly one of the largest nonprofit student loan secondary markets in America. It services accounts nationwide and had $168.1 billion in student loan assets serviced as of June 30, 2022. *See Rodgers*, 942 F.3d at 458. Given MOHELA's national role in servicing accounts, we discern no workable path in this emergency posture for narrowing the scope of relief. And beyond Missouri, tailoring an injunction to address the alleged harms to the remaining States would entail delving into complex issues and contested facts that would make any limits uncertain in their application and effectiveness. Although such complexities may not counsel against limiting the scope of an injunction in other contexts, here the Secretary's universal suspension of both loan payments and interest on student loans weighs against delving into such uncertainty at this stage.

We GRANT the Emergency Motion for Injunction Pending Appeal. The injunction will remain in effect until further order of this court or the Supreme Court of the United States.

AMERICAN OVERSIGHT

MO-AG-23-0462-A-000970

To: 'alida.kass@fed-soc.org'[alida.kass@fed-soc.org]
From: Atkins, Jay[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=1502E6E18E4545A38D80CC0069F63728-ATKINS, JAMES]
Sent: Wed 2/14/2024 8:32:35 AM (UTC-06:00)
Subject: Missouri - Student Loan
1. Emergency Motion for Administrative Stay.pdf
2. Emergency Motion for Administrative Stay - Opposition.pdf
3. Emergency Motion for Administrative Stay - Reply ISO.pdf
4. 8th Cir Opinion.pdf
5. Application to Vacate Injunction.pdf
6. Response to Application.pdf
7. Reply.pdf
8. Brief of Petitioners.pdf
9. Brief of Respondents.pdf
10. Reply Brief.pdf
11. SCOTUS Opinion.pdf

Ms. Kass,
Please find attached relevant papers in Missouri's student loan case decided by SCOTUS last year.Please let me know if you have any questions.
Very Best,
Jay

Jay Atkins | Chief of Staff
Missouri Attorney General's Office
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AMERICAN OVERSIGHT

No. 22A____

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, ET AL., APPLICANTS

v.

STATE OF NEBRASKA, ET AL.

APPLICATION TO VACATE THE INJUNCTION ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
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Washington, D.C. 20530-0001
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AMERICAN OVERSIGHT

PARTIES TO THE PROCEEDING

Applicants (defendants-appellees below) are Joseph R. Biden, Jr., in his official capacity as President of the United States; Miguel Cardona, in his official capacity as Secretary of Education; and the U.S. Department of Education.

Respondents (plaintiffs-appellants below) are the States of Nebraska, Missouri, Arkansas, Iowa, Kansas, and South Carolina.

RELATED PROCEEDINGS

United States District Court (E.D. Mo.):

Nebraska v. Biden, No. 22-cv-1040 (Oct. 21, 2022)

United States Court of Appeals (8th Cir.):

Nebraska v. Biden, No. 22-3179 (Nov. 14, 2022)

AMERICAN OVERSIGHT

IN THE SUPREME COURT OF THE UNITED STATES

No. 22A____

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, ET AL., APPLICANTS

v.

STATE OF NEBRASKA, ET AL.

APPLICATION TO VACATE THE INJUNCTION ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of the applicants, respectfully applies to vacate the injunction pending appeal entered on November 14, 2022, by the United States Court of Appeals for the Eighth Circuit (App., infra, 1a-6a).

Congress charged the Secretary of Education with administering federal student-loan programs. Because borrowers who default on their student loans face severe financial consequences -- including wage garnishment, long-term credit damage, and ineligibility for federal benefits -- Congress specifically authorized the Secretary to waive or modify any applicable statutory or regulatory provision as he deems necessary to ensure that borrowers

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affected by a national emergency are not worse off in relation to their student loans. See Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act or Act), Pub L. No. 108-76, § 2, 117 Stat. 904-905 (20 U.S.C. 1098bb). Confronted with the deadliest pandemic in the Nation's history, which has wreaked global economic havoc, both the Trump and Biden Administrations invoked the HEROES Act to pause repayment obligations and suspend interest accrual on all federally held student loans since March 2020. That pause is estimated to have cost the government more than $100 billion.

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

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Respondents are a group of six States that challenged the Secretary's plan. The district court dismissed their suit for lack of Article III standing, but the Eighth Circuit granted their request for a universal injunction pending appeal. In so doing, the court did not analyze the merits of respondents' claims, much less determine they are likely to succeed. The court's discussion of the merits instead consisted, in its entirety, of the following statement: "[T]he 'merits of the appeal before this court involve substantial questions of law which remain to be resolved.'" App., infra, 5a (citation omitted). That analysis does not suffice to support any injunction -- much less a universal injunction prohibiting the government from implementing a critically important policy with direct and tangible effects on millions of Americans.

This Court should vacate that injunction. Respondents lack standing to challenge the plan. On the merits, the plan falls squarely within the plain text of the Secretary's statutory authority. Indeed, the entire purpose of the HEROES Act is to authorize the Secretary to grant student-loan-related relief to at-risk borrowers because of a national emergency -- precisely what the Secretary did here. And the plan rested on the Secretary's examination of the relevant economic data and the Department's long experience with borrowers transitioning back into repayment. The Eighth Circuit did not address either the text of the statute or the data supporting the plan. And the court compounded its errors by issuing sweeping nationwide relief, rather

AMERICAN OVERSIGHT

than limiting the injunction to loans serviced by the sole entity on which the court relied in finding that respondents had standing.

The Eighth Circuit's erroneous injunction leaves millions of economically vulnerable borrowers in limbo, uncertain about the size of their debt and unable to make financial decisions with an accurate understanding of their future repayment obligations. If the Court declines to vacate the injunction, it may wish to construe this application as a petition for a writ of certiorari before judgment, grant the petition, and set the case for expedited briefing and argument this Term to avoid prolonging this uncertainty for the millions of affected borrowers. Cf. United States v. Texas, cert. granted, No. 22-58 (oral argument scheduled for Nov. 29, 2022).

STATEMENT

A. Background

1. The Department of Education administers various student-loan programs under Title IV of the Higher Education Act of 1965 (Education Act), 20 U.S.C. 1070 et seq. Those programs include the William D. Ford Federal Direct Loan Program (Direct Loans), 20 U.S.C. 1087a-1087j, under which the federal government lends money directly to students, and the Federal Family Education Loan Program (Family Education Loans), 20 U.S.C. 1071 to 1087-4, and Federal Perkins Loan Program (Perkins Loans), 20 U.S.C. 1087aa-1087ii, under which non-federal lenders issue loans guaranteed by entities reinsured by the federal government. Although authority to issue

AMERICAN OVERSIGHT

new loans under the latter two programs has expired, many loans remain outstanding. Borrowers generally may consolidate their federal student loans into loans held by the federal government. 34 C.F.R. 685.220. Nearly 43 million borrowers have outstanding loans under the three programs, and their debts total roughly $1.62 trillion. Office of Federal Student Aid, U.S. Dep't of Educ., Federal Student Aid Portfolio, https://studentaid.gov/data-center/student/portfolio (last visited Nov. 15, 2022).

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

A few months after the September 11, 2001 terrorist attacks, Congress enacted the Higher Education Relief Opportunities for Students Act of 2001, Pub. L. No. 107-122, 115 Stat. 2386, to "provide the Secretary of Education with specific waiver authority to respond to conditions in the national emergency declared by the President on September 14, 2001," ibid. Congress authorized the Secretary to "waive or modify any statutory or regulatory provision applicable to" student aid programs under Title IV of the Education Act "as may be necessary to ensure that" borrowers affected by

AMERICAN OVERSIGHT

September 11 and later terrorist attacks are not in a worse position in relation to their student loans. § 2(a)(1) and (2), 115 Stat. 2386; see § 5, 115 Stat. 2388.

In 2003, Congress extended and expanded that authority by enacting the HEROES Act. Like its predecessor, the HEROES Act authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" under Title IV. 20 U.S.C. 1098bb(a)(1). But the HEROES Act does not limit relief to borrowers who suffered hardship as a result of terrorist attacks; rather, it authorizes waiver or modification "as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide the waivers or modifications authorized by paragraph (2)." Ibid. Paragraph 2, in turn, authorizes the Secretary "to waive or modify any provision described in paragraph (1) as may be necessary to ensure that" certain objectives are achieved. 20 U.S.C. 1098bb(a)(2). The first objective is that "recipients of student financial assistance under title IV of the [Education] Act who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." 20 U.S.C. 1098bb(a)(2)(A). An "affected individual" is defined to include any individual who "resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency." 20 U.S.C. 1098ee(2)(C).

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

The HEROES Act was originally set to expire in 2005. Pub. L. No. 108-76, § 6, 117 Stat. 908. But Congress extended the Act by two years, Pub. L. No. 109-78, 119 Stat. 2043, and in 2007 made the Act permanent, Pub. L. No. 110-93, 121 Stat. 999. Since 2003, the Secretary has repeatedly invoked the Act to provide categorical relief to borrowers affected by emergencies, including by extending forbearance for Perkins loans and waiving the requirement that borrowers return overpayments of certain grant funds. See Office of Legal Counsel, U.S. Dep't of Justice, Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans, 2022 WL 3975075, at *5-*6 (Aug. 23, 2022) (OLC Op.); App., infra, 30a.

2. In March 2020, President Trump declared a national emergency in light of the COVID-19 pandemic. Proclamation 9994,

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3 C.F.R. 56 (2020 Comp.). That declaration remains in effect, and the government has declared all 50 States, the District of Columbia, and the territories to be disaster areas. See FEMA, COVID-19 Disaster Declarations, https://perma.cc/B7KA-W4KD. COVID-19 has killed more than one million Americans and led to the hospitalization of millions more. Centers for Disease Control and Prevention, COVID Data Tracker (Nov. 16, 2022), https://perma.cc/64SG-ZCL4. COVID-19 continues to kill more than 2,000 Americans a week. Ibid. The pandemic has also inflicted severe economic harms, including layoffs, spikes in inflation, rising delinquency rates on debt, and projected reductions in lifetime earnings for students who left school during the pandemic. See App., infra, 37a-39a, 45a. These harms have disproportionately affected lower-income households. Id. at 37a-38a, 41a-47a.

In response to the pandemic, the federal government provided substantial relief to borrowers with Department-held loans. In March 2020, then-Secretary of Education DeVos invoked the HEROES Act to pause repayment obligations and suspend interest accrual on all such loans. 85 Fed. Reg. 79,856, 79,857 (Dec. 11, 2020). Congress directed the Secretary to extend those policies through September 2020. COVID-19 Pandemic Education Relief Act of 2020, Pub. L. No. 116-136, Div. A, Tit. III, Subtit. B, § 3513, 134 Stat. 404. Both the Trump and Biden Administrations then further extended these protections under the HEROES Act. See, e.g., 85 Fed. Reg. at 79,857; App., infra, 32a-33a.

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In August 2022, Secretary Cardona determined that, despite those measures, any resumption of repayment obligations would put many lower-income borrowers "at heightened risk of loan delinquency and default" due to the pandemic. App., infra, 32a. The Secretary thus adopted a two-pronged approach. He announced that he would extend the pause a final time, through December 31, 2022. Id. at 33a. And to ensure that "borrowers are not in a worse position financially due to the pandemic with regard to their ability to repay their loans" when payment obligations resume in January 2023, the Secretary invoked the HEROES Act and directed the Department to issue up to $10,000 in student-loan relief to eligible borrowers with annual incomes under $125,000 ($250,000 for borrowers filing jointly). Id. at 32a. Qualifying Pell Grant recipients, who tend to have fewer resources and are at greater risk of default, can receive up to $20,000. Ibid.

As explained in the supporting analysis on which the Secretary relied, this relief will mitigate the pandemic's adverse economic effects and significantly reduce delinquency and default rates among those borrowers most affected by the pandemic. App., infra, 36a, 39a-40a. The Department analyzed its past experience with borrowers who transitioned back to repayment after long periods of forbearance, including after emergencies, and concluded that such borrowers are typically at "elevated risk of delinquency and default." Id. at 37a. Indeed, default rates increase twentyfold after the period of non-payment ends, and Pell Grant recipients

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affected by such events experience even "larger increases in default." Ibid. The Department reviewed borrower surveys, economic studies, and credit analyses conducted by the Consumer Financial Protection Bureau and Federal Reserve Banks that documented current economic conditions borrowers face due to the pandemic, including rising delinquency rates on non-student-loan debt; stark increases in the number of borrowers that anticipate difficulty making loan payments; and acute inflationary pressures on household budgets for "basic necessities, including energy, food, and shelter costs." Id. at 37a-39a. The Department also emphasized the substantial penalties imposed on borrowers who default on student-loan payments, including 50-to-90-point drops in credit scores that make insurance, rent, and other financial products more expensive and limit employment opportunities; exposure to involuntary collection methods; and lost access to affordable or flexible repayment options. Id. at 39a.

The Department explained that the contemplated debt relief would ameliorate these harms. App., infra, 39a-47a. The Department surveyed economic data establishing that borrowers with incomes under $125,000, especially Pell Grant recipients, are more likely to experience financial hardship in repaying their loans when payments resume. Id. at 41a-47a. Among other things, such borrowers were disproportionately likely to become unemployed and experience material hardship due to the pandemic, including food insecurity and difficulty making utility, rent, and mortgage

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payments. Id. at 38a, 45a-47a. As to the amount of debt to be discharged, the Department observed that "it should discharge an amount of debt necessary to significantly decrease the rates of delinquency and default." Id. at 40a. After considering borrower loan balances and the effectiveness of various monthly payment reductions in reducing delinquency rates, the Department determined that the $10,000 threshold (and $20,000 for Pell Grant recipients) would "mitigate the risk that delinquency and default rates will rise above pre-pandemic levels." Ibid.

B. Proceedings Below

Respondents are the States of Arkansas, Iowa, Kansas, Missouri, Nebraska, and South Carolina. App., infra, 9a. On September 29, 2022, respondents sued the President, the Secretary, and the Department in the U.S. District Court for the Eastern District of Missouri, alleging that the plan exceeds the Secretary's authority and is arbitrary and capricious. Ibid. Respondents moved for a preliminary injunction. Id. at 13a.

1. On October 20, 2022, the district court denied the motion and dismissed the suit for lack of Article III standing. App., infra, 9a-27a. As relevant here, the court rejected Missouri's argument that it had standing because the Missouri Higher Education Loan Authority (MOHELA), a non-profit entity that services federal loans, would suffer financial harms because of the plan. Id. at 18a. The court explained that MOHELA is a distinct legal person from the State of Missouri; MOHELA traditionally has not been

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considered an "arm of the State"; it has the capacity to "sue and be sued in its own name"; it "retains financial independence from the [S]tate"; and the State has no legal obligation to pay MOHELA's debts. Id. at 20a; see id. at 18a-21a. The court accordingly concluded that Missouri lacks the capacity to sue based on any harms to MOHELA. Id. at 21a. The court also rejected respondents' other theories of standing. Id. at 21a-26a.

2. The next day, the district court denied respondents' motion for an injunction pending appeal. App., infra, 8a. Later the same day, the court of appeals entered an "administrative stay prohibiting the [Department] from discharging any student loan debt under the Cancellation program." Id. at 7a.

3. Three weeks after issuing its administrative stay, the court of appeals issued a six-page per curiam opinion granting respondents an injunction pending appeal. App., infra, 1a-6a.

The court of appeals concluded that Missouri likely has standing to bring this suit (and did not address the other respondents' standing). App., infra, 5a. The court reasoned that MOHELA, as a loan servicer, "obtains revenue from the accounts it services," but that "the total revenue MOHELA recovers will decrease if a substantial portion of its accounts are no longer active under the Secretary's plan." Id. at 4a. The court concluded that, because MOHELA has "financial obligations to the State treasury," the plan's "financial impact on MOHELA" could lead to "financial harm to the State." Id. at 4a-5a.

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The court of appeals then turned to the merits and the equities. App., infra, 5a. The court stated, without elaboration, that the "merits of the appeal before this court involve substantial questions of law which remain to be resolved." Ibid. (citation omitted). The court also stated that the "equities strongly favor an injunction considering the irreversible impact the Secretary's debt forgiveness action would have as compared to the lack of harm an injunction would presently impose." Ibid. In particular, the court emphasized that "collection of student loan payments as well as accrual of interest on student loans have both been suspended," but it did not acknowledge that the suspension was scheduled to end on December 31. Ibid.

Finally, the court refused to limit its injunction "to the plaintiff States, or even more broadly to student loans affecting the States." App., infra, 6a. "Given MOHELA's national role in servicing accounts," the court "discern[ed] no workable path in this emergency posture for narrowing the scope of relief." Ibid.

4. In the meantime, four days before the Eighth Circuit issued its injunction in this case, a federal district court in Texas found the plan unlawful and vacated it on a nationwide basis. See Brown v. U.S. Dept of Educ., No. 22-cv-908, 2022 WL 16858525 (N.D. Tex. Nov. 10, 2022). The plaintiffs in that case are two individual borrowers who do not assert any injury from the provision of debt relief to others, and instead brought only a procedural claim asserting that they were improperly denied the

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opportunity to comment on the plan. Id. at *7-*8. The district court rejected that argument as foreclosed by the plain text of the HEROES Act. Id. at *10-*11 (citing 20 U.S.C. 1098bb(b)(1)). But the court then granted nationwide relief based on a substantive claim that the plaintiffs themselves had not asserted (and would not have had standing to assert in any event). Id. at *11-*15.

The government has appealed the Texas district court's decision and has sought a stay pending appeal. See Brown v. U.S. Dep't of Educ., appeal pending, No. 22-11115 (filed Nov. 14, 2022). That motion for a stay remains pending. If the Fifth Circuit denies a stay, the government intends to seek relief from this Court.

ARGUMENT

An injunction "is an extraordinary remedy never awarded as of right." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 24 (2008). A party seeking an injunction must show, among other things, that it is "likely to succeed on the merits." Id. at 20. Here, however, "one searches the opinion[] below in vain for any mention of [respondents'] likelihood of success on the merits." Munaf v. Geren, 553 U.S. 674, 690 (2008). The Eighth Circuit instead granted a universal injunction based on the assertion, unsupported by any further analysis, that the "merits of the appeal before this court involve substantial questions of law which remain to be resolved." App., infra, 5a. That deficiency by itself justifies vacating the injunction. See Munaf, 553 U.S. at 690.

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Nor could the Eighth Circuit have granted an injunction had it conducted the proper analysis. In considering interim equitable relief like an injunction pending appeal, this Court considers the "likelihood of success on the merits" and the "equities." Alabama Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2488-2489 (2021) (per curiam). In this case, the government is likely to succeed on the merits and the equities favor vacatur of the injunction.

I. THE GOVERNMENT IS LIKELY TO SUCCEED ON THE MERITS

If the court of appeals finds the plan unlawful, this Court would likely review that decision invalidating a national program affecting millions of Americans. See pp. 38-40, infra. And if the Court granted review, it would likely reverse a decision finding the plan unlawful. Contrary to the court of appeals' decision, respondents lack Article III standing to bring this suit. The plan is in any event lawful. And at a minimum, the Eighth Circuit's universal relief was overbroad.

A. The States Lack Article III Standing

Article III empowers the federal courts to decide only "Cases" and "Controversies." U.S. Const. Art. III, § 2, Cl. 1. An Article III case or controversy exists only if the plaintiff has standing -- that is, only if the plaintiff has suffered a concrete, particularized, and actual or imminent injury, the injury was likely caused by the defendant, and the injury would likely be redressed by judicial relief. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021). Respondents cannot satisfy those requirements. The

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plan confers benefits on third parties, but it does not require respondents to do anything, forbid them from doing anything, or harm them in any other way.

The Eighth Circuit determined that Missouri likely has standing because the plan causes financial harm to MOHELA, a state-created entity in Missouri that contracts with the federal government to service student loans and that would stop receiving administrative fees from the government for borrowers whose loans are discharged in their entirety. App., infra, 4a-5a. But it is well established that a plaintiff must demonstrate that it has a "personal stake in the outcome" of the litigation. Los Angeles v. Lyons, 461 U.S. 95, 101 (1983). That is, the plaintiff must "assert [its] own legal rights and interests, and cannot rest [its] claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499 (1975). Here, Missouri has chosen to structure MOHELA as a legal person that is distinct from the State -- specifically, as a corporation with the capacity to "sue and be sued" in its own name. Mo. Rev. Stat. § 173.385(3) (2022). And MOHELA has publicly stated that it was "not involved with the decision of the Missouri Attorney General's Office" to seek to block the program and that "the only communications between MOHELA and that Office as it relates to student debt relief" have involved the Office's "sunshine law requests" to MOHELA seeking documents for use in this litigation. C.A. Rule 28(j) Letter, Attach. 1 (Nov. 1, 2022). Even if alleged financial harm to MOHELA

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would establish standing for MOHELA, therefore, it would not establish standing for the State of Missouri.

The Eighth Circuit attempted to overcome that problem by observing that Missouri law requires MOHELA to contribute a specified amount to a fund in the State Treasury, and that "the financial impact on MOHELA due to the Secretary's debt discharge" may impair MOHELA's ability to fulfill that obligation. App., infra, 4a. But the court cited no authority for the proposition that, if A causes financial harm to B, and B owes money to C, C has standing to sue A. Such a theory of standing is irreconcilable with the principle that a plaintiff must "assert [its] own legal rights and interests, and cannot rest [its] claim to relief on the legal rights or interests of third parties." Warth, 422 U.S. at 499. If the Eighth Circuit's contrary theory were taken to its logical conclusion, banks could sue anyone who causes financial harm to their borrowers, credit-card companies could sue anyone who causes financial harm to their customers, and governments could sue anyone who causes financial harm to taxpayers.

The Eighth Circuit's theory of standing also conflicts with this Court's "usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." Clapper v. Amnesty International USA, 568 U.S. 398, 414 (2013). It is pure speculation that, if the plan causes financial harm to MOHELA, MOHELA will default on its obligations to the state treasury. The plan may not cause a significant drop in MOHELA's revenue

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at all. Alternatively, MOHELA may make enough money that it can fulfill its financial obligations to the State despite any loss of revenue. Or the supposed loss of revenue may lead MOHELA to cut other expenditures rather than to default on its obligations to the State. Guesswork about how the plan will affect MOHELA and how MOHELA will react to those effects does not suffice to establish Article III standing.

B. The Secretary's Action Is Lawful

Respondents have asserted that the Secretary's plan exceeds his statutory authority and is arbitrary and capricious. App., infra, 2a. Without addressing either contention in substance, the court of appeals issued an injunction because respondents had raised "substantial questions of law." Id. at 5a (citation omitted). But neither contention is persuasive, let alone sufficient to demonstrate a "substantial likelihood of success on the merits." Alabama Ass'n of Realtors, 141 S. Ct. at 2488.

1. The HEROES Act authorizes the Secretary's action

The HEROES Act provides that, "[n]otwithstanding any other provision of law," the Secretary may respond to a "national emergency" by waiving or modifying "any statutory or regulatory provision" governing federal student loans "as the Secretary deems necessary" to "ensure" that loan recipients who are "affected individuals" are not "placed in a worse position financially" because of the emergency. 20 U.S.C. 1098bb(a)(1) and (2). The Secretary's action falls within that specific grant of authority.

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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 previously invoked the HEROES Act to categorically suspend payments and interest accrual on all Department-held loans in light of the pandemic. See p. 8, supra. Respondents have not disputed that those actions were lawful.

Similarly, all student-loan borrowers are "affected individuals" under the HEROES Act. 20 U.S.C. 1098bb(a)(2)(A). The vast majority qualify based on where they "reside[]" or are "employed," 20 U.S.C. 1098ee(2): The 50 States, the District of Columbia, and all five permanently populated United States territories have been designated as COVID-19 disaster areas. See p. 8, supra. And because the pandemic has inflicted global economic harms, with particularly severe effects on lower-income borrowers, the Secretary reasonably "determined" that the small fraction of eligible borrowers living and working abroad qualify because they have suffered "direct economic hardship" due to the pandemic. 20 U.S.C. 1098ee(2)(D). Again, the payment pauses adopted by both the Trump and Biden Administrations rested on the same understanding of "affected individual."

The Secretary reasonably "deem[ed]" relief "necessary to ensure" that a subset of these affected individuals -- namely, those with lower incomes -- "are not placed in a worse position" in relation to their student-loan obligations "because of their

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status as affected individuals," i.e., because of the effects of the COVID-19 pandemic. 20 U.S.C. 1098bb(a)(1) and (2). That determination was supported by analysis and evidence showing that, because of the pandemic, such borrowers were at particularly high risk of delinquency and default once payment obligations restart. See pp. 9-11, supra.

Finally, the Act authorizes the type of relief that the Secretary granted. The provisions governing student-loan repayment obligations, cancellation, and discharge are "statutory or regulatory provision[s] applicable to the student financial assistance programs under title IV." 20 U.S.C. 1098bb(a)(1); see, e.g., 20 U.S.C. 1807 (2018 & Supp. I 2019), 1087dd(g); 34 C.F.R. 682.402, 685.212. The Secretary thus properly "waiv[ed] or modif[ied]" those provisions to reduce the scope of vulnerable borrowers' payment obligations to ensure that they are not worse off in relation to their student-loan obligations because of the pandemic. 20 U.S.C. 1098bb(a)(1); App., infra, 28a, 32a.

b. Respondents' contrary arguments lack merit.

Respondents have asserted that the plan seeks to place borrowers in a better position, rather than prevent them from falling into a worse position because of the pandemic. See Resp. C.A. Mot. For Inj. Pending Appeal 19-20. But the evidence before the Secretary showed that without relief, lower-income borrowers were likely to experience increased default and delinquency rates beyond pre-pandemic levels. See App., infra, 37a-39a, 41a, 45a-46a;

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pp. 9-10, supra. And the evidence further showed that reducing the principal owed by such borrowers by the proposed amounts, and reducing their monthly payments accordingly, would ameliorate the "risk that delinquency and default rates will rise above pre-pandemic levels." App., infra, 40a (emphasis added); p. 11, supra. The Secretary thus acted 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).

Contrary to respondents' contention, see Resp. C.A. Mot. For Inj. Pending Appeal 21, the proposed relief directly targets those borrowers facing "a worse position financially" in relation to their student loans "because of" the invoked national emergency, 20 U.S.C. 1098bb(a)(2)(A) -- here, the COVID-19 pandemic. The evidence before the Secretary showed that borrowers with individual incomes below $125,000 or household incomes below $250,000 were most likely to have experienced job loss, non-student-loan debt delinquency, and other material hardships as a result of the pandemic, and thus face the highest risk of delinquency and default when student-loan obligations resume. See App., infra, 38a, 41a, 45a-47a; pp. 9-11, supra.

Respondents have also asserted that the HEROES Act limits the Secretary to "temporary" measures and thus bars debt relief. Resp. C.A. Mot. For Inj. Pending Appeal 20 (emphasis omitted). But the Act expressly authorizes the Secretary to "waive or modify any

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statutory or regulatory provision applicable to the student financial assistance programs under Title IV." 20 U.S.C. 1098bb(a)(1) (emphasis added); see United States v. Gonzales, 520 U.S. 1, 5 (1997) ("[T]he word 'any' has an expansive meaning.") (citation omitted). To waive is "[t]o abandon, renounce, or surrender (a claim, privilege, right, etc.)" or "to give up (a right or claim) voluntarily," Black's Law Dictionary 1894 (11th ed. 2019); to modify is "[t]o make somewhat different" or "to reduce in degree or extent," id. at 1203. The Act thus authorizes the Secretary to eliminate or to reduce by some degree a borrower's obligation to comply with any Title IV student-aid provision so long as the other requirements of the statute are satisfied. Among the Title IV provisions eligible for waiver or modification are those that establish the obligation to repay loans and the circumstances in which such obligations can be cancelled or discharged. See p. 20, supra.

Previous invocations of the HEROES Act -- by both the Trump and Biden Administrations -- likewise had permanent and substantial economic effects. Most significantly, the previous COVID-19 relief measures, including the suspension of loan payments and interest accrual, are estimated to have cost the federal government $102 billion. See U.S. Gov't Accountability Office, Student Loans: Education Has Increased Federal Cost Estimates of Direct Loans by Billions due to Programmatic and Other Changes 14 (July 2022). The Department has estimated that these measures saved the

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average borrower approximately $233 a month -- comparable to the $200 to $300 reduction in monthly payments that the Department estimates will be achieved by the challenged plan. See App., infra, 40a-41a. Moreover, because the months during which these measures were in effect count toward the income-driven repayment and public service loan forgiveness programs, these measures resulted in additional debt cancellation for borrowers eligible for those programs. See Office of Federal Student Aid, U.S. Dep't of Educ., COVID-19 Relief: Income-Driven Repayment (IDR) Plans, https://perma.cc/9EX9-W64J (last visited Nov. 14, 2022); Office of Federal Student Aid, U.S. Dep't of Educ., COVID-19 Relief: Public Service Loan Forgiveness (PSLF), https://perma.cc/M6NV-ENSU (last visited Nov. 14, 2022). Likewise, the Secretary in December 2020 expanded eligibility for defenses to repayment by allowing certain borrowers to have their claims evaluated under more beneficial standards, 85 Fed. Reg. at 79,862, which "will almost certainly reduce the amount of principal repaid by borrowers," OLC Op., 2022 WL 3975075, at *12. Pre-2020 invocations of the Act similarly resulted in forgiveness of affected borrowers' debt obligations. For example, the Secretary in 2003 waived the requirement that affected borrowers return overpayments of certain grant funds. 68 Fed. Reg. 69,312, 69,314 (Dec. 12, 2003).

Respondents have argued that some individual borrowers who qualify for relief may not be in a worse position financially as they enter repayment. See Resp. C.A. Mot. For Inj. Pending Appeal

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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). And Congress authorized the Secretary to issue relief "as may be necessary to ensure" that affected individuals are not worse off with respect to their student loans. 20 U.S.C. 1098bb(a)(2) (emphasis added); see Webster's Third New International Dictionary 756 (2002) ("ensure" means "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" that borrowers are not placed in a worse position financially, Congress anticipated just this sort of relief. See Weinberger v. Salfi, 422 U.S. 749, 776-777 (1975) (Congress may conclude "that the expense and other difficulties of individual[ized] determinations justif[y] the inherent imprecision of a prophylactic rule.").

Previous invocations of the HEROES Act have likewise afforded relief on a class-wide basis, see OLC Op., 2022 WL 3975075, at *4-*5; indeed, each invocation to pause payment obligations and interest accrual during the pandemic -- which respondents do not challenge -- provided relief for all borrowers with federally held student loans. See, e.g., 85 Fed. Reg. at 79,857; 87 Fed. Reg. at 61,512, 61,513-65,514 (Oct. 12, 2022). Here, by contrast, the Secretary limited eligibility for relief to the subset of affected borrowers most likely to be in a "worse position financially in

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relation to" their student loans because of the pandemic. 20 U.S.C. 1098bb(a)(2)(A). No more is required.

c. Respondents have also invoked the major questions doctrine, see Resp. C.A. Mot. For Inj. Pending Appeal 17-19, but that doctrine provides no sound reason to depart from a straightforward application of the statutory text. In "extraordinary cases," this Court has required that an agency "point to 'clear congressional authorization'" -- rather than a more ordinary "textual basis" -- "for the power it claims." West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022); see id. at 2607-2609. But this case lacks the hallmarks of those extraordinary cases, and clear authorization exists in any event.

To start, the asserted agency power here is neither "'transformative'" nor "sweeping." West Virginia, 142 S. Ct. at 2608, 2610 (citation omitted). The Secretary's plan lies within the heartland of his statutory authority to administer federally held loans in a federal student-loan program. He does not claim any authority to "intrude[] into an area that is the particular domain of state law" or to impose novel requirements on regulated parties. Alabama Ass'n of Realtors, 141 S. Ct. at 2489. Indeed, unlike every case where this Court has invoked the major questions doctrine, this case does not involve any assertion of regulatory authority at all. Instead, it involves the exercise of authority over a government benefit program to lift otherwise applicable requirements on beneficiaries. And although the HEROES Act gives

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the Secretary powerful tools to address the situations encompassed by the Act, it applies only in a limited set of circumstances (including a "national emergency," 20 U.S.C. 1098bb(a)(1)); authorizes relief only for a defined class of individuals, 20 U.S.C. 1098ee(2) (defining "affected individual"); to accomplish limited objectives (such as "ensur[ing]" that these individuals are not "placed in a worse position financially" in relation to their loans, 20 U.S.C. 1098bb(a)(2)(A)); through specific measures (waiving or modifying applicable student-loan requirements, 20 U.S.C. 1098bb(a)(1)). In keeping with that authority, the Secretary issued relief to ensure that vulnerable borrowers would not be worse off in relation to their student loans due to the pandemic. This case is thus far afield from cases like West Virginia, where the Court found that the agency action at issue would have required a complete reorganization of American energy infrastructure. 142 S. Ct. at 2604.

Relatedly, this case does not 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 central provision of 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," "[n]otwithstanding any other provision of law," 20 U.S.C. 1098bb(a)(1). Congress, moreover,

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

Nor has the Secretary relied on a "long-extant statute" to claim "unheralded power." Utility Air Regulatory Grp. v. EPA, 573 U.S. 302, 324 (2014). Since its enactment in 2003, the Department has repeatedly invoked the HEROES Act to provide class-wide relief to certain borrowers, see pp. 7, 24-25, supra, and since March 2020, both the Trump and Biden Administrations have invoked the Act to issue relief to all borrowers, see pp. 8-9, 22-23, supra. The pandemic-related relief is estimated to have cost the government more than $100 billion. See pp. 22-23, supra. To the extent the Secretary's pre-pandemic actions under the Act were narrower in certain respects, that reflects the pandemic's unprecedented scope, not any established understanding of the Act's limits. It

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is only natural that the Secretary's response to an unprecedented pandemic will go "further than what the Secretary has done in the past" in response to less severe or less widespread exigencies. Biden v. Missouri, 142 S. Ct. 647, 653 (2022) (per curiam).

Even if the major questions doctrine applied, it would not rescue respondents' claim. Section 1098bb(a) of the HEROES Act is not a "vague statutory grant," West Virginia, 142 S. Ct. at 2614; rather, Congress clearly authorized the Secretary to ensure that student-loan borrowers are not placed in a worse financial position because of a national emergency, and the Secretary complied with the Act's plain terms in affording a limited measure of relief to borrowers at risk because of COVID-19. See pp. 9-11, supra. The notion that Congress might not have foreseen such relief is likewise implausible. The Act specifically contemplates that the Secretary will provide financial relief to classes of borrowers by waiving loan-repayment provisions in these circumstances. And in pandemic-relief legislation enacted in 2021, when the possibility of forgiveness under the HEROES Act was already being publicly debated, Congress anticipated the possibility of such relief by adopting a "Special Rule for Discharges in 2021 Through 2025" that makes student-loan discharges during that period tax-free. See American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9675(a), 135 Stat. 185 (capitalization altered).

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2. The Secretary's action was not arbitrary or capricious

The Administrative Procedure Act (APA), 5 U.S.C. 701 et seq., authorizes courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). "The APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies," FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1160 (2021), and "[i]t is not infrequent that the available data do not settle a regulatory issue," State Farm, 463 U.S. at 52. In assessing agency action, "[a] court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." FERC v. Electric Power Supply Ass'n, 577 U.S. 260, 292 (2016). Instead, to satisfy judicial scrutiny, an agency need only "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" State Farm, 463 U.S. at 43 (citation omitted). The Secretary's action readily satisfies that deferential standard.

a. The Secretary reviewed the Department's "[p]ast experience with student loan borrowers transitioning back into

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repayment" after emergency-related forbearance; borrower surveys, economic studies, and credit analyses examining "current economic conditions facing borrowers" as a result of the pandemic; and evidence about the "substantial negative penalties" imposed on borrowers "who go delinquent or default on their student loans." App., infra, 37a-39a (capitalization altered; emphasis omitted); pp. 9-10, supra. The Secretary also considered whether "pandemic-connected loan discharge will reduce * * * delinquency and default rates"; the availability of "other options to reduce monthly payments"; the "amount of debt to discharge" to "mitigate the risk that delinquency and default rates will rise above pre-pandemic levels"; and "borrower income threshold[s]" to confine relief to those borrowers "mo[st] likely to experience delinquency and default." App., infra, 39a-48a (capitalization altered; emphasis omitted); pp. 10-11, supra.

The Secretary found that, when loan-repayment obligations resume, many lower-income borrowers "will be at heightened risk of loan delinquency and default" due to the pandemic's effects. App., infra, 32a. The Secretary further determined that "[a]dditional steps are needed to * * * ensure that borrowers are not in a worse position financially due to the pandemic with regard to their ability to repay their loans." Ibid. Accordingly, the Secretary determined -- as part and parcel of the decision to end forbearance and restart repayments -- that eligible borrowers with annual incomes under $125,000 ($250,000 for married couples) should be

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afforded up to $10,000 in student-loan debt relief, and that Pell Grant recipients can receive up to $20,000. Ibid.

b. Respondents have argued that the Secretary failed to consider reasonable alternatives, overlooked reliance interests, and disregarded the statutory factors. Resp. C.A. Mot. For Inj. Pending Appeal 22-24. Those criticisms lack merit.

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) (citation omitted). And here, the Secretary considered the availability of alternatives, such as income-driven repayment plans and continuing forbearance, App., infra, 39a -- and the Secretary in fact did temporarily continue forbearance, id. at 33a. But the Secretary reasonably determined that the Department's objectives would be best served by resuming payments rather than indefinitely continuing forbearance, and that additional action was necessary to address the difficulties lower-income borrowers would face when payments resume. Id. at 32a-33a.

Nor did the Secretary ignore cognizable reliance interests in issuing relief to certain federal borrowers. Respondents have no cognizable interest at all in this action, see pp. 15-18, supra, let alone "'serious'" or "significant reliance interests." Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 222 (2016) (citation omitted); see also Solenex LLC v. Bernhardt, 962 F.3d 520, 529 (D.C. Cir. 2020) ("[U]nproven reliance interests are not a valid

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basis on which to undo agency action."). This case bears no resemblance to Regents, where the Court found that the agency had ignored the interests of DACA recipients themselves in rescinding a program those recipients had relied upon to "embark[] on careers," "purchase[] homes, and even marr[y] and ha[ve] children." 140 S. Ct. at 1914.

The Secretary also considered the relevant statutory factors in determining the scope of relief. Evidence showed that borrowers with individual incomes under $125,000 are most at risk of being in a "worse position financially in relation to" their student loans as a result of the pandemic. 20 U.S.C. 1098bb(a)(2)(A); see App., infra, 41a-47a. 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., App., infra, 45a (surveying evidence that lower-income borrowers were disproportionately impacted 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 (D.C. Cir. 2013) (citation omitted), particularly where the authorizing statute expressly contemplates such discretion, see pp. 26-27, supra.

C. The Eighth Circuit's Universal Relief Was Overbroad

Even if respondents had standing and were likely to succeed on the merits, the court of appeals seriously erred in enjoining the plan on a universal basis. As Members of this Court have

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

Under Article III, "a plaintiff's remedy must be 'limited to the inadequacy that produced his injury.'" Gill v. Whitford, 138 S. Ct. 1916, 1930 (2018) (brackets and citation omitted). This Court has accordingly narrowed injunctions that "improper[ly]" "grant[ed] a remedy beyond what was necessary to provide relief to [the injured parties]." Lewis v. Casey, 518 U.S. 343, 360 (1996).

Principles of equity reinforce that constitutional limitation. A federal court's authority is generally confined to the relief "traditionally accorded by courts of equity" in 1789. Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 319 (1999). Such relief must "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Califano v. Yamasaki, 442 U.S. 682, 702 (1979). Thus, English and early American "courts of equity" typically "did not provide relief beyond the parties to the case." Hawaii, 138 S. Ct. at 2427 (Thomas, J., concurring).

Universal relief is irreconcilable with these limitations. By definition, it extends to parties who were not "plaintiff[s] in th[e] lawsuit, and hence were not the proper object of th[e

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court's] remediation." Lewis, 518 U.S. at 358. And when a court awards relief to nonparties, it exceeds the relief "traditionally accorded by courts of equity" in 1789. Grupo Mexicano, 527 U.S. at 319; see Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 424-445 (2017) (detailing historical practice).

Universal relief also creates other legal and practical problems. It circumvents the rules governing class actions. See Fed. R. Civ. P. 23. It encourages forum shopping by empowering a single district court to nullify the decisions of other courts upholding the challenged agency action. See New York, 140 S. Ct. at 601 (Gorsuch, J., concurring in the grant of stay). And it operates asymmetrically: The government must prevail in every suit to keep its policy in force, but plaintiffs can derail a federal program nationwide with just a single lower-court victory. Ibid.

The prospect that a single lower-court decision can halt a government policy nationwide for years while the ordinary appellate process unfolds often leaves the Executive Branch with little choice but to seek emergency appellate relief. See New York, 140 S. Ct. at 600-601 (Gorsuch, J., concurring in the grant of stay). Emergency litigation in turn deprives the judicial system, including this Court, of the benefits that accrue when different courts grapple with complex legal questions in a considered, orderly dialogue. Ibid.

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The Eighth Circuit granted a universal remedy because it could "discern no workable path" to crafting a narrower remedy that would "provide complete relief" to respondents. App., infra, 6a. But a workable path was obvious: The court of appeals could have simply enjoined the Secretary from discharging loans that are serviced by MOHELA. Such an injunction would have fully remedied the injury that Missouri asserts, namely, financial harm allegedly caused by the forgiveness of loans serviced by MOHELA. The Eighth Circuit also believed that "tailoring an injunction to address the alleged harms to the remaining States" would be too "complex." App., infra, 6a. But the Eighth Circuit did not find that any of the remaining States had standing or that they faced irreparable harm because of the plan. The Eighth Circuit accordingly had no basis to grant them any injunctive relief at all -- much less to grant universal relief in order to avoid the supposed complications of tailoring an injunction to their asserted harms.

II. THE EQUITIES FAVOR A STAY

The harm to the government and the public from enjoining the Secretary's action is significant. The HEROES Act reflects Congress's judgment that the Secretary must be able to act quickly and effectively to afford relief to student-loan borrowers affected by national emergencies. See pp. 6-7, 26-29, supra. Here, the Secretary has crafted relief to protect vulnerable borrowers from delinquency and default (and thus from wage garnishment, credit-report damage, and seizure of federal benefits, see Office

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of Federal Student Aid, U.S. Dep't of Educ., Student Loan Delinquency and Default, https://perma.cc/4A6N-DA5Z; D. Ct. Doc. 42, at ¶ 6, Brown v. U.S. Dep't of Educ., No. 22-cv-908 (N.D. Tex. Nov. 15, 2022) (Kvaal Decl.)). The record includes ample evidence of the severity of the problem and the consequences of failing to act. See pp. 9-11, 30-31, supra. The injunction thus frustrates the government's ability to respond to the harmful economic consequences of a devastating pandemic with the policies it has determined are necessary. See Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (barring a sovereign from "employ[ing] a duly enacted statute to help prevent * * * injuries constitutes irreparable harm"); INS v. Legalization Assistance Project of L.A. County Fed'n of Labor, 510 U.S. 1301, 1305-1306 (1993) (O'Connor, J., in chambers) (emphasizing harm from "improper intrusion by a federal court into the workings of a coordinate branch of the Government").

Indeed, the Eighth Circuit's injunction (along with the Brown court's vacatur) threatens the Secretary's previously announced plan to resume student-loan payment obligations more broadly. The debt-relief measure was an integral component of the Secretary's simultaneous decision to restart such obligations after a lengthy period of forbearance during a devastating global pandemic. App., infra, 32a-33a; p. 9, supra. The injunction and vacatur thus place the Secretary in an unwarranted dilemma: Restart payments as previously planned -- and thereby invite the cascade of

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delinquencies and defaults that prompted the Secretary to adopt the debt-relief measure in the first place -- or continue forbearance in some form, at significant cost to the government. Both options undermine the Secretary's chosen policy, and both risk confusion and uncertainty for affected borrowers. The Department of Education is currently considering how to address that problem. Given the urgency of providing guidance to borrowers who need to know whether they will be required to resume payments in a matter of weeks, the Department plans to make a public announcement as soon as practicable.

No matter what the Secretary does, however, the injunction and vacatur will leave vulnerable borrowers in untenable limbo. Eligible borrowers have been told that they will be able to obtain meaningful debt relief: for the average borrower, the relief contemplated by the plan would result in $200 to $300 reductions in monthly payments. Kvaal Decl. ¶ 6. Those amounts are substantial to anyone attempting to responsibly manage his finances -- and all the more so for lower-income borrowers eligible for relief under the plan. App., infra, 39a-41a. Yet because of the injunction, the borrowers most likely to default if payment obligations resume without some relief face prolonged uncertainty about the scope of their payment obligations and when those obligations will resume. So long as that uncertainty continues, many borrowers will lack information they need to decide whether they can afford to change

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jobs, buy a home or a car, or assume other long-term financial obligations.

On the other side of the ledger, respondents would not face irreparable harm if the Eighth Circuit's injunction were vacated. Respondents have not even established the injury necessary for standing, see pp. 15-18, supra -- much less the irreparable injury necessary for the extraordinary remedy of an injunction. And even if the Secretary's plan did harm respondents, a universal injunction preventing the Secretary from implementing the plan anywhere in the Nation would be a disproportionate response to that harm. The balance of hardships therefore tips in favor of lifting the Eighth Circuit's injunction.

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

For the foregoing reasons, this Court should vacate the injunction pending appeal entered by the Eighth Circuit. If, however, the Court denies that relief, it may wish to construe this application as a petition for a writ of certiorari before judgment, grant the petition, and set this case for expedited briefing and argument this Term on the questions (1) whether respondents have Article III standing, and (2) whether the plan exceeds the Secretary's statutory authority or is arbitrary and capricious. Cf. United States v. Texas, cert. granted, No. 22-58 (oral argument scheduled for Nov. 29, 2022); Nken v. Mukasey, 555 U.S. 1042 (2008). The government would be prepared to brief this case on a

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schedule that would allow argument during the Court's February 2023 sitting.

A writ of certiorari before judgment under 28 U.S.C. 2101(e) is an extraordinary remedy, but the issues presented by the Eighth Circuit's injunction of the Secretary's action are "of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. Congress expressly contemplated that national emergencies would necessitate student-loan relief for affected borrowers, and Congress specifically authorized the Secretary to grant such relief without delay. See pp. 6-7, 26-29, supra. Here, the Secretary determined that relief was necessary to ensure that borrowers do not default on their loans or enter delinquency when payments obligations resume, with potentially irreparable consequences for their credit and financial futures. See pp. 9-11, 20-21, supra. Yet the Eighth Circuit, in a six-page opinion that omits any discussion of the merits, enjoined the Secretary's plan nationwide. That injunction, so long as it remains in place, thwarts the Secretary's considered judgment in responding to the harmful economic consequences of a devastating pandemic. See pp. 35-38, supra. And it leaves borrowers in limbo, uncertain of the scope of their debt obligations. Ibid.

Absent certiorari before judgment, however, this Court likely could not hear the case this Term. Based on the briefing schedule set by the Eighth Circuit, the appeal will not be fully briefed

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until February at the earliest, and there is no guarantee when the Eighth Circuit will rule. Postponing review until the Eighth Circuit enters judgment would thus likely delay the Court's resolution of this case until sometime in 2024, extending the uncertainty for vulnerable borrowers for an additional year or more. Certiorari before judgment would allow this Court to "promptly" consider the States' novel standing arguments and the legality of the plan after "full briefing and oral argument." See Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting).

CONCLUSION

This Court should vacate, or at minimum narrow, the injunction pending appeal entered by the court of appeals. If, however, the Court declines to vacate the injunction, it may wish to construe this application as a petition for a writ of certiorari before judgment, grant the petition, and set this case for expedited briefing and argument this Term.

Respectfully submitted.

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NOVEMBER 2022

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No. 22A444

In the Supreme Court of the United States

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, ET AL.,
Applicants,

v.

STATE OF NEBRASKA, ET AL.,
Respondents.

On Application to Vacate Injunction Entered by the
United States Court of Appeals for the Eighth Circuit

RESPONSE TO APPLICATION TO VACATE INJUNCTION

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INTRODUCTION

The Administration is once again invoking the COVID-19 pandemic to assert power far beyond anything Congress could have conceived. Previously, this Court stopped CDC's eviction moratorium. *Ala. Ass'n of Realtors* v. *Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021) (per curiam). Later, it stayed OSHA's vaccine-or-test mandate. *NFIB* v. *OSHA*, 142 S. Ct. 661, 666–67 (2022) (per curiam). Now, while President Biden publicly declares the pandemic over, the Secretary and Department of Education are using COVID-19 to justify the Mass Debt Cancellation—an unlawful attempt to erase over $400 billion of the $1.6 trillion in federal student-loan debt and eliminate all remaining loan balances for roughly 20 million of 43 million borrowers.

The States of Nebraska, Missouri, Arkansas, Iowa, Kansas, and South Carolina are likely to succeed in this challenge to the Cancellation. The Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act), Pub. L. No. 108-76, does not authorize this sweeping action of great economic and political significance. The Act requires a real connection to a national emergency. But the Department's reliance on the COVID-19 pandemic is a pretext to mask the President's true goal

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of fulfilling his campaign promise to erase student-loan debt. Hiding the real motive, the agency attempts to connect the Cancellation to the pandemic by citing current economic conditions supposedly caused by COVID-19. But those conditions are not directly attributable to the pandemic, so the Department has failed to adequately link the Cancellation to a national emergency.

In addition, the Act's text and context demonstrate that its purpose is to keep certain borrowers from falling into a *worse* position financially in relation to their student loans. Yet the Secretary uses it here to place tens of millions of borrowers in a *better* position by cancelling their loans en masse. The Act does not allow the Secretary to effectively transform federal student loans into grants. It is telling that the Secretary has never before used the Act in this way.

The equities also weigh heavily against granting the application. The Department can point to *no emergency or imminent harm* because, just yesterday, the agency extended the payment pause on student loans until the summer of 2023. Nor would lifting the injunction have any practical effect since all the Department's alleged injuries are independently caused by a separate judgment vacating the Cancellation in

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another case. In contrast to the Department's absence of any immediate injury, lifting the injunction risks unleashing on the States a wave of harms that could not be undone because of the Cancellation's "irreversible impact." App. 5a. Given this lopsided balance, the Court should deny the Department's request to vacate the Eighth Circuit's injunction.

STATEMENT

I. Background on Student Loans

The Higher Education Act (HEA) creates the Direct Loan Program. 20 U.S.C. §1087a *et seq.* Direct Loans are held by the Department and serviced by non-federal entities. *See* D. Ct. Doc. 5-1, at 194–254. The Higher Education Loan Authority of the State of Missouri (MOHELA)—a "public instrumentality" of the State, Mo. Rev. Stat. §173.360, and part of the Missouri Department of Higher Education and Workforce Development, §173.445—is one of those servicers. *See* D. Ct. Doc. 5-1, at 194–254. MOHELA services loan accounts for borrowers in all 50 States. *See id.* at 92–93.

The HEA also establishes the Federal Family Education Loan (FFEL) Program. 20 U.S.C. §1071 *et seq.* FFEL loans are held by either the Department or non-federal organizations. *See* D. Ct. Doc. 31-1, at 7–

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10. Non-federal entities that hold FFEL loans—such as MOHELA and the Arkansas Student Loan Authority (ASLA)—use them to secure bonds and earn income. *See* D. Ct. Doc. 5-1, at 60, 66–67; D. Ct. Doc. 5-4, at 2, ¶6. Other institutions—like the Nebraska Investment Council (NIC), which manages that State's assets—invest in FFEL student-loan asset-backed securities (SLABS). *See* D. Ct. Doc. 5-2, at 1–2, ¶¶4–7. Federal law allows borrowers to consolidate FFEL loans, which converts them into Department-held Direct Loans. 34 C.F.R. §685.220.

The Secretary must "try to collect a claim . . . for money . . . arising out of the activities of" the Department, which is to say he must collect outstanding student-loan debt. 31 U.S.C. §3711(a)(1). When Congress does not want the Secretary to collect on loans, it identifies specific groups of borrowers eligible for loan cancellation. *E.g.*, 20 U.S.C. §1078-10 ($5,000 in cancellation for teachers); 20 U.S.C. §1078-11 ($10,000 in cancellation for service in areas of national need); 20 U.S.C. §1087ee (percentage of cancellation for certain public service). Relatedly, when Congress wants to give educational funds that students need not repay, it establishes grant programs. *See* 20 U.S.C. §1070 *et seq*.

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II. The HEROES Act

Enacted in 2003, the HEROES Act permits the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" when "necessary in connection with a war or other military operation or national emergency." 20 U.S.C. §1098bb(a)(1). To be authorized, the waiver or modification must also, as relevant here, "be necessary to ensure that recipients of student financial assistance . . . who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." §1098bb(a)(2)(A).

The HEROES Act's congressional findings focus on affording relief to people serving in the "military" for "our nation's defense." 20 U.S.C. §1098aa(b)(1)–(6). The legislative history confirms the goal of relieving active-duty military from "making student loan payments . . . while they are away." 149 Cong. Rec. at H2522 (Apr. 1, 2003) (Rep. Garrett).[1]

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[1] *See also id.* at H2524 (Rep. Isakson) (the Act ensures that the "loan payments" of troops who "serve us in the Middle East and in Iraq" "are deferred until they return"); *id.* at H2525 (Rep. Burns) ("The HEROES bill would excuse military personnel from their Federal student loan obligations while they are on active duty"); 153 Cong. Rec. at H10790 (Sept. 25, 2007) (Rep. Kline) ("This bill is specific in its intent to insure that, as a result of a war or military contingency operation or national

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III. COVID-19 Pandemic and Student Loans

As soon as the COVID-19 pandemic began, the Department invoked the HEROES Act to pause payments and interest accrual on Department-held student loans. *See* 85 Fed. Reg. 79,856, 79,862–63 (Dec. 11, 2020). Congress quickly extended that forbearance through September 2020, *see* Pub. L. No. 116-136, §3513, and the Department later issued repeated extensions that were set to expire on December 31, 2022, *see* 87 Fed. Reg. 61,512, 61,514 (Oct. 12, 2022). Yesterday, however, the Department extended forbearance again, and it is now scheduled to expire 60 days after (1) resolution of litigation over the Cancellation or (2) June 30, 2023, whichever is later. Department's Press Release on Payment Pause (Nov. 22, 2022), https://tinyurl.com/5n8z2tj9.

Earlier in the pandemic, Congress considered—but rejected—a COVID-relief bill that would have discharged up to $10,000 in student-loan debt for some borrowers. H.R. 6800, 116th Cong. §150117(h) (2020). In recent months, with COVID-19 subsiding, the President has declared

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emergency, our men and women in uniform are protected."); *id.* (Rep. McKeon) ("What this bill does is allow the Secretary of Education to accommodate the unique needs of our student soldiers").

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"[t]he pandemic . . . over." 60 Minutes, Twitter (Sept. 18, 2022), https://tinyurl.com/2s35maau.

IV. The Mass Debt Cancellation

Meanwhile, on August 24, 2022, the Department announced its Mass Debt Cancellation. D. Ct. Doc. 5-3, at 4. The Administration explained that President Biden had "promised to provide targeted student debt relief" "[d]uring the [2020 presidential] campaign" and was now "following through." *Id.* at 29. In an accompanying memorandum, the Department revoked its prior view that it cannot cancel student-loan debt, *see* Memorandum from Rubinstein to DeVos 6 (Jan. 12, 2021), https://tinyurl.com/3kp29ys6 (Jan. 2021 Memo), and claimed such power for the first time, *see* 87 Fed. Reg. 52,943, 52,943–45 (Aug. 30, 2022).

The Congressional Budget Office estimates that the Cancellation will eliminate $430 billion of the $1.6 trillion in federal student-loan debt. CBO Sept. 26, 2022 Letter at 3, https://tinyurl.com/2p95x8kk. Other analyses project that the costs will approximate $519 billion. D. Ct. Doc. 5-3, at 23. Of the 43 million borrowers who still owe money, *see* CBO Sept. 26, 2022 Letter, *supra*, at 3, over 40 million will be eligible for the

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Cancellation, and nearly 20 million "will have their debt completely canceled," D. Ct. Doc. 5-3, at 31.

The Cancellation applies to Department-held loans, including Direct, FFEL, and Perkins. 87 Fed. Reg. at 61,514. To be eligible, borrowers must have had "an Adjusted Gross Income (AGI) below $125,000 for an individual taxpayer or below $250,000 for borrowers filing jointly . . . in *either* the 2020 or 2021 Federal tax year." *Ibid.* (emphasis added). These income cutoffs include most borrowers because 93 percent of American households earn less than $250,000 annually. *See Household Income Percentiles*, DQYDJ, https://tinyurl.com/vrks5mps. The Department will cancel up to $20,000 for eligible borrowers who received a Pell grant and $10,000 for those who did not. 87 Fed. Reg. at 61,514. Borrowers can apply until December 31, 2023. D. Ct. Doc. 31-1, at 5.

The Cancellation's details initially appeared only on the Department's website. At that time, the website told "borrowers with privately held federal student loans," including FFEL loans, that they can receive the Cancellation "by consolidating these loans into the Direct Loan program." D. Ct. Doc. 5-3, at 9. This incentivized borrowers to consolidate those loans. *See* D. Ct. Doc. 5-4, at 2, ¶7. Then on September 29, 2022—

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the day the States filed suit—the Department edited its website to say that borrowers with non-federally held FFEL loans can no longer become eligible "by consolidating . . . into Direct Loans," but that those who "applied to consolidate" before that date remain "eligible." D. Ct. Doc. 31-1, at 9. The Department has never explained this change, but by all accounts, it was a ploy to avoid judicial review because entities holding and investing in FFEL loans were "widely seen . . . inside . . . the administration[] as presenting the greatest legal risk" to the Cancellation. Michael Stratford, *Biden Administration Scales Back Student Debt Relief for Millions Amid Legal Concerns*, Politico (Sept. 29, 2022), https://tinyurl.com/2hexr9cf.

The Department did not publicly disclose its justification for the Cancellation until it filed the August 24 Rationale Memo in this case. App. 36a–48a. That filing shows that the Secretary received the Memo on August 24 and authorized the Cancellation at 9:25 am that same morning. *Id.* at 32a–33a. The Department eventually published the HEROES Act waiver authorizing the Cancellation on October 12. 87 Fed. Reg. at 61,512.

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V. Procedural History

On September 29, the States sued and moved for a preliminary injunction. App. 13a. On October 20, the district court denied the States' motion and dismissed the case for lack of standing, *id.* at 9a–27a, but the court recognized that the States raise "important and significant challenges" to the Cancellation, *id.* at 26a. The next day, after the appeal was docketed with the Eighth Circuit, the States moved for (1) an injunction pending appeal and (2) a temporary administrative stay, which the court promptly granted. *Id.* at 7a.

On November 14, the Eighth Circuit enjoined the Cancellation. App. 6a. The court's analysis focused on Missouri's standing. *Id.* at 3a–5a. It began by detailing the close relation between Missouri and MOHELA, explaining that Missouri's legislature created MOHELA as a state entity, charged it with "support[ing] the efforts of public colleges and universities," and required it to contribute to the Lewis and Clark Discovery Fund (LCD Fund) "in the State Treasury." *Id.* at 3–4 (citations omitted). Given those facts, "MOHELA may well be an arm of the State," the court said. *Id.* at 4 (collecting cases that so held). But even if not, the Cancellation's negative "financial impact on MOHELA . . . threatens to

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independently impact Missouri" by preventing MOHELA from satisfying its remaining obligation to pay $105.1 million into the LCD Fund. *Ibid.* Because Missouri has standing, the court did not "address the standing of the other States." *Id.* at 5a.

The Eighth Circuit then concluded that the States have raised "substantial questions of law" about the Cancellation's legality. App. 5a. The court also found that "the equities strongly favor an injunction considering the irreversible impact the [Cancellation] would have as compared to the lack of harm an injunction would presently impose." *Ibid.* To "provide complete relief to the plaintiffs," the court explained, it could not limit the injunction to certain States or loans. *Id.* at 6a. Because MOHELA services "$168.1 billion in student loan assets" nationwide and is "one of the largest" servicers of federal student loans, the court determined that there is "no workable path in this emergency posture for narrowing the scope of relief." *Ibid.*

ARGUMENT

The Court should not vacate the Eighth Circuit's injunction. The Department passingly argues (at 14) that courts issuing injunctions must announce plaintiffs' likelihood to succeed on the merits and that the

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Eighth Circuit's finding of "substantial questions of law" is not enough. The agency claims that *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008), and *Munaf* v. *Geren*, 553 U.S. 674, 690 (2008), establish this rule. They do not.

Winter addressed the standard for "irreparable harm" rather than the standard for assessing the merits. 555 U.S. at 21–22. And the error in *Munaf* was the lower court's failure to "consider[] the merits" at all. 553 U.S. at 690–91. Tellingly, after *Winter* and *Munaf*, many circuits—like the Eighth Circuit here—continue to approve injunctions where plaintiffs present substantial questions on the merits and the equities strongly favor them. *See, e.g.*, *Citigroup Glob. Mkts., Inc.* v. *VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34–38 (2d Cir. 2010) ("If the Supreme Court had meant" for *Winter* or *Munaf* "to abrogate the more flexible standard for a preliminary injunction, one would expect some reference to the considerable history of the flexible standards applied in this circuit, seven of our sister circuits, and in the Supreme Court itself"). The Eighth Circuit thus committed no error here.

Though there is no basis to do so, if the Court remands over this issue, it should enter an administrative stay forbidding the Department

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from discharging loans under the Cancellation while the Eighth Circuit takes up the injunction request again. The Department has already approved "16 million applications" from borrowers, and their debts are set "to be discharged" as soon as "allowed by the courts." Secretary's Nov. 11, 2022 Statement, https://tinyurl.com/2cewh6h4. Permitting those discharges to occur would immediately inflict the irreparable harms that the States are trying to avoid through this suit.

I. The States are likely to succeed on the merits.

A. The States have standing.

States are "entitled to special solicitude in [the] standing analysis." *Massachusetts* v. *EPA*, 549 U.S. 497, 520 (2007). Contrary to what the Department says (at 15–18), Missouri has standing. And though the Department ignores it, the other States have standing too.

1. Missouri has standing due to the Cancellation's negative effect on MOHELA's loan servicing.

The Cancellation will unquestionably inflict financial harm on MOHELA. Last fiscal year, MOHELA earned $88.9 million for "servicing 5.2 million" Direct Loan accounts. MOHELA FY 2022 Financial Statement at 4, https://tinyurl.com/4chp295x. This revenue is determined by how many accounts MOHELA services—the more it does, the more it earns,

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see D. Ct. Doc. 5-1, at 197–98, 209–10—and the Cancellation will "completely" eliminate the debt of nearly half of all borrowers (20 of 43 million), D. Ct. Doc. 5-3, at 31. Because many borrowers have more than one account, *see* D. Ct. Doc. 5-1, at 403–07, MOHELA is at risk of losing at least half of the Direct Loan accounts it services, which equates to millions of dollars of revenue per year. These financial losses to MOHELA harm Missouri in three ways.

First, MOHELA is a state agency, so financial harms to it are harms to Missouri. MOHELA and Missouri are organizationally and politically intertwined. MOHELA is "a public instrumentality" of Missouri that performs "essential public function[s]." Mo. Rev. Stat. §173.360. It is part of the Missouri Department of Higher Education and Workforce Development. §173.445. Its board members are state officials appointed by the State with the advice and consent of the legislature. §173.360; *see also* §173.005.2 (coordinating board); §173.007 (commissioner of higher education). And State law establishes MOHELA's powers. §173.385.

MOHELA and Missouri are also financially linked. MOHELA owes $105.1 million to the State's LCD Fund, *see* MOHELA FY 2022 Financial Statement, *supra*, at 20; Mo. Rev. Stat. §173.385.2, which supports

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"capital projects" at Missouri's "public colleges and universities," §173.392.2. And MOHELA is authorized to provide student financial aid, *see* §173.385.1(6), (19), which it does by giving millions of dollars per year to three scholarship programs run by its parent agency, the Department of Higher Education and Workforce Development, *see* MOHELA FY 2022 Financial Statement, *supra*, at 10 (listing the programs).

Overall, the connection between MOHELA and Missouri is so close that, as the Eighth Circuit noted, the agency "may well be an arm of the State" for sovereign immunity. App. 4a (collecting cases reaching that conclusion). Because of this tight relationship, financial injuries to MOHELA are harms to the State. *See Arkansas* v. *Texas*, 346 U.S. 368, 370–71 (1953) (injury to state university is injury to the State); *Alaska* v. *Chevron Chem. Co.*, 669 F.2d 1299, 1302–03 (9th Cir. 1982) (similar).

The Department's contrary arguments are unavailing. It is irrelevant that MOHELA "was not involved with the decision of the Missouri Attorney General's Office" to bring this suit, Appl. 16, because the Attorney General alone decides whether to sue "to protect the rights and interests of the state," Mo. Rev. Stat. §27.060. And it is not dispositive that MOHELA may "sue and be sued," Appl. 16 (quoting Mo. Rev. Stat.

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§173.385.1(3)), because bestowing that power on a state entity does not mean that it is separate from the State. *See State Highway Comm'n of Wyo.* v. *Utah Constr. Co.*, 278 U.S. 194, 199 (1929) (connecting a state entity to the State without addressing "the effect of the general grant of power to sue or be sued . . . or its withdrawal").

Second, Missouri has declared everything MOHELA does to be "the performance of an essential public function." Mo. Rev. Stat. §173.360. Those functions include advancing vital state goals like ensuring that Missouri "students have access to student loans" and providing funds to Missouri's "public colleges and universities." *Ibid.* MOHELA's revenue funds those essential state functions. *See* §173.385.1–.2. The Cancellation's negative effect on MOHELA's finances injures Missouri by impairing MOHELA's ability to carry out its state functions or forcing the State to appropriate money to make up the deficit.

Third, Missouri has standing because the Cancellation's adverse "financial impact on MOHELA . . . threatens to independently impact Missouri" by preventing or delaying MOHELA's contributions to "the LCD Fund," App. 4a, and the State's student aid programs, *see* MOHELA FY 2022 Financial Statement, *supra*, at 10. MOHELA affirms that "[a]ny

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available funds above its operating needs and reasonable reserves are devoted . . . to student financial aid." C.A. Rule 28(j) Letter, Attach. 1 (Nov. 1, 2022). By hindering MOHELA's contributions to the State, the Cancellation inflicts a classic financial injury on Missouri. *See Czyzewski* v. *Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017). This conclusion rebuts the Department's third-party standing arguments (at 16–17) because it establishes that even if MOHELA and Missouri are separate entities, Missouri may raise harms to its own interests. *See Clinton* v. *City of New York*, 524 U.S. 417, 431 (1998) (concluding that the city's claim did not "belong[] to the State" even though the State would have had a similar claim of its own).

The Department objects (at 17–18) to this standing theory as relying on "[g]uesswork" about "how MOHELA will react" to the Cancellation. Not so. The States rely on MOHELA's legal obligation to contribute to the LCD Fund, *see* Mo. Rev. Stat. §173.385.2, MOHELA's demonstrated practice of funding the State's student financial aid programs, *see* MOHELA FY 2022 Financial Statement, *supra*, at 10, and "the predictable effect" that decreasing MOHELA's revenue will have on

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those contributions to the State, *see Dep't of Com.* v. *New York*, 139 S. Ct. 2551, 2566 (2019). That goes far beyond "mere speculation." *Ibid.*

The Department also asserts (at 17) that if Missouri has standing to sue because of the harm to MOHELA, then "banks could sue anyone who causes financial harm to their borrowers." This analogy is off base. Missouri created MOHELA, tasked it with performing essential functions for the State, selected its board members, and bestowed power on it. That is entirely unlike the relationship between banks and their borrowers. Accordingly, the Department's dire predictions about these kinds of far-reaching implications miss the mark.

2. The States have standing on other grounds.

Direct Tax Losses. Nebraska, Iowa, Kansas, and South Carolina have standing because they face a "direct injury in the form of a loss of specific tax revenues." *Wyoming* v. *Oklahoma*, 502 U.S. 437, 448 (1992). Those States use federal adjusted gross income (AGI) to determine state taxable income. *See* Neb. Rev. Stat. §77-2714.01(1); Iowa Code §422.7; Kan. Stat. Ann. §79-32,117(a); S.C. Code §12-6-40. Normally, federal AGI includes student loan discharge. *See* 26 U.S.C. §61(a)(11). But

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under the American Rescue Plan Act (ARPA), federal AGI excludes those discharges until January 1, 2026. *See* 26 U.S.C. §108(f)(5).

Without the Cancellation, hundreds of thousands of loans are set to be discharged each year after January 1, 2026, under the Department's existing income-driven repayment (IDR) program. *See* U.S. Gov't Accountability Office, GAO-22-103720, Federal Student Aid: Education Needs to Take Steps to Ensure Eligible Loans Receive Income-Driven Repayment Forgiveness 16 fig. 3 (2022), https://tinyurl.com/bdhzca8z. These discharges will produce significant tax revenue for the States. But the Cancellation will erase over $400 billion in student-loan debt now when the States are not taxing loan discharges. That directly reduces the loans available for discharge once the States resume taxing it and thus will shrink the States' revenue.

Even if the States could respond to the Cancellation by changing their tax laws, that does not erase the injury. States have a sovereign right "to create . . . a legal code." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982). Forcing States to exercise that power by upending their preferred system for calculating state taxable income is itself an injury, and "the possibility that a plaintiff

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could avoid [one] injury by incurring [another] does not negate standing." *Texas* v. *United States*, 809 F.3d 134, 156–57 (5th Cir. 2015), *aff'd by an equally divided court*, 579 U.S. 547 (2016). That is why many circuits have declined to "treat[] the availability of changing state law as a bar to standing." *Id.* at 157; *accord California* v. *Azar*, 911 F.3d 558, 574 (9th Cir. 2018).

Consolidation Harms. Missouri, Arkansas, and Nebraska have experienced other harms because the Cancellation predictably prompted the widespread consolidation—and thus elimination—of non-federally held FFEL loans. *See* D. Ct. Doc. 5-4, at 2, ¶¶6–7 ($5–6 million of ASLA's $100 million in FFEL loans were consolidated after the Cancellation was announced). Missouri and Arkansas hold FFEL loans, and Nebraska invests in SLABS backed by FFEL loans. Eliminating those loans "reduc[es] the return on [the States'] investments" and thus inflicts an "actual financial injury." *Franchise Tax Bd. of Cal.* v. *Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990).

While the Cancellation now excludes consolidation as a pathway to eligibility, that does not foreclose standing. The States can still press their consolidation injuries for two reasons. First, the Department

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changed its website's language on consolidation and published the HEROES waiver reflecting that change *after* suit was filed, so this is a mootness (not standing) issue. *See Davis* v. *FEC*, 554 U.S. 724, 734 (2008) (standing focuses on "when the suit was filed"). This sort of "voluntary cessation" does not moot the States' claims, *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2019 n.1 (2017), especially because the Department is attempting "to insulate [its] decision from review," *Knox* v. *Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012). Second, the States can still obtain relief for their consolidation harms. For example, the Department could be ordered to direct borrowers who recently consolidated that they must pay part of their interest to the entity that held their prior FFEL loan. Such partial relief suffices for standing. *See Massachusetts*, 549 U.S. at 526.

Quasi-Sovereign Harms. The States also have "a quasi-sovereign interest in the health and well-being—both physical and economic—of [their] residents." *Alfred L. Snapp*, 458 U.S. at 607. MOHELA furthers Missouri's quasi-sovereign interest in higher education through its "essential public function[s]" of providing funding to students and the State's public universities. Mo. Rev. Stat. §173.360. When the Cancellation

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reduces MOHELA's revenue, it impairs Missourians' access to high education and harms that quasi-sovereign state interest.

B. The Cancellation exceeds the Department's authority.

A reviewing court shall "hold unlawful and set aside agency action" "in excess of statutory . . . authority." 5 U.S.C. §706(2)(C). The Department claims authority under the HEROES Act. That Act allows the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" when "necessary in connection with a . . . national emergency" "to ensure that recipients of student financial assistance . . . who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." 20 U.S.C. §1098bb(a)(1)–(2)(A). This text does not authorize the Cancellation.

Insufficient Connection to Emergency. To begin, the Act requires a real connection to a national emergency. The first clause demands that the action be "necessary in connection with a . . . national emergency." 20 U.S.C. §1098bb(a)(1). And the next specifies that borrowers must face "a worse position financially in relation to [their] financial assistance *because of*" the national emergency. §1098bb(a)(2)(A) (emphasis added).

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This statutory text requires more than the Department's "but-for causation" standard. *See Use of the Heroes Act of 2003 to Cancel the Principal Amounts of Student Loans*, 2022 WL 3975075, at *14 (O.L.C. Aug. 23, 2022). Because the but-for "consequences of an act go forward to eternity," *Holmes* v. *Sec. Inv. Prot. Corp.*, 503 U.S. 258, 266 n.10 (1992), that interpretation produces absurd results, allowing COVID-19 to justify the mass elimination of debt for years to come, *see United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (counseling against absurd constructions). In fact, the Department has argued that "in ten years, [it] could still use the HEROES Act to forgive student loan debt because of the COVID-19 pandemic if the Secretary deems it 'necessary.'" *Brown* v. *U.S. Dep't of Educ.*, No. 4:22-CV-0908-P, 2022 WL 16858525, at *13 (N.D. Tex. Nov. 10, 2022). Read correctly, however, the Act demands proximate or direct causation, meaning COVID-19 must be the "cause that directly produces" the need for relief. *Proximate Cause*, Black's Law Dictionary (11th ed. 2019); *see, e.g.*, *Holmes*, 503 U.S. at 265–68 (interpreting "by reason of" in RICO to require proximate causation).

The Cancellation fails that requirement. The Department tries to justify the program by citing "current economic conditions." App. 37a–

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39a (capitalization omitted). But those conditions are not primarily attributable to COVID-19. They are influenced by myriad other factors, including the President's fiscal policies and geopolitical events. Indeed, the Department admits that the cause of these economic conditions includes "other factors (such as Russia's invasion of Ukraine)." *Id.* at 38a. The Department's "indiscriminate approach" to economic conditions "fails to account for [the] crucial distinction" between economic risk from COVID-19 and economic "risk more generally." *NFIB*, 142 S. Ct. at 666.

The Department also argues that the end of forbearance supports the Cancellation. App. 37a. If, by this, the Secretary is suggesting that the end of forbearance always leads to defaults, then the Department (not COVID-19) caused the problem. Or if he thinks that resuming payments will risk harm to borrowers because of the broader economic conditions, the payment pause adds little to the analysis. Either way, the Department did not adequately connect the Cancellation to the pandemic.

Cannot Put Borrowers in Better Position by Discharging Principal. The Cancellation also falls because the HEROES Act does not authorize the direct discharge of loan principal. Relief must be "necessary" to keep borrowers from falling into "a worse position financially in relation to"

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their student loans. 20 U.S.C. §1098bb(a)(2)(A). Yet this direct discharge of principal does not simply prevent borrowers from slipping into a *worse* position but rather places them in a *better* one.

The Act's obvious focus on addressing *temporary* challenges like a "military operation or national emergency," 20 U.S.C. §1098bb(a)(1), further demonstrates that it is "incompatible" with the *permanent* cancellation of principal. *See Utility Air Regulatory Group* v. *EPA*, 573 U.S. 302, 322 (2014). Similarly, allowing the Secretary to erase loan principal conflicts with Congress's explicit distinction between student loans and student grants. *Compare* 20 U.S.C. §1070 *et seq.* (grant programs), *with* 20 U.S.C. §1087a *et seq.* (Direct Loan Program). Blurring the division between these two different forms of student aid would bring about "a fundamental revision" of the statutory scheme. *See MCI Telecommunications Corp.* v. *AT&T, Co.*, 512 U.S. 218, 231 (1994).

The Department argues (at 22–23) that other uses of the HEROES Act have "had permanent and substantial economic effects." This is beside the point because none of the past examples directly erased loan principal. Some of them—such as the COVID-19 payment pause and expanded eligibility for defenses to repayment—might have the indirect

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effect of reducing the principal that a borrower will ultimately pay. But those are incidental effects of actions not aimed at eliminating principal.

Excessive Scope. The Cancellation's scope—both who it covers and the amount of debt discharged—also exceeds the Secretary's authority. The Secretary has not limited the Cancellation to only "affected individuals." 20 U.S.C. §1098bb(a)(2)(A). While the Department argues (at 19) that this class includes *every* borrower in the world, nothing in the Department's materials purports to find that all borrowers have suffered "direct economic hardship" due to the pandemic. §1098ee(2)(D).

In addition, the Department has failed to respect the Act's requirement that "affected individuals" be at risk of facing "a worse position financially in relation to" their loans. 20 U.S.C. §1098bb(a)(2)(A). Many eligible borrowers face no such peril. For instance, the program includes high-income borrowers whose annual earnings have increased substantially since 2020, such as married individuals whose households earned between $200,000 and $250,000 in 2020 and more than $350,000 in 2021. No one can seriously contend that these borrowers need this relief.

The Department responds (at 24) by arguing that it need not provide relief "on a case-by-case basis" and that it may seek to "ensure"

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affected individuals are not worse off. 20 U.S.C. §§1098bb(a)(2) & (b)(3). But these statutory features at best permit modest imprecision. They do not excuse the Department's failure to tailor the eligibility requirements or relief amount at all.[2]

Nondelegation. Under the Department's reading of the HEROES Act, it has the power to cancel student-loan debt, of any amount, *see* Appl. 22 (claiming the Secretary may "eliminate . . . borrower's obligation"), for "[a]ll student-loan borrowers," *see id.* at 19, even a decade after a national emergency begins, *see Brown*, 2022 WL 16858525, at *13. This interpretation raises serious nondelegation concerns, *see Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 429–30 (1935), which counsels against accepting it, *see Clark* v. *Martinez*, 543 U.S. 371, 380–81 (2005) (avoidance doctrine).

Major-Questions Doctrine. The major-questions doctrine further reinforces the Department's lack of statutory authority. It applies to agency action that addresses issues of immense "economic and political significance" and demands that the agency show "clear congressional

[2] As explained in the amicus brief of Utah, Ohio, and others (at Section II.B.3.), the Cancellation also exceeds the Secretary's authority because it does not "waive" or "modify"—but rather rewrites—the provisions referenced in the Federal Register notice. *See* Fed. Reg. at 61,514.

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authorization." *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2608–09 (2022). A "plausible textual basis" will not do. *Id.* at 2609.

The major-questions doctrine applies here for four reasons. *First*, as the Department conceded below, *see* D. Ct. Doc. 27, at 41, it is claiming authority to resolve a matter of great "economic and political significance," *West Virginia*, 142 S. Ct. at 2608. With estimated costs between $430 billion and $519 billion, *see* CBO Sept. 26, 2022 Letter, *supra*, at 3; D. Ct. Doc. 5-3, at 23, the economic significance is plain, *see Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (per curiam) (applying the doctrine when the effect was $50 billion). So is the political significance. In recent years, Congress has "conspicuously and repeatedly declined to enact" many student-loan discharge bills, *West Virginia*, 142 S. Ct. at 2610, including one aimed at COVID-19 relief. *E.g.*, H.R. 2034, 117th Cong. (2021); H.R. 6800, 116th Cong. §150117(h) (2020); S. 2235, 116th Cong. (2019).

Second, the Department claims an "unheralded power." *West Virginia*, 142 S. Ct. at 2610. Until now, the agency has not "relied on the HEROES Act . . . for the blanket or mass cancellation . . . of student loan principal balances." Jan. 2021 Memo, *supra*, at 6; *see also The Biden Administration Extends the Pause on Federal Student Loan Payments*,

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Congressional Research Service, at 2–3 (Jan. 27, 2021), https://tinyurl.com/yxwm4eyj ("[B]efore the COVID-19 pandemic, Secretaries generally invoked the HEROES Act relatively narrowly to grant relief to limited subsets of borrowers, such as deployed military service members or victims of certain natural disasters"). Illustrating just how unprecedented this is, the Department has not erased loan principal in its "[p]ast experience[s] with student loan borrowers transitioning back into repayment after long periods of forbearance," App. 37a—even though it says that this circumstance requires the Cancellation here.

The Department denies (at 27) that it is asserting novel authority, citing the COVID-19 payment pause's $100 billion cost as a comparator. That the Department's best comparator is an action that did not directly discharge loan principal—implemented during the pandemic's lockdown phase for a fraction of the Cancellation's $430 billion cost—shows that the agency has no real analogue.

Third, "the sheer scope of the [Department's] claimed authority" confirms the major-questions doctrine's application. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. As explained above, the Department asserts power under the Act to cancel student-loan debt, of any amount, for any

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borrower, even a decade or more after a national emergency begins. *See* p. 27, *supra*. In other words, the agency believes that it has authority to erase all $1.6 trillion in student-loan debt, effectively converting the student-*loan* program into a student-*grant* program. Courts rightly greet such "assertions of extravagant statutory power" with skepticism. *West Virginia*, 142 S. Ct. at 2609 (cleaned up). That the Department also asks (at 26–27) for judicial deference to the Secretary's actions under the Act further underscores the vast power it claims.

Fourth, the Cancellation conflicts with the HEA's overall structure and the HEROES Act's legislative findings. The HEA not only distinguishes loans from grants, but also establishes specific classes of borrowers eligible for loan discharge. *See* p. 4, *supra*. Yet the Department's reading of the HEROES Act overrides those choices by authorizing the agency to convert loans into grants and identify new, broadly defined groups eligible for loan cancellation. The HEA also recognizes the importance of notice, comment, and collaboration by mandating "negotiated rulemaking" when the Department regulates on matters of student financial assistance. 20 U.S.C. §1098a(b)(2). Given this, it is implausible that Congress authorized the Department to use HEROES Act authority

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to completely bypass notice-and-comment rulemaking for one of the agency's most costly and consequential actions ever. §1098bb(b)(1). And because the HEROES Act's congressional findings focus on affording relief to those serving in the military, §1098aa(b)(1)–(6), "[t]here is little reason to think Congress" intended the Act to authorize worldwide debt discharge entirely unconnected to the military, *West Virginia*, 142 S. Ct. at 2612.

The Department says (at 25) that the major-questions doctrine does not apply because this case "involves the exercise of authority over a government benefit program." Yet the doctrine rests on "separation of powers principles and a practical understanding of legislative intent" that "presume[s] . . . Congress intends to make major policy decisions itself." *West Virginia*, 142 S. Ct. at 2609 (cleaned up). That presumption applies regardless of whether an agency is regulating private actors or administering a congressionally created benefit program. What matters is whether an agency is exceeding authority that Congress gave it. That can happen either when agencies regulate private parties or when they administer government benefits. There is nothing about the latter situation that is inconsistent with the major-questions doctrine.

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The Department also insists (at 28) that the HEROES Act "specifically contemplates that the Secretary" would "waiv[e] loan-repayment provision." But it cites no support for that statement because none exists. Nor does the part of ARPA that "makes student-loan discharges . . . tax-free" until 2025 mean that Congress endorsed this use of HEROES. *Contra* Appl. 28. Already-established loan programs, such as the IDR program mentioned above, result in the ongoing discharge of student-loan debt. So the referenced ARPA provision, which exempts debt discharges beyond the circumstances at issue here, says nothing about the HEROES Act. *See* Pub. L. 117-2, §9675, 135 Stat. 4, 185–86 (Mar. 11, 2021).

C. The Cancellation is arbitrary and capricious.

Courts must "hold unlawful and set aside agency action" that is "arbitrary" or "capricious." 5 U.S.C. §706(2)(A). The Cancellation is arbitrary and capricious for at least five reasons.

First, the Department did not consider *any* reasonable alternatives to the Cancellation. "[W]hen an agency rescinds a prior policy its reasoned analysis must consider the alternatives that are within the ambit of the existing policy." *DHS* v. *Regents of the Univ. of Cal.*, 140 S. Ct.

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1891, 1913 (2020) (cleaned up). The Department is moving from a forbearance policy to the Cancellation, so it must consider alternatives like (1) continuing forbearance and (2) other options to decrease monthly loan payments. Because those alternatives are within the ambit of the existing policy, the failure to consider them "renders [the] decision arbitrary." *Ibid.* The Department says (at 30) that the Secretary "considered . . . the availability of 'other options to reduce monthly payments.'" But the Secretary did not consider what *he* might do to reduce monthly payments; rather, the Rationale Memo simply observed that "*borrowers have* other options to reduce monthly payments, like income-driven repayment (IDR) plans." App. 39a (emphasis added). Nor, despite what the Department implies (at 31), did the Secretary "consider[]" the option of "continuing forbearance" in lieu of the Cancellation.

Second, the Department's reliance on COVID-19 as its justification for the Cancellation is "pretextual," *Dep't of Com.*, 139 S. Ct. at 2573, and an impermissible "*post hoc* rationalization," *Regents*, 140 S. Ct. at 1908 (citation omitted). The agency did not first identify the Cancellation as "necessary" to protect borrowers. 20 U.S.C. §1098bb(a)(2)(A). Rather, the Department pursued the Cancellation after failed legislative efforts,

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and it is using the pandemic as cover to "follow[] through" on the President's campaign "promise." D. Ct. Doc. 5-3, at 29. Indeed, the Secretary approved the Cancellation at 9:25 am on the day he received the Rationale Memo. *See* App. 33a. Such rapid turnaround is the opposite of reasoned decisionmaking and shows that the supposed reliance on COVID-19 is "contrived." *Dep't of Com.*, 139 S. Ct. at 2575.

Third, the Department has not tried to justify key aspects of the Cancellation's broad scope. For example, the agency documents do not offer any explanation—much less a reasonable one—for the $250,000 household income cutoff. Nor has the Department addressed why borrowers who exceed the income cutoff in either 2020 or 2021 qualify or why a borrower can apply *over a year from now* for a program purportedly addressing a pressing emergency. Such failures to explain core eligibility requirements—which drive the Cancellation's broad scope—cannot survive review.

Fourth, because the Department was changing its forbearance policy and "not writing on a blank slate, it *was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns."

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Regents, 140 S. Ct. at 1915 (cleaned up). Yet nothing in the agency materials suggests the Department did this. This failure to "consider[]" any "reliance interests" is "arbitrary and capricious." *Ibid.* The Department accepts that it ignored the States' reliance interests but asserts (at 31) that those interests are not "cognizable." The HEA itself, however, recognizes the vital interests of "groups involved in student financial assistance programs," including the interests of "lenders," secondary-market participants, and "loan servicers" like the States. 20 U.S.C. §1098a(a)(1).

Fifth, the Department's September 29 about-face on FFEL consolidation arbitrarily distinguishes between borrowers with non-federally held FFEL loans who applied for consolidation before September 29 and those who did not. The agency never rationalizes that distinction—nor can it. By all accounts, it was an attempt to avoid legal challenges to the program and thus reflects a failure to consider "the relevant issues" in crafting the Cancellation. *FCC* v. *Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021).

D. The injunction is not overbroad.

The current scope of the Eighth Circuit's injunction is necessary "to provide complete relief" to the States. *Madsen* v. *Women's Health Ctr.*,

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Inc., 512 U.S. 753, 765 (1994). Denying this, the Department contends (at 35) that the court should have simply "enjoined the Secretary from discharging loans that are serviced by MOHELA." But as the States told the Eighth Circuit, such an injunction would not prevent the harms to Missouri through MOHELA because the Department could skirt that relief by transferring loans eligible for the Cancellation to one of the agency's eight other loan servicers. *See Who's My Student Loan Servicer*, U.S. Dep't of Educ., https://tinyurl.com/2p9xkya8 (listing nine servicers).

A "geographically-limited injunction" would likewise "be ineffective" because borrowers and accounts "move among states." *Texas*, 809 F.3d at 188; *see also Pennsylvania* v. *President U.S.*, 930 F.3d 543, 576 (3d Cir. 2019), *rev'd on other grounds*, *Little Sisters of the Poor* v. *Pennsylvania*, 140 S. Ct. 2367 (2020). Regarding the States' tax harms, interstate migration means that a borrower living in California with a loan serviced in Wisconsin may reside in Iowa in 2026, so cancelling that debt inflicts injury on Iowa. And as for the consolidation harms, FFEL consolidations injure the States even if the borrowers live beyond their borders.

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II. The equities support the injunction.

The equities analysis begins and ends with the Cancellation's unlawfulness. "[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490. Accordingly, it is Congress's "responsibility"—not this Court's—"to weigh [the] tradeoffs" of the Cancellation. *NFIB*, 142 S. Ct. at 666.

Even so, the equitable balance tilts decidedly toward the States. All the Department's purported harms have been independently caused by a judgment vacating the Cancellation in a different case. *See Brown*, 2022 WL 16858525, at *15. Thus, lifting the injunction here will not solve the Department's concerns. Even without that judgment, now that the Department has extended the payment pause into the summer of 2023, its allegations of immediate harm fall flat.

The Department's specific arguments about harms to itself are likewise unpersuasive. The agency contends (at 35) that the injunction impedes its ability to "act quickly" to help borrowers during a national emergency. But this plea for speed rings hollow now that the President has declared the pandemic over and the payment pause has been extended. Also unavailing is the Department's protest (at 36–37) about

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the supposedly "significant cost" of continuing the pause. Whatever those temporary costs (roughly a few billion dollars per month), they pale in comparison to the Cancellation's $400 billion-plus price tag and the $100 billion already incurred for forbearance. Yesterday's additional extension of the pause further undermines any claim that it is too expensive.

Nor does the injunction harm the public. To be sure, many eligible borrowers prefer the Cancellation to proceed. But millions of others "who pay taxes to finance the government," App. 2a, and object to funding the loans that borrowers voluntarily assumed, want the Cancellation to fall. *See* Alexandra Marquez, *Voters Split on Student Loan Forgiveness, New Poll Shows*, NBC News (Sep. 20, 2022), https://tinyurl.com/2p8ku6se. The Department complains (at 37) about leaving borrowers in "limbo," but any uncertainty exists only because the agency publicly announced an unlawful handout and has desperately tried to shield it from legal review. Such "unclean hands" undercut the agency's appeal to equity. *See Henderson* v. *United States*, 575 U.S. 622, 625 n.1 (2015). The Department is also incorrect (at 35) that confining the injunction to MOHELA's accounts would benefit the public. From the public's perspective, such a distinction would be arbitrary and unjust.

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On the other hand, vacating the injunction would risk exposing the States to the irreparable harms identified in the standing section above. Missouri illustrates the point. It faces irreparable injury from the financial harms to MOHELA. Those monetary losses to MOHELA and the corresponding adverse impact on Missouri's receipt of funds from MOHELA are not recoverable and thus are irreparable. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (lost income "with no guarantee of eventual recovery" is "irreparable harm"). Also irreparable are the injuries to Missouri's quasi-sovereign interests in promoting higher education. *See Georgia* v. *Tenn. Copper Co.*, 206 U.S. 230, 239 (1907) (finding proper an injunction to protect Georgia's quasi-sovereign interests). And finally, the other States face irreparable harm to their tax revenue and their respective quasi-sovereign interests.

III. If the Court thinks the application raises close questions, it should leave the injunction in place and grant certiorari before judgment.

The Court should decline to lift or modify the injunction because, as discussed above, the States have a strong likelihood of success on the merits and the equities weigh decidedly in their favor. Yet if the Court thinks the application raises close questions, it should leave the

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injunction in place, grant certiorari before judgment on the two questions presented, set an expedited timetable for briefing, and schedule a February argument, as the Department suggests. Now that the agency has extended the payment pause well into 2023, no one will be harmed by leaving the injunction while this Court reviews the case.

If the Court grants certiorari, the States should be petitioners because the district court entered final judgment against them. "This Court reviews judgments," *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (cleaned up), and the "usual rule" is that the Court does not "consider[] prevailing parties' petitions," *Camreta* v. *Greene*, 563 U.S. 692, 709 (2011). Because the Department won the only judgment entered in this case, the States should be petitioners if review is granted.

CONCLUSION

The Court should decline to vacate or modify the injunction.

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MO-AG-23-0462-A-001057

No. 22A444

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, ET AL., APPLICANTS

v.

STATE OF NEBRASKA, ET AL.

REPLY IN SUPPORT OF APPLICATION TO VACATE THE INJUNCTION ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

No. 22A444

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, ET AL., APPLICANTS

v.

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REPLY IN SUPPORT OF APPLICATION TO VACATE THE INJUNCTION ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Congress authorized the Secretary of Education to respond to national emergencies by providing relief to affected student loan borrowers. Without making any finding that the Secretary exceeded that express statutory authority, the Eighth Circuit issued a nationwide injunction preventing the Secretary from granting critical relief to millions of Americans suffering the continuing economic effects of a global pandemic. Respondents cannot justify that extraordinary result.

Respondents largely retreat from the only theory of standing endorsed by the Eighth Circuit, and their alternative theories likewise contravene settled Article III principles. On the merits, respondents' arguments depend on limitations found nowhere in the

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text of the HEROES Act and on mischaracterizations of the Secretary's plan and its supporting analysis. And respondents make little effort to justify the injunction's universal scope.

This Court should vacate or, at a minimum, narrow the injunction. But if the Court declines to do so, it may wish to grant certiorari and set the case for argument this Term. See Resp. 39-40 (agreeing that review is warranted). Only prompt review by this Court would avoid the prolonged uncertainty that the Eighth Circuit's sweeping injunction would otherwise inflict on millions of vulnerable borrowers.

I. THE GOVERNMENT IS LIKELY TO SUCCEED ON THE MERITS

A. Respondents Lack Article III Standing

1. Respondents scarcely defend the only theory of standing adopted by the Eighth Circuit: that the plan injures Missouri because it causes financial harm to the Missouri Higher Education Loan Authority (MOHELA), which in turn owes money to the State. Appl. App. 4a-5a. Respondents briefly suggest (Resp. 17) that the plan will "hinder[] MOHELA's contributions to the State." But respondents have not shown that any reduction in revenue would lead MOHELA to default on its obligations to Missouri.

Respondents instead focus (Resp. 15) on a theory that the Eighth Circuit declined to adopt: that "financial injuries to MOHELA are harms to the State." MOHELA itself has not objected to the Secretary's plan and has played no role in this suit. Appl. 16. And respondents' assertion that the State can assert MOHELA's

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rights contradicts the "long settled" principle that "separately incorporated organizations are separate legal units with distinct legal rights." Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2087 (2020). In keeping with the general rule that a plaintiff "'cannot rest his claim to relief on the legal rights or interests of third parties,'" even a shareholder that otherwise satisfies Article III ordinarily cannot "initiat[e] actions to enforce the rights of [a] corporation." Franchise Tax Bd. v. Alcan Aluminium Ltd., 493 U.S. 331, 336 (1990) (citation omitted). That is true even if the shareholder "created" the corporation, "selected its board," and receives "millions of dollars" in dividends. Resp. 15, 18.

No basis exists to treat a corporation created by Missouri any differently. Missouri chose to structure MOHELA as a separate corporation that can sue and be sued in its own name. Mo. Rev. Stat. § 173.385(3) (2022). Respondents identify no prior case in which the State purported to sue on MOHELA's behalf. Having chosen to establish MOHELA as a separate legal entity and reaped the benefits of that choice, Missouri may not now maintain that the State and MOHELA are one and the same merely because it believes that MOHELA has standing to challenge a policy the State opposes.

2. Respondents advance (Resp. 18-22) three other theories that the district court rejected, Appl. App. 21a-26a, and the court of appeals did not consider, id. at 3a, 5a. All lack merit.

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a. Iowa, Kansas, Nebraska, and South Carolina assert (Resp. 18-20) that the plan diminishes their tax revenues. They contend (Resp. 19) that some student loans that would have been discharged in the future will instead be discharged under the plan. That hypothesized shift in timing matters because the Internal Revenue Code normally treats "discharge of indebtedness" as a form of gross income, 26 U.S.C. 61(a)(11), but a temporary provision excludes discharges of federal student loans from 2021 to 2025, see 26 U.S.C. 108(f)(5). The States argue (Resp. 18-20) that, because they have chosen to incorporate the Code's definition of "gross income" into their own laws, a change in the timing of discharges will diminish their revenues. That roundabout theory is incorrect.

First, respondents' alleged harm results from their own choice to tie their tax laws to the Code. Respondents are free to depart from the federal definition of "gross income." If they opt not to do so, any resulting reduction in their tax revenues is traceable to that choice, not the plan. And the States "cannot manufacture standing merely by inflicting harm on themselves." Clapper v. Amnesty Int'l USA, 568 U.S. 398, 416 (2013).

Respondents assert (Resp. 19-20) that States cannot be required to "chang[e] their tax laws" to avoid an injury. But this Court held otherwise in Pennsylvania v. New Jersey, 426 U.S. 660 (1976) (per curiam). There, Pennsylvania sought to establish standing to challenge a New Jersey tax by arguing that, because Pennsylvania provided a credit for taxes paid to other States, New

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Jersey's tax increase would lead Pennsylvania to lose revenue. Id. at 663-664. The Court rejected that argument, observing that "nothing prevents Pennsylvania from withdrawing that credit" and emphasizing that "[n]o State can be heard to complain about damage inflicted by its own hand." Id. at 664. So too here.

Second, even apart from the self-inflicted nature of the States' asserted harm, this Court's decision in Florida v. Mellon, 273 U.S. 12 (1927), establishes that a federal policy's incidental effects on state tax revenues are not judicially cognizable injuries. There, Florida sought to establish standing to challenge a federal inheritance tax by arguing that the tax would prompt the "withdrawal of property" and diminish the State's tax base. Id. at 18. This Court rejected that argument, explaining that Florida was required to show a "direct injury" and that any harm caused by the federal tax was, "at most, only remote and indirect." Ibid.

Florida controls this case. If the State there could not establish standing by claiming that state tax revenues would decline because of a federal policy, then the States here cannot do so either. Indeed, the States' theory is particularly speculative: The hypothesis that state tax revenues will decrease rests on the premise that, if borrowers do not receive discharges under the plan, some of them would receive discharges for other reasons after 2025. But respondents have not shown that borrowers covered by the plan would otherwise receive discharges for independent reasons. Nor have they shown that those hypothesized discharges would

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occur in 2026 or later, rather than, say, in 2024 or 2025.

b. Arkansas, Missouri, and Nebraska also argue (Resp. 8) that, because the plan provides relief for Direct Loans but not for Family Education Loans, it has "incentivized" borrowers to consolidate their Family Education Loans into Direct Loans. The States argue (Resp. 20-21) that such consolidation would harm them because they hold (or have invested in) Family Education Loans.

The most obvious problem with respondents' incentive-to-consolidate theory is that the plan does not create an incentive to consolidate. Under a decision the Department made the day before respondents sued and announced the same day they sued, "borrowers with federal student loans not held by the Department cannot obtain the one-time student debt relief by consolidating those loans into Direct Loans." Appl. App. 21a. Because consolidation does not make borrowers eligible for relief under the plan, the plan does not encourage borrowers to consolidate.

Respondents assert (Resp. 20-21) that they could secure relief for past consolidations in the form of an order requiring borrowers who recently consolidated to pay interest "to the entity that held their prior [Family Education] loan." But even if that were correct, any injury stemming from already-completed consolidations would not support respondents' request for an injunction barring future loan forgiveness -- the only relief at issue here. "[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim they press and each form

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of relief they seek." TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208 (2021).

c. Finally, Missouri argues (Resp. 21-22) that it may sue as parens patriae to protect the wellbeing of its residents. But the very case on which Missouri relies explains that "[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, 458 U.S. 592, 610 n.16 (1982).

B. The Secretary's Action Is Lawful

Respondents assert (Resp. 12) that the Eighth Circuit permissibly granted injunctive relief without finding a likelihood of success on the merits because it observed, without elaboration, that the appeal involves "substantial questions of law." Appl. App. 5a (citation omitted). But "a party seeking a preliminary injunction must demonstrate, among other things, 'a likelihood of success on the merits.'" Munaf v. Geren, 553 U.S. 674, 690 (2008) (emphasis added; citation omitted). The Eighth Circuit's failure to find a likelihood of success is thus a sufficient reason to vacate the injunction. And respondents' merits arguments fail to shore up that deficiency in any event.

1. Contrary to law. As the government explained (Appl. 18-28), the plan falls within the plain text of the HEROES Act. Respondents' contrary arguments fail.

a. Respondents principally seek to read limitations into the HEROES Act found nowhere in the statutory text. Respondents

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assert (Resp. 23), for instance, that the Act requires "more than" a "but-for" connection between the proposed relief and the national emergency. But the Act authorizes the Secretary to ensure that borrowers are not worse off in relation to their student loans "because of" an emergency. 20 U.S.C. 1098bb(a)(2)(A). And the term "because of" is most "often associated with but-for causation." Comcast Corp. v. National Ass'n of African Am.-Owned Media, 140 S. Ct. 1009, 1016 (2020); see University of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350 (2013) (collecting cases).

Respondents err in asserting (Resp. 23) that Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992), suggests otherwise. Holmes acknowledged that terms like "by reason of" often require only "but for" causation, but departed from that approach because the particular statute at issue incorporated a "judicial gloss" that required a higher showing. Id. at 267-268. The opposite inference is warranted here, where Congress expressly authorized class-wide rather than "case-by-case" relief, 20 U.S.C. 1098bb(b)(3), making proximate causation particularly inapt.

In any event, the plan satisfies any standard of causation. The evidence before the Secretary included substantial data showing that the pandemic has inflicted severe economic harms, including layoffs, inflationary spikes, rising delinquency rates, and projected reductions in lifetime earnings for students who left school in 2020 and 2021 -- and that these material hardships have disproportionately affected lower-income households. Appl. 8, 20-

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21. The evidence further showed that, without the proposed relief, those borrowers would likely experience default and delinquency rates beyond pre-pandemic levels. Appl. 20-21. The plan thus directly targets those borrowers facing "a worse position financially" "because of" the pandemic, 20 U.S.C. 1098bb(a)(1) and (2).

Respondents next argue (Resp. 24) that the HEROES Act bars "discharge of loan principal." But nothing in the Act reflects that limit; to the contrary, the Act specifically authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" under the Education Act, 20 U.S.C. 1098bb(a)(1) (emphasis added) -- provisions that include those governing student-loan repayment obligations, cancellation, and discharge. Appl. 20. Contrary to respondents' suggestion (Resp. 25), nothing about the nature of events that can trigger the Act -- i.e., military operations or national emergencies -- suggests a limit on the type of relief that might be necessary to respond to those conditions. And here, the Secretary determined that the best way to "ensure," 20 U.S.C. 1098bb(a)(2)(A), that borrowers are not worse off as a result of a devasting global pandemic was a one-time discharge of principal rather than a continued pause on interest and payments.

Economically, moreover, no principled line distinguishes discharges from other types of relief that likewise reduce the total amount a borrower will ultimately pay the government. Appl. 23. Most obviously, respondents do not challenge the across-the-board

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pause on interest accrual and payments maintained by Secretary Cardona and his predecessors since March 2020. But depending on a borrower's loan balance and interest rate, a 2.5-year pause on interest accrual could be worth significantly more than the plan's $10,000 forgiveness. Respondents also concede (Resp. 25-26) that earlier uses of the HEROES Act "might have the indirect effect of reducing the principal that a borrower will ultimately pay," and they make no attempt to argue that such uses were unlawful.

Respondents likewise err in their characterizations of the plan itself. For instance, respondents suggest (Resp. 26) that the Secretary failed to limit the plan to "affected individuals," but ignore that the vast majority of borrowers qualify based on where they work and reside, and that the Secretary could reasonably "determine[]" -- as both the Trump and Biden Administrations did -- that the small fraction of eligible borrowers who live and work abroad qualify because they have suffered "direct economic hardship" due to a global pandemic. 20 U.S.C. 1098ee(2)(D); Appl. 19.

Similarly, respondents suggest (Resp. 26-27) that the Secretary failed to "tailor the eligibility requirements or relief amount" to borrowers "facing 'a worse position financially in relation to' their loans." That is wrong. The plan directly corresponds to the Department's supporting analysis, which examined the relevant data and determined that $125,000 is the income threshold at which repayment capability is likely to change dramatically, and that a $10,000 discharge ($20,000 for qualifying

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Pell Grant recipients) will mitigate the risk that vulnerable borrowers will be worse off in relation to their student loans as a result of the pandemic. Appl. 10-11. As respondents recognize (Resp. 27), the Act expressly permits the Secretary to provide relief on a class-wide basis sufficient to "ensure" affected borrowers are not worse off, 20 U.S.C. 1098bb(a)(2); see 20 U.S.C. 1098bb(b)(3); some imprecision is inherent in class-wide criteria.

b. Lacking support in the HEROES Act's text, respondents retreat to the major questions doctrine. But that doctrine has no application here -- and even if it did, it would not support respondents' claims. Appl. 25-28.

This Court has never treated the major questions doctrine as a license for courts to override statutory text simply because an agency's action is controversial or has substantial economic effects. Instead, the doctrine applies when an agency claims an "[e]xtraordinary grant[] of regulatory authority" based on "'modest words,' 'vague terms,' or 'subtle device[s]'" and the "history and the breadth" of that asserted power provide "reason to hesitate before concluding that Congress" meant to confer such authority. West Virginia v. EPA, 142 S. Ct. 2587, 2608-2609 (2022). No such reason exists here. This is not a case where the agency has "no comparative expertise in making [the relevant] policy judgments," id. at 2613; relied on "ancillary" provisions to locate "newfound power," id. at 2610; or asserted authority that falls outside the agency's "particular domain," Alabama Ass'n of Realtors v. HHS,

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141 S. Ct. 2485, 2489 (2021). Rather, the Department of Education -- i.e., the federal agency primarily responsible for administering federal student loans -- has modified the scope of those loan obligations because of a national emergency, pursuant to the central provision of the HEROES Act, which expressly authorizes the Secretary to do just that. The plan "fits neatly within the language of the statute," Biden v. Missouri, 142 S. Ct. 647, 652 (2022) (per curiam), because the entire point of the HEROES Act is to authorize the Secretary to grant student-loan debt relief to mitigate economic harms borrowers face from national emergencies.

Critically, moreover, respondents do not dispute that every case this Court has treated as presenting a major question involved an agency asserting the power to regulate the conduct of private parties. This case, in contrast, does not involve a claimed "[e]xtraordinary grant[] of regulatory authority" at all, West Virginia, 142 S. Ct. at 269, but rather the exercise of authority over a benefit program to alleviate burdens on beneficiaries.

Respondents nevertheless characterize (Resp. 28) the Department as claiming an "unheralded power" to discharge loan principal. But as explained above, see pp. 9-10, supra, no principled legal or economic line distinguishes discharge of principal from other forms of student-loan relief. Insofar as respondents challenge the scale of relief as "unprecedented" (Resp. 29), the same could be said of the Department's across-the-board 2.5-year pause on payments and interest accrual, which respondents have not chal-

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lenged. And the unprecedented scale of those responses reflects the unprecedented scale of the national emergency that the Secretary confronted: a multi-year global pandemic driven by an infectious disease that caused massive disruption to the economy, commerce, and employment.

Respondents attempt to avoid this conclusion by distorting the Secretary's position. The Secretary is not asserting the power to "cancel student-loan debt, of any amount, for any borrower, even a decade or more after a national emergency." Resp. 29-30. Rather, the plan reflects the Secretary's determination that a one-time discharge of a limited measure of debt for a subset of affected borrowers is necessary as the country works to recover from the devastating effects of COVID-19. Other emergencies may be different in kind, scope, or scale, and may require different relief -- but always subject to the terms of the HEROES Act, which limit (1) the circumstances in which the Secretary can act; (2) the class of individuals eligible for relief; (3) the objectives any relief must aim to accomplish; and (4) the measures the Secretary may implement. Appl. 26.

Respondents also argue (Resp. 28) that Congress has "repeatedly declined to enact" supposedly similar student-loan relief measures. But each bill respondents cite meaningfully differed from the relief the Secretary authorized.[1] The far more relevant

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

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congressional action is the 2021 pandemic relief legislation that specifically anticipated that the Secretary would discharge loan principal by adopting a special rule making such discharges tax free from 2021 until 2025. Appl. 28. Respondents' suggestion (Resp. 32) that this measure was intended to apply only to existing discharge programs strains credulity. Nothing in the provision is so limited, and its sponsors specifically contemplated that it would "pave the way for President Biden to provide real debt relief." Sen. Menendez, Press Release, Menendez, Warren Bill to Make Student Loan Relief Tax-Free Passes as Part of COVID Relief Package, Clearing Hurdle for Broad Loan Forgiveness (Mar. 6, 2021).

Moreover, contrary to respondents' contention (Resp. 30) that any loan discharge conflicts with the Education Act, discharge of principal in appropriate circumstances is a familiar measure. The Act authorizes the Secretary to "compromise, waive, or release" any "right, title, claim, lien, or demand" acquired in the performance of his "functions, powers, and duties" in administering the student-loan programs. 20 U.S.C. 1082(a)(6). Pursuant to this authority, the Secretary has long discharged debts owed by federal borrowers -- including substantial amounts on a class-wide basis.[2] Those discharges do not "convert loans into grants."

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contested provisions); S. 2235, 116th Cong. (2019) (proposing discharge of up to $50,000 before the pandemic).

[2] See, e.g., Education Department Approves $5.8 Billion Group Discharge to Cancel all Remaining Loans for 560,000 Borrowers who Attended Corinthian (June 1, 2022), https://perma.cc/MTW6-XABV; Secretary DeVos Cancels Student Loans, Resets Pell Eligibility, and Extends Closed School Discharge Period for Students Impacted

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Resp. 30. Instead, they reflect the Secretary's authority to alter the ordinary operation of the Education Act, including the terms relevant to loans, to administer the student-loan programs. The same is true here; the HEROES Act specifically authorizes the Secretary to modify repayment terms to respond to an emergency.

Indeed, it is respondents who seek an "unprecedented" result -- a holding that, even though the relevant statutory text expressly authorizes debt relief in cases of national emergency, some heightened measure of specificity is required simply because the rule exceeds an unspecified dollar threshold or has engendered some undefined measure of political disagreement. Agencies cannot "act unlawfully even in pursuit of desirable ends," Alabama Ass'n, 141 S. Ct. at 2490, but neither are they disabled from acting lawfully because some find the ends undesirable. To rely on such "extratextual sources" would "risk amending statutes outside the legislative process reserved for the people's representatives," thereby undermining, not furthering, the separation of powers. Bostock v. Clayton County, 140 S. Ct. 1731, 1738 (2020); accord id. at 1824 (Kavanaugh, J., dissenting).

2. Arbitrary and capricious. Respondents argue (Resp. 32-35) that the plan is arbitrary and capricious, asserting that the Secretary did not consider "any" alternatives or the States' reliance interests. That charge is unfounded. Appl. 31-32. The

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by Dream Center School Closures (Nov. 8, 2019), https://perma.cc/FRT6-WAWS.

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supporting analysis considered whether discharge was necessary "even though borrowers have other options to reduce monthly payments, like income-driven repayment (IDR) plans." Appl. App. 39a-40a. The analysis determined that "[l]oan discharges" would reduce "delinquency and default rates" beyond what could be accomplished even through "efforts to increase enrollment in IDR." Ibid. And the Secretary's decision to continue forbearance until December 31, but resume payments after that date, id. at 32a-33a, reflects his determination that the Department's objectives would be best served by resuming payments rather than indefinitely continuing forbearance -- so long as lower-income borrowers could receive relief to address the difficulties they would face, ibid.

Respondents' contention (Resp. 34) that the Department did not justify "key aspects" of the plan likewise fails. The supporting analysis explains at length how the Department arrived at the $125,000 income threshold, including by examining data showing that "[t]here is a break in repayment capacity at around $125,000" and that "borrowers with incomes between $100,000 and $124,000 have rates of payment inconsistency * * * nearly double what they are for those with incomes between $125,000 and $149,000." Appl. App. 42a-43a. To account for the greater expenses associated with multi-person households, the Secretary reasonably set $250,000 -- i.e., twice that threshold -- as the ceiling for borrowers filing jointly or as head of household. Id. at 28a, 41a. Given that the COVID-19 disaster spanned both 2020 and 2021, it

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was likewise reasonable to consider borrowers' incomes from both years. Id. at 45a. And the Secretary reasonably set the deadline to apply for relief to reflect the fact, emphasized in the Department's analysis, that lower-income borrowers often do not immediately apply for available relief. Id. at 39a-40a.

Respondents' assertion (Resp. 33-34) that the Secretary's decision was pretextual is based on legally irrelevant political statements that cast no doubt on the Secretary's stated explanation. A "court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities." Department of Commerce v. New York, 139 S. Ct. 2551, 2573 (2019). The statements on which respondents rely reflect, at most, the sort of policy and political considerations that "routinely" inform policymaking. Ibid. They do not come close to the "strong showing of bad faith or improper behavior" necessary before this Court looks behind an agency's stated rationale. Id. at 2574 (citation omitted); see Biden v. Texas, 142 S. Ct. 2528, 2546-2547 (2022).[3]

C. The Eighth Circuit's Universal Relief Was Overbroad

Respondents offer no sound justification for enjoining the plan on a universal basis. They argue (Resp. 36) that "the De-

[3] Respondents mention in passing (Resp. 7) a 2021 memorandum that opined that the Secretary could not forgive student loans under the HEROES Act. But the Department reviewed that memorandum in consultation with the Office of Legal Counsel and determined that it should be "rescinded" because its conclusions are "unsupported and incorrect." 87 Fed. Reg. 52,945 (Aug. 30, 2022).

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partment could skirt" an injunction limited to loans serviced by MOHELA "by transferring" eligible loans to "the agency's eight other loan servicers." But the obvious solution would be to simply apply the injunction to all loans currently serviced by MOHELA, even if they are later transferred. Similarly, respondents assert that an injunction limited to borrowers within their borders would not protect against their asserted tax harms because borrowers living in other States today might move to the respondent States in the future. But an injunction is an equitable remedy that must be "tailored" to the scope of the harm, the burden on the opposing party, and the public interest. Winter v. NRDC, Inc., 555 U.S. 7, 33 (2008). It would be grossly inequitable to enjoin relief for millions of borrowers in other States simply because of the speculative possibility that some might one day move to the respondent States and thereafter pay lower state taxes sometime after 2025.

II. THE EQUITIES FAVOR A STAY

Respondents principally argue (Resp. 37-39) that the equities favor the States because the Department recently extended the payment pause and suspension of interest accrual. Respondents ignore, however, that the Department determined that this extension was necessary only because of the court orders blocking implementation of the plan -- and that payment obligations will resume whenever the Department is permitted to implement the plan. U.S. Dep't of Education, Biden-Harris Administration Continues Fight for Student Debt Relief for Millions of Borrowers, Extends Student Loan Re-

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payment Pause (Nov. 22, 2022), https://perma.cc/6T7Y-2YK9. The injunction has thus already frustrated -- and continues to frustrate -- the government's ability to effectuate its chosen policy. Moreover, vulnerable borrowers will face profound uncertainty as long as this litigation persists, lacking basic information about their loan obligations relevant to a host of financial decisions. On the other side of the ledger, respondents' asserted harms do not even satisfy Article III. See pp. 2-7, supra.

Respondents emphasize (Resp. 37) that a federal district court has also vacated the plan nationwide. See Brown v. U.S. Dep't of Educ., No. 22-cv-908, 2022 WL 16858525 (N.D. Tex. Nov. 10, 2022). But that ruling does not insulate the Eighth Circuit's injunction from review. The government has appealed and sought a stay pending appeal in Brown. If the Fifth Circuit denies a stay, the government will seek relief from this Court in Brown as well. Appl. 14. But even if the Fifth Circuit grants relief, the Department cannot implement the plan while the Eighth Circuit's injunction remains in place. That injunction thus independently prevents the Department from effectuating its chosen policy.

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

Respondents agree (Resp. 39-40) that if the Court believes the application presents "close questions," it may wish to grant certiorari before judgment and set this case for expedited briefing and argument. Respondents likewise agree (ibid.) that the Court

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should hear the case in the February 2023 sitting. They contend (Resp. 40) that, if this Court grants certiorari, "the States should be petitioners because the district court entered final judgment against them." But this Court is empowered to grant review "upon the petition of any party." 28 U.S.C. 1254(1). "That language covers petitions brought by litigants who have prevailed, as well as those who have lost, in the court below." Camreta v. Greene, 563 U.S. 692, 700-701 (2011). Here, applicants filed the document that would be treated as a petition for a writ of certiorari and thus would be petitioners if this Court granted review.

* * * * *

This Court should vacate, or at minimum narrow, the injunction pending appeal entered by the court of appeals. If, however, the Court declines to vacate the injunction, it may wish to construe this application as a petition for a writ of certiorari before judgment, grant the petition, and set this case for expedited briefing and argument this Term.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NOVEMBER 2022

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Nos. 22-506 and 22-535

In the Supreme Court of the United States

JOSEPH R. BIDEN, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

STATE OF NEBRASKA, ET AL.

DEPARTMENT OF EDUCATION, ET AL., PETITIONERS

v.

MYRA BROWN, ET AL.

ON WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND FIFTH CIRCUITS

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QUESTIONS PRESENTED

1. Whether respondents have Article III standing.

2. Whether the Secretary of Education's student-loan-relief plan exceeds the Secretary's statutory authority, is arbitrary and capricious, or was adopted in a procedurally improper manner.

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PARTIES TO THE PROCEEDING

In *Nebraska*, petitioners (defendants-appellees below) are Joseph R. Biden, in his official capacity as President of the United States; Miguel Cardona, in his official capacity as Secretary of Education; and the U.S. Department of Education. Respondents (plaintiffs-appellants below) are the States of Arkansas, Iowa, Kansas, Missouri, Nebraska, and South Carolina.

In *Brown*, petitioners (defendants-appellants below) are the U.S. Department of Education and Miguel Cardona, in his official capacity as Secretary of Education. Respondents (plaintiffs-appellees below) are Myra Brown and Alexander Taylor.

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In the Supreme Court of the United States

No. 22-506

JOSEPH R. BIDEN, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

STATE OF NEBRASKA, ET AL.

No. 22-535

DEPARTMENT OF EDUCATION, ET AL., PETITIONERS

v.

MYRA BROWN, ET AL.

ON WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND FIFTH CIRCUITS

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

In *Nebraska*, the opinion of the court of appeals (J.A. 160-167) is reported at 52 F.4th 1044. The order of the court of appeals granting an administrative stay (J.A. 158) is unreported. The order of the district court denying an injunction pending appeal (J.A. 157) is unreported. The opinion, memorandum, and order of the district court (J.A. 135-151) is available at 2022 WL 11728905.

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In *Brown*, the order of the court of appeals (J.A. 308) is unreported. The order of the district court (J.A. 263-297) is available at 2022 WL 1658525.

JURISDICTION

In *Nebraska*, the district court entered final judgment on October 20, 2022 (J.A. 152). Respondents appealed the same day (J.A. 153). The court of appeals' jurisdiction rests on 28 U.S.C. 1291. On November 18, 2022, petitioners applied to this Court for vacatur of the court of appeals' injunction. On December 1, 2022, the Court treated the application as a petition for a writ of certiorari before judgment and granted the petition (J.A. 168). The Court's jurisdiction rests on 28 U.S.C. 1254(1) and 2101(e).

In *Brown*, the district court entered final judgment on November 10, 2022 (J.A. 298-299). Petitioners appealed the same day (J.A. 300-301). The court of appeals' jurisdiction rests on 28 U.S.C. 1291. On December 2, 2022, petitioners applied to this Court for a stay. On December 12, 2022, the Court treated the application as a petition for a writ of certiorari before judgment and granted the petition (J.A. 309). The Court's jurisdiction rests on 28 U.S.C. 1254(1) and 2101(e).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced at App., *infra*, 1a-8a.

STATEMENT

To protect student-loan borrowers affected by a national emergency from student-debt-related financial harm, Congress provided the Secretary of Education with authority to waive or modify statutory and regulatory provisions governing their student-loan obligations

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under specified conditions. In August 2022, the Secretary announced a plan to use that statutory authority to provide targeted debt relief to millions of student-loan borrowers suffering the continuing economic fallout of an unprecedented global pandemic. Respondents are six States with policy objections to debt relief and two borrowers who purport to want broader relief. They filed suit seeking to bar the Secretary from providing any relief to anyone.

A. The HEROES Act

1. The Department of Education administers federal student-aid programs under Title IV of the Higher Education Act of 1965 (Education Act), 20 U.S.C. 1070 *et seq.* Those programs include the William D. Ford Federal Direct Loan Program (Direct Loans), 20 U.S.C. 1087a-1087j, under which the federal government lends money directly to student borrowers, and the Federal Family Education Loan Program (Family Education Loans), 20 U.S.C. 1071 to 1087-4, and Federal Perkins Loan Program (Perkins Loans), 20 U.S.C. 1087aa-1087ii, under which non-federal lenders issue loans to student borrowers on terms set by the federal government. New loans are no longer issued under the latter two programs, but prior loans under them remain outstanding. More than 43 million borrowers have outstanding loans under the three programs, and their debts total roughly $1.63 trillion. Office of Federal Student Aid, U.S. Dep't of Educ., *Federal Student Aid Portfolio*, https://studentaid.gov/data-center/student/portfolio (last visited Jan. 4, 2022).

The Education Act charges the Secretary of Education with "carry[ing] out" federal student-aid programs. 20 U.S.C. 1070(b). The Act grants the Secretary substantial "powers and responsibilities," 20 U.S.C. 1082

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(emphasis omitted), including authority to "compromise, waive, or release any right, title, claim, lien, or demand" acquired in the Secretary's performance of his "functions, powers, and duties" in administering the Department's portfolio of loans, 20 U.S.C. 1082(a)(6). In exercising that statutory authority, the Secretary has many times discharged debts owed by student-loan borrowers, including on a class-wide basis and for substantial amounts.[1]

2. On several occasions, Congress has also specifically authorized the Secretary to grant student-loan relief to particular classes of borrowers. In 1991, for example, Congress enacted the Persian Gulf Conflict Higher Education Assistance Act, Pub. L. No. 102-25, Tit. III, Pt. E, § 327(a)(1), 105 Stat. 93. That Act authorized the Secretary to "waive or modify any statutory or regulatory provision applicable to" the student-aid programs under Title IV of the Education Act as necessary to ensure that "the men and women serving on active duty in connection with Operation Desert Storm" were "not placed in a worse position financially in relation to" their student loans "because of such service." *Ibid.*

A decade later, in response to the September 11th terrorist attacks, Congress enacted the Higher Education Relief Opportunities for Students Act of 2001, Pub.

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[1] See, *e.g.*, Press Office, U.S. Dep't of Educ., *Education Department Approves $5.8 Billion Group Discharge to Cancel All Remaining Loans for 560,000 Borrowers Who Attended Corinthian* (June 1, 2022), https://perma.cc/MTW6-XABV; *Secretary DeVos Cancels Student Loans, Resets Pell Eligibility, and Extends Closed School Discharge Period for Students Impacted by Dream Center School Closures* (Nov. 8, 2019), https://perma.cc/FRT6-WAWS; see also Order Granting Final Settlement Approval, *Sweet* v. *Cardona*, No. 19-cv-3674, D. Ct. Doc. 345 (N.D. Cal. Nov. 16, 2022).

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L. No. 107-122, 115 Stat. 2386, to "provide the Secretary of Education with specific waiver authority to respond to conditions in the national emergency declared by the President on September 14, 2001," *ibid.* This time, Congress authorized the Secretary to "waive or modify any statutory or regulatory provision applicable to" the student-aid programs under Title IV of the Education Act "as may be necessary to ensure that" borrowers affected by September 11 and later terrorist attacks are not in a worse position in relation to their student loans. § 2(a)(1) and (2), 115 Stat. 2386; see § 5, 115 Stat. 2388.

In 2003, Congress extended and substantially expanded that authority by enacting the statute at issue here, the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act or Act), Pub. L. No. 108-76, § 2, 117 Stat. 904-905 (20 U.S.C. 1098bb). Like its predecessors, the HEROES Act authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" under Title IV of the Education Act. 20 U.S.C. 1098bb(a)(1). But the HEROES Act does not limit debt relief to borrowers affected by terrorist attacks; instead, it authorizes waiver or modification "as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide the waivers or modifications authorized by paragraph (2)." *Ibid.*

Paragraph 2, in turn, authorizes the Secretary "to waive or modify" any Title IV provision "as may be necessary to ensure" that certain objectives are achieved. 20 U.S.C. 1098bb(a)(2). The first objective is that "recipients of student financial assistance under title IV of the [Education] Act who are affected individuals are not placed in a worse position financially in relation to that

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financial assistance because of their status as affected individuals." 20 U.S.C. 1098bb(a)(2)(A). An "affected individual" is defined to include any individual who "resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency" or who "suffered direct economic hardship as a direct result of" a "national emergency." 20 U.S.C. 1098ee(2)(C) and (D). Congress defined "national emergency" as any "national emergency declared by the President of the United States." 20 U.S.C. 1098ee(4); see 50 U.S.C. 1621-1622 (authorizing such declarations).

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

The HEROES Act was originally set to expire in 2005. § 6, 117 Stat. 908. In 2005, Congress extended it for two years. Act of Sept. 30, 2005, Pub. L. No. 109-78, 119 Stat. 2043. And in 2007, Congress made the Act

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permanent. Act of Sept. 30, 2007, Pub. L. No. 110-93, 121 Stat. 999.

3. Since 2003, the Secretary has repeatedly invoked the HEROES Act to provide categorical relief to borrowers affected by emergencies, including by waiving the requirement that borrowers return overpayments of certain grant funds; waiving the requirement that service be uninterrupted to qualify for loan cancellation on the basis of employment in certain occupations; extending the maximum period of forbearance for Perkins loans and eligibility for deferment of Family Education Loans; and requiring the Department to pay the interest that accrues during extended deferments. See 68 Fed. Reg. 69,312-69,318 (Dec. 12, 2003); 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 (Aug. 23, 2022) (OLC Op.); *Notice of Debt Cancellation Legal Memorandum*, 87 Fed. Reg. 52,943, 52,944 (Aug. 30, 2022).

B. HEROES Act Relief During The COVID-19 Pandemic

1. In March 2020, President Trump declared a national emergency in light of the COVID-19 pandemic. Proclamation No. 9994, 3 C.F.R. 56 (2020 comp.). That declaration remains in effect, and the government has declared all 50 States, the District of Columbia, and the territories to be disaster areas. See FEMA, *COVID-19 Disaster Declarations*, https://perma.cc/B7KA-W4KD. COVID-19 has killed more than one million Americans and led to the hospitalization of millions more. Centers for Disease Control and Prevention, *COVID Data Tracker* (Dec. 30, 2022), https://perma.cc/ZH65-9PX3. The pandemic has also profoundly disrupted the Nation's economy and inflicted severe economic harms, including mass layoffs, food insecurity, spikes in inflation,

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rising delinquency rates on debt, and projected reductions in lifetime earnings for students who left school during the pandemic. J.A. 234-239, 249-250. These harms have disproportionately affected lower-income households. J.A. 234-239, 245-253.

In response to the pandemic, the government provided substantial relief to borrowers with Department-held loans. In March 2020, then-Secretary of Education Betsy DeVos invoked the HEROES Act to pause repayment obligations and suspend interest accrual on all such loans. 85 Fed. Reg. 79,856, 79,857 (Dec. 11, 2020). Congress directed the Secretary to extend those policies through September 2020. COVID-19 Pandemic Education Relief Act of 2020, Pub. L. No. 116-136, Div. A, Tit. III, Subtit. B, § 3513, 134 Stat. 404. Both the Trump and Biden Administrations then further extended these protections under the HEROES Act. See, *e.g.*, 85 Fed. Reg. at 79,857; J.A. 257-259. As of April 2022, the payment pause was estimated to have cost the federal government $102 billion, or roughly $5 billion per month. U.S. Gov't Accountability Office, *Student Loans: Education Has Increased Federal Cost Estimates of Direct Loans by Billions due to Programmatic and Other Changes* 14 (July 2022).

2. In August 2022, Secretary of Education Miguel Cardona determined that the across-the-board pause on all payments for all borrowers should come to an end. But he also determined that despite the pause and other COVID-19 relief measures, the resumption of repayment obligations would put many lower-income borrowers "at heightened risk of loan delinquency and default" due to the pandemic. J.A. 257. The Secretary therefore invoked the HEROES Act to adopt a two-pronged approach. He announced that he would extend the pause

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a final time, through December 31, 2022. J.A. 259. And to ensure that "borrowers are not in a worse position financially due to the pandemic with regard to their ability to repay their loans" when payment obligations resume, the Secretary directed the Department to issue up to $10,000 in student-loan relief to eligible borrowers with a federal adjusted gross income below $125,000 ($250,000 for borrowers filing jointly). J.A. 258-259. Qualifying Pell Grant recipients, who tend to have fewer resources and are at substantially greater risk of default, can receive up to $20,000. J.A. 258.

The supporting analysis on which the Secretary relied explained that additional relief beyond the payment pause is necessary to ensure that affected borrowers are not "in a worse position financially as a result of the COVID-19 pandemic." J.A. 232. The Department analyzed historical data about borrowers who transitioned back to repayment after periods of forbearance, including after other emergencies, and concluded that such borrowers are typically at "elevated risk of delinquency and default." J.A. 234. Indeed, default rates increase twentyfold after the period of non-payment ends, and affected Pell Grant recipients experience even "larger increases in default." J.A. 234-235. That data suggests that a pause on payments alone is not necessarily sufficient to alleviate the economic effects of a disaster on the affected borrowers' ability to repay their loans.

The Department also reviewed data specific to the COVID-19 pandemic and its effects on borrowers, including borrower surveys, loan data, economic studies, and credit analyses conducted by the Consumer Financial Protection Bureau and Federal Reserve Banks. That data revealed rising delinquency rates on non-student-loan debt and commercially held student-loan

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debt (which was not covered by the pause); high percentages of borrowers who anticipate difficulty making loan payments; and acute inflationary pressures on household budgets for "basic necessities, including energy, food, and shelter costs." J.A. 235-239, 245, 249-251. And the Department emphasized the substantial penalties imposed on borrowers who are delinquent or default on student-loan payments, including exposure to involuntary collection methods; lost access to affordable or flexible repayment options; and 50-to-90-point drops in credit scores that make insurance, rent, and other financial products more expensive and limit employment opportunities. J.A. 239.

The Department explained that the proposed relief was targeted to ameliorate these harms. J.A. 240-255. As to the income eligibility threshold, the relevant economic data established that borrowers with incomes under $125,000, especially Pell Grant recipients, are at "particular risk of being in a worse financial position because of the pandemic" and are far likelier to experience financial hardship in repaying their loans when payments resume. J.A. 243, 245-253. Among other things, such borrowers were disproportionately likely to become unemployed and experience material hardship due to the pandemic, including food insecurity and difficulty making utility, rent, and mortgage payments. J.A. 237, 248-253.

As to the amount of debt to be discharged, the Department concluded that "it should discharge an amount of debt necessary to significantly decrease the rates of delinquency and default." J.A. 242. After considering borrower loan balances and the effectiveness of various monthly payment reductions in reducing delinquency rates, the Department determined that

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$10,000 in relief (and $20,000 for Pell Grant recipients) would "mitigate the risk that delinquency and default rates will rise above pre-pandemic levels." J.A. 242-244.

On September 27, 2022, the Secretary implemented that debt relief by waiving and modifying certain Title IV statutory and regulatory provisions setting forth circumstances in which federal student-loan obligations can be cancelled or discharged. See J.A. 261-262 (citing 20 U.S.C. 1087, 1087a, 1087e, 1087dd(g); 34 C.F.R. 682.402, 685.212); 87 Fed. Reg. 61,512 (Oct. 12, 2022).

C. Proceedings Below In *Nebraska*

1. The States of Arkansas, Iowa, Kansas, Missouri, Nebraska, and South Carolina filed suit in the U.S. District Court for the Eastern District of Missouri, claiming that the plan exceeds the Secretary's statutory authority and is arbitrary and capricious. J.A. 1-44.

The district court dismissed the States' suit for lack of Article III standing. J.A. 135-151. The court rejected the argument that the plan would deprive Iowa, Kansas, Nebraska, and South Carolina of tax revenue. J.A. 150. Those States argued that, because they had "chosen to adopt [the federal] definition of taxable income in their own tax codes," and because the federal definition in turn excludes certain discharges of student loans from 2021 to 2025, the Secretary's plan would reduce the taxes that the States would otherwise collect from borrowers in those years. *Ibid.* The court rejected that argument as a self-inflicted harm, noting that the plan does not affect the States' "sovereign power to set [their] own tax policy" and that the States remain "free to propose and pass tax revenue plans as they see fit." *Ibid.*

The district court additionally rejected the argument that the plan would cause financial harm to Arkansas

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and Nebraska. J.A. 146-149. Those States argued that, because the Secretary's plan applies to Direct Loans but not Family Education Loans, it creates an "incentive" for borrowers to "consolidate" (*i.e.*, convert) their Family Education Loans into Direct Loans. J.A. 146; see 34 C.F.R. 685.220 (authorizing consolidation). The States asserted that such consolidation would harm the Arkansas Student Loan Authority, a state entity that receives administrative fees for servicing Family Education Loans, and the Nebraska Investment Council, a state entity that has invested in securities backed by Family Education Loans. J.A. 147-149. The court rejected that argument, observing that the Department had announced that "borrowers with federal student loans not held by the Department cannot obtain the one-time student debt relief by consolidating those loans into Direct Loans." J.A. 146. The court explained that there was accordingly no "ongoing incentive to consolidate." J.A. 147.

The court also rejected Missouri's argument that it has standing because the Missouri Higher Education Loan Authority (MOHELA), a state-created nonprofit corporation that services federal student loans, would suffer financial harms because of the plan. J.A. 142-146. The court explained that MOHELA is a distinct legal person from the State of Missouri; that it traditionally has not been considered an "arm of the State"; that it has the capacity to "sue and be sued in its own name"; that it "retains financial independence" from the State; and that the State has no legal obligation to pay MOHELA's debts. J.A. 145; see J.A. 144-146. The court accordingly concluded that Missouri lacks standing to sue based on alleged harms to MOHELA. J.A. 146.

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2. The States appealed, and the Eighth Circuit issued a nationwide injunction pending appeal. J.A. 160-167. The court concluded that Missouri likely has standing (and did "not address the standing of the other States"). J.A. 164-165. The court reasoned that MOHELA, as a loan servicer, "obtains revenue from the accounts it services," but that "the total revenue MOHELA recovers will decrease if a substantial portion of its accounts are no longer active under the Secretary's plan." J.A. 164. The court concluded that, since MOHELA has "financial obligations to the State treasury," the plan's "financial impact on MOHELA" could lead to "financial harm to the State." *Ibid.*

On the merits, the Eighth Circuit did not conclude that the States' suit is likely to succeed; instead, its one-sentence analysis stated only that the "merits of the appeal before this court involve substantial questions of law which remain to be resolved." J.A. 165 (citation omitted). The court also stated that the "equities strongly favor an injunction." *Ibid.* The court issued a universal injunction pending appeal prohibiting the Department from applying the plan to discharge any debt for any borrower in any State. J.A. 165-167.

D. Proceedings Below In *Brown*

1. Myra Brown and Alexander Taylor are individuals with outstanding student loans. J.A. 269. Brown is ineligible for relief under the plan because her loans are held by commercial entities rather than the Department. *Ibid.* Taylor is eligible for $10,000 rather than $20,000 in relief because he did not receive a Pell Grant. *Ibid.*

Brown and Taylor sued the Department and the Secretary in the U.S. District Court for the Northern District of Texas. J.A. 169-187. Their complaint asserted

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a single claim: that the Department improperly promulgated the plan without notice-and-comment rulemaking and without engaging in the Education Act's negotiated-rulemaking process. J.A. 184-186.

2. The district court granted summary judgment in favor of Brown and Taylor. J.A. 263-297. The court first concluded that they have Article III standing to raise their procedural challenge because they claim that the lack of notice and comment deprived them of the opportunity to urge the Secretary to expand the plan's eligibility criteria to provide greater debt relief. J.A. 276-282.

Turning to the merits, the district court rejected Brown and Taylor's claim that the plan is procedurally defective. J.A. 285-287. The court observed that the HEROES Act expressly provides that the Secretary need not act through notice and comment; instead, he need only publish a notice in the Federal Register setting forth "the waivers or modifications * * * the Secretary deems necessary to achieve the purposes of this section." J.A. 286 (quoting 20 U.S.C. 1098bb(b)(1)). The court rejected Brown and Taylor's assertion that they could establish that the plan falls outside the notice-and-comment exemption by showing that it exceeds the Secretary's statutory authority. J.A. 287.

Although Brown and Taylor had raised only a procedural claim, and although the district court had analyzed their standing only as to that claim, the court went on to hold that the plan is substantively unlawful. J.A. 287-294. The court stated that, "because the [plan] is an agency action of vast economic and political significance, the major-questions doctrine applies." J.A. 291. The court then concluded that the HEROES Act did not authorize the plan with sufficient clarity to satisfy that

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doctrine. J.A. 291-294. The court declared the plan unlawful and vacated it nationwide. J.A. 294-296.

3. The government appealed. J.A. 300-301. The Fifth Circuit denied a stay pending appeal in an unreasoned, per curiam order. J.A. 308.

E. The Secretary's Extension Of The Payment Pause

On November 22, 2022, in response to the orders in these cases preventing implementation of the plan, the Secretary extended the payment pause and suspension of interest accrual. Press Release, U.S. Dep't of Education, https://perma.cc/6T7Y-2YK9. The Department explained that the Secretary's "[t]argeted student debt relief" plan was designed to "address[] the financial harms of the pandemic" and to "help[] borrowers at highest risk of delinquencies or default once payments resume." *Ibid.* But "[e]fforts to block student debt relief in the courts have caused tremendous financial uncertainty for millions of borrowers who cannot set their family budgets or even plan for the holidays without a clear picture of their student debt obligations." *Ibid.* The extension will "alleviate uncertainty for borrowers" and "the continuing economic effects of the unprecedented COVID-19 pandemic" while this Court "review[s] the lower-court orders." *Ibid.* Payment obligations will resume "60 days after the Department is permitted to implement the program or the litigation is resolved," but no later than 60 days after June 30, 2023. *Ibid.*

SUMMARY OF ARGUMENT

The lower courts' orders have erroneously deprived the Secretary of his statutory authority to provide targeted student-loan debt relief to borrowers affected by national emergencies, leaving millions of economically

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vulnerable borrowers in limbo. For nearly three years, the Secretary and his predecessors have responded to an unprecedented global pandemic by adopting and extending an unprecedented across-the-board pause in payment obligations for all borrowers. The Secretary determined, and respondents have not seriously disputed, that ending that pause without providing some additional relief for lower-income borrowers would cause delinquency and default rates to spike above pre-pandemic levels. This Court should not compel that damaging and destabilizing result: Respondents do not have Article III standing, and the Secretary's plan is lawful in any event.

I. To establish Article III standing, a plaintiff must show that she has suffered an injury in fact that is fairly traceable to the defendant's challenged conduct and likely to be redressed by judicial relief. Neither the States nor Brown and Taylor can satisfy those fundamental requirements.

A. The States have raised four theories of standing, all of which the district court in *Nebraska* correctly rejected.

First, four States argue that the plan will diminish their tax revenues because some student loans that would have been discharged in the future will instead be discharged under the plan and because federal law (which the States have chosen to incorporate) does not treat discharges that occur between 2021 and 2025 as taxable income. That argument is flawed for several independent reasons: The States' alleged harm is self-inflicted; a federal policy's incidental effects on a State's tax revenues are not judicially cognizable injuries in any event; and the incidental injury the States posit rests on a chain of speculation.

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Second, three States argue that, because the plan provides relief for Direct Loans but not for Family Education Loans, it has encouraged borrowers to consolidate their Family Education Loans (which state entities hold or in which they have invested) into Direct Loans. But the plan does not encourage consolidation because the Department has announced that "borrowers with federal student loans not held by [the Department] cannot obtain one-time debt relief by consolidating those loans into Direct Loans." J.A. 215 (emphasis omitted). And even if the plan did encourage consolidation, the States would still lack standing. An injury suffices for Article III standing only if it is fairly traceable to the challenged action of the defendant, rather than to the independent action of a third party. Any harms resulting from consolidation are fairly traceable, not to the plan, but to borrowers' independent decisions to consolidate.

Third, the Eighth Circuit adopted a theory of standing focused on MOHELA, a state-created entity in Missouri. The Eighth Circuit reasoned that MOHELA has contracted with the Department to service student loans; that MOHELA will stop receiving servicing fees for loans that are discharged under the plan; and that this loss of revenue could in turn impair MOHELA's ability to fulfill its state-law obligation to contribute a specified amount of money to the state treasury. But the States have never alleged that the plan will cause MOHELA to default on its obligations to the State. And it is pure speculation that, if the plan causes a reduction in MOHELA's revenues, MOHELA will respond by defaulting on its obligations rather than, say, cutting its other expenditures. In any event, the Eighth Circuit cited no authority for the proposition that, if A causes

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financial harm to B, and B owes money to C, C has standing to sue A.

Finally, the States have asserted that the alleged financial harms to MOHELA are harms to the State of Missouri, and that Missouri may accordingly sue based on MOHELA's loss of servicing fees. But Missouri cannot establish standing based on harms to MOHELA, which it has established as a separate corporation.

B. Brown and Taylor, too, lack standing to challenge the plan as substantively unlawful. The district court in *Brown* held that they have standing because the plan provides no debt relief to borrowers such as Brown and only $10,000 rather than $20,000 in debt relief to borrowers such as Taylor. But a judgment that the plan is substantively unlawful would in no sense redress those asserted injuries. It would not grant Brown and Taylor the additional debt relief they say they desire; rather, it would mean that nobody gets any debt relief at all.

Nor do Brown and Taylor have standing to challenge the plan on procedural grounds. They argue that, although the HEROES Act exempts certain actions from notice-and-comment and negotiated-rulemaking procedures, that exemption does not apply here because the plan exceeds the Secretary's substantive authority under the HEROES Act. But a judgment based on that theory would not redress Brown and Taylor's injuries. Instead, because the ostensibly procedural judgment would be premised on the plan's substantive unlawfulness, it would mean that no one—including Brown and Taylor—could receive any debt-cancellation relief under the HEROES Act at all.

II. On the merits, the Secretary's plan is authorized by the HEROES Act, reasonably explained, and procedurally proper.

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A. The plain language of the HEROES Act authorizes the plan. The operative text empowers the Secretary to respond to a "national emergency" by "waiv[ing] or modify[ing] any statutory or regulatory provision" governing the federal student loan programs in order to "ensure" that affected student-loan borrowers are not "placed in a worse position financially" in relation to their loans because of the emergency. 20 U.S.C. 1098bb(a)(1) and (2). Here, the Secretary responded to the devastating economic consequences of the COVID-19 pandemic by granting targeted relief to borrowers at higher risk of delinquency and default due to the pandemic—specifically, by waiving and modifying certain provisions governing student-loan cancellation and discharge. That relief falls squarely within the Secretary's express statutory authority.

Respondents' various attempts to reconcile their contrary position with the Act's unambiguous text fall short. Their arguments rest on manufactured limits nowhere to be found in the Act; revisionist accounts of the Act's purpose and history flatly contradicted by the Act itself; strained readings of other provisions in other statutes; and mischaracterizations of the plan and the analysis on which it is based. Nothing in the text, purpose, or history of the Act undermines the most natural reading of its operative provisions, and the Secretary's plan readily satisfies the Act's requirements.

Respondents' resort to the major questions doctrine fares no better. That doctrine does not justify overriding ordinary principles of statutory construction whenever an agency action can be described as consequential; rather, this Court has applied the doctrine only in "extraordinary cases" characterized by what the Court has concluded is a gross mismatch between an agency's

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assertion of regulatory authority and the history and context of the supposed congressional authorization. *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2608-2609 (2022) (citation omitted). This case does not share the key features of those extraordinary cases. The Secretary's plan concerns the administration of a federal benefit program and involves no assertion of regulatory authority at all; the statutory authorization to provide debt relief is central to the HEROES Act, direct, and concrete; and the asserted authority to discharge debt is neither a surprising form of borrower relief nor beyond the Department's ordinary domain. Even if the major questions doctrine applied, moreover, it would not justify invalidating the plan: The Act's plain text supplies the clear authorization that the doctrine requires.

B. The Secretary's plan is both reasonable and reasonably explained. In defining the key aspects of the plan, the Secretary examined the available economic and historical data and tailored the relief to the relevant statutory objective: ensuring that borrowers affected by the pandemic would not be in a worse position financially with regard to their student-loan obligations. Respondents offer no sound basis to second-guess the Secretary's considered evaluation of the evidence or his predictive judgment about the type and degree of relief required to ensure that borrowers are not placed in a worse financial position because of the pandemic.

C. The Secretary's plan is also procedurally proper. The HEROES Act expressly exempts the Secretary from complying with the notice-and-comment requirements in the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, when issuing waivers and modifications under the Act. The Education Act's negotiated-rulemaking procedures are likewise inapplicable to such

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waivers and modifications. Contrary to respondents' contentions, neither procedural exemption depends on the substantive validity of the Secretary's plan. In any event, because the HEROES Act does authorize the plan, the Secretary's undisputed compliance with the Act's procedural requirements answers respondents' challenge in full.

ARGUMENT

I. RESPONDENTS LACK ARTICLE III STANDING

Article III empowers the federal courts to decide only "Cases" and "Controversies." U.S. Const. Art. III, § 2, Cl. 1. An Article III case or controversy exists only if the plaintiff has standing, a requirement that "ensures that [the] federal courts decide only 'the rights of individuals'" and "exercise 'their proper function in a limited and separated government.'" *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2203 (2021) (citations omitted). In our system, "[f]ederal courts do not possess a roving commission to publicly opine on every legal question" and "do not exercise general legal oversight of the Legislative and Executive Branches." *Ibid.*

The "irreducible constitutional minimum of standing" has "three elements." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Ibid.* (citations and internal quotation marks omitted). Second, the injury must be "fairly traceable to the challenged action of the defendant." *Id.* at 560-561 (brackets, citation, and ellipsis omitted). "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (citation omitted). "The party in-

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voking federal jurisdiction bears the burden of establishing these elements." *Ibid.* Respondents have failed to do so here.

A. The States Lack Standing

The States have raised four theories of standing. The district court in *Nebraska* correctly rejected each of them. J.A. 142-151.

1. Four States—Iowa, Kansas, Nebraska, and South Carolina—assert that the plan will diminish their tax revenues. J.A. 150. They contend that some student loans that would have been discharged in the future will instead be discharged under the plan. *Ibid.* That hypothesized shift in timing matters, they say, because the Internal Revenue Code normally treats "discharge of indebtedness" as a form of "gross income," 26 U.S.C. 61(a)(11)-(12), but a temporary provision excludes discharges of student loans from 2021 to 2025, see 26 U.S.C. 108(f)(5). J.A. 150. The States argue that, because they have chosen to incorporate the Code's definition of "gross income" into their own laws, a change in the timing of discharges will diminish their revenues. *Ibid.* That roundabout theory is incorrect for multiple independent reasons.

First, the States' alleged harm results from their own choice to tie their tax laws to the Internal Revenue Code. This Court's decision in *Pennsylvania* v. *New Jersey*, 426 U.S. 660 (1976) (per curiam), forecloses a State's effort to claim standing on such a self-generated basis. There, Pennsylvania sought to establish standing to challenge a New Jersey tax by arguing that, because Pennsylvania provided a credit for taxes paid to other States, a tax increase in New Jersey could lead to a loss of tax revenue in Pennsylvania. *Id.* at 664-665. The Court rejected that theory, explaining that nothing re-

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quired Pennsylvania to extend the credit, that any harm to Pennsylvania was thus "self-inflicted," and that "[n]o State can be heard to complain about damage inflicted by its own hand." *Id.* at 664.

Any harm to the States' treasuries here is likewise self-inflicted. The States have no obligation to track the federal definition of gross income; indeed, two of the six States that have brought this suit (Arkansas and Missouri) evidently do not do so. The other States remain free to depart from that definition and to treat student-loan discharges from 2021 to 2025 as taxable income for purposes of state income taxes. If they choose not to do so, any resulting reduction in their tax revenues is fairly traceable not to the Secretary's plan, but instead to their own choices about how to structure their tax laws. And the States "cannot manufacture standing merely by inflicting harm on themselves." *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 416 (2013).

Second, even apart from the self-inflicted nature of the States' asserted harm, this Court's decision in *Florida* v. *Mellon*, 273 U.S. 12 (1927), establishes that a federal policy's incidental effects on state tax revenues are not judicially cognizable injuries. There, Florida sought to establish standing to challenge a federal inheritance tax by arguing that the tax would prompt the "withdrawal of property" from the State, diminishing its tax base. *Id.* at 18. The Court rejected that argument, explaining that Florida was required to show a "direct injury" and that any harm caused by the federal tax was, "at most, only remote and indirect." *Ibid.* (emphasis omitted). That analysis equally applies here: Just as Florida could not establish standing by claiming that state tax revenues would decline because of a federal policy, the States here cannot do so either.

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Respondents' contrary view has startling implications. Virtually all federal actions—from prosecuting crime to imposing taxes to managing property—have some incidental effects on state finances. If such incidental effects suffice for standing, every State would have standing to challenge almost any federal policy. That would flout Article III's case-or-controversy requirement and convert the federal courts into "an open forum for the resolution of political or ideological disputes." *United States* v. *Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring); see *Pennsylvania* v. *Kleppe*, 533 F.2d 668, 672 (D.C. Cir.) ("[T]he unavoidable economic repercussions of virtually all federal policies * * * suggest to us that impairment of state tax revenues should not, in general, be recognized as sufficient injury in fact to support state standing."), cert. denied, 429 U.S. 977 (1976).

Third, the States' theory of reduced tax revenues is unduly speculative. "Standing is not 'an ingenious academic exercise in the conceivable'"; rather, a plaintiff must show that its asserted injury is "'*certainly* impending.'" *Defenders of Wildlife*, 504 U.S. at 564 n.2, 566 (citations omitted). The asserted loss of tax revenues after 2025 is neither certain nor impending. Instead, it depends on the assumption that if borrowers did not receive discharges under the plan, they would receive discharges for other reasons; that those discharges would not occur until 2026 or later; and that neither state nor federal law would change in the meantime. The States' theory thus depends on a "speculative chain of possibilities," which does not suffice to establish standing. *Clapper*, 568 U.S. at 410.

2. Three States—Arkansas, Missouri, and Nebraska —assert a second theory of standing. J.A. 146 & n.4.

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Those States argue that, because the plan provides relief for Direct Loans but not for Family Education Loans, it has encouraged borrowers to consolidate (*i.e.*, convert) their Family Education Loans into Direct Loans. The States maintain that such consolidation causes them financial harm because state entities hold or have invested in Family Education Loans. J.A. 146.

The most obvious problem with the States' incentive-to-consolidate theory is that the plan does not create an incentive to consolidate. Under a decision the Department made before the States sued and announced and made effective the day they sued, "borrowers with federal student loans not held by [the Department] cannot obtain one-time debt relief by consolidating those loans into Direct Loans." J.A. 215 (emphasis omitted). Because consolidation does not make borrowers eligible for relief under the plan, the plan does not encourage borrowers to consolidate their loans.

Even if the plan still somehow encouraged consolidation, the States would lack standing. An injury suffices for Article III standing only if it is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Defenders of Wildlife*, 504 U.S. at 560 (brackets, citation, and ellipses omitted). That principle "does not exclude injury produced by [the] determinative or coercive effect [of the defendant's conduct] upon the action of someone else." *Bennett* v. *Spear*, 520 U.S. 154, 169 (1997). But it does mean that, in general, a plaintiff cannot establish standing simply by showing that the defendant's conduct creates an incentive for third parties to act in a particular way. For example, in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), this Court held that a group of

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indigent plaintiffs lacked standing to challenge a revenue ruling concerning the availability of a federal tax benefit that allegedly "'encouraged' hospitals to deny services to indigents." *Id.* at 42. The Court found it "purely speculative" that any denial of service would result from the government's "'encouragement'" rather than from "decisions made by the hospitals without regard to the tax implications." *Id.* at 43.

The States' incentive-to-consolidate theory defies those principles. The States do not allege that the plan "coerc[ed]" borrowers to consolidate their loans. *Bennett*, 520 U.S. at 169. They instead allege only that the plan created an "incentive" for borrowers to do so. J.A. 146. But a borrower deciding whether to consolidate loans must weigh the benefits of consolidation (such as lower monthly payments, the switch from a variable interest rate to a fixed interest rate, and potential eligibility for COVID-19 forbearance) and the costs (such as a longer repayment period and the loss of discounts associated with the existing loans). See, *e.g.*, Federal Student Aid, U.S. Dep't of Educ., *What are the benefits and downsides of loan consolidation?*; Federal Student Aid, U.S. Dep't of Educ., *COVID-19 Loan Payment Pause and 0% Interest*. It is purely speculative whether any loan consolidations that may occur will result from the plan's "'encouragement'" or instead from "decisions made by the [borrowers] without regard to the [plan]." *Simon*, 426 U.S. at 43. Any financial harms that flow from consolidation would thus be fairly traceable to the borrowers' independent decisions to consolidate, not to the plan.

3. The Eighth Circuit adopted a theory of standing focused on MOHELA, a state-created entity in Missouri that has contracted with the Department of Edu-

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cation to service student loans. J.A. 162. The States have alleged that MOHELA receives an administrative fee for each loan it services and that MOHELA will stop receiving such fees for loans that are discharged under the plan. The Eighth Circuit reasoned that Missouri has standing because Missouri law requires MOHELA to contribute a specified amount to a fund in the state treasury, and "the financial impact on MOHELA due to the Secretary's debt discharge" may impair MOHELA's ability to fulfill that obligation. J.A. 164. But the States have not alleged that the plan's effect on MOHELA will cause it to default on its obligation to Missouri. And even if they had made such an allegation, the Eighth Circuit still would have erred in accepting it as a basis for Article III standing.

The Eighth Circuit cited no authority for the proposition that, if A causes financial harm to B, and B owes money to C, C has standing to sue A. That theory of standing is irreconcilable with the principle that a plaintiff must "assert [its] own legal rights and interests, and cannot rest [its] claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). Taken to its logical conclusion, the Eighth Circuit's theory would mean that banks could sue anyone who causes financial harm to their borrowers, credit-card companies could sue anyone who causes financial harm to their customers, and governments could sue anyone who causes financial harm to their taxpayers.

The Eighth Circuit's analysis also conflicts with this Court's "usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper*, 568 U.S. at 414. It is pure speculation that, if the plan causes financial harm to MO-

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HELA, MOHELA will default on its obligation to pay a fixed sum to the state treasury. The plan may not cause a significant drop in MOHELA's revenue at all. Alternatively, MOHELA may make enough money that it can fulfill its financial obligations to the State despite any loss of revenue. Guesswork about how the plan will affect MOHELA and how MOHELA will react to those effects does not suffice to establish Article III standing.

4. Fourth, the States have also advanced a different theory of standing based on MOHELA: They assert that the relationship between MOHELA and Missouri means that financial injuries to MOHELA are injuries to the State—and thus that MOHELA's alleged loss of servicing fees as a result of the plan constitutes an Article III injury to the State itself. J.A. 145-146.

The States' theory is foreclosed by two familiar legal principles, taken together. First, a plaintiff has standing only if it has a "personal stake" in the outcome of the litigation. *TransUnion*, 141 S. Ct. at 2203 (citation omitted). That is, a plaintiff may sue only to vindicate its "own legal rights and interests"; it may not rest its claim to judicial relief on "the legal rights and interests of third parties." *Warth*, 422 U.S. at 499. Second, "separately incorporated organizations are separate legal units with distinct legal rights and obligations." *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2087 (2020). Indeed, "[s]eparate legal personality has been described as 'an almost indispensable aspect of the public corporation.'" *First Nat'l City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 625 (1983) (*Bancec)* (citation omitted).

Missouri has established MOHELA as a corporation with a separate legal personality. Missouri law declares MOHELA to be a "body corporate." Mo. Rev. Stat.

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§ 173.360 (2022). MOHELA, like any other corporation, has "perpetual succession" and the right to "sue and be sued" in its own name. *Id.* § 173.385(1) and (3). Its assets shall not "be considered to be part of the revenue of the state," *id.* § 173.425, and the State "shall not be liable" for its debts, *id.* § 173.410. In short, Missouri and MOHELA are legally separate entities. Missouri thus cannot establish its own standing by asserting that the plan injures MOHELA.

The States' contrary arguments (*Nebraska* Resp. 13-16) conflict with the bedrock principle of corporate separateness. The States emphasize that Missouri law describes MOHELA as a "public instrumentality" that performs "essential public functions." *Id.* at 14 (brackets and citation omitted). But a corporation's status as a public instrumentality does not detract from its legal separateness. "[G]overnment instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Bancec*, 462 U.S. at 626-627; see *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 475 (2003). "Freely ignoring the separate status of government instrumentalities would result in substantial uncertainty" over the instrumentality's and the sovereign's legal rights and obligations. *Bancec*, 462 U.S. at 626.

The States also argue (*Nebraska* Resp. 15) that Missouri and MOHELA have a "close" relationship, but the States overstate the closeness of those ties. As the district court observed, Missouri has established MOHELA as a "self-sustaining," "financially independent" corporation with "express financial separation" from the State. J.A. 145. And MOHELA has stated that it was "not involved with the decision of the Missouri Attorney General's Office" to bring this suit. 22-3179 C.A.

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Docket Entry (8th Cir. Nov. 1, 2022). Indeed, MOHELA has stated that its only communications with the Office regarding student debt relief have involved the Office's "sunshine law requests" to MOHELA seeking documents for use in this litigation. *Ibid.*

More fundamentally, it makes no difference whether MOHELA has close ties to the State. A corporation's status as a separate legal person does not depend on the closeness of its relationship to its creator. "After all, incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 163 (2001). For example, the law generally treats a corporation and its sole owner as distinct persons, regardless of the closeness of the link between the two. See *ibid.*

There is no reason to treat a corporation created by Missouri any differently. Missouri chose to structure MOHELA as a separate corporation that can sue and be sued in its own name. Mo. Rev. Stat. § 173.385(3) (2022). The States identify no prior case in which Missouri purported to sue on MOHELA's behalf. Having chosen to establish MOHELA as a separate legal entity and reaped the benefits of that choice, Missouri may not now maintain that the State and MOHELA are one and the same merely because it believes that MOHELA has standing to challenge a policy the State opposes.[2]

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[2] In addition to their other theories, the States have asserted (*Nebraska* Resp. 21-22) that the plan's alleged effect on MOHELA wil l harm Missouri's "quasi-sovereign state interest" by diminishing its residents' educational opportunities. But it is well-established that "[a] State does not have standing as parens patriae to bring an ac-

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B. Brown And Taylor Lack Standing

Brown and Taylor, too, lack standing to challenge the plan. The district court in *Brown* held that they have standing because the plan provides them less debt relief than they claim to desire and they allege that they were improperly deprived of the opportunity to urge the Secretary to provide greater relief. J.A. 277-282. The court emphasized that Brown is ineligible for any relief under the plan because her debt is held by a commercial lender, while Taylor is eligible for $10,000 rather than $20,000 because he did not receive a Pell Grant. J.A. 279-280. But that theory is insufficient to establish standing to press either the substantive claim on which the court granted relief or the distinct procedural claim that Brown and Taylor have actually asserted.

Brown and Taylor plainly lack standing to raise the substantive claim on which the district court granted relief. Indeed, they have never seriously argued otherwise. To establish Article III standing, plaintiffs must do more than show injury; they must also show that "the injury would likely be redressed" by their requested relief. *TransUnion*, 141 S. Ct. at 2203. And because "standing is not dispensed in gross," plaintiffs must make that showing "for each claim that they press and for each form of relief they seek." *Id.* at 2208. The relief the district court granted—a declaration that the plan is substantively unlawful and an order vacating it—would not redress the injuries asserted here. That judgment leaves Brown's financial position unchanged; she would still receive no loan forgiveness. And it would leave Taylor worse off than before; he would receive

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tion against the Federal Government." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 610 n.16 (1982) (emphasis omitted).

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neither the $10,000 the plan provides nor the $20,000 he purports to seek, but instead nothing at all.

Brown and Taylor also lack standing to raise the procedural claim they presented below. In concluding otherwise, the district court reasoned that the ordinary redressability requirement is "relaxed when a plaintiff asserts a deprivation of a procedural right"—here, an asserted right to have the Secretary follow notice-and-comment and negotiated-rulemaking procedures, which would enable Brown and Taylor to "advocate for the expansion of the [plan's] eligibility criteria." J.A. 276, 279-280. The court concluded that, in that circumstance, the plaintiff need only show that "'there is some possibility that the requested relief will cause the injury-causing party to reconsider the decision that allegedly harmed the litigant.'" J.A. 281 (citation and emphasis omitted). But private respondents' claim fails that test.

Brown and Taylor contend that, even though the HEROES Act exempts waivers and modifications from notice-and-comment and negotiated-rulemaking procedures, those exemptions do not apply here because the plan exceeds the Secretary's substantive authority under the HEROES Act. Under that theory, the Secretary would lack authority to provide loan forgiveness to any borrower—Brown and Taylor included. A judgment based on that theory thus could not prompt the Secretary to reconsider the decisions that allegedly harmed private respondents—*i.e.*, the decision not to extend HEROES Act relief to borrowers such as Brown and to extend only $10,000 rather than $20,000 to borrowers such as Taylor. Instead, because the ostensibly procedural judgment would be premised on the plan's substantive unlawfulness, it would mean that no one could receive debt-cancellation relief under the HE-

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ROES Act at all, now or in the future following a notice-and-comment period. That result would in no way redress Brown's injury and would cost Taylor $10,000. Cf. *Carney* v. *Adams*, 141 S. Ct. 493, 501-502 (2020) (holding that a plaintiff lacked standing because "the context of th[e] particular record" suggested simply "a desire to vindicate his view of the law" and "not an actual desire" to have his asserted individual injury remedied).

* * * * *

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon*, 426 U.S. at 37; see *TransUnion*, 141 S. Ct. at 2203. Yet respondents' theories make that fundamental principle seem like a lawyer's game. The States assert standing based on injuries that are highly speculative, that they have inflicted upon themselves, or that fall upon a third party that is a stranger to this litigation. And private respondents purport to assert that the plan injures them because it provides too little debt relief, but seek a remedy that would result in no debt relief at all. This Court should reject those convoluted theories and hold that none of the respondents has established Article III standing to challenge the plan.

II. THE SECRETARY'S PLAN IS LAWFUL

On the merits, respondents challenge the Secretary's plan as exceeding his statutory authority, arbitrary and capricious, and procedurally improper. Each contention is wrong. The plan falls squarely within the plain text of the HEROES Act; indeed, a central purpose of the statute is to authorize the Secretary to grant student-loan-related relief to at-risk borrowers because

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of a national emergency—precisely what the Secretary did here. The plan rests on the Secretary's examination of the relevant economic data and his predictive judgment based on the Department's long experience with borrowers transitioning back into repayment after periods of forbearance, which illustrates that forbearance alone is not necessarily sufficient to alleviate the continuing economic effects of an emergency. And it is undisputed that the Secretary complied with the procedural requirements of the HEROES Act.

A. The HEROES Act Authorizes The Plan

The Secretary's plan is authorized by the plain text of the HEROES Act. Respondents' contrary arguments are unpersuasive, and their invocation of the major questions doctrine provides no sound reason to depart from the most natural reading of the statutory text.

1. The plain text of the HEROES Act authorizes the plan

a. The HEROES Act provides that, "[n]otwithstanding any other provision of law," the Secretary may (i) respond to a "national emergency" by (ii) providing relief to student-loan recipients who are "affected individuals" (iii) to the extent "the Secretary deems necessary" to "ensure" that those individuals are not "placed in a worse position financially" in relation to their loans because of the emergency. 20 U.S.C. 1098bb(a)(1) and (2). The Act further specifies (iv) that the relief may consist of "waiv[ing] or modify[ing] any statutory or regulatory provision" governing the federal student loan programs. 20 U.S.C. 1098bb(a)(1). The Secretary's plan satisfies each of those elements.

First, the COVID-19 pandemic is a "national emergency declared by the President of the United States."

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20 U.S.C. 1098ee(4); see 87 Fed. Reg. 10,289, 10,289 (Feb. 23, 2022). Both the Trump and Biden Administrations previously invoked the HEROES Act to categorically suspend payment obligations and interest accrual on all Department-held loans in light of the pandemic. See p. 8, *supra*. No respondent has argued that those actions were unlawful.

Second, borrowers eligible for relief under the plan are "affected individuals." 20 U.S.C. 1098bb(a)(2)(A). The vast majority qualify based on where they "reside[]" or are "employed," 20 U.S.C. 1098ee(2)(C): The 50 States, the District of Columbia, and all five permanently populated United States territories have been designated as COVID-19 disaster areas. See p. 7, *supra*. And because the pandemic has inflicted profound global economic harms, with particularly severe effects on lower-income borrowers, the Secretary reasonably "determined" that the small fraction of eligible borrowers living and working abroad qualify because they have suffered "direct economic hardship" due to the pandemic. 20 U.S.C. 1098ee(2)(D). Again, the payment pauses adopted by both the Trump and Biden Administrations rested on the same understanding of "affected individual."

Third, the plan serves an express statutory objective. The Secretary "deem[ed]" relief "necessary to ensure" that a subset of affected individuals—namely, those with lower incomes—"are not placed in a worse position" in relation to their student-loan obligations "because of their status as affected individuals," *i.e.*, because of the effects of the COVID-19 pandemic. 20 U.S.C. 1098bb(a)(1) and (2). That determination was supported by analysis and evidence showing that, because of the pandemic, such borrowers are at particu-

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larly high risk of delinquency and default once payment obligations restart. See pp. 9-10, *supra*.

Fourth, the Act authorizes the type of relief that the Secretary granted. The Act allows the Secretary to "waive or modify *any* statutory or regulatory provision applicable to the student financial assistance programs under title IV." 20 U.S.C. 1098bb(a)(1) (emphasis added). The provisions governing student-loan repayment obligations, cancellation, and discharge are unquestionably "statutory or regulatory provision[s] applicable to the student financial assistance programs under title IV." *Ibid.*; see, *e.g.*, 20 U.S.C. 1087 (2018 & Supp. I 2019), 1087dd(g); 34 C.F.R. 682.402, 685.212. The HEROES Act thus authorized the Secretary to "waive or modify" those provisions to reduce the scope of vulnerable borrowers' payment obligations in order to ensure that they are not worse off in relation to their student-loan obligations because of the pandemic. 20 U.S.C. 1098bb(a)(1); J.A. 257-259.

b. Other provisions of the HEROES Act underscore the breadth of the authority Congress conferred on the Secretary to determine eligibility criteria and define the scope of relief to be afforded. The Act specifically authorizes the Secretary to issue relief to classes of borrowers rather than on a "case-by-case basis." 20 U.S.C. 1098bb(b)(3). Congress likewise expressly contemplated the Secretary's exercise of substantial discretion in fashioning appropriate relief, authorizing the Secretary not once but twice to issue those waivers and modifications he "deems necessary" to "achieve the purposes of this section." 20 U.S.C. 1098bb(a)(1) and (b)(1). By authorizing relief that the Secretary "*deems*" necessary rather than relief that actually "*is* necessary," Congress adopted a standard that "fairly exudes defer-

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ence." *Webster* v. *Doe*, 486 U.S. 592, 600 (1988) (citation omitted). Congress underscored the point in Section 1098bb(a)(2), authorizing the Secretary to waive or modify any such provision "as *may* be necessary" to "ensure" that the Act's objectives are met. 20 U.S.C. 1098bb(a)(2) (emphasis added). And Congress made clear that the Secretary's authority to grant debt relief applies "[n]otwithstanding any other provision of law, unless enacted with specific reference to [the HEROES Act]," 20 U.S.C. 1098bb(a)(1)—thus setting a default of expansive remedial authority that can be displaced only through express reference.

2. Respondents' attempt to exclude discharge as a form of HEROES Act relief contradicts the Act's text

In challenging the Secretary's statutory authority to adopt the plan, respondents principally contend that the HEROES Act categorically precludes discharge of loan principal as a form of relief. See *Nebraska* Resp. 24-26; *Brown* Resp. 21-22. That purported limit contradicts the Act's unambiguous text, and respondents' various attempts to justify it are unpersuasive.

a. The Act specifically authorizes the Secretary to "waive or modify *any* statutory or regulatory provision applicable to the student financial assistance programs" under Title IV of the Education Act, 20 U.S.C. 1098bb(a)(1) (emphasis added). Nothing in the Act limits the Title IV provisions that the Secretary can waive or modify; to the contrary, "the word 'any' has an expansive meaning." *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (citation omitted). Respondents do not dispute that the referenced provisions include those governing student-loan cancellation and discharge, which are the provisions the Secretary waived and modified here. See J.A. 261-262 (citing 20 U.S.C. 1087, 1087a,

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1087e, 1087dd(g); 34 C.F.R. 682.402, 685.212); 87 Fed. Reg. at 61,512. And respondents cannot show that those provisions are implicitly excluded; to the contrary, Congress underscored that the HEROES Act authorizes the Secretary to displace the ordinary operation of those provisions by specifying that the Act applies "[n]otwithstanding any other provision of law, unless enacted with specific reference to [the Act]." 20 U.S.C. 1098bb(a)(1).

Respondents make little effort to square their contrary position with the Act's text. Brown and Taylor briefly assert that "waive" and "modify" are "'modest words'" that cannot authorize debt relief. *Brown* Resp. 21 (citation omitted). But to waive is "[t]o abandon, renounce, or surrender (a claim, privilege, right, etc.)" or "to give up (a right or claim) voluntarily," *Black's Law Dictionary* 1894 (11th ed. 2019); to modify is "[t]o make somewhat different" or "to reduce in degree or extent," *id.* at 1203. The Act thus unambiguously authorizes the Secretary to eliminate or reduce the requirements imposed by any Title IV student-aid provision—including those that establish loan repayment obligations and discharge eligibility. To be sure, the Secretary can only exercise that authority when all predicates for relief under the HEROES Act are satisfied, and those limitations ensure that any relief is tailored to the economic consequences of a particular emergency. See pp. 34-37, *supra*; pp. 50-51, *infra*. But there is no reason to think that Congress, by empowering the Secretary to "waive or modify" any Title IV student-aid provision, intended to limit the Secretary to modest changes when such changes would not suffice to ameliorate borrower hardship due to the emergency. "By introducing a limitation not found in the statute, respondents ask [this Court] to

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alter, rather than to interpret, the [Act]." *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2381 (2020). But courts have no authority to "impos[e] limits on an agency's discretion that are not supported by the text." *Ibid.*

b. Lacking textual support, respondents invoke other statutory provisions and the Act's purpose and legislative history. Those arguments are unpersuasive on their own terms, and none justifies a departure from the Act's unambiguous text.

First, Brown and Taylor emphasize that the Education Act explicitly authorizes the Department to discharge student-loan debt in certain circumstances and assert that "[t]he Court should not 'read [debt cancellation] into' the HEROES Act 'when it is clear that Congress knew how to [authorize it] when it wanted to.'" *Brown* Resp. 22 (citation omitted; brackets in original). But such specific statutory references to loan cancellation authorize *only* cancellation; by contrast, when Congress says "any," it authorizes any appropriate form of relief, which naturally includes debt cancellation in the context of a provision designed to provide student-loan-related relief as warranted by circumstances like a national emergency.

Moreover, the HEROES Act does not list *any* of the specific forms of relief the Secretary has long issued under the Act to ensure that borrowers affected by a national emergency are not left worse off—including extending forbearance, suspending interest accrual, and altering the requirements for loan deferrals. See pp. 7-8, *supra*. The Act instead ensures that the Secretary can respond quickly and effectively to the particular emergency at hand by authorizing the Secretary to waive or modify "any" Title IV provision applicable to

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the federal student-aid programs, where the circumstances so warrant. Indeed, as with cancellation, various provisions of the Education Act specifically authorize many of the forms of relief the Secretary has long granted under the HEROES Act. See, *e.g.*, 20 U.S.C. 1077(a)(2)(C) (deferment); 20 U.S.C. 1078(b)(1)(M) (same); 20 U.S.C. 1087e(f) (same); 20 U.S.C. 1087e(*o*) (suspension of interest accrual); 20 U.S.C. 1087dd(e) (forbearance). If respondents were correct that Congress's express authorization of a form of relief in other circumstances implicitly precludes the Secretary from granting that relief under the HEROES Act, the Act would be a virtual dead letter.

Respondents' effort to read Congress's express authorization of discharge in other circumstances as an implied limit on the HEROES Act also contradicts Congress's direction that the Secretary's authority under the Act applies "[n]otwithstanding any other provision of law, unless enacted with specific reference to [the Act]." 20 U.S.C. 1098bb(a)(1). "[T]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Cisneros* v. *Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993). The provisions authorizing debt relief in other circumstances—which were not enacted with specific reference to the HEROES Act—thus cannot be construed to limit the Secretary's authority under the Act.

Second, the States assert (*Nebraska* Resp. 25) that the Act's "focus on addressing *temporary* challenges like a 'military operation or a national emergency'" is inconsistent with "the *permanent* cancellation of principal." But nothing about the nature of events that can trigger the Act suggests a limitation on the *type of relief*

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that might be necessary to respond to those conditions. Rather, the Act contemplates that the Secretary will authorize relief in proportion to the scale and scope of the emergency; the more devastating and lingering the emergency, the more significant the relief "necessary to ensure" that borrowers are not worse off as a result. 20 U.S.C. 1098bb(a)(2)(A). And even in response to less-severe disruptions, the Secretary has long invoked the HEROES Act to provide permanent relief such as waiving the requirement that borrowers return certain overpayments or modifying the criteria for loan cancellation. OLC Op., 2022 WL 3975075, at *4; 87 Fed. Reg. at 52,944.

Finally, relying on statements made by individual legislators, respondents assert that in enacting the HEROES Act 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.'" *Brown* Resp. 18-19 (citation omitted); see *Nebraska* Resp. 30-31. But again, that argument flatly contradicts the statutory text. In two predecessor statutes, Congress had focused narrowly on providing relief to soldiers serving in the Gulf War and people affected by terrorist attacks. See pp. 4-5, *supra*. In the HEROES Act, in contrast, Congress deliberately granted the Secretary broader authority: Rather than limit relief to those "serving on active duty in connection with Operation Desert Storm," § 372(a)(1), 105 Stat. 93, or those affected by September 11th or subsequent terrorist attacks, 115 Stat. 2386, Congress authorized the Secretary to grant relief in response to any "national emergency." 20 U.S.C. 1098bb(a)(1). And the Act defines "affected individuals" to include not only individuals "serving on active duty" or "performing qualifying

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National Guard duty," but also anyone 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" or who "suffered direct economic hardship" due to that emergency. 20 U.S.C. 1098ee(2)(A)-(D); see pp. 5-6, *supra*. The Secretary has thus long issued relief under the Act to large groups of civilians, including in response to COVID-19. See pp. 7-8, *supra*.

3. Respondents' remaining statutory arguments lack merit

Respondents also argue that even if the HEROES Act generally authorizes discharge of principal as a form of relief, the particulars of the Secretary's plan do not comply with the Act's requirements. All those arguments are unpersuasive, and many of them rest on misunderstandings of the plan and its supporting analysis.

For instance, respondents assert (*Nebraska* Resp. 26; *Brown* Resp. 22-23) that the Secretary failed to limit the plan to those who "reside[d] or [were] employed in an area that is declared a disaster area." 20 U.S.C. 1098ee(2)(C). But the entire country has been declared a disaster area, so the vast majority of borrowers do qualify based on where they work and reside . See p. 35, *supra*. And the Secretary could reasonably "determine[]"—as both the Trump and Biden Administrations previously did—that the small fraction of eligible borrowers who live and work abroad qualify because they have suffered "direct economic hardship" due to a global pandemic. 20 U.S.C. 1098ee(2)(D); see p. 35, *supra*.

Respondents also assert that because interest accrual and payment obligations have been paused during

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the pandemic, the plan would place borrowers in a "better position" rather than ensuring that they are not placed in a "'worse position financially in relation to [their] financial assistance.'" *Nebraska* Resp. 22, 24 (capitalization, citation, and emphasis omitted; brackets in original); see *Brown* Resp. 21. But the evidence before the Secretary showed that without relief, lower-income borrowers were likely to experience increased default and delinquency rates *beyond* pre-pandemic levels once repayments resume. See J.A. 234-239, 245, 249-251; pp. 9-10, *supra*. And the evidence further showed that reducing the principal owed by such borrowers by the proposed amounts, and reducing their monthly payments accordingly, would ameliorate the "risk that delinquency and default rates will rise *above pre-pandemic levels*." J.A. 242 (emphasis added); see J.A. 242-244. Respondents do not seriously dispute those determinations.

Respondents further contend (*Nebraska* Resp. 26; *Brown* Resp. 22) that the Department failed to show that the plan was "necessary" to prevent delinquency and default for each borrower eligible for relief. Congress, however, authorized the Secretary to issue relief "as may be necessary to *ensure*" that affected individuals are not worse off with respect to their student loans. 20 U.S.C. 1098bb(a)(2) (emphasis added); see *Webster's Third New International Dictionary of the English Language* 756 (2002) ("ensure" means "to make sure, certain, or safe"). And again, 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). By authorizing the Secretary to act on a class-wide basis as may be necessary to make "sure" or "certain" that borrowers are not placed in a

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worse position financially, Congress authorized and encouraged the Secretary to err on the side of over-inclusion—a sensible approach in a statute addressing relief from national emergencies. See *Weinberger* v. *Salfi*, 422 U.S. 749, 777 (1975) (Congress may conclude "that the expense and other difficulties of individual[ized] determinations justif[y] the inherent imprecision of a prophylactic rule.").

Previous invocations of the HEROES Act have likewise afforded relief on a class-wide basis. See OLC Op., 2022 WL 3975075, at *4-*5. Most obviously, each invocation of the Act to pause payment obligations and interest accrual during the pandemic—which respondents do not challenge—provided relief for *all* borrowers with federally held student loans. See, *e.g.*, 85 Fed. Reg. at 79,857; 87 Fed. Reg. at 61,512-65,514. Here, by contrast, the Secretary limited eligibility for relief to the subset of affected borrowers most likely to be in a "worse position financially in relation to" their student loans because of the pandemic. 20 U.S.C. 1098bb(a)(2)(A). No more is required.

Relatedly, respondents argue (*Nebraska* Resp. 26; *Brown* Resp. 22) that the plan's income thresholds are insufficiently tailored to identify those borrowers who will be at heightened risk of delinquency and default due to the pandemic. But again, Congress specifically authorized the Secretary to respond quickly and fully to an emergency by acting on a class-wide basis, and it encouraged him to err on the side of over- rather than under-inclusion. Here, moreover, the plan directly corresponds to the Department's supporting analysis, which examined the relevant data and determined that $125,000 is the individual income threshold at which repayment capability is likely to substantially change, and

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that a $10,000 discharge ($20,000 for qualifying Pell Grant recipients) will mitigate the risk that vulnerable borrowers will be worse off in relation to their student loans as a result of the pandemic. See pp. 10-11, *supra*.

Finally, the States assert (*Nebraska* Resp. 23) that the Act requires "more than" a "but-for" connection between the proposed relief and the national emergency. But the Act authorizes the Secretary to ensure that borrowers are not worse off in relation to their student loans "because of" an emergency. 20 U.S.C. 1098bb(a)(2)(A). The term "because of" is most "often associated with but-for causation." *Comcast Corp.* v. *National Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1016 (2020); see *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 350 (2013) (collecting cases). And the States' assertion that the Act instead demands "direct causation" (*Nebraska* Resp. 23) cannot be reconciled with the Act's definition of the "affected individuals" eligible for relief. Congress defined an "affected individual" to include not just those who have "suffered direct economic hardship as a direct result" of the triggering emergency, but also three other categories, including anyone who "resides or is employed in an area that is declared a disaster area." 20 U.S.C. 1098ee(2)(C) and (D). If "direct causation" were required, those other provisions would be superfluous because the affected individuals in those categories who would be eligible for relief would necessarily fall within the separate "direct economic hardship" provision.

In any event, the plan satisfies any potentially applicable standard of causation. The evidence before the Secretary included substantial data showing that the pandemic has caused severe economic harms, including layoffs, inflationary spikes, rising delinquency rates,

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and projected reductions in lifetime earnings for students who left school in 2020 and 2021—and that those material hardships have disproportionately affected lower-income households. J.A. 234-239, 245-253. The evidence further showed that, without the proposed relief, those borrowers would likely experience default and delinquency rates beyond pre-pandemic levels. See J.A. 234-239, 242-245, 249-251. The plan thus directly targets those borrowers facing "a worse position financially" "because of" the pandemic, 20 U.S.C. 1098bb(a)(1) and (2).

4. The major questions doctrine provides no reason to depart from the statutory text

The district court in *Brown*—the only court that addressed the merits of the Secretary's plan—did not deny that the plan is authorized by the natural reading of the HEROES Act. But the court nonetheless believed that the major questions doctrine compelled a contrary result. J.A. 287-294. Respondents have likewise relied heavily on the major questions doctrine. But that doctrine does not apply here and, even if it did, it would not support respondents' claims.

a. The *Brown* district court believed that the major questions doctrine applies because the plan is an agency action of great "economic and political significance." J.A. 291. But this Court has never treated the major questions doctrine as a license for courts to override statutory text simply because they regard an agency's action as economically or politically consequential. Many agency actions can be characterized as costly or politically salient, but the Court has not applied the major questions doctrine as a matter of course. To the contrary, this Court regularly decides challenges to executive actions of major economic and political significance

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under the usual rules of statutory interpretation without imposing heightened-specificity requirements. See, *e.g.*, *Biden* v. *Missouri*, 142 S. Ct. 647, 652 (2022) (per curiam); *Collins* v. *Yellen*, 141 S. Ct. 1761, 1776 (2021); *Little Sisters of the Poor*, 140 S. Ct. at 2380-2381; *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2571-2572 (2019); *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2408 (2018).

In particular, the cost of a government program alone provides no basis to depart from plain statutory meaning. For example, although the scope of the Medicare program inevitably means that policies adopted by the Secretary of Health and Human Services may involve many billions of dollars, this Court has never treated that as a reason to demand specific authorization in a Medicare case. See, *e.g.*, *Becerra* v. *Empire Health Found.*, 142 S. Ct. 2354 (2022); *American Hosp. Ass'n* v. *Becerra*, 142 S. Ct. 1896 (2022); see generally *Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1808 (2019). The same is true for various agency actions implicating billions of dollars in costs to the energy, utility, and telecommunications industries. See, *e.g.*, *EPA* v. *EME Homer City Generation, L.P.*, 572 U.S. 489 (2014); *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967 (2005); *New York* v. *FERC*, 535 U.S. 1 (2002). The district court thus erred in presuming that the mere fact that an action could be called "economically and politically significant" suffices to demand clearer-than-ordinary congressional authorization.

Rather, the major questions doctrine applies when an agency claims an "[e]xtraordinary grant[] of regulatory authority" based on "'modest words,' 'vague terms,' or 'subtle devices,'" and the "'history and the

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breadth'" of that asserted power provide "'reason to hesitate before concluding that Congress'" meant to confer such authority. *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2608-2609 (2022) (brackets and citations omitted). The Court has thus applied the doctrine only in a handful of "extraordinary cases" that presented a marked incongruity between an agency's claimed authority and the history and context of the statutory provision that purportedly conferred it. *Id.* at 2609. This case lacks the hallmarks of those extraordinary cases.

Most fundamentally, this case does not involve any assertion of "regulatory authority," but rather the exercise of authority over a government benefit program to provide additional relief to beneficiaries. Every case in which this Court has invoked the major questions doctrine to invalidate an agency action involved an agency asserting the power to regulate, and not simply the provision of government benefits. See, *e.g.*, *West Virginia*, 142 S. Ct. at 2608 (EPA's authority to regulate power plants with emissions standards based on restructuring the Nation's mix of electricity generation); *NFIB* v. *OSHA*, 142 S. Ct. 661, 666 (2022) (per curiam) (OSHA's authority to adopt "a broad public health regulation" requiring vaccination or other COVID-19 precautions in the workplace); *Alabama Ass'n of Realtors* v. *HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (CDC's authority to regulate "the landlord-tenant relationship" by issuing a nationwide eviction moratorium); *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 324 (2014) (EPA's power to assert permitting authority over millions of small sources); *Gonzales* v. *Oregon*, 546 U.S. 243, 266-268 (2006) (Attorney General's authority to ban drugs used in physician-assisted suicide); *Whitman* v. *American Trucking Assn's*, 531 U.S. 457, 465-468

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(2001) (EPA's authority to consider implementation costs in setting national ambient air quality standards); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-161 (2000) (FDA's authority to regulate tobacco products).

The Court's focus on whether a case involves an "[e]xtraordinary grant[] of regulatory authority" makes good sense: the major questions doctrine rests on "separation of powers principles and a practical understanding of legislative intent," both of which inform the way one would expect Congress to legislate if it intended to grant an agency "'extravagant statutory power over the national economy.'" *West Virginia*, 142 S. Ct. at 2609 (citation omitted). It is, in other words, tailored to assertions of "expansive regulatory authority over some major social or economic activity." *United States Telecom Ass'n* v. *FCC*, 855 F.3d 381, 421 (D.C. Cir. 2017) (per curiam) (Kavanaugh, J., dissenting from the denial of rehearing en banc); see also *West Virginia*, 142 S. Ct. at 2618 (Gorsuch, J., concurring) ("The framers believed that the power to make new laws regulating private conduct was a grave one that could, if not properly checked, pose a serious threat to individual liberty."). The provision of government benefits, in contrast, poses no similar risk of "significant encroachment into the lives" of individuals and the affairs of entities. *NFIB*, 142 S. Ct. at 665. Broad grants of authority to provide such benefits accordingly do not provide the same "reason to hesitate" when interpreting a statute. *West Virginia*, 142 S. Ct. at 2608. Neither the district court nor respondents have offered any sound basis for extending the major questions doctrine to this distinct context, where the agency is not claiming power to impose regulation on private parties in the first place.

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b. Even setting aside that fundamental distinction, this case lacks the other key features this Court has emphasized in invoking the major questions doctrine. Most obviously, this is not a case where the agency relied on statutory language that is "vague," "cryptic," "ancillary," or "modest." *West Virginia*, 142 S. Ct. at 2608-2610 (citation omitted). To the contrary, the relevant grant of authority at issue here is direct, concrete, and central to the HEROES Act, which authorizes the Secretary to provide student-loan-related relief to affected borrowers in enumerated circumstances, including national emergencies. See pp. 34-37, *supra*.

Relatedly, the asserted power is neither " 'transformative' " nor "sweeping." *West Virginia*, 142 S. Ct. at 2608, 2610 (citation omitted). Although the HEROES Act gives the Secretary powerful tools to address the situations encompassed by the Act, it applies only in a limited set of circumstances (including a "national emergency," 20 U.S.C. 1098bb(a)(1)); authorizes relief only for a defined class of individuals and entities, *e.g.*, 20 U.S.C. 1098ee(2) (defining "affected individual"); to accomplish limited objectives (such as "ensur[ing]" that affected individuals are not "placed in a worse position financially" in relation to their loans, 20 U.S.C. 1098bb(a)(2)(A)); through specific measures related only to student loans (waiving or modifying applicable student-loan requirements, 20 U.S.C. 1098bb(a)(1)). In keeping with those limits, the Secretary waived and modified certain terms of a federal benefit program to ensure that vulnerable student-loan borrowers would not be worse off in relation to their student loans due to the pandemic. This case is thus far afield from cases like *West Virginia*, where the Court found that the agency action at issue would have required a complete

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reorganization of American energy infrastructure, 142 S. Ct. at 2604, or *Alabama Association of Realtors*, where the Court could perceive "no limit" on the types of "measures [the agency's] interpretation would place outside the CDC's reach," from "mandat[ing] free grocery delivery to the homes of the sick or vulnerable" to "[o]rder[ing] telecommunications companies to provide free high-speed Internet service to facilitate remote work," 141 S. Ct. at 2489.

This is also not a case in which the agency lacks "'comparative expertise' in making [the relevant] policy judgments," *West Virginia*, 142 S. Ct. at 2613 (citation omitted), or has asserted authority that falls outside its "particular domain," *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489. Rather, the Department of Education, the agency responsible for administering federal student loans, has taken actions that apply only within th e scope of the federal student-loan program—and, indeed, only to loans held by the Department itself.

Nor has the Secretary relied on a "long-extant statute" to claim "unheralded power." *Utility Air*, 573 U.S. at 324. Since the HEROES Act's enactment in 2003, the Department has repeatedly invoked it to provide classwide relief to affected borrowers, see p. 7, *supra*, and since March 2020, both the Trump and Biden Administrations have invoked the Act to afford relief to all borrowers, see p. 8, *supra*. Those previous invocations of the Act had permanent and substantial economic effects. Most significantly, the previous COVID-19 relief measures, including the suspension of loan payments and interest accrual, are estimated to have cost the federal government $102 billion. See U.S. Gov't Accountability Office, *Student Loans: Education Has Increased*

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Federal Cost Estimates of Direct Loans by Billions due to Programmatic and Other Changes 14 (July 2022).

That across-the-board pause and the Secretary's more targeted debt-relief plan affect many more borrowers—and thus involve significantly higher costs—than the Secretary's pre-pandemic actions. But that reflects the pandemic's unparalleled scope, not any established understanding about the limits of the Secretary's authority. It is only natural that the Secretary's response to an unprecedented pandemic went "further than what the Secretary has done in the past" in response to less severe and less widespread exigencies. *Missouri*, 142 S. Ct. at 653.

The *Brown* district court suggested that "Congress's extensive consideration of various bills seeking to forgive student loans and failure to pass such bills" justified applying the major questions doctrine. J.A. 290. But each bill the court cited meaningfully differed from the relief the Secretary authorized.[3] The far more relevant congressional action is a measure included in pandemic-relief legislation enacted in 2021. At that time, when the possibility of forgiveness under the HEROES Act was already being publicly debated, Congress anticipated and facilitated the possibility of such relief by adopting a "Special Rule for Discharges in 2021 Through 2025" that makes student-loan discharges during that period tax-free. See American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9675(a), 135 Stat. 185-186 (capitalization altered); see also Sen. Menendez, Press Release, *Menen-*

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[3] See, *e.g.*, H.R. 2034, 117th Cong., 1st Sess. (2021) (proposing discharge of entire loan balances); H.R. 6800, 116th Cong., 2d Sess. § 150117(h) (2020) (omnibus $3 trillion relief package that included many other controversial provisions); S. 2235, 116th Cong., 1st Sess. (2019) (proposing discharge of up to $50,000 before the pandemic).

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dez, Warren Bill to Make Student Loan Relief Tax-Free Passes as Part of COVID Relief Package, Clearing Hurdle for Broad Loan Forgiveness (Mar. 6, 2021). That enacted legislation—far from indicating any disapproval of loan forgiveness under the HEROES Act—instead shows that Congress foresaw and provided for precisely the sort of relief the Secretary granted. See *Brown & Williamson*, 529 U.S. at 155 (emphasizing, in finding that a case presented a major question, that the Court was "not rely[ing] on Congress' failure to act—its consideration and rejection of bills that would have given the FDA this authority," but rather on the fact that "Congress has enacted several statutes" that created a "regulatory scheme * * * incompatible with FDA's jurisdiction").

c. Even if the major questions doctrine applied, it would not justify invalidating the plan. The central interpretive question in the case is whether the HEROES Act authorizes the Secretary to grant loan forgiveness. On that score, the Act's unambiguous text provides the "clear congressional authorization" that the major questions doctrine demands. *West Virginia*, 142 S. Ct. at 2609 (citation omitted). And the doctrine provides no support for respondents' various secondary arguments quibbling with the Secretary's application of the Act's other requirements in defining the details of the plan.

First, as explained above, see pp. 34-37, *supra*, the Act's key provision, on its face, authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education] Act" the Secretary deems necessary to respond to a "national emergency," "[n]otwithstanding any other provision of law," 20 U.S.C. 1098bb(a)(1). The terms governing loan re-

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payment and discharge are among the most basic statutory and regulatory provisions governing the federal student-loan programs; Congress's express grant of authority to the Secretary to waive and modify "any" such Title IV provision cannot plausibly be read to exclude such obvious candidates for debt relief without saying anything of the sort. The plan thus "fits neatly within the language of the statute," *Missouri*, 142 S. Ct. at 652; indeed, a central purpose of the HEROES Act is to authorize the Secretary to grant student-loan debt relief to mitigate economic harms borrowers face from national emergencies.

Nor is discharge of principal a type of debt relief that "'Congress could not have intended to delegate.'" *West Virginia*, 142 S. Ct. at 2608 (citation omitted). In various circumstances, Congress has specifically recognized that loan forgiveness can be an appropriate response to hardships experienced by borrowers. See, *e.g.*, 20 U.S.C. 1087(a) (authorizing discharge of Family Education Loans due to total disability or death); 20 U.S.C. 1087dd(c)(1)(F)(ii) (same for Perkins Loans); 20 U.S.C. 1087(c) (authorizing discharge of Family Education Loans due to school closure); 20 U.S.C. 1087dd(g) (same for Perkins loans); 20 U.S.C. 1087(c) (authorizing discharge of Family Education Loans due to school's false eligibility certification); 20 U.S.C. 1087e(h) (authorizing the Secretary to establish borrower defenses to repayment); see also 20 U.S.C. 1087a(b)(2) (applying same terms to Direct Loans). And Congress has elsewhere granted the Secretary the substantial "power[]" to "compromise, waive, or release any right, title, claim, lien, or demand" acquired in administering the Department's portfolio of loans, 20 U.S.C. 1082(a)(6)—authority the Secretary has many times exercised to discharge

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debts owed by student borrowers, including on a class-wide basis and for substantial amounts. See p. 4, *supra*; see *West Virginia*, 142 S. Ct. at 2613 (emphasizing that Congress "ha[d] not conferred a like authority upon EPA anywhere else in the Clean Air Act"). In short, "there is nothing surprising" about the Secretary providing for discharge—a quintessential form of debt relief Congress clearly could have contemplated—upon finding that relief necessary to ensure that borrowers are not left worse off as a result of the unprecedented global pandemic. *West Virginia*, 142 S. Ct. at 2613.

Statutory context fortifies that conclusion. The determination whether the HEROES Act clearly confers authority for the plan "must be 'shaped, at least in some measure, by the nature of the question presented,'" *West Virginia*, 142 S. Ct. at 2608 (citation omitted)—here, whether Congress would likely authorize the Secretary to provide the benefit of discharge to student-loan borrowers when warranted by a national emergency. A central purpose of the HEROES Act is to empower the Secretary to respond quickly and fully to such emergencies to ensure borrowers are not left worse off in relation to their student-loan debt. And because the Act involves only the provision of government benefits—and not any authority to impose regulation—the claimed power to discharge debt risks no countervailing intrusion on individual liberty. Under these circumstances, declining to give full effect to the statutory language authorizing the Secretary to "waive or modify *any* statutory or regulatory provision" governing the federal student loan programs by excluding discharge as a permissible form of debt relief would not implement Congress's intent, but instead override it. 20 U.S.C. 1098bb(a)(1) (emphasis added).

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Second, the major questions doctrine provides no support for respondents' challenges to particular features of the plan, including the Secretary's determinations about which borrowers should be eligible for relief and the amount of relief necessary to achieve the HEROES Act's purpose. Those subsidiary issues—such as whether $10,000 is an appropriate amount of relief, whether the plan's income-eligibility thresholds are justified, or whether Pell Grant recipients warrant additional consideration—are not the sort of fundamental questions of agency authority to which the doctrine applies. Instead, they are questions about the application of the Act to the particular factual circumstances presented by a specific emergency. The major questions doctrine provides no basis for imposing a clear-statement requirement for such subsidiary applications of an agency's statutory authority. And imposing such a requirement here would directly contradict Congress's decision to vest the Secretary with broad authority to provide class-wide relief as he "deems necessary" to achieve the Act's objectives. 20 U.S.C. 1098bb(a)(1).

In any event, the Secretary's plan directly targets those borrowers facing "a worse position financially" in relation to their student loans "because of" a national emergency, 20 U.S.C. 1098bb(a)(2)(A)—here, the COVID-19 pandemic. The evidence before the Secretary showed that borrowers with individual incomes below $125,000 were most likely to have experienced job loss, non-student-loan debt delinquency, and other material hardships as a result of the pandemic, and thus faced the highest risk of delinquency and default when student-loan repayment obligations resume. See J.A. 235-236, 245-251; p. 10, *supra*. And the evidence further

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showed that reducing the principal owed by such borrowers by the proposed amounts, and reducing their monthly payments accordingly, would ameliorate the "risk that delinquency and default rates will rise above pre-pandemic levels." J.A. 242; see J.A. 239-243; pp. 10-11, *supra*.

Contrary to the *Brown* district court's suggestion, therefore, the Secretary has not asserted the power to "use the HEROES Act to forgive student-loan debt" "in ten years * * * because of the COVID-19 pandemic." J.A. 293. Rather, the plan reflects the Secretary's determination that a one-time discharge of a limited measure of debt for a subset of affected borrowers is necessary when loan-repayment obligations resume to ensure that those borrowers are not placed in a worse position as they and the country work to recover from the immediate and devastating effects of COVID-19. Other emergencies may be different in kind, scope, or scale, and may call for different relief—but always subject to the terms of the HEROES Act, which limit (1) the circumstances in which the Secretary can act; (2) the class of individuals eligible for relief; (3) the objectives any relief must aim to accomplish; and (4) the measures the Secretary may implement. See pp. 50-51, *supra*.

B. The Plan Is Reasonable And Reasonably Explained

The States—but not Brown and Taylor—maintain that the Secretary's plan is arbitrary and capricious. No court has accepted that argument, and it is without merit.

1. The Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, authorizes a court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). "The scope of review under the 'arbitrary

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and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Although "the available data" often "do not settle a regulatory issue," *id.* at 52, "[t]he APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies," *FCC* v. *Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021). In assessing agency action, "[a] court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC* v. *Electric Power Supply Ass'n*, 577 U.S. 260, 292 (2016). Instead, to satisfy judicial scrutiny, an agency need only "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *State Farm*, 463 U.S. at 43 (citation omitted). The Secretary's action readily satisfies that deferential standard because it is both "reasonable and reasonably explained." *Prometheus*, 141 S. Ct. at 1158.

The Secretary reviewed the Department's "[p]ast experience with student loan borrowers transitioning back into repayment" after emergency-related forbearance; borrower surveys, economic studies, and credit analyses examining "current economic conditions facing borrowers" as a result of the pandemic; and evidence about the "substantial negative penalties" imposed on borrowers "who go delinquent or default on their student loans." J.A. 233-239 (capitalization altered; emphasis omitted); pp. 9-10, *supra*. The Secretary also considered whether "pandemic-connected loan discharge will reduce * * * delinquency and default rates"; the availability of "other options to reduce monthly pay-

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ments"; the "amount of debt to discharge" to "mitigate the risk that delinquency and default rates will rise above pre-pandemic levels"; and "borrower income threshold[s]" to confine relief to those borrowers "mo[st] likely to experience delinquency and default." J.A. 240, 242, 245 (capitalization altered; emphasis omitted); see J.A. 240-255; pp. 10-11, *supra*.

The Secretary found that, when loan-repayment obligations resume, many lower-income borrowers "will be at heightened risk of loan delinquency and default" due to the pandemic's continuing economic effects. J.A. 257. The Secretary further determined that "[a]dditional steps are needed to * * * ensure that borrowers are not in a worse position financially due to the pandemic with regard to their ability to repay their loans." J.A. 257-258. Accordingly, the Secretary reasonably determined—as part and parcel of the decision to end forbearance and restart repayments—that eligible borrowers with federal adjusted gross incomes below $125,000 ($250,000 for joint filers) should be afforded up to $10,000 in student-loan debt relief, and that Pell Grant recipients can receive up to $20,000. J.A. 258-259.

2. The States have argued (*Nebraska* Resp. 32-35) that the Secretary failed to consider alternatives, overlooked reliance interests, failed to justify key aspects of the plan, and offered pretextual justifications. Those criticisms lack merit.

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) (citation omitted). And here, the Secretary did consider the availability of reasonable alternatives. The supporting analysis considered whether discharge was necessary "even though borrowers have other options

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to reduce monthly payments, like income-driven repayment (IDR) plans." J.A. 241. The analysis determined that "[l]oan discharges" would reduce "delinquency and default risks" beyond what could be accomplished through "efforts to increase enrollment in IDR." *Ibid.* The Secretary likewise considered continuing the across-the-board pause on interest accrual and payment obligations for all borrowers. His decision to continue that pause until December 31, 2022, but resume payments after that date, J.A. 257-259, reflected his determination that the Department's objectives would be best served by resuming payments rather than indefinitely continuing forbearance—so long as lower-income borrowers could receive relief to address the difficulties they would face, *ibid.*

Nor did the Secretary ignore cognizable reliance interests in issuing relief to certain federal borrowers. The States have no cognizable interest in this action, see pp. 22-30, *supra*, let alone "'serious'" or "significant reliance interests." *Encino Motorcars, LLC* v. *Navarro*, 579 U.S. 211, 222 (2016) (citation omitted). This case bears no resemblance to *Regents*, where the Court found that the agency had ignored the interests of DACA recipients themselves in *rescinding* a program they had relied upon to "embark[] on careers," "purchase[] homes, and even marr[y] and ha[ve] children." 140 S. Ct. at 1914.

The States' contention (*Nebraska* Resp. 34) that the Department did not justify "key aspects" of the plan likewise fails. The supporting analysis explains at length how the Department arrived at the $125,000 income threshold, including by examining data showing that "[t]here is a break in repayment capacity at around $125,000" and that "borrowers with incomes between

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$100,000 and $124,000 have rates of payment inconsistency * * * nearly double what they are for those with incomes between $125,000 and $149,000." J.A. 245-246; see J.A. 235-237, 246-248. Given that the COVID-19 disaster spanned both 2020 and 2021, it was reasonable to consider borrowers' incomes from both years. J.A. 262. And the Secretary reasonably set the deadline to apply for relief to reflect the fact, emphasized in the Department's analysis, that lower-income borrowers often do not immediately apply for available relief. J.A. 241-242. The Secretary has "'wide discretion' in making [such] line-drawing decisions," *National Shooting Sports Found., Inc.* v. *Jones*, 716 F.3d 200, 214 (D.C. Cir. 2013) (citation omitted), particularly where the authorizing statute expressly contemplates such discretion, see pp. 36-37, *supra*.

Finally, the States' assertion (*Nebraska* Resp. 33-34) that the Secretary's decision was pretextual is based on legally irrelevant political statements that cast no doubt on the Secretary's stated explanation. A "court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities." *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2573 (2019). The statements on which respondents rely reflect, at most, the sort of policy and political considerations that "routinely" inform policymaking. *Ibid.* They do not come close to the "strong showing of bad faith or improper behavior" necessary before this Court looks behind an agency's stated rationale. *Id.* at 2574 (citation omitted); see *Biden* v. *Texas*, 142 S. Ct. 2528, 2546-2547 (2022).

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C. The Secretary's Action Was Procedurally Proper

Finally, Brown and Taylor—but not the States—argue that the Secretary's plan was procedurally defective. Indeed, that is the only claim Brown and Taylor asserted in their complaint: a single count that the Secretary "fail[ed] to follow proper rulemaking procedures" under the APA, 5 U.S.C. 701 *et seq*. Compl. 13 (capitalization and emphasis omitted); see D. Ct. Doc. 4, at 20 (Oct. 10, 2022) (brief in support of preliminary injunction raising only one merits argument: "The Department violated the APA by adopting the [plan] without following the proper rulemaking procedures.") (emphasis omitted); pp. 13-14, *supra*.

The district court correctly rejected that claim. The Secretary adopted the plan under the HEROES Act, which expressly exempts the Secretary from complying with "section 553 of title 5"—*i.e.*, the APA's notice-and-comment requirement—when issuing waivers and modifications under the Act. See 20 U.S.C. 1098bb(b)(1). All the HEROES Act requires "is that the Secretary publish the modifications" in the Federal Register. J.A. 287. Brown and Taylor do not dispute that the Secretary has done that here. See *ibid.* The Secretary therefore satisfied the applicable procedural requirements.

Brown and Taylor have nonetheless asserted (*Brown* Resp. 14-16) that the plan falls outside the HEROES Act's express exemption from notice-and-comment procedures because it exceeds the Secretary's substantive authority. But as the district court recognized, the notice-and-comment exemption does not depend on whether, as a substantive matter, the HEROES Act actually authorizes the Secretary's action. J.A. 287. The statute provides: "Notwithstanding [the APA's notice-and-comment provisions], the Secretary shall, by notice

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in the Federal Register, publish the waivers or modifications of statutory and regulatory provisions the Secretary deems necessary to achieve the purposes of this section." 20 U.S.C. 1098bb(b)(1). That text makes clear that the procedural exemption depends only on the Secretary's determination that the HEROES Act applies and that waivers or modifications are necessary—not on the substantive merits of the Secretary's plan.

In addition to their arguments based on the APA's notice-and-comment requirement, Brown and Taylor have invoked Section 1098bb(d) of the HEROES Act. Section 1098bb(d) specifies that a provision requiring the Secretary to proceed by negotiated rulemaking in certain circumstances "shall not apply to the waivers and modifications authorized or required" by the HEROES Act. 20 U.S.C. 1098bb(d). But that direction cannot plausibly be read to condition the procedural exception on the substantive validity of the Secretary's action. To the contrary, the referenced provision for negotiated rulemaking imposes requirements only on "proposed regulations" issued for public comment. 20 U.S.C. 1098a(b)(1) and (2). By its terms, that provision has no application where, as here, the Act provides an express exemption from notice-and-comment procedures and the Secretary need not issue "proposed regulations" at all. *Ibid.*

More broadly, Brown and Taylor's theory would subvert the distinction between procedural and substantive challenges. Many statutes authorizing agency actions include specific procedural provisions that govern actions taken pursuant to that statute. See, *e.g.*, 21 U.S.C. 360eee-2(e); 42 U.S.C. 7410; Department of Homeland Security Appropriations Act, Pub. L. No. 109-90, Tit. V, § 540, 119 Stat. 2088 (49 U.S.C. 114 note). If litigants

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could characterize a claim that the action was not "actually" authorized by the statute, *Brown* Resp. 15 (emphasis omitted), as a *procedural* challenge—based on the agency's use of the procedures associated with the asserted statutory basis for its action—many substantive challenges could be reconceptualized as procedural claims, providing a ready end-run around the "normal standards for redressability and immediacy." *Defenders of Wildlife*, 504 U.S. at 572 n.7. Respondents cite no decision by any court endorsing—or even entertaining—such an end-run.

In any event, the HEROES Act does authorize the student-loan-relief plan: As explained above, the Secretary's actions fall comfortably within the plain text of the Act. See pp. 34-57, *supra*. Accordingly, the Secretary's undisputed compliance with the procedural requirements of the HEROES Act refutes Brown and Taylor's challenge, even on its own terms.

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CONCLUSION

The judgment of the district court in *Nebraska* should be affirmed. The judgment of the district court in *Brown* should be reversed.

Respectfully submitted.

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1. 20 U.S.C. 1082(a) provides:

Legal powers and responsibilities

(a) General powers

In the performance of, and with respect to, the functions, powers, and duties, vested in him by this part, the Secretary may–

(1) prescribe such regulations as may be necessary to carry out the purposes of this part, including regulations applicable to third party servicers (including regulations concerning financial responsibility standards for, and the assessment of liabilities for program violations against, such servicers) to establish minimum standards with respect to sound management and accountability of programs under this part, except that in no case shall damages be assessed against the United States for the actions or inactions of such servicers;

(2) sue and be sued in any court of record of a State having general jurisdiction or in any district court of the United States, and such district courts shall have jurisdiction of civil actions arising under this part without regard to the amount in controversy, and action instituted under this subsection by or against the Secretary shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in that office; but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Secretary or property under the Secretary's control and nothing herein shall be construed to except litigation arising out of activities under this part from

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the application of sections 509, 517, 547, and 2679 of title 28;

(3) include in any contract for Federal loan insurance such terms, conditions, and covenants relating to repayment of principal and payment of interest, relating to the Secretary's obligations and rights to those of eligible lenders, and borrowers in case of default, and relating to such other matters as the Secretary determines to be necessary to assure that the purposes of this part will be achieved; and any term, condition, and covenant made pursuant to this paragraph or pursuant to any other provision of this part may be modified by the Secretary, after notice and opportunity for a hearing, if the Secretary finds that the modification is necessary to protect the United States from the risk of unreasonable loss;

(4) subject to the specific limitations in this part, consent to modification, with respect to rate of interest, time of payment of any installment of principal and interest or any portion thereof, or any other provision of any note or other instrument evidencing a loan which has been insured by the Secretary under this part;

(5) enforce, pay, or compromise, any claim on, or arising because of, any such insurance or any guaranty agreement under section 1078(c) of this title; and

(6) enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption.

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2. 20 U.S.C. 1098bb provides:

Waiver authority for response to military contingencies and national emergencies

(a) Waivers and modifications

(1) In general

Notwithstanding any other provision of law, unless enacted with specific reference to this section, the Secretary of Education (referred to in this part as the "Secretary") may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the Act [20 U.S.C. 1070 et seq.] as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide the waivers or modifications authorized by paragraph (2).

(2) Actions authorized

The Secretary is authorized to waive or modify any provision described in paragraph (1) as may be necessary to ensure that—

(A) recipients of student financial assistance under title IV of the Act who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals;

(B) administrative requirements placed on affected individuals who are recipients of student financial assistance are minimized, to the extent possible without impairing the integrity of the student financial assistance programs, to ease the burden on such students and avoid inadvertent, technical violations or defaults;

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(C) the calculation of "annual adjusted family income" and "available income", as used in the determination of need for student financial assistance under title IV of the Act for any such affected individual (and the determination of such need for his or her spouse and dependents, if applicable), may be modified to mean the sums received in the first calendar year of the award year for which such determination is made, in order to reflect more accurately the financial condition of such affected individual and his or her family;

(D) the calculation under section 484B(b)(2) of the Act (20 U.S.C. 1091b(b)(2)) of the amount a student is required to return in the case of an affected individual may be modified so that no overpayment will be required to be returned or repaid if the institution has documented (i) the student's status as an affected individual in the student's file, and (ii) the amount of any overpayment discharged; and

(E) institutions of higher education, eligible lenders, guaranty agencies, and other entities participating in the student assistance programs under title IV of the Act that are located in areas that are declared disaster areas by any Federal, State or local official in connection with a national emergency, or whose operations are significantly affected by such a disaster, may be granted temporary relief from requirements that are rendered infeasible or unreasonable by a national emergency, including due diligence requirements and reporting deadlines.

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(b) Notice of waivers or modifications

(1) In general

Notwithstanding section 1232 of this title and section 553 of title 5, the Secretary shall, by notice in the Federal Register, publish the waivers or modifications of statutory and regulatory provisions the Secretary deems necessary to achieve the purposes of this section.

(2) Terms and conditions

The notice under paragraph (1) shall include the terms and conditions to be applied in lieu of such statutory and regulatory provisions.

(3) Case-by-case basis

The Secretary is not required to exercise the waiver or modification authority under this section on a case-by-case basis.

(c) Impact report

The Secretary shall, not later than 15 months after first exercising any authority to issue a waiver or modification under subsection (a), report to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor and Pensions of the Senate on the impact of any waivers or modifications issued pursuant to subsection (a) on affected individuals and the programs under title IV of the Act [20 U.S.C. 1070 et seq.], and the basis for such determination, and include in such report the Secretary's recommendations for changes to the statutory or regulatory provisions that were the subject of such waiver or modification.

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(d) No delay in waivers and modifications

Sections 482(c) and 492 of the Higher Education Act of 1965 (20 U.S.C. 1089(c), 1098a) shall not apply to the waivers and modifications authorized or required by this part.

3. 20 U.S.C. 1098ee provides:

Definitions

In this part:

(1) Active duty

The term "active duty" has the meaning given such term in section 101(d)(1) of title 10, except that such term does not include active duty for training or attendance at a service school.

(2) Affected individual

The term "affected individual" means an individual who—

(A) is serving on active duty during a war or other military operation or national emergency;

(B) is performing qualifying National Guard duty during a war or other military operation or national emergency;

(C) resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency; or

(D) suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary.

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(3) Military operation

The term "military operation" means a contingency operation as such term is defined in section 101(a)(13) of title 10.

(4) National emergency

The term "national emergency" means a national emergency declared by the President of the United States.

(5) Serving on active duty

The term "serving on active duty during a war or other military operation or national emergency" shall include service by an individual who is—

(A) a Reserve of an Armed Force ordered to active duty under section 12301(a), 12301(g), 12302, 12304, or 12306 of title 10 or any retired member of an Armed Force ordered to active duty under section 688 of such title, for service in connection with a war or other military operation or national emergency, regardless of the location at which such active duty service is performed; and

(B) any other member of an Armed Force on active duty in connection with such war, operation, or emergency or subsequent actions or conditions who has been assigned to a duty station at a location other than the location at which such member is normally assigned.

(6) Qualifying National Guard duty

The term "qualifying National Guard duty during a war or other military operation or national emergency" means service as a member of the National Guard on

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full-time National Guard duty (as defined in section 101(d)(5) of title 10) under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under section 502(f) of title 32, in connection with a war, another military operation, or a national emergency declared by the President and supported by Federal funds.

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No. 22-506

In the Supreme Court of the United States

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, et al.,

Petitioners,

v.

STATE OF NEBRASKA, et al.,

Respondents.

On Writ of Certiorari before Judgment to the United States Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED

1. Whether State respondents have Article III standing.

2. Whether the Department of Education's loan-cancellation program exceeds the Secretary's statutory authority or is arbitrary and capricious.

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INTRODUCTION

This case calls on the Court once again to stop the administration from unlawfully invoking COVID-19 to assert power beyond anything Congress could have conceived. Previously, the Court stopped CDC's eviction moratorium. *Ala. Ass'n of Realtors* v. *HHS*, 141 S. Ct. 2485, 2490 (2021) (per curiam). Later, it stayed OSHA's vaccine-or-test mandate. *NFIB* v. *OSHA*, 142 S. Ct. 661, 666–67 (2022) (per curiam). Now, while President Biden declares the pandemic over, his Secretary of Education and Department of Education cite COVID-19 to justify the Loan Cancellation Program—an unlawful attempt to eliminate $430 billion of federal student-loan debt.

Canceling hundreds of billions of dollars in student loans—through a decree that extends to nearly all borrowers—is a breathtaking assertion of power and a matter of great economic and political significance. The Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act), Pub. L. No. 108-76, 117 Stat. 904 (Aug. 18, 2003)—which the Secretary has *never* used to cancel student loans—does not authorize the Program, much less with the clarity this Court's precedent requires.

The Act allows the Secretary to waive or modify existing provisions when necessary to keep certain borrowers from being placed in a *worse* position in relation to their loans because of a national emergency. But the Program places an estimated 43 million borrowers in a *better* position by eliminating *all* loan balances for 20 million and erasing up to $20,000 for over 20 million more. This vastly exceeds the Secretary's authority under the Act, and the Court

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should affirm the Eighth Circuit's decision to enjoin the Program.

STATEMENT

A. Federal Student Loan Framework

Title IV of the Higher Education Act (HEA) covers three types of student loans. First, the Perkins Loan Program allowed schools to issue loans partially funded by federal money until that program ended in 2017. 20 U.S.C. 1087aa *et seq*. Second, the Federal Family Education Loan (FFEL) Program, initiated in 1965, authorized non-federal entities to issue Department-insured loans. *Id.* 1071 *et seq.* That program ended in 2010, *id.* 1071(d), but some FFEL Loans are still held by non-federal entities, while the Department has acquired others, J.A. 213–15. Third, Direct Loans, which first issued in 1994, are federally funded, 20 U.S.C. 1087a *et seq.*, but serviced by non-federal entities, J.A. 68–93. Borrowers may use the consolidation process to convert their FFEL Loans into Direct Loans. 20 U.S.C. 1078-3; *id.* 1087e(g); 34 C.F.R. 685.220.

Congress has specifically identified when student loans may be discharged. It has created loan-forgiveness programs for specific groups of borrowers. *E.g.*, 20 U.S.C. 1078-11 (borrowers serving in areas of national need). Congress also allows loan discharge in a few unfortunate circumstances, such as when a borrower dies or becomes disabled. *E.g.*, *id.* 1087. And it permits discharge of remaining loan principal at the end of certain repayment plans. *E.g.*, *id.* 1098e(b)(7).

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When these congressionally prescribed cancellations are unavailable, Congress's charge to the Secretary is clear: "try to collect" the money owed. 31 U.S.C. 3711(a)(1). While the Secretary has some power to "compromise" claims, 20 U.S.C. 1082(a)(6), the Department's regulations narrowly confine that authority, 34 C.F.R. 30.70(e)(1) (incorporating standards from 31 C.F.R. part 902); 31 C.F.R. 902.2(a) (allowing compromise only in limited circumstances). And though that compromise authority has existed since 1965, see Higher Education Act of 1965, Pub. L. No. 89-329, §432(a)(6), 79 Stat. 1219 (Nov. 8, 1965), the Department admits that it has historically used that authority "on an individualized, case-by-case basis." *Sweet* v. *Cardona*, No. 19-cv-3674, D. Ct. Doc. 337, at 2 (N.D. Cal. Nov. 9, 2022). The Department did not invoke that power for targeted "group discharges" until 2019, and even now, that has occurred only a handful of times for attendees of specific schools engaged in malfeasance. *Ibid.*

Respondent States participate in the federal student-loan industry. The Higher Education Loan Authority of the State of Missouri (MOHELA) is a state "public instrumentality" that performs the "essential public function" of ensuring Missouri students "have access to student loans." Mo. Rev. Stat. §173.360. MOHELA services Direct Loans under a contract with the Department, J.A. 62–64, 68–93, and holds FFEL Loans that secure its bonds and provide "ongoing revenue streams," J.A. 64. Another state entity named the Arkansas Student Loan Authority (ASLA) holds FFEL Loans that provide the agency "a source of revenue." J.A. 133 ¶6. And the Nebraska Investment Council (NIC), which manages the State's assets,

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invests in FFEL-based student-loan asset-backed securities (SLABS). J.A. 103 ¶¶4–7.

B. The HEROES Act

Congress enacted the HEROES Act to assist active-duty military in the wake of the 9/11 terrorist attacks. Pub. L. No. 108-76. This uncontroversial measure passed by a 421-1 vote in the House, see 149 Cong. Rec. H2553–54 (Apr. 1, 2003)—with the one "no" vote later clarifying that he "meant to vote 'yea,'" 149 Cong. Rec. E663 (Apr. 3, 2003)—and a unanimous voice vote in the Senate, 149 Cong. Rec. S10866 (July 31, 2003). Congress's findings focus on affording relief to people serving in the "military" for "our nation's defense." 20 U.S.C. 1098aa(b)(1)–(6).

The Act authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" when "necessary in connection with a war or other military operation or national emergency." 20 U.S.C. 1098bb(a)(1). The waiver or modification must also "be necessary to ensure that" one of five specific statutory goals is achieved. *Id.* 1098bb(a)(2). The first is to ensure that "recipients of student financial assistance . . . who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." *Id.* 1098bb(a)(2)(A). The other four goals are to (1) "minimize[]" "administrative requirements" on "affected individuals" to avoid "defaults," (2) "modif[y]" various "calculation[s]" for determining financial "need," (3) excuse withdrawing students from "return[ing]" a grant "overpayment," and (4) provide

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"temporary relief" from requirements "rendered infeasible or unreasonable." *Id.* 1098bb(a)(2)(B)–(E). The Secretary "shall" publish notice in the Federal Register when acting under the HEROES Act. *Id.* 1098bb(b)(1).

In December 2003, the Secretary issued the first set of HEROES Act waivers and modifications. 68 Fed. Reg. 69,312 (Dec. 12, 2003). Those changes were modest. They provided flexibility when calculating affected individuals' needed funds, *id.* at 69,313–14, exempted withdrawing students from "repay[ing] an overpayment of grant funds," *id.* at 69,314, relaxed various paperwork and documentation requirements, *id.* at 69,314–18, provided short extensions of borrower notice requirements, *id.* at 69,315, delayed commencement of loan repayment, *id.* at 69,315–16, eased requirements for and restrictions on specific statutory deferment and forbearance options, *id.* at 69,316–17, paused "collection on defaulted loans," *id.* at 69,316, and excused certain disruptions in service or missed payment for existing loan-cancellation, rehabilitation, and reinstatement programs, *id.* at 69,316–17.

While the Secretary later extended these waivers and modifications (with slight changes), *e.g.*, 72 Fed. Reg. 72,947 (Dec. 26, 2007); 77 Fed. Reg. 59,311 (Sep. 27, 2012); 82 Fed. Reg. 45,465 (Sep. 29, 2017), they are the only instances in which the Secretary invoked the Act before COVID-19. None of them discharged borrowers' loan principal.

C. COVID-19 and Student Loans

On March 20, 2020, then-Secretary Betsy DeVos, without specifying her source of authority, announced a 60-day pause on payments and interest accrual for

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Department-held student loans. Dep't of Educ., *Delivering on President Trump's Promise* (Mar. 20, 2020), https://perma.cc/R7BG-GPSL. A week later, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which suspended until September 30, 2020, all payments due, interest accrual, and collection for Direct Loans and FFEL Loans held by the Department. Pub. L. No. 116-136, §3513, 134 Stat. 281 (Mar. 27, 2020). Later in 2020, Congress considered—but rejected—a COVID-relief bill that would have canceled up to $10,000 in student-loan debt. H.R. 6800, 116th Cong. §150117 (2020).

After the CARES Act payment pause expired, President Trump directed Secretary DeVos "to continue the temporary cessation of payments and the waiver of all interest on student loans held by the Department . . . until December 31, 2020." 85 Fed. Reg. 49,585, 49,585 (Aug. 8, 2020). In December 2020, Secretary DeVos published the first COVID-related HEROES Act notice in the Federal Register. 85 Fed. Reg. 79,856 (Dec. 11, 2020). That notice "modif[ied] the terms of the [payment pause] benefits provided under . . . the CARES Act such that they will continue to be provided to borrowers until December 31, 2020." *Id.* at 79,863. A subsequent HEROES Act notice extended that deadline until January 31, 2021. 86 Fed. Reg. 5,008, 5,008 (Jan. 19, 2021). Meanwhile, the Department's Office of General Counsel concluded that the HEROES Act does *not* authorize "mass cancellation . . . of student loan principal balances." Memorandum from Reed Rubinstein to Betsy DeVos at 6 (Jan. 12, 2021), https://perma.cc/D94K-A7AV (Rubinstein Memo).

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President Biden's administration repeatedly extended the payment pause through various press releases but did not publish a HEROES Act notice until October 2022. *E.g.*, Dep't of Educ., *Biden Administration Extends Student Loan Pause until January 31, 2022* (Aug. 6, 2021), https://perma.cc/CUC3-XXZ5 ("announc[ing] a final extension of the pause" and "a definitive end date"); Dep't of Educ., *Biden-Harris Administration Extends Student Loan Pause through May 1, 2022* (Dec. 22, 2021), https://perma.cc/F47Y-XR9Y; Dep't of Educ., *Biden-Harris Administration Extends Student Loan Pause through August 31* (Apr. 6, 2022), https://perma.cc/5CT7-8MVK ("the economy continues to improve and COVID cases continue to decline"); 87 Fed. Reg. 61,512, 61,513–14 (Oct. 12, 2022) (extending the CARES Act's "Suspension of Payments").

D. The Loan Cancellation Program

Just weeks after the CARES Act passed, then-candidate Biden said that Congress's "next recovery package will need to" include "an immediate cancellation of a minimum of $10,000 of student debt per person." Biden, *Joe Biden Outlines New Steps to Ease Economic Burden on Working People*, Medium (Apr. 9, 2020), https://perma.cc/7SLA-XJ8Z (Biden, Medium). Going further, he "propose[d] to forgive all undergraduate tuition-related federal student debt from . . . public colleges and universities for debt-holders earning up to $125,000." *Ibid.*

Months later, "Biden entered the presidency deeply skeptical of the idea" that "he had the authority" to unilaterally "writ[e] off large chunks of student loan debt." Stratford & Daniels, *How Biden*

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Finally Got to "Yes" on Canceling Student Debt, Politico (Aug. 25, 2022), https://perma.cc/H7X4-5URZ. So he reiterated his request for "Congress to immediately cancel $10,000 in student debt per borrower." Nova, *Biden Will Call on Congress to Forgive $10,000 in Student Debt for All Borrowers*, CNBC (Jan. 8, 2021), https://perma.cc/597N-2MTF. For the first year of his presidency, Biden was "consistent that Congress"—not the Department—"should cancel student loans." Friedman, *Biden Was Asked about $10,000 of Student Loan Cancellation. Here's What He Said.*, Forbes (Jan. 20, 2022), https://perma.cc/9ASL-PJ92. But when Congress did not act, and with the midterm election quickly approaching, the President took matters into his own hands.

On August 24, 2022, the President and the Department announced the Program through government websites and press briefings. J.A. 117–31, 195–207. Administration officials explained that "the President promised to provide targeted student debt relief" "[d]uring the [presidential] campaign" and was now "following through." J.A. 117–18. In an accompanying memorandum, the Department "formally rescinded" its prior position that the HEROES Act does not authorize the Secretary to cancel student-loan principal. 87 Fed. Reg. 52,943, 52,945 (Aug. 30, 2022).

The Program applies to Department-held Direct, FFEL, and Perkins Loans. 87 Fed. Reg. at 61,514. To be eligible, borrowers must have "an Adjusted Gross Income (AGI) below $125,000 for an individual taxpayer or below $250,000 for borrowers filing jointly . . . in either the 2020 or 2021 Federal tax

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year." *Ibid.* These income cutoffs include almost all borrowers because approximately 95 percent of households earn less than $250,000 annually. J.A. 112–13, 119. The Department will cancel up to $20,000 for eligible borrowers who received a Pell grant and $10,000 for those who did not. 87 Fed. Reg. at 61,514.

The Department's administrative documents do not discuss the Program's cost, but the Congressional Budget Office estimates that the Program will eliminate $430 billion of the outstanding $1.6 trillion in federal student-loan debt. Letter from Congressional Budget Office to Members of Congress 3 (Sep. 26, 2022), https://perma.cc/62FW-M6BQ (CBO Letter). Another analysis projects the Program will cost up to $519 billion over ten years. J.A. 108. The Department announced that roughly 43 million borrowers will be eligible for the Program, and 20 million "will have their debt completely canceled." J.A. 119.

The Department's August 24 Rationale Memo tries to justify the Program. J.A. 232–55. It speculates that borrowers face a risk of "delinquency and default" because the payment pause is ending and current "[e]conomic conditions" are difficult. J.A. 233–39. While maintaining that COVID-19 caused the current economic conditions, the Department's analysis admits that "other factors (such as Russia's invasion of Ukraine)" have "contributed" to those economic conditions, including the "rise of inflation." J.A. 238. Without considering any option except loan cancellation, the memo concludes that reducing principal balances would decrease most eligible borrowers' monthly payments by a few hundred dollars, which, in turn, would reduce their likelihood of default. J.A.

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240–44. The Secretary officially approved the Program at 9:25 a.m. the day he received the memo. J.A. 257–59.

Meanwhile, the Government has been undermining what the Department said in the Rationale Memo. As to the COVID-19 justification, the President declared "[t]he pandemic . . . over" in September 2022. *Biden Says COVID-19 Pandemic Is "Over" in U.S.*, CBS News (Sep. 19, 2022), https://perma.cc/6ZCB-TL65. And as to the current economic conditions, the White House announced that "household finances are *stronger* than pre-pandemic." Biden-Harris Economic Blueprint 29 (Sep. 2022), https://perma.cc/QFW5-DCAD (emphasis added).

The Program's details initially appeared only on the Department's website. J.A. 195–207. The website told "borrowers with privately held federal student loans," including FFEL Loans, that they could receive the Program's benefits "by consolidating . . . into the Direct Loan program." J.A. 201. This incentivized borrowers to consolidate those loans. See J.A. 133 ¶¶6–7. On September 29, 2022—the day this suit began, but after the complaint was filed—the Department edited its website to state that borrowers with non-federally held FFEL Loans can no longer become eligible "by consolidating," but that those who "applied to consolidate" before that date remain "eligible." J.A. 215. Compare D. Ct. Doc. 1 (suit filed at 9:54 a.m. Central), with Turner, *In a Reversal, the Education Dept. Is Excluding Many from Student Loan Relief*, NPR (Sep. 30, 2022), https://perma.cc/8S5Z-8VLC (suggesting the Department's website changed around 11:39 a.m. Eastern). The Department has

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never explained this change, but reports indicate that the agency sought to avoid judicial review because entities holding and investing in FFEL Loans were "widely seen . . . inside . . . the administration[] as presenting the greatest legal risk" to the Program. Stratford, *Biden Administration Scales Back Student Debt Relief for Millions Amid Legal Concerns*, Politico (Sep. 29, 2022), https://perma.cc/24Q2-DV7M.

A few weeks later, on October 12, 2022, the HEROES Act notice detailing the Program was published in the Federal Register. 87 Fed. Reg. at 61,512. It states that "the Secretary modifies the provisions of: 20 U.S.C. 1087, which applies to the Direct Loan Program under 20 U.S.C. 1087a and 1087e; 20 U.S.C. 1087dd(g); and 34 CFR part 674, subpart D, and 34 CFR 682.402 and 685.212." *Id.* at 61,514. The Secretary modified—but did not waive—those provisions, all of which address the discharge or cancellation of loans, by rewriting them to create a new loan-cancellation program. See *ibid.*

E. Proceedings Below

The day they filed suit, the States moved for a preliminary injunction, arguing that the Secretary exceeded his authority by approving the Program and that the Program is arbitrary and capricious under the Administrative Procedure Act (APA). J.A. 1–44. The district court denied the States' motion and dismissed the case for lack of standing. J.A. 135–51.

The Eighth Circuit enjoined the Program pending appeal. J.A. 160–67. Starting with standing, the court observed that "MOHELA obtains revenue from the accounts it services," its revenue "will decrease if a

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substantial portion of its accounts are no longer active," and this will produce an "unanticipated financial downturn." J.A. 164. The court also detailed the close relationship between Missouri and MOHELA: (1) Missouri's legislature created MOHELA; (2) MOHELA's board consists exclusively of individuals chosen by the governor and officials from other state agencies; and (3) state law requires MOHELA to contribute to the Lewis and Clark Discovery Fund (LCD Fund) in the State Treasury. J.A. 163. It "may well be," the court reasoned, that MOHELA is "an arm of the State of Missouri." J.A. 163–64 (collecting cases). Regardless, the Program's negative "financial impact on MOHELA . . . threatens to independently impact Missouri" by preventing or delaying MOHELA from satisfying its obligation to pay money to the State Treasury. J.A. 164.

The Eighth Circuit then explained that the States raised "substantial questions of law" and "the equities strongly favor an injunction considering the [Program's] irreversible impact." J.A. 165. Limiting the injunction's scope would fail to provide "complete relief" because MOHELA services millions of student-loan accounts nationwide. J.A. 165–66.

SUMMARY OF ARGUMENT

I. The States have standing to challenge the Program. *First*, the Program will inflict substantial financial losses on MOHELA, and those losses injure Missouri. MOHELA is a state-created and state-controlled public entity that performs essential public functions for the State. As such, MOHELA is part of Missouri, and the State has standing to challenge actions that impair MOHELA's finances. In addition,

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MOHELA's financial losses harm Missouri by threatening to reduce, delay, or otherwise hinder MOHELA's financial contributions to the State Treasury and the State's financial-aid programs.

Second, Nebraska, Iowa, Kansas, and South Carolina have standing because the Program threatens the direct loss of income from taxing student-loan discharges. The States are set to begin taxing those discharges after 2025, and many student loans will be discharged at that time. But the Program will reduce the number and amount of those loans *now*, which will inevitably decrease the States' future tax revenue. That establishes standing.

Third, when this suit began, Arkansas, Missouri, and Nebraska were suffering financial harm because the Program prompted borrowers to consolidate non-federally held FFEL Loans into Direct Loans. This widespread consolidation reduces the revenue that Arkansas's ASLA earns from its FFEL Loans, deprives MOHELA of FFEL Loans that generate interest income and secure bonds, and undermines Nebraska's investments in FFEL-based SLABS. The Government wants to ignore those harms because the Department removed the consolidation pathway to access the Program *after* this suit began. But that raises a mootness issue—not a standing question—and the Government has not met its heavy burden to show that it will not reopen the consolidation pathway.

II. On the merits, the Program exceeds the Secretary's authority under the HEROES Act. To begin, this is a major-questions case. Discharging almost a half-trillion dollars owed to the Department is, as the

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Government admitted below, undoubtedly a matter of economic and political significance. And the Secretary's unprecedented reading of the HEROES Act claims breathtaking and transformative power beyond his institutional role and expertise. In short, the Secretary's asserted cancellation power is the type of major question that courts presume Congress reserves for itself. That this case involves a government-benefit program is no cause to discard the major-questions doctrine because the doctrine's separation-of-powers underpinnings apply equally in this context as in others.

The Government has not shown colorable—let alone clear—congressional authorization for the Program. The HEROES Act permits the Secretary to keep borrowers from a "worse position" by maintaining the status quo. It does not allow the Secretary to put nearly every borrower in a better position by reducing or eliminating their principal balances. The Act also limits the Secretary to "waiving or modifying" statutory or regulatory provisions. Yet here, the Secretary's HEROES Act notice does not purport to "waive" the cited provisions, and his decision to rewrite those provisions to create a new loan-cancellation program goes way beyond "modifying" them. Nor did the Secretary sufficiently connect the Program to the COVID-19 emergency. His tenuous attempt to do so is a pretext masking his true purpose—to fulfill the President's campaign promise on student-loan forgiveness. The Program's broad scope also demonstrates its unlawfulness. It includes all but the top five percent of earners, and the Secretary's unpublished, self-reported data confirm that most eligible borrowers do *not* expect to need the relief given. This

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complete failure to tailor the Program exceeds the Secretary's authority.

III. The Program is also arbitrary and capricious. The Secretary did not consider *any* alternatives to help borrowers besides mass loan cancellation. Nor did he assess the States' legitimate reliance interests. Also glaring is the Secretary's failure to explain the abrupt shift in the consolidation pathway to eligibility. All these failures violate the APA.

ARGUMENT

I. The States have standing.

"[T]he presence of one party with standing is sufficient" for Article III. *Rumsfeld* v. *FAIR*, 547 U.S. 47, 52 n.2 (2006). Standing requires "(1) an injury in fact, (2) a sufficient causal connection," and "(3) a likelihood that the injury will be redressed by a favorable decision." *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 157–58 (2014) (cleaned up). The States satisfy these elements for three groups of injuries: (1) financial harms to Missouri through MOHELA; (2) lost revenue from taxing student-loan discharges; and (3) financial injuries from the consolidation of FFEL Loans into Direct Loans.

A. The impending financial harm to MOHELA will injure Missouri.

The Government does not seriously dispute that the Program will inflict great financial harm on MOHELA. Nor could it. Last fiscal year, MOHELA earned $88.9 million—roughly 77.5 percent of its operating revenue—from servicing 5.2 million Direct Loan accounts. MOHELA FY 2022 Financial State-

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ment at 4, 23, https://perma.cc/2F8G-WWWV (MOHELA Financial Statement). This revenue depends on how many accounts MOHELA services—the more accounts, the more it earns. J.A. 71–72. But the Department estimates that the Program will completely eliminate the debt of nearly half of all borrowers. J.A. 118–19. Because many of those borrowers have multiple accounts, see J.A. 94–101, the Program threatens at least half of the Direct Loan accounts MOHELA services—and likely more. That jeopardizes nearly 40 percent of MOHELA's total operating revenue—or $44 million annually. See MOHELA Financial Statement, *supra*, at 4, 23.

These financial losses establish Missouri's standing for two reasons: (1) MOHELA is a Missouri-created and -controlled public instrumentality, so its harms are harms to the State; and (2) MOHELA's losses jeopardize its financial contributions to Missouri.

1. Missouri has standing because MOHELA is a public instrumentality of the State. "Government-created and -controlled corporations are" often "part of the Government itself." *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995). Such corporations exist when the Government (1) "creates [the] corporation by special law," (2) "for the furtherance of governmental objectives," and (3) "retains for itself permanent authority to appoint a majority of the directors." *Id.* at 399. It matters not if those entities lack "sovereign immunity," *id.* at 392, or possess "the authority to-sue-and-be-sued," *Keifer & Keifer* v. *Reconstruction Fin. Corp.*, 306 U.S. 381, 390 (1939). "[T]he practical reality of [government] control and

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supervision prevails" over corporate labels. *Dep't of Transp.* v. *Ass'n of Am. Railroads*, 575 U.S. 43, 55 (2015).

Applying those factors, MOHELA is part of Missouri's government. First, the legislature created MOHELA by special law. Mo. Rev. Stat. §173.360. Second, Missouri declares that "the exercise by [MOHELA] of the powers conferred" on it, which include ensuring access to loans for Missouri students, is "the performance of an essential public function." *Ibid.* Third, the governor appoints five of MOHELA's seven members; the remaining two are officials of other state entities; and all seven are "remov[able] by the governor" for cause. *Ibid.*

Other considerations underscore Missouri's control over MOHELA. The State established MOHELA's powers, see *id.* §173.385, and in doing so controls MOHELA by limiting it to only those powers. Missouri also "assigned" MOHELA to its Department of Higher Education and Workforce Development and requires annual reports of MOHELA's finances. *Id.* §173.445. Additionally, the State preserved its authority "over assets of" MOHELA, *id.* §173.420, and may "abolish" MOHELA at its pleasure, see *Cas. Reciprocal Exch.* v. *Missouri Emps. Mut. Ins. Co.*, 956 S.W.2d 249, 255 (Mo. 1997) (en banc). And though not essential, MOHELA qualifies as a "public entity" entitled to sovereign immunity from tort claims under state law. See *id.* at 254 (discussing sovereign-immunity factors); *Todd* v. *Curators of Univ. of Missouri*, 147 S.W.2d 1063, 1064 (Mo. 1941) (immunity for entity that "may sue and be sued").

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Because MOHELA is a Missouri-created and -controlled entity, the State may sue in its name to vindicate harms to MOHELA. Indeed, Missouri law authorizes its Attorney General to sue "in the name and on the behalf of the state . . . to protect the rights and interests of the state." Mo. Rev. Stat. §27.060.

Caselaw involving federally created corporations supports Missouri's standing. It is "well settled" that "when the United States acts through the agency of a wholly owned corporation, it may sue in its own name for the protection of its interest, without the joinder of the corporation." *Ins. Co. of N. Am.* v. *United States*, 159 F.2d 699, 702 (4th Cir. 1947) (collecting cases). In *Cherry Cotton Mills* v. *United States*, 327 U.S. 536, 539 (1946), for example, when a private company sued the Government for a tax refund, the Court allowed the Government to counterclaim based on the interests of the federally created Reconstruction Finance Corporation (without joining the corporation as a party) because Congress created the corporation to achieve "Governmental purposes." Similarly, *Erickson* v. *United States*, 264 U.S. 246, 248–49 (1924), held that the Government's lawsuit over a contract dispute between the federally created Spruce Corporation and a third party was "a suit brought by the United States" regardless of whether the corporation "join[ed] in the suit." See also *Lebron*, 513 U.S. at 395–96 (discussing other cases treating government-created corporations as "part of the Government"). That the entity in each of these cases took a corporate form did not "make it something other than what it actually is, an agency selected by Government to accomplish purely Governmental purposes." *Cherry Cotton Mills*, 327 U.S. at 539.

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Precedent involving States is no different. For instance, *Arkansas* v. *Texas*, 346 U.S. 368, 370–71 (1953), held that "any injury" to the University of Arkansas was "an injury to Arkansas" because the legislature "created" the university, the governor "appointed" its board, the university "report[ed]" its finances to the State, and the university is "'a body politic and corporate' with power to issue bonds" (even though those bonds did "not pledge the credit of the State"). See also *Florida* v. *Anderson*, 91 U.S. 667, 675–76 (1875) (Florida's interest in a state-created entity controlled by state officials "is sufficiently direct to give [the State] standing"); cf. *Missouri* v. *Illinois*, 180 U.S. 208, 242 (1901) (Illinois was correctly "made a party" for the actions of a sanitary district that was "a public corporation . . . within the control of the state"). For similar reasons, Missouri has standing here.

The Government's argument ignores all that precedent, relying instead on general principles of "corporate separateness." Br. 28–29. The Government's primary case—*First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623–27 (1983) (*Bancec*)—involved foreign government corporations, recognized that corporate separateness often gives way when the corporation is controlled by another, *id.* at 629, and distinguished prior cases addressing "the legal status" of domestic "government instrumentalities" because they involved "contexts" not "relevant" there, *id.* at 623 n.12. By its own terms, then, *Bancec* did not displace the caselaw discussed above.

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The Government emphasizes that MOHELA has a measure of separation—mainly "financial separation"—from Missouri. Br. 29. But the Government overplays this. As explained above, MOHELA is controlled by the State because its members are chosen by the governor or are officials of other state entities; the State gave MOHELA all its powers and can dissolve MOHELA and take its assets; and MOHELA annually reports its finances to the State. Also, as discussed below, MOHELA owes money to the State and helps fund the State's financial-aid programs. More importantly, quibbling about the degree of financial separation is beside the point because government-created and -controlled corporations are part of the government even if they are "distinct . . . financially." *Lebron*, 513 U.S. at 394–95. Nor is it relevant whether MOHELA was "involved with the decision of the Missouri Attorney General's Office" to file this suit. Br. 29. The Attorney General alone decides whether to sue to protect the "interests of the state." Mo. Rev. Stat. §27.060.

2. Missouri also has standing because MOHELA's financial losses jeopardize its monetary contributions to the State. Allegations of future injury establish standing if "there is a substantial risk that the harm will occur." *Dep't of Com.* v. *New York*, 139 S. Ct. 2551, 2565 (2019) (citation omitted). When the harm is financial, a plaintiff need only show "a sufficient likelihood of economic injury," *Clinton* v. *City of New York*, 524 U.S. 417, 432 (1998), which exists when the challenged action "might entail some future loss," *Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 152 (1970). Missouri satisfies that standard.

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MOHELA transfers money to Missouri in two ways. First, MOHELA has given $245 million—and still owes $105 million—to the State's LCD Fund, see MOHELA Financial Statement, *supra*, at 20; Mo. Rev. Stat. §173.385.2, which supports "capital projects" at Missouri's "public colleges and universities," Mo. Rev. Stat. §173.392.2. Second, Missouri has authorized MOHELA to provide student financial aid, *id.* §173.385.1(19), and MOHELA has done so by contributing, at the governor's request, nearly $100 million over the last 12 years to the State's scholarship and grant programs, see J.A. 62; MOHELA Financial Statement, *supra*, at 10; Missouri Dep't of Higher Educ. and Workforce Development, Grants and Scholarships, https://perma.cc/4GR3-MDLD (listing the State's programs).

The Program's adverse "financial impact on MOHELA," as the Eighth Circuit held, "threatens to independently impact Missouri" by preventing or delaying MOHELA's contributions to "the LCD Fund." J.A. 164. The same is true of MOHELA's regular funding for Missouri's student-aid programs. By hindering MOHELA's contributions to the State, the Program risks financial injury to Missouri. See *Franchise Tax Bd. of Cal.* v. *Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990) (owners of subsidiaries "have Article III standing to challenge the taxes that their . . . subsidiaries are required to pay" because higher taxes on the subsidiaries "threaten[] to cause actual financial injury" to the owners); *Hunt* v. *Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 345 (1977) (state agency has standing when harm to the industry that pays assessments to the agency "could reduce the amount" it receives).

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The Government objects that this argument relies on "[g]uesswork about how the plan will affect MOHELA and how MOHELA will react." Br. 28. Not so. As explained, the Program jeopardizes at least half of MOHELA's operating revenue. See pp. 15–16, *supra*. Such a massive loss will reduce, delay, or stop MOHELA's contributions to Missouri. Indeed, MOHELA affirms that "*[a]ny available funds* above its operating needs and reasonable reserves are devoted . . . to student financial aid." C.A. Docket Entry Attachment at 1 (Nov. 1, 2022) (emphasis added). Crippling MOHELA's operating revenue will necessarily shrink its "available funds" to contribute to the State's "student financial aid." This "predictable effect" on MOHELA's contributions to the State goes beyond "mere speculation." *Dep't of Com.*, 139 S. Ct. at 2566.

The Government also argues that accepting this standing theory would allow "banks [to] sue anyone who causes financial harm to their borrowers." Br. 27. Yet unlike a bank's arms-length relationship with borrowers, Missouri created MOHELA, selects its members, tasked it with performing essential functions for the State, and directed it to return funds to the State. This case is thus akin to an entity challenging financial harm inflicted on a corporation that it controls and receives money from, which satisfies Article III. See *Alcan*, 493 U.S. at 336. Those situations are not comparable to a bank's relationship with its borrowers. Missouri is also dissimilar from a bank because of its quasi-sovereign interest in ensuring that Missouri students and universities have adequate funding for education. See *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 607 (1982) (State

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has "quasi-sovereign interest" in the "well-being—both physical and economic—of its residents").

B. The States are facing direct harm to specific tax revenues.

Nebraska, Iowa, Kansas, and South Carolina have standing because they will suffer a "direct injury in the form of a loss of specific tax revenues." *Wyoming* v. *Oklahoma*, 502 U.S. 437, 448 (1992). Those States use federal adjusted gross income (AGI) to calculate state taxable income. Neb. Rev. Stat. §77-2714.01(1); Iowa Code §422.7; Kan. Stat. Ann. §79-32,117(a); S.C. Code §12-6-40. Normally, federal AGI includes student-loan discharge. 26 U.S.C. 61(a)(11). But the American Rescue Plan Act of 2021 (ARPA) temporarily excludes those discharges from federal AGI until January 1, 2026. Pub. L. No. 117-2, §9675, 135 Stat. 4 (Mar. 11, 2021) (26 U.S.C. 108(f)(5)). The Program harms the States by immediately causing $430 billion in non-taxable loan discharges that will reduce the amount of future discharges for the States to tax.

The States have shown "a substantial risk that the harm will occur." *Dep't of Com.*, 139 S. Ct. at 2565 (citation omitted). Billions of dollars in student-loan principal are set to be discharged after 2025. Some of that will come from the Department's Income-Driven Repayment (IDR) plans, which cancel outstanding principal after borrowers make payments for 20 or 25 years. See 34 C.F.R. 685.221(f). Between 2026 and 2030, 1.2 million IDR loans will cross the 20- or 25-year threshold and become potentially eligible for forgiveness. U.S. Gov't Accountability Office, *Federal Student Aid: Education Needs to Take Steps to Ensure Eligible Loans Receive Income-Driven Repayment*

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Forgiveness 16 fig.3 (2022), https://perma.cc/4AAY-EE5K. Those 1.2 million loans collectively amount to billions of dollars. See *id.* at 10. But the Program will erase or reduce most of those loans now, J.A. 118–19, 242–43, and thus prevent the States from taxing them.

The direct and specific nature of this tax harm is akin to *Wyoming*. There, Wyoming had standing because the challenged Oklahoma law caused "a *direct* injury in the form of a loss of *specific* tax revenues"—a severance tax on extracted coal. *Wyoming*, 502 U.S. at 448 (emphases added). The States here similarly present a direct harm to specific tax revenues—income tax on student-loan discharges.

The *Wyoming* Court distinguished cases where States challenge actions that allegedly injure their "economy," which, in turn, "cause[] a decline in *general* tax revenues." *Ibid.* (emphasis added). That describes *Florida* v. *Mellon*, 273 U.S. 12, 17–18 (1927), which the Government cites, see Br. 23. Florida speculated that a federal inheritance tax would prompt taxpayers to take independent action—"withdraw-[ing] property from the state"—which might result in less overall property to tax. *Florida*, 273 U.S. at 17–18. Such an "indirect" effect on Florida's general tax revenues did not establish standing. *Id.* at 18. Here, however, the States challenge the loss of particular tax revenue that the Program directly causes. The Government is thus wrong to claim that recognizing the States' tax injury would give every State "standing to challenge almost any federal policy." Br. 24. It would give States no more standing than *Wyoming* allows.

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Moreover, the likelihood of the injury in this case exceeds that of prospective economic injuries accepted in other cases. In *Clinton*, federal action left groups on "[un]equal footing with their competitors," 524 U.S. at 427, thus "inflict[ing] a sufficient likelihood of economic injury to establish standing," *id.* at 432. And in *Association of Data Processing Service Organizations*, businesses alleged that agency action allowing new competitors "might entail some future loss of profits." 397 U.S. at 152. In both cases, it was unclear whether the plaintiffs would suffer actual economic harm. But here, the injury is near certain. Barring a change in the law, the States will resume taxing student-loan discharges, and the number and amount of the taxable discharges will be less because of the Program. Article III requires no more.

Nor is this a self-inflicted injury. Contra Br. 22–23. Such injuries describe situations when plaintiffs *respond to* defendants' allegedly unlawful conduct by inflicting harm on themselves. In *Clapper* v. *Amnesty International USA*, 568 U.S. 398, 415 (2013), the plaintiffs took "costly and burdensome measures" in reaction to suspected government surveillance. Similarly, in *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 664 (1976) (per curiam), the States' harms were "self-inflicted" because they voluntarily incurred a cost—tax credits to offset taxes their citizens paid to other States—in response to other States' actions. See also *FEC* v. *Cruz*, 142 S. Ct. 1638, 1647 (2022) (describing *Pennsylvania* as involving States' "independent response to taxes levied"). Yet here, the legal framework causing the States' harm existed before the Program. That harm is not self-inflicted.

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Even if the States could respond by changing their tax laws, that would not erase their injury. States have a sovereign right "to create . . . a legal code." *Alfred L. Snapp*, 458 U.S. at 601. Forcing States to exercise that power by upending their preferred system for calculating state taxable income is itself an injury, and "the possibility that a plaintiff could avoid [one] injury by incurring [another] does not negate standing." *Texas* v. *United States*, 809 F.3d 134, 156–57 (5th Cir. 2015), *aff'd by an equally divided court*, 579 U.S. 547 (2016); see also *Cruz*, 142 S. Ct. at 1647 (finding standing even though plaintiffs "chose to subject themselves to [the challenged] provisions"). That is why many circuits have declined to "treat[] the availability of changing state law as a bar to standing." *Texas*, 809 F.3d at 157; *accord California* v. *Azar*, 911 F.3d 558, 574 (9th Cir. 2018).

C. The Program prompted broad loan consolidation causing injury to the States.

When this suit began, the Program was injuring Arkansas, Missouri, and Nebraska by causing the widespread consolidation of non-federally held FFEL Loans into Direct Loans. Those three States' injuries, each of which is slightly different, are all cognizable.

First, Arkansas's ASLA held $100 million in FFEL Loans before the Program existed. J.A. 133 ¶6. In the first 35 days after the Program was announced, consolidation eliminated $5 to $6 million of those loans. J.A. 133 ¶7. Because ASLA's administrative fee is based on the amount of its FFEL Loans, the Program has reduced ASLA's revenue, J.A. 133 ¶8, and inflicted injury, see *Hunt*, 432 U.S. at 345 ("reduc[ing]

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the amount of [a state agency's] assessments" harms the agency).

Second, MOHELA also holds FFEL Loans, which it uses to secure bonds and provide a source of interest income. J.A. 64–65. Diminishing those FFEL Loans inflicts an "actual financial injury" by "reducing the return on [MOHELA's] investments." *Alcan*, 493 U.S. at 336.

Third, Nebraska invests tens of millions in FFEL-secured SLABS. J.A. 103 ¶¶4–7. Consolidating FFEL Loans raises repayment rates, which returns the SLABS's principal and ends the interest income early. See J.A. 57 ("incentive for FFEL[] Loan borrowers to consolidate" risks raising "repayment rates" and "increasing monthly distributions of principal"); J.A. 58–59 (FFEL-backed securities are undermined when "prepayments" of FFEL Loans increase because they "are consolidated under the Direct Loan Program"); J.A. 103 ¶8. This, too, is an injury in fact. *Alcan*, 493 U.S. at 336.

For all those consolidation-based injuries, causation is satisfied. See *Dep't of Com.*, 139 S. Ct. at 2565–66. The Program caused the injuries because it explicitly advised borrowers with privately held FFEL Loans that they could receive the Program's benefits "by consolidating . . . into the Direct Loan program." J.A. 201. Telling borrowers that they can erase up to $20,000 of student loans through consolidation is an irresistible incentive, as demonstrated by ASLA losing about six percent of its FFEL Loans in just 35 days. J.A. 133 ¶¶6–7. The States' "theory of standing thus does not rest on mere speculation about the decisions of third parties; it relies instead on the

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[demonstrated] effect of Government action on the decisions of third parties." *Dep't of Com.*, 139 S. Ct. at 2566. The Government's preferred precedent—*Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42–43 (1976)—is nothing like this case because *Simon* lacked evidence showing a link between the challenged action and the harm.

The final standing factor—redressability—was also satisfied "when the suit was filed." *Davis* v. *FEC*, 554 U.S. 724, 734 (2008) ("[T]he standing inquiry remains focused on . . . when the suit was filed."). Setting aside or enjoining the Program at that time would have eliminated the compelling incentive to consolidate and stopped the consolidation injuries.

The Government dismisses those consolidation harms because of a change the Department implemented *after* this suit began. Br. 25. The day the States sued but after the complaint was filed, the Department updated its website to say that borrowers with privately held FFEL Loans could no longer become eligible for the Program through consolidation. J.A. 215. Though the Government says that it decided to make this change "before the States sued," Br. 25, what matters is when reviewable agency action occurred, *Biden* v. *Texas*, 142 S. Ct. 2528, 2544–45 (2022), and that happened—at the earliest—when the website changed after suit was filed.

"It is the doctrine of *mootness*, not standing, that addresses whether an intervening circumstance has deprived the plaintiff of a personal stake in the outcome of the lawsuit." *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2607 (2022) (cleaned up). "[V]oluntary cessation does not moot a case unless it is absolutely clear

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that the allegedly wrongful behavior could not reasonably be expected to recur." *Ibid.* (cleaned up). Here, the Secretary cannot satisfy that "heavy" burden, *ibid.*, because the change is an obvious attempt "to insulate [his] decision from [judicial] review," *Knox* v. *SEIU, Local 1000*, 567 U.S. 298, 307 (2012), and the Department continues to express its desire "to provide relief to borrowers" with non-federally held FFEL Loans, J.A. 216.

These consolidation injuries allow the States to challenge both the Program's initial inclusion of the consolidation pathway and the Program's debt discharge. These inextricably intertwined features of the Program—both of which existed when the suit began—cannot be separated because consolidation's enticement hinged on the promise of debt discharge. Litigants have standing to challenge the various aspects of "the *one* Government action that causes their harm." *Cruz*, 142 S. Ct. at 1650.

II. The Program exceeds the Secretary's authority.

The Court should "hold unlawful and set aside" the Program because it exceeds the Secretary's "statutory . . . authority." 5 U.S.C. 706(2)(C). The major-questions doctrine applies because the Secretary's claimed power to cancel loan principal for virtually all borrowers is a matter of immense economic and political significance, a novel use of a 20-year-old statute, and a breathtaking and transformative assertion of power beyond the Secretary's institutional and policy expertise. This "counsels skepticism" toward the Secretary's action, and he has failed to establish "clear"—

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or even plausible—"congressional authorization" for the Program. *West Virginia*, 142 S. Ct. at 2614.

A. This is a major-questions case.

Analysis of an agency's statutory authority "must be 'shaped, at least in some measure, by the nature of the question presented'—whether Congress in fact meant to confer the power the agency has asserted." *West Virginia*, 142 S. Ct. at 2608 (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). Major-questions cases are those "in which the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *Ibid.* (cleaned up).

The major-questions doctrine is a constitutionally based clear-statement canon rooted in "both separation of powers principles and a practical understanding of legislative intent." *Id.* at 2609. The Court "presume[s] that Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Ibid.* (cleaned up). And the Court exercises "common sense as to the manner in which Congress is likely to delegate a policy decision of . . . economic and political magnitude." *Brown & Williamson*, 529 U.S. at 133.

Clear-statement rules "ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation." *Spector* v. *Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005) (plurality opinion). They "operate[] as a vital check on expansive and aggressive assertions of executive authority." *U.S. Telecom Ass'n* v. *FCC*, 855

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F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

1. The key major-questions factors are present here.

As the Government conceded below, see D. Ct. Doc. 27, at 41, the claimed authority to cancel loan principal for virtually all borrowers is a matter of great "economic and political significance." *West Virginia*, 142 S. Ct. at 2608. This one use of that power erases $430 billion owed to the Government, see CBO Letter, *supra*, at 3, and costs taxpayers more than a half-trillion dollars over ten years, J.A. 108. See *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (applying the doctrine when the economic effect was $50 billion). To put that in perspective, a 2007 House Report projected that the Public Service Loan Forgiveness program and forgiveness for borrowers working in areas of national need would collectively cost $2.6 billion over ten years. H.R. Rep. No. 110-210, at 69–72 (2007); see College Cost Reduction and Access Act, Pub. L. No. 110-84, §401, 121 Stat. 784 (Sep. 27, 2007) (20 U.S.C. 1087e(m)); Higher Education Opportunity Act, Pub. L. No. 110-315, §430, 122 Stat. 3078 (Aug. 14, 2008) (20 U.S.C. 1078-11). The Program dwarfs that by orders of magnitude. A half-trillion-dollar agency action is no "everyday exercise of federal power." *NFIB*, 142 S. Ct. at 665 (citation omitted).

The political significance is likewise undeniable. Student-loan cancellation is a matter of "earnest and profound debate." *Gonzales* v. *Oregon*, 546 U.S. 243, 267 (2006). The issue is "regularly in the top five issues in the correspondence that the White House receive[s] from Americans each week." Stratford &

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Daniels, *supra*. The President has also acknowledged the political importance by calling on Congress to cancel student debt. Nova, *supra*. Yet Congress has "conspicuously and repeatedly declined to enact" student-loan discharge bills, *West Virginia*, 142 S. Ct. at 2610, including one COVID-relief bill that would have canceled $10,000 for certain borrowers, *e.g.*, H.R. 2034, 117th Cong. (2021); H.R. 6800, 116th Cong. §150117(h) (2020); S. 2235, 116th Cong. (2019). Instead, Congress chose in the CARES Act to grant limited forgiveness by canceling Direct Loans only "for a recipient" who "withdraws" from school "as a result of" COVID-19. Pub. L. No. 116-136, §3508(c). Now, the Department is "attempting to work around the legislative process to resolve for itself a question of great political significance." *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (cleaned up).

Through the Secretary's broad reading of the HEROES Act, he claims "a breathtaking amount of authority." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. He asserts power to cancel student debt, of any amount, for any borrower, originating from any kind of federal student loan (Direct, FFEL, or Perkins), even a decade after a war, military operation, or national emergency begins. See J.A. 293; 20 U.S.C. 1098bb(a)(1) (applying to "any" loan program under "title IV" of the HEA). Under his view, the Secretary could erase all $1.6 trillion in outstanding loans, including those held by non-federal entities, if he thinks it warranted after the exigencies of an emergency have subsided. Courts rightly greet such assertions of "extravagant statutory power" with skepticism. *West Virginia*, 142 S. Ct. at 2609.

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While the Government says that the HEROES Act "applies only in a limited set of circumstances," Br. 50, any "national emergency declared by the President" triggers it, 20 U.S.C. 1098ee(4). Presidents routinely declare such emergencies over all sorts of matters. *E.g.*, 84 Fed. Reg. 4,949, 4,949 (Feb. 15, 2019) ("national emergency . . . at the southern border"); 74 Fed. Reg. 55,439, 55,439 (Oct. 23, 2009) ("H1N1 influenza pandemic"). So if future Presidents announce national emergencies about any far-reaching issue—such as climate change, inflation, gun control, or general economic conditions, cf. 86 Fed. Reg. 7,037, 7,037 (Jan. 20, 2021) (directing action "to confront the climate crisis"), the Secretary could erase hundreds of billions of dollars more in loans.

This broad assertion of power is also "unheralded." *West Virginia*, 142 S. Ct. at 2610. Until now, the Secretary has not "relied on the HEROES Act" during its 20-year history for the "mass cancellation . . . of student loan principal balances." Rubinstein Memo, *supra*, at 6. The Congressional Research Service agrees that "[c]ategorical cancellation . . . reflects a use of [the Secretary's] HEROES Act authority that is unlike past invocations." Cong. Rsch. Serv., *Statutory Basis for Biden Administration Student Loan Forgiveness* 1 (Sep. 13, 2022). Even the current administration's Office of Legal Counsel (OLC) suggests that "the direct cancellation of the principal balances of student loans would be a new application of the statute." 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 *12 (Aug. 23, 2022) (OLC Op.). "It is telling" that the Sec-

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retary "has never before adopted" a new loan-forgiveness program under the HEROES Act. *NFIB*, 142 S. Ct. at 666.

The Government denies that the Secretary asserts novel authority, citing the COVID-19 payment pause as a comparator. Br. 51. But the legality of that action presents "unresolved questions regarding the Secretary's authority," Cong. Rsch. Serv., *The Biden Administration Extends the Pause on Federal Student Loan Payments* 2–4 (Jan. 27, 2021), "never addressed by a court," *West Virginia*, 142 S. Ct. at 2610. Regardless, the payment pause is no analogue. It never discharged loan principal; its purpose and direct effect were to maintain borrower status quo; it originated during extreme exigencies at the outset of the pandemic; it cost a fraction of the Program; and Congress has at least partially approved it through the CARES Act, see Pub. L. No. 116-136, §3513. Even if the Government could identify instances where the pause's indirect effect reduces a borrower's total payments over the life of a loan, "there is an obvious difference" between directly erasing loan principal and an action "that may end up causing an incidental" reduction in total payments. *West Virginia*, 142 S. Ct. at 2613 n.4. The Program is not "just business as usual." *Ibid.*

This novel power is also a "transformative expansion" of the Secretary's authority. *Util. Air Regul. Grp.* v. *EPA*, 573 U.S. 302, 324 (2014) (*UARG*). Prior uses of the Act maintained borrower status quo, 85 Fed. Reg. at 79,863, relaxed various paperwork and documentation requirements, 68 Fed. Reg. at 69,314–18, provided short extensions of borrower notice re-

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quirements, *id.* at 69,315, and waived specific eligibility requirements for existing loan-forgiveness programs, *id.* at 69,317. The power exercised here is different in kind. The Secretary is no longer just administering loan-forgiveness programs; he is creating them. And he is not merely preserving the status quo for borrowers but elevating them far beyond their pre-emergency position.

The Secretary's broad cancellation authority likewise moves the Department outside its legitimate institutional role and "policy expertise." *West Virginia*, 142 S. Ct. at 2612. The agency is not equipped to "balanc[e] the many vital considerations of national policy implicated" when establishing a half-trillion-dollar loan-forgiveness program, including its impact on the national debt and funding levels for other federal programs. *Ibid.* That balancing is a task for Congress. Additionally, this invocation of the HEROES Act required the Secretary to speculate that COVID-19 is the main cause of the nation's "current economic conditions." J.A. 235–39 (capitalization omitted). Yet the Department has "no comparative expertise" in macroeconomics or the causes of national economic trends. *West Virginia*, 142 S. Ct. at 2613 (quoting *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2417 (2019)). By proffering a justification based on such analysis, the Secretary assumed a role beyond what Congress could have intended.

The Secretary's asserted cancellation authority is also "'incompatible' with 'the substance of Congress' regulatory scheme.'" *UARG*, 573 U.S. at 322 (quoting *Brown & Williamson,* 529 U.S. at 156). The HEA establishes specific classes of borrowers eligible for

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loan discharge and narrow circumstances when discharge is permitted. The Secretary's reading of the HEROES Act overrides those choices by authorizing him to craft new loan-cancellation programs whenever the President declares a national emergency—and even after he says the emergency is over. In addition, the HEA's "negotiated rulemaking" requirements recognize that Congress generally values notice, comment, and collaboration when the Department regulates on matters of student financial assistance. 20 U.S.C. 1098a(b)(2). It is implausible that Congress authorized the Secretary to engage in one of the Department's most costly actions ever—a half-trillion-dollar loan-cancellation program—without any rulemaking procedures. *Id.* 1098bb(b)(1).

2. The Government's efforts to avoid the major-questions doctrine lack merit.

The Government dismisses the major-questions doctrine because this case involves "a government benefit program." Br. 48. But as discussed, the doctrine rests on "separation of powers principles and a practical understanding of legislative intent" that "presume[s] . . . Congress intends to make major policy decisions itself." *West Virginia*, 142 S. Ct. at 2609. Those principles apply regardless of whether an agency is regulating private actors or administering a congressionally created benefit program. In both contexts, "an agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 374 (1986). So what matters is not whether the agency is regulating private parties or administering benefits, but

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whether it is exercising the type of power that courts would expect Congress to clearly delegate.

Unlike the Government's narrow view, the Court has recognized that major-questions cases "arise[] from all corners of the administrative state." *West Virginia*, 142 S. Ct. at 2608. Notably, *King* v. *Burwell*, 576 U.S. 473, 485–86 (2015), applied the doctrine to a government-benefit program—a federal tax-credit program under the Affordable Care Act—because those tax credits "involv[ed] billions of dollars in spending each year," "affect[ed] . . . millions of people," and presented a question of deep "economic and political significance." For the same reasons, the doctrine applies here.

The Government next argues that extending benefits to citizens does not "encroach[] into the lives of individuals and the affairs of entities." Br. 49 (quotation mark omitted). Yet the Secretary's asserted cancellation power—which applies to any loan under title IV of the HEA—reaches beyond Department-held loans. Accordingly, that claim of authority infringes the rights of those who hold and invest in non-federally held loans, those who service any federal student loans, and countless others "involved in student financial assistance programs." 20 U.S.C. 1098a(a)(1). More broadly, many federal benefit programs—including grants to college students, SNAP food benefits, and social security—affect the daily lives of tens of millions of people. It is baseless to suggest that the major-questions doctrine plays no role in those contexts.

The Government also argues that the ARPA provision making "student-loan discharges . . . tax-free"

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until 2025 "anticipated" that the Secretary would use the HEROES Act to cancel debt. Br. 52–53 (discussing Pub. L. No. 117-2, §9675). It did no such thing. Wholly apart from the HEROES Act, existing IDR programs—and other congressionally created loan-forgiveness programs—guarantee the ongoing discharge of student-loan debt under that ARPA provision. See pp. 23–24, *supra*. Thus, ARPA says nothing about what Congress thinks of the HEROES Act. Even if it did, "the views of one Congress as to the construction of a statute adopted many years before by another Congress have very little, if any, significance." *United States* v. *Sw. Cable Co.*, 392 U.S. 157, 170 (1968) (cleaned up).

Finally, the Government's reliance on *Biden* v. *Missouri*, 142 S. Ct. 647, 652–53 (2022) (per curiam), which affirmed CMS's COVID-19 vaccine mandate, is misplaced. Because CMS's "longstanding practice" is to impose infection-control measures, and because vaccine requirements are "a common feature" of the healthcare industry, the Court held that the vaccine mandate was a "straightforward and predictable" use of CMS's power. *Ibid.* But using the HEROES Act to cancel loan principal has never been the Secretary's practice. Nor is it straightforward or predictable to invoke a statute designed to keep borrowers from a "worse position," 20 U.S.C. 1098bb(a)(2)(A), and use it to put them in a decidedly better position by canceling their debt.

B. The Secretary lacks colorable—let alone clear—congressional authorization.

The major-questions rule requires the Secretary to demonstrate "clear congressional authorization" for

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the Program. *West Virginia*, 142 S. Ct. at 2609. A "plausible" or "colorable textual basis" will not do. *Ibid.* The HEROES Act fails to provide even plausible support for the Program.

The Act permits the Secretary to (1) "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" when (2) "necessary in connection with a . . . national emergency" and (3) "necessary to ensure that recipients of student financial assistance . . . who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." 20 U.S.C. 1098bb(a)(1)–(2)(A). This text does not authorize the Program for four reasons. First, keeping borrowers from a "worse position" does not permit the mass discharge of loan principal because that puts those borrowers in a better position. Second, the Program does not "waive or modify" the "statutory or regulatory provision[s]" the Secretary invokes. Third, the Secretary provides only a tenuous and pretextual "connection" to a "national emergency." Fourth, the Program's broad scope vastly exceeds the Secretary's power.

1. Keeping borrowers from a "worse position" does not permit the mass discharge of loan principal.

The HEROES Act permits action "necessary to ensure" that affected individuals "are not placed in a worse position financially in relation to [their] financial assistance." 20 U.S.C. 1098bb(a)(2)(A). The Secretary may do that through measures that main-

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tain the status quo. These include delaying commencement of loan repayment, 68 Fed. Reg. at 69,315–16, pausing "collection on defaulted loans," *id.* at 69,316, easing requirements for or restrictions on temporary deferment and forbearance options, *id.* at 69,316–17, and pausing ongoing payment obligations, 85 Fed. Reg. at 79,863. The Program goes much further. It creates a new loan-discharge program for nearly all borrowers that places them in a far *better* position by eliminating or reducing their loan principal. That exceeds the statutory authorization.

The other statutory bases for invoking the HEROES Act confirm this. See *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488 (construing the meaning of one sentence by consulting the powers in the next sentence); *UARG*, 573 U.S. at 320 ("words of a statute must be read in their context"). Besides keeping borrowers from a "worse position," the Act permits actions that (1) "minimize[]" "administrative requirements" on "affected individuals" to avoid "defaults," (2) "modif[y]" various "calculation[s]" for determining financial "need," (3) excuse withdrawing students from "return[ing]" a grant "overpayment," or (4) provide "temporary relief" from requirements "rendered infeasible or unreasonable." 20 U.S.C. 1098bb(a)(2)(B)–(E). That the "worse position" provision is set among such modest goals demonstrates that Congress did not give the Secretary power to cancel loan principal en masse. Plus, the Government's broad reading of the "worse position" clause would render superfluous some of the others, see *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988) (canon against

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surplusage), particularly the provision allowing adjustments to "administrative requirements" to avoid "defaults," 20 U.S.C. 1098bb(a)(2)(B).

Most telling is the provision allowing affected individuals who withdraw from school to keep a grant "overpayment." *Id.* 1098bb(a)(2)(D). This limited congressional authorization for specific students (withdrawing students) to retain certain aid otherwise owed to the Department (grant overpayments) strongly suggests that this is the only situation where the HEROES Act authorizes the Secretary to excuse the repayment of funds owed. "It would be anomalous for Congress to have so painstakingly described the [Secretary's] limited authority" to excuse the return of funds owed, "but to have given him, just by implication, authority to declare" over 40 million borrowers exempt from paying $430 billion owed to the Government. *Gonzales*, 546 U.S. at 262.

Even the OLC opinion that attempts to justify the Program illustrates why it exceeds the Secretary's authority. The opinion says that the Secretary must "put loan recipients back into the financial position they would be in were it not for the national emergency." OLC Op., 2022 WL 3975075, at *14. The Program does not do that. The Department estimated that for 20 million borrowers, the Program will wipe away *all* their loan balances. J.A. 242–43. And the "median debt" for another 23 million will "fall[] from $29,400 to $13,600." J.A. 243. That does not maintain or restore the status quo ante. It's a windfall.

The Government says the Program does not place borrowers in a "better position" because "reducing the[ir] principal" will "reduc[e] their monthly

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payments" and those lower monthly payments might "ameliorate the 'risk that delinquency and default rates will rise *above pre-pandemic levels*.'" Br. 43 (quoting J.A. 242). That blinks reality. Borrowers whose principal balances decrease by up to $20,000 are in a much better position. The Secretary has other tools, such as payment pauses and repayment extensions, to address his concerns over delinquency and default. Canceling principal for nearly all borrowers is not one of the available options.

The Government's multistep argument—that it is (1) erasing principal (2) to reduce monthly payments (3) to decrease delinquency and default—further establishes that the Secretary's actions are unprecedented. Past uses of the HEROES Act have directly prevented borrowers from being placed in a "worse position financially in relation to [their] financial assistance." 20 U.S.C. 1098bb(a)(2)(A). Pausing payments and interest accrual ensures that principal balances do not increase because of interest capitalization. 85 Fed. Reg. at 79,863. And waiving consecutive-work requirements for existing loan-cancellation programs guarantees that borrowers do not lose their place in those programs. 68 Fed. Reg. at 69,317. But erasing principal to reduce monthly payments in hopes that some of the tens of millions of eligible borrowers with remaining balances might not default "relates . . . far more indirectly" to protecting borrowers' loan status. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488. Such a "downstream connection . . . is markedly different" than what the Secretary has done in the past, *ibid.*, and thus confirms that he is exceeding his authority.

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The Government also claims that the agency has "substantial discretion" because the Secretary need only "deem" his action "necessary" or show it "may be necessary" to achieve the statutory goal. Br. 36–37. *Alabama Association of Realtors* is instructive on this point. The statute there similarly authorized the relevant official to take actions that "in his judgment are necessary" or "in his judgment may be necessary." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2487; see *Deem*, Black's Law Dictionary (11th ed. 2019) ("deem" means to "judge"). Despite that text, the Court did not defer to the CDC but rather invalidated its eviction moratorium because it exceeded the agency's authority. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488–89. The Court should do the same here because the mass discharge of debt for virtually all borrowers—like the eviction moratorium—is not the kind of power Congress bestowed.

Nor does *Webster* v. *Doe*, 486 U.S. 592, 600 (1988), see Br. 36–37, help the Government. The statute in *Webster* empowered the CIA Director to terminate employees when he "deem[s] such termination necessary *or advisable in the interests of the United States*." 486 U.S. at 594 (emphasis added). That language "exudes deference" to an agency, *id.* at 600, in a way that "deems necessary" does not.

The Government further contends that "there is nothing surprising" about this use of the HEROES Act because the Secretary has recently used his "compromise" authority in 20 U.S.C. 1082(a)(6) for a handful of targeted class-wide loan discharges benefitting attendees of certain corrupt schools. Br. 54–55. But

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the Department elsewhere admits that it has historically used this Section 1082(a)(6) "authority to compromise student loan debts on an individualized, case-by-case basis." *Sweet*, *supra*, D. Ct. Doc. 337, at 2. Though that compromise authority was part of the original HEA in 1965, see Pub. L. No. 89-329, §432(a)(6), the Department did not use it for group discharges until 2019—long after the HEROES Act was adopted—and the handful of class-wide discharges under that provision have benefitted only attendees of specific schools, *Sweet*, *supra*, D. Ct. Doc. 337, at 2. This recent and targeted group-discharge practice under a different statute says nothing about the HEROES Act. If anything, the absence of Secretary-imposed class-wide discharges when the HEROES Act passed confirms that Congress did not contemplate anything like the Program.

The Government repeatedly says that the Secretary needs to discharge loans if he hopes to "quickly" assist borrowers during a national emergency. Br. 6, 39, 44, 55. But the word "quickly" does not describe an agency announcing a loan-cancellation program two-and-a-half years after an emergency began. If acting swiftly is the purpose, the Secretary has other tools at his disposal, as past uses of the Act illustrate. Debt cancellation must await congressional action.

2. The Program does not waive or modify the cited statutory and regulatory provisions.

The Act authorizes the Secretary to "waive or modify any statutory or regulatory provision." 20 U.S.C. 1098bb(a)(1). The Program does not stay within those parameters.

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The four sets of provisions cited in the Secretary's HEROES Act notice, see 87 Fed. Reg. at 61,514, address the discharge or cancellation of different types of federal loans:

First, 20 U.S.C. 1087 and 34 C.F.R. 682.402 direct the Secretary to discharge FFEL Loans when students die or are disabled, 20 U.S.C. 1087(a), borrowers file for certain bankruptcy relief, *id.* 1087(b), school closures keep students from completing programs, *id.* 1087(c), schools falsely certify borrower eligibility, *ibid.*, or schools fail to refund loan proceeds owed to students, *ibid.*

Second, 20 U.S.C. 1087dd(g) orders the Secretary to cancel Direct Loans when school closures prevent borrowers from completing their programs.

Third, 34 C.F.R. 685.212 outlines other situations when the Secretary discharges Direct Loans, including for the reasons listed in 20 U.S.C. 1087 and various types of public service.

Fourth, 34 C.F.R. part 674, subpart D addresses the circumstances in which Perkins Loans are cancelled. Those reasons include death or disability, 34 C.F.R. 674.61, service in law enforcement, correctional facilities, or the military, *id.* 674.57, 674.59, and work as a teacher, *id.* 674.53, 674.55.

The Secretary claimed to "modif[y]" those provisions by announcing a new cancellation program. 87 Fed. Reg. at 61,514. But "modify" "means to change moderately or in a minor fashion." *MCI Telecomms. Corp.* v. *AT&T*, 512 U.S. 218, 225 (1994) (citing dictionaries); accord *Modify*, Black's Law Dictionary (11th ed. 2019) ("to make small changes"). Rewriting

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statutes and regulations to add a new cancellation program—with unique eligibility requirements and discharge amounts—"is effectively the introduction of a whole new regime" of loan cancellation. *MCI*, 512 U.S. at 234. It exceeds what the word "modify" permits.

The Secretary's HEROES Act notice does not purport to "waive" those provisions. See 87 Fed. Reg. at 61,514. That makes sense because "waiving" a provision refers to an "agency's discretionary decision to refrain from enforcing an existing statutory requirement." *Waiver*, Black's Law Dictionary (11th ed. 2019). To illustrate, the Secretary has "waiv[ed] the requirements" that "periods of service" for loan forgiveness "be uninterrupted and/or consecutive, if the reason for the interruption" is a national emergency. 68 Fed. Reg. at 69,317. The Program looks nothing like that. The Secretary is not excusing compliance with an eligibility requirement in existing loan-discharge provisions. Rather, he is crafting a new cancellation program.

On the Government's telling, the Secretary appropriately "eliminate[d] or reduce[d] the requirements . . . that establish . . . discharge eligibility." Br. 38. But in fact, he *ignored* those requirements, preferring instead to construct a new discharge program. Because that is neither a waiver nor a modification, the HEROES Act does not allow it.

In essence, the Secretary is trying to waive or modify the *amount of debt itself*. Congress knows how to give the Secretary power to "waive the amounts that students" owe. 20 U.S.C. 1091b(b)(2)(D)–(E). But the HEROES Act does not use that language. Rather,

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the Act authorizes the Secretary to "waive" or "modify" a "statutory or regulatory provision." Because the Secretary did not comply with those requirements, he exceeded his authority.

3. The Program rests on a tenuous and pretextual connection to a national emergency.

The Act requires a direct connection to a national emergency. It does so by demanding, first, that the Secretary's action be "necessary in connection with a . . . national emergency," 20 U.S.C. 1098bb(a)(1), and second, that borrowers face "a worse position financially in relation to [their] financial assistance *because of*" the emergency, *id.* 1098bb(a)(2)(A) (emphasis added). The Program—which the Department was implementing when the President declared the emergency over—does not satisfy those requirements.

The Secretary justifies the Program mainly by citing "current economic conditions." J.A. 235–39 (capitalization omitted). But those conditions are not solely—or even primarily—attributable to COVID-19. They are influenced by myriad factors, including global demand for products, geopolitical events, federal legislation, and Federal Reserve policies. See McCausland, *What Is Causing Inflation? Economists Point Fingers at Different Culprits*, NBC (Feb. 16, 2022), https://perma.cc/35VP-YBJQ. Even the Secretary admits that the cause of these economic conditions includes "other factors (such as Russia's invasion of Ukraine)." J.A. 238. The Secretary's "indiscriminate approach" to economic conditions—reminiscent of OSHA's invalid vaccine-or-test mandate—"fails to account for [the] crucial distinction" between

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economic risk from COVID-19 and economic "risk more generally." *NFIB*, 142 S. Ct. at 666.

The Secretary also says that the Program is needed because the payment pause is ending. J.A. 234–35. If the Secretary means that stopping payment pauses inherently prompts more defaults, then the Department—not COVID-19—caused the problem. Or if the Secretary thinks that resuming payments is concerning only because broader economic conditions are challenging, the end of the payment pause adds little to the analysis. Either way, the link between the Program and the pandemic is tenuous.

It is no surprise that the Program's connection to COVID-19 is weak. That rationale was a pretext for the President to fulfill his campaign promise once Congress declined his request to forgive student debt. The evidence of pretext is compelling: the President has long supported student-loan forgiveness, Biden, Medium, *supra*; the Secretary did not consider any relief options other than loan discharge, see pp. 50–51, *infra*; and the Program, which reaches all borrowers with incomes outside the top five percent of households, is not tailored to individuals financially harmed by the pandemic, see pp. 49–50, *infra*.

Make no mistake, the President is trying to address what he views as systemic failings in federal student-loan programs. In the administration's press briefing, officials complained that college costs have "nearly tripled" in 40 years and that student loans often impose a "lifelong burden" keeping borrowers from "a middle-class life." J.A. 117–18. Material that the Secretary cites, see J.A. 236 n.4, 241 n.19, con-

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firms that "chronic repayment struggles are *not* primarily the result of pandemic-related transitory financial shocks but are more systemic in nature." Akana & Ritter, *Expectations of Student Loan Repayment, Forbearance, and Cancellation*, Fed. Reserve Bank of Phila. 2 (2022), https://perma.cc/P5FA-ZSEN (emphasis added). Any perceived student-loans problem is thus not a COVID-19 crisis, and agencies cannot issue decrees directed at one concern under the guise of addressing a different emergency. If the Department succeeds here, "declarations of emergencies [will] never end," and "our Constitution's separation of powers . . . [will] amount to little." *NFIB*, 142 S. Ct. at 670 (Gorsuch, J., concurring).

4. The Program's broad scope exceeds the Secretary's authority.

The Program's vast scope also exceeds the Secretary's authority. For starters, the Secretary has not limited the Program to "affected individuals." 20 U.S.C. 1098bb(a)(2)(A). Even if affected individuals include every borrower in the country under the theory that all States have been "declared a disaster area," *id.* 1098ee(2)(C), the agency records never explain why the Program includes borrowers overseas. Contrary to what the Government says, *nowhere* did the Secretary "'determine[]' that . . . borrowers living and working abroad . . . have suffered 'direct economic hardship' due to the pandemic." Br. 35 (quoting 20 U.S.C. 1098ee(2)(D)).

Nor has the Department targeted "affected individuals" at risk of facing "a worse position financially in relation to" their loans "because of" COVID-19. 20 U.S.C. 1098bb(a)(2)(A). Many eligible borrowers—

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such as those whose earnings have *increased* substantially since the pandemic's onset—face no such peril. Even the Secretary's unpublished, self-reported data show that most borrowers earning any income whatsoever do *not* "expect to experience difficulty repaying loans." J.A. 247–48 & fig.3. When the Secretary's own evidence says the Program is unnecessary for most eligible borrowers, he has gone too far.

The Government argues that the phrase "may be necessary to ensure," 20 U.S.C. 1098bb(a)(2), permits the Secretary to craft an "overinclusi[ve]" policy. Br. 43–44. Yet broad overinclusiveness cannot be squared with the word "necessary." In this context, "necessary" must at least mean "important." *Ayestas* v. *Davis*, 138 S. Ct. 1080, 1093 (2018). This requires the Secretary to show that the Program is important to ensure included borrowers do not experience delinquency or default because of COVID-19. But including all borrowers except the top five percent of earners, regardless of how the pandemic affected them financially, does not come close to satisfying that standard.

III. The Program is arbitrary and capricious.

The Program is also "arbitrary" and "capricious" and should be "set aside" for five reasons. 5 U.S.C. 706(2)(A).

First, the Secretary did not consider *any* alternatives to the Program. "[W]hen an agency rescinds a prior policy its reasoned analysis must consider the alternatives that are within the ambit of the existing policy." *DHS* v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (cleaned up). The Secretary determined that he should decrease borrowers' monthly payments to limit delinquencies and defaults. J.A.

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240–44. But he jumped right to debt discharge and did not evaluate any other option—such as extending repayment periods—that would minimize the risk of delinquency and default or reduce borrowers' monthly payments. That failure "renders [the] decision arbitrary and capricious." *Regents*, 140 S. Ct. at 1913.

The Government insists that the Secretary did "consider[] . . . the availability of 'other options to reduce monthly payments.'" Br. 58–59. But he did not consider what *he* might do to reduce monthly payments; rather, the Rationale Memo simply observed that "*borrowers* have other options to reduce monthly payments, like income-driven repayment (IDR) plans." J.A. 241 (emphasis added). Nor did the Secretary determine that "loan discharges would reduce delinquency and default risks beyond what could be accomplished through efforts to increase enrollment in IDR." Br. 60 (cleaned up). The Rationale Memo never compared loan discharge against other options. The Government's post hac assertion that it considered alternatives "is not a substitute" for actually considering them. *Getty* v. *Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986).

Second, because the Department was "not writing on a blank slate, it *was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Regents*, 140 S. Ct. at 1915 (cleaned up). Nothing in the agency materials suggests the Department considered a single reliance interest.

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The Government accepts that it ignored the States' reliance interests but asserts that those interests are not "cognizable" or "serious." Br. 60. Yet the HEA itself recognizes the vital interests of the "groups involved in student financial assistance programs," including the States' roles as "lenders," secondary-market participants, and "loan servicers." 20 U.S.C. 1098a(a)(1). Tens of billions of dollars pass through the federal student-loan industry each year. Weissman, *An Extremely Important Statistic about Student Debt That Has Never Been Published*, Slate (Mar. 24, 2021), https://perma.cc/XRJ7-5QVL. It is specious to suggest that the interests of those industry participants are not serious. Besides, contesting "the strength of [the] reliance interests" does not excuse the agency's failure to consider them "in the first instance." *Regents*, 140 S. Ct. at 1913–14.

Third, the Secretary "failed to consider [other] important aspect[s] of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In particular, he did not assess the costs of the Program or mention the Department's general duty to recover on debt owed. See 31 U.S.C. 3711(a)(1). By focusing exclusively on the interest of borrowers, he showed no concern for any countervailing considerations.

Fourth, the Secretary failed to "reasonably explain[]" his arbitrary distinction between borrowers who applied to consolidate non-federally held FFEL Loans before September 29 and those who did not. *State Farm*, 463 U.S. at 52. Although the Government never attempts to explain this, it was apparently an attempt to avoid legal challenges to the Program. See

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Stratford, *supra*. Evading judicial review is not a "factor[]" Congress "intended [the Secretary] to consider." *State Farm*, 463 U.S. at 43.

Fifth, for all the reasons discussed above, see pp. 47–49, *supra*, the Secretary's reliance on COVID-19 as justification for the Program is "pretextual," and thus his action is unlawful. *Dep't of Com.*, 139 S. Ct. at 2573–76.

CONCLUSION

The Court should affirm the Eighth Circuit's injunction and reverse the district court's judgment.

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Nos. 22-506 and 22-535

In the Supreme Court of the United States

JOSEPH R. BIDEN, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

STATE OF NEBRASKA, ET AL.

DEPARTMENT OF EDUCATION, ET AL., PETITIONERS

v.

MYRA BROWN, ET AL.

ON WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND FIFTH CIRCUITS

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

No. 22-506

JOSEPH R. BIDEN, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

STATE OF NEBRASKA, ET AL.

No. 22-535

DEPARTMENT OF EDUCATION, ET AL., PETITIONERS

v.

MYRA BROWN, ET AL.

ON WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND FIFTH CIRCUITS

REPLY BRIEF FOR THE PETITIONERS

For the last three years, Americans with federally held student loans have had their payment obligations and interest accrual suspended under HEROES Act waivers and modifications first adopted by then-Secretary DeVos. That across-the-board suspension has provided essential financial relief to borrowers affected by the COVID-19 pandemic. But Secretary Cardona found, and respondents do not dispute, that resuming payments without additional relief would cause delinquencies and defaults to spike above pre-pandemic

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MO-AG-23-0462-A-001241

levels among vulnerable borrowers still recovering from the economic fallout of COVID-19. The Secretary responded to that looming crisis by again invoking the HEROES Act to provide one-time debt relief that will smooth the transition to repayment and ensure that an unprecedented pandemic does not leave lower-income borrowers worse off in relation to their loans.

Respondents ask this Court to deny that vital relief to tens of millions of borrowers, many of whom have already applied for and been approved to receive it. But respondents' briefs confirm that they lack standing to seek that profoundly disruptive result. The States have suffered no cognizable injury; instead, they assert harms to a separate legal entity that has chosen not to sue and harms they have inflicted upon themselves. Brown and Taylor, for their part, purport to want greater loan forgiveness but press a claim that would prevent the Secretary from granting HEROES Act relief to *anyone*—them included.

Respondents' arguments on the merits fare no better. Their assertion that the Secretary can never discharge loan principal contravenes the plain language of the HEROES Act, which authorizes the Secretary to waive or modify "any" student-loan provision to provide relief to borrowers affected by national emergencies. Respondents' attempt to invoke the major questions doctrine to override that clear text seeks not to implement Congress's intent, but to thwart it. Congress empowered the Secretary to respond to unforeseen emergencies by granting relief to student-loan borrowers. Discharge of principal is a paradigmatic form of financial relief falling squarely within that authorization. And the Secretary acted within the heartland of his authority—and in line with the central pur-

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pose and function of the HEROES Act—by granting that relief in response to a once-in-a-century pandemic that starkly disrupted the Nation's economy and borrowers' ability to repay their loans. The Secretary's interpretation is not just a plausible reading of the statute; it is the best reading. The Court should reject respondents' distortion of the Act and their effort to deny student-loan borrowers the relief that Congress authorized and that the Secretary deemed essential.

I. RESPONDENTS LACK ARTICLE III STANDING

"The standing inquiry focuses on whether the plaintiff is the proper party to bring th[e] suit." *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997). Respondents are not proper parties because the plan causes them no cognizable injury.

A. The States Lack Standing

1. The States principally argue (Br. 15-20) that the plan will harm the Missouri Higher Education Loan Authority (MOHELA) and that injury to MOHELA is injury to Missouri itself. But a corporation is a distinct legal person with separate interests from its creators and owners. See *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 163 (2001). Missouri chose to organize MOHELA as a corporation with legal personality, the capacity to sue and be sued, and "express financial separation" from the State—including "the lack of any obligation for Missouri to pay MOHELA's debts." J.A. 145. Having reaped the benefits of that separation, Missouri cannot now claim MOHELA's injuries as its own.

The States do not deny that, if MOHELA were a private corporation, it would have to sue in its own name to protect its interests. But they argue (Br. 16-20) that the normal rules do not apply because MOHELA was

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created and is controlled by a State rather than private shareholders. That argument has no basis in history or precedent.

"At the time of our founding, the existence of a separate legal person, with the capacity to sue and be sued, was precisely what set certain * * * state entities apart from the state itself." *Puerto Rico Ports Auth.* v. *Federal Maritime Comm'n*, 531 F.3d 868, 881 (D.C. Cir. 2008) (Williams, J., concurring), cert. denied, 555 U.S. 1170 (2009). Early Americans were familiar with "public corporations"—corporations "founded by the government for public purposes." *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 668-669 (1819) (opinion of Story, J.). A public corporation, no less than a private one, was regarded as a separate legal entity, with the capacity of "suing and being sued" in its own name "in all things touching its corporate rights and duties." *Id.* at 667. And a public corporation "maintained its separate identity" even if the State had "an unqualified financial interest in the corporation's success," granted it "sovereign powers," or regarded it as an "'integral part of the State.'" *Puerto Rico Ports Auth.*, 531 F.3d at 881 (Williams, J., concurring) (citation omitted).

This Court's precedents likewise recognize that for public as well as private corporations, "[t]he meaning of incorporation is that you have a [separate] person." *Sloan Shipyards Corp.* v. *United States Shipping Bd. Emergency Fleet Corp.*, 258 U.S. 549, 567 (1922) (Holmes, J.); see, *e.g.*, *United States* v. *Strang*, 254 U.S. 491, 493 (1921) ("Notwithstanding all its stock was owned by the United States [a corporation] must be regarded as a separate entity."). That principle explains, for instance, why municipalities do not have sovereign

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immunity: Because a municipal corporation is a legally distinct person, a suit against a municipality is not a suit against the State. See *Lincoln County* v. *Luning*, 133 U.S. 529, 530-531 (1890). In assessing standing, the States provide no reason to depart from the rule that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *First Nat'l City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-627 (1983); see *id.* at 625-626 (emphasizing the importance of respecting "the separate status of government instrumentalities" that have independent "assets and liabilities").

The cases cited by the States (Br. 16-19) do not show otherwise. The States principally rely (Br. 16-17) on *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), which held that Amtrak is a state actor because it is government-created and -controlled and exists to advance governmental objectives. *Id.* at 399. But the question whether a corporation is a state actor is different from the question whether it is a separate legal person. A municipality, for example, is a state actor, yet a suit against a municipality is not a suit against the State. *Lebron* thus establishes at most that MOHELA may be a state actor bound by the Bill of Rights, not that Missouri can establish standing by asserting that the plan injures MOHELA.

The States also invoke (Br. 19) *Arkansas* v. *Texas*, 346 U.S. 368 (1953), which held that a State could sue on behalf of a state university. But the Court did so only because the university *lacked* separate legal personality: The university could not sue or be sued in its own name; instead, state law treated "a suit against the University" as "a suit against the State." *Id.* at 370; see

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Allen Eng'g Co. v. *Kays*, 152 S.W. 992 (Ark. 1913) (cited in *Arkansas*, 346 U.S. at 370 n.9). Far from endorsing the States' theory, *Arkansas* reaffirmed the fundamental principle that a State "must, of course, represent an interest of her own and not merely that of her citizens or corporations." 346 U.S. at 370.

Finally, the States rely (Br. 18-19) on a handful of cases in which courts held that the United States or a State could sue to vindicate its *own* legal interests. In *Florida* v. *Anderson*, 91 U.S. 667 (1875), this Court held that Florida could bring a suit concerning trust property because Florida was the trust "beneficia[ry]" and thus had a "propriet[ary]" interest in the trust. *Id.* at 676. In *Cherry Cotton Mills, Inc.* v. *United States*, 327 U.S. 536 (1946), the Court held that the United States could assert a statutory right to set off a debt it owed to a taxpayer against a debt the taxpayer owed to a government-owned corporation whose "profits, if any, go to the Government" and whose "losses the Government must bear." *Id.* at 539. And in *Insurance Co. of North America* v. *United States*, 159 F.2d 699 (1947), the Fourth Circuit collected decisions recognizing that the United States may sue "for the protection of its interest" when a corporation has acted on its behalf. *Id.* at 702. One of the cited cases, for example, held that the United States may sue "on contracts entered into by [a corporation] as its duly authorized agent." *United States* v. *Czarnikow-Rionda Co.*, 40 F.2d 214, 216 (2d Cir.), cert. denied, 282 U.S. 844 (1930).[1]

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[1] In *Erickson* v. *United States*, 264 U.S. 246 (1924), the United States likewise "claim[ed] to have a direct and legal interest" in contracts made by a corporation on its behalf. *Id.* at 249. But it was unnecessary for the Court to decide whether the United States had standing to sue because the corporation was a plaintiff, a nd the

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The States' cases thus did not apply any special rule to governmental corporations; rather, they acknowledged that the government, no less than a private party, may sue to enforce its own legal rights. In this case, however, Missouri does not assert any legal rights of its own—whether under the law of trusts, the law of agency, a federal statute, or anything else. Instead, Missouri simply seeks to prevent an alleged injury to MOHELA, a legally separate person—with "revenues and liabilities" that are "completely independent of the State," J.A. 145—that could sue in its own name if it wished to press that claim. The States fail to cite even a single case allowing such a suit.

2. The States next argue (Br. 20-23) that MOHELA owes money to Missouri and that the plan's effects on MOHELA could cause it to miss those payments. That theory is both factually and legally deficient.

The States have alleged that MOHELA receives a fee for each loan it services and thus stands to lose revenue because the plan will result in the discharge of some of those loans. J.A. 29. But MOHELA also stands to earn offsetting fees for effectuating discharges under the plan, and the States have not alleged, much less shown, that any loss of servicing revenue would prevent MOHELA from fulfilling any of its financial obligations to the State. Nor have the States shown that any potential default would be caused by the plan as opposed to other circumstances; MOHELA has not made any payments to the relevant state fund since 2008 and announced before the plan that future payments were not "deemed probable." MOHELA FY 2022 Financial Statement at 21; see ArchCity Defenders Amicus Br. 15-18.

Court held only that the case fell within a statutory grant of jurisdiction over "suits brought by the United States." *Ibid.*

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Even if the plan increased MOHELA's risk of default, Missouri still could not bring this suit. The States appear to concede (Br. 22) that a bank cannot challenge a regulation that reduces one of its borrower's revenues, even if that reduction causes the borrower to default. The States argue (*ibid.*) that Missouri is less like a bank and more like a shareholder that "controls and receives money from" a corporation. But in keeping with the general rule that a plaintiff "'cannot rest his claim to relief on the legal rights or interests of third parties,'" even a shareholder that otherwise satisfies Article III ordinarily cannot "initiat[e] actions to enforce the rights of the corporation." *Franchise Tax Bd.* v. *Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990) (citation omitted). That is true even if the shareholder "controls" the corporation and "receives money from" it. States Br. 22.

3. Four States argue (Br. 23-26) that the plan will diminish their income-tax revenues because they have chosen to track the Internal Revenue Code's definition of gross income, which anticipates pandemic-related debt relief by excluding discharges of student loans between 2021 and 2025. But the States cannot reconcile that theory with the principle that no plaintiff "can be heard to complain about damage inflicted by its own hand." *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 664 (1976) (per curiam). The States note (Br. 25) that they adopted the federal definition of gross income before the Secretary announced the plan. But the same was true in *Pennsylvania*, where the Court emphasized that Pennsylvania could avoid the alleged injury by "withdrawing" a previously granted tax credit. 426 U.S. at 664. Regardless of the timing, the relevant point is that any "injuries to the plaintiffs' fiscs were

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self-inflicted, resulting from decisions by their respective state legislatures." *Ibid.* That analysis likewise refutes the States' argument (Br. 26) that they would suffer a legally cognizable injury by making changes to their "preferred system for calculating state taxable income." As in *Pennsylvania*, "[n]othing required" the States to adopt the federal definition of gross income, and "nothing prevents" them from abandoning that definition now. 426 U.S. 664.

Nor can the States reconcile their theory with the longstanding principle that a federal policy's "indirect" effect on state tax revenues is not an Article III injury. *Florida* v. *Mellon*, 273 U.S. 12, 18 (1927). Their reliance (Br. 23-24) on *Wyoming* v. *Oklahoma*, 502 U.S. 437 (1992), is misplaced. There, Oklahoma adopted discriminatory regulations with the avowed purpose of reducing purchases of coal from Wyoming. *Id.* at 443. The Court held that Wyoming had standing to invoke this Court's original jurisdiction and challenge the Oklahoma laws under the Commerce Clause because it had suffered "a direct injury in the form of a loss of specific [coal] tax revenues." *Id.* at 448. This is not a suit by one State against another in the forum the Constitution provides for resolving such disputes. Nor do the States claim that the Secretary targeted or discriminated against them. They allege, at most, that the plan will have incidental effects on their general tax revenues. And *Florida* establishes that such incidental effects from federal policies are not Article III injuries.

The States fail to identify any meaningful limit to their contrary view. Virtually every federal policy has incidental effects on state revenues. Labor policy affects incomes (and hence state income taxes); agricultural policy affects food prices (and hence state sales

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taxes); foreign policy affects oil prices (and hence state gasoline taxes); and housing policy affects real-estate values (and hence state property taxes). A system where any State can challenge any federal policy that incidentally affects its tax revenues would "make a mockery" of Article III. *Arizona* v. *Biden*, 40 F.4th 375, 386 (6th Cir. 2022) (Sutton, C.J.) (citation omitted).

4. Finally, three States argue (Br. 26-29) that the plan has encouraged borrowers to consolidate their Federal Family Education Loans into Direct Loans, harming state entities that hold or have invested in Federal Family Education Loans. But that theory, too, lacks merit.

The States acknowledge (Br. 28) that the plan as finalized by the Department and published in the Federal Register does not create an incentive to consolidate because it does not apply to loans consolidated on or after September 29, 2022. 87 Fed. Reg. 61,512, 61,514 (Oct. 12, 2022). The States assert (Br. 28) that this exclusion raises a question of mootness rather than standing because the Department "change[d]" the plan "after suit was filed." But the States sued on September 29, before the final version of the plan was published. Accordingly, there was no "change" (*ibid.*) to the plan as adopted, only a change to the Department's prior statements about what it *intended* to do. The States cite no authority suggesting that a plaintiff can transform a question of standing into a question of mootness by challenging an agency's action before it is finalized.

In addition, the States cannot dispute that the Department determined *before* this suit was filed to exclude loans consolidated on or after September 29. See 22-cv-1040 D. Ct. Doc. 27-1, at 4, 35, 47-48 (Oct. 7, 2022). Thus, the plan's eligibility requirements could not have

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created an incentive to consolidate during this litigation whether looking at the plan as finalized or at the Department's intent regarding the plan's scope when the States filed their complaint.

In any event, this suit would not be justiciable even if one accepted the States' premise that they had standing at the moment they filed their complaint. Under Article III, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (citations omitted). No actual controversy exists now because the plan as finalized does not create any incentive to consolidate.

The States invoke (Br. 28-29) the principle that the defendant's voluntary cessation of the challenged conduct does not normally moot a case. But the voluntary-cessation exception exists to ensure that a defendant does not stop the challenged conduct after being sued and then "return to his old ways" once the litigation ends. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953). This case does not raise any such concerns: The plan as adopted did not include the feature that the States challenge, so the allegedly wrongful behavior "could not reasonably be expected to recur," *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2607 (2022) (citation omitted). And that is particularly true because the Department decided to exclude loans consolidated on or after September 29 *before* the States sued. That timing makes clear that the decision was not a response to this suit.

B. Brown And Taylor Lack Standing

Brown and Taylor abandon the only claim on which the district court granted them relief—the substantive claim that the plan exceeds the Secretary's authority.

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They concede (Br. 32-33) that they "didn't bring" that claim, that the court committed an "analytical error" by deciding it, and that they "don't seek affirmance" on that basis. They instead pursue (Br. 3) a claim the district court rejected—that the plan is unlawful because it was promulgated without the required procedures. But Brown and Taylor do not have standing to bring that claim either.

Brown and Taylor argue that, when a plaintiff alleges a deprivation of a "procedural right," "the normal standards for redressability" do not apply, and the plaintiff need only show "some possibility" that the requested relief "will prompt the injury-causing party to reconsider the decision" that harmed her. Br. 22 (citations omitted). But their claim fails their own test.

Brown and Taylor contend (Br. 34-55) that, although the HEROES Act exempts certain actions from notice-and-comment and negotiated-rulemaking procedures, the exemption does not apply here because the plan exceeds the Secretary's substantive HEROES Act authority. A judgment based on that theory would not "prompt the [Secretary] to reconsider" the decision that allegedly harmed Brown and Taylor, Br. 22 (citation omitted)—*i.e.*, the decision not to extend HEROES Act relief to borrowers such as Brown and the decision to extend only $10,000 rather than $20,000 in HEROES Act relief to borrowers such as Taylor. Such a judgment would mean that no one could receive HEROES Act relief at all—a result that would in no way redress Brown's asserted injury, and that would cost Taylor $10,000.

Brown and Taylor concede that the judgment they seek would preclude the Secretary from granting HEROES Act relief to them or anyone else. But they hy-

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pothesize (Br. 30) that if the Secretary is prevented from providing relief under the HEROES Act, he might consider making an entirely *different* decision—granting debt relief under the Higher Education Act of 1965 (Education Act), 20 U.S.C. 1001 *et seq.*, a separate statute providing distinct authorities to be used for distinct purposes. And although Brown and Taylor broadly attack the idea of loan forgiveness in terms that are not limited to the HEROES Act, they assert without elaboration that the Education Act would authorize even greater relief for a wider class of borrowers, including them.

Brown and Taylor cite no decision endorsing their assertion that plaintiffs can establish standing to challenge an agency action that inflicts no injury on them by positing that invalidation of that action might prompt the agency to take some *other* action under a *different* statute. If Brown and Taylor would like the Secretary to grant them relief under the Education Act, they can ask for it, including by filing a petition for rulemaking. See 5 U.S.C. 553(e). But challenging the Secretary's separate decision to forgive the loans of other borrowers under the HEROES Act will not lead to the relief that Brown and Taylor purport to seek. Instead, all they could achieve by challenging that distinct decision is to deny HEROES Act relief to others (and to Taylor) without getting anything for themselves. They do not have standing to do that.

* * * * *

Respondents are classic ideological plaintiffs—persons who have suffered no concrete injury, but who sue to prevent the government from violating the law as they see it. In their rush to vindicate their view of Article II, respondents urge this Court to ignore well-

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established limits under Article III: Federal courts do not "exercise general legal oversight" over the Executive Branch. *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2203 (2021). Accepting respondents' convoluted theories of standing would flout that fundamental separation-of-powers principle. See Bray & Baude Amicus Br. 3-17.

II. THE PLAN IS LAWFUL

A. The HEROES Act Authorizes The Plan

The government's opening brief explained (at 34-46) that the plain text of the HEROES Act authorizes the Secretary's plan. In an effort to override the text, respondents invoke the major questions doctrine. But the doctrine does not apply here—and even if it did, the Act clearly authorizes the Secretary to discharge loan principal when the statute's requirements are satisfied. Respondents' other arguments—focused on details of the plan that cannot be characterized as major questions—likewise lack merit.

1. The Act clearly authorizes the plan

Respondents primarily argue that the HEROES Act does not authorize the Secretary to discharge loan principal under any circumstances. That is also the only interpretive issue that could even arguably raise a major question. But the Act's unambiguous text answers that question in the Secretary's favor.

The HEROES Act was enacted to authorize the Secretary to grant student-loan-related relief in enumerated circumstances. The Act's central provision empowers the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education] Act" that the Secretary "deems necessary" to "en-

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sure" that borrowers are not left "in a worse position financially" because of a national emergency. 20 U.S.C. 1098bb(a)(1) and (2)(A). Congress's express grant of authority to waive and modify "any" Title IV provision cannot plausibly be read to exclude the provisions governing loan repayment and discharge, which are among the most obvious candidates for waiver or modification under a statute designed to provide financial relief to borrowers affected by emergencies. Respondents' contrary arguments lack merit.

Respondents first assert that, while Section 1098bb(a)(2)(A) authorizes the Secretary to issue relief "'to ensure'" that borrowers "'are not placed in a worse position,'" discharge of principal inevitably places borrowers in a "*better* position." States Br. 39-40 (citation omitted). That is wrong. Like all other relief authorized by the HEROES Act, a discharge obviously puts borrowers in a better position than they would have occupied without that relief. But the relevant question is whether the relief ensures that borrowers are not left worse off "because of their status as affected individuals," 20 U.S.C. 1098bb(a)(2)(A)—that is, because of the emergency. And depending on the impact of the emergency, discharge of principal may be necessary to ensure that borrowers are not in a worse position to repay their student loans.

This case illustrates the point. The Secretary determined that when payments resume, lower-income borrowers are likely to experience *higher* default and delinquency rates than they did before the pandemic. That conclusion was supported by data documenting the pandemic's severe financial consequences, particularly on lower-income borrowers' ability to repay outstanding loans. The Secretary thus acted to ensure affected

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borrowers would not be left in a "worse position" as a result of the pandemic by reducing their loan burden in amounts sufficient to ameliorate the "risk that delinquency and default rates will rise *above pre-pandemic levels*." J.A. 242 (emphasis added).

Respondents likewise err in asserting (States Br. 44-47; Brown Br. 48-49) that the HEROES Act does not authorize the Secretary to waive or modify the Title IV provisions governing loan cancellation and discharge. See J.A. 261-262 (Secretary's memorandum "issuing waivers and modifications" of 20 U.S.C. 1087, 1087a, 1087e, 1087dd(g); 34 C.F.R. Pt. 674, Subpt. D, 682.402, 685.212); 87 Fed. Reg. at 61,514 (same). Nothing in the Act—which grants the Secretary power to waive and modify "any" Title IV provision—indicates that those provisions are uniquely off limits. Thus, to effectuate the plan, the Secretary waived and modified the loan cancellation and discharge provisions to permit a one-time discharge in an additional circumstance: to assist borrowers affected by the continuing economic fallout of a global pandemic who satisfy defined criteria for relief. That action accords with a straightforward understanding of the statutory verbs, which authorize the Secretary to eliminate or change the requirements imposed by any Title IV student-aid provision.

Citing *MCI Telecommunications Corp.* v. *AT&T Co.*, 512 U.S. 218, 225 (1994), respondents assert (States Br. 45; Brown Br. 48-49) that "'modify' 'means to change moderately or in a minor fashion.'" But unlike in *MCI*, the term "modify" here is part of a phrase granting broader authority to "waive or modify," and respondents do not dispute that the term "waive" empowers the Secretary to eliminate legal obligations in their entirety. It would make little sense to construe

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the Act to allow the Secretary to eliminate legal obligations wholesale or to alter them to a marginal degree, but nothing in between. Instead, "Congress granted the Secretary the power both to eliminate legal obligations ('waive') and to reduce them to any extent short of waiver ('modify') as long as the other requirements of the statute are satisfied." 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 *8 (Aug. 23, 2022).

Respondents suggest (States Br. 46; Brown Br. 49-50) that the Secretary can only eliminate requirements but never add them. But the HEROES Act specifically contemplates that when the Secretary publishes waivers and modifications in the Federal Register, he will also publish "the terms and conditions to be applied in lieu of such statutory and regulatory provisions." 20 U.S.C. 1098bb(b)(2). That is precisely what the Secretary did here, publishing the eligibility criteria for the one-time discharge alongside the relevant waivers and modifications. 87 Fed. Reg. at 61,514.

Finally, the States err in asserting (Br. 40-41) that discharging loan principal to ensure that affected borrowers "are not placed in a worse position financially" due to an emergency, 20 U.S.C. 1098bb(a)(2)(A), would render superfluous or conflict with the other waivers and modifications authorized in subparagraphs (B)-(E). Those provisions address different circumstances and impose different requirements. Subparagraph (B) addresses "administrative requirements," not borrowers' ability to pay. Subparagraph (C) deals with students seeking financial assistance, not repayment of loans already received. Subparagraph (D) addresses students who withdraw from school early; the statute

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allows the Secretary to waive otherwise-applicable repayment obligations but—unlike subparagraph (A)—does not condition relief on the student's financial position. And subparagraph (E) addresses lenders and schools, not borrowers.

The States are wrong to contend (Br. 40) that the purportedly "modest" scope of those other provisions compels an atextually restrictive reading of subparagraph (A). In fact, each provision addresses a particular context and authorizes the Secretary to provide complete relief in that context. For example, subparagraph (D), on which the States principally rely (Br. 41), allows the Secretary to entirely eliminate a special repayment obligation imposed on withdrawing students. Congress's inclusion of those other authorities to ensure that the HEREOS Act covers the waterfront of applicants, students, borrowers, and others involved in the student-loan program simply confirms that Congress authorized the Secretary to fully respond to national emergencies—including discharging principal when necessary to avoid leaving borrowers in a worse position financially in accordance with subparagraph (A)'s plain language.

2. The major questions doctrine provides no basis to override the clear terms of the HEROES Act

Respondents seek to avoid the HEROES Act's text by invoking the major questions doctrine. But that doctrine should not be extended to strip the Secretary of his clear statutory authority to provide essential debt relief to student-loan borrowers. The Secretary's determination that the HEROES Act empowers him to discharge loan principal falls comfortably within the authority that Congress could reasonably be expected to have granted in a statute specifically authorizing him to

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respond to a crisis by modifying any of the requirements of a government benefit program at the heartland of his expertise and existing authority. Respondents' contrary arguments seek to transform the major questions doctrine from an interpretive principle grounded in "a practical understanding of legislative intent," *West Virginia*, 142 S. Ct. at 2609, into a straitjacket that would thwart Congress's ability to empower agencies to respond to unforeseen events.

a. Respondents assert (States Br. 1, 29, 31-32, 37; Brown Br. 41-44) that the plan's "economic and political significance," without more, triggers the major questions doctrine. But heightened-specificity requirements do not apply simply because courts consider agency action to be significant, whether economically or politically; indeed, this Court has often decided challenges to highly significant actions without invoking any clear-statement requirement. See Gov't Br. 47. The question is not simply whether the agency action meets some (ill-defined) threshold of significance, which would hardly confine the major questions doctrine to exceptional cases, see *West Virginia*, 142 S. Ct. at 2609; the Court has instead demanded an *additional* showing that the claimed power is such an "[e]xtraordinary grant[] of regulatory authority" that it extends "beyond what Congress could reasonably be understood to have granted." *Ibid.*

In addition, respondents' assessment of the plan's "significance" is itself flawed. Brown and Taylor argue (Br. 42) that the plan's economics are "considerably larger" than the costs of regulatory actions in "other cases applying the major questions doctrine." But each of the cited cases involved agency action that imposed *regulatory burdens*, rather than (as here) offering addi-

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tional *benefits*. See pp. 21-22, *infra*. The plan's scale, moreover, reflects the size of the federal student-loan portfolio (approximately $1.63 trillion), the number of borrowers (approximately 43 million), and the unprecedented scope of the once-in-a-century COVID-19 pandemic (which has triggered over $5 trillion in government spending on other relief measures, see Alicia Parlapiano et al., *Where $5 Trillion in Pandemic Stimulus Money Went*, N.Y. Times (Mar. 11, 2022)).

Similarly, as evidence of the plan's political significance, respondents emphasize (States Br. 32; Brown Br. 42-44) Congress's refusal to enact three student-loan-relief bills. But the cited bills differed markedly from the plan: one preceded the pandemic, another proposed substantially greater relief, and the third appeared in an omnibus multi-trillion-dollar relief package containing several contested provisions. Gov't Br. 52 & n.3. The more reliable indicator of congressional intent is the *enacted* legislation specifically anticipating pandemic-related loan forgiveness under the Secretary's existing authority by providing a special tax exemption from 2021-2025. *Id.* at 52-53. And if any inference is to be taken from unenacted legislation, it cuts against respondents: Congress refused to enact several bills that would have amended the HEROES Act to forbid discharge of loan principal.[2]

b. Context matters in determining how Congress is likely to legislate—and every case in which this Court has invoked the major questions doctrine to invalidate

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[2] See, *e.g.*, Stop Reckless Student Loan Actions Act of 2022, H.R. 7656, § 4(d), 117th Cong., 2d Sess. (2022) (seeking to amend the HEROES Act to provide that the Secretary "may not cancel the outstanding balances, or a portion of the balances, on covered loans due to the COVID-19 national emergency").

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an agency action involved the power to regulate, not the provision of government benefits. The States invoke (Br. 37) *King* v. *Burwell*, 576 U.S. 473 (2015), but the Court did not impose a clear-statement requirement of the sort respondents urge here; instead, *King* held only that the IRS's interpretation of the statute was not entitled to deference—and nevertheless *upheld* the agency's action. *Id.* at 485-486.

Respondents offer no persuasive reason to extend the major questions doctrine to this distinct context. They argue that agency determinations about federal benefit programs can affect individuals, States Br. 37, or involve substantial sums, Brown Br. 47, but neither feature justifies requiring clearer-than-ordinary congressional authorization. This Court has instead reserved such "skepticism" for cases in which an agency has claimed expansive authority to *regulate* private conduct. *West Virginia*, 142 S. Ct. at 2609 (citation omitted). Here, in contrast, Congress authorized an agency to provide government benefits as a lifeline in response to national emergencies that wreak financial havoc on citizens' lives and ability to pay their student loans. "[C]ommon sense as to the manner in which Congress is likely to delegate," *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), supports interpreting that statutory authority in accordance with its plain meaning—not imposing on Congress the near-impossible burden to identify and enumerate every possible application of the statute to various future crises. The separation-of-powers principles that respondents invoke (States Br. 36-37; Brown Br. 47) would be undermined, not advanced, by changing the rules of statutory construction to curtail Congress's ability to preauthor-

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ize the Executive to provide critical benefits in response to national emergencies.[3]

c. Even if the Court were inclined to extend the major questions doctrine to this distinct context, this case lacks many of the features the Court has characterized as extraordinary. Respondents argue that the agency's assertion of power is some combination of "unheralded," "transformative," States Br. 33-34 (citations omitted), and "unprecedented," Brown Br. 45 (citation omitted). But they do not meaningfully dispute that the Secretary has previously issued class-wide relief under the HEROES Act, or that such relief had substantial economic effects.

Respondents attempt to draw (States Br. 33-36; Brown Br. 42-46) a categorical distinction between discharge of principal and all previous forms of relief, but nothing in the HEROES Act supports such a line. To the contrary, the Act 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), so long as the Act's predicates for relief are satisfied. As respondents do not dispute, the Title IV terms governing repayment and discharge are central to the student-loan programs; Congress's broad authorization to the Secretary to waive and modify "any" Title IV provision in a statute specifically de-

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[3] Indeed, the legislators who enacted the HEROES Act understood the Act to grant substantial discretion to the Secretary to respond to unforeseen emergencies. *E.g.*, H.R. Rep. No. 122, 108th Cong., 1st Sess. 9 (2003) (describing Act as "[p]rovid[ing] the Secretary with the authority to implement waivers deemed necessary and not yet contemplated"); 149 Cong. Rec. 7923 (2003) (Rep. McKeon) (Act allows the Secretary "to act quickly should a situation arise that has not been considered"); see also Miller Amicus Br. 18-21.

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signed to provide financial relief to borrowers thus plainly encompasses those terms.

Economically, moreover, no principled line separates discharge of principal from other types of relief that likewise reduce the total amount a borrower will ultimately pay the government. Take the across-the-board suspension of interest accrual and payments maintained since March 2020. Depending on a borrower's loan balance and interest rate, a three-year suspension of interest accrual could be worth significantly more than the plan's $10,000 forgiveness. See J.A. 243-244. And the corresponding cost to the government is likewise permanent; just like discharge of principal, suspending payment obligations and interest accrual directly reduces the value of the government's loan portfolio—by roughly $5 billion per month, or over $100 billion since the suspension was instituted nearly three years ago. Respondents' contrary position rests on a misunderstanding of basic accounting principles and the present value of a loan. Previous uses of the Act did not merely "maintain borrower status quo," States Br. 34; instead, they permanently reduced borrower financial obligations and the value of the debt held by the government. See, *e.g.*, Letter from Phillip L. Swagel, Director, Congressional Budget Office, to Sen. Richard Burr and Rep. Virginia Foxx, 1 (Sept. 26, 2022), https://perma.cc/62FW-M6BQ (calculating the "present-value cost" of extending forbearance).

Perhaps because no principled economic line separates forgiveness from forbearance, respondents now attempt (States Br. 34; Brown Br. 45-46) to cast doubt on forbearance as well. But respondents have never objected to the suspension of payments and interest accrual before; to the contrary, the States have consist-

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ently treated that relief as uncontroversial, even telling the district court that they "would have been okay with continued forbearance." D. Ct. Oral Arg. 39:40-41:30, https://www.youtube.com/watch?v=iA8wm41bk2Q. Respondents' late-breaking change highlights the difficulty of their position: Forbearance was adopted in 2020, effectively ratified by Congress, carried forward across two administrations for three years, and never questioned by any court. If respondents' reading would have precluded that vital and uncontroversial program, that is a strong indication their interpretation is wrong.

Respondents also err in arguing that the Secretary "asserts power to cancel student debt, of any amount, for any borrower," even "a decade after" a national emergency. States Br. 32-33 (citation omitted); see Brown Br. 46-47. That is a strawman: The Secretary can only issue relief under the HEROES Act that he determines is necessary to ameliorate the harmful economic consequences of a particular emergency for affected borrowers, subject to the Act's express limitations. Here, the plan reflects the Secretary's determination that a one-time discharge of a limited measure of debt for a subset of affected borrowers is necessary to ensure that those borrowers are not placed in a worse position as they and the country work to recover from the immediate effects of COVID-19—nothing akin to the unlimited power respondents posit.

The States likewise miss the mark in asserting that the plan falls outside the Department's "legitimate institutional role and 'policy expertise'" because the agency is not equipped to balance the relevant fiscal considerations. Br. 35 (quoting *West Virginia*, 142 S. Ct. at 2612). Congress has tasked the Secretary with administering the Department's $1.63 trillion loan port-

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folio, vesting him with substantial "powers and responsibilities" in "carry[ing] out" the student-loan programs, 20 U.S.C. 1070(b), 1082 (emphasis omitted); the plan falls within the heartland of that authority. Likewise, the States' contention (Br. 35) that the "Secretary assumed a role beyond what Congress could have intended" by determining that the financial effects of COVID-19 necessitated student-loan relief ignores that Congress charged him with making precisely this sort of determination, which is inherent in deciding what relief is necessary to ensure that borrowers "are not placed in a worse position financially." 20 U.S.C. 1098bb(a)(2)(A). This case is thus far afield from those in which the Court believed that an agency had asserted authority far outside its "particular domain." *Alabama Ass'n of Realtors* v. *HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam).

Finally, the States argue (Br. 35-36) that cancellation authority is incompatible with the regulatory scheme because the Education Act establishes particular circumstances in which loan discharge is permitted. But the Education Act also specifically authorizes the other forms of relief the Secretary has long granted under the HEROES Act. If specific reference in the Education Act precluded relief under the HEROES Act, the latter would have no meaningful application. Instead, the very point of the HEROES Act is to allow the Secretary to issue relief *beyond* what is already provided in the Education Act when warranted by a national emergency. And the fact that discharge is a form of relief authorized throughout the Education Act only confirms that such relief would have surprised Congress not one whit.

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This Court has explained that the major questions doctrine is a principle of statutory interpretation aimed at faithfully implementing Congress's intent and rooted in the "fundamental canon" that "the words o f a statute must be read in their context and with a view to their place in the overall statutory scheme." *West Virginia*, 142 S. Ct. at 2607 (citation omitted). But respondents wield the doctrine as a trump card to override plain text for all agency actions that can be characterized as significant. That departure from the text is unwarranted here, where the Secretary is not imposing onerous regulations, invoking a backwater provision, or claiming authority outside his lane and outside the core purpose of the statute. The central function of the HEROES Act is to provide debt relief in emergencies; discharge of principal is a quintessential form of debt relief that Congress could foresee; and Congress clearly authorized the Secretary to provide that relief when it empowered him to waive or modify any Title IV provision within the limits established by the Act. That is not merely a "plausible" or "colorable" interpretation of the statute, *id.* at 2609; it is the best reading. Overriding that reading thus would not implement Congress's intent, but thwart it.

3. Respondents' remaining statutory arguments lack merit

Respondents briefly assert that even if the HEROES Act sometimes authorizes discharge, that relief was not authorized here. Those arguments are likewise meritless.

a. The States assert (Br. 47-48) that the Secretary's plan has too "tenuous" a connection to a national emergency. It is of course true that the acute public-health

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emergency caused by COVID-19 is abating. But the HEROES Act and the Secretary's plan are not aimed at stopping the spread of disease; they are concerned with *economic* consequences. The Secretary found—and respondents do not seriously deny—that those consequences persist. Thus, the Secretary permissibly acted to ensure that borrowers are not worse off in connection with the COVID-19 emergency as the country—and especially lower-income borrowers—continue to recover from the economic effects of an unprecedented global pandemic.[4]

The States object (Br. 47-48) that current economic conditions are not attributable "solely" to COVID-19, but Congress did not include any such limitation in the HEROES Act. With good reason: Our economy is complex, and the conditions borrowers face are never attributable solely to one factor. Respondents' contrary theory would write words into the statute and effectively nullify the Act because the Secretary would never be able to determine that a borrower's economic difficulty is attributable "solely" to a national emergency, unaffected by any other force or circumstance.[5]

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[4] Consistent with the transition from the acute phase of the pandemic, the Administration has announced that it intends to allow the COVID-19 national emergency to expire on May 11, 2023. See Office of Management and Budget, *Statement of Administration Policy* (Jan. 30, 2023), https://perma.cc/8FNC-22KX. But that expiration would not affect this case: The HEROES Act requires that the Secretary's waivers and modifications be "in connection with a * * * national emergency," 20 U.S.C. 1098bb(a)(1), not that he provide relief *during* the emergency.

[5] Respondents mischaracterize (States Br. 49; Brown Br. 53) the study published by the Federal Reserve Bank of Philadelphia. While the study noted the uncontroversial reality of "chronic repayment struggles" even aside from COVID-19, it also emphasized "the prev-

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Finally, the States' suggestion (Br. 47-49) that the Department relied on COVID-19 as a pretext to issue student-loan relief is based on legally irrelevant political statements that cast no doubt on the Secretary's stated rationale, which reasonably explains that the economic consequences of an unprecedented global pandemic warrant one-time targeted relief to affected borrowers.

b. Respondents also criticize (States Br. 49-50; Brown Br. 51-55) other features of the plan—primarily, the Secretary's decisions about which borrowers should be eligible for relief. But respondents provide no reason to invalidate the Secretary's application of the HEROES Act in the particular factual circumstances presented by the COVID-19 pandemic—particularly since Congress expressly authorized the Secretary to err on the side of over-inclusion by providing that he need not act "on a case-by-case basis" and should grant relief as he "deems necessary" to "ensure" that affected individuals are not worse off with respect to their student loans. 20 U.S.C. 1098bb(a)(1) and (2), (b)(3).

Respondents assert (States Br. 49; Brown Br. 54), the Secretary should have excluded the small fraction of eligible borrowers who live and work abroad because they do not qualify as "affected individuals" by virtue of living or working in a declared disaster area. But those borrowers separately qualify as affected individuals because the Secretary reasonably "determined" that they

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alence of shocks during the pandemic" and the substantially higher number of borrowers who anticipate difficulty making loan payments when forbearance ends than report struggling before the pandemic. Tom Akana & Dubravka Ritter, *Expectations of Student Loan Repayment, Forbearance, and Cancellation: Insights from Recent Survey Data* 2, 7 (2022), https://perma.cc/P5FA-ZSEN; see *id.* at 9 Tbl. 1.

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"suffered direct economic hardship," 20 U.S.C. 1098ee(2)(D), as a result of a pandemic that had devastating economic effects across the globe.

Similarly, the States' contention (Br. 50) that the Secretary should have excluded any borrower whose earnings increased during the pandemic ignores that Congress specifically authorized the Secretary to act on a class-wide basis to provide full relief, even at risk of over-inclusion. The States likewise overlook that such borrowers may have experienced pandemic-related economic hardships, including layoffs and acute inflationary pressures on household budgets for basic necessities. And the plan's income thresholds are consistent with the available evidence, which established that "[t]here is a break in repayment capacity at around $125,000." J.A. 247; see J.A. 245-246.

The States emphasize (Br. 50) that some eligible borrowers do not expect to experience difficulty repaying loans, but they ignore the data showing that between 19% and 51% of borrowers in each income bracket below $125,000 anticipate difficulty making student-loan payments when forbearance ends. J.A. 235-236, 247-248 & fig. 3. Given the substantial penalties imposed on borrowers who default on student-loan payments, the Secretary reasonably determined that adopting a $125,000 income threshold was necessary to ensure that substantial swaths of "borrowers are not in a worse position financially due to the pandemic with regard to their ability to repay their loans." J.A. 258.

B. The Plan Is Reasonable And Reasonably Explained

The States also maintain (Br. 50-53) that the plan is arbitrary and capricious in five ways. The States failed to raise several of these contentions below, and all of them are unfounded.

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First, the States err in asserting (Br. 50) th at the Secretary did not consider "*any*" alternatives to the plan. In fact, the Secretary considered options such as increasing enrollment in income-driven repayment plans and continued forbearance. The Department's supporting analysis, for example, compares the likely success of the plan in "reduc[ing] delinquency and default risks" against "efforts to increase enrollment in [income-driven repayment plans]." J.A. 241. And the plan was an essential component of the Secretary's determination that forbearance should end rather than continue indefinitely. The States likewise overlook how the Secretary tailored the plan—from the income eligibility thresholds, to the discharge amounts, to the limitation to existing loans—after rejecting other alternatives as either excessive or insufficient.

Second, the States maintain that the Secretary failed to consider relevant reliance interests. But the States lack cognizable reliance interests. See pp. 3-11, *supra*. And none of the "industry participants" the States mention (Br. 52) have challenged the plan—undercutting the suggestion that the Secretary ignored serious reliance interests.

Third, the States argue that the Secretary failed to consider the plan's costs and the Department's duty to recover debt owed. Those arguments were "never presented to any lower court and [are] therefore forfeited." *OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27, 37 (2015). And the States' new arguments are meritless in any event. The Department extensively modeled the cost of debt relief, submitting cost estimates to the Office of Management and Budget shortly after announc-

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ing the plan.[6] Moreover, this is not a case where an agency disregarded cost in implementing a regulatory priority, see, *e.g.*, *Michigan* v. *EPA*, 576 U.S. 743, 750 (2015); rather, the plan involves the Department, acting as creditor, determining how best to administer its loan portfolio after a devastating national emergency. In analyzing the amount of debt to discharge and the number of eligible borrowers, see J.A. 242-245, the Secretary necessarily considered the government's "costs"—they are two sides of the same coin.

Nor was the Secretary obligated to expressly address the "general duty to recover on debt owed" imposed on all agencies by 31 U.S.C. 3711(a)(1). The question confronting the Secretary, and analyzed in the plan's supporting analysis, was whether the pandemic warranted a deviation from that norm under the HEROES Act, which authorizes the Secretary to grant relief "[n]otwithstanding any other provision of law." 20 U.S.C. 1098bb(a)(1).

Fourth, the States criticize the Department for failing to explain the exclusion of borrowers who applied to consolidate Federal Family Education Loans on or after September 29. But assisting borrowers with non-federally held loans implicates distinct and complex considerations, including the effects on the private entities that hold those loans. After extensive discussion with industry leaders, stakeholders, and participants, the Department reasonably determined that it needed additional time to "assess[] whether there are alterna-

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[6] See Office of Management and Budget, Executive Office of the President, *Approved Apportionments*, https://apportionment-public.max.gov/ (publishing approved apportionments for plan's budgetary costs, in "Department of Education" folder for "Fiscal Year 2023").

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tive pathways to provide relief to borrowers with federal student loans not held by [the Department]." J.A. 216. An agency is not required to resolve either all or none of a problem. In any event, the States lack standing to challenge the exclusion of borrowers with private loans because (by their own admission, see pp. 3-11, *supra*) they have no interest whatsoever in *expanding* eligibility for relief.

Finally, the States' characterization of the Secretary's reliance on COVID-19 as pretextual fails for the reasons discussed above. See p. 28, *supra*.

C. The Secretary's Action Was Procedurally Proper

Brown and Taylor, but not the States, argue (Br. 34-41) that the plan was procedurally defective. They do not dispute, however, that their procedural challenge necessarily fails if the plan was authorized by the HEROES Act. And their procedural arguments also fail for additional, independent reasons.

1. By its terms, the HEROES Act's exemption from notice-and-comment is conditioned on only one criterion: that "the Secretary deem[ed]" those waivers or modifications "necessary to achieve the purposes of this section," 20 U.S.C. 1098bb(b)(1). The exemption thus turns on the Secretary's determination that the challenged waivers and modifications are warranted under the HEROES Act, not on whether that determination survives a subsequent legal challenge.

Brown and Taylor's contrary arguments lack merit. The government has never suggested that subsection (b)(1) "allow[s] the Secretary to 'deem' that a particular regulation is exempt from notice-and-comment," Brown Br. 39 (brackets and citation omitted); rather, the government explained (Br. 63) that the exemption turns on the Secretary's "determination that the HEROES Act

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applies and that waivers or modifications are necessary"—a determination that he indisputably made here.

Azar v. *Allina Health Services*, 139 S. Ct. 1804 (2019), is not to the contrary. There, the Court explained that the Secretary of Health and Human Services could not avoid the Medicare Act's notice-and-comment requirements by "mislabeling" the agency's action. *Id.* at 1812. But unlike Section 1098bb(b)(1) of the HEROES Act, the procedural exemption at issue in *Azar* did not turn on any determination by the Secretary; rather, that statute required HHS to allow notice-and-comment for any "rule, requirement, or other statement of policy" setting a legal standard for "the payment for services." 42 U.S.C. 1395hh(a)(2). And there is no potential for the Department to engage in "mislabeling" mischief here; because the Secretary adopted the plan under the HEROES Act, the waivers and modifications are either authorized by the Act and therefore valid, or not authorized under the Act and therefore substantively invalid. The only "mislabeling" is Brown and Taylor's characterization of a substantive challenge as a procedural one in service of their roundabout effort to circumvent Article III.

2. Brown and Taylor's negotiated-rulemaking challenge is likewise meritless. The referenced negotiated-rulemaking requirements apply only to "proposed regulations" issued for public comment, see 20 U.S.C. 1098a(b)(1) and (2), so that provision cannot apply where, as here, the Act provides an express exemption from notice-and-comment procedures and the Secretary need not issue "proposed regulations" at all.

Brown and Taylor note that Congress adopted separate provisions exempting HEROES Act waivers and

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modifications from both notice-and-comment and negotiated-rulemaking procedures. But Congress often employs that sort of "belt and suspenders approach" to ensure its aims are clear, *Atlantic Richfield Co.* v. *Christian*, 140 S. Ct. 1335, 1350 n.5 (2020)—particularly where, as here, it intends to waive requirements in two distinct statutes.

More fundamentally, the only consequence of Brown and Taylor's reading would be to enable procedural gambits like the one they pursue here. If the Secretary's plan is substantively unauthorized by the HEROES Act, then it is invalid—regardless of the procedures used to adopt it. If Brown and Taylor believe that the Act does not authorize the plan, they could have brought a straightforward substantive challenge on that basis—as the States did. But Brown and Taylor have disclaimed any such challenge because they obviously lack standing to bring it. The Court should reject a reading of Section 1098bb(d) that would allow them to assert the exact same claim by labeling it "procedural."

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For the foregoing reasons and those stated in our opening brief, the judgment of the district court in *Nebraska* should be affirmed and the judgment of the district court in *Brown* should be reversed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

FEBRUARY 2023

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BIDEN, PRESIDENT OF THE UNITED STATES, ET AL. *v.* NEBRASKA ET AL.

CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 22–506. Argued February 28, 2023—Decided June 30, 2023

Title IV of the Higher Education Act of 1965 (Education Act) governs federal financial aid mechanisms, including student loans. 20 U. S. C. §1070(a). The Act authorizes the Secretary of Education to cancel or reduce loans in certain limited circumstances. The Secretary may cancel a set amount of loans held by some public servants, see §§1078–10, 1087j, 1087ee. He may also forgive the loans of borrowers who have died or become "permanently and totally disabled," §1087(a)(1); borrowers who are bankrupt, §1087(b); and borrowers whose schools falsely certify them, close down, or fail to pay lenders. §1087(c).

The issue presented in this case is whether the Secretary has authority under the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) to depart from the existing provisions of the Education Act and establish a student loan forgiveness program that will cancel about $430 billion in debt principal and affect nearly all borrowers. Under the HEROES Act, the Secretary "may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency." §1098bb(a)(1). As relevant here, the Secretary may issue such waivers or modifications only "as may be necessary to ensure" that "recipients of student financial assistance under title IV of the [Education Act affected by a national emergency] are not placed in a worse position financially in relation to that financial assistance because of [the national emergency]." §§1098bb(a)(2)(A), 1098ee(2)(C)–(D).

In 2022, as the COVID–19 pandemic came to its end, the Secretary

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invoked the HEROES Act to issue "waivers and modifications" reducing or eliminating the federal student debt of most borrowers. Borrowers with eligible federal student loans who had an income below $125,000 in either 2020 or 2021 qualified for a loan balance discharge of up to $10,000. Those who previously received Pell Grants—a specific type of federal student loan based on financial need—qualified for a discharge of up to $20,000.

Six States challenged the plan as exceeding the Secretary's statutory authority. The Eighth Circuit issued a nationwide preliminary injunction, and this Court granted certiorari before judgment.

Held:

1. At least Missouri has standing to challenge the Secretary's program. Article III requires a plaintiff to have suffered an injury in fact—a concrete and imminent harm to a legally protected interest, like property or money—that is fairly traceable to the challenged conduct and likely to be redressed by the lawsuit. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561. Here, as the Government concedes, the Secretary's plan would cost MOHELA, a nonprofit government corporation created by Missouri to participate in the student loan market, an estimated $44 million a year in fees. MOHELA is, by law and function, an instrumentality of Missouri: Labeled an "instrumentality" by the State, it was created by the State, is supervised by the State, and serves a public function. The harm to MOHELA in the performance of its public function is necessarily a direct injury to Missouri itself. The Court reached a similar conclusion 70 years ago in *Arkansas* v. *Texas*, 346 U. S. 368.

The Secretary emphasizes that, as a public corporation, MOHELA has a legal personality separate from the State. But such an instrumentality—created and supervised by the State to serve a public function—remains "(for many purposes at least) part of the Government itself." *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 397. The Secretary also contends that because MOHELA can sue on its own behalf, it—not Missouri—must be the one to sue. But where a State has been harmed in carrying out its responsibilities, the fact that it chose to exercise its authority through a public corporation it created and controls does not bar the State from suing to remedy that harm itself. See *Arkansas*, 346 U. S. 368. With Article III satisfied, the Court need not consider the States' other standing arguments. Pp. 7–12.

2. The HEROES Act allows the Secretary to "waive or modify" existing statutory or regulatory provisions applicable to financial assistance programs under the Education Act, but does not allow the Secretary to rewrite that statute to the extent of canceling $430 billion of student loan principal. Pp. 12–26.

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(a) The text of the HEROES Act does not authorize the Secretary's loan forgiveness program. The Secretary's power under the Act to "modify" does not permit "basic and fundamental changes in the scheme" designed by Congress. *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 225. Instead, "modify" carries "a connotation of increment or limitation," and must be read to mean "to change moderately or in minor fashion." *Ibid.* That is how the word is ordinarily used and defined, and the legal definition is no different.

The authority to "modify" statutes and regulations allows the Secretary to make modest adjustments and additions to existing provisions, not transform them. Prior to the COVID–19 pandemic, "modifications" issued under the Act were minor and had limited effect. But the "modifications" challenged here create a novel and fundamentally different loan forgiveness program. While Congress specified in the Education Act a few narrowly delineated situations that could qualify a borrower for loan discharge, the Secretary has extended such discharge to nearly every borrower in the country. It is "highly unlikely that Congress" authorized such a sweeping loan cancellation program "through such a subtle device as permission to 'modify.'" *Id.*, at 231.

The Secretary responds that the Act authorizes him to "waive" legal provisions as well as modify them—and that this additional term "grant[s] broader authority" than would "modify" alone. But the Secretary's invocation of the waiver power here does not remotely resemble how it has been used on prior occasions, where it was simply used to nullify particular legal requirements. The Secretary next argues that the power to "waive or modify" is greater than the sum of its parts: Because waiver allows the Secretary "to eliminate legal obligations in their entirety," the combination of "waive or modify" must allow him "to reduce them to any extent short of waiver" (even if the power to "modify" ordinarily does not stretch that far). But the challenged loan forgiveness program goes beyond even that. In essence, the Secretary has drafted a new section of the Education Act from scratch by "waiving" provisions root and branch and then filling the empty space with radically new text.

The Secretary also cites a procedural provision in the HEROES Act directing the Secretary to publish a notice in the Federal Register, "includ[ing] the terms and conditions to be applied in lieu of such statutory and regulatory provisions" as the Secretary has waived or modified. §1098bb(b)(2). In the Government's view, that language authorizes both "waiving and then putting [the Secretary's] own requirements in"—a sort of "red penciling" of the existing law. But rather than implicitly granting the Secretary authority to draft new substantive statutory provisions at will, §1098bb(b)(2) simply imposes the

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obligation to report any waivers and modifications he has made. The Secretary's ability to add new terms "in lieu of" the old is limited to his authority to "modify" existing law. As with any other modification issued under the Act, no new term or condition reported pursuant to §1098bb(b)(2) may distort the fundamental nature of the provision it alters.

In sum, the Secretary's comprehensive debt cancellation plan is not a waiver because it augments and expands existing provisions dramatically. It is not a modification because it constitutes "effectively the introduction of a whole new regime." *MCI*, 512 U. S., at 234. And it cannot be some combination of the two, because when the Secretary seeks to *add* to existing law, the fact that he has "waived" certain provisions does not give him a free pass to avoid the limits inherent in the power to "modify." However broad the meaning of "waive or modify," that language cannot authorize the kind of exhaustive rewriting of the statute that has taken place here. Pp. 13–18.

(b) The Secretary also appeals to congressional purpose, arguing that Congress intended "to grant substantial discretion to the Secretary to respond to unforeseen emergencies." On this view, the unprecedented nature of the Secretary's debt cancellation plan is justified by the pandemic's unparalleled scope. But the question here is not whether something should be done; it is who has the authority to do it. As in the Court's recent decision in *West Virginia* v. *EPA*, given the "'history and the breadth of the authority'" asserted by the Executive and the "'economic and political significance' of that assertion," the Court has "'reason to hesitate before concluding that Congress' meant to confer such authority." 597 U. S. ___, ___ (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 159–160).

This case implicates many of the factors present in past cases raising similar separation of powers concerns. The Secretary has never previously claimed powers of this magnitude under the HEROES Act; "[n]o regulation premised on" the HEROES Act "has even begun to approach the size or scope" of the Secretary's program. *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. ___, ___ (*per curiam*). The "'economic and political significance'" of the Secretary's action is staggering. *West Virginia*, 597 U. S., at ___ (quoting *Brown & Williamson*, 529 U. S., at 160). And the Secretary's assertion of administrative authority has "conveniently enabled [him] to enact a program" that Congress has chosen not to enact itself. *West Virginia*, 597 U. S., at ___. The Secretary argues that the principles explained in *West Virginia* and its predecessors should not apply to cases involving government benefits. But major questions cases "have arisen from all corners of the administrative state," *id., at* ___, and this is not the first such case to arise in the context of government benefits. See *King*

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v. *Burwell*, 576 U. S. 473, 485.

All this leads the Court to conclude that "[t]he basic and consequential tradeoffs" inherent in a mass debt cancellation program "are ones that Congress would likely have intended for itself." *West Virginia*, 597 U. S., at ___. In such circumstances, the Court has required the Secretary to "point to 'clear congressional authorization'" to justify the challenged program. *Id.*, at ___, ___ (quoting *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 324). And as explained, the HEROES Act provides no authorization for the Secretary's plan when examined using the ordinary tools of statutory interpretation—let alone "clear congressional authorization" for such a program. Pp. 19–25.

Reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. BARRETT, J., filed a concurring opinion. KAGAN, J., filed a dissenting opinion, in which SOTOMAYOR and JACKSON, JJ., joined.

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SUPREME COURT OF THE UNITED STATES

No. 22–506

JOSEPH R. BIDEN, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS *v.* NEBRASKA, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 30, 2023]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

To ensure that Americans could keep up with increasing international competition, Congress authorized the first federal student loans in 1958—up to a total of $1,000 per student each year. National Defense Education Act of 1958, 72 Stat. 1584. Outstanding federal student loans now total $1.6 trillion extended to 43 million borrowers. Letter from Congressional Budget Office to Members of Congress, p. 3 (Sept. 26, 2022) (CBO Letter). Last year, the Secretary of Education established the first comprehensive student loan forgiveness program, invoking the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) for authority to do so. The Secretary's plan canceled roughly $430 billion of federal student loan balances, completely erasing the debts of 20 million borrowers and lowering the median amount owed by the other 23 million from $29,400 to $13,600. See *ibid.*; App. 243. Six States sued, arguing that the HEROES Act does not authorize the loan cancellation plan. We agree.

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I

A

The Higher Education Act of 1965 (Education Act) was enacted to increase educational opportunities and "assist in making available the benefits of postsecondary education to eligible students . . . in institutions of higher education." 20 U. S. C. §1070(a). To that end, Title IV of the Act restructured federal financial aid mechanisms and established three types of federal student loans. Direct Loans are, as the name suggests, made directly to students and funded by the federal fisc; they constitute the bulk of the Federal Government's student lending efforts. See §1087a *et seq.* The Government also administers Perkins Loans—government-subsidized, low-interest loans made by schools to students with significant financial need—and Federal Family Education Loans, or FFELs—loans made by private lenders and guaranteed by the Federal Government. See §§1071 *et seq.*, 1087aa *et seq.* While FFELs and Perkins Loans are no longer issued, many remain outstanding. §§1071(d), 1087aa(b).

The terms of federal loans are set by law, not the market, so they often come with benefits not offered by private lenders. Such benefits include deferment of any repayment until after graduation, loan qualification regardless of credit history, relatively low fixed interest rates, income-sensitive repayment plans, and—for undergraduate students with financial need—government payment of interest while the borrower is in school. Dept. of Ed., Federal Student Aid, Federal Versus Private Loans.

The Education Act specifies in detail the terms and conditions attached to federal loans, including applicable interest rates, loan fees, repayment plans, and consequences of default. See §§1077, 1080, 1087e, 1087dd. It also authorizes the Secretary to cancel or reduce loans, but only in certain limited circumstances and to a particular extent. Specifically, the Secretary can cancel a set amount of loans held

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by some public servants—including teachers, members of the Armed Forces, Peace Corps volunteers, law enforcement and corrections officers, firefighters, nurses, and librarians—who work in their professions for a minimum number of years. §§1078–10, 1087j, 1087ee. The Secretary can also forgive the loans of borrowers who have died or been "permanently and totally disabled," such that they cannot "engage in any substantial gainful activity." §1087(a)(1). Bankrupt borrowers may have their loans forgiven. §1087(b). And the Secretary is directed to discharge loans for borrowers falsely certified by their schools, borrowers whose schools close down, and borrowers whose schools fail to pay loan proceeds they owe to lenders. §1087(c).

Shortly after the September 11 terrorist attacks, Congress became concerned that borrowers affected by the crisis—particularly those who served in the military—would need additional assistance. As a result, it enacted the Higher Education Relief Opportunities for Students Act of 2001. That law provided the Secretary of Education, for a limited period of time, with "specific waiver authority to respond to conditions in the national emergency" caused by the September 11 attacks. 115 Stat. 2386. Rather than allow this grant of authority to expire by its terms at the end of September 2003, Congress passed the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act). 117 Stat. 904. That Act extended the coverage of the 2001 statute to include any war or national emergency—not just the September 11 attacks. By its terms, the Secretary "may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency." 20 U. S. C.

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§1098bb(a)(1).[1]

The Secretary may issue waivers or modifications only "as may be necessary to ensure" that "recipients of student financial assistance under title IV of the [Education Act] who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." §1098bb(a)(2)(A). An "affected individual" is defined, in relevant part, as someone 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" or who "suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary." §§1098ee(2)(C)–(D). And a "national emergency" for the purposes of the Act is "a national emergency declared by the President of the United States." §1098ee(4).

Immediately following the passage of the Act in 2003, the Secretary issued two dozen waivers and modifications addressing a handful of specific issues. 68 Fed. Reg. 69312–69318. Among other changes, the Secretary waived the requirement that "affected individuals" must "return or repay an overpayment" of certain grant funds erroneously disbursed by the Government, *id.*, at 69314, and the requirement that public service work must be uninterrupted to qualify an "affected individual" for loan cancellation, *id.*, at 69317. Additional adjustments were made in 2012, with similar limited effects. 77 Fed. Reg. 59311–59318.

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[1] Like its 2001 predecessor, the HEROES Act enjoyed virtually unanimous bipartisan support at the time of its enactment, passing by a 421-to-1 vote in the House of Representatives and a unanimous voice vote in the Senate. See 149 Cong. Rec. 7952–7953 (2003); *id.*, at 20809; 147 Cong. Rec. 20396 (2001); *id.*, at 26292–26293. The single dissenting Representative later voiced his support for the Act, explaining that he "meant to vote 'yea.'" 149 Cong. Rec. 8559 (statement of Rep. Miller).

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But the Secretary took more significant action in response to the COVID–19 pandemic. On March 13, 2020, the President declared the pandemic a national emergency. Presidential Proclamation No. 9994, 85 Fed. Reg. 15337–15338 (2020). One week later, then-Secretary of Education Betsy DeVos announced that she was suspending loan repayments and interest accrual for all federally held student loans. See Dept. of Ed., Breaking News: Testing Waivers and Student Loan Relief (Mar. 20, 2020). The following week, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act, which required the Secretary to extend the suspensions through the end of September 2020. 134 Stat. 404–405. Before that extension expired, the President directed the Secretary, "[i]n light of the national emergency," to "effectuate appropriate waivers of and modifications to" the Education Act to keep the suspensions in effect through the end of the year. 85 Fed. Reg. 49585. And a few months later, the Secretary further extended the suspensions, broadened eligibility for federal financial assistance, and waived certain administrative requirements (to allow, for example, virtual rather than on-site accreditation visits and to extend deadlines for filing reports). *Id.*, at 79856–79863; 86 Fed. Reg. 5008–5009 (2021).

Over a year and a half passed with no further action beyond keeping the repayment and interest suspensions in place. But in August 2022, a few weeks before President Biden stated that "the pandemic is over," the Department of Education announced that it was once again issuing "waivers and modifications" under the Act—this time to reduce and eliminate student debts directly. See App. 257–259; Washington Post, Sept. 20, 2022, p. A3, col. 1. During the first year of the pandemic, the Department's Office of General Counsel had issued a memorandum concluding that "the Secretary does not have statutory authority to provide blanket or mass cancellation, compromise, discharge, or forgiveness of student loan principal balances."

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Memorandum from R. Rubinstein to B. DeVos, p. 8 (Jan. 12, 2021). After a change in Presidential administrations and shortly before adoption of the challenged policy, however, the Office of General Counsel "formally rescinded" its earlier legal memorandum and issued a replacement reaching the opposite conclusion. 87 Fed. Reg. 52945 (2022). The new memorandum determined that the HEROES Act "grants the Secretary authority that could be used to effectuate a program of targeted loan cancellation directed at addressing the financial harms of the COVID–19 pandemic." *Id.*, at 52944. Upon receiving this new opinion, the Secretary issued his proposal to cancel student debt under the HEROES Act. App. 257–259. Two months later, he published the required notice of his "waivers and modifications" in the Federal Register. 87 Fed. Reg. 61512–61514.

The terms of the debt cancellation plan are straightforward: For borrowers with an adjusted gross income below $125,000 in either 2020 or 2021 who have eligible federal loans, the Department of Education will discharge the balance of those loans in an amount up to $10,000 per borrower.[2] *Id.*, at 61514 ("modif[ying] the provisions of" 20 U. S. C. §§1087, 1087dd(g); 34 CFR pt. 647, subpt. D (2022); 34 CFR §§682.402, 685.212). Borrowers who previously received Pell Grants qualify for up to $20,000 in loan cancellation. 87 Fed. Reg. 61514. Eligible loans include "Direct Loans, FFEL loans held by the Department or subject to collection by a guaranty agency, and Perkins Loans held by the Department." *Ibid.* The Department of Education estimates that about 43 million borrowers qualify for relief, and the Congressional Budget Office estimates that the plan will cancel about $430 billion in debt principal. See App. 119; CBO Letter 3.

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[2] A borrower filing "jointly or as a Head of Household, or as a qualifying widow(er)," qualifies for loan cancellation with an adjusted gross income lower than $250,000. 87 Fed. Reg. 61514.

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B

Six States moved for a preliminary injunction, claiming that the plan exceeded the Secretary's statutory authority. The District Court held that none of the States had standing to challenge the plan and dismissed the suit. ___ F. Supp. 3d ___ (ED Mo. 2022). The States appealed, and the Eighth Circuit issued a nationwide preliminary injunction pending resolution of the appeal. The court concluded that Missouri likely had standing through the Missouri Higher Education Loan Authority (MOHELA or Authority), a public corporation that holds and services student loans. 52 F. 4th 1044 (2022). It further concluded that the State's challenge raised "substantial" questions on the merits and that the equities favored maintaining the status quo pending further review. *Id.*, at 1048 (internal quotation marks omitted).

With the plan on pause, the Secretary asked this Court to vacate the injunction or to grant certiorari before judgment, "to avoid prolonging this uncertainty for the millions of affected borrowers." Application 4. We granted the petition and set the case for expedited argument. 598 U. S. ___ (2022).

II

Before addressing the legality of the Secretary's program, we must first ensure that the States have standing to challenge it. Under Article III of the Constitution, a plaintiff needs a "personal stake" in the case. *TransUnion LLC* v. *Ramirez*, 594 U. S. ___, ___ (2021) (slip op., at 7). That is, the plaintiff must have suffered an injury in fact—a concrete and imminent harm to a legally protected interest, like property or money—that is fairly traceable to the challenged conduct and likely to be redressed by the lawsuit. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992). If at least one plaintiff has standing, the suit may proceed. *Rumsfeld* v. *Forum for Academic and Institutional*

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Rights, Inc., 547 U. S. 47, 52, n. 2 (2006). Because we conclude that the Secretary's plan harms MOHELA and thereby directly injures Missouri—conferring standing on that State—we need not consider the other theories of standing raised by the States.

Missouri created MOHELA as a nonprofit government corporation to participate in the student loan market. Mo. Rev. Stat. §173.360 (2016). The Authority owns over $1 billion in FFELs. MOHELA, FY 2022 Financial Statement 9 (Financial Statement). It also services nearly $150 billion worth of federal loans, having been hired by the Department of Education to collect payments and provide customer service to borrowers. *Id.*, at 4, 8. MOHELA receives an administrative fee for each of the five million federal accounts it services, totaling $88.9 million in revenue last year alone. *Ibid.*

Under the Secretary's plan, roughly half of all federal borrowers would have their loans completely discharged. App. 119. MOHELA could no longer service those closed accounts, costing it, by Missouri's estimate, $44 million a year in fees that it otherwise would have earned under its contract with the Department of Education. Brief for Respondents 16. This financial harm is an injury in fact directly traceable to the Secretary's plan, as both the Government and the dissent concede. See Tr. of Oral Arg. 18; *post*, at 5 (KAGAN, J., dissenting).

The plan's harm to MOHELA is also a harm to Missouri. MOHELA is a "public instrumentality" of the State. Mo. Rev. Stat. §173.360. Missouri established the Authority to perform the "essential public function" of helping Missourians access student loans needed to pay for college. *Ibid.*; see *Todd* v. *Curators of University of Missouri*, 347 Mo. 460, 464, 147 S. W. 2d 1063, 1064 (1941) ("Our constitution recognizes higher education as a governmental function."). To fulfill this public purpose, the Authority is empowered by the State to invest in or finance student loans, including by

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issuing bonds. §§173.385(1)(6)–(7). It may also service loans and collect "reasonable fees" for doing so. §§173.385(1)(12), (18). Its profits help fund education in Missouri: MOHELA has provided $230 million for development projects at Missouri colleges and universities and almost $300 million in grants and scholarships for Missouri students. Financial Statement 10, 20.

The Authority is subject to the State's supervision and control. Its board consists of two state officials and five members appointed by the Governor and approved by the Senate. §173.360. The Governor can remove any board member for cause. *Ibid.* MOHELA must provide annual financial reports to the Missouri Department of Education, detailing its income, expenditures, and assets. §173.445. The Authority is therefore "directly answerable" to the State. *Casualty Reciprocal Exchange* v. *Missouri Employers Mut. Ins. Co.*, 956 S. W. 2d 249, 254 (Mo. 1997). The State "set[s] the terms of its existence," and only the State "can abolish [MOHELA] and set the terms of its dissolution." *Id.*, at 254–255.

By law and function, MOHELA is an instrumentality of Missouri: It was created by the State to further a public purpose, is governed by state officials and state appointees, reports to the State, and may be dissolved by the State. The Secretary's plan will cut MOHELA's revenues, impairing its efforts to aid Missouri college students. This acknowledged harm to MOHELA in the performance of its public function is necessarily a direct injury to Missouri itself.

We came to a similar conclusion 70 years ago in *Arkansas* v. *Texas*, 346 U. S. 368 (1953). Arkansas sought to invoke our original jurisdiction in a suit against Texas, claiming that Texas had wrongfully interfered with a contract between the University of Arkansas and a Texas charity. *Id.*, at 369. Texas argued that the suit could not proceed because the University did "not stand in the shoes of the State." *Id.*, at 370. The harm to the University, as Texas

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saw it, was not a harm to Arkansas sufficient for the State to sue in its own name.

We disagreed. We recognized that "Arkansas must, of course, represent an interest of her own and not merely that of her citizens or corporations." *Ibid.* But we concluded that Arkansas was in fact seeking to protect its *own* interests because the University was "an official state instrumentality." *Ibid.* The State had labeled the University "an instrument of the state in the performance of a governmental work." *Ibid.* (internal quotation marks omitted). The University served a public purpose, acting as the State's "agen[t] in the educational field." *Id.*, at 371. The University had been "created by the Arkansas legislature," was "governed by a Board of Trustees appointed by the Governor with consent of the Senate," and "report[ed] all of its expenditures to the legislature." *Id.*, at 370. In short, the University was an instrumentality of the State, and "any injury under the contract to the University [was] an injury to Arkansas." *Ibid.* So too here. Because the Authority is part of Missouri, the State does not seek to "rely on injuries suffered by others." *Post*, at 2 (opinion of KAGAN, J.). It aims to remedy its own.

The Secretary and the dissent assert that MOHELA's injuries should not count as Missouri's because MOHELA, as a public corporation, has a legal personality separate from the State. Every government corporation has such a distinct personality; it is a corporation, after all, "with the powers to hold and sell property and to sue and be sued." *First Nat. City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U. S. 611, 624 (1983). Yet such an instrumentality—created and operated to fulfill a public function—nonetheless remains "(for many purposes at least) part of the Government itself." *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 397 (1995).

In *Lebron*, Amtrak was sued for refusing to display a political advertisement on a billboard at one of its stations.

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Id., at 376–377. Amtrak argued that it was not subject to the First Amendment because it was a corporation separate from the Federal Government. See *id.*, at 392. Congress had even specified in its authorizing statute that Amtrak was not "an agency or establishment of the United States Government." *Id.*, at 391 (quoting 84 Stat. 1330). Despite this disclaimer, we held that Amtrak remained subject to the First Amendment because it functioned as an instrumentality of the Federal Government, "created by a special statute, explicitly for the furtherance of federal governmental goals" of ensuring that the American public had access to passenger trains. *Lebron*, 513 U. S., at 397. Its board was appointed by the President, and it had to submit annual reports to the President and Congress. *Id.*, at 385–386. Having been "established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees," Amtrak could not disclaim that it was "part of the Government." *Id.*, at 398, 400.

We reiterated the point in *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43 (2015). There, railroads argued that giving Amtrak regulatory power was an unconstitutional delegation of government authority to a private entity. *Id.*, at 49–50. We rejected that contention, noting that "Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit." *Id.*, at 53. It was therefore acting "as a governmental entity" in exercising that regulatory power. *Id.*, at 54.

That principle holds true here. The Secretary and the dissent contend that because MOHELA can sue on its own behalf, it—not Missouri—must be the one to sue. But in *Arkansas*, 346 U. S. 368, the University of Arkansas could have asserted its rights under the contract on its own. The University's governing statute made it "a body politic and corporate," with "all the powers of a corporate body," Ark.

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Stat. §80–2804 (1887)—including the power to sue and be sued on its own behalf, see *HRR Arkansas, Inc.* v. *River City Contractors, Inc.*, 350 Ark. 420, 427, 87 S. W. 3d 232, 237 (2002); see, *e.g.*, *Board of Trustees, Univ. of Ark.* v. *Pulaski County*, 229 Ark. 370, 315 S. W. 2d 879 (1958). We permitted Arkansas to bring an original suit all the same. Where a State has been harmed in carrying out its responsibilities, the fact that it chose to exercise its authority through a public corporation it created and controls does not bar the State from suing to remedy that harm itself.[3]

The Secretary's plan harms MOHELA in the performance of its public function and so directly harms the State that created and controls MOHELA. Missouri thus has suffered an injury in fact sufficient to give it standing to challenge the Secretary's plan. With Article III satisfied, we turn to the merits.

III

The Secretary asserts that the HEROES Act grants him the authority to cancel $430 billion of student loan principal. It does not. We hold today that the Act allows the Secretary to "waive or modify" existing statutory or regulatory provisions applicable to financial assistance programs under the Education Act, not to rewrite that statute from the ground up.

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[3]The dissent, for all its attempts to cabin these precedents, cites no precedents of its own addressing a State's standing to sue for a harm to its instrumentality. The dissent offers only a state court case involving a different public corporation, in which the Missouri Supreme Court said that the corporation was separate from the State for the purposes of a state ban on "the lending of the credit of the state." *Menorah Medical Center* v. *Health and Ed. Facilities Auth.*, 584 S. W. 2d 73, 78 (1979) (plurality opinion). But as the dissent recognizes, a public corporation can count as part of the State for some but not "other purposes." *Post*, at 11, and n. 1. The Missouri Supreme Court said nothing about, and had no reason to address, whether an injury to that public corporation was a harm to the State.

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A

The HEROES Act authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency." 20 U. S. C. §1098bb(a)(1). That power has limits. To begin with, statutory permission to "modify" does not authorize "basic and fundamental changes in the scheme" designed by Congress. *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 225 (1994). Instead, that term carries "a connotation of increment or limitation," and must be read to mean "to change moderately or in minor fashion." *Ibid.* That is how the word is ordinarily used. See, *e.g.*, Webster's Third New International Dictionary 1952 (2002) (defining "modify" as "to make more temperate and less extreme," "to limit or restrict the meaning of," or "to make minor changes in the form or structure of [or] alter without transforming"). The legal definition is no different. Black's Law Dictionary 1203 (11th ed. 2019) (giving the first definition of "modify" as "[t]o make somewhat different; to make small changes to," and the second as "[t]o make more moderate or less sweeping"). The authority to "modify" statutes and regulations allows the Secretary to make modest adjustments and additions to existing provisions, not transform them.

The Secretary's previous invocations of the HEROES Act illustrate this point. Prior to the COVID–19 pandemic, "modifications" issued under the Act implemented only minor changes, most of which were procedural. Examples include reducing the number of tax forms borrowers are required to file, extending time periods in which borrowers must take certain actions, and allowing oral rather than written authorizations. See 68 Fed. Reg. 69314–69316.

Here, the Secretary purported to "modif[y] the provisions of" two statutory sections and three related regulations

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governing student loans. 87 Fed. Reg. 61514. The affected statutory provisions granted the Secretary the power to "discharge [a] borrower's liability," or pay the remaining principal on a loan, under certain narrowly prescribed circumstances. 20 U. S. C. §§1087, 1087dd(g)(1). Those circumstances were limited to a borrower's death, disability, or bankruptcy; a school's false certification of a borrower or failure to refund loan proceeds as required by law; and a borrower's inability to complete an educational program due to closure of the school. See §§1087(a)–(d), 1087dd(g). The corresponding regulatory provisions detailed rules and procedures for such discharges. They also defined the terms of the Government's public service loan forgiveness program and provided for discharges when schools commit malfeasance. See 34 CFR §§682.402, 685.212; 34 CFR pt. 674, subpt. D.

The Secretary's new "modifications" of these provisions were not "moderate" or "minor." Instead, they created a novel and fundamentally different loan forgiveness program. The new program vests authority in the Department of Education to discharge up to $10,000 for every borrower with income below $125,000 and up to $20,000 for every such borrower who has received a Pell Grant. 87 Fed. Reg. 61514. No prior limitation on loan forgiveness is left standing. Instead, every borrower within the specified income cap automatically qualifies for debt cancellation, no matter their circumstances. The Department of Education estimates that the program will cover 98.5% of all borrowers. See Dept. of Ed., White House Fact Sheet: The Biden Administration's Plan for Student Debt Relief Could Benefit Tens of Millions of Borrowers in All Fifty States (Sept. 20, 2022). From a few narrowly delineated situations specified by Congress, the Secretary has expanded forgiveness to nearly every borrower in the country.

The Secretary's plan has "modified" the cited provisions

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only in the same sense that "the French Revolution 'modified' the status of the French nobility"—it has abolished them and supplanted them with a new regime entirely. *MCI*, 512 U. S., at 228. Congress opted to make debt forgiveness available only in a few particular exigent circumstances; the power to modify does not permit the Secretary to "convert that approach into its opposite" by creating a new program affecting 43 million Americans and $430 billion in federal debt. *Descamps* v. *United States*, 570 U. S. 254, 274 (2013). Labeling the Secretary's plan a mere "modification" does not lessen its effect, which is in essence to allow the Secretary unfettered discretion to cancel student loans. It is "highly unlikely that Congress" authorized such a sweeping loan cancellation program "through such a subtle device as permission to 'modify.'" *MCI*, 512 U. S., at 231.

The Secretary responds that the Act authorizes him to "waive" legal provisions as well as modify them—and that this additional term "grant[s] broader authority" than would "modify" alone. But the Secretary's invocation of the waiver power here does not remotely resemble how it has been used on prior occasions. Previously, waiver under the HEROES Act was straightforward: the Secretary identified a particular legal requirement and waived it, making compliance no longer necessary. For instance, on one occasion the Secretary waived the requirement that a student provide a written request for a leave of absence. See 77 Fed. Reg. 59314. On another, he waived the regulatory provisions requiring schools and guaranty agencies to attempt collection of defaulted loans for the time period in which students were affected individuals. See 68 Fed. Reg. 69316.

Here, the Secretary does not identify any provision that he is actually waiving.[4] No specific provision of the Educa-

[4] While the Secretary's notice published in the Federal Register refers

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tion Act establishes an obligation on the part of student borrowers to pay back the Government. So as the Government concedes, "waiver"—as used in the HEROES Act—cannot refer to "waiv[ing] loan balances" or "waiving the obligation to repay" on the part of a borrower. Tr. of Oral Arg. 9, 64. Contrast 20 U. S. C. §1091b(b)(2)(D) (allowing the Secretary to "waive the amounts that students are required to return" in specified circumstances of overpayment by the Government). Because the Secretary cannot waive a particular provision or provisions to achieve the desired result, he is forced to take a more circuitous approach, one that avoids any need to show compliance with the statutory limitation on his authority. He simply "waiv[es] the elements of the discharge and cancellation provisions that are inapplicable in this [debt cancellation] program that would limit eligibility to other contexts." Tr. of Oral Arg. 64–65.

Yet even that expansive conception of waiver cannot justify the Secretary's plan, which does far more than relax existing legal requirements. The plan specifies particular sums to be forgiven and income-based eligibility requirements. The addition of these new and substantially different provisions cannot be said to be a "waiver" of the old in any meaningful sense. Recognizing this, the Secretary acknowledges that waiver alone is not enough; after waiving whatever "inapplicable" law would bar his debt cancellation plan, he says, he then "modif[ied] the provisions to bring [them] in line with this program." *Id.*, at 65. So in the end, the Secretary's plan relies on modifications all the way down. And as we have explained, the word "modify" simply cannot bear that load.

The Secretary and the dissent go on to argue that the power to "waive or modify" is greater than the sum of its

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to "waivers and modifications" generally, see 87 Fed. Reg. 61512–61514, and while two sentences use the somewhat ambiguous phrase "[t]his waiver," *id.*, at 61514, the notice identifies no specific legal provision as having been "waived" by the Secretary.

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parts. Because waiver allows the Secretary "to eliminate legal obligations in their entirety," the argument runs, the combination of "waive or modify" allows him "to reduce them to any extent short of waiver"—even if the power to "modify" ordinarily does not stretch that far. Reply Brief 16–17 (internal quotation marks omitted). But the Secretary's program cannot be justified by such sleight of hand. The Secretary has not truly waived or modified the provisions in the Education Act authorizing specific and limited forgiveness of student loans. Those provisions remain safely intact in the U. S. Code, where they continue to operate in full force. What the Secretary has actually done is draft a new section of the Education Act from scratch by "waiving" provisions root and branch and then filling the empty space with radically new text.

Lastly, the Secretary points to a procedural provision in the HEROES Act. The Act directs the Secretary to publish a notice in the Federal Register "includ[ing] *the terms and conditions to be applied in lieu of* such statutory and regulatory provisions" as the Secretary has waived or modified. 20 U. S. C. §1098bb(b)(2) (emphasis added). In the Secretary's view, that language authorizes "both deleting and then adding back in, waiving and then putting his own requirements in"—a sort of "red penciling" of the existing law. Tr. of Oral Arg. 65; see also Reply Brief 17.

Section 1098bb(b)(2) is, however, "a wafer-thin reed on which to rest such sweeping power." *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. ___, ___ (2021) (*per curiam*) (slip op., at 7). The provision is no more than it appears to be: a humdrum reporting requirement. Rather than implicitly granting the Secretary authority to draft new substantive statutory provisions at will, it simply imposes the obligation to report any waivers and modifications he has made. Section 1098bb(b)(2) suggests that "waivers and modifications" includes addi-

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tions. The dissent accordingly reads the statute as authorizing any degree of change or any new addition, "from modest to substantial"—and nothing in the dissent's analysis suggests stopping at "substantial." *Post*, at 20. Because the Secretary "does not have to leave gaping holes" when he waives provisions, the argument runs, it follows that *any* replacement terms the Secretary uses to fill those holes must be lawful. *Ibid.* But the Secretary's ability to add new terms "in lieu of" the old is limited to his authority to "modify" existing law. As with any other modification issued under the Act, no new term or condition reported pursuant to §1098bb(b)(2) may distort the fundamental nature of the provision it alters.[5]

The Secretary's comprehensive debt cancellation plan cannot fairly be called a waiver—it not only nullifies existing provisions, but augments and expands them dramatically. It cannot be mere modification, because it constitutes "effectively the introduction of a whole new regime." *MCI*, 512 U. S., at 234. And it cannot be some combination of the two, because when the Secretary seeks to *add* to existing law, the fact that he has "waived" certain provisions does not give him a free pass to avoid the limits inherent in the power to "modify." However broad the meaning of "waive or modify," that language cannot authorize the kind of exhaustive rewriting of the statute that has taken place here.[6]

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[5] The dissent asserts that our decision today will control any challenge to the Secretary's temporary suspensions of loan repayments and interest accrual. *Post*, at 21–22. We decide only the case before us. A challenge to the suspensions may involve different considerations with respect to both standing and the merits.

[6] The States further contend that the Secretary's program violates the requirement in the HEROES Act that any waivers or modifications be "necessary to ensure that . . . affected individuals are not placed in a worse position financially in relation to" federal financial assistance. 20 U. S. C. §1098bb(a)(2)(A); see Brief for Respondents 39–44. While our decision does not rest upon that reasoning, we note that the Secretary

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B

In a final bid to elide the statutory text, the Secretary appeals to congressional purpose. "The whole point of" the HEROES Act, the Government contends, "is to ensure that in the face of a national emergency that is causing financial harm to borrowers, the Secretary can do something." Tr. of Oral Arg. 55. And that "something" was left deliberately vague because Congress intended "to grant substantial discretion to the Secretary to respond to unforeseen emergencies." Reply Brief 22, n. 3. So the unprecedented nature of the Secretary's debt cancellation plan only "reflects the pandemic's unparalleled scope." Brief for Petitioners 52 (Brief for United States).

The dissent agrees. "Emergencies, after all, are emergencies," it reasons, and "more serious measures" must be expected "in response to more serious problems." *Post*, at 25, 28. The dissent's interpretation of the HEROES Act would grant unlimited power to the Secretary, not only to modify or waive certain provisions but to "fill the holes that action creates with new terms"—no matter how drastic those terms might be—and to "alter [provisions] to the extent [he] think[s] appropriate," up to and including "the most substantial kind of change" imaginable. *Post,* at 16, 19–20. That is inconsistent with the statutory language and past practice under the statute.

The question here is not whether something should be done; it is who has the authority to do it. Our recent decision in *West Virginia* v. *EPA* involved similar concerns over the exercise of administrative power. 597 U. S. ___ (2022). That case involved the EPA's claim that the Clean Air Act authorized it to impose a nationwide cap on carbon dioxide

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faces a daunting task in showing that cancellation of debt principal is "necessary to ensure" that borrowers are not placed in "worse position[s] financially in relation to" their loans, especially given the Government's prior determination that pausing interest accrual and loan repayments would achieve that end.

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emissions. Given "the 'history and the breadth of the authority that [the agency] ha[d] asserted,' and the 'economic and political significance' of that assertion," we found that there was "'reason to hesitate before concluding that Congress' meant to confer such authority." *Id.*, at ___ (slip op., at 17) (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 159–160 (2000); first alteration in original).

So too here, where the Secretary of Education claims the authority, on his own, to release 43 million borrowers from their obligations to repay $430 billion in student loans. The Secretary has never previously claimed powers of this magnitude under the HEROES Act. As we have already noted, past waivers and modifications issued under the Act have been extremely modest and narrow in scope. The Act has been used only once before to waive or modify a provision related to debt cancellation: In 2003, the Secretary waived the requirement that borrowers seeking loan forgiveness under the Education Act's public service discharge provisions "perform uninterrupted, otherwise qualifying service for a specified length of time (for example, one year) or for consecutive periods of time, such as 5 consecutive years." 68 Fed. Reg. 69317. That waiver simply eased the requirement that service be uninterrupted to qualify for the public service loan forgiveness program. In sum, "[n]o regulation premised on" the HEROES Act "has even begun to approach the size or scope" of the Secretary's program. *Alabama Assn.*, 594 U. S., at ___ (slip op., at 7).[7]

Under the Government's reading of the HEROES Act, the

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[7] The Secretary also cites a prior invocation of the HEROES Act waiving the requirement that borrowers must repay prior overpayments of certain grant funds. See Brief for United States 41; 68 Fed. Reg. 69314. But Congress had already limited borrower liability in such cases to exclude overpayments in amounts up to "50 percent of the total grant assistance received by the student" for the period at issue, so the Secretary's waiver had only a modest effect. 20 U. S. C. §1091b(b)(2)(C)(i)(II). And that waiver simply held the Government responsible for its *own* errors when it had mistakenly disbursed undeserved grant funds.

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Secretary would enjoy virtually unlimited power to rewrite the Education Act. This would "effec[t] a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind," *West Virginia*, 597 U. S., at ___ (slip op., at 24) (quoting *MCI*, 512 U. S., at 231)—one in which the Secretary may unilaterally define every aspect of federal student financial aid, provided he determines that recipients have "suffered direct economic hardship as a direct result of a . . . national emergency." 20 U. S. C. §1098ee(2)(D).

The "'economic and political significance'" of the Secretary's action is staggering by any measure. *West Virginia*, 597 U. S., at ___ (slip op., at 17) (quoting *Brown & Williamson*, 529 U. S., at 160). Practically every student borrower benefits, regardless of circumstances. A budget model issued by the Wharton School of the University of Pennsylvania estimates that the program will cost taxpayers "between $469 billion and $519 billion," depending on the total number of borrowers ultimately covered. App. 108. That is ten times the "economic impact" that we found significant in concluding that an eviction moratorium implemented by the Centers for Disease Control and Prevention triggered analysis under the major questions doctrine. *Alabama Assn.*, 594 U. S., at ___ (slip op., at 6). It amounts to nearly one-third of the Government's $1.7 trillion in annual discretionary spending. Congressional Budget Office, The Federal Budget in Fiscal Year 2022. There is no serious dispute that the Secretary claims the authority to exercise control over "a significant portion of the American economy." *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 324 (2014) (quoting *Brown & Williamson*, 529 U. S., at 159).

The dissent is correct that this is a case about one branch of government arrogating to itself power belonging to another. But it is the Executive seizing the power of the Legislature. The Secretary's assertion of administrative authority has "conveniently enabled [him] to enact a program"

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that Congress has chosen not to enact itself. *West Virginia*, 597 U. S., at ___ (slip op., at 27). Congress is not unaware of the challenges facing student borrowers. "More than 80 student loan forgiveness bills and other student loan legislation" were considered by Congress during its 116th session alone. M. Kantrowitz, Year in Review: Student Loan Forgiveness Legislation, Forbes, Dec. 24, 2020.[8] And the discussion is not confined to the halls of Congress. Student loan cancellation "raises questions that are personal and emotionally charged, hitting fundamental issues about the structure of the economy." J. Stein, Biden Student Debt Plan Fuels Broader Debate Over Forgiving Borrowers, Washington Post, Aug. 31, 2022.

The sharp debates generated by the Secretary's extraordinary program stand in stark contrast to the unanimity with which Congress passed the HEROES Act. The dissent asks us to "[i]magine asking the enacting Congress: Can the Secretary use his powers to give borrowers more relief when an emergency has inflicted greater harm?" *Post*, at 27–28. The dissent "can't believe" the answer would be no. *Post*, at 28. But imagine instead asking the enacting Congress a more pertinent question: "Can the Secretary use his powers to abolish $430 billion in student loans, completely canceling loan balances for 20 million borrowers, as a pandemic winds down to its end?" We can't believe the answer would be yes. Congress did not unanimously pass the HEROES Act with such power in mind. "A decision of such magnitude and consequence" on a matter of "'earnest and profound debate across the country'" must "res[t] with Congress itself, or an agency acting pursuant to a clear delegation from that representative body." *West Virginia*, 597 U. S., at ___, ___ (slip op., at 28, 31) (quoting *Gonzales*

[8] Resolutions were also introduced in 2020 and 2021 "[c]alling on the President . . . to take executive action to broadly cancel Federal student loan debt." See S. Res. 711, 116th Cong., 2d Sess. (2020); S. Res. 46, 117th Cong., 1st Sess. (2021). Those resolutions failed to reach a vote.

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v. *Oregon*, 546 U. S. 243, 267–268 (2006)). As then-Speaker of the House Nancy Pelosi explained:

> "People think that the President of the United States has the power for debt forgiveness. He does not. He can postpone. He can delay. But he does not have that power. That has to be an act of Congress." Press Conference, Office of the Speaker of the House (July 28, 2021).

Aside from reiterating its interpretation of the statute, the dissent offers little to rebut our conclusion that "indicators from our previous major questions cases are present" here. *Post*, at 15 (BARRETT, J., concurring). The dissent insists that "[s]tudent loans are in the Secretary's wheelhouse." *Post*, at 26 (opinion of KAGAN, J.). But in light of the sweeping and unprecedented impact of the Secretary's loan forgiveness program, it would seem more accurate to describe the program as being in the "wheelhouse" of the House and Senate Committees on Appropriations. Rather than dispute the extent of that impact, the dissent chooses to mount a frontal assault on what it styles "the Court's made-up major questions doctrine." *Post*, at 29–30. But its attempt to relitigate *West Virginia* is misplaced. As we explained in that case, while the major questions "label" may be relatively recent, it refers to "an identifiable body of law that has developed over a series of significant cases" spanning decades. *West Virginia*, 597 U. S., at ___ (slip op., at 20). At any rate, "the issue now is not whether [*West Virginia*] is correct. The question is whether that case is distinguishable from this one. And it is not." *Collins* v. *Yellen*, 594 U. S. ___, ___ (2021) (KAGAN, J., concurring in part and concurring in judgment) (slip op., at 2).

The Secretary, for his part, acknowledges that *West Virginia* is the law. Brief for United States 47–48. But he objects that its principles apply only in cases concerning "agency action[s] involv[ing] the power to regulate, not the

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provision of government benefits." Reply Brief 21. In the Government's view, "there are fewer reasons to be concerned" in cases involving benefits, which do not impose "profound burdens" on individual rights or cause "regulatory effects that might prompt a note of caution in other contexts involving exercises of emergency powers." Tr. of Oral Arg. 61.

This Court has never drawn the line the Secretary suggests—and for good reason. Among Congress's most important authorities is its control of the purse. U. S. Const., Art. I, §9, cl. 7; see also *Office of Personnel Management* v. *Richmond*, 496 U. S. 414, 427 (1990) (the Appropriations Clause is "a most useful and salutary check upon profusion and extravagance" (internal quotation marks omitted)). It would be odd to think that separation of powers concerns evaporate simply because the Government is providing monetary benefits rather than imposing obligations. As we observed in *West Virginia*, experience shows that major questions cases "have arisen from all corners of the administrative state," and administrative action resulting in the conferral of benefits is no exception to that rule. 597 U. S., at ___ (slip op., at 17). In *King* v. *Burwell*, 576 U. S. 473 (2015), we declined to defer to the Internal Revenue Service's interpretation of a healthcare statute, explaining that the provision at issue affected "billions of dollars of spending each year and . . . the price of health insurance for millions of people." *Id.*, at 485. Because the interpretation of the provision was "a question of deep 'economic and political significance' that is central to [the] statutory scheme," we said, we would not assume that Congress entrusted that task to an agency without a clear statement to that effect. *Ibid.* (quoting *Utility Air*, 573 U. S., at 324). That the statute at issue involved government benefits made no difference in *King*, and it makes no difference here.

All this leads us to conclude that "[t]he basic and consequential tradeoffs" inherent in a mass debt cancellation

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program "are ones that Congress would likely have intended for itself." *West Virginia*, 597 U. S., at ___ (slip op., at 26). In such circumstances, we have required the Secretary to "point to 'clear congressional authorization'" to justify the challenged program. *Id.*, at ___, ___ (slip op., at 19, 28) (quoting *Utility Air*, 573 U. S., at 324). And as we have already shown, the HEROES Act provides no authorization for the Secretary's plan even when examined using the ordinary tools of statutory interpretation—let alone "clear congressional authorization" for such a program.[9]

* * *

It has become a disturbing feature of some recent opinions to criticize the decisions with which they disagree as going beyond the proper role of the judiciary. Today, we have concluded that an instrumentality created by Missouri, governed by Missouri, and answerable to Missouri is indeed part of Missouri; that the words "waive or modify" do not mean "completely rewrite"; and that our precedent—old and new—requires that Congress speak clearly before a Department Secretary can unilaterally alter large sections of the American economy. We have employed the traditional tools of judicial decisionmaking in doing so. Reasonable minds may disagree with our analysis—in fact, at least three do. See *post*, p. ___ (KAGAN, J., dissenting). We do

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[9] The dissent complains that our application of the major questions doctrine is a "tell" revealing that "'normal' statutory interpretation cannot sustain [our] decision." *Post*, at 23, 30. Not so. As we have explained, the statutory text alone precludes the Secretary's program. Today's opinion simply reflects this Court's familiar practice of providing multiple grounds to support its conclusions. See, *e.g.*, *Kucana* v. *Holder*, 558 U. S. 233, 243–252 (2010) (interpreting the text of a federal immigration statute in the first instance, then citing the "presumption favoring judicial review of administrative action" as an additional sufficient basis for the Court's decision). The fact that multiple grounds support a result is usually regarded as a strength, not a weakness.

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not mistake this plainly heartfelt disagreement for disparagement. It is important that the public not be misled either. Any such misperception would be harmful to this institution and our country.

The judgment of the District Court for the Eastern District of Missouri is reversed, and the case is remanded for further proceedings consistent with this opinion. The Government's application to vacate the Eighth Circuit's injunction is denied as moot.

It is so ordered.

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SUPREME COURT OF THE UNITED STATES

No. 22–506

JOSEPH R. BIDEN, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS *v.* NEBRASKA, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 30, 2023]

JUSTICE BARRETT, concurring.

I join the Court's opinion in full. I write separately to address the States' argument that, under the "major questions doctrine," we can uphold the Secretary of Education's loan cancellation program only if he points to "'clear congressional authorization'" for it. *West Virginia* v. *EPA*, 597 U. S. ___, ___ (2022) (slip op., at 19). In this case, the Court applies the ordinary tools of statutory interpretation to conclude that the HEROES Act does not authorize the Secretary's plan. *Ante*, at 12–18. The major questions doctrine reinforces that conclusion but is not necessary to it. *Ante*, at 25.

Still, the parties have devoted significant attention to the major questions doctrine, and there is an ongoing debate about its source and status. I take seriously the charge that the doctrine is inconsistent with textualism. *West Virginia*, 597 U. S., at ___ (KAGAN, J., dissenting) (slip op., at 28) ("When [textualism] would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards"). And I grant that some articulations of the major questions doctrine on offer—most notably, that the doctrine is a substantive canon—should give a textualist pause.

Yet for the reasons that follow, I do not see the major

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questions doctrine that way. Rather, I understand it to emphasize the importance of *context* when a court interprets a delegation to an administrative agency. Seen in this light, the major questions doctrine is a tool for discerning—not departing from—the text's most natural interpretation.

I

A

Substantive canons are rules of construction that advance values external to a statute.[1] A. Barrett, Substantive Canons and Faithful Agency, 90 B. U. L. Rev. 109, 117 (2010) (Barrett). Some substantive canons, like the rule of lenity, play the modest role of breaking a tie between equally plausible interpretations of a statute. *United States* v. *Santos*, 553 U. S. 507, 514 (2008) (plurality opinion). Others are more aggressive—think of them as strong-form substantive canons. Unlike a tie-breaking rule, a strong-form canon counsels a court to *strain* statutory text to advance a particular value. Barrett 168. There are many such canons on the books, including constitutional avoidance, the clear-statement federalism rules, and the presumption against retroactivity. *Id.*, at 138–145, 172–173. Such rules effectively impose a "clarity tax" on Congress by demanding that it speak unequivocally if it wants to accomplish certain ends. J. Manning, Clear Statement Rules and the Constitution, 110 Colum. L. Rev. 399, 403 (2010). This "clear statement" requirement means that the better interpretation of a statute will not necessarily prevail. *E.g.*, *Boechler* v. *Commissioner*, 596 U. S. ___, ___ (2022) (slip op., at 6) ("[I]n this context, better is not enough"). Instead, if

[1] They stand in contrast to linguistic or descriptive canons, which are designed to reflect grammatical rules (such as the punctuation canon) or speech patterns (like the inclusion of some things implies the exclusion of others). A. Barrett, Substantive Canons and Faithful Agency, 90 B. U. L. Rev. 109, 117 (2010).

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the better reading leads to a disfavored result (like provoking a serious constitutional question), the court will adopt an inferior-but-tenable reading to avoid it. So to achieve an end protected by a strong-form canon, Congress must close all plausible off ramps.

While many strong-form canons have a long historical pedigree, they are "in significant tension with textualism" insofar as they instruct a court to adopt something other than the statute's most natural meaning. Barrett 123–124. The usual textualist enterprise involves "hear[ing] the words as they would sound in the mind of a skilled, objectively reasonable user of words." F. Easterbrook, The Role of Original Intent in Statutory Construction, 11 Harv. J. L. & Pub. Pol'y 59, 65 (1988). But a strong-form canon "load[s] the dice for or against a particular result" in order to serve a value that the judiciary has chosen to specially protect. A. Scalia, A Matter of Interpretation 27 (1997) (Scalia); see also Barrett 124, 168–169. Even if the judiciary's adoption of such canons can be reconciled with the Constitution,[2] it is undeniable that they pose "a lot of trouble" for "the honest textualist." Scalia 28.

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[2] Whether the creation or application of strong-form canons exceeds the "judicial Power" conferred by Article III is a difficult question. On the one hand, "federal courts have been developing and applying [such] canons for as long as they have been interpreting statutes," and that is some reason to regard the practice as consistent with the original understanding of the "judicial Power." Barrett 155, 176. Moreover, many strong-form canons advance constitutional values, which heightens their claim to legitimacy. *Id.*, at 168–170. On the other hand, these canons advance constitutional values by imposing prophylactic constraints on Congress—and that is in tension with the Constitution's structure. *Id.*, at 174, 176. Thus, even assuming that the federal courts have not overstepped by adopting such canons in the past, I am wary of adopting new ones—and if the major questions doctrine were a newly minted strong-form canon, I would not embrace it. In my view, however, the major questions doctrine is neither new nor a strong-form canon.

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B

Some have characterized the major questions doctrine as a strong-form substantive canon designed to enforce Article I's Vesting Clause. See, *e.g.*, C. Sunstein, There Are Two "Major Questions" Doctrines, 73 Admin. L. Rev. 475, 483–484 (2021) (asserting that recent cases apply the major questions doctrine as "a nondelegation canon"); L. Heinzerling, The Power Canons, 58 Wm. & Mary L. Rev. 1933, 1946–1948 (2017) (describing the major questions doctrine as a "normative" canon that "is both a presumption against certain kinds of agency interpretations and an instruction to Congress"). On this view, the Court overprotects the nondelegation principle by increasing the cost of delegating authority to agencies—namely, by requiring Congress to speak unequivocally in order to grant them significant rulemaking power. See Barrett 172–176; see also *post*, at 27 (KAGAN, J., dissenting) (describing the major questions doctrine as a "heightened-specificity requirement"); *Georgia* v. *President of the United States*, 46 F. 4th 1283, 1314 (CA11 2022) (Anderson, J., concurring in part and dissenting in part) ("[T]he major questions doctrine is essentially a clear-statement rule"). This "clarity tax" might prevent Congress from getting too close to the nondelegation line, especially since the "intelligible principle" test largely leaves Congress to self-police. (So the doctrine would function like constitutional avoidance.) In addition or instead, the doctrine might reflect the judgment that it is so important for Congress to exercise "[a]ll legislative Powers," Art. I, §1, that it should be forced to think twice before delegating substantial discretion to agencies—even if the delegation is well within Congress's power to make. (So the doctrine would function like the rule that Congress must speak clearly to abrogate state sovereign immunity.) No matter which rationale justifies it, this "clear statement" version of the major questions doctrine "loads the dice" so that a plausible

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antidelegation interpretation wins even if the agency's interpretation is better.

While one could walk away from our major questions cases with this impression, I do not read them this way. No doubt, many of our cases express an expectation of "clear congressional authorization" to support sweeping agency action. See, *e.g.*, *West Virginia*, 597 U. S., at ___ (slip op., at 19); *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 324 (2014); see also *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. ___, ___ (2021) (*per curiam*) (slip op., at 6). But none requires "an 'unequivocal declaration'" from Congress authorizing the *precise* agency action under review, as our clear-statement cases do in their respective domains. See *Financial Oversight and Management Bd. for P. R.* v. *Centro De Periodismo Investigativo, Inc.*, 598 U. S. ___, ___ (2023) (slip op., at 6). And none purports to depart from the best interpretation of the text—the hallmark of a true clear-statement rule.

So what work is the major questions doctrine doing in these cases? I will give you the long answer, but here is the short one: The doctrine serves as an interpretive tool reflecting "common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133 (2000).

II

The major questions doctrine situates text in context, which is how textualists, like all interpreters, approach the task at hand. C. Nelson, What Is Textualism? 91 Va. L. Rev. 347, 348 (2005) ("[N]o 'textualist' favors isolating statutory language from its surrounding context"); Scalia 37 ("In textual interpretation, context is everything"). After all, the meaning of a word depends on the circumstances in which it is used. J. Manning, The Absurdity Doctrine, 116

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Harv. L. Rev. 2387, 2457 (2003) (Manning). To strip a word from its context is to strip that word of its meaning.

Context is not found exclusively "'within the four corners' of a statute." *Id.*, at 2456. Background legal conventions, for instance, are part of the statute's context. F. Easterbrook, The Case of the Speluncean Explorers: Revisited, 112 Harv. L. Rev. 1876, 1913 (1999) ("Language takes meaning from its linguistic context," as well as "historical and governmental contexts"). Thus, courts apply a presumption of *mens rea* to criminal statutes, *Xiulu Ruan* v. *United States*, 597 U. S. ___, ___ (2022) (slip op., at 5), and a presumption of equitable tolling to statutes of limitations, *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 95–96 (1990). It is also well established that "[w]here Congress employs a term of art obviously transplanted from another legal source, it brings the old soil with it." *George* v. *McDonough*, 596 U. S. ___, ___ (2022) (slip op., at 5) (internal quotation marks omitted). I could go on. See, *e.g.*, *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U. S. 118, 132 (2014) (federal causes of action are construed "to incorporate a requirement of proximate causation"); *Wisconsin Dept. of Revenue* v. *William Wrigley, Jr., Co.*, 505 U. S. 214, 231 (1992) ("*de minimis non curat lex*"). As it happens, "[t]he notion that some things 'go without saying' applies to legislation just as it does to everyday life." *Bond* v. *United States*, 572 U. S. 844, 857 (2014).

Context also includes common sense, which is another thing that "goes without saying." Case reporters and casebooks brim with illustrations of why literalism—the antithesis of context-driven interpretation—falls short. Consider the classic example of a statute imposing criminal penalties on "'whoever drew blood in the streets.'" *United States* v. *Kirby*, 7 Wall. 482, 487 (1869). Read literally, the statute would cover a surgeon accessing a vein of a person in the street. But "common sense" counsels otherwise, *ibid.*, be-

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cause in the context of the criminal code, a reasonable observer would "expect the term 'drew blood' to describe a violent act," Manning 2461. Common sense similarly bears on judgments like whether a floating home is a "vessel," *Lozman* v. *Riviera Beach*, 568 U. S. 115, 120–121 (2013), whether tomatoes are "vegetables," *Nix* v. *Hedden*, 149 U. S. 304, 306–307 (1893), and whether a skin irritant is a "chemical weapon," *Bond*, 572 U. S., at 860–862.

Why is any of this relevant to the major questions doctrine? Because context is also relevant to interpreting the scope of a delegation. Think about agency law, which is all about delegations. When an agent acts on behalf of a principal, she "has actual authority to take action designated or implied in the principal's manifestations to the agent . . . as the agent reasonably understands [those] manifestations." Restatement (Third) of Agency §2.02(1) (2005). Whether an agent's understanding is reasonable depends on "[t]he *context* in which the principal and agent interact," including their "[p]rior dealings," industry "customs and usages," and "the nature of the principal's business or the principal's personal situation." *Id.*, §2.02, Comment *e* (emphasis added). With that in mind, imagine that a grocer instructs a clerk to "go to the orchard and buy apples for the store." Though this grant of apple-purchasing authority sounds unqualified, a reasonable clerk would know that there are limits. For example, if the grocer usually keeps 200 apples on hand, the clerk does not have actual authority to buy 1,000—the grocer would have spoken more directly if she meant to authorize such an out-of-the-ordinary purchase. A clerk who disregards context and stretches the words to their fullest will not have a job for long.

This is consistent with how we communicate conversationally. Consider a parent who hires a babysitter to watch her young children over the weekend. As she walks out the door, the parent hands the babysitter her credit card and says: "Make sure the kids have fun." Emboldened, the

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babysitter takes the kids on a road trip to an amusement park, where they spend two days on rollercoasters and one night in a hotel. Was the babysitter's trip consistent with the parent's instruction? Maybe in a literal sense, because the instruction was open-ended. But was the trip consistent with a *reasonable* understanding of the parent's instruction? Highly doubtful. In the normal course, permission to spend money on fun authorizes a babysitter to take children to the local ice cream parlor or movie theater, not on a multiday excursion to an out-of-town amusement park. If a parent were willing to greenlight a trip that big, we would expect much more clarity than a general instruction to "make sure the kids have fun."

But what if there is more to the story? Perhaps there is obvious contextual evidence that the babysitter's jaunt was permissible—for example, maybe the parent left tickets to the amusement park on the counter. Other clues, though less obvious, can also demonstrate that the babysitter took a reasonable view of the parent's instruction. Perhaps the parent showed the babysitter where the suitcases are, in the event that she took the children somewhere overnight. Or maybe the parent mentioned that she had budgeted $2,000 for weekend entertainment. Indeed, some relevant points of context may not have been communicated by the parent at all. For instance, we might view the parent's statement differently if this babysitter had taken the children on such trips before or if the babysitter were a grandparent.

In my view, the major questions doctrine grows out of these same commonsense principles of communication. Just as we would expect a parent to give more than a general instruction if she intended to authorize a babysitter-led getaway, we also "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Utility Air*, 573 U. S., at 324. That clarity may come from specific words in the statute,

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but context can also do the trick. Surrounding circumstances, whether contained within the statutory scheme or external to it, can narrow or broaden the scope of a delegation to an agency.

This expectation of clarity is rooted in the basic premise that Congress normally "intends to make major policy decisions itself, not leave those decisions to agencies." *United States Telecom Assn.* v. *FCC*, 855 F. 3d 381, 419 (CADC 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc). Or, as Justice Breyer once observed, "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters [for agencies] to answer themselves in the course of a statute's daily administration." S. Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 370 (1986); see also A. Gluck & L. Bressman, Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 Stan. L. Rev. 901, 1003–1006 (2013). That makes eminent sense in light of our constitutional structure, which is itself part of the legal context framing any delegation. Because the Constitution vests Congress with "[a]ll legislative Powers," Art. I, §1, a reasonable interpreter would expect it to make the big-time policy calls itself, rather than pawning them off to another branch. See *West Virginia*, 597 U. S., at ___ (slip op., at 19) (explaining that the major questions doctrine rests on "both separation of powers principles and a practical understanding of legislative intent").

Crucially, treating the Constitution's structure as part of the context in which a delegation occurs is *not* the same as using a clear-statement rule to overenforce Article I's nondelegation principle (which, again, is the rationale behind the substantive-canon view of the major questions doctrine). My point is simply that in a system of separated powers, a reasonably informed interpreter would expect

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Congress to legislate on "important subjects" while delegating away only "the details." *Wayman* v. *Southard*, 10 Wheat. 1, 43 (1825). That is different from a normative rule that *discourages* Congress from empowering agencies. To see what I mean, return to the ambitious babysitter. Our expectation of clearer authorization for the amusement-park trip is not about discouraging the parent from giving significant leeway to the babysitter or forcing the parent to think hard before doing so. Instead, it reflects the intuition that the parent is in charge and sets the terms for the babysitter—so if a judgment is significant, we expect the parent to make it. If, by contrast, one parent left the children with the other parent for the weekend, we would view the same trip differently because the parents share authority over the children. In short, the balance of power between those in a relationship inevitably frames our understanding of their communications. And when it comes to the Nation's policy, the Constitution gives Congress the reins—a point of context that no reasonable interpreter could ignore.

Given these baseline assumptions, an interpreter should "typically greet" an agency's claim to "extravagant statutory power" with at least some "measure of skepticism." *Utility Air*, 573 U. S., at 324. That skepticism is neither "made-up" nor "new." *Post*, at 24, 29 (KAGAN, J., dissenting). On the contrary, it appears in a line of decisions spanning at least 40 years. *E.g.*, *King* v. *Burwell*, 576 U. S. 473, 485–486 (2015); *Gonzales* v. *Oregon*, 546 U. S. 243, 267–268 (2006); *Brown & Williamson*, 529 U. S., at 159–160; *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U. S. 607, 645 (1980) (plurality opinion).[3]

Still, this skepticism does not mean that courts have an

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[3] Indeed, the doctrine may have even deeper roots. See *ICC* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 494–495 (1897) (explaining that for agency assertions of "vast and comprehensive" power, "no just rule of construction would tolerate a grant of such power by mere implication").

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obligation (or even permission) to choose an inferior-but-tenable alternative that curbs the agency's authority—and that marks a key difference between my view and the "clear statement" view of the major questions doctrine. In some cases, the court's initial skepticism might be overcome by text directly authorizing the agency action or context demonstrating that the agency's interpretation is convincing. (And because context can suffice, I disagree with JUSTICE KAGAN's critique that "[t]he doctrine forces Congress to delegate in highly specific terms." *Post*, at 24.) If so, the court must adopt the agency's reading despite the "majorness" of the question.[4] In other cases, however, the court might conclude that the agency's expansive reading, even if "plausible," is not the best. *West Virginia*, 597 U. S., at ___ (slip op., at 19). In that event, the major questions doctrine plays a role, because it helps explain the court's conclusion that the agency overreached.

Consider *Brown & Williamson*, in which we rejected the Food and Drug Administration's (FDA's) determination that tobacco products were within its regulatory purview. 529 U. S., at 131. The agency's assertion of authority—which depended on the argument that nicotine is a "'drug'" and that cigarettes and smokeless tobacco are "'drug delivery devices'"—would have been plausible if the relevant statutory text were read in a vacuum. *Ibid.* But a vacuum is no home for a textualist. Instead, we stressed that the "meaning" of a word or phrase "may only become evident when placed in *context*." *Id.*, at 132 (emphasis added). And the critical context in *Brown & Williamson* was tobacco's

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[4] I am dealing only with statutory interpretation, not the separate argument that a statutory delegation exceeds constitutional limits. See *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 474 (2001) (describing a delegation held unconstitutional because it "conferred authority to regulate the entire economy on the basis of" an imprecise standard).

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"unique political history": the FDA's longstanding disavowal of authority to regulate it, Congress's creation of "a distinct regulatory scheme for tobacco products," and the tobacco industry's "significant" role in "the American economy." *Id.*, at 159–160. In light of those considerations, we concluded that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.*, at 160.

We have also been "[s]keptical of mismatches" between broad "invocations of power by agencies" and relatively narrow "statutes that purport to delegate that power." *In re MCP No. 165, OSHA, Interim Final Rule: Covid–19 Vaccination and Testing*, 20 F. 4th 264, 272 (CA6 2021) (Sutton, C. J., dissenting from denial of initial hearing en banc). Just as an instruction to "pick up dessert" is not permission to buy a four-tier wedding cake, Congress's use of a "subtle device" is not authorization for agency action of "enormous importance." *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 231 (1994); cf. *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes"). This principle explains why the Centers for Disease Control and Prevention's (CDC's) general authority to "'prevent the . . . spread of communicable diseases'" did not authorize a nationwide eviction moratorium. *Alabama Assn. of Realtors*, 594 U. S., at ___–___, ___ (slip op., at 2–3, 6). The statute, we observed, was a "wafer-thin reed" that could not support the assertion of "such sweeping power." *Id.*, at ___ (slip op., at 7). Likewise, in *West Virginia*, we held that a "little-used backwater" provision in the Clean Air Act could not justify an Environmental Protection Agency (EPA) rule that would "restructur[e] the Nation's overall mix of electricity generation." 597 U. S., at ___, ___ (slip op., at 16, 26).

Another telltale sign that an agency may have transgressed its statutory authority is when it regulates outside

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its wheelhouse. For instance, in *Gonzales* v. *Oregon*, we rebuffed an interpretive rule from the Attorney General that restricted the use of controlled substances in physician-assisted suicide. 546 U. S., at 254, 275. This judgment, we explained, was a medical one that lay beyond the Attorney General's expertise, and so a sturdier source of statutory authority than "an implicit delegation" was required. *Id.*, at 267–268. Likewise, in *King* v. *Burwell*, we blocked the Internal Revenue Service's (IRS's) attempt to decide whether the Affordable Care Act's tax credits could be available on federally established exchanges. 576 U. S., at 485–486. Among other things, the IRS's lack of "expertise in crafting health insurance policy" made us think that "had Congress wished to assign that question to an agency, it surely would have done so expressly." *Id.*, at 486. Echoing the theme, our reasoning in *Alabama Association of Realtors* rested partly on the fact that the CDC's eviction moratorium "intrude[d] into . . . the landlord-tenant relationship"—hardly the day-in, day-out work of a public-health agency. 594 U. S., at ___ (slip op., at 6). *National Federation of Independent Business* v. *OSHA* is of a piece. 595 U. S. ___ (2022) (*per curiam*). There, we held that the Occupational Safety and Health Administration's (OSHA's) authority to ensure "'safe and healthful working conditions'" did not encompass the power to mandate the vaccination of employees; as we explained, the statute empowered the agency "to set *workplace* safety standards, not broad public health measures." *Id.*, at ___, ___ (slip op., at 2, 6). The shared intuition behind these cases is that a reasonable speaker would not understand Congress to confer an unusual form of authority without saying more.

We have also pumped the brakes when "an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy.'" *Utility Air*, 573 U. S., at 324. Of course, an agency's post-

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enactment conduct does not control the meaning of a statute, but "this Court has long said that courts may consider the consistency of an agency's views when we weigh the persuasiveness of any interpretation it proffers in court." *Bittner* v. *United States*, 598 U. S. 85, 97 (2023) (citing *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944)). The agency's track record can be particularly probative in this context: A longstanding "want of assertion of power by those who presumably would be alert to exercise it" may provide some clue that the power was never conferred. *FTC* v. *Bunte Brothers, Inc.*, 312 U. S. 349, 352 (1941). Once again, *Brown & Williamson* is a good example. There, we balked at the FDA's novel attempt to regulate tobacco in part because this move was "[c]ontrary to its representations to Congress since 1914." 529 U. S., at 159. And in *Utility Air*, we were dubious when the EPA discovered "newfound authority" in the Clean Air Act that would have allowed it to require greenhouse-gas permits for "millions of small sources—including retail stores, offices, apartment buildings, shopping centers, schools, and churches." 573 U. S., at 328.

If the major questions doctrine were a substantive canon, then the common thread in these cases would be that we "exchange[d] the most natural reading of a statute for a bearable one more protective of a judicially specified value." Barrett 111. But by my lights, the Court arrived at the most plausible reading of the statute in these cases. To be sure, "[a]ll of these regulatory assertions had a colorable textual basis." *West Virginia*, 597 U. S., at ___ (slip op., at 18). In each case, we could have "[p]ut on blinders" and confined ourselves to the four corners of the statute, and we might have reached a different outcome. *Sykes* v. *United States*, 564 U. S. 1, 43 (2011) (KAGAN, J., dissenting). Instead, we took "off those blinders," "view[ed] the statute as a whole," *ibid.*, and considered context that would be important to a reasonable observer. With the full picture in

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view, it became evident in each case that the agency's assertion of "highly consequential power" went "beyond what Congress could reasonably be understood to have granted." *West Virginia*, 597 U. S., at ___ (slip op., at 20).

III

As for today's case: The Court surely could have "hi[t] the send button," *post*, at 23 (KAGAN, J., dissenting), after the routine statutory analysis set out in Part III–A. But it is nothing new for a court to punctuate its conclusion with an additional point, and the major questions doctrine is a good one here. *Ante*, at 25, n. 9. It is obviously true that the Secretary's loan cancellation program has "vast 'economic and political significance.'" *Utility Air*, 573 U. S., at 324. That matters not because agencies are incapable of making highly consequential decisions, but rather because an initiative of this scope, cost, and political salience is not the type that Congress lightly delegates to an agency. And for the reasons given by the Court, the HEROES Act provides no indication that Congress empowered the Secretary to do anything of the sort. *Ante*, at 12–18, 25.

Granted, some context clues from past major questions cases are absent here—for example, this is not a case where the agency is operating entirely outside its usual domain. But the doctrine is not an on-off switch that flips when a critical mass of factors is present—again, it simply reflects "common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude." *Brown & Williamson*, 529 U. S., at 133. Common sense tells us that as more indicators from our previous major questions cases are present, the less likely it is that Congress would have delegated the power to the agency without saying so more clearly.

Here, enough of those indicators are present to demonstrate that the Secretary has gone far "beyond what Congress could reasonably be understood to have granted" in

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the HEROES Act. *West Virginia*, 597 U. S., at ___ (slip op., at 20). Our decision today does not "trump" the statutory text, nor does it make this Court the "arbiter" of "national policy." *Post*, at 24–25 (KAGAN, J., dissenting). Instead, it gives Congress's words their best reading.

* * *

The major questions doctrine has an important role to play when courts review agency action of "vast 'economic and political significance.'" *Utility Air*, 573 U. S., at 324. But the doctrine should not be taken for more than it is—the familiar principle that we do not interpret a statute for all it is worth when a reasonable person would not read it that way.

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SUPREME COURT OF THE UNITED STATES

No. 22–506

JOSEPH R. BIDEN, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS *v.* NEBRASKA, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 30, 2023]

JUSTICE KAGAN, with whom JUSTICE SOTOMAYOR and JUSTICE JACKSON join, dissenting.

In every respect, the Court today exceeds its proper, limited role in our Nation's governance.

Some 20 years ago, Congress enacted legislation, called the HEROES Act, authorizing the Secretary of Education to provide relief to student-loan borrowers when a national emergency struck. The Secretary's authority was bounded: He could do only what was "necessary" to alleviate the emergency's impact on affected borrowers' ability to repay their student loans. 20 U. S. C. §1098bb(a)(2). But within that bounded area, Congress gave discretion to the Secretary. He could "waive or modify any statutory or regulatory provision" applying to federal student-loan programs, including provisions relating to loan repayment and forgiveness. And in so doing, he could replace the old provisions with new "terms and conditions." §§1098bb(a)(1), (b)(2). The Secretary, that is, could give the relief that was needed, in the form he deemed most appropriate, to counteract the effects of a national emergency on borrowers' capacity to repay. That may have been a good idea, or it may have been a bad idea. Either way, it was what Congress said.

When COVID hit, two Secretaries serving two different

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Presidents decided to use their HEROES Act authority. The first suspended loan repayments and interest accrual for all federally held student loans. The second continued that policy for a time, and then replaced it with the loan forgiveness plan at issue here, granting most low- and middle-income borrowers up to $10,000 in debt relief. Both relied on the HEROES Act language cited above. In establishing the loan forgiveness plan, the current Secretary scratched the pre-existing conditions for loan discharge, and specified different conditions, opening loan forgiveness to more borrowers. So he "waive[d]" and "modif[ied]" statutory and regulatory provisions and applied other "terms and conditions" in their stead. That may have been a good idea, or it may have been a bad idea. Either way, the Secretary did only what Congress had told him he could.

The Court's first overreach in this case is deciding it at all. Under Article III of the Constitution, a plaintiff must have standing to challenge a government action. And that requires a personal stake—an injury in fact. We do not allow plaintiffs to bring suit just because they oppose a policy. Neither do we allow plaintiffs to rely on injuries suffered by others. Those rules may sound technical, but they enforce "fundamental limits on federal judicial power." *Allen* v. *Wright*, 468 U. S. 737, 750 (1984). They keep courts acting like courts. Or stated the other way around, they prevent courts from acting like this Court does today. The plaintiffs in this case are six States that have no personal stake in the Secretary's loan forgiveness plan. They are classic ideological plaintiffs: They think the plan a very bad idea, but they are no worse off because the Secretary differs. In giving those States a forum—in adjudicating their complaint—the Court forgets its proper role. The Court acts as though it is an arbiter of political and policy disputes, rather than of cases and controversies.

And the Court's role confusion persists when it takes up the merits. For years, this Court has insisted that the way

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to keep judges' policy views and preferences out of judicial decisionmaking is to hew to a statute's text. The HEROES Act's text settles the legality of the Secretary's loan forgiveness plan. The statute provides the Secretary with broad authority to give emergency relief to student-loan borrowers, including by altering usual discharge rules. What the Secretary did fits comfortably within that delegation. But the Court forbids him to proceed. As in other recent cases, the rules of the game change when Congress enacts broad delegations allowing agencies to take substantial regulatory measures. See, *e.g.*, *West Virginia* v. *EPA*, 597 U. S. ___ (2022). Then, as in this case, the Court reads statutes unnaturally, seeking to cabin their evident scope. And the Court applies heightened-specificity requirements, thwarting Congress's efforts to ensure adequate responses to unforeseen events. The result here is that the Court substitutes itself for Congress and the Executive Branch in making national policy about student-loan forgiveness. Congress authorized the forgiveness plan (among many other actions); the Secretary put it in place; and the President would have been accountable for its success or failure. But this Court today decides that some 40 million Americans will not receive the benefits the plan provides, because (so says the Court) that assistance is too "significan[t]." *Ante*, at 20–21. With all respect, I dissent.

I

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 37 (1976). In our system, "[f]ederal courts do not possess a roving commission to publicly opine on every legal question." *TransUnion LLC* v. *Ramirez*, 594 U. S. ___, ___ (2021) (slip op., at 8). Nor do they "exercise general legal oversight of the Legislative and

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Executive Branches." *Ibid.* A court may address the legality of a government action only if the person challenging it has standing—which requires that the person have suffered a "concrete and particularized injury." *Ibid.* It is not enough for the plaintiff to assert a "generalized grievance[]" about government policy. *Gill* v. *Whitford*, 585 U. S. ___, ___ (2018) (slip op., at 13). And critically here, the plaintiff cannot rest its claim on a third party's rights and interests. See *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975). The plaintiff needs its own stake—a "personal stake"—in the outcome of the litigation. *TransUnion*, 594 U. S., at ___ (slip op., at 7). If the plaintiff has no such stake, a court must stop in its tracks. To decide the case is to exceed the permissible boundaries of the judicial role.

That is what the Court does today. The plaintiffs here are six States: Arkansas, Iowa, Kansas, Missouri, Nebraska, and South Carolina. They oppose the Secretary's loan cancellation plan on varied policy and legal grounds. But as everyone agrees, those objections are just general grievances; they do not show the particularized injury needed to bring suit. And the States have no straightforward way of making that showing—of explaining how *they* are harmed by a plan that reduces individual borrowers' federal student-loan debt. So the States have thrown no fewer than four different theories of injury against the wall, hoping that a court anxious to get to the merits will say that one of them sticks. The most that can be said of the theory the majority selects, proffered solely by Missouri, is that it is less risible than the others. It still contravenes a bedrock principle of standing law—that a plaintiff cannot ride on someone else's injury. Missouri is doing just that in relying on injuries to the Missouri Higher Education Loan Authority (MOHELA), a legally and financially independent public corporation. And that means the Court, by deciding this case, exercises authority it does not have. It violates the Constitution.

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A

Missouri's theory of standing, as accepted by the majority, goes as follows. MOHELA is a state-created corporation participating in the student-loan market. As part of that activity, it has contracted with the Department of Education to service federally held loans—essentially, to handle billing and collect payments for the Federal Government. Under that contract, MOHELA receives an administrative fee for each loan serviced. When a loan is canceled, MOHELA will not get a fee; so the Secretary's plan will cost MOHELA money. And if MOHELA is harmed, Missouri must be harmed, because the corporation is a "public instrumentality" and, as such, "part of Missouri's government." Brief for Respondents 16–17; see *ante*, at 8–9.

Up to the last step, the theory is unexceptionable—except that it points to MOHELA as the proper plaintiff. Financial harm is a classic injury in fact. MOHELA plausibly alleges that it will suffer that harm as a result of the Secretary's plan. So MOHELA can sue the Secretary, as the Government readily concedes. See Tr. of Oral Arg. 18. But not even Missouri, and not even the majority, claims that MOHELA's revenue loss gets passed through to the State. As further discussed below, MOHELA is financially independent from Missouri—as corporations typically are, the better to insulate their creators from financial loss. See *infra*, at 6. So MOHELA's revenue decline—the injury in fact claimed to justify this suit—is not in fact Missouri's. The State's treasury will not be out one penny because of the Secretary's plan. The revenue loss allegedly grounding this case is MOHELA's alone.

Which leads to an obvious question: Where's MOHELA? The answer is: As far from this suit as it can manage. MOHELA could have brought this suit. It possesses the power under Missouri law to "sue and be sued" in its own name. Mo. Rev. Stat. §173.385.1(3) (2016). But MOHELA is not a party here. Nor is it an *amicus*. Nor is it even a

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rooting bystander. MOHELA was "not involved with the decision of the Missouri Attorney General's Office" to file this suit. Letter from Appellees in No. 22–3179 (CA8), p. 3 (Nov. 1, 2022). And MOHELA did not cooperate with the Attorney General's efforts. When the AG wanted documents relating to MOHELA's loan-servicing contract, to aid him in putting forward the State's standing theory, he had to file formal "sunshine law" demands on the entity. See *id.*, at 3–4. MOHELA had no interest in assisting voluntarily.

If all that makes you suspect that MOHELA is distinct from the State, you would be right. And that is so as a matter of law and financing alike. Yes, MOHELA is a creature of state statute, a public instrumentality established to serve a public function. §173.360. But the law sets up MOHELA as a corporation—a so-called "body corporate"—with a "[s]eparate legal personality." *Ibid.*; *First Nat. City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U. S. 611, 625 (1983) (*Bancec*). Or said a bit differently, MOHELA is—like the lion's share of corporations, whether public or private—a "separate legal [entity] with distinct legal rights and obligations" from those belonging to its creator. *Agency for Int'l Development* v. *Alliance for Open Society Int'l Inc.*, 591 U. S. ___, ___ (2020) (slip op., at 5). MOHELA, for example, has the power to contract with other entities, which is how it entered into a loan-servicing contract with the Department of Education. See §173.385.1(15). MOHELA's assets, including the fees gained from that contract, are not "part of the revenue of the [S]tate" and cannot be "used for the payment of debt incurred by the [S]tate." §§173.386, 173.425. On the other side of the ledger, MOHELA's debts are MOHELA's alone; Missouri cannot be liable for them. §173.410. And as noted earlier, MOHELA has the power to "sue and be sued" independent of Missouri, so it can both "prosecute and defend"

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all its varied interests. §173.385.1(3); see *supra*, at 5. Indeed, before this case, Missouri had never tried to appear in court on MOHELA's behalf. That is no surprise. In the statutory scheme, independence is everywhere: State law created MOHELA, but in so doing set it apart.

The Missouri Supreme Court itself recognized as much in addressing a near-carbon-copy state instrumentality. MOHEFA (note the one-letter difference) issues bonds to support various health and educational institutions in the State. Like MOHELA, MOHEFA is understood as a "public instrumentality" serving a "public function." *Menorah Medical Center* v. *Health and Ed. Facilities Auth.*, 584 S. W. 2d 73, 76 (Mo. 1979). And like MOHELA, MOHEFA has a board appointed by the Governor and sends annual reports to a state department. See Mo. Rev. Stat. §§360.020, 360.140 (1978); *ante*, at 9 (suggesting those features matter). But the State Supreme Court, when confronted with a claim that MOHEFA's undertakings should be ascribed to the State, could hardly have been more dismissive. The court thought it beyond dispute that MOHEFA "is not the [S]tate," and that its activities are not state activities. *Menorah*, 584 S. W. 2d, at 78. Citing MOHEFA's financial and legal independence, the court explained that "[s]imilar bodies have been adjudged as 'separate entities' from" Missouri. *Ibid.* MOHELA is no different.

Under our usual standing rules, that separation would matter—indeed, would decide this case. A plaintiff, this Court has held time and again, cannot rest its claim to judicial relief on the "legal rights and interests" of third parties. *Warth*, 422 U. S., at 499. And MOHELA qualifies as such a party, for all the reasons just given. That MOHELA is publicly created makes not a whit of difference: When a "government instrumentalit[y]" is "established as [a] juridical entit[y] distinct and independent from [its] sovereign," the law—including the law of standing—is supposed to treat it that way. *Bancec*, 462 U. S., at 626–627; see *Sloan*

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Shipyards Corp. v. *United States Shipping Bd. Emergency Fleet Corporation*, 258 U. S. 549, 567 (1922). So this case should have been open-and-shut. Missouri and MOHELA are legally, and also financially, "separate entities." *Menorah*, 584 S. W. 2d, at 78. MOHELA is fully capable of representing its own interests, and always has done so before. The injury to MOHELA thus does not entitle Missouri—under our normal standing rules—to go to court.

And those normal rules are more than just rules: They are, as this case shows, guarantors of our constitutional order. The requirement that the proper party—the party actually affected—challenge an action ensures that courts do not overstep their proper bounds. See *Clapper* v. *Amnesty Int'l USA*, 568 U. S. 398, 408–409 (2013) ("Relaxation of standing [rules] is directly related to the expansion of judicial power"). Without that requirement, courts become "forums for the ventilation of public grievances"—for settlement of ideological and political disputes. *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 473 (1982). The kind of forum this Court has become today. Is there a person in America who thinks Missouri is here because it is worried about MOHELA's loss of loan-servicing fees? I would like to meet him. Missouri is here because it thinks the Secretary's loan cancellation plan makes for terrible, inequitable, wasteful policy. And so too for Arkansas, Iowa, Kansas, Nebraska, and South Carolina. And maybe all of them are right. But that question is not what this Court sits to decide. That question is "more appropriately addressed in the representative branches," and by the broader public. *Allen*, 468 U. S., at 751. Our third-party standing rules, like the rest of our standing doctrine, exist to separate powers in that way—to send political issues to political institutions, and retain only legal controversies, brought by plaintiffs who have suffered real legal injury. If MOHELA had brought this suit, we would have had to resolve it, however

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hot or divisive. But Missouri? In adjudicating Missouri's claim, the majority reaches out to decide a matter it has no business deciding. It blows through a constitutional guardrail intended to keep courts acting like courts.

B

The majority does not over-expend itself in defending that action. It recites the State's assertion that a "harm to MOHELA is also a harm to Missouri" because the former is the latter's instrumentality. *Ante*, at 8. But in doing so, the majority barely addresses MOHELA's separate corporate identity, its financial independence, and its distinct legal rights. In other words, the majority glides swiftly over all the attributes of MOHELA ensuring that its economic losses (1) are not passed on to the State and (2) can be rectified (if there is legal wrong) without the State's help. The majority is left to argue from a couple of prior decisions and a single idea, the latter relating to the State's desire to "aid Missouri college students." *Ante*, at 9. But the decisions do not stand for what the majority claims. And the idea collides with another core precept of standing law. All in all, the majority's justifications turn standing law from a pillar of a restrained judiciary into nothing more than "a lawyer's game." *Massachusetts* v. *EPA*, 549 U. S. 497, 548 (2007) (ROBERTS, C. J., dissenting).

The majority mainly relies on *Arkansas* v. *Texas*, 346 U. S. 368 (1953), but that case shows only that not all public instrumentalities are the same. The Court there held that Arkansas could bring suit on behalf of a state university. But it did so because the school *lacked* the financial and legal separateness MOHELA has. Arkansas, we observed, "owns all the property used by the University." *Id.*, at 370. And the suit, if successful, would have enhanced that property: The litigation sought to stop Texas from interfering with a contract to build a medical facility on campus. For the same reason, the Court found that "any injury under

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the contract to the University is an injury to Arkansas": The State was the principal beneficiary of the contract to improve its own property. *Ibid.* So Arkansas had the sort of direct financial interest not present here. And there is more: The University, the Court thought, could not sue on its own. See *ibid.* The majority suggests otherwise, citing a state-court decision holding that corporations usually have the power to bring and defend legal actions. See *ante*, at 11–12. But the *Arkansas* Court referenced a different state-court decision—one holding that another state school was "not authorized" to "sue and be sued." *Allen Eng. Co.* v. *Kays*, 106 Ark. 174, 177, 152 S. W. 992, 993 (1913); see *Arkansas*, 346 U. S., at 370, and n. 9. That decision led this Court to conclude that Arkansas law treated "a suit against the University" as "a suit against the State." *Id.*, at 370. But if state law had not done so—as it does not in Missouri for MOHELA? See *supra*, at 6–7. The Court made clear that a State cannot stand in for an independent entity. The State, the Court said, "must, of course, represent an interest of her own and not merely that of her citizens or corporations." *Ibid.*

The majority's second case—*Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374 (1995)—is yet further afield. The issue there was whether Amtrak, a public corporation similar to MOHELA, had to comply with the First Amendment. The Court held that it did, labeling Amtrak a state actor for that purpose. On the opposite view, we reasoned, a government could "evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Id.*, at 397; see *ibid.* (noting that *Plessy* could then be "resurrected by the simple device" of creating a public corporation to run trains). But that did not mean Amtrak was equivalent to the Government for all purposes. Over and over, we cabined our holding that Amtrak was a state actor by adding a phrase like "for purposes of the First Amendment" or other constitutional rights. *Id.*, at 400; see

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id., at 383 (Amtrak "must be regarded as a Government entity for First Amendment purposes"); *id.*, at 392 (Amtrak is "a Government entity for purposes of determining the constitutional rights of citizens"); *id.*, at 394 (Amtrak is an "instrumentality of the United States for the purpose of individual rights guaranteed against the Government"); *id.*, at 397, 399, 400 (similar, similar, and similar). But for other purposes, a different rule might, or would, obtain. Our holding, we said, did not mean Amtrak had sovereign immunity. See *id.*, at 392. And most relevant here, we reaffirmed that "[t]he State does not, by becoming a corporator, identify itself with the corporation" for purposes of litigation. *Id.*, at 398. Or said again, the Government is "not a party to suits brought by or against" its corporation. *Id.*, at 399. So what *Lebron* tells us about MOHELA is that it must comply with the Constitution. *Lebron* offers no support (more like the opposite) for the different view that MOHELA and Missouri are interchangeable parties in litigation.[1]

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[1] The same goes for the majority's other case about Amtrak, which just "reiterate[s]" *Lebron*'s reasoning. *Ante*, at 11; see *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43 (2015). There too we held that Amtrak was a "governmental entity" for purposes of the "requirements of the Constitution"—specifically, the nondelegation doctrine. *Id.*, at 54. And there too we kept our holding as limited as possible, repeatedly stating that we were treating Amtrak as the Government for that purpose alone. See, *e.g.*, *id.*, at 51 ("for purposes of separation-of-powers analysis under the Constitution"); *id.*, at 54 ("for purposes of the Constitution's separation of powers provisions"); *id.*, at 55 ("for purposes of determining the constitutional issues presented in this case"). As for any other purpose? Not a word to suggest the same result. And as even the majority concedes, "a public corporation can count as part of the State for some but not other purposes." *Ante*, at 12, n. 3 (internal quotation marks omitted). The Amtrak decisions, to continue borrowing the majority's language, "said nothing about, and had no reason to address, whether an injury to [a] public corporation is a harm to the [Government]." *Ibid.*

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Remaining is the majority's unsupported—and insupportable—idea that the Secretary's plan "necessarily" hurts Missouri because it "impair[s]" MOHELA's "efforts to aid [the State's] college students." *Ante*, at 9. To begin with, it seems unlikely that the reduction in MOHELA's revenues resulting from the discharge would make it harder for students to "access student loans," as the majority contends. *Ante*, at 8. MOHELA is not a lender; it services loans others have made. Which is probably why even Missouri has never tried to show that the Secretary's plan will so detrimentally affect the State's borrowers. In any event—and more important—such a harm to citizens cannot provide an escape hatch out of MOHELA's legal and financial independence. That is because of another canonical limit on a State's ability to ride on third parties: A State may never sue the Federal Government based on its citizens' rights and interests. See *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U. S. 592, 610, n. 16 (1982); *Haaland* v. *Brackeen*, 599 U. S. ___, ___, and n. 11 (2023) (slip op., at 32, and n. 11). Or said more technically, a "State does not have standing as *parens patriae* to bring an action against the Federal Government." *Ibid.*; see *Massachusetts* v. *Mellon*, 262 U. S. 447, 485–486 (1923). So Missouri cannot get standing by asserting that a harm to MOHELA will harm the State's citizens. Missouri needs to show that the harm to MOHELA produces harm to the State itself. And because, as explained above, MOHELA was set up (as corporations typically are) to insulate its creator from such derivative harm, Missouri is incapable of making that showing. See *supra*, at 6. The separateness, both financial and legal, between MOHELA and Missouri makes MOHELA alone the proper party.

The author of today's opinion once wrote that a 1970s-era standing decision "became emblematic" of "how utterly manipulable" this Court's standing law is "if not taken seriously as a matter of judicial self-restraint." *Massachusetts*,

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549 U. S., at 548 (ROBERTS, C. J., dissenting). After today, no one will have to go back 50 years for the classic case of the Court manipulating standing doctrine, rather than obeying the edict to stay in its lane. The majority and I differ, as I'll soon address, on whether the Executive Branch exceeded its authority in issuing the loan cancellation plan. But assuming the Executive Branch did so, that does not license this Court to exceed its own role. Courts must still "function as courts," this one no less than others. *Ibid.* And in our system, that means refusing to decide cases that are not really cases because the plaintiffs have not suffered concrete injuries. The Court ignores that principle in allowing Missouri to piggy-back on the "legal rights and interests" of an independent entity. *Warth*, 422 U. S., at 499. If MOHELA wanted to, it could have brought this suit. It declined to do so. Under the non-manipulable, serious version of standing law, that would have been the end of the matter—regardless how much Missouri, or this Court, objects to the Secretary's plan.

II

The majority finds no firmer ground when it reaches the merits. The statute Congress enacted gives the Secretary broad authority to respond to national emergencies. That authority kicks in only under exceptional conditions. But when it kicks in, the Secretary can take exceptional measures. He can "waive or modify any statutory or regulatory provision" applying to the student-loan program. §1098bb(a)(1). And as part of that power, he can "appl[y]" new "terms and conditions" "in lieu of" the former ones. §1098bb(b)(2). That means when an emergency strikes, the Secretary can alter, so as to cover more people, pre-existing provisions enabling loan discharges. Which is exactly what the Secretary did in establishing his loan forgiveness plan. The majority's contrary conclusion rests first on stilted textual analysis. The majority picks the statute apart piece by

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piece in an attempt to escape the meaning of the whole. But the whole—the expansive delegation—is so apparent that the majority has no choice but to justify its holding on extra-statutory grounds. So the majority resorts, as is becoming the norm, to its so-called major-questions doctrine. And the majority again reveals that doctrine for what it is—a way for this Court to negate broad delegations Congress has approved, because they will have significant regulatory impacts. Thus the Court once again substitutes itself for Congress and the Executive Branch—and the hundreds of millions of people they represent—in making this Nation's most important, as well as most contested, policy decisions.

A

A bit of background first, to give a sense of where the HEROES Act came from. In 1991 and again in 2002, Congress authorized the Secretary to grant student-loan relief to borrowers affected by a specified war or emergency. The first statute came out of the Persian Gulf Conflict. It gave the Secretary power to "waive or modify any statutory or regulatory provision" relating to student-loan programs in order to assist "the men and women serving on active duty in connection with Operation Desert Storm." §§372(a)(1), (b), 105 Stat. 93. The next iteration responded to the impacts of the September 11 terrorist attacks. It too gave the Secretary power to "waive or modify" any student-loan provision, but this time to help borrowers affected by the "national emergency" created by September 11. §2(a)(1), 115 Stat. 2386.

With those one-off statutes in its short-term memory, Congress decided there was a need for a broader and more durable emergency authorization. So in 2003, it passed the HEROES Act. Instead of specifying a particular crisis, that statute enables the Secretary to act "as [he] deems necessary" in connection with any military operation or "national

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emergency." §1098bb(a)(1). But the statute's greater coverage came with no sacrifice of potency. When the law's emergency conditions are satisfied, the Secretary again has the power to "waive or modify any statutory or regulatory provision" relating to federal student-loan programs. *Ibid.*

Before turning to the scope of that power, note the stringency of the triggering conditions. Putting aside military applications, the Secretary can act only when the President has declared a national emergency. See §1098ee(4). Further, the Secretary may provide benefits only to "affected individuals"—defined as anyone who "resides or is employed in an area that is declared a disaster area . . . in connection with a national emergency" or who has "suffered direct economic hardship as a direct result of a . . . national emergency." §§1098ee(2)(C)–(D). And the Secretary can do only what he determines to be "necessary" to ensure that those individuals "are not placed in a worse position financially in relation to" their loans "because of" the emergency. §1098bb(a)(2). That last condition, said more simply, requires the Secretary to show that the relief he awards does not go beyond alleviating the economic effects of an emergency on affected borrowers' ability to repay their loans.

But if those conditions are met, the Secretary's delegated authority is capacious. As in the prior statutes, the Secretary has the linked power to "waive or modify any statutory or regulatory provision" applying to the student-loan programs. §1098bb(a)(1). To start with the phrase after the verbs, "the word 'any' has an expansive meaning." *United States* v. *Gonzales*, 520 U. S. 1, 5 (1997). "Any" of the referenced provisions means, well, any of those provisions. And those provisions include several relating to student-loan cancellation—more precisely, specifying conditions in which the Secretary can discharge loan principal. See §§1087, 1087dd(g); 34 CFR §§682.402, 685.212 (2022). Now go back to the twin verbs: "waive or modify." To "waive" means to "abandon, renounce, or surrender"—so here, to

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eliminate a regulatory requirement or condition. Black's Law Dictionary 1894 (11th ed. 2019). To "modify" means "[t]o make somewhat different" or "to reduce in degree or extent"—so here, to lessen rather than eliminate such a requirement. *Id.*, at 1203. Then put the words together, as they appear in the statute: To "waive or modify" a requirement means to lessen its effect, from the slightest adjustment up to eliminating it altogether. Of course, making such changes may leave gaps to fill. So the statute says what is anyway obvious: that the Secretary's waiver/modification power includes the ability to specify "the terms and conditions to be applied in lieu of such [modified or waived] statutory and regulatory provisions." §1098bb(b)(2). Finally, attach the "waive or modify" power to all the provisions relating to loan cancellation: The Secretary may amend, all the way up to discarding, those provisions and fill the holes that action creates with new terms designed to counteract an emergency's effects on borrowers.

Before reviewing how that statutory scheme operated here, consider how it might work for a hypothetical emergency that the enacting Congress had in the front of its mind. As noted above, a precursor to the HEROES Act was a statute authorizing the Secretary to assist student-loan borrowers affected by September 11. See *supra*, at 14. The HEROES Act, as Congress designed it, would give him the identical power to address similar terrorist attacks in the future. So imagine the horrific. A terrorist organization sets off a dirty bomb in Chicago. Beyond causing deaths, the incident leads millions of residents (including many with student loans) to flee the city to escape the radiation. They must find new housing, probably new jobs. And still their student-loan bills are coming due every month. To prevent widespread loan delinquencies and defaults, the Secretary wants to discharge $10,000 for the class of affected borrowers. Is that legal? Of course it is; it is exactly what Congress provided for. The statutory preconditions

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are met: The President has declared a national emergency; the Secretary's proposed relief extends only to "affected individuals"; and the Secretary has deemed the action "necessary to ensure" that the attack does not place those borrowers "in a worse position" to repay their loans. §1098bb(a). And the statutory powers of waiver and modification give the Secretary the means to offer the needed assistance. He can, for purposes of this special loan forgiveness program, scratch the pre-existing conditions for discharge and specify different conditions met by the affected borrowers. That is what the congressionally delegated powers are *for*. If the Secretary did not use them, Congress would be appalled.

The HEROES Act applies to the COVID loan forgiveness program in just the same way. Of course, Congress did not know COVID was coming; and maybe it wasn't even thinking about pandemics generally. But that is immaterial, because Congress delegated broadly, for all national emergencies. It is true, too, that the Secretary's use of the HEROES Act delegation has proved politically controversial, in a way that assistance to terrorism victims presumably would not. But again, that fact is irrelevant to the lawfulness of the program. If the hypothetical plan just discussed is legal, so too is this real one. Once more, the statutory preconditions have been met. The President declared the COVID pandemic a "national emergency." §1098ee(4); see 87 Fed. Reg. 10289 (2022). The eligible borrowers all fall within the law's definition of "affected individual[s]." §1098ee(2); see *supra*, at 15. And the Secretary "deem[ed]" relief "necessary to ensure" that the pandemic did not put low- and middle-income borrowers "in a worse position" to repay their loans. §§1098bb(a)(1)–(2).[2] With those boxes checked,

[2]More specifically, the Secretary determined that without a loan discharge, borrowers making less than $125,000 are likely to experience higher delinquency and default rates because of the pandemic's economic effects. See App. 234–242, 257–259. In a puzzling footnote, the majority

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the Secretary's waiver/modification powers kick in. And the Secretary used them just as described in the hypothetical above. For purposes of the COVID program, he scratched the conditions for loan discharge contained in several provisions. See App. 261–262 (citing §§1087, 1087dd(g); 34 CFR §§682.402, 685.212). He then altered those provisions by specifying different conditions, which opened up loan forgiveness to more borrowers. So he "waive[d]" and "modif[ied]" pre-existing law and, in so doing, applied new "terms and conditions" "in lieu of" the old. §§1098bb(a)(1), (b)(2); see 87 Fed. Reg. 61514. As in the prior hypothetical, then, he used his statutory emergency powers in the manner Congress designed.

How does the majority avoid this conclusion? By picking the statute apart, and addressing each segment of Congress's authorization as if it had nothing to do with the others. For the first several pages—really, the heart—of its analysis, the majority proceeds as though the statute contains only the word "modify." See *ante*, at 13–15. It eventually gets around to the word "waive," but similarly spends most of its time treating that word alone. See *ante*, at 15–16. Only when that discussion is over does the majority in -

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expresses doubt about that finding, though says that its skepticism plays no role in its decision. See *ante*, at 18–19, n. 6. Far better if the majority had ruled on that alternative ground. Then, the Court's invalidation of the Secretary's plan would not have neutered the statute for all future uses. But in any event, the skepticism is unwarranted. All the majority says to support it is that the current "paus[e]" on "interest accrual and loan repayments" could achieve the same end. *Ibid.* But the majority gives no reason for concluding that the pause would work just as well to ensure that borrowers are not "placed in a worse position financially in relation to" their loans because of the COVID emergency. §1098bb(a)(2)(A). How could it possibly know? And in any event, the majority's view of the statute would also make the pause unlawful, as later discussed. See *infra*, at 21. So the availability of the pause can hardly provide a basis for the majority's questioning of the Secretary's finding that cancellation is necessary.

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form the reader that the statute also contemplates the Secretary's addition of new terms and conditions. See *ante*, at 17–18. But once again the majority treats that authority in isolation, and thus as insignificant. Each aspect of the Secretary's authority—waiver, modification, replacement—is kept sealed in a vacuum-packed container. The way they connect and reinforce each other is generally ignored. "Divide to conquer" is the watchword. So there cannot possibly emerge "a fair construction of the whole instrument." *McCulloch* v. *Maryland*, 4 Wheat. 316, 406 (1819). The majority fails to read the statutory authorization right because it fails to read it whole. See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 167–169 (2012) (discussing the importance of the whole-text—here, really, the whole-sentence—canon).

The majority's cardinal error is reading "modify" as if it were the only word in the statutory delegation. Taken alone, this Court once stated, the word connotes "increment" and means "to change moderately or in minor fashion." *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 225 (1994). But no sooner did the Court say that much than it noted the importance of "contextual indications." *Id.*, at 226; see Scalia & Garner 167 ("Context is a primary determinant of meaning"). And in the HEROES Act, the dominant piece of context is that "modify" does not stand alone. It is one part of a couplet: "waive or modify." The first verb, as discussed above, means eliminate—usually the most substantial kind of change. See *supra*, at 15; accord, *ante*, at 16. So the question becomes: Would Congress have given the Secretary power to wholly eliminate a requirement, as well as to relax it just a little bit, but nothing in between? The majority says yes. But the answer is no, because Congress would not have written so insane a law. The phrase "waive or modify" instead says to the Secretary: "Feel free to get rid of a requirement or, short of that, to alter it to the extent

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you think appropriate." Otherwise said, the phrase extends from minor changes all the way up to major ones.

The majority fares no better in claiming that the phrase "waive or modify" somehow limits the Secretary's ability "to *add* to existing law." *Ante*, at 18 (emphasis in original). The majority's explanation of that idea oscillates a fair bit. At times the majority tries to convey that "additions" as a class are somehow suspect. See *ante*, at 17–18 (looking askance at "add[ing] new terms," "adding back in," "filling the empty space," "augment[ing]," and "draft[ing] new" language). But that is mistaken. Change often (usually?) involves or necessitates replacements. So when the Secretary uses his statutory power to remove some conditions on loan cancellation, he can under that same power replace them with others. The majority itself must ultimately concede that point. See *ante*, at 13, 17–18. So it falls back on arguing that the "additions" allowed cannot be "substantial[]" because the statute uses the word "modify." *Ante*, at 16; see *ante*, at 17–18. But that just doubles down on the majority's most basic error: extracting "modify" from the "waive or modify" phrase in order to confine the Secretary to making minor changes. As just shown, the phrase as a whole says the opposite—tells the Secretary that he can make changes along a spectrum, from modest to substantial. See *supra*, at 19. And so he can make additions along that spectrum as well. In particular, if he entirely removes existing conditions on loan discharge, he can substitute new ones; he does not have to leave gaping holes.

Indeed, other language in the statute makes that substitution authority perfectly clear. As noted earlier, the statute refers expressly to "the terms and conditions to be applied in lieu of such [modified or waived] statutory and regulatory provisions." §1098bb(b)(2); see *supra*, at 16. In other words, the statute expects the Secretary's waivers and modifications to involve replacing the usual provisions with different ones. The majority rejoins that the "in lieu

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of" language is a "wafer-thin reed" for the Secretary to rely on because it appears in a "humdrum reporting requirement." *Ante*, at 17. But the adjectives are by far the best part of that response. It is perfectly true that the language instructs the Secretary to "include" his new "terms and conditions" when he provides notice of his "waivers or modifications." §1098bb(b)(2). But that is because the statute contemplates that there will be new terms and conditions to report. In other words, the statute proceeds on the premise that the usual waiver or modification will, contra the majority, involve adding "new substantive" provisions. *Ante*, at 17. The humdrum reporting requirement thus confirms the expansive extent of the Secretary's waiver/modification authority.

The majority's opposing construction makes the Act inconsequential. The Secretary emerges with no ability to respond to large-scale emergencies in commensurate ways. The creation of any "novel and fundamentally different loan forgiveness program" is off the table. *Ante*, at 14. So, for example, the Secretary could not cancel student loans held by victims of the hypothetical terrorist attack described above. See *supra*, at 16–17. That too would involve "the introduction of a whole new regime" by way of "draft[ing] new substantive" conditions for discharging loans. *Ante*, at 17–18. And under the majority's analysis, new loan *forbearance* policies are similarly out of bounds. When COVID struck, Secretary DeVos immediately suspended loan repayments and interest accrual for all federally held student loans. See *ante*, at 5. The majority claims it is not deciding whether that action was lawful. *Ante*, at 18, n. 5. Which is all well and good, except that under the majority's reasoning, how could it not be? The suspension too offered a significant new benefit, and to an even greater number of borrowers. (Indeed, for many borrowers, it was worth much more than the current plan's $10,000 discharge.) So the

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suspension could no more meet the majority's pivotal definition of "modify"—as make a "minor change[]"—than could the forgiveness plan. *Ante*, at 13. On the majority's telling, Congress thought that in the event of a national emergency financially harming borrowers—under a statute gearing potential relief to the measure of that harm, so that affected borrowers end up no less able to repay their loans—the Secretary can do no more than fiddle. He can, the majority says, "reduc[e] the number of tax forms borrowers are required to file." *Ibid.* Or he can "waive[] the requirement that a student provide a written request for a leave of absence." *Ante*, at 15. But he can do nothing that would ameliorate an emergency's economic impact on student-loan borrowers.

That is not the statute Congress wrote. The HEROES Act was designed to deal with national emergencies—typically major in scope, often unpredictable in nature. It gave the Secretary discretionary authority to relieve borrowers of the adverse impacts of many possible crises—as "necessary" to ensure that those individuals are not "in a worse position financially" to make repayment. §1098bb(a)(2). If all the Act's triggers are met, the Secretary can waive or modify the usual provisions relating to student loans, and substitute new terms and conditions. That power extends to the varied provisions governing loan repayment and discharge. Those provisions are, indeed, the most obvious candidates for alteration under a statute drafted to leave borrowers no worse off, in relation to their loans, than before an emergency struck. But the majority will not accept the statute's meaning. At every pass, it "impos[es] limits on an agency's discretion that are not supported by the text." *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*, 591 U. S. ___, ___ (2020) (slip op., at 16). It refuses to apply the Act in accordance with its terms. Explains the majority: "However broad the meaning of 'waive or modify'"—meaning however much power Congress gave the

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Secretary—this program is just too large. *Ante*, at 18.

B

The tell comes in the last part of the majority's opinion. When a court is confident in its interpretation of a statute's text, it spells out its reading and hits the send button. Not this Court, not today. This Court needs a whole other chapter to explain why it is striking down the Secretary's plan. And that chapter is not about the statute Congress passed and the President signed, in their representation of many millions of citizens. It instead expresses the Court's own "concerns over the exercise of administrative power." *Ante*, at 19. Congress may have wanted the Secretary to have wide discretion during emergencies to offer relief to student-loan borrowers. Congress in fact drafted a statute saying as much. And the Secretary acted under that statute in a way that subjects the President he serves to political accountability—the judgment of voters. But none of that is enough. This Court objects to Congress's permitting the Secretary (and other agency officials) to answer so-called major questions. Or at least it objects when the answers given are not to the Court's satisfaction. So the Court puts its own heavyweight thumb on the scales. It insists that "[h]owever broad" Congress's delegation to the Secretary, it (the Court) will not allow him to use that general authorization to resolve important issues. The question, the majority helpfully tells us, is "who has the authority" to make such significant calls. *Ibid.* The answer, as is now becoming commonplace, is this Court. See, *e.g.*, *West Virginia*, 597 U. S. ___; *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. ___ (2021); see also *Sackett* v. *EPA*, 598 U. S. ___ (2023) (using a similar judicially manufactured tool to negate statutory text enabling regulation).

The majority's stance, as I explained last Term, prevents Congress from doing its policy-making job in the way it

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thinks best. See *West Virginia*, 597 U. S., at ___–___, ___–___ (dissenting opinion) (slip op., at 13–19, 28–33). The new major-questions doctrine works not to better understand—but instead to trump—the scope of a legislative delegation. See *id.*, at ___ (slip op., at 32). Here is a fact of the matter: Congress delegates to agencies often and broadly. And it usually does so for sound reasons. Because agencies have expertise Congress lacks. Because times and circumstances change, and agencies are better able to keep up and respond. Because Congress knows that if it had to do everything, many desirable and even necessary things wouldn't get done. In wielding the major-questions sword, last Term and this one, this Court overrules those legislative judgments. The doctrine forces Congress to delegate in highly specific terms—respecting, say, loan forgiveness of certain amounts for borrowers of certain incomes during pandemics of certain magnitudes. Of course Congress sometimes delegates in that way. But also often not. Because if Congress authorizes loan forgiveness, then what of loan forbearance? And what of the other 10 or 20 or 50 knowable and unknowable things the Secretary could do? And should the measure taken—whether forgiveness or forbearance or anything else—always be of the same size? Or go to the same classes of people? Doesn't it depend on the nature and scope of the pandemic, and on a host of other foreseeable and unforeseeable factors? You can see the problem. It is hard to identify and enumerate every possible application of a statute to every possible condition years in the future. So, again, Congress delegates broadly. Except that this Court now won't let it reap the benefits of that choice.

And that is a major problem not just for governance, but for democracy too. Congress is of course a democratic institution; it responds, even if imperfectly, to the preferences of American voters. And agency officials, though not them-

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selves elected, serve a President with the broadest of all political constituencies. But this Court? It is, by design, as detached as possible from the body politic. That is why the Court is supposed to stick to its business—to decide only cases and controversies (but see *supra*, at 3–13), and to stay away from making this Nation's policy about subjects like student-loan relief. The policy judgments, under our separation of powers, are supposed to come from Congress and the President. But they don't when the Court refuses to respect the full scope of the delegations that Congress makes to the Executive Branch. When that happens, the Court becomes the arbiter—indeed, the maker—of national policy. See *West Virginia*, 597 U. S., at ___ (KAGAN, J., dissenting) (slip op., at 32) ("The Court, rather than Congress, will decide how much regulation is too much"). That is no proper role for a court. And it is a danger to a democratic order.

The HEROES Act is a delegation both purposive and clear. Recall that Congress enacted the statute after passing two similar laws responding to specific crises. See *supra*, at 14. Congress knew that national emergencies would continue to arise. And Congress decided that when they did, the Secretary should have the power to offer relief without waiting for another, incident-specific round of legislation. Emergencies, after all, are emergencies, where speed is of the essence. For similar reasons, Congress replicated its prior (two-time) choice to leave the scope and nature of the loan relief to the Secretary, so that he could respond to varied conditions. As the House Report noted, Congress provided "the authority to implement waivers" that were "not yet contemplated" but might become necessary to deal with "any unforeseen issues that may arise." H. R. Rep. No. 108–122, pp. 8–9 (2003). That delegation is at the statute's very center, in its "waive or modify" language. And the authority it grants goes only to the Secretary—the offi-

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cial Congress knew to hold the responsibility for administering the Government's student-loan portfolio and programs. See §1082. Student loans are in the Secretary's wheelhouse. And so too, Congress decided, relief from those loan obligations in case of emergency. That delegation was the entire point of the HEROES Act. Indeed, the statute accomplishes nothing else.

The majority is therefore wrong to say that the "indicators from our previous major questions cases are present here." *Ante*, at 23 (internal quotation marks omitted). Compare the HEROES Act to other statutes containing broad delegations that the same majority has found to raise major-questions problems. Last Term, for example, the majority thought the trouble with the Clean Power Plan lay in the EPA's use of a "long-extant" and "ancillary" provision addressed to other matters. *West Virginia*, 597 U. S., at ___ (slip op., at 20). Before that, the majority invalidated the CDC's eviction moratorium because the agency had asserted authority far outside its "particular domain." *Alabama Assn. of Realtors*, 594 U. S., at ___ (slip op., at 6). I thought both those decisions wrong. But assume the opposite; there is, even on that view, nothing like those circumstances here. (Or, to quote the majority quoting me, those "case[s are] distinguishable from this one." *Ante*, at 23.) In this case, the Secretary responsible for carrying out the student-loan programs forgave student loans in a national emergency under the core provision of a recently enacted statute empowering him to provide student-loan relief in national emergencies.[3] Today's decision thus moves the

[3]The nature of the delegation here poses a particular challenge for JUSTICE BARRETT, given her distinctive understanding of the major-questions doctrine. In her thoughtful concurrence, she notes the "importance of *context* when a court interprets a delegation to an administrative agency." *Ante*, at 2 (emphasis in original). I agree, and have said so; there are, indeed, some significant overlaps between my and JUSTICE

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goalposts for triggering the major-questions doctrine. Who knows—by next year, the Secretary of Health and Human Services may be found unable to implement the Medicare program under a broad delegation because of his actions' (enormous) "economic impact." *Ante*, at 21.

To justify *this* use of its heightened-specificity requirement, the majority relies largely on history: "[P]ast waivers and modifications," the majority argues, "have been extremely modest." *Ante*, at 20. But first, it depends what you think is "past." One prior action, nowhere counted by the majority, is the suspension of loan payments and interest accrual begun in COVID's first days. That action cost the Federal Government over $100 billion, and benefited many more borrowers than the forgiveness plan at issue. See *supra*, at 21. And second, it's all relative. Past actions were more modest because the precipitating emergencies were more modest. (The COVID emergency generated, all told, over $5 *trillion* in Government relief spending.) In providing more significant relief for a more significant emergency—or call it unprecedented relief for an unprecedented emergency—the Secretary did what the HEROES Act contemplates. Imagine asking the enacting Congress: Can the Secretary use his powers to give borrowers more

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BARRETT's views on properly contextual interpretation of delegation provisions. See *West Virginia*, 597 U. S., at ___–___ (dissenting opinion) (slip op., at 14–19). But then consider two of the contextual factors JUSTICE BARRETT views as "telltale sign[s]" of whether an agency has exceeded the scope of a delegation. *Ante*, at 12. First, she asks, is there a "mismatch[]" between a "backwater provision" or "subtle device" and an agency's exercise of power? *Ibid.* And second, is the agency official operating within or "outside [his] wheelhouse"? *Ante*, at 12–13. Here, for the reasons stated above, there is no mismatch: The broadly worded "waive or modify" delegation IS the HEROES Act, not some tucked away ancillary provision. And as JUSTICE BARRETT agrees, "this is not a case where the agency is operating entirely outside its usual domain." *Ante*, at 15. So I could practically rest my case on JUSTICE BARRETT's reasoning.

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relief when an emergency has inflicted greater harm? I can't believe the majority really thinks Congress would have answered "no." In any event, the statute Congress passed does not say "no." Delegations like the HEROES Act are designed to enable agencies to "adapt their rules and policies to the demands of changing circumstances." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 157 (2000). Congress allows, and indeed expects, agencies to take more serious measures in response to more serious problems.

Similarly unavailing is the majority's reliance on the controversy surrounding the program. Student-loan cancellation, the majority says, "raises questions that are personal and emotionally charged," precipitating "profound debate across the country." *Ante*, at 22. I have no quarrel with that description. Student-loan forgiveness, and responses to COVID generally, have joined the list of issues on which this Nation is divided. But that provides yet more reason for the Court to adhere to its properly limited role. There are two paths here. One is to respect the political branches' judgments. On that path, the Court recognizes the breadth of Congress's delegation to the Secretary, and declines to interfere with his use of that granted authority. Maybe Congress was wrong to give the Secretary so much discretion; or maybe he, and the President he serves, did not make good use of it. But if so, there are political remedies—accountability for all the actors, up to the President, who the public thinks have made mistakes. So a political controversy is resolved by political means, as our Constitution requires. That is one path. Now here is the other, the one the Court takes. Wielding its judicially manufactured heightened-specificity requirement, the Court refuses to acknowledge the plain words of the HEROES Act. It declines to respect Congress's decision to give broad emergency powers to the Secretary. It strikes down his lawful use of that authority to provide student-loan assistance. It

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does not let the political system, with its mechanisms of accountability, operate as normal. It makes itself the decisionmaker on, of all things, federal student-loan policy. And then, perchance, it wonders why it has only compounded the "sharp debates" in the country? *Ibid.*

III

From the first page to the last, today's opinion departs from the demands of judicial restraint. At the behest of a party that has suffered no injury, the majority decides a contested public policy issue properly belonging to the politically accountable branches and the people they represent. In saying so, and saying so strongly, I do not at all "disparage[]" those who disagree. *Ante*, at 26. The majority is right to make that point, as well as to say that "[r]easonable minds" are found on both sides of this case. *Ante*, at 25. And there is surely nothing personal in the dispute here. But Justices throughout history have raised the alarm when the Court has overreached—when it has "exceed[ed] its proper, limited role in our Nation's governance." *Supra*, at 1. It would have been "disturbing," and indeed damaging, if they had not. *Ante*, at 25. The same is true in our own day.

The majority's opinion begins by distorting standing doctrine to create a case fit for judicial resolution. But there is no such case here, by any ordinary measure. The Secretary's plan has not injured the plaintiff-States, however much they oppose it. And in that respect, Missouri is no different from any of the others. Missouri does not suffer any harm from a revenue loss to MOHELA, because the two entities are legally and financially independent. And MOHELA has chosen not to sue—which of course it could have. So no proper party is before the Court. A court acting like a court would have said as much and stopped.

The opinion ends by applying the Court's made-up major-

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questions doctrine to jettison the Secretary's loan forgiveness plan. Small wonder the majority invokes the doctrine. The majority's "normal" statutory interpretation cannot sustain its decision. The statute, read as written, gives the Secretary broad authority to relieve a national emergency's effect on borrowers' ability to repay their student loans. The Secretary did no more than use that lawfully delegated authority. So the majority applies a rule specially crafted to kill significant regulatory action, by requiring Congress to delegate not just clearly but also microspecifically. The question, the majority maintains, is "who has the authority" to decide whether such a significant action should go forward. *Ante*, at 19; see *supra*, at 23. The right answer is the political branches: Congress in broadly authorizing loan relief, the Secretary and the President in using that authority to implement the forgiveness plan. The majority instead says that it is theirs to decide.

So in a case not a case, the majority overrides the combined judgment of the Legislative and Executive Branches, with the consequence of eliminating loan forgiveness for 43 million Americans. I respectfully dissent from that decision.

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SC100132

IN THE SUPREME COURT OF MISSOURI

State of Missouri ex rel. Dr. Anna Fitz-James,

Plaintiff-Respondent,

v.

Andrew Bailey, Missouri Attorney General, *et al.*,

Defendants-Appellants.

From the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Circuit Judge

BRIEF OF APPELLANT ATTORNEY GENERAL ANDREW BAILEY

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JURISDICTIONAL STATEMENT

On May 4, 2023, Respondent Dr. Anna Fitz-James (Relator below) filed her Verified Petition for Writ of Mandamus and Declaratory Judgment. Counts I and II of the Petition prayed for a writ of mandamus or declaratory judgment against the Attorney General, the State Auditor, and the Secretary of State.[1] Count III of the Petition asserted a direct challenge to the constitutionality of seven different elections statutes related to the ballot initiative process under Article III, §§ 49 and 50 of the Missouri Constitution: §§ 116.040, 116.050, 116.175, 116.180, 116.190, 116.332, and 116.334. Specifically, Respondent prayed for the Court to conclude that "any or all" of the aforementioned statutes are unconstitutional "in whole or in part . . . on their face or as applied" to Respondent.

This Court has exclusive appellate jurisdiction over this case because, under Article V, § 3 of the Missouri Constitution, this Court has "exclusive appellate jurisdiction in all cases involving the validity . . . of a statute . . . of this state." *See Alderson v. State*, 273 S.W.3d 533, 535 (Mo. banc 2009). That appellate jurisdiction also extends to situations where "any party properly raises and preserves in the trial court a real and substantial (as opposed to merely colorable) claim that a statute is unconstitutional[.]"*Boeving v. Kander*, 496 S.W.3d 498, 503 (Mo. banc 2016)

[1] The Circuit Court dismissed the Secretary of State from this lawsuit at the beginning of trial.

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(further noting that "this Court has exclusive appellate jurisdiction over any appeal in which that claim may need to be resolved.").

On June 20, 2023, the Circuit Court issued a Judgment against the Attorney General on Count I, and denied Respondent's claims in Counts II and III. The Attorney General has appealed the portion of the Circuit Court's June 20, 2023 judgment adverse to the Attorney General that issued a writ of mandamus or declaratory relief, against the Attorney General. As represented in Respondent's Petition and the Circuit Court's Judgment, the Attorney General's appeal inherently involves questions surrounding the obligations imposed on executive branch officials by various elections statutes and the relationship between those obligations and different provisions of the Missouri Constitution.

Respondent's Petition also directly challenged the validity of seven different duly enacted statutes under Article III, §§ 49 and 50 (both on the face of each statute and as applied), and this issue was repeatedly addressed by both parties throughout the litigation and ruled on by the Circuit Court. *See Collector of Revenue of the City of St. Louis v. Parcels of Land Encumbered with Delinquent Tax Liens Serial Numbers 1-047 and 1-048, et al.*, 517 S.W.2d 49, 55 (Mo. banc 1974) (stating that the Supreme Court "reviews only questions presented to the trial court."). The Attorney General's appeal of the Circuit Court's Judgment on Respondent's Petition may implicate the scope of Article III, § 49 and Article III, § 50 of the Missouri

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Constitution, as each relates to the validity of the Missouri election system under the statutes that Respondent sought to declare as unconstitutional in Count III of the Petition: §§ 116.040, 116.050, 116.175, 116.180, 116.190, 116.332, and 116.334. And Respondent has cross-appeal rights over Count III.

Accordingly, appellate jurisdiction is proper in this Court because this case involves "the validity . . . of a statute . . . of this state," Mo. Const. art. V, § 3, or at the very least it involves a properly-preserved and colorable constitutional claim that may need to be resolved on appeal, *see Boeving*, 496 S.W.3d at 503.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises the question of when the Attorney General can properly exercise the authority given to his office under Section 116.175 to "return to the [State Auditor] for revision" a fiscal note and fiscal note summary prepared for an initiative petition that does not contain the "legal content" required for those materials. § 116.175.4, .5, RSMo. The answer to that question is clear, and it comes from the very statute granting the Attorney General the authority to review the State Auditor's submissions: he can return to the Auditor for revision a fiscal note and summary that is "argumentative" or is "likely to create prejudice for or against the proposed measure." § 116.175.3, RSMo. That is exactly what the Attorney General did here. For several reasons, the Circuit Court erred in slashing the Attorney General's authority and relegating his office to merely rubber stamping the State Auditor's submissions.

First, the plain meaning of the Attorney General's and State Auditor's roles under Section 116.175 are clear. The Attorney General has the responsibility to review the Auditor's proposed fiscal note and fiscal note summary[2] and determine

[2] As discussed in the Statement of Facts, Respondent proposed 11 initiative petitions. For purposes of the issues raised in this appeal, there is no material difference between those ballot measures or between the fiscal notes and fiscal note summaries prepared for them. For that reason and in order to simplify the language in this brief, Appellant will refer to Respondent's initiative petitions and the State Auditor's fiscal note and fiscal note summaries in the singular. Appellant will differentiate between the measures when necessary.

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whether the fiscal note and fiscal note summary each satisfy the requirements of the statute. The statute commands that State Auditor shall revise his submissions if the Attorney General returns them to him. § 116.175.5, RSMo. Here, the State Auditor refused to do so. He could, and should, have done more, as Section 116.175 commands. In fact, the evidence demonstrates that for many of Respondent's proposed ballot measures, the State Auditor *did* receive additional comments from government officials that should have been incorporated into a revised fiscal note and fiscal note summary.

Second, the Attorney General correctly rejected the State Auditor's fiscal note and fiscal note summary. The only plausible interpretation of "legal content," based on that phrase's plain meaning and surrounding context in Section 116.175, is that a fiscal note or fiscal note summary that is obviously deficient on its face does *not* contain the required legal content. This is a narrow reading of "legal content" that does not justify the Circuit Court's holding that the Attorney General engaged in an unwarranted exercise of authority.

In his Opinion Letters to the State Auditor, the Attorney General described the many reasons why the State Auditor's materials lacked the required legal content. The State Auditor's fiscal note contained wildly inadequate responses based on divergent and nonsensical methodologies from local governmental entities that, on their face, cannot survive even the most forgiving review. The fiscal note

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summary, too, lacks the required legal content because it conveys the misleading—and therefore facially argumentative and prejudicial—message that it is a reliable estimate of the cost of the measure. The fiscal note summary also fails to adequately summarize all submissions the State Auditor received from "others with knowledge pertinent to the cost of the proposal." § 116.175.1, RSMo. Voters will be misled when reviewing the fiscal note and fiscal note summary, and the information contained in them will create prejudice in favor of the measure.

Third, the Circuit Court erred in entering either mandamus or declaratory relief against the Attorney General. Mandamus relief ordering the Attorney General to approve the State Auditor's materials was inappropriate because mandamus is a last-resort remedy, and there were other steps that needed to take place before a writ of mandamus could be sought. Section 116.175 allows the Attorney General's review of a fiscal note and fiscal note summary to be more than a rubber-stamp review confined to the number of words in the materials; for that reason, the Attorney General's duty is not ministerial and not one that can be enforced through mandamus. And Respondent did not demonstrate that she had a *right* to inject herself at this early stage in the ballot measure review process, which should be an exchange of materials between two statewide elected officials. Her challenge is premature.

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For these reasons, this Court should reverse the Circuit Court's judgment, and remand it to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary.

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STATEMENT OF FACTS

I. The Proposed Initiative Petitions.

On March 8, 2023, Respondent Dr. Anna Fitz-James submitted eleven initiative petitions that would amend the Missouri Constitution to the Secretary of State. (D28, at ¶2; D29 (Jt. Stip. Ex. A)). The Secretary of State assigned the following initiative numbers to the petitions: 2024-077, 2024-078, 2024-079, 2024-080, 2024-081, 2024-082, 2024-083, 2024-084, 2024-085, 2024-086, and 2024-087. (D28, ¶4). The Secretary of State sent a copy of each initiative petition's sample sheet to the Attorney General and the State Auditor. (D28, ¶6). Additionally, the text of each initiative petition was posted to the Secretary of State's website. (D28, ¶5).

The Attorney General reviewed and approved the sample sheets for each of the eleven initiative petitions as to form under Section 116.050. (D28, ¶7). Following that approval, the Secretary of State also approved each of the initiative petitions as to form. (D29, ¶8).

On March 29, 2023, the Auditor sent a proposed fiscal note and fiscal note summary for each of the eleven initiative petitions to the Attorney General. (D28, ¶9). On April 10, 2023, the Attorney General responded to each of the fiscal notes and fiscal note summaries from the Auditor with an opinion letter, stating the reasons that the proposed fiscal notes and fiscal note summaries were legally deficient under Section 116.175. (D28, ¶11; D34-D35 (Jt. Stip. Ex. C)).

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II. The Attorney General's Opinion Letters Sent to the Auditor in Response to the Fiscal Note and Fiscal Note Summaries.

In the April 10, 2023 Opinion Letters from the Attorney General to the State Auditor, the Attorney General stated that he was rejecting the State Auditor's fiscal note and fiscal note summary for lacking the required legal content and returning them to the State Auditor for revision. (D34-D35 (Jt. Stip. Ex. C)). The Attorney General's Opinion Letters detailed the reasons for his rejection, as follows. (*Id.*).

First, the Attorney General wrote that the fiscal note contains inadequate and divergent submissions from local government entities. (D34 at p.2). The Attorney General stressed the statistically insignificant small sample size of responses solicited by the State Auditor, noting "this ballot measure will affect the present and future population of Missouri. (*Id.*) Yet, while Missouri has 114 counties and one independent city, in addition to over 1,000 other cities and villages . . . only three counties and two cities responded." (*Id.*).

The Opinion Letter noted that only one local governmental entity, Greene County, made an effort to submit a reliable methodology for calculating the fiscal impact. (*Id.*) "Greene County[] understood that the measure would have the obvious effect of reducing the population of [its] citizens," and estimated that 135 future citizens would be lost in that county annually due to legalizing abortion to Missouri. It estimated nearly $51,000 in lost county revenue annually. (*Id.*). The Attorney

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General emphasized again that Greene County "was the only entity to recognize what is facially apparent from this measure." (*Id.*).

The Greene County response stated that the "substantial economic fiscal reality of abortion relating to unborn lives cannot be denied or omitted from a fiscal note to inform voters of the consequences." (*Id.* at p.3). The Attorney General reviewed the submission and informed the State Auditor that it must have "recognized that this was a reasonable assumption" and that the "fiscal note summary reflects the financial impact to Greene County." (*Id.*). The Attorney General continued by noting that, however, that the State Auditor "did not apply that same reasonable assumption when assessing the submissions from the few other entities who responded." (*Id.*). Additionally, the Attorney General wrote that the Greene County methodology should be applied to the remainder of the populous of Missouri, because it is "unreasonable for those entities to conclude that the measure will have no estimated fiscal impact[.]" (*Id.*).

Second, the Attorney General also stated the fiscal note contained inadequate submissions concerning the impact to state government operations. (*Id.*). Citing submissions submitted to the State Auditor's office by a few entities, the Attorney General wrote that the proposed initiative petitions could jeopardize federal funding for Missouri Medicaid. (*Id.* at pp.3-4). He compared Missouri's situation to another other state who recently suffered similar losses when changes were made to its

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abortion policies. (*Id.* at p.4). The Attorney General stated those submissions should not be accepted, because the potential value of the loss was not reflected in the submissions from the varying state government entities. (*Id.*).

Third, the Attorney General stated that the fiscal note summary was also legally deficient for two principal reasons. (*Id.* at pp.4-5). The first reason was that the fiscal note summary "conveys the misleading message that it is an accurate representation of the true cost to local and state governmental operations." (*Id.* at p.4). The Attorney General wrote that this was because the "only numerical figure mentioned in the fiscal note summary is . . . a sliver of the maximum (or even likely) potential financial impact" and that the "average, reasonable voter reading this summary will not know the small sample of entities" that the State Auditor had solicited for a submission. (*Id.*).

The second reason was that the fiscal note summary fails "to adequately summarize the submissions [the State Auditor's] office received." (*Id.* at p.5). The Attorney General wrote that "the fiscal note summary merely states that 'opponents estimate a potentially significant loss to state revenues.'" (*Id.*). He stated that the State Auditor "received submissions indicating that the 'potentially significant loss' could be nearly $12.5 billion dollars" and because of that potential loss, "the fiscal note summary should reflect that number." (*Id.*).

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One submission by an interested party noted "the loss of federal Medicaid dollars, which in the proposed fiscal year 2024 budget would be a loss of nearly $12.5 billion." (*Id.*; *see also* D30 at p. 15 (Jt. Stip. Ex. B)). The submission explained several examples of how this might occur. (D30 at p.15 (Jt. Stip. Ex. B)). For example, under the initiative petitions, the entity noted that hospitals might be required to perform certain procedures that are disallowed by the federal government. (*Id.*). That same submission noted that under the initiative petitions, the cost of inpatient medical procedures and emergency department services for treating "issues before childbirth with complications" has a median charge per person of $11,997 with a maximum charge of $35,345. (*Id.* at p.16). The submission noted that these procedures may ultimately be paid by taxpayers. (*Id.*). Another submission by an interested party echoed many of those same concerns and potential loss of $12.5 billion in federal Medicaid money. (D30 at p.22 (Jt. Stip. Ex. B)).

For these reasons, the Attorney General concluded that "voters reading the fiscal note summary are likely to be misled into thinking that this ballot measure will have little fiscal impact on state and local governmental entities." (D34 at p.5). Therefore, the Attorney General's Opinion Letters continued, "the fiscal note and fiscal note summary do not satisfy the requirements of § 116.175 and therefore I am returning them to you for revision." (D34 at p.5).

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III. The State Auditor Receives Additional Fiscal Impact Estimates.

Three days before the Attorney General responded with his rejection of the State Auditor's fiscal note and fiscal note summary, on April 7, 2023, the State Auditor received additional information from the Governor's Office. (D41 (Jt. Stip. Ex. I)). The Governor's Office provided a fiscal estimate for each of the 11 initiative petitions based on "additional costs identified by other agencies in regards to regulation and enforcement." (*Id.*) In addition, the Governor's Office stated that each initiative petition appears "to conflict with federal law, which may have bearing on the fiscal responsibilities of [the Governor's Office]." (*Id.*).

Each submission from the Governor's Office noted that "there will likely be litigation leading to a fiscal impact on the Legal Expense Fund (LEF) ranging from $1,500 to unknown" due to potential conflicts with the U.S. Supreme Court's decision in "*Dobbs v. Jackson Women's Health Organization* and requirements of parental consent." (*Id.*) (Italics to case citation added). In addition, for several of the initiative petitions, the Governor's Office estimated that "failing to be in compliance with federal requirements related to Medicaid and MO HealthNet could lead to a fiscal impact of up to $600M" due to an apparent conflict "with the federal policy related to the Hyde Amendment and expending public funds on abortions." (*Id.*).

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IV. The State Auditor's Response to the Attorney General's Decision to Return the Fiscal Note and Fiscal Note Summary.

On April 21, 2023, the State Auditor sent the Attorney General a letter refusing to revise the fiscal note and fiscal note summary. The State Auditor did not revise its original materials to incorporate the new information it had received from the Governor's Office. (D28, ¶13; D38 (Jt. Stip. Ex. F)). The State Auditor stated that his office is "resubmitting the unaltered fiscal note and fiscal note summary for [the Attorney General's] review and approval as to legal content and form." (D38 (Jt. Stip. Ex. F)). The State Auditor's response letter stated that the Attorney General should "return the approved fiscal note summaries within 10 days, pursuant to § 116.175.4, RSMo." (*Id.*)

Additionally, on April 21, 2023, the State Auditor sent a separate letter stating that the fiscal note and fiscal note summary contained "estimated costs to state and local government entities and the fiscal note summary further states potential significant costs are anticipated by opponents." (D37 (Jt. Stip. Ex. E)). The State Auditor did not revise the fiscal note or the fiscal note summaries because "no new information [had] been presented that warrant[ed] inclusion in the fiscal note or fiscal note summary." (*Id.*). The State Auditor's letter made no mention of the new information it received from the Governor's Office. (*See id.*).

On May 1, 2023, the Attorney General stated that because the proposed fiscal notes and fiscal note summaries remained unchanged after the previous rejection,

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they were not approved. (D28, ¶ 14; D40 (Jt. Stip. Ex. H)). The Attorney General's Office "thus concluded that we have fulfilled our response obligations under § 116.175, RSMo for initiative petitions 2024-077 through 2024-087." (*Id.*).

V. Respondent Files Litigation.

On May 4, 2023, Respondent filed a Petition against the Attorney General, State Auditor, and Secretary of State. (D2). The Petition raised three Counts. Count I was asserted only against the Attorney General and sought mandamus or declaratory relief that ultimately sought to order the Attorney General to approve the State Auditor's initial fiscal note and fiscal note summary. Count II was asserted against the State Auditor and the Secretary of State and sought mandamus or declaratory relief requiring the State Auditor to deliver to the Secretary of State the initial fiscal note and fiscal note summary for inclusion in an official ballot title. Count III was a request for declaratory relief against all three statewide officials and sought to strike as unconstitutional "any or all" of seven statutes governing the ballot initiative process in Chapter 116: Sections 116.040, 116.050, 116.175, 116.180, 116.190, 116.332, and 116.334. (*Id.*).

The case was briefed and tried on an expedited basis, and limited discovery took place also on an expedited basis. (*See generally* D1). It was ultimately tried on a joint stipulation of facts and exhibits. (D28). At the trial on June 14, 2023, the Circuit Court granted a motion to dismiss filed by the Secretary of State, leaving

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only the Attorney General and State Auditor as remaining parties. (Tr. 17:14-20). Ultimately, no witnesses testified, and counsel for Respondent, the State Auditor, and the Attorney General presented argument. (*See generally* Tr.).

On June 20, 2023, the Circuit Court issued a Judgment against the Attorney General on Count I, and denied Respondent's claims in Counts II and III. (D44). The Circuit Court entered a writ of mandamus ordering the Attorney General to "approve the legal content and form of the fiscal note summaries submitted to the Attorney General on March 29, 2023, by the Auditor" for the eleven initiative petitions. (D44, p.28; D45). Later that same day, the Attorney General filed this notice of appeal. (D47).

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POINTS RELIED ON

I. The circuit court erred in granting mandamus or declaratory relief against the Attorney General, because the Attorney General properly returned the State Auditor's fiscal note and fiscal note summary to the State Auditor for revision, in that the State Auditor's submissions lacked the required legal content under Section 116.175, RSMo.

- Section 116.175, RSMo
- *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582 (Mo. banc 2018)
- *State v. Teer*, 275 S.W.3d 258 (Mo. banc 2009)

II. The circuit court erred in granting mandamus or declaratory relief against the Attorney General, because the State Auditor was required to revise his fiscal note and fiscal note summary after the Attorney General rejected them, in that the Attorney General's rejection was proper, Section 116.175 contains a clear command to revise the materials upon rejection, and the State Auditor received additional information that should have been incorporated.

- Section 116.175, RSMo
- *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582 (Mo. banc 2018)
- *Protect Consumers' Access to Quality Home Care Coal., LLC v. Kander*, 488 S.W.3d 665 (Mo. App. W.D. 2015)

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- *Missouri Mun. League v. Carnahan*, 303 S.W.3d 573 (Mo. App. W.D. 2010)
- *Pippens v. Ashcroft*, 606 S.W.3d 689 (Mo. App. W.D. 2020)

III. The circuit court erred in granting mandamus relief against the Attorney General, because Respondent had other remedies available and the Attorney General's duty under Section 116.175 is not ministerial, in that the Auditor had not yet revised his materials before Respondent filed suit, the Attorney General has not refused to perform a ministerial duty, and the Attorney General has discretionary authority to review and determine a fiscal note and fiscal note summary's compliance under Section 116.175.

- Section 116.175, RSMo
- *State ex rel. Swoboda v. Missouri Comm'n on Hum. Rts.*, 651 S.W.3d 800 (Mo. banc 2022)
- *State v. Teer*, 275 S.W.3d 258 (Mo. banc 2009)
- *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261 (Mo. banc 1980)
- *Barnes v. Uhlich*, 592 S.W.3d 67 (Mo. App. W.D. 2019)

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IV. The circuit court erred in granting declaratory relief against the Attorney General, because the case was not yet ripe and therefore not justiciable, in that the fiscal note and fiscal note summary review and resubmission process had not yet concluded.

- Section 116.175, RSMo
- *State ex rel. Swoboda v. Missouri Comm'n on Hum. Rts.*, 651 S.W.3d 800 (Mo. banc 2022)
- *State v. Teer*, 275 S.W.3d 258 (Mo. banc 2009)
- *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261 (Mo. banc 1980)
- *Barnes v. Uhlich*, 592 S.W.3d 67 (Mo. App. W.D. 2019)

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ARGUMENT

I. The circuit court erred in granting mandamus or declaratory relief against the Attorney General, because the Attorney General properly returned the State Auditor's fiscal note and fiscal note summary to the State Auditor for revision, in that the State Auditor's submissions lacked the required legal content under Section 116.175, RSMo.

Standard of Review. This point on appeal raises a question of statutory interpretation, which is reviewed de novo on appeal. *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020).

Preservation. The Attorney General preserved this issue for appeal in his answer to Respondent's Petition (D19), in his pre-trial brief (D23), and during trial (*See* Tr.).

A. Background to Section 116.175.

Section 116.175 clearly establishes the role of the Attorney General in reviewing, and either approving or rejecting the Auditor's fiscal note and fiscal note summary prepared for an initiative petition. The process of crafting the fiscal note and fiscal note summary for an initiative petition begins with the Auditor, who prepares a proposed fiscal note and fiscal note summary for each initiative petition received from the Secretary of State's office. RSMo. § 116.175.1. The adequacy of a fiscal note and fiscal note summary are governed by Section 116.175, which

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provides, among other things, mechanisms for proponents or opponents of a measure to submit statements related to the measure and which requires that any fiscal note or fiscal note summary "state the measure's estimated cost or savings, if any, to state or local governmental entities." § 116.175.3. The fiscal note summary shall additionally "summarize the fiscal note in language neither argumentative nor likely to create prejudice either for or against the proposed measure." *Id*.

After the Auditor has "prepare[d] a fiscal note and a fiscal note summary" for a proposed initiative, the Auditor "forwards both to the attorney general" for the Attorney General's review. § 116.175.2. At that point, the plain language of Section 116.175 is clear: a review of the proposed fiscal note and fiscal note summary shifts to the Attorney General. "[W]ithin ten days of receipt of the fiscal note and the fiscal note summary," the Attorney General must either "approve the legal content and form" of the fiscal note and fiscal note summary or "determine[] that the fiscal note or fiscal note summary does not satisfy the requirements" of § 116.175.4, .5.

If the Attorney General determines that the fiscal note and fiscal note summary satisfies the requirements of Section 116.175, he "forward[s] notice of such approval to the state auditor." 116.175.4. If, on the other hand, the Attorney General "determines that the fiscal note or the fiscal note summary does not satisfy the requirements of [§ 116.175]," the Attorney General "return[s]" the fiscal note and fiscal note summary "to the auditor for revision." § 116.175.5. At that point, the

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statute commands that the Auditor must revise the proposed fiscal note and fiscal note summary and again forwards both to the Attorney General. *Id*. The statute uses the strongest language: "the fiscal note and the fiscal note summary shall be returned to the auditor for revision." *Id.*

It is only after the fiscal note and fiscal note summary are ultimately approved by the Attorney General that the Secretary of State may use the "approved fiscal note summary and fiscal note," along with the official summary statement, to certify the official ballot title. § 116.180. Section 116.180 mandates that the official ballot title contain "separate paragraphs with the fiscal note summary immediately following the summary statement of the measure[.]" Section 116.175.5 is clear that a fiscal note or fiscal note summary that the Attorney General determines does not satisfy the requirements of the statute "also shall not satisfy the requirements of section 116.180." § 116.175.5.

In summary, the Auditor first prepares fiscal notes and fiscal note summaries and forwards them to the Attorney General. The Attorney General then reviews the fiscal note and fiscal note summary to determine whether each complies with the requirements of Section 116.175, which includes a review for legal content that plainly incorporates a review for argumentative language or information that is likely to create prejudice for or against a measure. § 116.175.3. If the Attorney General determines that a proposed fiscal note or fiscal note summary does not

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comply with § 116.175, he is required by the statute to send the deficient fiscal note or fiscal note summary back for further revision. The State Auditor then revises the deficient fiscal note or summary and re-submits it to the Attorney General for review and, if the updates satisfy § 116.175, ultimately approval by the Attorney General. Once the Attorney General determines that a revised fiscal note or fiscal note summary complies with § 116.175, the Attorney General exercises his statutory authority to approve the fiscal note and fiscal note summary for the Secretary of State's use in a certified official ballot title.

B. "Legal content" is different than "form," and the Attorney General's review of the "legal content" of a fiscal note and fiscal note summary is more than just counting words and checking boxes.

A plain-text reading of Section 116.175 and surrounding context make clear that the Attorney General's review for "legal content" plainly incorporates a review for argumentative language or information that is likely to create prejudice for or against a measure. § 116.175.3. The statute does not include a definition of "legal content," but "legal content" must be distinct from "form." The statute requires the Attorney General to review a fiscal note and fiscal note summary for "legal content and form." § 116.175.4. The statute is mandatory, as it uses "shall" to describe the Attorney General's role. Courts have consistently held in statutory interpretation that "[t]he word 'shall' generally prescribes a mandatory duty." *State v. Teer*, 275 S.W.3d 258, 261 (Mo. banc 2009).

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Because form and legal content are two separate phrases in the statute, they must have two separate meanings. The legislature "is presumed to have intended every word, provision, sentence, and clause in a statute to be given effect" and "[t]he plain and ordinary meaning of the words in a statute is determined from the words' usage in the context of the entire statute." *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 585 (Mo. banc 2018) (citing *Mantia v. Mo. Dep't of Transp.*, 529 S.W.3d 804, 809 (Mo. banc 2017)).

There does not appear to be a dispute in this case about "form," as Section 116.175.3 makes clear what the "form" of a fiscal note and fiscal note summary are: "the fiscal note and fiscal note summary shall state the measure's estimated cost or savings, if any, to state or local governmental entities. The fiscal note summary shall contain no more than fifty words, excluding articles[.]" § 116.175.3. This reading of "form" is consistent with how Missouri's appellate courts construe "form" in other initiative petition contexts. For example, in *Bradshaw v. Ashcroft*, the Court of Appeals reasoned that the "form" of the initiative petition is limited to whether the measure contains the designated items that must be contained in the measure, such as certain notices, a signature sheet, specification of the county the signature page will be circulated, and space for notarization:

> Section 116.040 specifies the form of an initiative petition, and directs that the form must be "substantially" followed. The form of an initiative petition is required to include notice that it is a crime to "sign any initiative petition with

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> any name other than [one's] own, or knowingly to sign [one's] name more than once for the same measure for the same election, or to sign a petition when such person knows he or she is not a registered voter." *Id.* Section 116.040 requires the form of an initiative petition to afford a place for each person signing the petition to provide a signature, the date of signature, the signer's address including zip code, the signer's congressional district, and the signer's printed name. Section 116.040 requires the form of an initiative petition to include a circulator's affidavit swearing and affirming under penalty of perjury that persons identified on the petition "signed this page of the foregoing petition ... in my presence," and that the circulator believes each signer to be "a registered voter in the State of Missouri" in the county specified on the signature page. Section 116.040 requires the form of an initiative petition to afford a place for the circulator's affidavit to be signed by the circulator in the presence of a notary.

559 S.W.3d 79, 83 (Mo. App. W.D. 2018). Here, in the context of a fiscal note and fiscal note summary, "form" can mean only whether the fiscal note summary contains 50 or fewer words and a statement of estimated costs or savings. § 116.175.3.

In contrast, "legal content" demands more. The relevant dictionary definitions of "content" are "the topics, ideas, facts, or statements in a book, document, or letter." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 492 (3d ed. 1993). And "legal" means "of or relating to law," "conforming to or permitted by law or established rules : conforming to the procedures and methods prescribed by law." *Id.* 1290. The plain dictionary of "legal content," then, must refer to what *else* is

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required *by law* to be done when preparing, and ultimately contained in, a fiscal note and fiscal note summary. Surrounding context in Section 116.175 makes clear what the legal content of a fiscal note and fiscal note summary must include, at minimum: it must not be "argumentative," and it must not "create prejudice either for or against the proposed measure." *See Richter v. Union Pac. R. Co.*, 265 S.W.3d 294, 297 (Mo. App. E.D. 2008) ("In absence of statutory definitions, we may derive the plain and ordinary meaning from a dictionary and by considering the context of the entire statute in which it appears.") (citing *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 224 (Mo. banc 2007)). "The primary goal of statutory interpretation is to give effect to legislative intent, which is most clearly evidenced by the plain text of the statute." *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 585 (Mo. banc 2018). The Attorney General's construction of Section 116.175 achieves these fundamental canons of construction.

At first, all parties followed the process for crafting a fiscal note and fiscal note summary laid out in § 116.175. The State Auditor submitted to the Attorney General an identical proposed fiscal note and fiscal note summary for each of Respondent's eleven initiative petitions. The Attorney General reviewed each of these submissions and determined that each of the fiscal notes and fiscal note summaries "does not satisfy the requirements of [§ 116.175]." In part, the Attorney General determined that the STate Auditor's proposed fiscal note "contain[ed]

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inadequate and divergent submissions from local government entities" and "contain[ed] inadequate submissions concerning the impact to state governmental operations." The Attorney General additionally determined that the Auditor's proposed fiscal note summary is legally deficient because in part it "conveys [a] misleading message" and "fail[s] to adequately summarize" the submissions in the fiscal note. Consequently, the Attorney General determined that the fiscal note and fiscal note summary for each of Respondent's initiative petitions was inadequate and returned each to the Auditor for revision. *Id*.

The plain and reasonable intent of the legislature for each of these clauses in the statutory scheme is that the Attorney General's determination actually has meaning and acts as a review on the State Auditor. The Circuit Court's judgment relegates the Attorney General's authority to little more than a word-counter and rubber stamp. As the Circuit Court and Respondent view the statute, the Auditor could prepare a fiscal note or fiscal note summary plainly in contravention of § 116.175 and, without any effective check on his determination, could disregard the Attorney General's concerns and require the Secretary of State to certify an official ballot title with a clearly deficient fiscal note and fiscal note summary. Adoption of Respondent's interpretation would require the Court to conclude that the legislature meant to render significant portions of § 116.175 superfluous and intended that any review of the Auditor's submissions by the Attorney General is completely toothless.

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Section 116.175 reinforces the Attorney General's interpretation of § 116.180, making explicitly clear that "[a] fiscal note or fiscal note summary that does not satisfy the requirements of [§ 116.175] also shall not satisfy the requirements of section 116.180"—the official ballot title requirement statute. Respondent's and the Circuit Court's view would additionally require the Court to exercise its judicial authority to create, out of thin air and without any legislative consent, authority for another executive branch official to approve a proposed fiscal note and fiscal note summary—the State Auditor himself. But the statutory scheme is clear that the State Auditor cannot approve his own fiscal note and fiscal note summary. That role belongs only to the Attorney General. And for reasons further discussed in Point III below, the Attorney General's role *must* be more than simply ministerial when reviewing for legal content.

C. The State Auditor's fiscal note and fiscal note summary are deficient as to legal content.

The Attorney General's Opinion Letters detailed across several pages why the State Auditor's fiscal note and fiscal note summary lack the required legal content under Section 116.165. Ultimately, if voters were to see the fiscal note summary at the ballot box, they would be more likely driven to vote for the measure due to misleading language that is apparent from the face of the fiscal note. Of course, the full fiscal note is not present on the ballot itself, and so voters are left only to look at the 50-word fiscal note summary. This is more than just a dispute over whether the

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Attorney General "does not like the fiscal conclusion reached by the Auditor," as the Circuit Court held. Rather, it is apparent from the face of the fiscal note and fiscal note summary that they lack the required legal content and will create undue prejudice in favor of the measure.

First, the fiscal note contains inadequate and divergent submissions from local government entities. This goes to the heart of the "legal content" required of a fiscal note, because a fiscal note must contain adequate submissions from governmental entities. In his Opinion Letter, the Attorney General stressed the statistically insignificant small sample size of responses solicited by the State Auditor, noting "this ballot measure will affect the present and future population of Missouri. Yet, while Missouri has 114 counties and one independent city, in addition to over 1,000 other cities and villages . . . only three counties and two cities responded." Not many more were even solicited for submissions: only 12 and 14 cities.

Only one local governmental entity, Greene County, made an effort to submit a reliable methodology for calculating the fiscal impact. Greene County understood that the abortion-legalization measure would have the obvious effect of reducing population. No other entity engaged in this common-sense analysis that should be present on the face of any submission. As Greene County correctly stated, the "substantial economic fiscal reality of abortion relating to unborn lives cannot be denied or omitted from a fiscal note to inform voters of the consequences."

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However, the State Auditor did not apply that same reasonable assumption when assessing the submissions from the few other entities who responded. Instead, the fiscal note and fiscal note summary took Greene County's calculated estimated fiscal impact and purported to represent that fiscal impact as the fiscal impact for the *entire state*. Never once did Greene County purport to calculate the fiscal impact of the effects of the initiative petition on the entire state. To represent otherwise is misleading and prejudicial in favor of the initiative petitions. As the Attorney General informed the State Auditor in his Opinion Letter, the Greene County methodology should be applied to the remainder of the populous of Missouri, because it is "unreasonable for those entities to conclude that the measure will have no estimated fiscal impact[.]" (D34, p.3). In other words, it was misleading and prejudicial to represent the financial impact of the measures on Greene County as representative of all 114 counties in Missouri.

To properly apply the methodology would not raise the State Auditor's minimum responsibilities outlined by this Court in *Brown v. Carnahan*, 370 S.W.3d 637 (Mo. banc 2012). Rather, doing so would underscore *why* the State Auditor even plays a role in the process in the first place while giving proper meaning to "legal content." This Court in *Brown* noted the State Auditor "is not required to compel and second-guess reasonable submissions from entities but is able to rely on the responses submitted. Nor should the auditor wade into the policy debates

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surrounding initiative petitions, which an independent investigation would entail. . . . It is not the auditor's role to choose a winner among these opposing viewpoints by independently researching the issue himself, double-checking economic theories and assumptions, and adopting one side's view over another's in the resulting fiscal note." *Id.* at 650. *Brown* did not preclude the State Auditor from selecting *an* assumption or methodology. Any reasonable construction of "legal content" and the duties of the State Auditor require some sort of methodology, and *Brown* does not stand for the proposition that the State Auditor *must only* add and subtract numbers that entities submit.

But, in fact, the State Auditor did not even do that properly. Non-governmental entities estimated a massive possible loss to state revenues, up to a possible loss of $12.5 billion. But that figure is nowhere in the fiscal note summary. Instead, all the State Auditor did was note that "opponents estimate a potentially significant loss to state revenues." This vague language does not comply with the State Auditor's role under Section 116.175 or under *Brown*.

Section 116.175 expressly allows for consideration of figures submitted by governmental and non-governmental entities. Subsection (1) of that statute states that "The state auditor may consult with the state departments, local government entities, the general assembly ***and others with knowledge pertinent to the cost of the proposal***." § 116.175.1 (emphasis added). Furthermore, "[p]roponents or

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opponents of any proposed measure may submit to the state auditor a proposed statement of fiscal impact estimating the cost of the proposal in a manner consistent with the standards of the governmental accounting standards board and section 23.140, provided that all such proposals are received by the state auditor within ten days of his or her receipt of the proposed measure from the secretary of state." There is no dispute that the State Auditor received estimates from "others with knowledge pertinent to the cost of the proposal," who may be opponents to the measure, that those estimates were out of compliance with the appropriate fiscal standards, or that the submission were timely received. The record contains no such fact-finding or evidence to the contrary. Instead, the record contains submissions that were not expressly incorporated into the fiscal note summary. The Auditor should have done so, just as it did when it included a specific dollar figure based on Greene County's estimate.

Thus, as the Attorney General wrote in his Opinion Letter, the fiscal note summary "conveys the misleading message that it is an accurate representation of the true cost to local and state governmental operations." The only numerical figure mentioned in the fiscal note summary is a sliver of the maximum (or even likely) potential financial impact. The average, reasonable voter reading this summary will not know the small sample of entities that the State Auditor had solicited for a submission. That same voter is also much more likely to vote in favor of a measure

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that is estimated to cost approximately $50,000 than one that estimates a fiscal impact closer to what the submissions *actually received by the State Auditor* estimated the measure will cost.

To be clear: the Attorney General is advancing a narrow and appropriate reading of his authority to review a fiscal note and fiscal note summary under Section 116.175. That review must be more than a rubber stamp. And at minimum that review allows a rejection of the State Auditor's submissions if it is evident from their face that they are inaccurate, misleading, and likely to create bias for or against a measure. This Court should reverse the Circuit Court's decision, and remand the case to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary under Section 116.175.5.

II. The circuit court erred in granting mandamus or declaratory relief against the Attorney General, because the State Auditor was required to revise his fiscal note and fiscal note summary after the Attorney General rejected them, in that the Attorney General's rejection was proper, Section 116.175 contains a clear command to revise the materials upon rejection, and the State Auditor received additional information that should have been incorporated.

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Standard of Review. This point on appeal raises a question of statutory interpretation, which is reviewed de novo on appeal. *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020).

Preservation. The Attorney General preserved this issue for appeal in his answer to Respondent's Petition (D19), in his pre-trial brief (D23), and during trial (*See* Tr.).

As noted above, "The primary goal of statutory interpretation is to give effect to legislative intent, which is most clearly evidenced by the plain text of the statute." *State ex rel. Goldsworthy*, 543 S.W.3d at 585. The legislature "is presumed to have intended every word, provision, sentence, and clause in a statute to be given effect" and "[t]he plain and ordinary meaning of the words in a statute is determined from the words' usage in the context of the entire statute." *Id*. (citing *Mantia v. Mo. Dep't of Transp*., 529 S.W.3d 804, 809 (Mo. banc 2017)). "Where a statute's language is clear, courts must give effect to its plain meaning and refrain from applying the rules of construction unless there is some ambiguity." *Ross v. Dir. of Revenue*, 311 S.W.3d 732, 735 (Mo. banc 2010).

Section 116.175 could not be more clear: if the Attorney General "determines" that the Auditor's proposed fiscal note or fiscal note summary for an initiative petition does not satisfy the requirements of Section 116.175, the Attorney General "shall" return the deficient fiscal note or fiscal note summary to the Auditor "for

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revision." § 116.175.5. The Attorney General complied with his duty. The State Auditor has yet to do so.

Instead of revising each fiscal note and fiscal note summary to comply with Section 116.175, the State Auditor "decline[d] to revise the fiscal note and fiscal note summary" for each of the initiative petitions. Because the State Auditor failed to revise the fiscal notes and fiscal note summaries, and because the Attorney General determined that the proposed fiscal notes and fiscal note summaries submitted by the Auditor continue to fail to satisfy the requirements of Section 116.175, the Attorney General again returned the fiscal notes and fiscal note summaries to the Auditor for revision. *See, e.g.* Ex. D. The Auditor has, to date, failed to revise the fiscal note or fiscal note summary for any of Respondent's initiative petitions.

In crafting the text of Section 116.175, the legislature plainly laid out the scope of responsibilities for both the Auditor and the Attorney General. It is the *Attorney General's* responsibility to "determine" whether the fiscal note or fiscal note summary "does not satisfy the requirements of [§ 116.175]" and, if the Attorney General determines that a fiscal note or fiscal note summary does not satisfy those requirements, "the fiscal note and the fiscal note summary shall be returned to the auditor for revision." § 116.175.5. In the context of Section 116.175, the meaning of the requirement that the fiscal note and fiscal note summary be "returned to the

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auditor for revision" is clear. The phrase "return . . . for revision" imposes on the State Auditor a statutory duty to provide an updated or altered fiscal note and fiscal note summary for the Attorney General's review under Section 116.175. Any other meaning of the word would render the responsibility for the Attorney General to determine whether a proposed fiscal note and proposed fiscal note summary complies with § 116.175, and, consequently, whether to approve it or send it back to the Auditor for revision, superfluous. Any alternative reading of the requirement that the fiscal note and fiscal note summary shall be "returned for revision" upon a determination by the Attorney General would be contrary to this pronouncement.

This understanding of the legislature's use of the word "revision" is consistent with how the word "revision" is used by courts addressing challenges under Chapter 116. *See, e.g. Pippens v. Ashcroft*, 606 S.W.3d 689, 693 (Mo. App. W.D. 2020) (using the term "revision" to refer to the process of making changes to the official summary statement for an initiative petition); *Sedey v. Ashcroft*, 594 S.W.3d 256, 265 n. 6 (Mo. App. W.D. 2020) (using the terms "revised" and "revisions" to describe changes to the summary language of citizen initiatives). It is also consistent with how Missouri courts have traditionally used the words "revise" and "revisions." *See, e.g. Care & Treatment of Morgan v. State*, 176 S.W.3d 200, 205–06 (Mo. App. W.D. 2005) (considering the "revised" version of a statute as being a change to the legal definition of a term compared to the past definition); *McCarty v. City of Kansas*

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City, 671 S.W.2d 790, 795 (Mo. App. W.D. 1984) (using the term "revisions" to refer to "a change in existing regulations and restrictions" at issue). "[I]n construing a statute to determine legislative intent, a court must presume that the legislature acted with a full awareness and complete knowledge of the present state of the law" and Missouri court cases. *State v. Rumble*, 680 S.W.2d 939, 942 (Mo. banc 1984). Even if the plain meaning of the term "revision" was uncertain (which it is not), Missouri courts' past use and definition of the term strongly supports the Attorney General.

Both the plain meaning of the term "revision" as used in the statute and the regular use of the term by courts in analyzing both ballot title cases and other general cases makes clear: the State Auditor had a statutory duty to send to the Attorney General an *updated and modified* fiscal note or fiscal note summary for each of Respondent's initiative petitions. The Attorney General would then review the resubmitted fiscal note and fiscal note summary to determine whether the documents complied with the requirements of Section 116.175, just as he would upon receiving a first submission. Despite this clear statutory instruction, the State Auditor refused to revise the statute to address the Attorney General's concerns.[3] In fact, the State

[3] Notably, in her Petition below, the one claim Respondent did *not* bring is a request for this Court to enter a judgment declaring that the Auditor must comply with his statutory obligation under § 116.175 to "revise" the proposed fiscal notes and fiscal note summaries. As discussed in the Attorney General's other points on appeal, the Circuit Court erred in blessing Respondent's failure to ask for the relief she did

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Auditor explicitly stated instead that he "*declines to revise* the fiscal note and fiscal note summary." (D38, cleaned up, emphasis added). As the Auditor "decline[d]" to perform his statutory duties under Section 116.175, the Attorney General again returned the fiscal notes and fiscal note summaries for revision. (*See, e.g. id.*; D40).

Neither Section 116.175 nor any other statute requires the Attorney General to approve a fiscal note or fiscal note summary that he determines does not satisfy the requirements of Section 116.175 and is therefore deficient. On the contrary, Section 116.175.5 entrusts in the Attorney General *only one* nondiscretionary duty: that any fiscal note or fiscal note summary which he "determines . . . does not satisfy the requirements of [§ 116.175] . . . ***shall be*** returned to the Auditor for revision." § 116.175.5 RSMo. Courts have consistently held in statutory interpretation that "[t]he word 'shall' generally prescribes a mandatory duty." *State v. Teer*, 275 S.W.3d 258, 261 (Mo. banc 2009).

Here, the Attorney General determined that the State Auditor failed to make any revisions to the deficient proposed fiscal note and proposed fiscal note summary

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request in her lawsuit and then complain that she does not have relief available to her to resolve her claimed injury. *See State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 266 (Mo. banc 1980) (finding it "undisputed that the relators had an alternative remedy [to a writ of mandamus] available to them" when the relators also "filed an action seeking a declaratory judgment" related to the same dispute.). The proper relief here is for completion of the Attorney General and Auditor's submission, review, and resubmission process. And then if Respondent found the *final* fiscal note or fiscal note summary unfair or insufficient, she could file her own lawsuit under Section 116.190 challenging those materials.

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for each of the initiative petitions, and, consequently, complied with his statutory duty to return the drafts to the State Auditor for further revision. The Attorney General would be running afoul of the requirements of § 116.175.5 if he *did not* return fiscal notes and fiscal note summaries for further revision after a determination that they did not comply Section 116.175.5.

Section 116.175 is clear on the continuing responsibilities of both the Attorney General and the Auditor in reaching an approved fiscal note and fiscal note summary that complies with § 116.175. The General Assembly's use of the term "revision" and the requirements that a fiscal note and fiscal note summary satisfy Section 116.175 and be "approved" by the Attorney General for the purpose of Section 116.180 before the Secretary of State may certify a ballot title demonstrates that the preparation of a fiscal note is an ongoing process. The dual requirements of revision and approval create an ongoing review process that continues until an adequate fiscal note and fiscal note summary is approved. The clear text of the statute renders any additional construction unnecessary. *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 540 (Mo. banc 2012) ("When the words are clear, there is nothing to construe beyond applying the plain meaning of the law.").

Even to the extent this Court concludes that it is necessary to look beyond the plain meaning of the statute, the plain and straightforward construction of Section 116.175 is that the use of the terms "revision," "determine," and "approve" create

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continuing, time-constrained obligations on the Auditor and Attorney General to engage in the processes of Section 116.175 until the fiscal note and fiscal note summary for an initiative petition are approved. The rules of statutory construction "require this court to determine the intent of the legislature" by considering the plain and ordinary meaning and application of the text of the statute. *Owsley v. Brittain*, 186 S.W.3d 810, 815 (Mo. App. W.D. 2006).

Here, the plain and ordinary application of the text utilizes the time limit imposed on the executive branch officials—ten days—to govern any deadlines for revisions to proposed fiscal notes or fiscal note summaries. The Attorney General has ten days after receiving an iteration of a proposed fiscal note and fiscal note summary to determine whether to approve or send back for revision the fiscal note and fiscal note summary. § 116.175.4, .5. Under the most permissive interpretation of these provisions controlling executive branch officials drafting and reviewing proposed fiscal notes and fiscal note summaries, "returning" a draft "for revision" *at minimum* implies (and, in the Attorney General's view, expressly requires) that the draft will be edited and then re-submitted for potential approval under a similar statutory timeline as the initial production. Indeed, both the State Auditor and Attorney General acted under this construction of the statute—each provided communications on the proposed fiscal note and fiscal note summary within ten days of receipt. The Circuit Court's judgment effectively discards portions of the statute

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mandating a determination of when a fiscal note or fiscal note summary is insufficient—an outcome which is unlikely to be "the intent of the legislature" drafting the provision. *Owsley*, 186 S.W.3d at 815.

Second, the Circuit Court's judgment creates unnecessary statutory conflicts that ultimately render meaningless critical portions of Section 116.175. The judgment expresses concern that there could be a a parade of horribles occurs that then invites intervention from outside the relationship between statewide elected officials carefully crafted by the legislature. Not only is this legal conclusion not supported by the statute, there is no evidence that this fear is happening here. The only event that has occurred is *one* rejection of the State Auditor's initial submissions based on several grounds clearly explained in the Attorney General's Opinion Letters. At most, the present challenge is unripe, especially given that the statute specifically addresses the Attorney General's authority to review and then approve or reject a fiscal note and fiscal note summary. It cannot be the case that every time the Attorney General were to take an action expressly allowed by statute, a parade of horribles occurs that then invites intervention from outside the statewide elected officials. What is more, the solution to this problem is clear: an order requiring the State Auditor to complete his duty under the statute and revise the fiscal note and fiscal note summary. The solution is not to slash the Attorney General's authority that Section 116.175 plainly gives him.

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Finally, the record below demonstrates that the State Auditor still had more work to do. Three days before the Attorney General responded with his rejection of the State Auditor's fiscal note and fiscal note summary, on April 7, 2023, the State Auditor received additional information from the Governor's Office. The Governor's Office provided a fiscal estimate for each of the 11 initiative petitions based on "additional costs identified by other agencies in regards to regulation and enforcement." In addition, the Governor's Office stated that each initiative petition appears "to conflict with federal law, which may have bearing on the fiscal responsibilities of [the Governor's Office]."

Each submission from the Governor's Office noted that "there will likely be litigation leading to a fiscal impact on the Legal Expense Fund (LEF) ranging from $1,500 to unknown" due to potential conflicts with the U.S. Supreme Court's decision in "*Dobbs v. Jackson Women's Health Organization* and requirements of parental consent." (Italics to case citation added). In addition, for several of the measures, the Governor's Office estimated that "failing to be in compliance with federal requirements related to Medicaid and MO HealthNet could lead to a fiscal impact of up to $600M" due to a conflict between the content of the initiative petitions and "the federal policy related to the Hyde Amendment and expending public funds on abortions."

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The State Auditor has failed to incorporate these new figures, even though the State Auditor acknowledged receiving these responses and could have incorporated the responses from the Governor's office when revising his fiscal note and fiscal note summary.

For these reasons, this Court should reverse the Circuit Court's judgment, and remand it to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary under Section 116.175.5

III. The circuit court erred in granting mandamus relief against the Attorney General, because Respondent had other remedies available and the Attorney General's duty under Section 116.175 is not ministerial, in that the Auditor had not yet revised his materials before Respondent filed suit, the Attorney General has not refused to perform a ministerial duty, and the Attorney General has discretionary authority to review and determine a fiscal note and fiscal note summary's compliance under Section 116.175.

Standard of Review. This point on appeal raises a question of statutory interpretation, which is reviewed de novo on appeal. *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020).

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Preservation. The Attorney General preserved this issue for appeal in his answer to Respondent's Petition (D19), in his pre-trial brief (D23), and during trial (*See* Tr.).

A writ of mandamus may only be issued in instances where the litigant: (1) proves that "no alternative remedy exists"; (2) "proves that he has a clear, unequivocal, specific right to a thing claimed"; and (3) proves the writ relates to "a ministerial duty that one charged with the duty has refused to perform." *Barnes v. Uhlich*, 592 S.w.3d 67, 70–71 (Mo. App. W.D. 2019). Here, Respondent's Petition failed on every count. This Court should reverse the Circuit Court's finding otherwise.

A. Respondent failed to establish that a writ of mandamus is the exclusive remedy available to her.

"There is no remedy that a court can provide that is more drastic, no exercise of raw judicial power that is more awesome, than that available through the extraordinary writ of mandamus." *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 266 (Mo. banc 1980). As it is the most significant exercise of judicial power a court can perform, a "writ of mandamus issues only in a case of necessity," and if "there is any doubt of its necessity or propriety, it will not be issued." *State ex rel. University Park Building Corp. v. Henry*, 376 S.W.2d 614, 617 (Mo. App. 1964); *see also State ex rel. Kelley*, 595 S.W.2d at 266 ("Recognizing the extreme nature of the order to act in accordance with a peremptory writ of mandamus, we believe

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that the remedial writ ought to be reserved for those cases in which no alternative measure will be effective.").

Recognizing these limitations, courts have held that "[i]t is a long-established principle of law that mandamus does not issue where there is another adequate remedy available to relator." *State ex rel. Kelley*, 595 S.W.2d at 265. "In other words, 'the writ of mandamus is to be used only as a last resort on the failure of any adequate alternative remedy.'" *Beauchamp v. Monarch Fire Protection District*, 471 S.W.3d 805, 810 (Mo. App. E.D. 2015) (quoting *State ex rel. Kelley*, 595, S.W.2d at 265); *see also State ex rel. KelCor., Inc. v. Nooney Realty Tr., Inc.*, 966 S.W.2d 399, 402 (Mo. App. E.D. 1998) ("A required element of proving a right to mandamus is that there is no alternative, adequate remedy other than the issuance of the writ.").

A review the Petition below reveals that Respondent likely acknowledges that a writ of mandamus is the exclusive possible remedy. Count I of the Petition acknowledges the existence of other possible remedies and therefore, on the face of Respondent's own pleadings, bars any right to a writ of mandamus. *See Barnes*, 592 S.W.3d at 71–72 (dismissing a petition for writ of mandamus where the relator "did not allege in his petition in mandamus that he was without an adequate alternative remedy."). In briefing before the Circuit Court, Respondent even took one step past *Barnes*, acknowledging with frankness that Respondent believes "mandamus . . . is not the exclusive remedy" against the Attorney General available to her in her

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Petition. (D8 at p.5). Respondent's own admission should have been fatal to Count I of her Petition.

This Court has held that an attempt to take two bites of the same apple by requesting both a declaratory judgment and writ of mandamus per se demonstrates that mandamus is not the exclusive remedy available and, consequently, bars a court from issuing the writ in her favor. In *State ex rel. Kelley*, this Court found it "undisputed that the relators had an alternative remedy [to a writ of mandamus] available to them" when the relators also "filed an action seeking a declaratory judgment" related to the same dispute. *State ex rel. Kelley*, 595 S.W.2d at 267. The Court noted that, "[b]y filing the action for declaratory judgment seeking a judicial declaration" on the same underlying facts of the lawsuit, the relator "demonstrated his willingness to submit the controversy . . . to the judgment of the court" and was consequently barred from seeking mandamus. *Id*. Likewise here, Respondent's "alternative" request for declaratory judgment on the same facts demonstrates mandamus is not the exclusive remedy available to her. Mandamus is not a "short cut for the speedy resolution of disputes that adequately may be resolved by other means." *Id.* at 268. A writ of mandamus is an extraordinary remedy of last resort. Even now, this case is not at a last resort stage.

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B. Respondent failed to establish any clear, unequivocal, and specific right she seeks to vindicate with a writ of mandamus.

Respondent also failed to demonstrate any clearly established and presently existing right she could vindicate through mandamus. "Mandamus is a discretionary writ, not a writ of right," and it "is not appropriate to establish a legal right, but only to compel performance of a right that already exists." *State ex rel. Petti v. Goodwin-Raftery*, 190 S.W.3d 501, 506 (Mo. App. E.D. 2006). A petitioner seeking mandamus bears the burden of establishing that he or she has a "clear, unequivocal, specific right to have the act performed as well as a corresponding present, imperative, and unconditional duty on the part of the respondent to perform the action sought." *State ex rel. Lee v. City of Grain Valley*, 293 S.W.3d 104, 109 (Mo. App. W.D. 2009) (emphasis omitted). This is because "the purpose of mandamus is to execute and not to adjudicate; it coerces performance of a duty already defined by law." *State ex rel. City of Crestwood v. Lohman*, 895 S.W.2d 22, 27 (Mo. App. W.D. 1994).

Respondent did not meet her burden of establishing a clear, unequivocal, specific right to have the act performed. It is important to break down the precise "clear and unequivocal right" Respondent asserted warrants the granting of extraordinary mandamus relief. Section 116.175 relates exclusively to the interactions between the Auditor and the Attorney General in the process of drafting and reviewing proposed fiscal notes and fiscal note summaries. § 116.175. Nowhere

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in the statute is any provision that even *implies* that a member of the public has a "clear and unequivocal" right to interject themselves into the process of the Attorney General reviewing fiscal notes and fiscal note summaries. The absence of any case establishing Respondent's right to file a lawsuit while there is still more work for one state official to do is telling.

In fact, Respondent already has an alternative avenue here – to challenge an official ballot title under Section 116.190. If Respondent disagrees with the ultimately approved fiscal note or approved fiscal note summary, she is free to challenge the ballot title once the Secretary of State certifies the official ballot title. Her statutory rights under Section 116.190 does not, however, support any suggestion that she has a "clear and unequivocal" right to intervene before that time. The Circuit Court erred in holding otherwise.

To allow a party to obtain mandamus relief from generalized statements that they have a right to bring issues they deem significant under a constitutional provision, such as Article III, Section 50, would render entirely meaningless the requirement to demonstrate a clear and specific right to relief. This Court has conclusively held that one must demonstrate a "specific" right to relief before a court may rule on a request for mandamus. *See State ex rel. Swoboda v. Missouri Comm'n on Hum. Rts.*, 651 S.W.3d 800, 805 (Mo. banc 2022). A generalized pronouncement

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of a litigant's "right to bring issues they deem significant to the voters" (D8 at p.4) as Respondent argued below plainly does not satisfy this standard.

Mandamus is an extraordinary and consequential tool. It is "a hard and fast writ, and an unreasoning writ, a cast-iron writ, the right arm of the court." *State ex rel. Kelley*, 595 S.W.2d at 266 (quoting *State ex rel. Kansas City v. Kansas City Gas Co.*, 163 S.W. 854, 857 (Mo. banc 1914)). To protect against overreach of this power, courts may only exercise mandamus when a litigant has identified a "clear, unequivocal, and specific right" to the action a party seeks performed. Respondent failed to establish any such right, and the Circuit Court erred in concluding otherwise.

C. The Attorney General's statutory authority under Section 116.175 to approve or reject the State Auditor's proposed fiscal note and fiscal note summary is not ministerial and therefore not subject to a writ of mandamus.

Respondent's request for mandamus should also have failed below because she asked the Circuit Court to exercise judicial power to compel an executive branch official to reach a *particular* outcome on a *discretionary* decision. Courts have long held that a writ of "'[m]andamus will not lie to compel an act when its performance is discretionary.'" *McDonald v. City of Brentwood*, 66 S.W.3d 46, 51 (Mo. App. E.D. 2001) (quoting *State ex rel. University Park Building*, 376 S.W.2d at 617). This is because the purpose of a writ of mandamus is to "compel the performance of a ministerial duty that one charged with the duty has refused to perform." *Lemay Fire*

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Prot. Dist. v. St. Louis County, 340 S.W.3d 292, 294 (Mo. App. E.D. 2011) (quoting *State ex rel. Pub. Counsel v. Pub. Serv. Comm'n*, 236 S.W.3d 632, 635 (Mo. banc 2007)); *see also State ex rel. Thomas v. Neeley*, 128 S.W.3d 920, 924 ("[A] writ of mandamus cannot compel the performance of a discretionary act.") (Mo. App. S.D. 2004).

Even if Respondent were able to establish all of the other requirements for a writ of mandamus—which she failed to do—mandamus relief should have been unavailable because the Attorney General's duties to *review* ***and*** *approve or deny* a fiscal note and fiscal note summary Section 116.175 are not "ministerial." When analyzing whether a writ of mandamus may issue, courts have juxtaposed "ministerial" government actions with discretionary actions of government officials "that require[] the exercise of reason in determining how or whether the act should be performed." *State ex rel. Thomas*, 128 S.W.3d at 924. A writ of mandamus "will only issue when there is an *unequivocal showing* that the public office failed to perform a ministerial duty imposed by law." *Id*. (emphasis added).

Section 116.175 directs the Attorney General to "determine[]" whether the fiscal note and fiscal note summary satisfy the requirements of the statute, which, in turn, affects whether the Attorney General approves the proposed fiscal note and fiscal note summary or returns each to the auditor for revision. The fact that the Attorney General's determinations under the statute are more than simply

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"ministerial" is demonstrated by the explicit contemplation under the statute that the Attorney General *may* determine that the fiscal note and fiscal note summary cannot approved until further revision—all depending on his review of the proposed fiscal note and fiscal note summary. *State ex rel. Thomas*, 128 S.W.3d at 924. In the face of the plain text of the statute, Respondent did not carry her burden to make an "unequivocal showing" that the Attorney General failed to perform a ministerial duty. *Id.*

A discretionary action does not become ministerial simply because a party challenging a decision strongly believes the outcome should have been different. *State ex rel. Thomas*, 128 S.W.3d at 924. After all, it is often the case that actions by government officials can elicit strong reactions on both sides of the question. Respondent asked the Circuit Court to utilize the writ of mandamus to direct the Attorney General to exercise his discretion in a particular manner on the question of whether or not a proposed fiscal note and fiscal note summary comply with requirements of § 116.175. The Circuit Court agreed, and that decision risks creating a dangerous and unprecedented result of the exercise of judicial power over Missouri elections officials performing discretionary elections responsibilities. The very fact that the Attorney General must "determine[]" whether the "content" of a proposed fiscal note and fiscal note summary complies with a list of requirements, and then either approve the draft or return it to the State Auditor for revision, demonstrates

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that Section 116.175 entrusts in the Attorney General fundamental discretionary powers. Missouri courts have held time and again that mandamus may not be used to compel the Attorney General—or indeed, any other government official—to exercise his discretion in a particular way favored by a litigant. *E.g.*, *McDonald*, 66 S.W.3d at 51.

For these reasons, this Court should reverse the Circuit Court's judgment, and remand it to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary under Section 116.175.5.

IV. The circuit court erred in granting declaratory relief against the Attorney General, because the case was not yet ripe and therefore not justiciable, in that the fiscal note and fiscal note summary review and resubmission process had not yet concluded.

Standard of Review. This point on appeal raises a question of statutory interpretation, which is reviewed de novo on appeal. *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020).

Preservation. The Attorney General preserved this issue for appeal in his answer to Respondent's Petition (D19), in his pre-trial brief (D23), and during trial (*See* Tr.).

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For similar reasons as the Attorney General argued above why the Circuit Court erred in granting mandamus relief and why the State Auditor failed to comply with his duty under Section 116.175 to revise his fiscal note and fiscal note summary, the Circuit Court erred in granting Respondent's alternative request for declaratory relief against the Attorney General. The Circuit Court held in footnote 11 to its judgment that it would "direct the same relief by declaratory judgment" if it did not grant Respondent's request for mandamus relief. Because the Circuit Court appears to have rested an alternative declaratory judgment ruling on the same grounds as the ruling granting mandamus relief, the Attorney General incorporates his same arguments above here. The Attorney General will also elaborate on some of those points.

There was no presently existing controversy over which a court can grant relief of a conclusive character. "Ripeness, like standing, is an element of justiciability." *Calzone v. Ashcroft*, 559 S.W.3d 32, 35 (Mo. App. W.D. 2018). Ripeness is determined by whether "the parties' dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict that is presently existing, and to grant specific relief of a conclusive character." *Mo. Health Care Ass'n v. Attorney Gen. of Mo.,* 953 S.W.2d 617, 620 (Mo. banc 1997); *see also Seay v. Jones*, 439 S.W.3d 881, 888 (Mo. App. W.D. 2014) ("citizens are authorized to seek judicial review of the official ballot title… [i]n such an action, the

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challenger must 'state the reason or reasons why the summary statement portion of the official ballot title is insufficient or unfair.'").

Here, Respondent's suit is not ripe because the exchange—and review and resubmission—of materials between the Attorney General and the State Auditor had not yet concluded. There was more work left for the State Auditor to do, as the State Auditor received new submissions from the Governor's Office on a fiscal impact for the initiative petitions. Even if the State Auditor did not receive those submissions, the State Auditor still has not complied with his duty to revise the fiscal note and fiscal note summary. § 116.175.5. But his receipt of new information shows even more that there was more work to do.

Respondent's alternative request for declaratory relief—and the Circuit Court's granting of that alternative request—came too early. Of course, as discussed above, Respondent should wait until the entire process had concluded and challenge an official ballot title under Section 116.190. But at the time she filed her lawsuit and up until the time of trial, there was no real presently existing controversy between the Attorney General and Respondent. Simply because Respondent disagreed with the Attorney General's decision does not entitle her to a request for declaratory relief. Rather, the dispute must be ripe. Furthermore, in bringing her lawsuit Respondent may not attempt to challenge the Attorney General's underlying exercise of discretion in determining that the Auditor's identical proposed fiscal note

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and fiscal note summaries for Respondent's initiative petitions failed to comply with Section 116.175. And ultimately, her request for declaratory relief seems to challenge the discretion the Attorney General exercised at a pre-final dispositional stage. There is no right for Respondent to file any lawsuit and interfere in the State Auditor and Attorney General's process before it has been completed.

For these reasons, this Court should reverse the Circuit Court's judgment because it was not yet ripe and therefore non-justiciable, and remand it to the Circuit Court with instructions to dismiss the case.

CONCLUSION

For these reasons, this Court should reverse the Circuit Court's judgment, and remand it to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary under Section 116.175.5.

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July 5, 2023

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via the Court's electronic filing system on the 3rd day of July, 2023, to all counsel of record.

I also certify that the foregoing brief complies with the limitations in Rule No. 84.06(b) and that the brief contains 13,432 words.

/s/ *Jason K. Lewis*

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To: 'susan.k@missourilife.org'[susan.k@missourilife.org]
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Fitz-James v. Bailey - MO Supreme Court Appellant's Brief.pdf

Susan –
Attached is filed AGO brief and the brief filed by the amicus.I will check on the other questions we discussed.I will share the response brief when it is filed.
Thank you.
Ray

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From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Mon 8/21/2023 12:51:47 AM (UTC-05:00)
Subject: AG Bailey Protects Children from Child Mutilation

Hi,

Maddie with **Missouri Attorney General Andrew Bailey** here.

I'm writing to flag for you that from **Tuesday-Thursday**, Attorney General Bailey will be in court **defending Missouri's law that outlaws child mutilation**. Set to go into effect on August 28, the bill has been challenged by the ACLU and Lambda Legal in **state court (which has never been done before**- all prior legal challenges to state laws protecting children have been in federal court).

This legal challenge comes after AG Bailey was **the first official in the nation** to promulgate an **emergency rule outlawing such procedures for minors** until the state legislature could get a bill across the finish line. More info on that can be found here: https://ago.mo.gov/home/news/2023/04/13/missouri-attorney-general-andrew-bailey-promulgates-emergency-regulation-targeting-gender-transition-procedures-for-minors

AG Bailey issued this emergency rule after he launched an **investigation** into **Washington University's** pediatric transgender clinic for allegedly giving **puberty blockers and cross-sex hormones** to children **without parental consent**. More on that here: https://ago.mo.gov/home/news/2023/02/09/missouri-attorney-general-andrew-bailey-confirms-launch-of-multi-agency-investigation-into-st.-louis-transgender-center-for-harming-hundreds-of-children

AG Bailey was able to get the **leftist activists to admit in open court** that:

-the leading health studies "supporting" gender transition interventions for children are **based on weak science**

-they didn't know that the Swedish health authorities assert that the harms to these procedures outweigh the benefits

Our 104-page brief outlining the science that supports Missouri's law can be accessed here: https://ago.mo.gov/docs/default-source/press-releases/2023-08-16---response-in-opposition-to-pi-(1).pdf?sfvrsn=3cffbb7b_2

-Some of those highlights include:

- **There have been ZERO FDA approvals for puberty blockers or cross-sex hormones to treat gender dysphoria in children**
- Almost all European health authorities have condemned and sharply curtailed these procedures for minors

We have the support of 16 other state AGs. Their amicus brief can be found here: https://ago.mo.gov/docs/default-source/press-releases/noe-amicus.pdf?sfvrsn=e42bb35a_2

AG Bailey would be happy to speak on this topic, as this issue is of national importance. Our children are worth the fight.

Thanks very much,

Madeline Sieren | Communications Director
Missouri Attorney General's Office

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From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
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Thanks very much,

Madeline Sieren | Communications Director
Missouri Attorney General's Office

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Sent: Wed 8/23/2023 7:55:00 AM (UTC-05:00)
Subject: FW: Attorney General Bailey Puts Mayor Jones on Notice After Her Announcement to Target Gun Rights

Hi,
Maddie with Missouri Attorney General Andrew Bailey here. Flagging this release for you as AG Bailey takes St. Louis Mayor Tishaura Jones to task over her announcement to target law-abiding gun owners.
Let me know if there is any interest in speaking with the AG on this topic!
Best,

Madeline Sieren | Communications Director
Missouri Attorney General's Office
Jefferson City, MO
573-690-1205
Madeline.Sieren@ago.mo.gov

From: AGO Press <press@ago.mo.gov>
Sent: Wednesday, August 23, 2023 7:41 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Attorney General Bailey Puts Mayor Jones on Notice After Her Announcement to Target Gun Rights

View this email in your browser

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FOR IMMEDIATE RELEASE

August 23, 2023

Contact: Madeline Sieren
Cell: 573-690-1205
Email: madeline.sieren@ago.mo.gov

Attorney General Bailey Puts Mayor Jones on Notice After Her Announcement to Target Gun Rights

JEFFERSON CITY, Mo. - Today, Missouri Attorney General Andrew Bailey put St. Louis City Mayor Tishaura Jones on notice that her office's proposed legislation would violate Missourians' constitutional right to keep and bear arms.

In his letter, Attorney General Bailey notes,"'Our state constitution guarantees that the right of law-abiding citizens to bear arms 'shall be unalienable' and that 'Any restriction on these rights shall be subject to **strict scrutiny** and the state of Missouri **shall be obligated to uphold these rights** and shall under no circumstances

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decline to protect against their infringement.'Mo. Const. art. I, § 23 (emphasis added).people's elected representatives have already spoken on this issue by preempting local authority in state statute. *See* § 21.750, RSMo. To implement your plan would be to violate Missouri law."

He continues, "By this letter, let me be clear – I will zealously perform my constitutional duty to defend the rights of each law-abiding citizen to 'keep and bear arms … in defense of [their] home, person, family and property…'is the promise made to them by the Missouri Constitution. Mo. Const. art. I, § 23.

"Your proposal would not survive the strict scrutiny analysis codified in the Missouri Constitution, which requires a compelling state interest to be addressed with a remedy that is narrowly-tailored.Not even you believe that your proposal is narrowly-tailored to actually stop crime, as evidenced by your statement that, 'Chicago has strict gun laws as well **but that doesn't deter gun violence**.'"

Attorney General Bailey concludes, "It is my hope that you will reverse course and use existing law to combat the crime plaguing your city, rather than choosing to target the rights of law-abiding Missourians. In other words, I encourage you to go after criminals, not guns. As the Attorney General for the State of Missouri, I will discharge my duties under the Constitution and resist any effort to infringe on the right of the people of Missouri to keep and bear arms."

The full letter can be read here: https://ago.mo.gov/docs/default-source/press-releases/mayor-jones-letter.pdf?sfvrsn=d516aba8_2

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From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Wed 8/23/2023 7:55:00 AM (UTC-05:00)
Subject: FW: Attorney General Bailey Puts Mayor Jones on Notice After Her Announcement to Target Gun Rights

Hi,
Maddie with Missouri Attorney General Andrew Bailey here. Flagging this release for you as AG Bailey takes St. Louis Mayor Tishaura Jones to task over her announcement to target law-abiding gun owners.
Let me know if there is any interest in speaking with the AG on this topic!
Best,
Madeline Sieren | Communications Director
Missouri Attorney General's Office
Jefferson City, MO
573-690-1205
Madeline.Sieren@ago.mo.gov

From: AGO Press <press@ago.mo.gov>
Sent: Wednesday, August 23, 2023 7:41 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Attorney General Bailey Puts Mayor Jones on Notice After Her Announcement to Target Gun Rights

View this email in your browser

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FOR IMMEDIATE RELEASE

August 23, 2023

Contact: Madeline Sieren
Cell: 573-690-1205
Email: madeline.sieren@ago.mo.gov

Attorney General Bailey Puts Mayor Jones on Notice After Her Announcement to Target Gun Rights

JEFFERSON CITY, Mo. - Today, Missouri Attorney General Andrew Bailey put St. Louis City Mayor Tishaura Jones on notice that her office's proposed legislation would violate Missourians' constitutional right to keep and bear arms.

In his letter, Attorney General Bailey notes,"'Our state constitution guarantees that the right of law-abiding citizens to bear arms 'shall be unalienable' and that 'Any restriction on these rights shall be subject to **strict scrutiny** and the state of Missouri **shall be obligated to uphold these rights** and shall under no circumstances decline to protect against their

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infringement.'Mo. Const. art. I, § 23 (emphasis added).people's elected representatives have already spoken on this issue by preempting local authority in state statute. *See* § 21.750, RSMo. To implement your plan would be to violate Missouri law."

He continues, "By this letter, let me be clear – I will zealously perform my constitutional duty to defend the rights of each law-abiding citizen to 'keep and bear arms … in defense of [their] home, person, family and property…'is the promise made to them by the Missouri Constitution. Mo. Const. art. I, § 23.

"Your proposal would not survive the strict scrutiny analysis codified in the Missouri Constitution, which requires a compelling state interest to be addressed with a remedy that is narrowly-tailored.Not even you believe that your proposal is narrowly-tailored to actually stop crime, as evidenced by your statement that, 'Chicago has strict gun laws as well **but that doesn't deter gun violence**.'"

Attorney General Bailey concludes, "It is my hope that you will reverse course and use existing law to combat the crime plaguing your city, rather than choosing to target the rights of law-abiding Missourians. In other words, I encourage you to go after criminals, not guns. As the Attorney General for the State of Missouri, I will discharge my duties under the Constitution and resist any effort to infringe on the right of the people of Missouri to keep and bear arms."

The full letter can be read here: https://ago.mo.gov/docs/default-source/press-releases/mayor-jones-letter.pdf?sfvrsn=d516aba8_2

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To: Popp, John[John.Popp@heritage.org]
Cc: Olohan, Mary Margaret[MaryMargaret.Olohan@heritage.org]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Mon 8/28/2023 12:02:22 PM (UTC-05:00)
Subject: Re: TDS Interview with Missouri AG Andrew Bailey

This will be closer to 3:10 PM CT if that's alright!

Sent from my iPhone

> On Aug 28, 2023, at 10:51 AM, Popp, John <John.Popp@heritage.org> wrote:
>
> https://riverside.fm/studio/tds_082823_int_mo-ag-andrew-bailey?t=undefined<https://urldefense.com/v3/__https://riverside.fm/studio/tds_082823_int_mo-ag-andrew-bailey?t=undefined__;!!EErPFA7f--AJOw!BoNIbUtYXdhtQYtfR0GReytsG2Lh9HKS-DlaIWM-ZpuiyR-9jksNw5CDyyQmFM5Ltc0pPttAL8wOH2JHa-aE-ROoXWU5$>
>
>
>
> This is an audio and video interview today (Monday) at 4 pm/et (3 pm/ct).
>
>
> Please use the above link for the interview.
>
> What you need to know before the interview:
> * We record interviews via the podcast platform Riverside.fm.
> * You need a laptop or desktop computer with a built in or external (preferred) microphone.
> * Please wear ear buds or headphones if you have them.
> * You must use Chrome as your web browser. (Make sure you are not in stealth or private mode).
> * There is also a Riverside app that will work with an iPhone or iPad.
> Go to Riverside.fm<https://urldefense.com/v3/__http://riverside.fm/__;!!EErPFA7f--AJOw!BoNIbUtYXdhtQYtfR0GReytsG2Lh9HKS-DlaIWM-ZpuiyR-9jksNw5CDyyQmFM5Ltc0pPttAL8wOH2JHa-aE-csGVCU0$> and download the app.
> * Please silence all alerts, ringers, and sounds on your computer, phone or iPad.
> * Finally, please do not leave the session until your file is uploaded. We will tell you when it is safe to leave the session.
>
> *** If we are experiencing technical difficulties connecting with you for the interview, we will record via phone. Please provide a phone number where we can reach you for back-up. ***
>
> If you have questions, please call me at 703-307-5884.
>
> Thanks!
>
> John Popp
>
>
>
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> _____
> Microsoft Teams meeting
>
> Join on your computer, mobile app or room device
> Click here to join the meeting<https://urldefense.com/v3/__https://teams.microsoft.com/l/meetup-join/19*3ameeting_Nzg2Yzg2YWQtNTNhNC00MWI0LTg3ZDktNGVjMjg5M2ZkYWEx*40thread.v2/0?context=*7b*22Tid*22*3a*22cbd93b48-67ea-4675-9ee8-4178b273204a*22*2c*22Oid*22*3a*22b7b9c994-1704-415a-942e-d42e1d355852*22*7d__;JSUlJSUlJSUlJSUlJSUl!!EErPFA7f--AJOw!BoNIbUtYXdhtQYtfR0GReytsG2Lh9HKS-DlaIWM-ZpuiyR-9jksNw5CDyyQmFM5Ltc0pPttAL8wOH2JHa-aE-Ua3sjM_$>
> Meeting ID: 252 049 944 614
> Passcode: PpBinb
> Download Teams<https://urldefense.com/v3/__https://www.microsoft.com/en-us/microsoft-teams/download-app__;!!EErPFA7f--AJOw!BoNIbUtYXdhtQYtfR0GReytsG2Lh9HKS-DlaIWM-ZpuiyR-9jksNw5CDyyQmFM5Ltc0pPttAL8wOH2JHa-aE-TtHkHdS$> | Join on the web<https://urldefense.com/v3/__https://www.microsoft.com/microsoft-teams/join-a-meeting__;!!EErPFA7f--AJOw!BoNIbUtYXdhtQYtfR0GReytsG2Lh9HKS-DlaIWM-ZpuiyR-9jksNw5CDyyQmFM5Ltc0pPttAL8wOH2JHa-aE-fklSSmr$>
> Or call in (audio only)
> +1 509-904-4844,,875338235#<tel:+15099044844,,875338235#> United States, Spokane
> Phone Conference ID: 875 338 235#
> Find a local number<https://urldefense.com/v3/__https://dialin.teams.microsoft.com/7d1aa6b7-843e-4ff7-9878-c19e51fef777?id=875338235__;!!EErPFA7f--AJOw!BoNIbUtYXdhtQYtfR0GReytsG2Lh9HKS-DlaIWM-ZpuiyR-9jksNw5CDyyQmFM5Ltc0pPttAL8wOH2JHa-aE-dHbKUVk$> | Reset PIN<https://urldefense.com/v3/__https://dialin.teams.microsoft.com/usp/pstnconferencing__;!!EErPFA7f--

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AJOw!BoNIbUtYXdhtQYtfR0GReytsG2Lh9HKS-DlaIWM-ZpuiyR-9jksNw5CDyyQmFM5Ltc0pPttAL8wOH2JHa-aE-T_qVBL5$>
>
> Learn More<https://urldefense.com/v3/__https://aka.ms/JoinTeamsMeeting__;!!EErPFA7f--AJOw!BoNIbUtYXdhtQYtfR0GReytsG2Lh9HKS-DlaIWM-ZpuiyR-9jksNw5CDyyQmFM5Ltc0pPttAL8wOH2JHa-aE-TM9ltJo$> | Meeting options<https://urldefense.com/v3/__https://teams.microsoft.com/meetingOptions/?organizerId=b7b9c994-1704-415a-942e-d42e1d355852&tenantId=cbd93b48-67ea-4675-9ee8-4178b273204a&threadId=19_meeting_Nzg2Yzg2YWQtNTNhNC00MWI0LTg3ZDktNGVjMjg5M2ZkYWEx@thread.v2&messageId=0&language=en-US__;!!EErPFA7f--AJOw!BoNIbUtYXdhtQYtfR0GReytsG2Lh9HKS-DlaIWM-ZpuiyR-9jksNw5CDyyQmFM5Ltc0pPttAL8wOH2JHa-aE-TAKZlYs$>
>
> _____
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From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Fri 8/25/2023 4:02:08 PM (UTC-05:00)
Subject: FW: HUGE WIN - Attorney General Bailey Successfully Defends State Law Banning Child Mutilation

Hi, Maddie with Missouri Attorney General Andrew Bailey here. Missouri is officially the first state in the nation to successfully defend at the trial court level a law barring child mutilation!!
He is available tonight and into next week if you are interested in speaking with the AG.
Thanks so much!

Madeline Sieren | Communications Director
Missouri Attorney General's Office
Jefferson City, MO
573-690-1205
Madeline.Sieren@ago.mo.gov

From: AGO Press <press@ago.mo.gov>
Sent: Friday, August 25, 2023 3:51 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Attorney General Bailey Successfully Defends State Law Banning Child Mutilation

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FOR IMMEDIATE RELEASE

August 25, 2023
Contact: Madeline Sieren
Cell: 573-690-1205
Email: madeline.sieren@ago.mo.gov

Attorney General Bailey Successfully Defends State Law Banning Child Mutilation

JEFFERSON CITY, Mo. - Missouri Attorney General Andrew Bailey released the following statement after his office successfully defended Senate Bill 49:

"Missouri is the first state in the nation to successfully defend at the trial court level a law barring child mutilation. I've said from day one as Attorney General that I will fight to ensure that Missouri is the safest state in the nation for children. This is a huge step in that direction.

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What a day."

The judge's order can be found here: https://ago.mo.gov/docs/default-source/press-releases/sb-49-order.pdf?sfvrsn=1a3d0aea_2

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From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Fri 8/25/2023 4:02:08 PM (UTC-05:00)
Subject: FW: HUGE WIN - Attorney General Bailey Successfully Defends State Law Banning Child Mutilation

Hi, Maddie with Missouri Attorney General Andrew Bailey here. Missouri is officially the first state in the nation to successfully defend at the trial court level a law barring child mutilation!!
He is available tonight and into next week if you are interested in speaking with the AG.
Thanks so much!

Madeline Sieren | Communications Director
Missouri Attorney General's Office
Jefferson City, MO
573-690-1205
Madeline.Sieren@ago.mo.gov

From: AGO Press <press@ago.mo.gov>
Sent: Friday, August 25, 2023 3:51 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Attorney General Bailey Successfully Defends State Law Banning Child Mutilation

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FOR IMMEDIATE RELEASE

August 25, 2023
Contact: Madeline Sieren
Cell: 573-690-1205
Email: madeline.sieren@ago.mo.gov

Attorney General Bailey Successfully Defends State Law Banning Child Mutilation

JEFFERSON CITY, Mo. - Missouri Attorney General Andrew Bailey released the following statement after his office successfully defended Senate Bill 49:

"Missouri is the first state in the nation to successfully defend at the trial court level a law barring child mutilation. I've said from day one as Attorney General that I will fight to ensure that Missouri is the safest state in the nation for children. This is a huge step in that direction.

What a day."

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The judge's order can be found here: https://ago.mo.gov/docs/default-source/press-releases/sb-49-order.pdf?sfvrsn=1a3d0aea_2

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Bcc: Maslar, Mija[Mija.Maslar@FOX.COM]; 'Prasad, Shannon'[Shannon.Prasad@FOX.COM]; 'Nicholas.Hahn@fox.com'[Nicholas.Hahn@fox.com]; 'michael.lamarca@fox.com'[michael.lamarca@fox.com]; 'michaela.hebbeler@fox.com'[michaela.hebbeler@fox.com]; 'Chavez, Ari'[ari.chavez@FOX.COM]; 'mary.butterfield@fox.com'[mary.butterfield@fox.com]; 'Moshe Maryles'[MosheM@newsmax.com]; 'Ashley Gian'[AGian@newsmax.com]; PRESS FOX Kaitlyn Chamberlin[Kaitlyn.Chamberlin@FOXNEWS.COM]; 'kaitlyn.garvey@fox.com'[kaitlyn.garvey@fox.com]; 'james.coffey@fox.com'[james.coffey@fox.com]; 'Kenny, Ryan'[Ryan.Kenny@FOX.COM]; 'Wurm, Christina'[Christina.Wurm@FOX.COM]; 'Robbins, Christina'[Christina.Robbins@FOX.COM]; 'Dagger, Christian'[Christian.Dagger@FOX.COM]; 'Glasgow, Chris'[Chris.Glasgow@Siriusxm.com]; 'Kenneth Chan'[kchan@frc.org]; Whiteman, Caroline[Caroline.Whiteman@FOX.COM]; 'Angelus, Alexa'[Alexa.Angelus@FOX.COM]; 'ryan.tillman@fox.com'[ryan.tillman@fox.com]; 'ryan.cofini@fox.com'[ryan.cofini@fox.com]; 'Sarah Kolk'[skolk@glennbeck.com]; 'sarah.daniello@fox.com'[sarah.daniello@fox.com]; Higgins, Michael[Michael.Higgins@FOX.COM]; 'bryn.jeffers@fox.com'[bryn.jeffers@fox.com]; 'bryn.mccarthy@fox.com'[bryn.mccarthy@fox.com]; 'Leopold, Courtney'[courtney.leopold@FOX.COM]; 'brigid.mcdonnell@fox.com'[brigid.mcdonnell@fox.com]; 'tom.oconnor@fox.com'[tom.oconnor@fox.com]; 'Prasad, Shannon'[Shannon.Prasad@FOX.COM]; 'Novotny Reda, Laura'[Laura.novotny-Reda@FOX.COM]; 'laura.taglianetti@fox.com'[laura.taglianetti@fox.com]; 'taylor.walters@fox.com'[taylor.walters@fox.com]; 'antaria.phillips@fox.com'[antaria.phillips@fox.com]; 'Monica Wallace'[Monica@joepags.com]; 'AMroczkowski@premierenetworks.com'[AMroczkowski@premierenetworks.com]; 'ngiordano@pasreport.com'[ngiordano@pasreport.com]; 'steve@stevedeace.com'[steve@stevedeace.com]; 'media@briankilmeade.com'[media@briankilmeade.com]; 'Alyson.Mansfield@foxnews.com'[Alyson.Mansfield@foxnews.com]; 'Peter.Caterina@foxnews.com'[Peter.Caterina@foxnews.com]; 'eric.albeen@foxnews.com'[eric.albeen@foxnews.com]; 'Allen, Virginia'[Virginia.Allen@heritage.org]; 'Rivera, Anthony'[Anthony.Rivera@siriusxm.com]; 'Ramirez, Edwin'[Edwin.Ramirez@siriusxm.com]; 'Gregory.sahakian@siriusxm.com'[Gregory.sahakian@siriusxm.com]; 'emily@thefederalist.com'[emily@thefederalist.com]; 'jon.constantino@foxnews.com'[jon.constantino@foxnews.com]; 'jon.decker@foxnews.com'[jon.decker@foxnews.com]; 'Danielle Hitchen'[bookings@hughhewitt.com]; 'pascarella@foxnews.com'[pascarella@foxnews.com]; 'sam@joepags.com'[sam@joepags.com]; 'pags@joepags.com'[pags@joepags.com]; 'viewsandnews@icloud.com'[viewsandnews@icloud.com]; 'Christine.desanctis@foxnews.com'[Christine.desanctis@foxnews.com]; 'lynda@hannity.com'[lynda@hannity.com]; 'jjverdi@live.com'[jjverdi@live.com]; 'savagemikesavage@aol.com'[savagemikesavage@aol.com]; 'r.ocallaghan15@gmail.com'[r.ocallaghan15@gmail.com]; 'hayley.silverman@siriusxm.com'[hayley.silverman@siriusxm.com]; 'jpauldecker@gmail.com'[jpauldecker@gmail.com]; 'Binns, Michael'[Michael.Binns@siriusxm.com]; 'bschrader@mercurystudios.com'[bschrader@mercurystudios.com]
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Sent: Fri 9/8/2023 7:22:33 PM (UTC-05:00)
Subject: FW: Fifth Circuit Sides with Missouri Attorney General Andrew Bailey, Blocks White House and FBI From Censoring Speech

Hi, Maddie with Missouri Attorney General Andrew Bailey here. The Fifth Circuit just upheld the district court's order in Missouri v. Biden, **enjoining the White House, FBI, CDC and Surgeon General from violating Americans' right to free speech** on social media platforms!!
The AG is available this weekend and next week if you are interested in an interview.
Thanks so much!

Madeline Sieren | Communications Director
Missouri Attorney General's Office
Jefferson City, MO
573-690-1205
Madeline.Sieren@ago.mo.gov

From: AGO Press <press@ago.mo.gov>
Sent: Friday, September 8, 2023 6:03 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Fifth Circuit Sides with Missouri Attorney General Andrew Bailey, Blocks White House and FBI From Censoring Speech

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FOR IMMEDIATE RELEASE

September 8, 2023
Contact: Madeline Sieren
Cell: 573-690-1205
Email: madeline.sieren@ago.mo.gov

Fifth Circuit Sides with Missouri Attorney General Andrew Bailey, Blocks White House and FBI From Censoring Speech

JEFFERSON CITY, Mo. - Missouri Attorney General Andrew Bailey announced today that the United States Fifth Circuit Court of Appeals has upheld his free speech case, *Missouri v. Biden*, by enjoining the White House, Surgeon General, FBI, and CDC from continuing to violate the First Amendment rights of millions of Americans.

"We filed this landmark lawsuit against dozens of officials in the federal government to haltbiggest violation of the First Amendment in our nation's history. The first brick was laid in the wall of separation between tech and state on July 4. Today's ruling is yet another

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brick,"**said Attorney General Bailey**. "Missouri will continue to lead the way in the fight to defend our most fundamental freedoms."

The Fifth Circuit wrote, "We find that the White House, acting in concert with the Surgeon General's office, likely (1) coerced the platforms to make their moderation decisions by way of intimidating messages and threats of adverse consequences, and (2) significantly encouraged the platforms' decisions by commandeering their decision-making processes, both in violation of the First Amendment."

The Court continued, "the officials made express threats and, at the very least, leaned into the inherent authority of the President's office. The officials made inflammatory accusations, such as saying that the platforms were 'poison[ing]'public, and 'killing people.'platforms were told they needed to take greater responsibility and action. Then, they followed their statements with threats of 'fundamental reforms'regulatory changes and increased enforcement actions that would ensure the platforms were 'held accountable.'beyond express threats, there was always an unspoken 'or else.'"

The Court continued, "We find that the FBI, too, likely (1) coerced the platforms into moderating content, and (2) encouraged them to do so by effecting changes to their moderation policies, both in violation of the First Amendment. We start with coercion. Similar to the White House, Surgeon General, and CDC officials, the FBI regularly met with the platforms, shared 'strategic information,'alerted the social media companies to misinformation spreading on their platforms, and monitored their content moderation policies. But, the FBI went beyond that—they urged the platforms to take down content. Turning to the Second Circuit's four-factor test, we find that those requests were coercive."

The Court noted, "the Supreme Court has rarely been faced with a coordinated campaign of this magnitude orchestrated by federal officials that jeopardized a fundamental aspect of American life. Therefore, the district court was correct in its assessment—'unrelenting pressure'certain government officials likely "had the intended result of suppressing millions of protected free speech postings by American citizens.'see no error or abuse of discretion in that finding."

*Missouri v. Biden*filed by the attorneys general of Missouri and Louisiana on May 5, 2022. The Court granted their motion for discovery on July 12, 2022, clearing the way for Missouri and Louisiana to gather documents and depose witnesses from the Biden Administration.

Missouri and Louisiana deposed top-ranking officials in the federal government under oath, including Dr. Anthony Fauci, FBI Special Agent Elvis Chan, Eric Waldo of the Surgeon General's Office, Carol Crawford of the CDC, Brian Scully of the Cybersecurity and Infrastructure Security Agency, and Daniel Kimmage of the State Department.

General Bailey and General Landry filed their motion for preliminary injunction on March 6,

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2023, citing more than 1,400 facts showing that top officials in the federal government coerced and colluded with big tech social media companies to violate Americans' right to free speech.

The Western District of Louisiana granted Missouri and Louisiana's motion to block top officials in the federal government from continuing to violate the First Amendment rights of millions of Americans on July 4, 2023.

The Fifth Circuit Court of Appeals heard oral arguments on August 10, 2023, and issued its ruling today.

The ruling can be read here: https://nclalegal.org/wp-content/uploads/2023/09/Doc.-238-1-Fifth-Circuit-Opinion.pdf

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DECLARATION OF JAMES STUDNICKI, SC.D., MPH, MBA

1. I, James Studnicki, state under oath that I am of at least 18 years of age, and that I am competent to testify as follows.

BACKGROUND AND QUALIFICATIONS

2. I am Vice President and Director of Data Analytics for the Charlotte Lozier Institute. From 2006 to 2016, I was the Irwin Belk Endowed Chair in Health Services Research, and Professor of Public Health Sciences, at the University of North Carolina, Charlotte, College of Health and Human Services. I was the first Director of the Master of Health Science (M.H.S.) Program in Health Finance and Management at the Johns Hopkins School of Hygiene and Public Health, where I served as a faculty member for 13 years. Subsequently, I was Chairman, Department of Health Policy and Management, and Director, Center for Health Outcomes Research, at the University of South Florida Health Sciences Center. I have also been a senior hospital executive and President of a technology company which was started in a University incubator.

3. I am not a clinician. Instead, my work focuses on health services research. My research has focused on the use of large-scale databases, and associated information technology, in analyzing outcomes at the patient, hospital, and community levels. I have been a frequent contributor to the health services research and public health systems and services research literatures. My publications have appeared in some of the most influential journals in public health, medical care and information technology/sciences. I have been a winner of the Article of the Year award given annually by the Public Health Systems Research (PHSR) interest group of Academy Health.

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4. My work has contributed to many important research domains: quality comparisons between U.S.-trained and foreign-trained physicians; the regionalization of complex surgical procedures; data pattern recognition strategies; sub-population analytics; racial disparity in effects of abortion; community health status and priority determination; hospital admissions from the emergency room; career phase, workload composition, and outcomes for general surgeons; community networks, websites, and report cards; complex adaptive systems and surgery; data warehousing in bioterrorism surveillance; rating the health status of American communities; malpractice claims against hospital defendants; intensive care, survival, and treatment of terminally ill cancer patients; excessive clinical laboratory testing; state high-risk health insurance pools; cybernetic systems and inappropriate hospital utilization; multi-hospital systems; correlation, scaling, and sensitivity of medical audits; and state Certification of Need programs.

5. I hold both Doctor of Science (Sc.D.) and Master of Public Health (M.P.H.) degrees from Johns Hopkins University and a Master of Business Administration (M.B.A.) degree from the George Washington University. A copy of my curriculum vitae is attached as Exhibit 1.

EMERGENCY ROOM UTILIZATION FOLLOWING MIFEPRISTONE AND SURGICAL ABORTIONS

6. In 2021, I published a peer-reviewed study with seven other coauthors in *Health Services Research and Managerial Epidemiology* entitled "A Longitudinal Cohort Study of Emergency Room Utilization Following Mifepristone Chemical and Surgical Abortions, 1999–2015."

7. Previous attempts to study emergency room utilization that had relied on the treating physician in an emergency room to recognize that a complication derived from a chemical

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abortion, which is difficult because the symptoms from a chemical abortion are similar to those from a natural miscarriage. Unlike those previous attempts, the 2021 study relied on cases in states where Medicaid paid for abortion, so there was a confirmed "code payment for abortion, thus eliminating the need for the treating physician to recognize a complication from a chemical abortion." *Id.* at 7. The study looked at "every emergency room visit occurring within thirty days" of the abortion and "disaggregated ER visits into 3 categories: all-cause, abortion-related codes and spontaneous abortion [miscarriage] code." *Id.* at 3 (codes omitted). While surgical abortions led to ER visits 4% to 5% of the time, the percentage for chemical abortions was 8% to 9% between 2002 and 2013, increasing to a peak of 14.6% from 2014 to 2015. Thus, "an ER visit is significantly more likely to occur following a prior chemical abortion than following a prior surgical abortion." *Id.* at 5.

8. The study made two important findings. First, "[r]egression analysis definitively supports the hypothesis that chemical abortion is associated with more frequent emergency room visits of all kinds." *Id.* at 6. This increased ER rate may be because "adverse events following a mifepristone abortion are more likely to be experienced at home in the absence of a physician," *id.* at 2, and because chemical abortions are sometimes provided by clinicians who lack surgical knowledge "to handle complications after chemical abortions," *id.* at 7.

9. Second, "[t]reatment in the ER miscoded as for spontaneous abortion is consistently and progressively more likely following a chemical abortion than following a surgical abortion." *Id.* at 4. "Spontaneous abortion" is another term for natural miscarriage. Because the study sample included women who were already confirmed by medical records to have received an abortion within the previous 30 days, the study was able to ascertain whether follow-up emergency room care was correctly coded as a complication from abortion or incorrectly coded

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as a complication from a miscarriage. The study determined, "As a percent of abortion-related visits, visits miscoded for spontaneous abortion treatments following a confirmed mifepristone abortion averaged approximately 30% between 2003 and 2012 and increased between 2013 and 2015, reaching 60.9%." *Id.* at 4 (codes omitted). This was "2 to 4 times as likely" as miscoding after a surgical abortion. *Id.* at 3.

10. This may help explain why "[a]bortion studies in the United States consistently report lower postabortion complication rates than are documented in the international scientific literature." *Id.* at 7. Due to miscoding, up to 60.9% of abortion complications from chemical abortions "would have been invisible to previous researchers, resulting in a large underestimation of actual mifepristone abortion complications." *Id.* "There are likely multiple reasons for this discrepancy, but among them are the miscoding of abortion-related complications by the provider and the nondisclosure of prior abortion history by the patient." *Id.* "[S]ome abortion advocates encourage women to withhold information if seeking treatment for an adverse event." *Id.*

11. "These findings are especially consequential because they are derived directly from all paid medical claims records, unlike most other studies of abortion complications which involve voluntary survey reporting and/or a more limited query of a select set of treatment codes." *Id.*

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____. */s/ James Studnicki, SC.D., MPH, MBA*

BIBLIOGRAPHY

Works Cited

[Author], [Year]. "Title." *Journal* Citation.

Studnicki J, Harrison DJ, Longbons T, *et al*., 2021. "A Longitudinal Cohort Study of Emergency Room Utilization Following Mifepristone Chemical and Surgical Abortions, 1999–2015." *Health Services Research and Managerial Epidemiology*. 2021;8. doi:10.1177/23333928211053965

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DECLARATION OF JAMES STUDNICKI, SC.D., MPH, MBA

1. I, James Studnicki, state under oath that I am of at least 18 years of age, and that I am competent to testify as follows.

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3. I am not a clinician. Instead, my work focuses on health services research. My research has focused on the use of large-scale databases, and associated information technology, in analyzing outcomes at the patient, hospital, and community levels. I have been a frequent contributor to the health services research and public health systems and services research literatures. My publications have appeared in some of the most influential journals in public health, medical care and information technology/sciences. I have been a winner of the Article of the Year award given annually by the Public Health Systems Research (PHSR) interest group of Academy Health.

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5. I hold both Doctor of Science (Sc.D.) and Master of Public Health (M.P.H.) degrees from Johns Hopkins University and a Master of Business Administration (M.B.A.) degree from the George Washington University. A copy of my curriculum vitae is attached as Exhibit 1.

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as a complication from a miscarriage. The study determined, "As a percent of abortion-related visits, visits miscoded for spontaneous abortion treatments following a confirmed mifepristone abortion averaged approximately 30% between 2003 and 2012 and increased between 2013 and 2015, reaching 60.9%." *Id.* at 4 (codes omitted). This was "2 to 4 times as likely" as miscoding after a surgical abortion. *Id.* at 3.

10. This may help explain why "[a]bortion studies in the United States consistently report lower postabortion complication rates than are documented in the international scientific literature." *Id.* at 7. Due to miscoding, up to 60.9% of abortion complications from chemical abortions "would have been invisible to previous researchers, resulting in a large underestimation of actual mifepristone abortion complications." *Id.* "There are likely multiple reasons for this discrepancy, but among them are the miscoding of abortion-related complications by the provider and the nondisclosure of prior abortion history by the patient." *Id.* "[S]ome abortion advocates encourage women to withhold information if seeking treatment for an adverse event." *Id.*

11. "These findings are especially consequential because they are derived directly from all paid medical claims records, unlike most other studies of abortion complications which involve voluntary survey reporting and/or a more limited query of a select set of treatment codes." *Id.*

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____. */s/ James Studnicki, SC.D., MPH, MBA*

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IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

ANNA FITZ-JAMES, Respondent, vs. JOHN R. ASHCROFT, MISSOURI SECRETARY OF STATE, Appellant.	)	WD86595

IN THE CIRCUIT COURT OF MISSOURI
19TH JUDICIAL CIRCUIT, DIVISION I
HONORABLE JON E. BEETEM, JUDGE

ANNA FITZ-JAMES, Plaintiff, vs. JOHN R. ASHCROFT, MISSOURI SECRETARY OF STATE, Defendant.	)	Case Nos. 21AC-CC03167; 23AC-CC03953; 23AC-CC4022 23AC-CC04574; 23AC-CC04575 23AC-CC04576

RECORD ON APPEAL
SEPTEMBER 11, 2023
VOLUME I OF I

Kaye F. Asel, Certified Court Reporter
Official Court Reporter, 19th Judicial Circuit
Cole County, Missouri

AMERICAN OVERSIGHT
MO-AG-23-0462-A-001451

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IN THE CIRCUIT COURT OF MISSOURI
19TH JUDICIAL CIRCUIT, DIVISION I
HONORABLE JON E. BEETEM, JUDGE

HANNAH SUE KELLY, et al., Plaintiffs,	)	
vs.	)	23AC-CC04802
SCOTT FITZPATRICK, MISSOURI STATE AUDITOR, And JOHN R. ASHCROFT, MISSOURI SECRETARY OF STATE, Defendants, And ANNA FITZ-JAMES, Intervenor.	)	

TRANSCRIPT OF PROCEEDINGS
SEPTEMBER 11, 2023

AMERICAN OVERSIGHT

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P R O C E E D I N G S

THE COURT: All right. We're here on two files. The first is 23AC-CC03167, Anna Fitz-James versus Ashcroft. We're also here on the Kelly case on the fiscal note which is here.

For the Plaintiffs I've got Mr. Rothert, Ms. Schafer. For the Secretary I've got Mr. Lewis. I've got Mr. Tillman for the Auditor. I've got Mr. Belz for amicus.

MR. BELZ: No, for Kelly.

THE COURT: Yeah, for Kelly. Okay. And Ms. Hodes.

MS. HODES: Also for Kelly.

THE COURT: All right. Ms. Korte.

MS. KORTE: The State Auditor.

THE COURT: You are with Mr. Tillman.

Before we get started here, pursuant to Supreme Court Operating Rule 16, broadcasting from this courtroom is under those rules. Now, I realize this seems odd for me speaking to all the people out there in TV land, but you are not authorized to record from the Webex or to republish from that Webex. You are to -- You may get copies of what we do here from the pool camera, which is here, that is how Rule 16 works. I realize that is kind of difficult telling you all out in TV land that is what the rule is, but here is how this work. You publish something off of Webex, someone will send it to me and you will be on the list, so

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I ask that you honor the rule as it is there. The Supreme Court is doing its best to recognize the reality of what we do and what we have to deal with here, and I would like to be able to maintain Webex as a way to expand everybody's access to these proceedings.

All right. How would you like to proceed?

MR. ROTHERT: Your Honor, the parties have all conferred, the evidentiary record for both cases is the same --

THE COURT: Okay.

MR. ROTHERT: -- so we would propose that --

THE COURT: Move it into evidence.

MR. ROTHERT: Move it into evidence and then hear the cases back to back.

THE COURT: What are you calling the evidence?

MR. LEWIS: Your Honor, we prepared a joint stipulation of facts and exhibits. We have one copy and two binders if you would like us to bring to the court. These would also be filed as well.

THE COURT: Okay.

MR. LEWIS: And, Your Honor, in looking at the joint stipulation, as the stipulation makes clear, the parties have reserved the right to make objections as to relevancy. We know it is a bench-tried case, but we do reserve objections to relevancy as appropriate to foundation and

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overall admissibility.

THE COURT: Okay. All right. With respect to the joint stipulation of facts and exhibits, Plaintiff --

MR. ROTHERT: Yes.

THE COURT: -- you are good with that? Mr. Belz.

MR. BELZ: Yes.

THE COURT: The Auditor's case is good with that?

MR. TILLMAN: Yes, Your Honor.

THE COURT: Mr. Lewis on behalf of the Secretary?

MR. LEWIS: Yes.

THE COURT: All right. All right. We're going to do summary statement first and then the fiscal note. Mr. Rothert.

MR. ROTHERT: I also have for you a copy of the red line versions we filed earlier and they are demonstrative, if that helps with the different versions.

THE COURT: Okay. Okay. Which is what I was looking for.

MR. ROTHERT: May it please the court.

THE COURT: Okay.

MR. ROTHERT: Dr. Anna Fitz-James has proposed amendments to our constitution that would presume a right to make our decisions about reproductive healthcare, including abortion, without government interference. The right to make decisions about reproductive healthcare is

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not in our constitution explicitly, so any one of these measures would provide greater independence from the government than we've ever before enjoyed but they do not create the boundless right the Secretary paints it to be. None of these measures require the government or anyone else to do anything. Instead, they are focused on decision making by individuals and limiting government interference with the decision making process.

One of these initiatives will appear on the ballot next year and when it does, voters are entitled to rely on the ballot title summary statement that is impartial and without argumentative language, concisely and clearly describes the purpose of the proposition. It was the Secretary's duty to set aside his personal bias against the proposals and craft a mutual statement. Instead, the Secretary acted as if he were playing the political spin and manipulation edition of Mathlists resulting in the very opposite of a fair summary to which voters are entitled.

While the Western District came up in *Asher v Carnahan* that ten different people or ten different authors could craft ten different summary statements that are fair and sufficient, it is equally true that those ten could come up with ten insufficient and unfair ones, like the ones the Secretary concocted here. So Dr. Fitz-James asks this court for different summary statements, statements or

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summaries that are free willing to politicians special interests and will give notice to the voters the purpose of each amendment because, particularly in this case, the Secretary decided to abandon any pretence of doing his job impartially and instead of that, trying to scuttle an effort to let Missourians have a vote on this important topic, writing a summary is going to fall to this court. And to assist this court in drafting a fair and adequate summary statement, I will describe what the initiatives do, discuss the differences between the six initiatives, try to muddle through the Secretary's verbosity to explain how it is argumentive and misleading and then touch on some considerations for the writing of a new summary statement.

So what do the initiatives do? At their most basic level, the proposals are about burden shifting. They each provide, when it comes to challenging government descriptions on patients' decision making on reproductive healthcare, the usual burden on challengers to a statute shifts to the government; that is, rather than regulations starting with the presumption of constitutionality and the burden being on the patient to show it violates the constitution that there was no good reason for it, the government, rather than the patient receiving the healthcare, has the burden of showing there is a good reason for it and the patient, rather than the government,

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starts with a favorable, although still rebuttable, presumption. This burden shifting applies both in decision making to access healthcare, reproductive healthcare and to not access healthcare. So if Missouri -- it hasn't currently -- if Missouri were to join the 31 states in the District of Columbia and having a statute for forced sterilization, the right to reproductive freedom could be invoked to refuse sterilization as much as it could be used to have the right to consent to sterilization, unless the government can overcome the presumption.

Burden shifting is common in the law. It is similar, what we're proposing, similar to the burden shifting when one challenges certain speech or expresses conduct restrictions. The language is borrowed from the 2000 Supreme Court case, *United States against Playboy Entertainment*, where there is a presumption of unconstitutionality for instance, and there are countless cases in the first amendment context that are recounting being the government's burden. However, decision making about abortion in particular is given less protection under these initiatives than other reproductive healthcare for all, except Count II, which is '24, 2024-078, abortion is treated differently than the other types of reproductive healthcare; that is, when it comes to abortion, the burden presumption shifts back to what they are now without the

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constitutional amendment. This applies to any restriction on abortion after fetal viability in some persons and after 24 weeks gestation in others so long as the state keeps an exception for emergencies. So, in other words, when there is a challenge to restriction on abortion, the usual presumption that the statute is constitutional applies and the burden is on the patient to overcome that presumption after 24 weeks of fetal viability. This would allow abortion care to even be banned if the state wanted to and objectively define point so long as the legislature retains an exception, as it has now with the current ban for exception or for emergency situations. And the exemption is needed, for instance, to allow families to make their own decisions about what to do, for instance with an ectopic pregnancy.

An ectopic pregnancy is one where the fertilized egg does not attach to the uterine wall like it's supposed to in its ordinary course; instead, it attaches somewhere outside the uterus, the fallopian tube, ovary and cervix, and these ectopic pregnancies can't be located. They do not result in the birth of a child. Eventually there will be a burst resulting in massive bleeding that is likely to kill the patient if the pregnancy is not aborted. And unless this court thinks the need to protect the right to make abortion decisions in this situation is illusory, I

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will point you to House Bill 2810 from 2022, which was the second session of the 101st Assembly. As introduced, that bill would have created a new section, 188.090, of our revised statutes that would specifically ban the abortion of an ectopic pregnancy.

With an initiative, our constitution -- Without an initiative rather, our constitution does not include a right to prevent the General Assembly from enacting such a law and as the law is now you would have to wait until there is a real emergency. So this right to reproductive healthcare though, it does include abortion, no secret about that. And although you might not know it from reading the summary statements, it envisions a right to reproductive freedom that includes abortion, not one that is limited to abortion.

There are initiatives in other states. Ones in Exhibit T is an initiative proposed in Arizona. Its language is very similar to these initiatives, except the right there is only with respect to abortion. And here in Missouri just recently proposed initiatives have been submitted to the Secretary that create a right also limited just to abortion. Exhibit MM is an example of that. That initiative could share a ballot with Dr. Fitz-James, making all the more important that summary statement not overlook the robust application of the right for reproductive

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freedom factor that Dr. Fitz-James is suggesting.

Our constitution includes no right to make reproductive healthcare decisions without government interference whatsoever, not just abortion. So to correct that, the right to reproductive freedom includes the right to make all decisions about reproductive healthcare, abortion yes, but also prenatal care, childbirth, postpartum care, birth control and marriage -- sorry, not marriage -- miscarriage care. None of these are explicitly protected under our constitution so each are vulnerable to the General Assembly's interference.

As noted in our brief, abortion is not the only area where the legislature has shown interest in restricting. It is particularly true of contraception. Unlike the majority of states, Missouri does not allow pharmacists to prescribe birth control, although they are allowed to prescribe nicotine replacement products, not birth control, and it is getting harder to access contraception in this state. Unlike most states, Missouri forbids any school personnel or anyone associated with them from distributing condoms or other birth control, limiting the government again access to contraceptive, contraception. Missouri has a statute that allows a policy maker to dictate or a policyholder to dictate that her spouse or her children cannot receive coverage for contraceptives. And all that

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was before, before *Dobbs*. Now, once a senator, we cite him in our brief, quoting him as saying, when it comes to contraception, anything is on the table. And the fact is that various types of reproductive healthcare overlap, they are not provided in isolation. It is a holistic approach. So miscarriage mismanagement uses the identical procedure as the first trimester abortion; that is in Exhibit II, paragraph 5. So if one of those procedures can be restricted, it follows that another could, the same could in another context.

And worrying about miscarriages are not a healthcare concern. Just last year a 26-year old woman in another state was indicted after a miscarriage because someone thought the miscarriage care she received might have been an abortion. Eventually those charges were dismissed but not before she was arrested and all the private information was made public.

Next the various versions, each prohibit discrimination and other adverse actions by the government, just because no adverse consideration decided access or decided not to access reproductive healthcare. It protects also, although it doesn't make it to the summary statement, those who aid someone in obtaining reproductive healthcare. This is an effort to forestall a bill like Texas' Senate Bill 8 that created a cause of action, anyone could bring

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against anyone else who assisted someone in having an abortion.

And it would prevent even worse government intrusion like what was proposed by one of the Plaintiffs in the fiscal note summary case. She introduced an amendment in the House I believe, yes, the House, it is Exhibit BB, and it would make it unlawful to assist a Missouri resident in obtaining an abortion within or outside of Missouri and gives specific examples of how someone might be aiding, providing Internet service that allows access to any website and encourages or facilitates access to abortion, providing insurance coverage for abortion care, providing referral to a provider of abortion care, that is actually in the amendment in Exhibit BB, and it demonstrates what voters might reasonably want to include as safeguards against in the constitution.

Turning to taxpayer funding for reproductive healthcare. Right now the constitution is silent. Some versions would explicitly allow the General Assembly to refuse to fund abortions, something that is not in the constitution now, immediately leaving things the way they are but foreclosing is a matter of law that the amendment could be interpreted as requiring taxpayer money for abortions. The others say nothing, just let the constitution now, which would retain the status quo that

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existed, exists now and existed before *Dobbs*, whether to fund abortions is a matter left to the discretion of a legislature without saying one way or another. The result of that would be that current statute, which forbids funds for abortion, could be challenged but it would remain in effect until it was successfully challenged. None of the proposals take a third route and require taxpayer funding of abortion.

Next, the initiative, another topic they discuss that our constitution is silent about is minors. Some versions would explicitly allow the General Assembly to require parental consent so long as there is an alternative authorization method as was required under the fair cases before *Dobbs*. Some versions say nothing, which again retains the status quo; the result being the current statute requirement for parental consent but also has an alternative authorization method that would remain in effect. None state that minors must be given access without parental consent.

So with that overview, I will discuss the differences between the six initiatives . In essence there are three ways in which the initiatives differ from each other. The first -- By the way, they only relate to abortion care, the differences. They are the same when it comes to all other reproductive healthcare.

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First, there is a point in which the burden of presumption shifts back to what they are now in the absence of constitutional protection. The first option is that the burden never returns to the patient and the presumption remains throughout; that's the case only as to Count II, which is 2024-078. The second option is that the burden returns to the Plaintiff and there is a presumption of constitutionality after 24 weeks gestation. That is the case for initiative numbers 2024-080 and 2024-082, which are Counts III and IV. And the third option is that the burden presumption be shift after fetal viability, and that is in 2024-085, 2024-086 and 2024-087, which are Counts I, V and VI.

The second way they differ is when it comes to what they have to say about the taxpayer funding for abortion. For Counts II, III, IV, and V said nothing. Two, Counts I and VI explicitly state they do not require taxpayer funding for abortions. Zero state that the taxpayer funding is required.

And finally the various versions differ in what they have, whether they have anything to say about parental consent. Four, Counts II, IV, V and VI say nothing about it. Two, Counts I and III, explicitly put in the constitution that parental consent may be required. None say that the state can not require parental consent.

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Now, I will turn to what is wrong with the Secretary's summary statements. A politicized partisan personal Secretary can distort public understanding of an initiative and how the Secretary exercised his role in this particular case is akin to the referee playing for one of the teams. Rather than neutral and impartial summaries, his statements are riddled with argumentative and misleading language that could create bias against the initiatives. None of the amendments do what the Secretary says they do. Indeed, his arguments stitched together would mean that these amendments require free abortions upon the request of any pregnant minor for any reason at any time, including when contractions are five minutes apart and to have that abortion induced by a lay person without malpractice insurance. These amendments do not do that and no one would want them to, including the proponents. They address real life government intrusion into decisions here in Missouri whether to receive healthcare provided by professionals in accordance with their professional obligations, just like every other kind of healthcare that is provided throughout the state every day without the preposterous outcome the Secretary presents.

Among the summaries there are five different look-alikes. They aren't the same for each one, but the genesis for the Secretary's misleading of the public is in

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the second bullet point which is comments, second bullet point for all six summaries. I'll start there.

The Secretary's second bullet point says the initiatives will nullify long standing Missouri law protecting the right to life including, but not limited to, partial-birth abortion. It takes some decoding, but the overall premise of the summary statement is that every Missouri law having anything to do with abortion, although this would be true of all other reproductive healthcare events, at least abortion, anything having to do with all abortion, including general law for regulating healthcare, will immediately vanish. This is inaccurate for a bunch of reasons.

First, laws don't become invalid just because there is an amendment to our constitution. First, there is a court determination of what they are or they are not and even when there is a strict scrutiny like they set up here, that is not a foregone conclusion of what will happen. As the Supreme Court said in *State against Merritt* when it was considering ballot language on gun rights initiatives, that will be for a court to decide later.

Second, just because you have the burden of proof doesn't mean you lose. Usually I am here arguing against that usual presumption of constitutionality asking for a law to be found unconstitutional and sometimes we win

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despite that presumption against us, so just not like every law is found constitutional with the presumption against constitutionality applies, not every law will be found constitutional just because the presumption is reversed. Assuming someone wants to challenge a restriction and further assuming they have standing for an issue, they still have to win the case after the state has an opportunity to prove that the restriction withstands scrutiny, and it can meet that scrutiny by showing it is needed to protect or maintain, maintain or improve the health of the patient.

Third, the Secretary, saying in the second point, ignores for Count II heightened scrutiny stops applying for someone, either 24 weeks or fetal viability. Just as the state does now, it could ban abortions with an exception after 24 weeks or fetal viability. So it is from these legal errors that the Secretary hypothesized that there can never be a regulation of abortion. And this will be a recurring theme throughout all these bullet points.

In addition to nullify being wrong about the amendments, probable effect and thus misleading, it is also prejudicial. You can see it is prejudicial by comparing it to other recent examples. Last year Amendment 3 actually forbade certain existing marijuana related laws and future laws and provided no basis on which the government can

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defend them. It preceded to voters without a summary statement, saying that a yes vote can nullify marijuana laws. Instead, the summary statement advised voters that the measure would remove some restrictions. And for the 2014 amendment to Article I, Section 23, which expanded, expanded the limitations on the government's ability to restrict gun rights, the General Assembly wrote its own summary, didn't mention it was going to nullify the law; instead, it said the constitution would be amended to include the declaration that the right to carry arms is an unenviable right and the government is obliged to uphold it. If you are treating these initiatives the same way as that, the summary statement could have been much easier. It could have been, do you want to amend the constitution to declare that Missourians had a right to make decisions about reproductive healthcare, including abortion or including abortion and contraception. There is no rule that you have to use all 100 words. A summary statement like they had in 2014 would be fair and adequate.

The second bullet point is also misleading in suggesting that long-standing laws are a target here. The 2019 law that has now banned abortion in Missouri and before that effectively did so by requiring medically contraindicated ultrasounds, a law that the Secretary misused his authority to prevent the people from taking to

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a referendum. There is no doubt that that law, that 2019 law, being able to challenge it, is the purpose of this initiative. It also would, I hope, be able to challenge some of the nation's most onerous restrictions which are unique to Missouri. But even assuming those challenges are also accessible, those laws are recent vintage, they are not a long-standing statute.

The second bullet point is also argumentative in using the term right to life. Our brief goes in to this in some detail. This is a combative phrase best used, best known by its adoption by purpose of abortion and birth control. It is intended -- It is a political phrase intended to provoke an emotional response and it's not a neutral description of the response to the initiative.

The next second bullet point is argumentative with its awkward use of the term partial-birth abortion. It is also misleading. It is argumentative in that partial-birth abortion is not something that has any medical meaning; thus, it means different things to different people. If you can compare a Missouri statute that talks about partial-birth abortion to the dictionary talking about partial-birth abortion, there are big differences. In Missouri it can mean pre-viability and in the dictionary, and common, the best the Supreme Court's understanding in *Gonzales versus Carhart*, it would be very last minute

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abortions that would ever use that, but because no one knows what partial-birth abortion is, it is left to the imagination of the voter, so it is a political thing, not a neutral description of the measure. And it is also misleading because there will be a court proceeding at which the state can defend its laws before any restriction is lifted. Every version of the amendment allows restrictions on abortion necessary to maintain or improve the health of the pregnant person and the Supreme Court in *Gonzales v Carnahan* pointed to evidence the way the federal law describes partial-birth abortions would be a risk to, would be a risk to the patient, for the health of the patient. But also by pointing to anyone that would be having such a procedure, it would be after, if ever, it would be after 24 weeks or fetal viability. And as I said before, the state can ban anything at once after fetal viability or 24 weeks.

Also, the other reason the amendment, probable effect of the amendment would not be partial-birth abortions is because federal law bans partial-birth abortions with a statute similar, some with error for sure, but similar to Missouri's, and that is 18 USC Section 1531, and a statute that was upheld by the Supreme Court in *Gonzales against Carhart*. So I guess the key point here that allowing, quote-unquote, partial-birth abortions is not a probable

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effect of the initiatives.

So with that, returning to the first bullet point which is again common to all six proposals, it states that the initiatives will allow for dangerous unrelated and unrestricted abortions from conception to live birth without requiring a medical license or potentially being the subject to malpractice, and there is a lot to attack in that, in that bullet point. First of all, dangerous abortions, not dangerous, while continuing pregnancy through childbirth comes with an 8 percent complication rate. Abortions, according to the state's evidence, is a 4 percent complication rate. But that 4 percent is inflated. Our evidence shows it is really only 2 percent; that is in Exhibit GG at paragraph 6. For comparison, in reference to hip replacement surgery, it has a 4 percent complication rate. Even so, the recorded rate complication for Missouri is suspect because of Section 188.052.2 which requires any post-abortion care to be reported as a complication, so Missouri's complications include complications that are not complications. All healthcare -- Of course, because even if it is not a complication, if there is a post-abortion care that is for something other than a complication, it still gets reported as a complication.

All healthcare comes with some risk of complications but abortion is safe. Its risk especially fails in

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comparisons to continuing the pregnancy through childbirth which results in 700 to 900 deaths per year in this country. So even if you set aside the scientific method and science -- And we're not asking for a summary statement that says abortion is safe, just one that doesn't say it is dangerous. Setting aside the science, the initiatives -- the legislators enacted productive healthcare restrictions needed to improve or maintain the health of the patient so they can restrict dangerous abortions. An accurate summary statement would probably say safe. We want one that doesn't mislead.

And here the Secretary shows he doesn't really believe his own healthcare because abortion can be restricted more than any other type of reproductive healthcare, he wants to tell the voters only about dangerous abortions. Does he not care about dangerous contraceptives, dangerous miscarriage of treatment, dangerous childbirth methods? It is not that. He is trying to mislead voters by sticking to things unique to abortion. Dangerous reproductive healthcare though of any kind, including abortion, is not a probable effect of the initiative.

They also want to allow unregulated and unrestricted abortion. I've already described how all reproductive healthcare, including abortion, can be regulated and restricted; thus, telling voters that abortion will be

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unregulated and unrestricted is deceptive. It is especially misleading in the five versions when at a point where there is no limit on the government's ability to restrict and that misleading, misconception comes from ignoring the not withstanding clause in paragraph 4 of all its versions except number 2. The not withstanding clause strictly applies to paragraph 3, all of it, so the requirements that any restriction be consistent with standards of care and based on medicine and not interfere with autonomy do not apply after 24 weeks or after fetal viability because they are in paragraph 3 and restrictions allowed in paragraph 4 are not withstanding paragraph 3, consistent with the standards of care based on medicine would be a problem before fetal viability or 24 weeks for ultrasounds during the early period when most abortions occur, that is not only because there is never a medical need to conduct the ultrasound but also because at that early stage at which Missouri would require an ultrasound, the only way to perform an ultrasound is to take the wand and insert it into the vagina and maneuver it inside until it picks up, picks up a sound, and this causes pain and discomfort and no competent healthcare provider would subject a patient to it were they not required to by law, so that restriction would be likely not to be upheld before 24 weeks or before fetal viability depending on the

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version.

Afterwards there is no requirement that it be medically based so the legislature could do whatever it wanted. Not interfering with autonomous decision making will provide an additional problem for the Missouri statute that requires providers to supply medically inaccurate and unsupported information about abortion before obtaining informed consent, so literally misinforming instead of informing patients, that is a direct interference with autonomous decision making and that is what is targeted by the requirement and restriction to not interfere with autonomous decision making.

Again, the Secretary does not care about other reproductive healthcare which would be equally, if he is right, impossible to regulate and restrict. It will be more difficult than abortion because there is no -- the presumption has changed. But he knows that is not true and no one would be gullible enough to believe it. Because abortion could and would remain most heavily government regulated and restricted healthcare and abortion even after this amendment, neither unrestricted nor unregulated abortions are a probable effect of the initiatives.

The next argument in deception, the second point, is that abortion is permitted from conception to live birth. So one problem is that abortion is not healthcare available

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in either conception or live birth, so these extremes that are imagined are illusory, but medical facts seem to relay political framing all reproductive healthcare, including abortion, subject to restriction and abortion can be banned at a certain point for almost all of them and that remains true.

There is an amicus from the American Law and Justice Center that adopts the Secretary's argument that there can never be a restriction. They cannot resist explaining why saying that, in their view, the exceptions to the General Assembly's related to the reproductive healthcare, quote, swallows the rule, unquote, even though that is really by his argument, is the Secretary knows better than to put it that way because of the Missouri law that we would not interpret exceptions as if they swallowed the rule, most recently discussed in the Southern District case of *Harner against Mercy Hospital Joplin*. And an exception that follows the rule would render the rule one in which is meaningless and superfluous and every word, the court said many times, every word in a constitutional provision assumes to have affect and meaning and none are superfluous . And *Uchner against Bond*, U-c-h-n-e-r, against Bond is a Missouri Supreme Court case with that proposition.

And the lawyers for life when they entered a brief stepped further with the logic of the Secretary's argument

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and intimated, because reproductive healthcare is defined to include postpartum care, maybe it would authorize cloning infants. Now, setting aside for a moment that, much like abortion and live birth, killing an infant is not healthcare that is provided by any practitioner, the lawyers might have a point were the Secretary's argument meritorious. If the exceptions mean that there can be no regulation whatsoever of any decision, then that would apply to postpartum just as much as it would to abortion. But in addition to the other statutory interpretation rules, this one runs into a plethora of cases saying that language is not interpreted in a way that causes a certain response. I think either the Secretary did not think that utilization of incentivize was important enough to mention or even he recognizes that at some level is illogical, is extreme and his argument is absurd.

In reality, these exceptions are narrow and intended to address current circumstances in Missouri before there was a ban and that was multiple non-medically supported requirements that were prerequisite to consenting, making a decision to have an abortion and it directly, therefore, interfered with autonomous decision making, all of which is a way of saying abortion from conception to live birth is not a probable effect of the initiatives.

It is also not probable that abortions could be

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performed without a medical license, potential malpractice. Missouri law requires a physician with medical malpractice insurance to perform abortions and the court never repealed that law. If someone were to challenge that statute limiting it to physicians, the state, true enough, would have the burden of showing doing so that is needed to maintain or improve health of the parents. The Secretary assumes the state will not be able to make that showing. Is he right? It seems unlikely to me, but I don't know and neither does he. It is not an issue the court can decide at this stage where we're limited to just fair ballot, but the restriction limiting abortions to procedures that doctors can perform will be upheld if it is needed to protect the health of the patient. If it is not upheld, it will be because it wasn't necessary. But it seems highly more confident than the Attorney General thinks than the Secretary does.

The third bullet point is virtually the same for all initiatives except for Count II. It says that they would allow for laws to be enacted regulating procedures after fetal viability or 24 weeks, depending on the version, while guaranteeing the right of any woman, including a minor, to end the life of their unborn child at any time. So the first phrase, allow the laws to enacting regulating abortions after fetal viability or after 24 weeks, that

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does describe probable effect of the initiatives even though we felt that such laws could be banned with an injunction. Again, it is ignoring the not withstanding clause of paragraph 4 that applies the entirety of paragraph 3 that heightened scrutiny that no longer applies. Heightened security that is in paragraph 3 is no longer applies after fetal viability or after 24 weeks because that is in paragraph 4 which says, not withstanding paragraph 3, you may regulate after fetal viability or 24 weeks. So it is important to know, for the voters to know that there are no limits after fetal viability or 24 weeks.

The next part of that bullet point contradicts the first part and says that the initiatives guarantee the right of any woman to have an abortion, including a minor, have an abortion at any time. And I've already discussed, is just not an accurate description. And then including minor, once the initiative passes and the ban on abortion is successfully challenged, minors will have access to abortion; however, it is not a guarantee like the Secretary of State says because Missouri's existing statutes require parental consent or alternative authorization process will still be in effect. And for two versions that requirement -- such a requirement is explicitly allowed. And there is a difference in the medical provider, a

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medical provider rather than Judge will determine the patient's capacity to give informed consent moving the assessment from court to don't do medicine to medical providers that take informed consent and determine capacity all day. So it is inaccurate to have them putting in a minor and it is also unnecessary because they are not encompassed by the word woman that proceeds including minors. Again, this is argumentative and being used for emotional response, and it is especially argumentative in that it is wrong, that there are additional restraints placed on minors.

The Secretary says that the measures would allow folks to end the life of their unborn child. For this I would point to Justice Kavanaugh in *Dobbs* and noted that people with good faith feel passionately about whether zygote, blastocyst, fetus or embryo are just that or if it is an unborn child, that is a live debate about which people have feelings and views. The Secretary shares his views in the summary statement but that is not an impartial description. Our brief points out why the phrase is misleading as a matter of law, as a matter of fact, and just basic language. However, this court need not weigh into the debate because the phrase is argumentative. It is certainly not the impartial statement that the Secretary is supposed to produce. The phrase can be stricken.

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Missourians know what an abortion is and they can draw their own conclusion and figure out what it does and doesn't do, it doesn't need the Secretary of State's definition of the word. It is misleading to say that abortion is available at any time, as I described when the Secretary of State says it elsewhere.

The last bullet point that is common to all versions is that the amendment would require the government not to discriminate against persons providing continuing abortion or potentially including taxpayer funding. It is a little mess grammatically and also we thought someone could assist someone obtaining an abortion, something we know that is important. But is especially misleading where it states that there could be taxpayer funding for abortion. Nothing in any other versions state that it required taxpayer funding. The fiscal note itself, not summaries, the note hasn't been challenged. It includes responses from state agencies, local governments, even though one government, Department of Revenue, no agency, none, expects to have to expend funds because the amendment passes and that wouldn't be true if there could really be taxpayer funding of abortions under this measure. This is inserted to create bias against the initiatives by giving voters a reason, even a voter who wants to return to *Roe versus Wade*, to vote no on taxpayer funding and it is disingenuous to

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include it, but it is especially disingenuous that the Secretary includes it even in versions of the initiatives that say they do not require government funding for abortions. His able counsel has done the best possible to work around that by submitting an amendment saying government funding is not required means that government funding could be provided but that is not a probable effect of the amendment because it is already true. The legislature already has the authority to fund abortions if it wants to. Currents statutes do not, that could change in the future, but that could happen with or without the initiative. Our constitution is silent about it.

The final bullet point appears in 2024-080. It says the amendment will prohibit any municipality, city, town, village, district, authority, local subdivision, or public corporation that has the power to tax or regulate or the State of Missouri from regulating abortion procedures. I think this is just the Secretary using up his 100 words. So, you know, starting again, it is false to say the State of Missouri would be prohibited from regulation of abortion procedures. As explained from all the other times, the Secretary said the same thing, so it would be redundant to say even if it were true. The regulation of abortion of a local government entity is not recommended because of the initiative. It is prohibited because Missouri has adopted

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the law at state level regarding abortion and therefore pre-empted in the area. Cooperative healthcare incorporated in the City of St. Louis, the 2017 Supreme Court decision, is the latest case talking about that, so when it comes to re-writing the fiscal note, that is a remedy that is available here, not just a fiscal note, a different summary statement.

The Court of Appeals clarified relatively recently in *Hill versus Ashcroft*, the summary statement -- I'm going to quote here -- is intended to provided voters with enough information that they are made aware of the subject and purpose of the initiative and allow the voter to make an informed decision as to whether to investigate the initiative further. I submit that that means that not all of the details need to be in a summary statement, just the topic, the general purpose and if a voter is interested they can do further research. This court should replace the language that is bias or argumentative or misleading and replace it with language that is neutral or impartial, non-argumentative and advises of the purpose of the initiative enough that the voter can decide whether to investigate it further. The phrases that causes the summary to be inefficient and unfair are dangerous, unregulated and unrestricted abortion from conception to live birth, without requiring a medical license, without

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potentially being subject to medical malpractice, nullify long-standing Missouri law, the right to life, partial-birth abortion, including a minor, in the life, unborn child at any time, potentially including taxpayer funding, and that whole long thing about prohibiting any municipality, city, town, et cetera, et cetera, on the last bullet point, misleading.

So we acknowledge that they will have the greatest impact immediately, these initiatives would have the greatest impact immediately on abortion, and certainly we're not asking for a summary statement that did not mention abortion, but absent any reference to reproductive cause healthcare beyond abortion is insufficient because it would cause the voter to believe the amendment is only about abortion and no other healthcare, just that one type of healthcare. And it is especially problematic when it may share the ballot with an initiative that is limited to abortion. Further, the phrase that would require the government not to discriminate is a confusing phrase that will cause confusion and should be changed to, if it stays in, prohibit discrimination.

So we understand that the Secretary is personally vested in proposing these initiatives but his job is to set aside his personal views and provide voters with a neutral summary; instead, be provided a script for a campaign ad

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against them. We ask this court to do what the Secretary failed to do and write impartial, neutral statements that summarize the initiatives and certify them to the Secretary of State.

THE COURT: Mr. Lewis.

MR. LEWIS: Good morning, Your Honor. And may it please the court.

Plaintiff's initiative petitions would roll back Missouri law to a pre-*Dobbs* Missouri that frankly goes even far beyond it. Listening to my friend Mr. Rothert's argument this morning, I think it is very good evidence why Missouri law rightfully does not allow its proponents to draft their own summary statements and why this court should look only at the Secretary's language in light of what the plain text of the initiative petitions say. Initiative proponents understandably would like to persuade voters to vote for their measure. And I think if Your Honor were to look at the proposed alternative statements that the ACLU has submitted in their petitions filed with this court Your Honor would see how those proposal alternative summary statements hide the ball, and I think listening to the argument this morning and reading Plaintiff's pre-trial briefs also show how their argument hides the ball about what these initiative petitions will actually do.

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I think one thing that Mr. Rothert and I agree on is what the standard for these cases are. And the standard is, does the summary statement give voters sufficient notice as to the purpose and the effects of the initiative petitions. And as this court knows, courts are differential to the Secretary of State's considered draftsmanship choices as there are conflict interpretations of how to summarize a text. The Secretary's summaries here are, some of those, in many ways in which the initiative petitions can be summarized. The standard for that is *Asher v Carnahan,* which Mr. Rothert mentioned, where the Court of Appeals said that ten different writers would produce ten different versions, and there are many appropriate and adequate ways of writing the summary ballot language. The Secretary's summaries here are to some of those many ways, but what sets the Secretary's summaries apart from Plaintiff's alternative summaries is that the Secretary's summaries actually do summarize and convey to voters the massive loopholes in the initiative petitions that grant access to effectively unregulated and unrestricted abortions in Missouri and that each of the measures has critical provisions that will render any law making impractical if these initiatives were to become law.

And, Your Honor, first I would like to talk about those loopholes and how available abortions will be in

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Missouri. It will be to agree more than they ever were pre-*Dobbs* decision, so I will walk the court through exactly what the initiative petitions say. And then from there I will talk about why this court should defer to the Secretary's summaries and explain how they neatly well establish a text for fairness and sufficiency and that, of course, is because the Secretary, unlike the Plaintiff's alternatives, actually explain to voters what the probable effects are of the initiatives and, of course, as the probable effects standard from *Brown* and many other cases that should guide this court's analysis.

So walking through the initiative there are six of them. They have many commonalities. The first commonality is that all of them say in subsection 3 that, quote, any, any denial, interference, delay or restriction of abortion rights is presumed invalid. Presumed invalid is from the plain text of the initiative petitions. Any denial is presumed invalid. Any interference is presumed invalid. Any delay is presumed invalid and, again, any restriction is presumed invalid. That is all in subsection 3 of the initiative petitions.

But Missouri, as the court knows, has dozens of laws that regulate abortions. And I also want to call this court's attention to, and I think this court will hear argument later today for the fiscal note portion of the

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case, the Department of Health and Senior Services itself noted that the abortion initiative petitions will likely validate regulations and laws. So this is certainly not new for the Secretary of State to be the first to express many concerns about what this initiative will do and, again, that comes from the plain text of subsection 3, presuming they are invalid. Missouri has dozens of those laws. Missouri prohibits abortion on the basis of sex, race or Down's Syndrome. It prohibits abortion for unborn children that can feel pain. It has gestation-age requirements. It has fetal heart beat law and certainly has informed consent law, those are just some of the measures. And Missouri law makes it clear that life begins at conception.

Are these interferences, are they delays, are they restrictions or are there no restrictions? There are laws that govern the availability of abortion but under these initiative petitions subsection 3 validates them. Mr. Rothert talks a lot this morning about burden shifting. Your Honor, I'm not aware of any Missouri constitutional provision that alligates and says laws are invalid. Normally there is a presumption of validity of the laws and if the challenger is able to overcome certain scrutiny hurdles, a law may then be declared invalid by a court in the normal course of litigation. Here the exact opposite,

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I think it probably first of its kind where laws are actually fully deemed invalid. What does that mean? Unless the General Assembly tries to pass a law to overcome all these hurdles, right off the gate they are presumed invalid. Are they enforceable on August 28th of a given legislative year? I think the best answer, probably no. That is what the initiative petition says, they are presumed invalid. So that is the baseline commonality, one of many, between all the initiatives, presumed invalid, again any denial, interference, delay or restriction.

The second commonality is that all initiatives, subject to any law in this stage, whether they are presumed invalid or not, are subject to the strict scrutiny standard. All laws must have a compelling governmental interest to survive but, again, I think this even assumes that maybe the law is valid because we have a baseline that they are invalid to begin with, but there is a strict scrutiny review in here. All laws must have a compelling governmental interest to survive the initiative to define what the compelling governmental interest is. Again, it is a fairly nominal proposition for the constitution to have a say in what the governmental interests are. They are virtually narrow, but the big one here is that the initiative bound a universe of governmental interests and those interests must be defined to include not infringing

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on the person's autonomous decision making.

What is missing from that definition? The health and well being of the unborn child. But Missouri law currently makes it, already Missouri law right now in section 1.205, currently makes it a compelling governmental interest to value the life of every unborn child. That already is a governmental interest under Missouri law. I think we have to presume it to be invalid under these initiative petitions.

The initiative petition goes further, any law must not infringe on a person's autonomous decision making. The US Supreme Court has made clear that states do have a compelling governmental interest in promoting life. It comes from *Casey*, it comes from *Webster*, and the Secretary is correct that the initiative petitions would likely, at this rate Missouri's current compelling governmental interest like in 1.205, like in 188.027, likely making any current fetal viability or gestation age relevant in Missouri law or under the initiative petitions. And to require any abortion law to be enforceable only if it does not infringe on a pregnant mother's autonomous decision making what almost would certainly allow abortions at any point until conception or life. At least there is a very probable consequence which is the standard of these cases is, of the initiative petitions, the Secretary properly

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conveyed a summary statement.

I think here is an example to prove the point. Hypothetically even if there's a law prohibiting abortions within, lets say, the final two months of pregnancy, gets passed every other roadblock, gets passed the presumed valid roadblock, gets passed the scrutiny roadblock, gets passed all those roadblocks, if a pregnant mother autonomously decides in those final month or two of pregnancy that she would like to have an abortion that that law would presumably not survive under the initiative petitions because it would be a compelling governmental interest, a compelling governmental interest must not infringe on a pregnant mother's autonomous decision making.

A third commonality, which is shared by five of the six measures, all but 078, is that even if all the laws survive all the hurdles as mentioned, subsection 4 of those five initiative petitions states that, not withstanding everything else, there can be regulation, so perhaps there could be some regulation -- Mr. Rothert talked about this -- but ultimately under no circumstance shall the government, quote, deny, interfere with, delay or restrict an abortion that in a good faith judgment of a treating healthcare professional the abortion is needed to protect the life or physical or mental health of the pregnant person.

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There is a few issues with this. The Secretary tried to convey this in the bullet points in the summaries. 401, subsection 4, does not define what a treating healthcare professional is. That category of individuals undefined as it is is likely not limited to obstetricians or gynecologists and does not seem to limit the category of healthcare professionals to those even treating the pregnant mother or her pregnancy. I think worse yet, subsection 4 allows any treating healthcare professional to make an assessment of the necessity of an abortion based on the pregnant mother's mental health. That comes directly from subsection 4 of the initiative petitions, a carve out for a mental health determination an abortion could be appropriate for the pregnant mother. So psychologists or psychiatrists seemingly can make a determination that the mother should have an abortion, even after fetal viability, if the abortion is needed to protect the mental health of the pregnant person. And that clause, subsection 4 here, overlies what was in subsection 3. Subsection 4 begins with the sentence, not withstanding the above, not withstanding subsection 3, not withstanding all we talked about before, if, quote, a treating healthcare professional, undefined as that phrase is, determines that it is appropriate for the mental health of the mother to obtain an abortion seems to be law.

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With that, Your Honor, it is clear by reading the plain text of these measures that Missourians must be informed of the drastic affect that it will have on Missouri law. It was fair for the Secretary to summarize these measures as allowing abortion from conception to live birth if unregulated and unrestricted abortions will be allowed. And the Secretary also characterized these as allowing, quote-unquote, a dangerous abortion as stated in the bullet points of the summary statements and publically available and judiciary noticeable evidence supports the use of the term dangerous in the bullet points.

For a couple reasons, first, it should go without saying that performing these procedures without any guidelines with presumed invalid laws and regulations would be dangerous; that should just speak for itself. In an unregulated landscape, that is a probable effect of initiative petitions. But even pre-*Dobbs*, pre-*Dobbs* in 2022, before that era, when abortions were allowed less restrictively than they are now, there were complication rates of at least 4 percent. I think Mr. Rothert identified 4 percent and he characterized it as over inflated. I think the evidence that we have in our joint stipulations actually shows it is quite the opposite of the 4 percent but probably much higher given under reporting concerns which were discussed in our brief with this court.

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And since the initiatives were deemed invalid, any restriction or interference, it seems that requirement that abortion providers have any privileges to hospitals, assumingly that might interfere or delay with abortion care and seems to be an invalid requirement.

The Missouri Department of Health and Senior Service Director has an affidavit in another case, which is in the joint stipulations, talking about the importance of continuity of care, a requirement for making privileges of hospitals, and those are all gone. I think it is just a logical inference the complication rates would certainly increase. Dangerous speaks for itself. I think the evidence makes it clear as well.

Beyond that, the case law supports the use of the word dangerous. In the *Dobbs* case, the majority opinion there is references to dangerous procedures. And this is from *Dobbs*, where *Dobbs* found that most abortions after 15 weeks employed dilation and evacuation procedures. There is a case from the District Court of Connecticut that we also reference in our brief that talk about the history of abortion laws and how they were designed to promote the health of the mother, the unborn child and the dangerous landscape before restrictions on regulations which would be the case in Missouri after the initiatives. And we don't think that dangerous is pejorative. We don't think it is a

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biased additive. I think, Your Honor, it would be akin if there were hypothetically an initiative petition that pertains to felonies and included illicit, like murder or armed robbery, and the Secretary decided to summarize those crimes as, quote-unquote, dangerous felonies, that is a pejorative term, not a bias term. It is a normal descriptor and it was adequately used to describe the unregulated landscape that these initiative petitions would effectively create.

I would like to spend some time, Your Honor, talking about taxpayer funding. I want to express at the outset that for this argument the summary statement notes, quote, potentially including taxpayer funding. The summary statements do not say mandate taxpayer funding. I think at least listening to the argument earlier this morning, that was certainly my takeaway, is that is perhaps what the summary statement says, they don't, they say potentially including taxpayer funding, so I want to clear that for the record, that is what the summary actually says. That is fair and sufficient for several reasons. Taxpayer funding for abortions is subject to significant dispute by individuals interested in this topic. And, again, under *Brown*, and many other cases, Missouri voters should know what the legal and probable consequence of initiatives are. Here it is why it is a probable consequence that there

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could be a potential for taxpayer funding of these procedures.

First of all, there are four initiatives, numbers 78, 80, 82 and 86, that contain no mention of taxpayer funds whatsoever. They are not in there anywhere. So the Plaintiff's takeaway is that that could possibly also include taxpayer funding for abortions. And that definition is enough to include the taxpayer funds for the other to, 085 and 087, state that nothing in this section requires government funding of abortion procedures; therefore allowing for the possibility of it, you're stating that nothing requires government funding, then government funding could be a result of legislature might needing to mandate under these initiative petitions.

Clearly government funding is permissible. As the summary statements adequately convey potential, the potential allows for taxpayer funding. And it is especially fair to include in the summary statements given the plain text of the non-discrimination provisions in the initiative petitions and other restrictions on the government's ability to deny or infringe upon a person's fundamental right, so one person might think that is an interference or restriction on their right to obtain an abortion if they are not covered by this Medicare or some other healthcare funding, they are not able to get this

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through funding, that that person could presumably make the argument, likely successfully, that it would be an interference or delay on the right to obtain the abortion if it is not covered under state healthcare costs, so we think it is clear that these initiatives do allow for the potential for governmental funding.

Your Honor, those are the highlights I would like to, I think, cover today. It was fair and sufficient for the Secretary to use language that he did. The initiative petitions do highlight all the central features of the measures. Mr. Rothert spent some time this morning talking about other forms of reproductive healthcare freedom, such as miscarriage care, prenatal care, postnatal care, and those are not essential for the initiatives. These initiatives are being circulated for proposal placement on the ballot next year and the weight of the *Dobbs* opinion is certainly, I think, the central feature of a topic of abortion and the Secretary's summary statement adequately conveys all the loopholes and drastic effects the initiatives will have if these initiatives were to go in to law. And I think both the arguments earlier this morning, as well as the Plaintiff's proposed alternatives, highlight why the proponents, who have a personal bias in favor of having voters persuaded to vote for the measure, should not be at the driver's seat to draft their own language for

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these measures. The critical question is whether the Secretary's summary statement adequately conveyed the probable effects and measures. They do.

And finally, Your Honor, as a brief housekeeping matter, the joint stipulation of facts, the parties reserve the right to object to relevancy and weight for certain exhibits. I would just like to make for the record objections as to the relevancy and weight of certain exhibits in there. Of course, we stipulated to the foundation of the exhibits, but I would like to make an objection on the record to Exhibit BB, that is a House amendment for a bill that I believe from last legislative session. A House amendment has no relevancy or weight to determine the accuracy of the summary statements here.

Exhibits CC through LL, those are filings in a United States District Court case and, Your Honor, we think that those filings are not relevant. They should be given no weight. The Secretary has also offered some exhibits from that case. The Secretary's exhibits in the record from that case do show why the Secretary considered language here is fair and sufficient and why those probable effects are there, but Exhibits CC through LL do not do the same thing.

And, finally, Exhibits MM through RR, those are, I believe, six other initiative petitions that were recently

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submitted to the Secretary of State's office from a different proponent. There is no certified initiative ballot title. We think it is irrelevant and insufficient and there is no weight to be given to the court's analysis of the summary statement for this case.

Unless the court has any questions --

THE COURT: Let me make sure I get this point down here. There were two proposals that exclusively say government funding is not required. And if I understood you correctly, you said, well, it is non-discrimination in seven and then we have this no explicit funding in eight, so how would you construe those two statements to give them both meaning as required by the rules of construction under Missouri law?

MR. LEWIS: Right. Your Honor, I think it is challenging based on how these are currently drafted. I think the best canon is one against superfluidity, what is right of the legislature -- of course, this case is an initiative petition -- but normally you would think the legislature is not frivolous or redundant. And here you do have a provision stating that on the one hand that there is nothing mandating taxpayer funding -- of course, I think two petitions have that -- then the converse is certainly true; otherwise, why would that provision be in the constitution if not to allow the possibility of just not

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simply mandating it.

THE COURT: You made the argument that the government pays for some reproductive healthcare, that it can't discriminate against other reproductive healthcare.

MR. LEWIS: That is possibly a consequence of this. Again, Your Honor, the challenge here is parsing through the language that to some degree might be self contradictory. What the Secretary wanted to do was to convey at least there would be a possibility of taxpayer funding for these procedures for two reasons. One is, the plain tax I just mentioned, where the constitution says there is no requirement for that --

THE COURT: There could be taxpayer funding.

MR. LEWIS: Could be. The second reason is, all that is still subject to the general restriction against lawmaking that will interfere or restrict or delay abortion care, so that would be like medically someone saying, hey, I want -- a pregnant mother might say I would like to obtain an abortion, I don't have enough money to pay for it, any law that prohibits me from getting funding is presumed valid and I should be able to obtain funding for that remedy from the State.

THE COURT: Just out of curiosity, you said, if I understand you right, you talk about there is no requirement for government funding but there could be

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government funding.

MR. LEWIS: Yes.

THE COURT: How would that happen? This amendment would not require, would not create that government funding. Wouldn't the legislature have to --

MR. LEWIS: That is correct. Seemingly they would go through the general appropriations process with the legislature. But, again, the Secretary's language here in the summary is very important. It states, including the potential for taxpayer funding by the abortion, that is not --

THE COURT: That would be a function of the General Assembly, wouldn't it?

MR. LEWIS: Right, it would be. I think the summary statement adequately states this, that there would be no laws that could interfere or infringe on the rights to abortion, potentially including the right to taxpayer funding abortions do.

THE COURT: Okay.

MR. LEWIS: Thank you, Judge.

THE COURT: On the summary statement, anything else, Mr. Rothert?

MR. ROTHERT: Just a couple of things.

The speech restrictions are presumed invalid, presumed unconstitutional, enforced all the time. They are presumed

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invalid, not that they are invalid. The need to have that whole text about compelling government interest if they were automatically invalid.

I just want to point out that all those hurdles they talked about, compelling government interest and the presumption, are in paragraph 3, and paragraph 4 says not withstanding paragraph 3, the General Assembly may enact laws that regulate abortion after fetal viability. None of those hurdles apply. That is not what withstanding means, that ignoring paragraph 3 you can regulate after, after abortion.

I will admit that we do not require an obstetrician or a gynecologist to make the decisions about whether or not there is an emergency enough for an abortion, that is true, but neither does current Missouri law require for emergencies which allow abortions in cases like saving the life of the mother is not required for an obstetrician or gynecologist to be the person making that decision then.

As to the admitting privileges at hospitals, you know, their evidence standing alone that they submitted is medically necessary for the health of the patient and so if that is what the evidence is, then that would be upheld at any point during pregnancy but certainly fetal viability and after fetal viability and abortion.

I agree frankly with Mr. Lewis that the proponents

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shouldn't be writing summary statements. We include one because the statute requires it to be included in the petition. But neither should opponents and that is what has happened here, is the opponents have written the summary statements, and we would ask the court to —

THE COURT: This takes us to Mr. Belz.

MR. BELZ: I will defer to my co-counsel, Mary Catherine Hodes.

THE COURT: Okay.

MS. HODES: Thank you, Your Honor. I'm Mary Catherine Hodes, and I'm here representing three Missouri citizens who object to the fiscal note summary that has been offered by the Auditor relevant to the aforementioned initiative petitions and, in fact, not just the six that have been discussed but all 11 as both insufficient and unfair. I do think that --

THE COURT: All 11. I don't -- There is five other petitions.

MS. HODES: There are a total of 11 initiative petitions that have all been summarized in the fiscal note summary identically. And I do have a red line of the fiscal note summary.

THE COURT: I'm confused. I've not looked at your petition. Are those 11 cases covered in your petition?

MR. BELZ: Yes.

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THE COURT: Okay. I'm fine.

MS. HODES: Would the court like this red line?

THE COURT: Certainly.

MS. HODES: As the court is aware, I'm sure, the same standard applies to the fiscal note summary as applies to the summary, at least in the statute that the fiscal note summary must be both sufficient and fair. And in the case of the fiscal note summary which is supposed to be -- In the case of the fiscal note summary, what it is supposed to be sufficient to do is to state the estimated costs or savings, if any, from the adoption of the measure, that is under the statute, and the Supreme Court has further stated that it should advise the voters about the potential costs or savings from the adoption of the measures and further state the fiscal consequences of the cost of the potential measures.

You'll see in front of you that the fiscal note summary, all 11 of these initiative petitions, is identical. And we're here to argue that it is both insufficient and unfair. Specifically the first argument I would like to bring to your attention is that the use of a very specific figure in the fiscal note summary, the way it is used, is insufficient because it, not only is it inadequate to advise voters, it inaccurately misleads them. Specifically the summary reads, local government entities

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estimate costs of at least $51,000 annually in reduced tax revenues.

We argue in our brief and here to the court to consider that $51,000 is inadequate in two ways. One, because it is just too specific to be the foundation of any kind of generality like at least or around. The use of very specific figures suggest that someone did very specific calculating and, therefore, is an indecision on the reliability and draws the voters to rely on it as an actual estimate as opposed to, if you were to say at least even $50,000 or at least $100,000 or at least $200,000. The use of a round number in an estimate is consistent with it being an estimate. Using very specific numbers indicates very specific calculations. In using that number in this case confuses more than anything. It causes the voter who is reading that, and caused me when I first read it, to wonder what possible local tax could correspond across the state with $51,000. $51,000 is the cost of a midsize SUV, not the cost of a statewide tax. And so it fails to inform voters.

There is a good reason that it is too specific because it is the product of very specific and careful calculations produced by one county. Now, the problem here is not the submitter is one county. The problem is that the calculations that the county used were based on

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approximately 1.5 percent of the total abortions in Missouri in the year they were using numbers in 2020, so that $51,000 corresponds to what Greene County's clerk estimates using actual numbers based on their sales and property tax. It would be a loss to Greene County in one year, the first year, in which 135 abortions, which is how many were performed according to the statistics on Greene County's residents in 2020, in one year they would lose approximately $51,000 in sales and property tax revenue. That number is very specific because it uses actual value related to this very small percentage of lost citizens.

What it doesn't represent is what Greene County predicts is the impact of these initiative petitions. It is only what they said would happen in the first year. Greene County itself points out that that number would say that is inadequate. Not only is it too specific, it's too low, vastly too low in correspondence to the 1.5 percent of the abortions and it is too low in terms of time. It estimates only what will happen in Greene County next year. And even the Greene County Commission points out that those numbers would increase annually, double, triple, quadruple each year and then start to compound once the effect became generational, and that is only in Greene County. And because of that, because of the vast under estimation that results from using this very tiny number and also the

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confusion from using this very specific number, we suggest in our proposed fiscal note summary that the estimate to local government entities be rephrased in this way. Local government entities estimate costs due to reduced tax revenues which across the state could be estimated to cost millions of dollars annually. If you use the numbers by Greene County or any number relating to actual abortions on Missouri residents in 2020 and you multiply it by the very modest number Greene County used or you could use in a different county, you easily get to several million dollars of loss and, again, that would only be in the first year and it would compound year after year after year.

There is an argument, I believe, in one of the briefs that says that that cost would not be immediate because these tiny residents would not pay taxes until they were adults. We would also urge the voters to consider that these are sales and property taxes and sales and property taxes are vastly influenced, at least in my home the sales and tax that we pay are 90 percent function of our children, that you pay sales and property taxes toward your children or on behalf of your children before they even count by buying a bigger house, buying diapers, lego sets and school uniforms, so these figures would be impacted long, long before these citizens became adults.

Moving on to another section of the fiscal note

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summary. We also object as both inefficient and unfair to the last sentence of the fiscal note summary, which reads, opponents estimate potentially a significant loss to state revenue. The Auditor argues that that is technically correct, so at least to $51,000. But that doesn't mean that it advises voters or that it adequately states the fiscal conditions or in this case it synopsizes the fiscal note, which is another obligation of the fiscal note summary, it must fairly and sufficiently synopsize the fiscal note.

The fiscal note of this case included five submitters or the Auditor received five submissions regarding the risk to federal Medicaid funding, federal funding especially related to Medicaid opposed by the impact outlined by the Attorney General's office on Missouri's abortion access, specifically the possibility of taxpayer's money for abortions which is specifically addressed in two of the six initiatives that were discussed earlier and conspicuously not mentioned in the other four, leaving open the possibility that it would be a consequence of those four petitions that we would have taxpayer funding for abortion. And, also, the non-discrimination provisions and the other provisions that could be used to implicate healthcare workers, Catholic hospitals and all kinds of people protected by federal conscious rights, and these five

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fiscal submissions to the Auditor, which he chose not to include in the fiscal note summary, they all reference past enforcement actions by the federal government on the basis of conscious protections and on the basis of mandatory insurance coverage for abortion, and these are all possible implications of these constitutional amendments. These are not just laws. They are constitutional amendments, which means that, if they were to become law of our constitution, we must assume they are going to be enforced for the foreseeable future in Missouri and that we must accept the consequences of their enforcement under any manner of federal enforcement authority of an under estimated abortion policy, so is it fair to look at the past to predict the future and to see that the federal government does enforce regulations protecting some of the people affected by this constitutional amendment in Missouri and that they enforce it by withholding funding and that that is a power they have and we need to be aware they might use it, so we think it is inadequate to advise Missouri voters by the fiscal note summary by excluding any possible mention of a huge amount of money and the huge effect it would have on Missouri if we lost our federal funding or some measure of it as a result of these constitutional amendments without consequences of them.

And, moreover, to exclude these five submitters we

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think render the fiscal note summary unfair because they were -- because these suggestions, which were legitimately raised and documented by five legitimate submitters, were dismissed as a result of what the Auditor described as careful legal analysis and that they failed to have sufficient legal analysis, they didn't describe sufficient immediate impact that it would have on current federal law, and overall he just imposed a standard on these five submissions that he didn't impose anywhere else. For instance, on $51,000 or any of the state submissions he insisted that he could not review those for anything except basically completeness and it wasn't his place to second-guess any other submitters. But then when he went to synopsize the fiscal note summary he excluded one of the most commonly submitted comments in one brief, 12 pages of careful legal analysis, and we think that the differences in treatment between the comments that he disfavors and the comments that he preferred to use is clear and shows bias and prejudice.

And if you were looking for evidence of that, you could also look at that sentence I quoted, opponents estimate a potentially significant loss to State revenue. Presumably there would be a way to summarize the legitimate contributions invited by the General Assembly of the members of the public who submitted a fiscal impact

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submission other than these submissions of opponents, and using the word opponents necessarily invites skepticism, it suggests non-neutral and non-economic motivations for their calculations. He follows it with the words estimate which is not a fair characterization of what they did. They did not estimate the serious consequences that they mentioned would happen, they predicted them. They recounted the -- They predict serious impacts to the state healthcare system as a result of unregulating abortion and simultaneously making it more widely available and all the follow-up care that results from complications from abortion and the effect on conscientious workers who cannot participate in abortion no longer being willing to work in Missouri healthcare facilities. These are not hypotheticals or estimates. These are predictions based on experience of the consequences of liberal abortion access in other states and in known circumstances.

They also -- He goes on to say upon this estimate a potentially significant loss. There is nothing potential about the loss to the state, nothing potentially significant about the losses to the state from serious impacts on the healthcare system, loss of huge numbers of citizens, and even in the federal -- in this case the federal Medicaid, there are concerns about the loss of federal Medicaid funding. There is nothing potentially

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significant about it. It is a potential loss but it will certainly be significant to use the word that was submitted in a fiscal impact statement in 2019 when the Auditor did eventually include in her summary the possibility that an abortion restriction in Missouri would imperil federal Medicaid funding.

The City of St. Louis' impact submission in '19 called the possibility of loss of support from the federal government for Medicaid potentially calamitous. It is not potentially significant, they called it calamitous. And we think the conclusion in that last sentence of three separate words inviting skepticism about the estimates submitted by these legitimate submitters is unnecessary and also shows bias and impartiality.

As a result of all of these failures to be fair or sufficient, we suggest the sentence I read to you earlier and in the second sentence we suggest as a part of the fiscal note summary is, in addition, revenue losses to the state and additional healthcare costs to the state are unknown but could be billions of dollars annually. This is not an exaggeration of the actual submissions made by multiple submitters, and not just opponents, and the Auditor is charged with synopsizing the fiscal note and this adequately synopsizes the fiscal note. We don't argue this is the only way that one could adequately synopsize

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the fiscal note, but we don't think that anything would include the number of $51,000 to defer the statewide impact on taxes of losing thousands of citizens and we don't believe that these words that invite skepticism about other submissions will be included in an initiative petition.

Thank you for your time.

THE COURT: St. Louis submit the calamitous comment again.

MS. HODES: St. Louis submitted that comment when it referred to -- It actually cited past loss of federal --

THE COURT: Did St. Louis submit the calamitous --

MS. HODES: They submitted it to a 2019 --

THE COURT: They didn't submit it on this petition?

MS. HODES: Oh, no. Nor do we use that term.

THE COURT: If you had a million Missourians all sign a post card summarizing your position on this, does the Auditor give that any different weight?

MS. HODES: Do you mean if someone took a poll and submitted a --

THE COURT: What I'm saying is, you talked about 12 legitimate, you know, comments were made.

MS. HODES: I see.

THE COURT: Are you telling me somewhere that the number of comments makes a difference, they are all saying the same thing?

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MS. HODES: No, Your Honor. I didn't mean to suggest that there would be some kind of accumulative effect but merely the fact that five different submitters in not a very large pool submitted the same comment makes it particularly insufficient that it is not included in the note summary that is supposed to synopsize the contents of that fiscal note.

THE COURT: A million Missourians all send in a post card and said I agree with you, that is something that should be noted by the Auditor?

MS. HODES: Not at all. If a million people submitted the same comment to the fiscal note and it was all included in the fiscal note, the synopsize of the fiscal note would be inadequate without mentioning that that many submitters said that.

THE COURT: Well, is it the number of submitters?

MS. HODES: Well, the Auditor does have a role in considering the reasonableness of the submission but when he describes that role to other submitters that bar is very low and when he exercises that role related to these five submitters it was very high and I think that suggests bias and impartiality. I'm not suggesting that he doesn't have a role or that the number of them is -- Two of them were state actors. The Attorney General and governor both expressed the opinion as three pro-life submissions.

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THE COURT: Okay. Pre-*Dobbs*?

MS. HODES: Pre-*Dobbs*.

THE COURT: What was the exposure for Missouri on conscious objectors?

MS. HODES: I am afraid I cannot answer that question. I don't know if any of the others can.

THE COURT: And then --

MS. HODES: I don't know of any enforcement.

THE COURT: All right. But clearly what is being proposed looks like pre-*Dobbs*, at the very least pre-*Dobbs*?

MS. HODES: Oh, yes. Yes.

THE COURT: Okay. And then the billions analysis is the analysis that we're jeopardizing Medicaid funding or we could be jeopardizing the Medicaid funding?

MS. HODES: Right. Maximum Medicaid funding. This year Medicaid funding is $12.5 billion.

THE COURT: Are there any other states that have lost their Medicaid funding? There are a number of states that have liberal abortion policies.

MS. HODES: Right. There are two state enforcement actions in the record, California and Vermont, that had their Medicaid funding -- an enforcement action in which their Medicaid funding was at risk. The enforcement actions with the change in administration were withdrawn.

THE COURT: Okay. Thank you very much.

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MS. HODES: Thank you.

THE COURT: For the Auditor.

MR. TILLMAN: Thank you. Good morning, Your Honor. May it please the court.

The party challenging the official ballot title also has the burden of showing why a fiscal note or fiscal note summary is unfair or insufficient. Petitioners have failed to meet this burden. For the convenience of the court, I will go through the fiscal note summaries for the initiative petitions sentence by sentence and address Petitioners respective arguments for each.

The first sentence on the fiscal note summary states, state governmental entities estimate no cost or savings but unknown impact. Petitioners incorrectly argue that the first sentence of the fiscal note summary is problematic because the fiscal note summary failed to reflect the multiple submissions that stated a substantial risk would exist to the state's federal Medicaid funding if voters approved a state abortion law that conflicts with federal law. But the respective submissions have failed to provide any explanations setting forth what provision of each initiative conflicts with federal law to create such a risk. Based on the Auditor's experience in state government, his overall knowledge and understanding of the state budget and his review of federal Medicaid funding

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requirements, state and federal law pertaining to government funding of abortion, the provisions of the proposed measures and other relevant law, the Auditor determined that the measures do not jeopardize the state's federal Medicaid funding. The Auditor's determination was further supported by the MO HealthNet Division, the entity responsible for managing the state's Medicaid program and the de facto expert regarding the state's federal Medicaid funding stating through the Department of Social Services fiscal impact submission to the Auditor that it did not anticipate a fiscal impact as a result of the measures.

Additionally, after the Attorney General mistakenly asserted that the state's federal Medicaid funding would be at risk, the Auditor reached out to the directors of the Department of Social Services and the MO HealthNet Division who declined to revise the original fiscal impact submissions. After being given two opportunities to say that the state's federal Medicaid funding would be in jeopardy and not doing so indicates that the Department of Social Services and the MO HealthNet Division also know the initiatives will not result in the loss of federal Medicaid funding. And stated in *Brown v Carnahan*, *Sinquefield v Jones* and both Missouri Municipal League v Carnahan cases, if the Auditor finds a suggested impact unreasonable, he gives it less weight in preparing a fiscal note summary and

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may exclude it.

In regard to the claims that state's federal Medicaid funding would be jeopardized by the measures, the Auditor, after performing is aforementioned review and receiving the Department of Social Services and the MO HealthNet Division's fiscal impact submission, determined the claims to be unreasonable and therefore excluded them from the fiscal note summaries. Now Petitioners point to a 2019 fiscal note summary drafted by Auditor Galloway for a referendum of HB 126 which effectively banned nearly all abortions in the state as support for substantial disallowance of the state's federal Medicaid funding will occur if voters approve a state abortion law that conflicts with federal law, but Petitioners argument is dubious because they have failed to show that Missouri has ever been threatened with or otherwise faced a federal Medicaid disallowance before or after HB 126 took effect and Section 188.017 in 2002 because, in fact, such has never occurred.

Besides the fiscal note summary for HB 126, Petitioners have failed to offer any further insight as to why the state's federal Medicaid funding would be at risk due to the measures, and Petitioners have failed to identify any state that has ever been subjected to a US Department of Health and Human Services imposed disallowance in any amount due to a violation of the

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federal amendments that pertain to abortion.

Petitioners also mistakenly argue that the Auditor failed to include the Department of Health and Senior Services submitted petition for fiscal impact in the fiscal note summaries. In its fiscal impact submission to the Auditor the Department of Health and Senior Services discussed that the measures could potentially, one, void most or all of Chapter 188 which pertains to the regulation of abortion; two, remove the Department's authority to regulate abortion facilities; three, negate administrative rules; and four, expand the practice of abortion and the number of abortion facilities in the state and that due to the aforementioned factors stated the proposed constitutional amendment has an unknown impact on the Department. In the fiscal note summaries the Auditor used the very same language used by the Department of Health and Senior Services, unknown impact. Repeatedly the courts upheld that the word unknown is language not likely to cause bias, prejudice, deception or favoritism for or against a measure and that the use of unknown in a fiscal note summary is fair and sufficient. As such, the fiscal note summaries fairly and sufficiently describe the potential costs or savings of the measures that are recorded by the Department of Health and Senior Services.

Petitioners further appear to wrongly argue that the

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Auditor should have rejected the Department of Revenue's submission of unknown fiscal impact because Petitioners believe the state will suffer a loss in state revenue. Similarly to the MO HealthNet Division with regard to Medicaid funding, the Department of Revenue as the central collection agency for taxes and fees due and owing to the state, the de facto expert regarding the state's tax laws and tax revenue streams, and again after the Attorney General raised his mistaken concerns, the Auditor reached out to the Director of the Department of Revenue who, just like the Director of the Department of Social Services and the MO HealthNet Division, declined to revise the Department's original fiscal impact submission. Due to the Auditor having no obligation to independently develop an estimate of the measure's impact on state tax revenues as held in *Boeving v Kander*, the Department of Revenue's expertise and knowledge of state taxes and state's tax revenue and because the submission addressed and did not diverge on the issue of the measures, it was reasonable for the Auditor to not discount the Department of Revenue's submission. The fiscal note summaries for the initiative petitions included all fiscal impacts recorded by state governmental entities, excluded information found unreasonable by the Auditor and expressed the potential impact to state governmental entities in language that was

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adequate and without bias, prejudice or favoritism. As such, the fiscal note summary's first intent fairly and sufficiently characterizes the potential costs of the initiative petitions as recorded by the state governmental entities.

Next, the second sentence of the fiscal note summary states, local governmental entities estimate costs of at least $51,000 annually in reduced tax revenues. The Petitioners incorrectly argue that the second sentence of the fiscal note summary is flawed because the Auditor didn't vote, ignored the fiscal impact submissions of all local governmental entities other than Greene County and applied the economic methodology of Greene County to the entire population of every county in the state. Petitioners argument fails because, first, the statutory time line for the Auditor to review fiscal impact submissions and draft fiscal notes and fiscal note summaries is not sufficient to analyze every economic theory contained in received submissions, much less extrapolate a single entity's assumptions to thousands of different political subdivisions, each having different levels of taxation, fertility rates and numbers of citizens who may seek an abortion. And, second, it would be inappropriate for the Auditor to apply Greene County's economic theory to other political subdivisions when no

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other subdivision provided a similar analysis. As stated in *Brown v Carnahan*, it is not the Auditor's role to chose a winner among these opposing viewpoints by independent issues themselves, double checking economic theories and assumptions and adopting one side's view over another's in resulting in a financial note.

Petitioners further mistakenly argue that the Auditor should have either applied Greene County's fiscal assessment to the entire state or excluded it entirely. But Petitioners are misunderstanding how the Auditor examines fiscal impact submissions. As the court has held, the Auditor is not required to judge the merits of the fiscal impact submission or second-guess a reasonable submission. Rather, his role to fiscal submissions is determine complete, relevant, reasonable and have an identifiable source.

Petitioners also erroneously argue that it is misleading for the fiscal note summaries to state that local governmental entities estimate a total loss of $51,000, as if $51,000 represents the entire loss to all of Missouri's local governmental entities and not just to Greene County. In *Protect Consumers' Access to Quality Home Care Coalition, LLC v Kander*, the court upheld the use of a collective term such as local entities to describe all responsive information received by the Auditor, even when

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only a single entity responded with a potential cost, was not considered unfair and insufficient. Additionally, Petitioner wrongly argued that the Auditor further misrepresented the significance of the fiscal impact reported by Greene County, specifically reported the $51,000 loss was misrepresented as the total entire loss, but the financial significance of Greene County recorded impact was not misrepresented because the $51,000 included in the fiscal note summary is modified by the phrase at least, thus the fiscal note summary's state the $51,000 is the floor, not the ceiling of the potential impact reported by the local governmental entities. Due to the aforementioned reason, the second sentence of the fiscal note summaries fairly and sufficiently describe the fiscal impact of the measures recorded by local governmental entities and Petitioners have failed to demonstrate otherwise.

Lastly, the third and final sentence of the fiscal note summary state, opponents have estimated a potentially significant loss to state revenue. Petitioners incorrectly argue that their sentence of fiscal note summary is effective because it failed to account for all losses recorded by opponents of the measures. First, it was accurate for the Auditor to let respective submitters as opponents, a term that is expressly used in Section

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116.175, due to the submitters public opposition to the initiatives and the content of their submissions. And, second, while the Auditor concluded the state's Medicaid funding was not in jeopardy, he did acknowledge in the fiscal note summaries that the measures provided fiscal impact submissions that estimated the measures to proposed other significant losses to state revenue by stating just that. The real issue for Petitioners is that the fiscal note summaries do not set forth the specific dollar amount. In order to be fair and sufficient, the court has held a fiscal note summary is not required to inform voters of an expressed amount of the potential costs of the initiative and describe such estimated costs as significant because such language is accurate and unlikely to cause bias and prejudice, deception or favoritism. No reasonable person could argue that the various dollar amounts of potential losses of state revenues submitted be opponents, which included $6.9 trillion or infinity as proposed by Petitioners, do not constitute the continually significant losses and thus are not accurately reflected by the Auditor's language. As such, the fiscal note summaries third sentence fairly and sufficiently reflect potential costs of the measure as reported by those opponents.

In conclusion, the Auditor's fiscal note summaries for each of the 11 initiative petitions is fair and sufficient

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and accurately represents potential costs or savings of each measure and the fact that proponents or opponents of the measure find some fault with the fiscal notes to compel this court that the Auditor drafted the fiscal note summaries is appropriate. Due to the fiscal note summaries being fair and sufficient, the court should dismiss the Petitioners actions and certify the Auditor's fiscal note summary portion of the official ballot titles to the Secretary of State.

Thank you.

THE COURT: Ms. Hodes, anything else?

MS. HODES: I believe -- Yes.

THE COURT: Okay. Thank you.

MS. SCHAFER: May it please the court.

Your Honor, we believe the Auditor is correct. If he is not and we're not, then in the alternate he should have excluded Greene County's fiscal estimate entirely.

First, I'll very briefly highlight why the Auditor is correct not to include a loss of billions of dollars to Medicaid funding and then I'll address that if it was a mistake to include only Greene County, then Greene County's estimate should be excluded entirely.

The Auditor's determination, as was said, of reasonableness is based on the Auditor's experience in state government and overall knowledge and understanding of

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business and economic issues. Because the provisions of the initiative petitions do not jeopardize federal Medicaid funding, the Auditor found it unreasonable to suggest any federal Medicaid dollars would be at risk. The Petitioners cite opponents fiscal impact statements as proof the Auditor should have adopted their assessment. On the other hand, as was stated, the Department of Social Services, an organization actually tasked with the administration of Medicaid funds, submitted fiscal statements that did not anticipate a fiscal impact to Medicaid funding.

Turning to our second point. Greene County's fiscal impact assessment uses a broad methodology. Greene County calculated their reported loss as was estimated at $51,000 by adding up their total tax revenue from sales and property taxes and dividing it by their 2020 census data and the state benefited $376.94 per person. They then took that number and multiplied it by the resident abortion in 2020 which was 135, that number equals $50,886.90. To be clear, resident abortions do not refer to the number of abortions received in a county but the number of county residents that received an abortion regardless of where that abortion took place.

If the Auditor was wrong to include Greene County's submission, it was because it was unreasonable to adopt Greene County's fiscal estimate at all. First, there is no

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proof that the amendment would cause more residents of Greene County to have an abortion. The state statute says that fiscal note and fiscal note summary shall estimate the measure's estimated costs as stated, if any. Regardless of the proposed measure, people continue to leave the state to have abortions. There is no showing that the amendment would cause more abortions like Greene County residents and, therefore, the amendment would be the reason for any hypothetical loss of tax revenue. For all we know, each resident abortion could have taken place in other states like Illinois or Kansas where abortion remains legal regardless of the result of this proposed constitutional amendment.

Further, Greene County's use of resident abortion number fails to account for cases where a taxpayer would never have been treated such as in the instance of a non-viable pregnancy. Under current law, abortions that are medically a necessity can still occur in our state. The Greene County number does not differentiate between medical and non-medical to receive an abortion; therefore, it is wrong to conclude that all 135 Greene County residents who had abortions in 2020 would only have had access to that care if this measure was passed.

Second, Greene County wrongly assumes that every abortion that residents received would have resulted in a

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person who stayed in Greene County and paid taxes. Not every person lives in the place and continues to be a taxpayer in the place where they are conceived and gestated.

Third, Greene County's estimate fails to account for the cost savings of having been a resident. If there was a loss of people from Greene County, then the amount of Greene County on things like public school funding could also be less.

Finally, all other responsive counties and local governments reported they anticipated no fiscal impact. St. Louis County, who had 56 resident abortions in 2020, said they anticipated no fiscal impact. Jefferson City also stated they did not anticipate a direct fiscal impact. Their county had 20 resident abortions. Kansas City anticipated no fiscal impact and Jackson County had 1,748 resident abortions. Clay County also indicated no fiscal impact. And Clay County had 353 resident abortions which is, of course, higher than Greene County of 135 resident abortions. If it was unreasonable to include only Greene County's cost of $51,000, then the Auditor should have erred on the side of not including it and the numbers certainly should not be duplicated as Petitioners suggest.

The Missouri State Auditor's office drafted a fiscal note summary that adequately and fairly summarized the

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fiscal note. If, however, it was an error only in Greene County's estimate, then no cost to the county should have been included in the summary ballot.

Thank you.

MS. HODES: Thank you, Your Honor.

It is worth noting that the Auditor is big on defending his process in coming up with the actual words that he included in his fiscal note summary, but he never once claims to have advised Missouri voters with that summary and he never once claims to believe in any way or that anyone could possibly believe that making abortion profoundly more available in Missouri than it was during *Roe* and taking away all of the limiting and regulating provisions that Missouri has built up over the years in one fell swoop is going to cost the state and local governments, even just local governments, anything like $51,000.

Here are some things that cost $51,000...a Chevy Tahoe, a mid-level kitchen remodel, a not very extravagant, unfortunately, wedding, but not lifting all the abortion restrictions in the State of Missouri and allowing unfettered access to abortion as a permanent constitutional amendment and making it impossible without intensive litigation or possibly federal enforcement action for anything, narrowing that is in place in the federal level

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or that protects individuals to have without cost of litigation or these threats of federal enforcement, this is not going to cost us $51,000. And it is misleading to the voters to use that number not because the calculations are faulty, although they are very minimal. Sales and property taxes are not the only way that human beings contribute to our economy, but they are a minimal way which is why the estimate should go much higher with a much lower floor. It should still be an estimate because the impact should be absolutely profound and definitely will be.

He also defends his process in not examining the submissions by state actors and totally deferring to DHSS and DOR, Department of Revenue, although DHSS does say that in its fiscal notes, in its fiscal impact submission, that it anticipates the possibility that these alter regulations will disappear, which I'm not sure is consistent with what the Auditor is estimating. In any case he tends to not examine any of these submissions but then he makes incredible assertions to defend his right to exclude legitimate and documented submissions because they don't accurately describe the state of the law tomorrow and the likelihood of what will happen from the federal government tomorrow as a result of these constitutional amendments coming into place, that is not his job. His job is to advise of the impact of the measures...period, not the

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second they are passed and no one else restricts themselves to what is going to happen definitely tomorrow in their estimates of the impacts to state and local government and to the State of Missouri and to citizens.

Moreover, I just want to address the point -- I already addressed the point that sales and property tax in particular are not going to wait for these children to become adults in order to become significantly associated with their presence as Missouri citizens. But also the suggestion that it is possible that the number of abortions in Missouri will remain constant or to Missouri citizens will remain constant seems unlikely and also it raises the question of what is the purpose of removing all those restrictions on all these protections of the unborn in Missouri, other than to make abortions more easily available to Missouri residents and not just Missouri residents but those who will come to our state for an abortion.

There is plenty of actual evidence, if the court would want us to make them available, of, you know, actual evidence based on other states in which abortion laws were legalized, the abortion rates going up. And more to the point, I don't understand if abortions are so freely available now, why would we need to -- what would be the point of the constitutional amendments if we were not

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counting on the number of Missouri women seeking abortion and potentially abortions continually rising.

With that, I leave you to our briefs. Thank you, Your Honor.

THE COURT: Thank you very much.

All right. I think I've seen it from Mr. Tillman. But I would ask the parties to, if they have proposed judgments or orders, to submit those. I have Mr. Rothert standing there with his. You can give it to Mr. Parish there. Mr. Lewis, will you send me something.

MR. LEWIS: I'll finally submit them after entering.

MS. HODES: We can electronically submit them.

THE COURT: That is fine. Before they leave, make sure they have the e-mail address to do that. It is a different e-mail address to send us a Word document than to send us a PDF.

MS. HODES: Thank you.

THE COURT: All right. Anything else?

MR. BELZ: Did you give us a deadline on this?

THE COURT: Can I have them by Monday?

MR. BELZ: Sure.

MR. LEWIS: That is fine.

MS. HODES: Yes.

THE COURT: Monday is probably as late as I want to go on this.

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MS. HODES: It will be before Monday.

THE COURT: Thank you so much for your time. That concludes today's hearing.

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Reporter's Certificate

I, Kaye F. Asel, Certified Court Reporter, hereby certify that I was the official court reporter for Division I of the 19th County Circuit Court; that on September 11, 2023, I was present and reported all the proceedings had in DR. ANNA FITZ-JAMES, Plaintiff, vs. JOHN R. ASHCROFT, MISSOURI SECRETARY OF STATE, Defendant, Case Nos. 23AC-CC03167, 23AC-CC03953, 23AC-CC04022, 23AC-CC04574, 23AC-CC04575, 23AC-CC04576 and 23AC-CC04802 and HANNAH SUE KELLY, et al., vs. SCOTT FITZPATRICK, MISSOURI STATE AUDITOR AND JOHN R. ASHCROFT, MISSOURI SECRETARY OF STATE, Defendants, AND ANNA FITZ-JAMES, Intervenor, Case No. 23AC-CC04802.

I further certify that the foregoing pages 86 contain a true and accurate reproduction of the proceedings transcribed.

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/s/ Kaye F. Asel, CCR
Official Court Reporter

Transcript completed: September 30, 2023

AMERICAN OVERSIGHT

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

ANNA FITZ-JAMES,)
)
Respondent,)
)
vs.) WD86595
)
JOHN R. ASHCROFT, MISSOURI)
SECRETARY OF STATE,)
)
Appellant.)

IN THE CIRCUIT COURT OF MISSOURI
19TH JUDICIAL CIRCUIT, DIVISION I
HONORABLE JON E. BEETEM, JUDGE

ANNA FITZ-JAMES,)
)
Plaintiff,)
)
vs.) Case Nos. 21AC-CC03167;
) 23AC-CC03953; 23AC-CC4022
JOHN R. ASHCROFT, MISSOURI) 23AC-CC04574; 23AC-CC04575
SECRETARY OF STATE,) 23AC-CC04576
)
Defendant.)

RECORD ON APPEAL
SEPTEMBER 11, 2023
VOLUME I OF I

Kaye F. Asel, Certified Court Reporter
Official Court Reporter, 19th Judicial Circuit
Cole County, Missouri

IN THE CIRCUIT COURT OF MISSOURI
19TH JUDICIAL CIRCUIT, DIVISION I
HONORABLE JON E. BEETEM, JUDGE

HANNAH SUE KELLY, et al.,)
)
Plaintiffs,)
)
vs.) 23AC-CC04802
)
SCOTT FITZPATRICK, MISSOURI)
STATE AUDITOR,)
)
And)
)
JOHN R. ASHCROFT, MISSOURI)
SECRETARY OF STATE,)
)
Defendants,)
)
And)
)
ANNA FITZ-JAMES,)
)
Intervenor.)

TRANSCRIPT OF PROCEEDINGS
SEPTEMBER 11, 2023

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AMERICAN OVERSIGHT

MO-AG-23-0462-A-001537

PROCEEDINGS

THE COURT: All right. We're here on two files. The first is 23AC-CC03167, Anna Fitz-James versus Ashcroft. We're also here on the Kelly case on the fiscal note which is here.

For the Plaintiffs I've got Mr. Rothert, Ms. Schafer. For the Secretary I've got Mr. Lewis. I've got Mr. Tillman for the Auditor. I've got Mr. Belz for amicus.

MR. BELZ: No, for Kelly.

THE COURT: Yeah, for Kelly. Okay. And Ms. Hodes.

MS. HODES: Also for Kelly.

THE COURT: All right. Ms. Korte.

MS. KORTE: The State Auditor.

THE COURT: You are with Mr. Tillman.

Before we get started here, pursuant to Supreme Court Operating Rule 16, broadcasting from this courtroom is under those rules. Now, I realize this seems odd for me speaking to all the people out there in TV land, but you are not authorized to record from the Webex or to republish from that Webex. You are to -- You may get copies of what we do here from the pool camera, which is here, that is how Rule 16 works. I realize that is kind of difficult telling you all out in TV land that is what the rule is, but here is how this work. You publish something off of Webex, someone will send it to me and you will be on the list, so

I ask that you honor the rule as it is there. The Supreme Court is doing its best to recognize the reality of what we do and what we have to deal with here, and I would like to be able to maintain Webex as a way to expand everybody's access to these proceedings.

All right. How would you like to proceed?

MR. ROTHERT: Your Honor, the parties have all conferred, the evidentiary record for both cases is the same --

THE COURT: Okay.

MR. ROTHERT: -- so we would propose that --

THE COURT: Move it into evidence.

MR. ROTHERT: Move it into evidence and then hear the cases back to back.

THE COURT: What are you calling the evidence?

MR. LEWIS: Your Honor, we prepared a joint stipulation of facts and exhibits. We have one copy and two binders if you would like us to bring to the court. These would also be filed as well.

THE COURT: Okay.

MR. LEWIS: And, Your Honor, in looking at the joint stipulation, as the stipulation makes clear, the parties have reserved the right to make objections as to relevancy. We know it is a bench-tried case, but we do reserve objections to relevancy as appropriate to foundation and

overall admissibility.

THE COURT: Okay. All right. With respect to the joint stipulation of facts and exhibits, Plaintiff--

MR. ROTHERT: Yes.

THE COURT: -- you are good with that? Mr. Belz.

MR. BELZ: Yes.

THE COURT: The Auditor's case is good with that?

MR. TILLMAN: Yes, Your Honor.

THE COURT: Mr. Lewis on behalf of the Secretary?

MR. LEWIS: Yes.

THE COURT: All right. All right. We're going to do summary statement first and then the fiscal note. Mr. Rothert.

MR. ROTHERT: I also have for you a copy of the red line versions we filed earlier and they are demonstrative, if that helps with the different versions.

THE COURT: Okay. Okay. Which is what I was looking for.

MR. ROTHERT: May it please the court.

THE COURT: Okay.

MR. ROTHERT: Dr. Anna Fitz-James has proposed amendments to our constitution that would presume a right to make our decisions about reproductive healthcare, including abortion, without government interference The right to make decisions about reproductive healthcare is

not in our constitution explicitly, so any one of these measures would provide greater independence from the government than we've ever before enjoyed but they do not create the boundless right the Secretary paints it to be. None of these measures require the government or anyone else to do anything. Instead, they are focused on decision making by individuals and limiting government interference with the decision making process.

One of these initiatives will appear on the ballot next year and when it does, voters are entitled to rely on the ballot title summary statement that is impartial and without argumentative language, concisely and clearly describes the purpose of the proposition. It was the Secretary's duty to set aside his personal bias against the proposals and craft a mutual statement. Instead, the Secretary acted as if he were playing the political spin and manipulation edition of Mathlists resulting in the very opposite of a fair summary to which voters are entitled.

While the Western District came up in *Asher v Carnahan* that ten different people or ten different authors could craft ten different summary statements that are fair and sufficient, it is equally true that those ten could come up with ten insufficient and unfair ones, like the ones the Secretary concocted here. So Dr. Fitz-James asks this court for different summary statements, statements or

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summaries that are free willing to politicians special interests and will give notice to the voters the purpose of each amendment because, particularly in this case, the Secretary decided to abandon any pretence of doing his job impartially and instead of that, trying to scuttle an effort to let Missourians have a vote on this important topic, writing a summary is going to fall to this court. And to assist this court in drafting a fair and adequate summary statement, I will describe what the initiatives do, discuss the differences between the six initiatives, try to muddle through the Secretary's verbosity to explain how it is argumentive and misleading and then touch on some considerations for the writing of a new summary statement.

So what do the initiatives do? At their most basic level, the proposals are about burden shifting. They each provide, when it comes to challenging government descriptions on patients' decision making on reproductive healthcare, the usual burden on challengers to a statute shifts to the government; that is, rather than regulations starting with the presumption of constitutionality and the burden being on the patient to show it violates the constitution that there was no good reason for it, the government, rather than the patient receiving the healthcare, has the burden of showing there is a good reason for it and the patient, rather than the government,

starts with a favorable, although still rebuttable, presumption. This burden shifting applies both in decision making to access healthcare, reproductive healthcare and to not access healthcare. So if Missouri -- it hasn't currently -- if Missouri were to join the 31 states in the District of Columbia and having a statute for forced sterilization, the right to reproductive freedom could be invoked to refuse sterilization as much as it could be used to have the right to consent to sterilization, unless the government can overcome the presumption.

Burden shifting is common in the law. It is similar, what we're proposing, similar to the burden shifting when one challenges certain speech or expresses conduct restrictions. The language is borrowed from the 2000 Supreme Court case, *United States against Playboy Entertainment*, where there is a presumption of unconstitutionality for instance, and there are countless cases in the first amendment context that are recounting being the government's burden. However, decision making about abortion in particular is given less protection under these initiatives than other reproductive healthcare for all, except Count II, which is '24, 2024-078, abortion is treated differently than the other types of reproductive healthcare; that is, when it comes to abortion, the burden presumption shifts back to what they are now without the

constitutional amendment. This applies to any restriction on abortion after fetal viability in some persons and after 24 weeks gestation in others so long as the state keeps an exception for emergencies. So, in other words, when there is a challenge to restriction on abortion, the usual presumption that the statute is constitutional applies and the burden is on the patient to overcome that presumption after 24 weeks of fetal viability. This would allow abortion care to even be banned if the state wanted to and objectively define point so long as the legislature retains an exception, as it has now with the current ban for exception or for emergency situations. And the exemption is needed, for instance, to allow families to make their own decisions about what to do, for instance with an ectopic pregnancy.

An ectopic pregnancy is one where the fertilized egg does not attach to the uterine wall like it's supposed to in its ordinary course; instead, it attaches somewhere outside the uterus, the fallopian tube, ovary and cervix, and these ectopic pregnancies can't be located. They do not result in the birth of a child. Eventually there will be a burst resulting in massive bleeding that is likely to kill the patient if the pregnancy is not aborted. And unless this court thinks the need to protect the right to make abortion decisions in this situation is illusory, I

will point you to House Bill 2810 from 2022, which was the second session of the 101st Assembly. As introduced, that bill would have created a new section, 188.090, of our revised statutes that would specifically ban the abortion of an ectopic pregnancy.

With an initiative, our constitution -- Without an initiative rather, our constitution does not include a right to prevent the General Assembly from enacting such a law and as the law is now you would have to wait until there is a real emergency. So this right to reproductive healthcare though, it does include abortion, no secret about that. And although you might not know it from reading the summary statements, it envisions a right to reproductive freedom that includes abortion, not one that is limited to abortion.

There are initiatives in other states. Ones in Exhibit T is an initiative proposed in Arizona. Its language is very similar to these initiatives, except the right there is only with respect to abortion. And here in Missouri just recently proposed initiatives have been submitted to the Secretary that create a right also limited just to abortion. Exhibit MM is an example of that. That initiative could share a ballot with Dr. Fitz-James, making all the more important that summary statement not overlook the robust application of the right for reproductive

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freedom factor that Dr. Fitz-James is suggesting.

Our constitution includes no right to make reproductive healthcare decisions without government interference whatsoever, not just abortion. So to correct that, the right to reproductive freedom includes the right to make all decisions about reproductive healthcare, abortion yes, but also prenatal care, childbirth, postpartum care, birth control and marriage -- sorry, not marriage -- miscarriage care. None of these are explicitly protected under our constitution so each are vulnerable to the General Assembly's interference.

As noted in our brief, abortion is not the only area where the legislature has shown interest in restricting. It is particularly true of contraception. Unlike the majority of states, Missouri does not allow pharmacists to prescribe birth control, although they are allowed to prescribe nicotine replacement products, not birth control, and it is getting harder to access contraception in this state. Unlike most states, Missouri forbids any school personnel or anyone associated with them from distributing condoms or other birth control, limiting the government again access to contraceptive, contraception. Missouri has a statute that allows a policy maker to dictate or a policyholder to dictate that her spouse or her children cannot receive coverage for contraceptives. And all that

was before, before *Dobbs*. Now, once a senator, we cite him in our brief, quoting him as saying, when it comes to contraception, anything is on the table. And the fact is that various types of reproductive healthcare overlap, they are not provided in isolation. It is a holistic approach. So miscarriage mismanagement uses the identical procedure as the first trimester abortion; that is in Exhibit II, paragraph 5. So if one of those procedures can be restricted, it follows that another could, the same could in another context.

And worrying about miscarriages are not a healthcare concern. Just last year a 26-year old woman in another state was indicted after a miscarriage because someone thought the miscarriage care she received might have been an abortion. Eventually those charges were dismissed but not before she was arrested and all the private information was made public.

Next the various versions, each prohibit discrimination and other adverse actions by the government, just because no adverse consideration decided access or decided not to access reproductive healthcare. It protects also, although it doesn't make it to the summary statement, those who aid someone in obtaining reproductive healthcare. This is an effort to forestall a bill like Texas' Senate Bill 8 that created a cause of action, anyone could bring

against anyone else who assisted someone in having an abortion.

And it would prevent even worse government intrusion like what was proposed by one of the Plaintiffs in the fiscal note summary case. She introduced an amendment in the House I believe, yes, the House, it is Exhibit BB, and it would make it unlawful to assist a Missouri resident in obtaining an abortion within or outside of Missouri and gives specific examples of how someone might be aiding, providing Internet service that allows access to any website and encourages or facilitates access to abortion, providing insurance coverage for abortion care, providing referral to a provider of abortion care, that is actually in the amendment in Exhibit BB, and it demonstrates what voters might reasonably want to include as safeguards against in the constitution.

Turning to taxpayer funding for reproductive healthcare. Right now the constitution is silent. Some versions would explicitly allow the General Assembly to refuse to fund abortions, something that is not in the constitution now, immediately leaving things the way they are but foreclosing is a matter of law that the amendment could be interpreted as requiring taxpayer money for abortions. The others say nothing, just let the constitution now, which would retain the status quo that

existed, exists now and existed before *Dobbs,* whether to fund abortions is a matter left to the discretion of a legislature without saying one way or another. The result of that would be that current statute, which forbids funds for abortion, could be challenged but it would remain in effect until it was successfully challenged. None of the proposals take a third route and require taxpayer funding of abortion.

Next, the initiative, another topic they discuss that our constitution is silent about is minors. Some versions would explicitly allow the General Assembly to require parental consent so long as there is an alternative authorization method as was required under the fair cases before *Dobbs*. Some versions say nothing, which again retains the status quo; the result being the current statute requirement for parental consent but also has an alternative authorization method that would remain in effect. None state that minors must be given access without parental consent.

So with that overview, I will discuss the differences between the six initiatives . In essence there are three ways in which the initiatives differ from each other. The first -- By the way, they only relate to abortion care, the differences. They are the same when it comes to all other reproductive healthcare.

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First, there is a point in which the burden of presumption shifts back to what they are now in the absence of constitutional protection. The first option is that the burden never returns to the patient and the presumption remains throughout; that's the case only as to Count II, which is 2024-078. The second option is that the burden returns to the Plaintiff and there is a presumption of constitutionality after 24 weeks gestation. That is the case for initiative numbers 2024-080 and 2024-082, which are Counts III and IV. And the third option is that the burden presumption be shift after fetal viability, and that is in 2024-085, 2024-086 and 2024-087, which are Counts I, V and VI.

The second way they differ is when it comes to what they have to say about the taxpayer funding for abortion. For Counts II, III, IV, and V said nothing. Two, Counts I and VI explicitly state they do not require taxpayer funding for abortions. Zero state that the taxpayer funding is required.

And finally the various versions differ in what they have, whether they have anything to say about parental consent. Four, Counts II, IV, V and VI say nothing about it. Two, Counts I and III, explicitly put in the constitution that parental consent may be required. None say that the state can not require parental consent.

Now, I will turn to what is wrong with the Secretary's summary statements. A politicized partisan personal Secretary can distort public understanding of an initiative and how the Secretary exercised his role in this particular case is akin to the referee playing for one of the teams. Rather than neutral and impartial summaries, his statements are riddled with argumentative and misleading language that could create bias against the initiatives. None of the amendments do what the Secretary says they do. Indeed, his arguments stitched together would mean that these amendments require free abortions upon the request of any pregnant minor for any reason at any time, including when contractions are five minutes apart and to have that abortion induced by a lay person without malpractice insurance. These amendments do not do that and no one would want them to, including the proponents. They address real life government intrusion into decisions here in Missouri whether to receive healthcare provided by professionals in accordance with their professional obligations, just like every other kind of healthcare that is provided throughout the state every day without the preposterous outcome the Secretary presents.

Among the summaries there are five different look-alikes. They aren't the same for each one, but the genesis for the Secretary's misleading of the public is in

the second bullet point which is comments, second bullet point for all six summaries. I'll start there.

The Secretary's second bullet point says the initiatives will nullify long standing Missouri law protecting the right to life including, but not limited to, partial-birth abortion. It takes some decoding, but the overall premise of the summary statement is that every Missouri law having anything to do with abortion, although this would be true of all other reproductive healthcare events, at least abortion, anything having to do with all abortion, including general law for regulating healthcare, will immediately vanish. This is inaccurate for a bunch of reasons.

First, laws don't become invalid just because there is an amendment to our constitution. First, there is a court determination of what they are or they are not and even when there is a strict scrutiny like they set up here, that is not a foregone conclusion of what will happen. As the Supreme Court said in *State against Merritt* when it was considering ballot language on gun rights initiatives, that will be for a court to decide later.

Second, just because you have the burden of proof doesn't mean you lose. Usually I am here arguing against that usual presumption of constitutionality asking for a law to be found unconstitutional and sometimes we win

despite that presumption against us, so just not like every law is found constitutional with the presumption against constitutionality applies, not every law will be found constitutional just because the presumption is reversed. Assuming someone wants to challenge a restriction and further assuming they have standing for an issue, they still have to win the case after the state has an opportunity to prove that the restriction withstands scrutiny, and it can meet that scrutiny by showing it is needed to protect or maintain, maintain or improve the health of the patient.

Third, the Secretary, saying in the second point, ignores for Count II heightened scrutiny stops applying for someone, either 24 weeks or fetal viability. Just as the state does now, it could ban abortions with an exception after 24 weeks or fetal viability. So it is from these legal errors that the Secretary hypothesized that there can never be a regulation of abortion. And this will be a recurring theme throughout all these bullet points.

In addition to nullify being wrong about the amendments, probable effect and thus misleading, it is also prejudicial. You can see it is prejudicial by comparing it to other recent examples. Last year Amendment 3 actually forbade certain existing marijuana related laws and future laws and provided no basis on which the government can

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defend them. It preceded to voters without a summary statement, saying that a yes vote can nullify marijuana laws. Instead, the summary statement advised voters that the measure would remove some restrictions. And for the 2014 amendment to Article I, Section 23, which expanded, expanded the limitations on the government's ability to restrict gun rights, the General Assembly wrote its own summary, didn't mention it was going to nullify the law; instead, it said the constitution would be amended to include the declaration that the right to carry arms is an unenviable right and the government is obliged to uphold it. If you are treating these initiatives the same way as that, the summary statement could have been much easier. It could have been, do you want to amend the constitution to declare that Missourians had a right to make decisions about reproductive healthcare, including abortion or including abortion and contraception. There is no rule that you have to use all 100 words. A summary statement like they had in 2014 would be fair and adequate.

The second bullet point is also misleading in suggesting that long-standing laws are a target here. The 2019 law that has now banned abortion in Missouri and before that effectively did so by requiring medically contraindicated ultrasounds, a law that the Secretary misused his authority to prevent the people from taking to

a referendum. There is no doubt that that law, that 2019 law, being able to challenge it, is the purpose of this initiative. It also would, I hope, be able to challenge some of the nation's most onerous restrictions which are unique to Missouri. But even assuming those challenges are also accessible, those laws are recent vintage, they are not a long-standing statute.

The second bullet point is also argumentative in using the term right to life. Our brief goes in to this in some detail. This is a combative phrase best used, best known by its adoption by purpose of abortion and birth control. It is intended -- It is a political phrase intended to provoke an emotional response and it's not a neutral description of the response to the initiative.

The next second bullet point is argumentative with its awkward use of the term partial-birth abortion. It is also misleading. It is argumentative in that partial-birth abortion is not something that has any medical meaning; thus, it means different things to different people. If you can compare a Missouri statute that talks about partial-birth abortion to the dictionary talking about partial-birth abortion, there are big differences. In Missouri it can mean pre-viability and in the dictionary, and common, the best the Supreme Court's understanding in *Gonzales versus Carhart*, it would be very last minute

abortions that would ever use that, but because no one knows what partial-birth abortion is, it is left to the imagination of the voter, so it is a political thing, not a neutral description of the measure. And it is also misleading because there will be a court proceeding at which the state can defend its laws before any restriction is lifted. Every version of the amendment allows restrictions on abortion necessary to maintain or improve the health of the pregnant person and the Supreme Court in *Gonzales v Carnahan* pointed to evidence the way the federal law describes partial-birth abortions would be a risk to, would be a risk to the patient, for the health of the patient. But also by pointing to anyone that would be having such a procedure, it would be after, if ever, it would be after 24 weeks or fetal viability. And as I said before, the state can ban anything at once after fetal viability or 24 weeks.

Also, the other reason the amendment, probable effect of the amendment would not be partial-birth abortions is because federal law bans partial-birth abortions with a statute similar, some with error for sure, but similar to Missouri's, and that is 18 USC Section 1531, and a statute that was upheld by the Supreme Court in *Gonzales against Carhart*. So I guess the key point here that allowing, quote-unquote, partial-birth abortions is not a probable

effect of the initiatives.

So with that, returning to the first bullet point which is again common to all six proposals, it states that the initiatives will allow for dangerous unrelated and unrestricted abortions from conception to live birth without requiring a medical license or potentially being the subject to malpractice, and there is a lot to attack in that, in that bullet point. First of all, dangerous abortions, not dangerous, while continuing pregnancy through childbirth comes with an 8 percent complication rate. Abortions, according to the state's evidence, is a 4 percent complication rate. But that 4 percent is inflated. Our evidence shows it is really only 2 percent; that is in Exhibit GG at paragraph 6. For comparison, in reference to hip replacement surgery, it has a 4 percent complication rate. Even so, the recorded rate complication for Missouri is suspect because of Section 188.052.2 which requires any post-abortion care to be reported as a complication, so Missouri's complications include complications that are not complications. All healthcare -- Of course, because even if it is not a complication, if there is a post-abortion care that is for something other than a complication, it still gets reported as a complication.

All healthcare comes with some risk of complications but abortion is safe. Its risk especially fails in

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comparisons to continuing the pregnancy through childbirth which results in 700 to 900 deaths per year in this country. So even if you set aside the scientific method and science -- And we're not asking for a summary statement that says abortion is safe, just one that doesn't say it is dangerous. Setting aside the science, the initiatives -- the legislators enacted productive healthcare restrictions needed to improve or maintain the health of the patient so they can restrict dangerous abortions. An accurate summary statement would probably say safe. We want one that doesn't mislead.

And here the Secretary shows he doesn't really believe his own healthcare because abortion can be restricted more than any other type of reproductive healthcare, he wants to tell the voters only about dangerous abortions. Does he not care about dangerous contraceptives, dangerous miscarriage of treatment, dangerous childbirth methods? It is not that. He is trying to mislead voters by sticking to things unique to abortion. Dangerous reproductive healthcare though of any kind, including abortion, is not a probable effect of the initiative.

They also want to allow unregulated and unrestricted abortion. I've already described how all reproductive healthcare, including abortion, can be regulated and restricted; thus, telling voters that abortion will be

unregulated and unrestricted is deceptive. It is especially misleading in the five versions when at a point where there is no limit on the government's ability to restrict and that misleading, misconception comes from ignoring the not withstanding clause in paragraph 4 of all its versions except number 2. The not withstanding clause strictly applies to paragraph 3, all of it, so the requirements that any restriction be consistent with standards of care and based on medicine and not interfere with autonomy do not apply after 24 weeks or after fetal viability because they are in paragraph 3 and restrictions allowed in paragraph 4 are not withstanding paragraph 3, consistent with the standards of care based on medicine would be a problem before fetal viability or 24 weeks for ultrasounds during the early period when most abortions occur, that is not only because there is never a medical need to conduct the ultrasound but also because at that early stage at which Missouri would require an ultrasound, the only way to perform an ultrasound is to take the wand and insert it into the vagina and maneuver it inside until it picks up, picks up a sound, and this causes pain and discomfort and no competent healthcare provider would subject a patient to it were they not required to by law, so that restriction would be likely not to be upheld before 24 weeks or before fetal viability depending on the

version.

Afterwards there is no requirement that it be medically based so the legislature could do whatever it wanted. Not interfering with autonomous decision making will provide an additional problem for the Missouri statute that requires providers to supply medically inaccurate and unsupported information about abortion before obtaining informed consent, so literally misinforming instead of informing patients, that is a direct interference with autonomous decision making and that is what is targeted by the requirement and restriction to not interfere with autonomous decision making.

Again, the Secretary does not care about other reproductive healthcare which would be equally, if he is right, impossible to regulate and restrict. It will be more difficult than abortion because there is no -- the presumption has changed. But he knows that is not true and no one would be gullible enough to believe it. Because abortion could and would remain most heavily government regulated and restricted healthcare and abortion even after this amendment, neither unrestricted nor unregulated abortions are a probable effect of the initiatives.

The next argument in deception, the second point, is that abortion is permitted from conception to live birth. So one problem is that abortion is not healthcare available

in either conception or live birth, so these extremes that are imagined are illusory, but medical facts seem to relay political framing all reproductive healthcare, including abortion, subject to restriction and abortion can be banned at a certain point for almost all of them and that remains true.

There is an amicus from the American Law and Justice Center that adopts the Secretary's argument that there can never be a restriction. They cannot resist explaining why saying that, in their view, the exceptions to the General Assembly's related to the reproductive healthcare, quote, swallows the rule, unquote, even though that is really by his argument, is the Secretary knows better than to put it that way because of the Missouri law that we would not interpret exceptions as if they swallowed the rule, most recently discussed in the Southern District case of *Harner against Mercy Hospital Joplin*. And an exception that follows the rule would render the rule one in which is meaningless and superfluous and every word, the court said many times, every word in a constitutional provision assumes to have affect and meaning and none are superfluous . And *Uchner against Bond*, U-c-h-n-e-r, against Bond is a Missouri Supreme Court case with that proposition.

And the lawyers for life when they entered a brief stepped further with the logic of the Secretary's argument

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and intimated, because reproductive healthcare is defined to include postpartum care, maybe it would authorize cloning infants. Now, setting aside for a moment that, much like abortion and live birth, killing an infant is not healthcare that is provided by any practitioner, the lawyers might have a point were the Secretary's argument meritorious. If the exceptions mean that there can be no regulation whatsoever of any decision, then that would apply to postpartum just as much as it would to abortion. But in addition to the other statutory interpretation rules, this one runs into a plethora of cases saying that language is not interpreted in a way that causes a certain response. I think either the Secretary did not think that utilization of incentivize was important enough to mention or even he recognizes that at some level is illogical, is extreme and his argument is absurd.

In reality, these exceptions are narrow and intended to address current circumstances in Missouri before there was a ban and that was multiple non-medically supported requirements that were prerequisite to consenting, making a decision to have an abortion and it directly, therefore, interfered with autonomous decision making, all of which is a way of saying abortion from conception to live birth is not a probable effect of the initiatives.

It is also not probable that abortions could be

performed without a medical license, potential malpractice. Missouri law requires a physician with medical malpractice insurance to perform abortions and the court never repealed that law. If someone were to challenge that statute limiting it to physicians, the state, true enough, would have the burden of showing doing so that is needed to maintain or improve health of the parents. The Secretary assumes the state will not be able to make that showing. Is he right? It seems unlikely to me, but I don't know and neither does he. It is not an issue the court can decide at this stage where we're limited to just fair ballot, but the restriction limiting abortions to procedures that doctors can perform will be upheld if it is needed to protect the health of the patient. If it is not upheld, it will be because it wasn't necessary. But it seems highly more confident than the Attorney General thinks than the Secretary does.

The third bullet point is virtually the same for all initiatives except for Count II. It says that they would allow for laws to be enacted regulating procedures after fetal viability or 24 weeks, depending on the version, while guaranteeing the right of any woman, including a minor, to end the life of their unborn child at any time. So the first phrase, allow the laws to enacting regulating abortions after fetal viability or after 24 weeks, that

does describe probable effect of the initiatives even though we felt that such laws could be banned with an injunction. Again, it is ignoring the not withstanding clause of paragraph 4 that applies the entirety of paragraph 3 that heightened scrutiny that no longer applies. Heightened security that is in paragraph 3 is no longer applies after fetal viability or after 24 weeks because that is in paragraph 4 which says, not withstanding paragraph 3, you may regulate after fetal viability or 24 weeks. So it is important to know, for the voters to know that there are no limits after fetal viability or 24 weeks.

The next part of that bullet point contradicts the first part and says that the initiatives guarantee the right of any woman to have an abortion, including a minor, have an abortion at any time. And I've already discussed, is just not an accurate description. And then including minor, once the initiative passes and the ban on abortion is successfully challenged, minors will have access to abortion; however, it is not a guarantee like the Secretary of State says because Missouri's existing statutes require parental consent or alternative authorization process will still be in effect. And for two versions that requirement -- such a requirement is explicitly allowed. And there is a difference in the medical provider, a

medical provider rather than Judge will determine the patient's capacity to give informed consent moving the assessment from court to don't do medicine to medical providers that take informed consent and determine capacity all day. So it is inaccurate to have them putting in a minor and it is also unnecessary because they are not encompassed by the word woman that proceeds including minors. Again, this is argumentative and being used for emotional response, and it is especially argumentative in that it is wrong, that there are additional restraints placed on minors.

The Secretary says that the measures would allow folks to end the life of their unborn child. For this I would point to Justice Kavanaugh in *Dobbs* and noted that people with good faith feel passionately about whether zygote, blastocyst, fetus or embryo are just that or if it is an unborn child, that is a live debate about which people have feelings and views. The Secretary shares his views in the summary statement but that is not an impartial description. Our brief points out why the phrase is misleading as a matter of law, as a matter of fact, and just basic language. However, this court need not weigh into the debate because the phrase is argumentative. It is certainly not the impartial statement that the Secretary is supposed to produce. The phrase can be stricken.

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Missourians know what an abortion is and they can draw their own conclusion and figure out what it does and doesn't do, it doesn't need the Secretary of State's definition of the word. It is misleading to say that abortion is available at any time, as I described when the Secretary of State says it elsewhere.

The last bullet point that is common to all versions is that the amendment would require the government not to discriminate against persons providing continuing abortion or potentially including taxpayer funding. It is a little mess grammatically and also we thought someone could assist someone obtaining an abortion, something we know that is important. But is especially misleading where it states that there could be taxpayer funding for abortion. Nothing in any other versions state that it required taxpayer funding. The fiscal note itself, not summaries, the note hasn't been challenged. It includes responses from state agencies, local governments, even though one government, Department of Revenue, no agency, none, expects to have to expend funds because the amendment passes and that wouldn't be true if there could really be taxpayer funding of abortions under this measure. This is inserted to create bias against the initiatives by giving voters a reason, even a voter who wants to return to *Roe versus Wade,* to vote no on taxpayer funding and it is disingenuous to

include it, but it is especially disingenuous that the Secretary includes it even in versions of the initiatives that say they do not require government funding for abortions. His able counsel has done the best possible to work around that by submitting an amendment saying government funding is not required means that government funding could be provided but that is not a probable effect of the amendment because it is already true. The legislature already has the authority to fund abortions if it wants to. Currents statutes do not, that could change in the future, but that could happen with or without the initiative. Our constitution is silent about it.

The final bullet point appears in 2024-080. It says the amendment will prohibit any municipality, city, town, village, district, authority, local subdivision, or public corporation that has the power to tax or regulate or the State of Missouri from regulating abortion procedures. I think this is just the Secretary using up his 100 words. So, you know, starting again, it is false to say the State of Missouri would be prohibited from regulation of abortion procedures. As explained from all the other times, the Secretary said the same thing, so it would be redundant to say even if it were true. The regulation of abortion of a local government entity is not recommended because of the initiative. It is prohibited because Missouri has adopted

the law at state level regarding abortion and therefore pre-empted in the area. Cooperative healthcare incorporated in the City of St. Louis, the 2017 Supreme Court decision, is the latest case talking about that, so when it comes to re-writing the fiscal note, that is a remedy that is available here, not just a fiscal note, a different summary statement.

The Court of Appeals clarified relatively recently in *Hill versus Ashcroft*, the summary statement -- I'm going to quote here -- is intended to provided voters with enough information that they are made aware of the subject and purpose of the initiative and allow the voter to make an informed decision as to whether to investigate the initiative further. I submit that that means that not all of the details need to be in a summary statement, just the topic, the general purpose and if a voter is interested they can do further research. This court should replace the language that is bias or argumentative or misleading and replace it with language that is neutral or impartial, non-argumentative and advises of the purpose of the initiative enough that the voter can decide whether to investigate it further. The phrases that causes the summary to be inefficient and unfair are dangerous, unregulated and unrestricted abortion from conception to live birth, without requiring a medical license, without

potentially being subject to medical malpractice, nullify long-standing Missouri law, the right to life, partial-birth abortion, including a minor, in the life, unborn child at any time, potentially including taxpayer funding, and that whole long thing about prohibiting any municipality, city, town, et cetera, et cetera, on the last bullet point, misleading.

So we acknowledge that they will have the greatest impact immediately, these initiatives would have the greatest impact immediately on abortion, and certainly we're not asking for a summary statement that did not mention abortion, but absent any reference to reproductive cause healthcare beyond abortion is insufficient because it would cause the voter to believe the amendment is only about abortion and no other healthcare, just that one type of healthcare. And it is especially problematic when it may share the ballot with an initiative that is limited to abortion. Further, the phrase that would require the government not to discriminate is a confusing phrase that will cause confusion and should be changed to, if it stays in, prohibit discrimination.

So we understand that the Secretary is personally vested in proposing these initiatives but his job is to set aside his personal views and provide voters with a neutral summary; instead, be provided a script for a campaign ad

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against them. We ask this court to do what the Secretary failed to do and write impartial, neutral statements that summarize the initiatives and certify them to the Secretary of State.

THE COURT: Mr. Lewis.

MR. LEWIS: Good morning, Your Honor. And may it please the court.

Plaintiff's initiative petitions would roll back Missouri law to a pre-*Dobbs* Missouri that frankly goes even far beyond it. Listening to my friend Mr. Rothert's argument this morning, I think it is very good evidence why Missouri law rightfully does not allow its proponents to draft their own summary statements and why this court should look only at the Secretary's language in light of what the plain text of the initiative petitions say. Initiative proponents understandably would like to persuade voters to vote for their measure. And I think if Your Honor were to look at the proposed alternative statements that the ACLU has submitted in their petitions filed with this court Your Honor would see how those proposal alternative summary statements hide the ball, and I think listening to the argument this morning and reading Plaintiff's pre-trial briefs also show how their argument hides the ball about what these initiative petitions will actually do.

I think one thing that Mr. Rothert and I agree on is what the standard for these cases are. And the standard is, does the summary statement give voters sufficient notice as to the purpose and the effects of the initiative petitions. And as this court knows, courts are differential to the Secretary of State's considered draftsmanship choices as there are conflict interpretations of how to summarize a text. The Secretary's summaries here are, some of those, in many ways in which the initiative petitions can be summarized. The standard for that is *Asher v Carnahan,* which Mr. Rothert mentioned, where the Court of Appeals said that ten different writers would produce ten different versions, and there are many appropriate and adequate ways of writing the summary ballot language. The Secretary's summaries here are to some of those many ways, but what sets the Secretary's summaries apart from Plaintiff's alternative summaries is that the Secretary's summaries actually do summarize and convey to voters the massive loopholes in the initiative petitions that grant access to effectively unregulated and unrestricted abortions in Missouri and that each of the measures has critical provisions that will render any law making impractical if these initiatives were to become law.

And, Your Honor, first I would like to talk about those loopholes and how available abortions will be in

Missouri. It will be to agree more than they ever were pre-*Dobbs* decision, so I will walk the court through exactly what the initiative petitions say. And then from there I will talk about why this court should defer to the Secretary's summaries and explain how they neatly well establish a text for fairness and sufficiency and that, of course, is because the Secretary, unlike the Plaintiff's alternatives, actually explain to voters what the probable effects are of the initiatives and, of course, as the probable effects standard from *Brown* and many other cases that should guide this court's analysis.

So walking through the initiative there are six of them. They have many commonalities. The first commonality is that all of them say in subsection 3 that, quote, any, any denial, interference, delay or restriction of abortion rights is presumed invalid. Presumed invalid is from the plain text of the initiative petitions. Any denial is presumed invalid. Any interference is presumed invalid. Any delay is presumed invalid and, again, any restriction is presumed invalid. That is all in subsection 3 of the initiative petitions.

But Missouri, as the court knows, has dozens of laws that regulate abortions. And I also want to call this court's attention to, and I think this court will hear argument later today for the fiscal note portion of the

case, the Department of Health and Senior Services itself noted that the abortion initiative petitions will likely validate regulations and laws. So this is certainly not new for the Secretary of State to be the first to express many concerns about what this initiative will do and, again, that comes from the plain text of subsection 3, presuming they are invalid. Missouri has dozens of those laws. Missouri prohibits abortion on the basis of sex, race or Down's Syndrome. It prohibits abortion for unborn children that can feel pain. It has gestation-age requirements. It has fetal heart beat law and certainly has informed consent law, those are just some of the measures. And Missouri law makes it clear that life begins at conception.

Are these interferences, are they delays, are they restrictions or are there no restrictions? There are laws that govern the availability of abortion but under these initiative petitions subsection 3 validates them. Mr. Rothert talks a lot this morning about burden shifting. Your Honor, I'm not aware of any Missouri constitutional provision that alligates and says laws are invalid. Normally there is a presumption of validity of the laws and if the challenger is able to overcome certain scrutiny hurdles, a law may then be declared invalid by a court in the normal course of litigation. Here the exact opposite,

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I think it probably first of its kind where laws are actually fully deemed invalid. What does that mean? Unless the General Assembly tries to pass a law to overcome all these hurdles, right off the gate they are presumed invalid. Are they enforceable on August 28th of a given legislative year? I think the best answer, probably no. That is what the initiative petition says, they are presumed invalid. So that is the baseline commonality, one of many, between all the initiatives, presumed invalid, again any denial, interference, delay or restriction.

The second commonality is that all initiatives, subject to any law in this stage, whether they are presumed invalid or not, are subject to the strict scrutiny standard. All laws must have a compelling governmental interest to survive but, again, I think this even assumes that maybe the law is valid because we have a baseline that they are invalid to begin with, but there is a strict scrutiny review in here. All laws must have a compelling governmental interest to survive the initiative to define what the compelling governmental interest is. Again, it is a fairly nominal proposition for the constitution to have a say in what the governmental interests are. They are virtually narrow, but the big one here is that the initiative bound a universe of governmental interests and those interests must be defined to include not infringing

on the person's autonomous decision making.

What is missing from that definition? The health and well being of the unborn child. But Missouri law currently makes it, already Missouri law right now in section 1.205, currently makes it a compelling governmental interest to value the life of every unborn child. That already is a governmental interest under Missouri law. I think we have to presume it to be invalid under these initiative petitions.

The initiative petition goes further, any law must not infringe on a person's autonomous decision making. The US Supreme Court has made clear that states do have a compelling governmental interest in promoting life. It comes from *Casey*, it comes from *Webster*, and the Secretary is correct that the initiative petitions would likely, at this rate Missouri's current compelling governmental interest like in 1.205, like in 188.027, likely making any current fetal viability or gestation age relevant in Missouri law or under the initiative petitions. And to require any abortion law to be enforceable only if it does not infringe on a pregnant mother's autonomous decision making what almost would certainly allow abortions at any point until conception or life. At least there is a very probable consequence which is the standard of these cases is, of the initiative petitions, the Secretary properly

conveyed a summary statement.

I think here is an example to prove the point. Hypothetically even if there's a law prohibiting abortions within, lets say, the final two months of pregnancy, gets passed every other roadblock, gets passed the presumed valid roadblock, gets passed the scrutiny roadblock, gets passed all those roadblocks, if a pregnant mother autonomously decides in those final month or two of pregnancy that she would like to have an abortion that that law would presumably not survive under the initiative petitions because it would be a compelling governmental interest, a compelling governmental interest must not infringe on a pregnant mother's autonomous decision making.

A third commonality, which is shared by five of the six measures, all but 078, is that even if all the laws survive all the hurdles as mentioned, subsection 4 of those five initiative petitions states that, not withstanding everything else, there can be regulation, so perhaps there could be some regulation -- Mr. Rothert talked about this -- but ultimately under no circumstance shall the government, quote, deny, interfere with, delay or restrict an abortion that in a good faith judgment of a treating healthcare professional the abortion is needed to protect the life or physical or mental health of the pregnant person.

There is a few issues with this. The Secretary tried to convey this in the bullet points in the summaries. 401, subsection 4, does not define what a treating healthcare professional is. That category of individuals undefined as it is is likely not limited to obstetricians or gynecologists and does not seem to limit the category of healthcare professionals to those even treating the pregnant mother or her pregnancy. I think worse yet, subsection 4 allows any treating healthcare professional to make an assessment of the necessity of an abortion based on the pregnant mother's mental health. That comes directly from subsection 4 of the initiative petitions, a carve out for a mental health determination an abortion could be appropriate for the pregnant mother. So psychologists or psychiatrists seemingly can make a determination that the mother should have an abortion, even after fetal viability, if the abortion is needed to protect the mental health of the pregnant person. And that clause, subsection 4 here, overlies what was in subsection 3. Subsection 4 begins with the sentence, not withstanding the above, not withstanding subsection 3, not withstanding all we talked about before, if, quote, a treating healthcare professional, undefined as that phrase is, determines that it is appropriate for the mental health of the mother to obtain an abortion seems to be law.

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With that, Your Honor, it is clear by reading the plain text of these measures that Missourians must be informed of the drastic affect that it will have on Missouri law. It was fair for the Secretary to summarize these measures as allowing abortion from conception to live birth if unregulated and unrestricted abortions will be allowed. And the Secretary also characterized these as allowing, quote-unquote, a dangerous abortion as stated in the bullet points of the summary statements and publically available and judiciary noticeable evidence supports the use of the term dangerous in the bullet points.

For a couple reasons, first, it should go without saying that performing these procedures without any guidelines with presumed invalid laws and regulations would be dangerous; that should just speak for itself. In an unregulated landscape, that is a probable effect of initiative petitions. But even pre-*Dobbs*, pre-*Dobbs* in 2022, before that era, when abortions were allowed less restrictively than they are now, there were complication rates of at least 4 percent. I think Mr. Rothert identified 4 percent and he characterized it as over inflated. I think the evidence that we have in our joint stipulations actually shows it is quite the opposite of the 4 percent but probably much higher given under reporting concerns which were discussed in our brief with this court.

And since the initiatives were deemed invalid, any restriction or interference, it seems that requirement that abortion providers have any privileges to hospitals, assumingly that might interfere or delay with abortion care and seems to be an invalid requirement.

The Missouri Department of Health and Senior Service Director has an affidavit in another case, which is in the joint stipulations, talking about the importance of continuity of care, a requirement for making privileges of hospitals, and those are all gone. I think it is just a logical inference the complication rates would certainly increase. Dangerous speaks for itself. I think the evidence makes it clear as well.

Beyond that, the case law supports the use of the word dangerous. In the *Dobbs* case, the majority opinion there is references to dangerous procedures. And this is from *Dobbs*, where *Dobbs* found that most abortions after 15 weeks employed dilation and evacuation procedures. There is a case from the District Court of Connecticut that we also reference in our brief that talk about the history of abortion laws and how they were designed to promote the health of the mother, the unborn child and the dangerous landscape before restrictions on regulations which would be the case in Missouri after the initiatives. And we don't think that dangerous is pejorative. We don't think it is a

biased additive. I think, Your Honor, it would be akin if there were hypothetically an initiative petition that pertains to felonies and included illicit, like murder or armed robbery, and the Secretary decided to summarize those crimes as, quote-unquote, dangerous felonies, that is a pejorative term, not a bias term. It is a normal descriptor and it was adequately used to describe the unregulated landscape that these initiative petitions would effectively create.

I would like to spend some time, Your Honor, talking about taxpayer funding. I want to express at the outset that for this argument the summary statement notes, quote, potentially including taxpayer funding. The summary statements do not say mandate taxpayer funding. I think at least listening to the argument earlier this morning, that was certainly my takeaway, is that is perhaps what the summary statement says, they don't, they say potentially including taxpayer funding, so I want to clear that for the record, that is what the summary actually says. That is fair and sufficient for several reasons. Taxpayer funding for abortions is subject to significant dispute by individuals interested in this topic. And, again, under *Brown,* and many other cases, Missouri voters should know what the legal and probable consequence of initiatives are. Here it is why it is a probable consequence that there

could be a potential for taxpayer funding of these procedures.

First of all, there are four initiatives, numbers 78, 80, 82 and 86, that contain no mention of taxpayer funds whatsoever. They are not in there anywhere. So the Plaintiff's takeaway is that that could possibly also include taxpayer funding for abortions. And that definition is enough to include the taxpayer funds for the other to, 085 and 087, state that nothing in this section requires government funding of abortion procedures; therefore allowing for the possibility of it, you're stating that nothing requires government funding, then government funding could be a result of legislature might needing to mandate under these initiative petitions.

Clearly government funding is permissible. As the summary statements adequately convey potential, the potential allows for taxpayer funding. And it is especially fair to include in the summary statements given the plain text of the non-discrimination provisions in the initiative petitions and other restrictions on the government's ability to deny or infringe upon a person's fundamental right, so one person might think that is an interference or restriction on their right to obtain an abortion if they are not covered by this Medicare or some other healthcare funding, they are not able to get this

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through funding, that that person could presumably make the argument, likely successfully, that it would be an interference or delay on the right to obtain the abortion if it is not covered under state healthcare costs, so we think it is clear that these initiatives do allow for the potential for governmental funding.

Your Honor, those are the highlights I would like to, I think, cover today. It was fair and sufficient for the Secretary to use language that he did. The initiative petitions do highlight all the central features of the measures. Mr. Rothert spent some time this morning talking about other forms of reproductive healthcare freedom, such as miscarriage care, prenatal care, postnatal care, and those are not essential for the initiatives. These initiatives are being circulated for proposal placement on the ballot next year and the weight of the *Dobbs* opinion is certainly, I think, the central feature of a topic of abortion and the Secretary's summary statement adequately conveys all the loopholes and drastic effects the initiatives will have if these initiatives were to go in to law. And I think both the arguments earlier this morning, as well as the Plaintiff's proposed alternatives, highlight why the proponents, who have a personal bias in favor of having voters persuaded to vote for the measure, should not be at the driver's seat to draft their own language for

these measures. The critical question is whether the Secretary's summary statement adequately conveyed the probable effects and measures. They do.

And finally, Your Honor, as a brief housekeeping matter, the joint stipulation of facts, the parties reserve the right to object to relevancy and weight for certain exhibits. I would just like to make for the record objections as to the relevancy and weight of certain exhibits in there. Of course, we stipulated to the foundation of the exhibits, but I would like to make an objection on the record to Exhibit BB, that is a House amendment for a bill that I believe from last legislative session. A House amendment has no relevancy or weight to determine the accuracy of the summary statements here.

Exhibits CC through LL, those are filings in a United States District Court case and, Your Honor, we think that those filings are not relevant. They should be given no weight. The Secretary has also offered some exhibits from that case. The Secretary's exhibits in the record from that case do show why the Secretary considered language here is fair and sufficient and why those probable effects are there, but Exhibits CC through LL do not do the same thing.

And, finally, Exhibits MM through RR, those are, I believe, six other initiative petitions that were recently

submitted to the Secretary of State's office from a different proponent. There is no certified initiative ballot title. We think it is irrelevant and insufficient and there is no weight to be given to the court's analysis of the summary statement for this case.

Unless the court has any questions --

THE COURT: Let me make sure I get this point down here. There were two proposals that exclusively say government funding is not required. And if I understood you correctly, you said, well, it is non-discrimination in seven and then we have this no explicit funding in eight, so how would you construe those two statements to give them both meaning as required by the rules of construction under Missouri law?

MR. LEWIS: Right. Your Honor, I think it is challenging based on how these are currently drafted. I think the best canon is one against superfluidity, what is right of the legislature -- of course, this case is an initiative petition -- but normally you would think the legislature is not frivolous or redundant. And here you do have a provision stating that on the one hand that there is nothing mandating taxpayer funding -- of course, I think two petitions have that -- then the converse is certainly true; otherwise, why would that provision be in the constitution if not to allow the possibility of just not

simply mandating it.

THE COURT: You made the argument that the government pays for some reproductive healthcare, that it can't discriminate against other reproductive healthcare.

MR. LEWIS: That is possibly a consequence of this. Again, Your Honor, the challenge here is parsing through the language that to some degree might be self contradictory. What the Secretary wanted to do was to convey at least there would be a possibility of taxpayer funding for these procedures for two reasons. One is, the plain tax I just mentioned, where the constitution says there is no requirement for that --

THE COURT: There could be taxpayer funding.

MR. LEWIS: Could be. The second reason is, all that is still subject to the general restriction against lawmaking that will interfere or restrict or delay abortion care, so that would be like medically someone saying, hey, I want -- a pregnant mother might say I would like to obtain an abortion, I don't have enough money to pay for it, any law that prohibits me from getting funding is presumed valid and I should be able to obtain funding for that remedy from the State.

THE COURT: Just out of curiosity, you said, if I understand you right, you talk about there is no requirement for government funding but there could be

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government funding.
MR. LEWIS: Yes.
THE COURT: How would that happen? This amendment would not require, would not create that government funding. Wouldn't the legislature have to --
MR. LEWIS: That is correct. Seemingly they would go through the general appropriations process with the legislature. But, again, the Secretary's language here in the summary is very important. It states, including the potential for taxpayer funding by the abortion, that is not --
THE COURT: That would be a function of the General Assembly, wouldn't it?
MR. LEWIS: Right, it would be. I think the summary statement adequately states this, that there would be no laws that could interfere or infringe on the rights to abortion, potentially including the right to taxpayer funding abortions do.
THE COURT: Okay.
MR. LEWIS: Thank you, Judge.
THE COURT: On the summary statement, anything else, Mr. Rothert?
MR. ROTHERT: Just a couple of things.
The speech restrictions are presumed invalid, presumed unconstitutional, enforced all the time. They are presumed

invalid, not that they are invalid. The need to have that whole text about compelling government interest if they were automatically invalid.
I just want to point out that all those hurdles they talked about, compelling government interest and the presumption, are in paragraph 3, and paragraph 4 says not withstanding paragraph 3, the General Assembly may enact laws that regulate abortion after fetal viability. None of those hurdles apply. That is not what withstanding means, that ignoring paragraph 3 you can regulate after, after abortion.
I will admit that we do not require an obstetrician or a gynecologist to make the decisions about whether or not there is an emergency enough for an abortion, that is true, but neither does current Missouri law require for emergencies which allow abortions in cases like saving the life of the mother is not required for an obstetrician or gynecologist to be the person making that decision then.
As to the admitting privileges at hospitals, you know, their evidence standing alone that they submitted is medically necessary for the health of the patient and so if that is what the evidence is, then that would be upheld at any point during pregnancy but certainly fetal viability and after fetal viability and abortion.
I agree frankly with Mr. Lewis that the proponents

shouldn't be writing summary statements. We include one because the statute requires it to be included in the petition. But neither should opponents and that is what has happened here, is the opponents have written the summary statements, and we would ask the court to --
THE COURT: This takes us to Mr. Belz.
MR. BELZ: I will defer to my co-counsel, Mary Catherine Hodes.
THE COURT: Okay.
MS. HODES: Thank you, Your Honor. I'm Mary Catherine Hodes, and I'm here representing three Missouri citizens who object to the fiscal note summary that has been offered by the Auditor relevant to the aforementioned initiative petitions and, in fact, not just the six that have been discussed but all 11 as both insufficient and unfair. I do think that --
THE COURT: All 11. I don't -- There is five other petitions.
MS. HODES: There are a total of 11 initiative petitions that have all been summarized in the fiscal note summary identically. And I do have a red line of the fiscal note summary.
THE COURT: I'm confused. I've not looked at your petition. Are those 11 cases covered in your petition?
MR. BELZ: Yes.

THE COURT: Okay. I'm fine.
MS. HODES: Would the court like this red line?
THE COURT: Certainly.
MS. HODES: As the court is aware, I'm sure, the same standard applies to the fiscal note summary as applies to the summary, at least in the statute that the fiscal note summary must be both sufficient and fair. And in the case of the fiscal note summary which is supposed to be -- In the case of the fiscal note summary, what it is supposed to be sufficient to do is to state the estimated costs or savings, if any, from the adoption of the measure, that is under the statute, and the Supreme Court has further stated that it should advise the voters about the potential costs or savings from the adoption of the measures and further state the fiscal consequences of the cost of the potential measures.
You'll see in front of you that the fiscal note summary, all 11 of these initiative petitions, is identical. And we're here to argue that it is both insufficient and unfair. Specifically the first argument I would like to bring to your attention is that the use of a very specific figure in the fiscal note summary, the way it is used, is insufficient because it, not only is it inadequate to advise voters, it inaccurately misleads them. Specifically the summary reads, local government entities

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estimate costs of at least $51,000 annually in reduced tax revenues.

We argue in our brief and here to the court to consider that $51,000 is inadequate in two ways. One, because it is just too specific to be the foundation of any kind of generality like at least or around. The use of very specific figures suggest that someone did very specific calculating and, therefore, is an indecision on the reliability and draws the voters to rely on it as an actual estimate as opposed to, if you were to say at least even $50,000 or at least $100,000 or at least $200,000. The use of a round number in an estimate is consistent with it being an estimate. Using very specific numbers indicates very specific calculations. In using that number in this case confuses more than anything. It causes the voter who is reading that, and caused me when I first read it, to wonder what possible local tax could correspond across the state with $51,000. $51,000 is the cost of a midsize SUV, not the cost of a statewide tax. And so it fails to inform voters.

There is a good reason that it is too specific because it is the product of very specific and careful calculations produced by one county. Now, the problem here is not the submitter is one county. The problem is that the calculations that the county used were based on

approximately 1.5 percent of the total abortions in Missouri in the year they were using numbers in 2020, so that $51,000 corresponds to what Greene County's clerk estimates using actual numbers based on their sales and property tax. It would be a loss to Greene County in one year, the first year, in which 135 abortions, which is how many were performed according to the statistics on Greene County's residents in 2020, in one year they would lose approximately $51,000 in sales and property tax revenue. That number is very specific because it uses actual value related to this very small percentage of lost citizens.

What it doesn't represent is what Greene County predicts is the impact of these initiative petitions. It is only what they said would happen in the first year. Greene County itself points out that that number would say that is inadequate. Not only is it too specific, it's too low, vastly too low in correspondence to the 1.5 percent of the abortions and it is too low in terms of time. It estimates only what will happen in Greene County next year. And even the Greene County Commission points out that those numbers would increase annually, double, triple, quadruple each year and then start to compound once the effect became generational, and that is only in Greene County. And because of that, because of the vast under estimation that results from using this very tiny number and also the

confusion from using this very specific number, we suggest in our proposed fiscal note summary that the estimate to local government entities be rephrased in this way. Local government entities estimate costs due to reduced tax revenues which across the state could be estimated to cost millions of dollars annually. If you use the numbers by Greene County or any number relating to actual abortions on Missouri residents in 2020 and you multiply it by the very modest number Greene County used or you could use in a different county, you easily get to several million dollars of loss and, again, that would only be in the first year and it would compound year after year after year.

There is an argument, I believe, in one of the briefs that says that that cost would not be immediate because these tiny residents would not pay taxes until they were adults. We would also urge the voters to consider that these are sales and property taxes and sales and property taxes are vastly influenced, at least in my home the sales and tax that we pay are 90 percent function of our children, that you pay sales and property taxes toward your children or on behalf of your children before they even count by buying a bigger house, buying diapers, lego sets and school uniforms, so these figures would be impacted long, long before these citizens became adults.

Moving on to another section of the fiscal note

summary. We also object as both inefficient and unfair to the last sentence of the fiscal note summary, which reads, opponents estimate potentially a significant loss to state revenue. The Auditor argues that that is technically correct, so at least to $51,000. But that doesn't mean that it advises voters or that it adequately states the fiscal conditions or in this case it synopsizes the fiscal note, which is another obligation of the fiscal note summary, it must fairly and sufficiently synopsize the fiscal note.

The fiscal note of this case included five submitters or the Auditor received five submissions regarding the risk to federal Medicaid funding, federal funding especially related to Medicaid opposed by the impact outlined by the Attorney General's office on Missouri's abortion access, specifically the possibility of taxpayer's money for abortions which is specifically addressed in two of the six initiatives that were discussed earlier and conspicuously not mentioned in the other four, leaving open the possibility that it would be a consequence of those four petitions that we would have taxpayer funding for abortion. And, also, the non-discrimination provisions and the other provisions that could be used to implicate healthcare workers, Catholic hospitals and all kinds of people protected by federal conscious rights, and these five

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fiscal submissions to the Auditor, which he chose not to include in the fiscal note summary, they all reference past enforcement actions by the federal government on the basis of conscious protections and on the basis of mandatory insurance coverage for abortion, and these are all possible implications of these constitutional amendments. These are not just laws. They are constitutional amendments, which means that, if they were to become law of our constitution, we must assume they are going to be enforced for the foreseeable future in Missouri and that we must accept the consequences of their enforcement under any manner of federal enforcement authority of an under estimated abortion policy, so is it fair to look at the past to predict the future and to see that the federal government does enforce regulations protecting some of the people affected by this constitutional amendment in Missouri and that they enforce it by withholding funding and that that is a power they have and we need to be aware they might use it, so we think it is inadequate to advise Missouri voters by the fiscal note summary by excluding any possible mention of a huge amount of money and the huge effect it would have on Missouri if we lost our federal funding or some measure of it as a result of these constitutional amendments without consequences of them.

And, moreover, to exclude these five submitters we

think render the fiscal note summary unfair because they were -- because these suggestions, which were legitimately raised and documented by five legitimate submitters, were dismissed as a result of what the Auditor described as careful legal analysis and that they failed to have sufficient legal analysis, they didn't describe sufficient immediate impact that it would have on current federal law, and overall he just imposed a standard on these five submissions that he didn't impose anywhere else. For instance, on $51,000 or any of the state submissions he insisted that he could not review those for anything except basically completeness and it wasn't his place to second-guess any other submitters. But then when he went to synopsize the fiscal note summary he excluded one of the most commonly submitted comments in one brief, 12 pages of careful legal analysis, and we think that the differences in treatment between the comments that he disfavors and the comments that he preferred to use is clear and shows bias and prejudice.

And if you were looking for evidence of that, you could also look at that sentence I quoted, opponents estimate a potentially significant loss to State revenue. Presumably there would be a way to summarize the legitimate contributions invited by the General Assembly of the members of the public who submitted a fiscal impact

submission other than these submissions of opponents, and using the word opponents necessarily invites skepticism, it suggests non-neutral and non-economic motivations for their calculations. He follows it with the words estimate which is not a fair characterization of what they did. They did not estimate the serious consequences that they mentioned would happen, they predicted them. They recounted the -- They predict serious impacts to the state healthcare system as a result of unregulating abortion and simultaneously making it more widely available and all the follow-up care that results from complications from abortion and the effect on conscientious workers who cannot participate in abortion no longer being willing to work in Missouri healthcare facilities. These are not hypotheticals or estimates. These are predictions based on experience of the consequences of liberal abortion access in other states and in known circumstances.

They also -- He goes on to say upon this estimate a potentially significant loss. There is nothing potential about the loss to the state, nothing potentially significant about the losses to the state from serious impacts on the healthcare system, loss of huge numbers of citizens, and even in the federal -- in this case the federal Medicaid, there are concerns about the loss of federal Medicaid funding. There is nothing potentially

significant about it. It is a potential loss but it will certainly be significant to use the word that was submitted in a fiscal impact statement in 2019 when the Auditor did eventually include in her summary the possibility that an abortion restriction in Missouri would imperil federal Medicaid funding.

The City of St. Louis' impact submission in '19 called the possibility of loss of support from the federal government for Medicaid potentially calamitous. It is not potentially significant, they called it calamitous. And we think the conclusion in that last sentence of three separate words inviting skepticism about the estimates submitted by these legitimate submitters is unnecessary and also shows bias and impartiality.

As a result of all of these failures to be fair or sufficient, we suggest the sentence I read to you earlier and in the second sentence we suggest as a part of the fiscal note summary is, in addition, revenue losses to the state and additional healthcare costs to the state are unknown but could be billions of dollars annually. This is not an exaggeration of the actual submissions made by multiple submitters, and not just opponents, and the Auditor is charged with synopsizing the fiscal note and this adequately synopsizes the fiscal note. We don't argue this is the only way that one could adequately synopsize

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the fiscal note, but we don't think that anything would include the number of $51,000 to defer the statewide impact on taxes of losing thousands of citizens and we don't believe that these words that invite skepticism about other submissions will be included in an initiative petition.

Thank you for your time.

THE COURT: St. Louis submit the calamitous comment again.

MS. HODES: St. Louis submitted that comment when it referred to -- It actually cited past loss of federal --

THE COURT: Did St. Louis submit the calamitous --

MS. HODES: They submitted it to a 2019 --

THE COURT: They didn't submit it on this petition?

MS. HODES: Oh, no. Nor do we use that term.

THE COURT: If you had a million Missourians all sign a post card summarizing your position on this, does the Auditor give that any different weight?

MS. HODES: Do you mean if someone took a poll and submitted a --

THE COURT: What I'm saying is, you talked about 12 legitimate, you know, comments were made.

MS. HODES: I see.

THE COURT: Are you telling me somewhere that the number of comments makes a difference, they are all saying the same thing?

MS. HODES: No, Your Honor. I didn't mean to suggest that there would be some kind of accumulative effect but merely the fact that five different submitters in not a very large pool submitted the same comment makes it particularly insufficient that it is not included in the note summary that is supposed to synopsize the contents of that fiscal note.

THE COURT: A million Missourians all send in a post card and said I agree with you, that is something that should be noted by the Auditor?

MS. HODES: Not at all. If a million people submitted the same comment to the fiscal note and it was all included in the fiscal note, the synopsize of the fiscal note would be inadequate without mentioning that that many submitters said that.

THE COURT: Well, is it the number of submitters?

MS. HODES: Well, the Auditor does have a role in considering the reasonableness of the submission but when he describes that role to other submitters that bar is very low and when he exercises that role related to these five submitters it was very high and I think that suggests bias and impartiality. I'm not suggesting that he doesn't have a role or that the number of them is -- Two of them were state actors. The Attorney General and governor both expressed the opinion as three pro-life submissions.

THE COURT: Okay. Pre-*Dobbs*?

MS. HODES: Pre-*Dobbs*.

THE COURT: What was the exposure for Missouri on conscious objectors?

MS. HODES: I am afraid I cannot answer that question. I don't know if any of the others can.

THE COURT: And then --

MS. HODES: I don't know of any enforcement.

THE COURT: All right. But clearly what is being proposed looks like pre-*Dobbs*, at the very least pre-*Dobbs*?

MS. HODES: Oh, yes. Yes.

THE COURT: Okay. And then the billions analysis is the analysis that we're jeopardizing Medicaid funding or we could be jeopardizing the Medicaid funding?

MS. HODES: Right. Maximum Medicaid funding. This year Medicaid funding is $12.5 billion.

THE COURT: Are there any other states that have lost their Medicaid funding? There are a number of states that have liberal abortion policies.

MS. HODES: Right. There are two state enforcement actions in the record, California and Vermont, that had their Medicaid funding -- an enforcement action in which their Medicaid funding was at risk. The enforcement actions with the change in administration were withdrawn.

THE COURT: Okay. Thank you very much.

MS. HODES: Thank you.

THE COURT: For the Auditor.

MR. TILLMAN: Thank you. Good morning, Your Honor. May it please the court.

The party challenging the official ballot title also has the burden of showing why a fiscal note or fiscal note summary is unfair or insufficient. Petitioners have failed to meet this burden. For the convenience of the court, I will go through the fiscal note summaries for the initiative petitions sentence by sentence and address Petitioners respective arguments for each.

The first sentence on the fiscal note summary states, state governmental entities estimate no cost or savings but unknown impact. Petitioners incorrectly argue that the first sentence of the fiscal note summary is problematic because the fiscal note summary failed to reflect the multiple submissions that stated a substantial risk would exist to the state's federal Medicaid funding if voters approved a state abortion law that conflicts with federal law. But the respective submissions have failed to provide any explanations setting forth what provision of each initiative conflicts with federal law to create such a risk. Based on the Auditor's experience in state government, his overall knowledge and understanding of the state budget and his review of federal Medicaid funding

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requirements, state and federal law pertaining to government funding of abortion, the provisions of the proposed measures and other relevant law, the Auditor determined that the measures do not jeopardize the state's federal Medicaid funding. The Auditor's determination was further supported by the MO HealthNet Division, the entity responsible for managing the state's Medicaid program and the de facto expert regarding the state's federal Medicaid funding stating through the Department of Social Services fiscal impact submission to the Auditor that it did not anticipate a fiscal impact as a result of the measures.

Additionally, after the Attorney General mistakenly asserted that the state's federal Medicaid funding would be at risk, the Auditor reached out to the directors of the Department of Social Services and the MO HealthNet Division who declined to revise the original fiscal impact submissions. After being given two opportunities to say that the state's federal Medicaid funding would be in jeopardy and not doing so indicates that the Department of Social Services and the MO HealthNet Division also know the initiatives will not result in the loss of federal Medicaid funding. And stated in *Brown v Carnahan*, *Sinquefield v Jones* and both Missouri Municipal League v Carnahan cases, if the Auditor finds a suggested impact unreasonable, he gives it less weight in preparing a fiscal note summary and

may exclude it.

In regard to the claims that state's federal Medicaid funding would be jeopardized by the measures, the Auditor, after performing is aforementioned review and receiving the Department of Social Services and the MO HealthNet Division's fiscal impact submission, determined the claims to be unreasonable and therefore excluded them from the fiscal note summaries. Now Petitioners point to a 2019 fiscal note summary drafted by Auditor Galloway for a referendum of HB 126 which effectively banned nearly all abortions in the state as support for substantial disallowance of the state's federal Medicaid funding will occur if voters approve a state abortion law that conflicts with federal law, but Petitioners argument is dubious because they have failed to show that Missouri has ever been threatened with or otherwise faced a federal Medicaid disallowance before or after HB 126 took effect and Section 188.017 in 2002 because, in fact, such has never occurred.

Besides the fiscal note summary for HB 126, Petitioners have failed to offer any further insight as to why the state's federal Medicaid funding would be at risk due to the measures, and Petitioners have failed to identify any state that has ever been subjected to a US Department of Health and Human Services imposed disallowance in any amount due to a violation of the

federal amendments that pertain to abortion.

Petitioners also mistakenly argue that the Auditor failed to include the Department of Health and Senior Services submitted petition for fiscal impact in the fiscal note summaries. In its fiscal impact submission to the Auditor the Department of Health and Senior Services discussed that the measures could potentially, one, void most or all of Chapter 188 which pertains to the regulation of abortion; two, remove the Department's authority to regulate abortion facilities; three, negate administrative rules; and four, expand the practice of abortion and the number of abortion facilities in the state and that due to the aforementioned factors stated the proposed constitutional amendment has an unknown impact on the Department. In the fiscal note summaries the Auditor used the very same language used by the Department of Health and Senior Services, unknown impact. Repeatedly the courts upheld that the word unknown is language not likely to cause bias, prejudice, deception or favoritism for or against a measure and that the use of unknown in a fiscal note summary is fair and sufficient. As such, the fiscal note summaries fairly and sufficiently describe the potential costs or savings of the measures that are recorded by the Department of Health and Senior Services.

Petitioners further appear to wrongly argue that the

Auditor should have rejected the Department of Revenue's submission of unknown fiscal impact because Petitioners believe the state will suffer a loss in state revenue. Similarly to the MO HealthNet Division with regard to Medicaid funding, the Department of Revenue as the central collection agency for taxes and fees due and owing to the state, the de facto expert regarding the state's tax laws and tax revenue streams, and again after the Attorney General raised his mistaken concerns, the Auditor reached out to the Director of the Department of Revenue who, just like the Director of the Department of Social Services and the MO HealthNet Division, declined to revise the Department's original fiscal impact submission. Due to the Auditor having no obligation to independently develop an estimate of the measure's impact on state tax revenues as held in *Boeving v Kander*, the Department of Revenue's expertise and knowledge of state taxes and state's tax revenue and because the submission addressed and did not diverge on the issue of the measures, it was reasonable for the Auditor to not discount the Department of Revenue's submission. The fiscal note summaries for the initiative petitions included all fiscal impacts recorded by state governmental entities, excluded information found unreasonable by the Auditor and expressed the potential impact to state governmental entities in language that was

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adequate and without bias, prejudice or favoritism. As such, the fiscal note summary's first intent fairly and sufficiently characterizes the potential costs of the initiative petitions as recorded by the state governmental entities.

Next, the second sentence of the fiscal note summary states, local governmental entities estimate costs of at least $51,000 annually in reduced tax revenues. The Petitioners incorrectly argue that the second sentence of the fiscal note summary is flawed because the Auditor didn't vote, ignored the fiscal impact submissions of all local governmental entities other than Greene County and applied the economic methodology of Greene County to the entire population of every county in the state. Petitioners argument fails because, first, the statutory time line for the Auditor to review fiscal impact submissions and draft fiscal notes and fiscal note summaries is not sufficient to analyze every economic theory contained in received submissions, much less extrapolate a single entity's assumptions to thousands of different political subdivisions, each having different levels of taxation, fertility rates and numbers of citizens who may seek an abortion. And, second, it would be inappropriate for the Auditor to apply Greene County's economic theory to other political subdivisions when no

other subdivision provided a similar analysis. As stated in *Brown v Carnahan*, it is not the Auditor's role to chose a winner among these opposing viewpoints by independent issues themselves, double checking economic theories and assumptions and adopting one side's view over another's in resulting in a financial note.

Petitioners further mistakenly argue that the Auditor should have either applied Greene County's fiscal assessment to the entire state or excluded it entirely. But Petitioners are misunderstanding how the Auditor examines fiscal impact submissions. As the court has held, the Auditor is not required to judge the merits of the fiscal impact submission or second-guess a reasonable submission. Rather, his role to fiscal submissions is determine complete, relevant, reasonable and have an identifiable source.

Petitioners also erroneously argue that it is misleading for the fiscal note summaries to state that local governmental entities estimate a total loss of $51,000, as if $51,000 represents the entire loss to all of Missouri's local governmental entities and not just to Greene County. In *Protect Consumers' Access to Quality Home Care Coalition, LLC v Kander*, the court upheld the use of a collective term such as local entities to describe all responsive information received by the Auditor, even when

only a single entity responded with a potential cost, was not considered unfair and insufficient. Additionally, Petitioner wrongly argued that the Auditor further misrepresented the significance of the fiscal impact reported by Greene County, specifically reported the $51,000 loss was misrepresented as the total entire loss, but the financial significance of Greene County recorded impact was not misrepresented because the $51,000 included in the fiscal note summary is modified by the phrase at least, thus the fiscal note summary's state the $51,000 is the floor, not the ceiling of the potential impact reported by the local governmental entities. Due to the aforementioned reason, the second sentence of the fiscal note summaries fairly and sufficiently describe the fiscal impact of the measures recorded by local governmental entities and Petitioners have failed to demonstrate otherwise.

Lastly, the third and final sentence of the fiscal note summary state, opponents have estimated a potentially significant loss to state revenue. Petitioners incorrectly argue that their sentence of fiscal note summary is effective because it failed to account for all losses recorded by opponents of the measures. First, it was accurate for the Auditor to let respective submitters as opponents, a term that is expressly used in Section

116.175, due to the submitters public opposition to the initiatives and the content of their submissions. And, second, while the Auditor concluded the state's Medicaid funding was not in jeopardy, he did acknowledge in the fiscal note summaries that the measures provided fiscal impact submissions that estimated the measures to proposed other significant losses to state revenue by stating just that. The real issue for Petitioners is that the fiscal note summaries do not set forth the specific dollar amount. In order to be fair and sufficient, the court has held a fiscal note summary is not required to inform voters of an expressed amount of the potential costs of the initiative and describe such estimated costs as significant because such language is accurate and unlikely to cause bias and prejudice, deception or favoritism. No reasonable person could argue that the various dollar amounts of potential losses of state revenues submitted be opponents, which included $6.9 trillion or infinity as proposed by Petitioners, do not constitute the continually significant losses and thus are not accurately reflected by the Auditor's language. As such, the fiscal note summaries third sentence fairly and sufficiently reflect potential costs of the measure as reported by those opponents.

In conclusion, the Auditor's fiscal note summaries for each of the 11 initiative petitions is fair and sufficient

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and accurately represents potential costs or savings of each measure and the fact that proponents or opponents of the measure find some fault with the fiscal notes to compel this court that the Auditor drafted the fiscal note summaries is appropriate. Due to the fiscal note summaries being fair and sufficient, the court should dismiss the Petitioners actions and certify the Auditor's fiscal note summary portion of the official ballot titles to the Secretary of State.

Thank you.

THE COURT: Ms. Hodes, anything else?

MS. HODES: I believe -- Yes.

THE COURT: Okay. Thank you.

MS. SCHAFER: May it please the court.

Your Honor, we believe the Auditor is correct. If he is not and we're not, then in the alternate he should have excluded Greene County's fiscal estimate entirely.

First, I'll very briefly highlight why the Auditor is correct not to include a loss of billions of dollars to Medicaid funding and then I'll address that if it was a mistake to include only Greene County, then Greene County's estimate should be excluded entirely.

The Auditor's determination, as was said, of reasonableness is based on the Auditor's experience in state government and overall knowledge and understanding of

business and economic issues. Because the provisions of the initiative petitions do not jeopardize federal Medicaid funding, the Auditor found it unreasonable to suggest any federal Medicaid dollars would be at risk. The Petitioners cite opponents fiscal impact statements as proof the Auditor should have adopted their assessment. On the other hand, as was stated, the Department of Social Services, an organization actually tasked with the administration of Medicaid funds, submitted fiscal statements that did not anticipate a fiscal impact to Medicaid funding.

Turning to our second point. Greene County's fiscal impact assessment uses a broad methodology. Greene County calculated their reported loss as was estimated at $51,000 by adding up their total tax revenue from sales and property taxes and dividing it by their 2020 census data and the state benefited $376.94 per person. They then took that number and multiplied it by the resident abortion in 2020 which was 135, that number equals $50,886.90. To be clear, resident abortions do not refer to the number of abortions received in a county but the number of county residents that received an abortion regardless of where that abortion took place.

If the Auditor was wrong to include Greene County's submission, it was because it was unreasonable to adopt Greene County's fiscal estimate at all. First, there is no

proof that the amendment would cause more residents of Greene County to have an abortion. The state statute says that fiscal note and fiscal note summary shall estimate the measure's estimated costs as stated, if any. Regardless of the proposed measure, people continue to leave the state to have abortions. There is no showing that the amendment would cause more abortions like Greene County residents and, therefore, the amendment would be the reason for any hypothetical loss of tax revenue. For all we know, each resident abortion could have taken place in other states like Illinois or Kansas where abortion remains legal regardless of the result of this proposed constitutional amendment.

Further, Greene County's use of resident abortion number fails to account for cases where a taxpayer would never have been treated such as in the instance of a non-viable pregnancy. Under current law, abortions that are medically a necessity can still occur in our state. The Greene County number does not differentiate between medical and non-medical to receive an abortion; therefore, it is wrong to conclude that all 135 Greene County residents who had abortions in 2020 would only have had access to that care if this measure was passed.

Second, Greene County wrongly assumes that every abortion that residents received would have resulted in a

person who stayed in Greene County and paid taxes. Not every person lives in the place and continues to be a taxpayer in the place where they are conceived and gestated.

Third, Greene County's estimate fails to account for the cost savings of having been a resident. If there was a loss of people from Greene County, then the amount of Greene County on things like public school funding could also be less.

Finally, all other responsive counties and local governments reported they anticipated no fiscal impact. St. Louis County, who had 56 resident abortions in 2020, said they anticipated no fiscal impact. Jefferson City also stated they did not anticipate a direct fiscal impact. Their county had 20 resident abortions. Kansas City anticipated no fiscal impact and Jackson County had 1,748 resident abortions. Clay County also indicated no fiscal impact. And Clay County had 353 resident abortions which is, of course, higher than Greene County of 135 resident abortions. If it was unreasonable to include only Greene County's cost of $51,000, then the Auditor should have erred on the side of not including it and the numbers certainly should not be duplicated as Petitioners suggest.

The Missouri State Auditor's office drafted a fiscal note summary that adequately and fairly summarized the

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fiscal note. If, however, it was an error only in Greene County's estimate, then no cost to the county should have been included in the summary ballot.

Thank you.

MS. HODES: Thank you, Your Honor.

It is worth noting that the Auditor is big on defending his process in coming up with the actual words that he included in his fiscal note summary, but he never once claims to have advised Missouri voters with that summary and he never once claims to believe in any way or that anyone could possibly believe that making abortion profoundly more available in Missouri than it was during *Roe* and taking away all of the limiting and regulating provisions that Missouri has built up over the years in one fell swoop is going to cost the state and local governments, even just local governments, anything like $51,000.

Here are some things that cost $51,000...a Chevy Tahoe, a mid-level kitchen remodel, a not very extravagant, unfortunately, wedding, but not lifting all the abortion restrictions in the State of Missouri and allowing unfettered access to abortion as a permanent constitutional amendment and making it impossible without intensive litigation or possibly federal enforcement action for anything, narrowing that is in place in the federal level

or that protects individuals to have without cost of litigation or these threats of federal enforcement, this is not going to cost us $51,000. And it is misleading to the voters to use that number not because the calculations are faulty, although they are very minimal. Sales and property taxes are not the only way that human beings contribute to our economy, but they are a minimal way which is why the estimate should go much higher with a much lower floor. It should still be an estimate because the impact should be absolutely profound and definitely will be.

He also defends his process in not examining the submissions by state actors and totally deferring to DHSS and DOR, Department of Revenue, although DHSS does say that in its fiscal notes, in its fiscal impact submission, that it anticipates the possibility that these alter regulations will disappear, which I'm not sure is consistent with what the Auditor is estimating. In any case he tends to not examine any of these submissions but then he makes incredible assertions to defend his right to exclude legitimate and documented submissions because they don't accurately describe the state of the law tomorrow and the likelihood of what will happen from the federal government tomorrow as a result of these constitutional amendments coming into place, that is not his job. His job is to advise of the impact of the measures...period, not the

second they are passed and no one else restricts themselves to what is going to happen definitely tomorrow in their estimates of the impacts to state and local government and to the State of Missouri and to citizens.

Moreover, I just want to address the point -- I already addressed the point that sales and property tax in particular are not going to wait for these children to become adults in order to become significantly associated with their presence as Missouri citizens. But also the suggestion that it is possible that the number of abortions in Missouri will remain constant or to Missouri citizens will remain constant seems unlikely and also it raises the question of what is the purpose of removing all those restrictions on all these protections of the unborn in Missouri, other than to make abortions more easily available to Missouri residents and not just Missouri residents but those who will come to our state for an abortion.

There is plenty of actual evidence, if the court would want us to make them available, of, you know, actual evidence based on other states in which abortion laws were legalized, the abortion rates going up. And more to the point, I don't understand if abortions are so freely available now, why would we need to -- what would be the point of the constitutional amendments if we were not

counting on the number of Missouri women seeking abortion and potentially abortions continually rising.

With that, I leave you to our briefs. Thank you, Your Honor.

THE COURT: Thank you very much.

All right. I think I've seen it from Mr. Tillman. But I would ask the parties to, if they have proposed judgments or orders, to submit those. I have Mr. Rothert standing there with his. You can give it to Mr. Parish there. Mr. Lewis, will you send me something.

MR. LEWIS: I'll finally submit them after entering.

MS. HODES: We can electronically submit them.

THE COURT: That is fine. Before they leave, make sure they have the e-mail address to do that. It is a different e-mail address to send us a Word document than to send us a PDF.

MS. HODES: Thank you.

THE COURT: All right. Anything else?

MR. BELZ: Did you give us a deadline on this?

THE COURT: Can I have them by Monday?

MR. BELZ: Sure.

MR. LEWIS: That is fine.

MS. HODES: Yes.

THE COURT: Monday is probably as late as I want to go on this.

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MS. HODES: It will be before Monday.

THE COURT: Thank you so much for your time. That concludes today's hearing.

Reporter's Certificate

I, Kaye F. Asel, Certified Court Reporter, hereby certify that I was the official court reporter for Division I of the 19th County Circuit Court; that on September 11, 2023, I was present and reported all the proceedings had in DR. ANNA FITZ-JAMES, Plaintiff, vs. JOHN R. ASHCROFT, MISSOURI SECRETARY OF STATE, Defendant, Case Nos. 23AC-CC03167, 23AC-CC03953, 23AC-CC04022, 23AC-CC04574, 23AC-CC04575, 23AC-CC04576 and 23AC-CC04802 and HANNAH SUE KELLY, et al., vs. SCOTT FITZPATRICK, MISSOURI STATE AUDITOR AND JOHN R. ASHCROFT, MISSOURI SECRETARY OF STATE, Defendants, AND ANNA FITZ-JAMES, Intervenor, Case No. 23AC-CC04802.

I further certify that the foregoing pages 86 contain a true and accurate reproduction of the proceedings transcribed.

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/s/ Kaye F. Asel, CCR
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Here you go.
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AG Bailey released the Kim Gardner report, which details how he ousted St. Louis Soros-backed prosecutor Kim Gardner. He's happy to talk about it if you are interested.
Please below.
Thanks!

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November 13, 2023
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Attorney General Bailey Releases Kim Gardner Report

JEFFERSON CITY, Mo. - Today, Missouri Attorney General Andrew Bailey released the *Kim Gardner Report*, which details his successful petition in quo warranto that ousted Kimberly Gardner from office in May after she failed to prosecute violent crime in the City of St. Louis for several years.

"Kim Gardner hit the eject button and resigned as Circuit Attorney when it became clear that our lawsuit to remove her from office for her refusal to do her job was going to be successful," **said Attorney General Bailey.** "My office published the Gardner Report to put into the public domain what went wrong here, how it happened, and what systems need to be put in

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place to prevent it from ever happening in the future."

In the *Gardner Report*, Attorney General Bailey lists several recommendations and takeaways from his lawsuit against the Circuit Attorney, including:

1. Ms. Gardner's delay tactics threatened to defeat the purpose of the writ and left many unanswered questions.
2. Missouri statutes do not protect the public against usurpers who may seek public office again in the future.
3. Ms. Gardner's pursuit of an advanced nursing degree while holding the Office of the Circuit Attorney demonstrated a lack of accountability under the law.
4. The Office of the Circuit Attorney is a law enforcement agency first, and it must be primarily concerned with preserving public safety.
5. Ms. Gardner failed to effectively manage staffing in her office and she failed to provide adequate training for her staff.
6. Section 595.209 does not extend victim's rights to post-conviction relief proceedings.

The *Gardner Report* lays out a timeline of the quo warranto process, as well as the actions taken by the Attorney General's Office to restore order to the City of St. Louis once she resigned. It points out how, beginning on May 16th (the day Ms. Gardner resigned from her office) until the appointment of a new Circuit Attorney, assistant attorneys general began stabilizing the Circuit Attorney's Office.

Assistant attorneys general provided assistance including, but not limited to:

- Meeting with assistant circuit attorneys to review their pending cases set for trial and offering to provide trial support and legal strategy;
- Re-opening the warrant office to in-person warrant applications on in-custody offenders and on serious cases;
- Attending homicide crime scenes when requested by the St. Louis Metropolitan Police Department;
- Authorizing the issuance of recommendations, plea deals, and plea offers;
- Providing training and assistance in staffing Division 16B, the in-custody bond hearings;
- Attending dockets to ensure that no court appearances were missed;
- Meeting with judges of the 22nd judicial circuit to obtain feedback and information about how to best support the functioning of the circuit;
- Meeting with members of the Circuit Attorney's Office staff who requested meetings to provide feedback and suggestions on how to improve the office;
- Processing discovery for immediate disclosure to criminal defendants;
- Conducting preliminary hearings in associate circuit court;
- Identifying action items and key areas of concern for the future administration; and
- Meeting with St. Louis Metropolitan Police Department staff to identify areas where cooperation can be improved.

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In addition, the *Gardner Report* reveals never-before-released information learned from the victims, assistant circuit attorneys, and judges that the Attorney General's Office interviewed throughout the discovery process.

"The public is entitled to know the mistakes that Kim Gardner made, especially after she tried to deprive the public of access to information by resigning a mere two hours before the Court could order disclosure of several records," **said Attorney General Bailey**.

The full report can be viewed here: https://ago.mo.gov/wp-content/uploads/FINAL-KG-REPORT-NOV-13.pdf

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Cc: Wagner, Ray[Ray.Wagner@ago.mo.gov]; Bagby, Karen[Karen.Bagby@ago.mo.gov]
From: Wagner, Ray[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=F577E20AF58F4CE4AFCDDD101E8A3745-WAGNER, RAY]
Sent: Mon 11/27/2023 5:09:37 AM (UTC-06:00)
Subject: Follow up meeting

Good morning Susan. I thought I would touch base with you to see if the meeting has been set up with our office. Diana was going to reach to you. I understand we had some scheduling difficulties. I am happy to give you a call to see what we can do to smooth through any schedules challenges.

Thanks!

Ray

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Cc: Wagner, Ray[Ray.Wagner@ago.mo.gov]; Bagby, Karen[Karen.Bagby@ago.mo.gov]
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CHEMICAL ABORTION FAST FACTS

ANDREW BAILEY
MISSOURI ATTORNEY GENERAL

more than **10%**

of women who take chemical abortion drugs need follow-up medical treatment for an incomplete or failed chemical abortion,

with an average of **39%**

of women requiring surgery if taken in the second trimester.

Chemical abortions are over

50% more likely

than surgical abortions to result in an emergency department visit within thirty days

Affecting **1 in 20** Females

THE FDA CLAIMS CHEMICALLY INDUCED ABORTION IS "SAFE"

BUT THE SCIENCE SAYS...

20%

of females who take chemical abortion drugs experience a related adverse medical event. Of those:

- **15%** experience hemorrhage
- **2%** experience an infection

500% increase

in the number of chemical abortion-related emergency room visits between 2002 and 2015.

This rate is increasing over time.

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From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Mon 11/6/2023 1:02:28 PM (UTC-06:00)
Subject: AG BAILEY FILES SUIT AGAINST FDA FOR ALLOWING CHEMICAL ABORTION PILLS IN MAIL
11□1 abortion fast facts.jpg

Hi,

It's Maddie Sieren, communications director for **Missouri Attorney General Andrew Bailey** here. Hope you're well!

I wanted to pass this release along about Missouri's **multistate motion to intervene in ADF's chemical abortion case** against the FDA, *Alliance for Hippocratic Medicine v. FDA*.

AG Bailey has been a national leader in the fight against chemical abortion. **Less than one month after being in office,** he put the FDA on notice that its **guidance approving mifepristone to be shipped in the mail was illegal**. He also **led 20 states in putting private pharmacies on notice** that if they were to follow the FDA's guidance, they would be breaking both state and federal law. **Walgreens immediately backed off, to the dismay of several leftists, including California Governor Gavin Newsom**.

The FDA has continued to unlawfully allow for chemical abortion pills to be shipped in the mail, despite the dangers they pose to both women and their unborn children. Thus, **General Bailey followed through on his word and filed suit**.

This is his **28th lawsuit against the Biden Administration**, as he works to hold Biden accountable for his unlawful actions.

Here is the release further detailing the suit: https://ago.mo.gov/attorney-general-bailey-files-suit-against-joe-bidens-fda-for-approving-shipment-of-dangerous-abortion-pills-in-mail/

Here is ADF's **Erin Hawley's statement supporting AG Bailey's** motion to intervene: https://adfmedia.org/press-release/mo-ks-id-seek-join-lawsuit-restore-safeguards-chemical-abortion-drugs

Attached also are some of the **statistics** that AG Bailey highlights in his suit on the **dangers chemical abortion pills pose to women**.

Let me know if there is any interest in **interviewing** the AG on this topic!

Best,

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Sent: Thur 11/16/2023 3:50:17 PM (UTC-06:00)
Subject: FW: Attorney General Bailey Files Brief Opposing Unconstitutional Gag Order on President Donald Trump

Attorney General Bailey has opened up a new front in his war for free speech. This time he's going to battle for President Trump. See below press release for more info. Let me know if there is any interest in interviewing the AG!

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From: AGO Press <press@ago.mo.gov>
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To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Attorney General Bailey Files Brief Opposing Unconstitutional Gag Order on President Donald Trump

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FOR IMMEDIATE RELEASE

November 16, 2023
Contact: Madeline Sieren
Cell: 573-690-1205
Email: madeline.sieren@ago.mo.gov

Attorney General Bailey Files Brief Opposing Unconstitutional Gag Order on President Donald Trump

JEFFERSON CITY, Mo. - Missouri Attorney General Andrew Bailey announced today that he has filed an amicus brief calling on the courts to reverse the unconstitutional gag order against President Donald J. Trump. a blatant violation of the First Amendment, the gag order stifles President Trump's ability to speak freely ahead of the approaching presidential election and denies Americans the right to hear free, fair and open debate from all presidential candidates.

"Missouri is a champion for free speech. President Trump, like so many Americans, has been

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silenced on social media platforms for daring to be a political opponent of Joe Biden, and now they're attempting to silence his right to speak at all," **said Attorney General Bailey**. "Thisweaponization of the criminal justice system is inherently un-American and goes against the very soul of our great nation. I'm proud to stand with President Trump in this new front in the war for free speech."

In the brief, General Bailey and the other states assert, "President Trump is actively campaigning for—is the leading Republican candidate for—the presidency. The district court's broad order interrupts President Trump's right to 'communicat[e] with the electorate.' This case—the propriety of bringing it, the motives for doing so, and the process the Biden Administration continues to employ in pursuing it—is a central issue in his reelection campaign. And rather than protect President Trump's ability to discuss that issue on the campaign trail, the district court's prior restraint muzzles him."

Attorney General Bailey and the other states conclude, "Given the magnitude—in importance and effect—of such an overly broad and vague prior restraint on President Trump's speech, this Court should reverse" the gag order, and immediately reinstate the President's right to free speech.

Attorney General Bailey has been a staunch defender of the free speech rights of all Americans. His landmark free speech case, *Missouri v. Biden,* which exposes the vast censorship enterprise emanating from the White House and across a spectrum of federal agencies, will be heard by the nation's highest court early next year.

Joining Missouri in filing the brief are Alabama, Alaska, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah and West Virginia.

The full brief can be read here: https://ago.mo.gov/wp-content/uploads/File-Stamped-United-States-v.-Trump-Amicus-1.pdf

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188.207. It shall be unlawful for any public funds to be expended to any abortion facility, or to any affiliate or associate of such abortion facility.

188.220. Any taxpayer of this state or its political subdivisions shall have standing to bring **[**suit in a circuit court of proper venue**]** a cause of action in any court or administrative agency of competent jurisdiction to enforce the provisions of sections 188.200 to 188.215.

208.152. 1. MO HealthNet payments shall be made on behalf of those eligible needy persons as described in section 208.151 who are unable to provide for it in whole or in part, with any payments to be made on the basis of the reasonable cost of the care or reasonable charge for the services as defined and determined by the MO HealthNet division, unless otherwise hereinafter provided, for the following:

(1) Inpatient hospital services, except to persons in an institution for mental diseases who are under the age of sixty-five years and over the age of twenty-one years; provided that the MO HealthNet division shall provide through rule and regulation an exception process for coverage of inpatient costs in those cases requiring treatment beyond the seventy-fifth percentile professional activities study (PAS) or the MO HealthNet children's diagnosis length-of-stay schedule; and provided further that the MO HealthNet division shall take into account through its payment system for hospital services the situation of hospitals which serve a disproportionate number of low-income patients;

(2) All outpatient hospital services, payments therefor to be in amounts which represent no more than eighty percent of the lesser of reasonable costs or

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customary charges for such services, determined in accordance with the principles set forth in Title XVIII A and B, Public Law 89-97, 1965 amendments to the federal Social Security Act (42 U.S.C. Section 301, et seq.), but the MO HealthNet division may evaluate outpatient hospital services rendered under this section and deny payment for services which are determined by the MO HealthNet division not to be medically necessary, in accordance with federal law and regulations;

(3) Laboratory and X-ray services;

(4) Nursing home services for participants, except to persons with more than five hundred thousand dollars equity in their home or except for persons in an institution for mental diseases who are under the age of sixty-five years, when residing in a hospital licensed by the department of health and senior services or a nursing home licensed by the department of health and senior services or appropriate licensing authority of other states or government-owned and -operated institutions which are determined to conform to standards equivalent to licensing requirements in Title XIX of the federal Social Security Act (42 U.S.C. Section 301, et seq.), as amended, for nursing facilities. The MO HealthNet division may recognize through its payment methodology for nursing facilities those nursing facilities which serve a high volume of MO HealthNet patients. The MO HealthNet division when determining the amount of the benefit payments to be made on behalf of persons under the age of twenty-one in a nursing facility may consider nursing facilities furnishing care to persons under the age of twenty-one as a classification separate from other nursing facilities;

(5) Nursing home costs for participants receiving benefit payments under subdivision (4) of this subsection

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for those days, which shall not exceed twelve per any period of six consecutive months, during which the participant is on a temporary leave of absence from the hospital or nursing home, provided that no such participant shall be allowed a temporary leave of absence unless it is specifically provided for in his or her plan of care. As used in this subdivision, the term "temporary leave of absence" shall include all periods of time during which a participant is away from the hospital or nursing home overnight because he or she is visiting a friend or relative;

(6) Physicians' services, whether furnished in the office, home, hospital, nursing home, or elsewhere; provided, that no funds shall be expended to any abortion facility, as defined in section 188.015, or to any affiliate or associate of such abortion facility;

(7) Subject to appropriation, up to twenty visits per year for services limited to examinations, diagnoses, adjustments, and manipulations and treatments of malpositioned articulations and structures of the body provided by licensed chiropractic physicians practicing within their scope of practice. Nothing in this subdivision shall be interpreted to otherwise expand MO HealthNet services;

(8) Drugs and medicines when prescribed by a licensed physician, dentist, podiatrist, or an advanced practice registered nurse; except that no payment for drugs and medicines prescribed on and after January 1, 2006, by a licensed physician, dentist, podiatrist, or an advanced practice registered nurse may be made on behalf of any person who qualifies for prescription drug coverage under the provisions of P.L. 108-173;

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(9) Emergency ambulance services and, effective January 1, 1990, medically necessary transportation to scheduled, physician-prescribed nonelective treatments;

(10) Early and periodic screening and diagnosis of individuals who are under the age of twenty-one to ascertain their physical or mental defects, and health care, treatment, and other measures to correct or ameliorate defects and chronic conditions discovered thereby. Such services shall be provided in accordance with the provisions of Section 6403 of P.L. 101-239 and federal regulations promulgated thereunder;

(11) Home health care services;

(12) Family planning as defined by federal rules and regulations; provided, that no funds shall be expended to any abortion facility, as defined in section 188.015, or to any affiliate or associate of such abortion facility; and further provided, however, that such family planning services shall not include abortions or any abortifacient drug or device that is used for the purpose of inducing an abortion unless such abortions are certified in writing by a physician to the MO HealthNet agency that, in the physician's professional judgment, the life of the mother would be endangered if the fetus were carried to term;

(13) Inpatient psychiatric hospital services for individuals under age twenty-one as defined in Title XIX of the federal Social Security Act (42 U.S.C. Section 1396d, et seq.);

(14) Outpatient surgical procedures, including presurgical diagnostic services performed in ambulatory surgical facilities which are licensed by the department of health and senior services of the state of Missouri; except, that such outpatient surgical services shall not include persons who are eligible for coverage under Part B of Title

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XVIII, Public Law 89-97, 1965 amendments to the federal Social Security Act, as amended, if exclusion of such persons is permitted under Title XIX, Public Law 89-97, 1965 amendments to the federal Social Security Act, as amended;

(15) Personal care services which are medically oriented tasks having to do with a person's physical requirements, as opposed to housekeeping requirements, which enable a person to be treated by his or her physician on an outpatient rather than on an inpatient or residential basis in a hospital, intermediate care facility, or skilled nursing facility. Personal care services shall be rendered by an individual not a member of the participant's family who is qualified to provide such services where the services are prescribed by a physician in accordance with a plan of treatment and are supervised by a licensed nurse. Persons eligible to receive personal care services shall be those persons who would otherwise require placement in a hospital, intermediate care facility, or skilled nursing facility. Benefits payable for personal care services shall not exceed for any one participant one hundred percent of the average statewide charge for care and treatment in an intermediate care facility for a comparable period of time. Such services, when delivered in a residential care facility or assisted living facility licensed under chapter 198 shall be authorized on a tier level based on the services the resident requires and the frequency of the services. A resident of such facility who qualifies for assistance under section 208.030 shall, at a minimum, if prescribed by a physician, qualify for the tier level with the fewest services. The rate paid to providers for each tier of service shall be set subject to appropriations. Subject to appropriations, each resident of such facility who qualifies for assistance under section 208.030 and meets the level of

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care required in this section shall, at a minimum, if prescribed by a physician, be authorized up to one hour of personal care services per day. Authorized units of personal care services shall not be reduced or tier level lowered unless an order approving such reduction or lowering is obtained from the resident's personal physician. Such authorized units of personal care services or tier level shall be transferred with such resident if he or she transfers to another such facility. Such provision shall terminate upon receipt of relevant waivers from the federal Department of Health and Human Services. If the Centers for Medicare and Medicaid Services determines that such provision does not comply with the state plan, this provision shall be null and void. The MO HealthNet division shall notify the revisor of statutes as to whether the relevant waivers are approved or a determination of noncompliance is made;

(16) Mental health services. The state plan for providing medical assistance under Title XIX of the Social Security Act, 42 U.S.C. Section 301, as amended, shall include the following mental health services when such services are provided by community mental health facilities operated by the department of mental health or designated by the department of mental health as a community mental health facility or as an alcohol and drug abuse facility or as a child-serving agency within the comprehensive children's mental health service system established in section 630.097. The department of mental health shall establish by administrative rule the definition and criteria for designation as a community mental health facility and for designation as an alcohol and drug abuse facility. Such mental health services shall include:

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(a) Outpatient mental health services including preventive, diagnostic, therapeutic, rehabilitative, and palliative interventions rendered to individuals in an individual or group setting by a mental health professional in accordance with a plan of treatment appropriately established, implemented, monitored, and revised under the auspices of a therapeutic team as a part of client services management;

(b) Clinic mental health services including preventive, diagnostic, therapeutic, rehabilitative, and palliative interventions rendered to individuals in an individual or group setting by a mental health professional in accordance with a plan of treatment appropriately established, implemented, monitored, and revised under the auspices of a therapeutic team as a part of client services management;

(c) Rehabilitative mental health and alcohol and drug abuse services including home and community-based preventive, diagnostic, therapeutic, rehabilitative, and palliative interventions rendered to individuals in an individual or group setting by a mental health or alcohol and drug abuse professional in accordance with a plan of treatment appropriately established, implemented, monitored, and revised under the auspices of a therapeutic team as a part of client services management. As used in this section, mental health professional and alcohol and drug abuse professional shall be defined by the department of mental health pursuant to duly promulgated rules. With respect to services established by this subdivision, the department of social services, MO HealthNet division, shall enter into an agreement with the department of mental health. Matching funds for outpatient mental health services, clinic mental health services, and rehabilitation

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services for mental health and alcohol and drug abuse shall be certified by the department of mental health to the MO HealthNet division. The agreement shall establish a mechanism for the joint implementation of the provisions of this subdivision. In addition, the agreement shall establish a mechanism by which rates for services may be jointly developed;

(17) Such additional services as defined by the MO HealthNet division to be furnished under waivers of federal statutory requirements as provided for and authorized by the federal Social Security Act (42 U.S.C. Section 301, et seq.) subject to appropriation by the general assembly;

(18) The services of an advanced practice registered nurse with a collaborative practice agreement to the extent that such services are provided in accordance with chapters 334 and 335, and regulations promulgated thereunder;

(19) Nursing home costs for participants receiving benefit payments under subdivision (4) of this subsection to reserve a bed for the participant in the nursing home during the time that the participant is absent due to admission to a hospital for services which cannot be performed on an outpatient basis, subject to the provisions of this subdivision:

(a) The provisions of this subdivision shall apply only if:

a. The occupancy rate of the nursing home is at or above ninety-seven percent of MO HealthNet certified licensed beds, according to the most recent quarterly census provided to the department of health and senior services which was taken prior to when the participant is admitted to the hospital; and

b. The patient is admitted to a hospital for a medical condition with an anticipated stay of three days or less;

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(b) The payment to be made under this subdivision shall be provided for a maximum of three days per hospital stay;

(c) For each day that nursing home costs are paid on behalf of a participant under this subdivision during any period of six consecutive months such participant shall, during the same period of six consecutive months, be ineligible for payment of nursing home costs of two otherwise available temporary leave of absence days provided under subdivision (5) of this subsection; and

(d) The provisions of this subdivision shall not apply unless the nursing home receives notice from the participant or the participant's responsible party that the participant intends to return to the nursing home following the hospital stay. If the nursing home receives such notification and all other provisions of this subsection have been satisfied, the nursing home shall provide notice to the participant or the participant's responsible party prior to release of the reserved bed;

(20) Prescribed medically necessary durable medical equipment. An electronic web-based prior authorization system using best medical evidence and care and treatment guidelines consistent with national standards shall be used to verify medical need;

(21) Hospice care. As used in this subdivision, the term "hospice care" means a coordinated program of active professional medical attention within a home, outpatient and inpatient care which treats the terminally ill patient and family as a unit, employing a medically directed interdisciplinary team. The program provides relief of severe pain or other physical symptoms and supportive care to meet the special needs arising out of physical, psychological, spiritual, social, and economic stresses

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which are experienced during the final stages of illness, and during dying and bereavement and meets the Medicare requirements for participation as a hospice as are provided in 42 CFR Part 418. The rate of reimbursement paid by the MO HealthNet division to the hospice provider for room and board furnished by a nursing home to an eligible hospice patient shall not be less than ninety-five percent of the rate of reimbursement which would have been paid for facility services in that nursing home facility for that patient, in accordance with subsection (c) of Section 6408 of P.L. 101-239 (Omnibus Budget Reconciliation Act of 1989);

(22) Prescribed medically necessary dental services. Such services shall be subject to appropriations. An electronic web-based prior authorization system using best medical evidence and care and treatment guidelines consistent with national standards shall be used to verify medical need;

(23) Prescribed medically necessary optometric services. Such services shall be subject to appropriations. An electronic web-based prior authorization system using best medical evidence and care and treatment guidelines consistent with national standards shall be used to verify medical need;

(24) Blood clotting products-related services. For persons diagnosed with a bleeding disorder, as defined in section 338.400, reliant on blood clotting products, as defined in section 338.400, such services include:

(a) Home delivery of blood clotting products and ancillary infusion equipment and supplies, including the emergency deliveries of the product when medically necessary;

(b) Medically necessary ancillary infusion equipment and supplies required to administer the blood clotting products; and

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(c) Assessments conducted in the participant's home by a pharmacist, nurse, or local home health care agency trained in bleeding disorders when deemed necessary by the participant's treating physician;

(25) The MO HealthNet division shall, by January 1, 2008, and annually thereafter, report the status of MO HealthNet provider reimbursement rates as compared to one hundred percent of the Medicare reimbursement rates and compared to the average dental reimbursement rates paid by third-party payors licensed by the state. The MO HealthNet division shall, by July 1, 2008, provide to the general assembly a four-year plan to achieve parity with Medicare reimbursement rates and for third-party payor average dental reimbursement rates. Such plan shall be subject to appropriation and the division shall include in its annual budget request to the governor the necessary funding needed to complete the four-year plan developed under this subdivision.

2. Additional benefit payments for medical assistance shall be made on behalf of those eligible needy children, pregnant women and blind persons with any payments to be made on the basis of the reasonable cost of the care or reasonable charge for the services as defined and determined by the MO HealthNet division, unless otherwise hereinafter provided, for the following:

(1) Dental services;

(2) Services of podiatrists as defined in section 330.010;

(3) Optometric services as described in section 336.010;

(4) Orthopedic devices or other prosthetics, including eye glasses, dentures, hearing aids, and wheelchairs;

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(5) Hospice care. As used in this subdivision, the term "hospice care" means a coordinated program of active professional medical attention within a home, outpatient and inpatient care which treats the terminally ill patient and family as a unit, employing a medically directed interdisciplinary team. The program provides relief of severe pain or other physical symptoms and supportive care to meet the special needs arising out of physical, psychological, spiritual, social, and economic stresses which are experienced during the final stages of illness, and during dying and bereavement and meets the Medicare requirements for participation as a hospice as are provided in 42 CFR Part 418. The rate of reimbursement paid by the MO HealthNet division to the hospice provider for room and board furnished by a nursing home to an eligible hospice patient shall not be less than ninety-five percent of the rate of reimbursement which would have been paid for facility services in that nursing home facility for that patient, in accordance with subsection (c) of Section 6408 of P.L. 101-239 (Omnibus Budget Reconciliation Act of 1989);

(6) Comprehensive day rehabilitation services beginning early posttrauma as part of a coordinated system of care for individuals with disabling impairments. Rehabilitation services must be based on an individualized, goal-oriented, comprehensive and coordinated treatment plan developed, implemented, and monitored through an interdisciplinary assessment designed to restore an individual to optimal level of physical, cognitive, and behavioral function. The MO HealthNet division shall establish by administrative rule the definition and criteria for designation of a comprehensive day rehabilitation service facility, benefit limitations and payment mechanism. Any rule or portion of a rule, as that term is

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defined in section 536.010, that is created under the authority delegated in this subdivision shall become effective only if it complies with and is subject to all of the provisions of chapter 536 and, if applicable, section 536.028. This section and chapter 536 are nonseverable and if any of the powers vested with the general assembly pursuant to chapter 536 to review, to delay the effective date, or to disapprove and annul a rule are subsequently held unconstitutional, then the grant of rulemaking authority and any rule proposed or adopted after August 28, 2005, shall be invalid and void.

3. The MO HealthNet division may require any participant receiving MO HealthNet benefits to pay part of the charge or cost until July 1, 2008, and an additional payment after July 1, 2008, as defined by rule duly promulgated by the MO HealthNet division, for all covered services except for those services covered under subdivisions (15) and (16) of subsection 1 of this section and sections 208.631 to 208.657 to the extent and in the manner authorized by Title XIX of the federal Social Security Act (42 U.S.C. Section 1396, et seq.) and regulations thereunder. When substitution of a generic drug is permitted by the prescriber according to section 338.056, and a generic drug is substituted for a name-brand drug, the MO HealthNet division may not lower or delete the requirement to make a co-payment pursuant to regulations of Title XIX of the federal Social Security Act. A provider of goods or services described under this section must collect from all participants the additional payment that may be required by the MO HealthNet division under authority granted herein, if the division exercises that authority, to remain eligible as a provider. Any payments made by participants under this section shall be in addition to and

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not in lieu of payments made by the state for goods or services described herein except the participant portion of the pharmacy professional dispensing fee shall be in addition to and not in lieu of payments to pharmacists. A provider may collect the co-payment at the time a service is provided or at a later date. A provider shall not refuse to provide a service if a participant is unable to pay a required payment. If it is the routine business practice of a provider to terminate future services to an individual with an unclaimed debt, the provider may include uncollected co-payments under this practice. Providers who elect not to undertake the provision of services based on a history of bad debt shall give participants advance notice and a reasonable opportunity for payment. A provider, representative, employee, independent contractor, or agent of a pharmaceutical manufacturer shall not make co-payment for a participant. This subsection shall not apply to other qualified children, pregnant women, or blind persons. If the Centers for Medicare and Medicaid Services does not approve the MO HealthNet state plan amendment submitted by the department of social services that would allow a provider to deny future services to an individual with uncollected co-payments, the denial of services shall not be allowed. The department of social services shall inform providers regarding the acceptability of denying services as the result of unpaid co-payments.

4. The MO HealthNet division shall have the right to collect medication samples from participants in order to maintain program integrity.

5. Reimbursement for obstetrical and pediatric services under subdivision (6) of subsection 1 of this section shall be timely and sufficient to enlist enough health care providers so that care and services are

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available under the state plan for MO HealthNet benefits at least to the extent that such care and services are available to the general population in the geographic area, as required under subparagraph (a)(30)(A) of 42 U.S.C. Section 1396a and federal regulations promulgated thereunder.

6. Beginning July 1, 1990, reimbursement for services rendered in federally funded health centers shall be in accordance with the provisions of subsection 6402(c) and Section 6404 of P.L. 101-239 (Omnibus Budget Reconciliation Act of 1989) and federal regulations promulgated thereunder.

7. Beginning July 1, 1990, the department of social services shall provide notification and referral of children below age five, and pregnant, breast-feeding, or postpartum women who are determined to be eligible for MO HealthNet benefits under section 208.151 to the special supplemental food programs for women, infants and children administered by the department of health and senior services. Such notification and referral shall conform to the requirements of Section 6406 of P.L. 101-239 and regulations promulgated thereunder.

8. Providers of long-term care services shall be reimbursed for their costs in accordance with the provisions of Section 1902 (a)(13)(A) of the Social Security Act, 42 U.S.C. Section 1396a, as amended, and regulations promulgated thereunder.

9. Reimbursement rates to long-term care providers with respect to a total change in ownership, at arm's length, for any facility previously licensed and certified for participation in the MO HealthNet program shall not increase payments in excess of the increase that would result from the application of Section 1902 (a)(13)(C) of the Social Security Act, 42 U.S.C. Section 1396a (a)(13)(C).

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10. The MO HealthNet division may enroll qualified residential care facilities and assisted living facilities, as defined in chapter 198, as MO HealthNet personal care providers.

11. Any income earned by individuals eligible for certified extended employment at a sheltered workshop under chapter 178 shall not be considered as income for purposes of determining eligibility under this section.

12. If the Missouri Medicaid audit and compliance unit changes any interpretation or application of the requirements for reimbursement for MO HealthNet services from the interpretation or application that has been applied previously by the state in any audit of a MO HealthNet provider, the Missouri Medicaid audit and compliance unit shall notify all affected MO HealthNet providers five business days before such change shall take effect. Failure of the Missouri Medicaid audit and compliance unit to notify a provider of such change shall entitle the provider to continue to receive and retain reimbursement until such notification is provided and shall waive any liability of such provider for recoupment or other loss of any payments previously made prior to the five business days after such notice has been sent. Each provider shall provide the Missouri Medicaid audit and compliance unit a valid email address and shall agree to receive communications electronically. The notification required under this section shall be delivered in writing by the United States Postal Service or electronic mail to each provider.

13. Nothing in this section shall be construed to abrogate or limit the department's statutory requirement to promulgate rules under chapter 536.

14. Beginning July 1, 2016, and subject to appropriations, providers of behavioral, social, and

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psychophysiological services for the prevention, treatment, or management of physical health problems shall be reimbursed utilizing the behavior assessment and intervention reimbursement codes 96150 to 96154 or their successor codes under the Current Procedural Terminology (CPT) coding system. Providers eligible for such reimbursement shall include psychologists.

208.153. 1. Pursuant to and not inconsistent with the provisions of sections 208.151 and 208.152, the MO HealthNet division shall by rule and regulation define the reasonable costs, manner, extent, quantity, quality, charges and fees of MO HealthNet benefits herein provided. The benefits available under these sections shall not replace those provided under other federal or state law or under other contractual or legal entitlements of the persons receiving them, and all persons shall be required to apply for and utilize all benefits available to them and to pursue all causes of action to which they are entitled. Any person entitled to MO HealthNet benefits may obtain it from any provider of services that is not excluded or disqualified as a provider under any provision of law including, but not limited to, section 208.164, with which an agreement is in effect under this section and which undertakes to provide the services, as authorized by the MO HealthNet division. At the discretion of the director of the MO HealthNet division and with the approval of the governor, the MO HealthNet division is authorized to provide medical benefits for participants receiving public assistance by expending funds for the payment of federal medical insurance premiums, coinsurance and deductibles pursuant to the provisions of Title XVIII B and XIX, Public Law 89-97, 1965 amendments to the federal Social Security Act (42 U.S.C. 301, et seq.), as amended.

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2. MO HealthNet shall include benefit payments on behalf of qualified Medicare beneficiaries as defined in 42 U.S.C. Section 1396d(p). The family support division shall by rule and regulation establish which qualified Medicare beneficiaries are eligible. The MO HealthNet division shall define the premiums, deductible and coinsurance provided for in 42 U.S.C. Section 1396d(p) to be provided on behalf of the qualified Medicare beneficiaries.

3. MO HealthNet shall include benefit payments for Medicare Part A cost sharing as defined in clause (p)(3)(A)(i) of 42 U.S.C. 1396d on behalf of qualified disabled and working individuals as defined in subsection (s) of Section 42 U.S.C. 1396d as required by subsection (d) of Section 6408 of P.L. 101-239 (Omnibus Budget Reconciliation Act of 1989). The MO HealthNet division may impose a premium for such benefit payments as authorized by paragraph (d)(3) of Section 6408 of P.L. 101-239.

4. MO HealthNet shall include benefit payments for Medicare Part B cost sharing described in 42 U.S.C. Section 1396(d)(p)(3)(A)(ii) for individuals described in subsection 2 of this section, but for the fact that their income exceeds the income level established by the state under 42 U.S.C. Section 1396(d)(p)(2) but is less than one hundred and ten percent beginning January 1, 1993, and less than one hundred and twenty percent beginning January 1, 1995, of the official poverty line for a family of the size involved.

5. For an individual eligible for MO HealthNet under Title XIX of the Social Security Act, MO HealthNet shall include payment of enrollee premiums in a group health plan and all deductibles, coinsurance and other cost-sharing for items and services otherwise covered under the state Title XIX plan under Section 1906 of the federal Social Security Act and regulations established under the authority of

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Section 1906, as may be amended. Enrollment in a group health plan must be cost effective, as established by the Secretary of Health and Human Services, before enrollment in the group health plan is required. If all members of a family are not eligible for MO HealthNet and enrollment of the Title XIX eligible members in a group health plan is not possible unless all family members are enrolled, all premiums for noneligible members shall be treated as payment for MO HealthNet of eligible family members. Payment for noneligible family members must be cost effective, taking into account payment of all such premiums. Non-Title XIX eligible family members shall pay all deductible, coinsurance and other cost-sharing obligations. Each individual as a condition of eligibility for MO HealthNet benefits shall apply for enrollment in the group health plan.

6. Any Social Security cost-of-living increase at the beginning of any year shall be disregarded until the federal poverty level for such year is implemented.

7. If a MO HealthNet participant has paid the requested spenddown in cash for any month and subsequently pays an out-of-pocket valid medical expense for such month, such expense shall be allowed as a deduction to future required spenddown for up to three months from the date of such expense.

208.164. 1. As used in this section, unless the context clearly requires otherwise, the following terms mean:

(1) "Abuse", a documented pattern of inducing, furnishing, or otherwise causing a recipient to receive services or merchandise not otherwise required or requested by the recipient, attending physician or appropriate utilization review team; a documented pattern of performing and billing tests, examinations, patient visits, surgeries, drugs or merchandise that exceed limits or frequencies

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determined by the department for like practitioners for which there is no demonstrable need, or for which the provider has created the need through ineffective services or merchandise previously rendered. The decision to impose any of the sanctions authorized in this section shall be made by the director of the department, following a determination of demonstrable need or accepted medical practice made in consultation with medical or other health care professionals, or qualified peer review teams;

(2) "Department", the department of social services;

(3) "Excessive use", the act, by a person eligible for services under a contract or provider agreement between the department of social services or its divisions and a provider, of seeking and/or obtaining medical assistance benefits from a number of like providers and in quantities which exceed the levels that are considered medically necessary by current medical practices and standards for the eligible person's needs;

(4) "Fraud", a known false representation, including the concealment of a material fact that the provider knew or should have known through the usual conduct of his or her profession or occupation, upon which the provider claims reimbursement under the terms and conditions of a contract or provider agreement and the policies pertaining to such contract or provider agreement of the department or its divisions in carrying out the providing of services, or under any approved state plan authorized by the federal Social Security Act;

(5) "Health plan", a group of services provided to recipients of medical assistance benefits by providers under a contract with the department;

(6) "Medical assistance benefits", those benefits authorized to be provided by sections 208.152 and 208.162;

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(7) "Prior authorization", approval to a provider to perform a service or services for an eligible person required by the department or its divisions in advance of the actual service being provided or approved for a recipient to receive a service or services from a provider, required by the department or its designated division in advance of the actual service or services being received;

(8) "Provider", any person, partnership, corporation, not-for-profit corporation, professional corporation, or other business entity that enters into a contract or provider agreement with the department or its divisions for the purpose of providing services to eligible persons, and obtaining from the department or its divisions reimbursement therefor;

(9) "Recipient", a person who is eligible to receive medical assistance benefits allocated through the department;

(10) "Service", the specific function, act, successive acts, benefits, continuing benefits, requested by an eligible person or provided by the provider under contract with the department or its divisions.

2. The department or its divisions shall have the authority to suspend, revoke, or cancel any contract or provider agreement or refuse to enter into a new contract or provider agreement with any provider where it is determined the provider has committed or allowed its agents, servants, or employees to commit acts defined as abuse or fraud in this section.

3. The department or its divisions shall have the authority to impose prior authorization as defined in this section:

(1) When it has reasonable cause to believe a provider or recipient has knowingly followed a course of conduct

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which is defined as abuse or fraud or excessive use by this section; or

(2) When it determines by rule that prior authorization is reasonable for a specified service or procedure.

4. If a provider or recipient reports to the department or its divisions the name or names of providers or recipients who, based upon their personal knowledge has reasonable cause to believe an act or acts are being committed which are defined as abuse, fraud or excessive use by this section, such report shall be confidential and the reporter's name shall not be divulged to anyone by the department or any of its divisions, except at a judicial proceeding upon a proper protective order being entered by the court.

5. Payments for services under any contract or provider agreement between the department or its divisions and a provider may be withheld by the department or its divisions from the provider for acts or omissions defined as abuse or fraud by this section, until such time as an agreement between the parties is reached or the dispute is adjudicated under the laws of this state.

6. The department or its designated division shall have the authority to review all cases and claim records for any recipient of public assistance benefits and to determine from these records if the recipient has, as defined in this section, committed excessive use of such services by seeking or obtaining services from a number of like providers of services and in quantities which exceed the levels considered necessary by current medical or health care professional practice standards and policies of the program.

7. The department or its designated division shall have the authority with respect to recipients of medical

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assistance benefits who have committed excessive use to limit or restrict the use of the recipient's Medicaid identification card to designated providers and for designated services; the actual method by which such restrictions are imposed shall be at the discretion of the department of social services or its designated division.

8. The department or its designated division shall have the authority with respect to any recipient of medical assistance benefits whose use has been restricted under subsection 7 of this section and who obtains or seeks to obtain medical assistance benefits from a provider other than one of the providers for designated services to terminate medical assistance benefits as defined by this chapter, where allowed by the provisions of the federal Social Security Act.

9. The department or its designated division shall have the authority with respect to any provider who knowingly allows a recipient to violate subsection 7 of this section or who fails to report a known violation of subsection 7 of this section to the department of social services or its designated division to terminate or otherwise sanction such provider's status as a participant in the medical assistance program. Any person making such a report shall not be civilly liable when the report is made in good faith.

10. In order to comply with the provisions of 42 U.S.C. Section 1320a-7(a) relating to mandatory exclusion of certain individuals and entities from participation in any federal health care program, and in furtherance of the state's authority under federal law, as implemented by 42 CFR 1002.3(b), to exclude an individual or entity from MO HealthNet for any reason or period authorized by state law, the department or its divisions shall suspend, revoke, or

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cancel any contract or provider agreement or refuse to enter into a new contract or provider agreement with any provider where it is determined that such provider is not qualified to perform the service or services required, as described in 42 U.S.C. Section 1396a(a)(23), because such provider, or such provider's agent, servant, or employee acting under such provider's authority:

(1) Has a conviction related to the delivery of any item or service under Medicare or under any state health care program, as described in 42 U.S.C. Section 1320a-7(a)(1);

(2) Has a conviction related to the neglect or abuse of a patient in connection with the delivery of any health care item or service, as described in 42 U.S.C. Section 1320a-7(a)(2);

(3) Has a felony conviction related to health care fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct, as described in 42 U.S.C. Section 1320a-7(a)(3);

(4) Has a felony conviction related to the unlawful manufacture, distribution, prescription, or dispensation of a controlled substance, as described in 42 U.S.C. Section 1320a-7(a)(4);

(5) Has been found guilty of, or civilly liable of, a pattern of intentional discrimination in the delivery or nondelivery of any health care item or service based on the race, color, or national origin of recipients, as described in 42 U.S.C. Section 2000d;

(6) Has historically discriminated against particular races by promoting eugenics as a means of limiting procreation of such races, including but not limited to sterilizations and the use of targeted abortions;

(7) Has been found civilly liable for, or has paid any

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fee, fine, penalty, or settlement of greater than one million dollars, in connection with, any activity related to health care fraud, theft, embezzlement, breach of fiduciary responsibility, false claim, or other financial misconduct, under 42 U.S.C. Section 1320a-7(a), the federal False Claims Act, 31 U.S.C. Section 3729 et seq., other federal law, or the laws of this or any other state, or has otherwise violated any such law; or

(8) Is an abortion facility, as defined in section 188.015, or an affiliate or associate of such abortion facility.

208.659. The MO HealthNet division shall revise the eligibility requirements for the uninsured women's health program, as established in 13 CSR Section 70- 4.090, to include women who are at least eighteen years of age and with a net family income of at or below one hundred eighty-five percent of the federal poverty level. In order to be eligible for such program, the applicant shall not have assets in excess of two hundred and fifty thousand dollars, nor shall the applicant have access to employer-sponsored health insurance. Such change in eligibility requirements shall not result in any change in services provided under the program. No funds shall be expended to any abortion facility, as defined in section 188.015, or to any affiliate or associate of such abortion facility.

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To: susank@missourilife.org[susank@missourilife.org]
From: Wagner, Ray[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=F577E20AF58F4CE4AFCDDD101E8A3745-WAGNER, RAY]
Sent: Sun 12/10/2023 6:46:12 PM (UTC-06:00)
Subject: Defunding bill
Abortion funding bill draft v.2.docx

Susan, I think this is the draft bill we were talking about. If I'm wrong about that, please let me know. I will call you in the morning.

Raymond T. Wagner, Jr.
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-0531
(573) 645-9875 (cell)
Ray.Wagner@ago.mo.gov

Sent from my iPhone
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188.207. It shall be unlawful for any public funds to be expended to any abortion facility, or to any affiliate or associate of such abortion facility.

188.220. Any taxpayer of this state or its political subdivisions shall have standing to bring **[**suit in a circuit court of proper venue**]** a cause of action in any court or administrative agency of competent jurisdiction to enforce the provisions of sections 188.200 to 188.215.

208.152. 1. MO HealthNet payments shall be made on behalf of those eligible needy persons as described in section 208.151 who are unable to provide for it in whole or in part, with any payments to be made on the basis of the reasonable cost of the care or reasonable charge for the services as defined and determined by the MO HealthNet division, unless otherwise hereinafter provided, for the following:

(1) Inpatient hospital services, except to persons in an institution for mental diseases who are under the age of sixty-five years and over the age of twenty-one years; provided that the MO HealthNet division shall provide through rule and regulation an exception process for coverage of inpatient costs in those cases requiring treatment beyond the seventy-fifth percentile professional activities study (PAS) or the MO HealthNet children's diagnosis length-of-stay schedule; and provided further that the MO HealthNet division shall take into account through its payment system for hospital services the situation of hospitals which serve a disproportionate number of low-income patients;

(2) All outpatient hospital services, payments therefor to be in amounts which represent no more than eighty percent of the lesser of reasonable costs or

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customary charges for such services, determined in accordance with the principles set forth in Title XVIII A and B, Public Law 89-97, 1965 amendments to the federal Social Security Act (42 U.S.C. Section 301, et seq.), but the MO HealthNet division may evaluate outpatient hospital services rendered under this section and deny payment for services which are determined by the MO HealthNet division not to be medically necessary, in accordance with federal law and regulations;

(3) Laboratory and X-ray services;

(4) Nursing home services for participants, except to persons with more than five hundred thousand dollars equity in their home or except for persons in an institution for mental diseases who are under the age of sixty-five years, when residing in a hospital licensed by the department of health and senior services or a nursing home licensed by the department of health and senior services or appropriate licensing authority of other states or government-owned and -operated institutions which are determined to conform to standards equivalent to licensing requirements in Title XIX of the federal Social Security Act (42 U.S.C. Section 301, et seq.), as amended, for nursing facilities. The MO HealthNet division may recognize through its payment methodology for nursing facilities those nursing facilities which serve a high volume of MO HealthNet patients. The MO HealthNet division when determining the amount of the benefit payments to be made on behalf of persons under the age of twenty-one in a nursing facility may consider nursing facilities furnishing care to persons under the age of twenty-one as a classification separate from other nursing facilities;

(5) Nursing home costs for participants receiving benefit payments under subdivision (4) of this subsection

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for those days, which shall not exceed twelve per any period of six consecutive months, during which the participant is on a temporary leave of absence from the hospital or nursing home, provided that no such participant shall be allowed a temporary leave of absence unless it is specifically provided for in his or her plan of care. As used in this subdivision, the term "temporary leave of absence" shall include all periods of time during which a participant is away from the hospital or nursing home overnight because he or she is visiting a friend or relative;

(6) Physicians' services, whether furnished in the office, home, hospital, nursing home, or elsewhere; provided, that no funds shall be expended to any abortion facility, as defined in section 188.015, or to any affiliate or associate of such abortion facility;

(7) Subject to appropriation, up to twenty visits per year for services limited to examinations, diagnoses, adjustments, and manipulations and treatments of malpositioned articulations and structures of the body provided by licensed chiropractic physicians practicing within their scope of practice. Nothing in this subdivision shall be interpreted to otherwise expand MO HealthNet services;

(8) Drugs and medicines when prescribed by a licensed physician, dentist, podiatrist, or an advanced practice registered nurse; except that no payment for drugs and medicines prescribed on and after January 1, 2006, by a licensed physician, dentist, podiatrist, or an advanced practice registered nurse may be made on behalf of any person who qualifies for prescription drug coverage under the provisions of P.L. 108-173;

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(9) Emergency ambulance services and, effective January 1, 1990, medically necessary transportation to scheduled, physician-prescribed nonelective treatments;

(10) Early and periodic screening and diagnosis of individuals who are under the age of twenty-one to ascertain their physical or mental defects, and health care, treatment, and other measures to correct or ameliorate defects and chronic conditions discovered thereby. Such services shall be provided in accordance with the provisions of Section 6403 of P.L. 101-239 and federal regulations promulgated thereunder;

(11) Home health care services;

(12) Family planning as defined by federal rules and regulations; provided, that no funds shall be expended to any abortion facility, as defined in section 188.015, or to any affiliate or associate of such abortion facility; and further provided, however, that such family planning services shall not include abortions or any abortifacient drug or device that is used for the purpose of inducing an abortion unless such abortions are certified in writing by a physician to the MO HealthNet agency that, in the physician's professional judgment, the life of the mother would be endangered if the fetus were carried to term;

(13) Inpatient psychiatric hospital services for individuals under age twenty-one as defined in Title XIX of the federal Social Security Act (42 U.S.C. Section 1396d, et seq.);

(14) Outpatient surgical procedures, including presurgical diagnostic services performed in ambulatory surgical facilities which are licensed by the department of health and senior services of the state of Missouri; except, that such outpatient surgical services shall not include persons who are eligible for coverage under Part B of Title

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XVIII, Public Law 89-97, 1965 amendments to the federal Social Security Act, as amended, if exclusion of such persons is permitted under Title XIX, Public Law 89-97, 1965 amendments to the federal Social Security Act, as amended;

(15) Personal care services which are medically oriented tasks having to do with a person's physical requirements, as opposed to housekeeping requirements, which enable a person to be treated by his or her physician on an outpatient rather than on an inpatient or residential basis in a hospital, intermediate care facility, or skilled nursing facility. Personal care services shall be rendered by an individual not a member of the participant's family who is qualified to provide such services where the services are prescribed by a physician in accordance with a plan of treatment and are supervised by a licensed nurse. Persons eligible to receive personal care services shall be those persons who would otherwise require placement in a hospital, intermediate care facility, or skilled nursing facility. Benefits payable for personal care services shall not exceed for any one participant one hundred percent of the average statewide charge for care and treatment in an intermediate care facility for a comparable period of time. Such services, when delivered in a residential care facility or assisted living facility licensed under chapter 198 shall be authorized on a tier level based on the services the resident requires and the frequency of the services. A resident of such facility who qualifies for assistance under section 208.030 shall, at a minimum, if prescribed by a physician, qualify for the tier level with the fewest services. The rate paid to providers for each tier of service shall be set subject to appropriations. Subject to appropriations, each resident of such facility who qualifies for assistance under section 208.030 and meets the level of

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care required in this section shall, at a minimum, if prescribed by a physician, be authorized up to one hour of personal care services per day. Authorized units of personal care services shall not be reduced or tier level lowered unless an order approving such reduction or lowering is obtained from the resident's personal physician. Such authorized units of personal care services or tier level shall be transferred with such resident if he or she transfers to another such facility. Such provision shall terminate upon receipt of relevant waivers from the federal Department of Health and Human Services. If the Centers for Medicare and Medicaid Services determines that such provision does not comply with the state plan, this provision shall be null and void. The MO HealthNet division shall notify the revisor of statutes as to whether the relevant waivers are approved or a determination of noncompliance is made;

(16) Mental health services. The state plan for providing medical assistance under Title XIX of the Social Security Act, 42 U.S.C. Section 301, as amended, shall include the following mental health services when such services are provided by community mental health facilities operated by the department of mental health or designated by the department of mental health as a community mental health facility or as an alcohol and drug abuse facility or as a child-serving agency within the comprehensive children's mental health service system established in section 630.097. The department of mental health shall establish by administrative rule the definition and criteria for designation as a community mental health facility and for designation as an alcohol and drug abuse facility. Such mental health services shall include:

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(a) Outpatient mental health services including preventive, diagnostic, therapeutic, rehabilitative, and palliative interventions rendered to individuals in an individual or group setting by a mental health professional in accordance with a plan of treatment appropriately established, implemented, monitored, and revised under the auspices of a therapeutic team as a part of client services management;

(b) Clinic mental health services including preventive, diagnostic, therapeutic, rehabilitative, and palliative interventions rendered to individuals in an individual or group setting by a mental health professional in accordance with a plan of treatment appropriately established, implemented, monitored, and revised under the auspices of a therapeutic team as a part of client services management;

(c) Rehabilitative mental health and alcohol and drug abuse services including home and community-based preventive, diagnostic, therapeutic, rehabilitative, and palliative interventions rendered to individuals in an individual or group setting by a mental health or alcohol and drug abuse professional in accordance with a plan of treatment appropriately established, implemented, monitored, and revised under the auspices of a therapeutic team as a part of client services management. As used in this section, mental health professional and alcohol and drug abuse professional shall be defined by the department of mental health pursuant to duly promulgated rules. With respect to services established by this subdivision, the department of social services, MO HealthNet division, shall enter into an agreement with the department of mental health. Matching funds for outpatient mental health services, clinic mental health services, and rehabilitation

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services for mental health and alcohol and drug abuse shall be certified by the department of mental health to the MO HealthNet division. The agreement shall establish a mechanism for the joint implementation of the provisions of this subdivision. In addition, the agreement shall establish a mechanism by which rates for services may be jointly developed;

(17) Such additional services as defined by the MO HealthNet division to be furnished under waivers of federal statutory requirements as provided for and authorized by the federal Social Security Act (42 U.S.C. Section 301, et seq.) subject to appropriation by the general assembly;

(18) The services of an advanced practice registered nurse with a collaborative practice agreement to the extent that such services are provided in accordance with chapters 334 and 335, and regulations promulgated thereunder;

(19) Nursing home costs for participants receiving benefit payments under subdivision (4) of this subsection to reserve a bed for the participant in the nursing home during the time that the participant is absent due to admission to a hospital for services which cannot be performed on an outpatient basis, subject to the provisions of this subdivision:

(a) The provisions of this subdivision shall apply only if:

a. The occupancy rate of the nursing home is at or above ninety-seven percent of MO HealthNet certified licensed beds, according to the most recent quarterly census provided to the department of health and senior services which was taken prior to when the participant is admitted to the hospital; and

b. The patient is admitted to a hospital for a medical condition with an anticipated stay of three days or less;

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(b) The payment to be made under this subdivision shall be provided for a maximum of three days per hospital stay;

(c) For each day that nursing home costs are paid on behalf of a participant under this subdivision during any period of six consecutive months such participant shall, during the same period of six consecutive months, be ineligible for payment of nursing home costs of two otherwise available temporary leave of absence days provided under subdivision (5) of this subsection; and

(d) The provisions of this subdivision shall not apply unless the nursing home receives notice from the participant or the participant's responsible party that the participant intends to return to the nursing home following the hospital stay. If the nursing home receives such notification and all other provisions of this subsection have been satisfied, the nursing home shall provide notice to the participant or the participant's responsible party prior to release of the reserved bed;

(20) Prescribed medically necessary durable medical equipment. An electronic web-based prior authorization system using best medical evidence and care and treatment guidelines consistent with national standards shall be used to verify medical need;

(21) Hospice care. As used in this subdivision, the term "hospice care" means a coordinated program of active professional medical attention within a home, outpatient and inpatient care which treats the terminally ill patient and family as a unit, employing a medically directed interdisciplinary team. The program provides relief of severe pain or other physical symptoms and supportive care to meet the special needs arising out of physical, psychological, spiritual, social, and economic stresses

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which are experienced during the final stages of illness, and during dying and bereavement and meets the Medicare requirements for participation as a hospice as are provided in 42 CFR Part 418. The rate of reimbursement paid by the MO HealthNet division to the hospice provider for room and board furnished by a nursing home to an eligible hospice patient shall not be less than ninety-five percent of the rate of reimbursement which would have been paid for facility services in that nursing home facility for that patient, in accordance with subsection (c) of Section 6408 of P.L. 101-239 (Omnibus Budget Reconciliation Act of 1989);

(22) Prescribed medically necessary dental services. Such services shall be subject to appropriations. An electronic web-based prior authorization system using best medical evidence and care and treatment guidelines consistent with national standards shall be used to verify medical need;

(23) Prescribed medically necessary optometric services. Such services shall be subject to appropriations. An electronic web-based prior authorization system using best medical evidence and care and treatment guidelines consistent with national standards shall be used to verify medical need;

(24) Blood clotting products-related services. For persons diagnosed with a bleeding disorder, as defined in section 338.400, reliant on blood clotting products, as defined in section 338.400, such services include:

(a) Home delivery of blood clotting products and ancillary infusion equipment and supplies, including the emergency deliveries of the product when medically necessary;

(b) Medically necessary ancillary infusion equipment and supplies required to administer the blood clotting products; and

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(c) Assessments conducted in the participant's home by a pharmacist, nurse, or local home health care agency trained in bleeding disorders when deemed necessary by the participant's treating physician;

(25) The MO HealthNet division shall, by January 1, 2008, and annually thereafter, report the status of MO HealthNet provider reimbursement rates as compared to one hundred percent of the Medicare reimbursement rates and compared to the average dental reimbursement rates paid by third-party payors licensed by the state. The MO HealthNet division shall, by July 1, 2008, provide to the general assembly a four-year plan to achieve parity with Medicare reimbursement rates and for third-party payor average dental reimbursement rates. Such plan shall be subject to appropriation and the division shall include in its annual budget request to the governor the necessary funding needed to complete the four-year plan developed under this subdivision.

2. Additional benefit payments for medical assistance shall be made on behalf of those eligible needy children, pregnant women and blind persons with any payments to be made on the basis of the reasonable cost of the care or reasonable charge for the services as defined and determined by the MO HealthNet division, unless otherwise hereinafter provided, for the following:

(1) Dental services;

(2) Services of podiatrists as defined in section 330.010;

(3) Optometric services as described in section 336.010;

(4) Orthopedic devices or other prosthetics, including eye glasses, dentures, hearing aids, and wheelchairs;

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(5) Hospice care. As used in this subdivision, the term "hospice care" means a coordinated program of active professional medical attention within a home, outpatient and inpatient care which treats the terminally ill patient and family as a unit, employing a medically directed interdisciplinary team. The program provides relief of severe pain or other physical symptoms and supportive care to meet the special needs arising out of physical, psychological, spiritual, social, and economic stresses which are experienced during the final stages of illness, and during dying and bereavement and meets the Medicare requirements for participation as a hospice as are provided in 42 CFR Part 418. The rate of reimbursement paid by the MO HealthNet division to the hospice provider for room and board furnished by a nursing home to an eligible hospice patient shall not be less than ninety-five percent of the rate of reimbursement which would have been paid for facility services in that nursing home facility for that patient, in accordance with subsection (c) of Section 6408 of P.L. 101-239 (Omnibus Budget Reconciliation Act of 1989);

(6) Comprehensive day rehabilitation services beginning early posttrauma as part of a coordinated system of care for individuals with disabling impairments. Rehabilitation services must be based on an individualized, goal-oriented, comprehensive and coordinated treatment plan developed, implemented, and monitored through an interdisciplinary assessment designed to restore an individual to optimal level of physical, cognitive, and behavioral function. The MO HealthNet division shall establish by administrative rule the definition and criteria for designation of a comprehensive day rehabilitation service facility, benefit limitations and payment mechanism. Any rule or portion of a rule, as that term is

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defined in section 536.010, that is created under the authority delegated in this subdivision shall become effective only if it complies with and is subject to all of the provisions of chapter 536 and, if applicable, section 536.028. This section and chapter 536 are nonseverable and if any of the powers vested with the general assembly pursuant to chapter 536 to review, to delay the effective date, or to disapprove and annul a rule are subsequently held unconstitutional, then the grant of rulemaking authority and any rule proposed or adopted after August 28, 2005, shall be invalid and void.

3. The MO HealthNet division may require any participant receiving MO HealthNet benefits to pay part of the charge or cost until July 1, 2008, and an additional payment after July 1, 2008, as defined by rule duly promulgated by the MO HealthNet division, for all covered services except for those services covered under subdivisions (15) and (16) of subsection 1 of this section and sections 208.631 to 208.657 to the extent and in the manner authorized by Title XIX of the federal Social Security Act (42 U.S.C. Section 1396, et seq.) and regulations thereunder. When substitution of a generic drug is permitted by the prescriber according to section 338.056, and a generic drug is substituted for a name-brand drug, the MO HealthNet division may not lower or delete the requirement to make a co-payment pursuant to regulations of Title XIX of the federal Social Security Act. A provider of goods or services described under this section must collect from all participants the additional payment that may be required by the MO HealthNet division under authority granted herein, if the division exercises that authority, to remain eligible as a provider. Any payments made by participants under this section shall be in addition to and

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not in lieu of payments made by the state for goods or services described herein except the participant portion of the pharmacy professional dispensing fee shall be in addition to and not in lieu of payments to pharmacists. A provider may collect the co-payment at the time a service is provided or at a later date. A provider shall not refuse to provide a service if a participant is unable to pay a required payment. If it is the routine business practice of a provider to terminate future services to an individual with an unclaimed debt, the provider may include uncollected co-payments under this practice. Providers who elect not to undertake the provision of services based on a history of bad debt shall give participants advance notice and a reasonable opportunity for payment. A provider, representative, employee, independent contractor, or agent of a pharmaceutical manufacturer shall not make co-payment for a participant. This subsection shall not apply to other qualified children, pregnant women, or blind persons. If the Centers for Medicare and Medicaid Services does not approve the MO HealthNet state plan amendment submitted by the department of social services that would allow a provider to deny future services to an individual with uncollected co-payments, the denial of services shall not be allowed. The department of social services shall inform providers regarding the acceptability of denying services as the result of unpaid co-payments.

4. The MO HealthNet division shall have the right to collect medication samples from participants in order to maintain program integrity.

5. Reimbursement for obstetrical and pediatric services under subdivision (6) of subsection 1 of this section shall be timely and sufficient to enlist enough health care providers so that care and services are

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available under the state plan for MO HealthNet benefits at least to the extent that such care and services are available to the general population in the geographic area, as required under subparagraph (a)(30)(A) of 42 U.S.C. Section 1396a and federal regulations promulgated thereunder.

6. Beginning July 1, 1990, reimbursement for services rendered in federally funded health centers shall be in accordance with the provisions of subsection 6402(c) and Section 6404 of P.L. 101-239 (Omnibus Budget Reconciliation Act of 1989) and federal regulations promulgated thereunder.

7. Beginning July 1, 1990, the department of social services shall provide notification and referral of children below age five, and pregnant, breast-feeding, or postpartum women who are determined to be eligible for MO HealthNet benefits under section 208.151 to the special supplemental food programs for women, infants and children administered by the department of health and senior services. Such notification and referral shall conform to the requirements of Section 6406 of P.L. 101-239 and regulations promulgated thereunder.

8. Providers of long-term care services shall be reimbursed for their costs in accordance with the provisions of Section 1902 (a)(13)(A) of the Social Security Act, 42 U.S.C. Section 1396a, as amended, and regulations promulgated thereunder.

9. Reimbursement rates to long-term care providers with respect to a total change in ownership, at arm's length, for any facility previously licensed and certified for participation in the MO HealthNet program shall not increase payments in excess of the increase that would result from the application of Section 1902 (a)(13)(C) of the Social Security Act, 42 U.S.C. Section 1396a (a)(13)(C).

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10. The MO HealthNet division may enroll qualified residential care facilities and assisted living facilities, as defined in chapter 198, as MO HealthNet personal care providers.

11. Any income earned by individuals eligible for certified extended employment at a sheltered workshop under chapter 178 shall not be considered as income for purposes of determining eligibility under this section.

12. If the Missouri Medicaid audit and compliance unit changes any interpretation or application of the requirements for reimbursement for MO HealthNet services from the interpretation or application that has been applied previously by the state in any audit of a MO HealthNet provider, the Missouri Medicaid audit and compliance unit shall notify all affected MO HealthNet providers five business days before such change shall take effect. Failure of the Missouri Medicaid audit and compliance unit to notify a provider of such change shall entitle the provider to continue to receive and retain reimbursement until such notification is provided and shall waive any liability of such provider for recoupment or other loss of any payments previously made prior to the five business days after such notice has been sent. Each provider shall provide the Missouri Medicaid audit and compliance unit a valid email address and shall agree to receive communications electronically. The notification required under this section shall be delivered in writing by the United States Postal Service or electronic mail to each provider.

13. Nothing in this section shall be construed to abrogate or limit the department's statutory requirement to promulgate rules under chapter 536.

14. Beginning July 1, 2016, and subject to appropriations, providers of behavioral, social, and

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psychophysiological services for the prevention, treatment, or management of physical health problems shall be reimbursed utilizing the behavior assessment and intervention reimbursement codes 96150 to 96154 or their successor codes under the Current Procedural Terminology (CPT) coding system. Providers eligible for such reimbursement shall include psychologists.

208.153. 1. Pursuant to and not inconsistent with the provisions of sections 208.151 and 208.152, the MO HealthNet division shall by rule and regulation define the reasonable costs, manner, extent, quantity, quality, charges and fees of MO HealthNet benefits herein provided. The benefits available under these sections shall not replace those provided under other federal or state law or under other contractual or legal entitlements of the persons receiving them, and all persons shall be required to apply for and utilize all benefits available to them and to pursue all causes of action to which they are entitled. Any person entitled to MO HealthNet benefits may obtain it from any provider of services that is not excluded or disqualified as a provider under any provision of law including, but not limited to, section 208.164, with which an agreement is in effect under this section and which undertakes to provide the services, as authorized by the MO HealthNet division. At the discretion of the director of the MO HealthNet division and with the approval of the governor, the MO HealthNet division is authorized to provide medical benefits for participants receiving public assistance by expending funds for the payment of federal medical insurance premiums, coinsurance and deductibles pursuant to the provisions of Title XVIII B and XIX, Public Law 89-97, 1965 amendments to the federal Social Security Act (42 U.S.C. 301, et seq.), as amended.

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2. MO HealthNet shall include benefit payments on behalf of qualified Medicare beneficiaries as defined in 42 U.S.C. Section 1396d(p). The family support division shall by rule and regulation establish which qualified Medicare beneficiaries are eligible. The MO HealthNet division shall define the premiums, deductible and coinsurance provided for in 42 U.S.C. Section 1396d(p) to be provided on behalf of the qualified Medicare beneficiaries.

3. MO HealthNet shall include benefit payments for Medicare Part A cost sharing as defined in clause (p)(3)(A)(i) of 42 U.S.C. 1396d on behalf of qualified disabled and working individuals as defined in subsection (s) of Section 42 U.S.C. 1396d as required by subsection (d) of Section 6408 of P.L. 101-239 (Omnibus Budget Reconciliation Act of 1989). The MO HealthNet division may impose a premium for such benefit payments as authorized by paragraph (d)(3) of Section 6408 of P.L. 101-239.

4. MO HealthNet shall include benefit payments for Medicare Part B cost sharing described in 42 U.S.C. Section 1396(d)(p)(3)(A)(ii) for individuals described in subsection 2 of this section, but for the fact that their income exceeds the income level established by the state under 42 U.S.C. Section 1396(d)(p)(2) but is less than one hundred and ten percent beginning January 1, 1993, and less than one hundred and twenty percent beginning January 1, 1995, of the official poverty line for a family of the size involved.

5. For an individual eligible for MO HealthNet under Title XIX of the Social Security Act, MO HealthNet shall include payment of enrollee premiums in a group health plan and all deductibles, coinsurance and other cost-sharing for items and services otherwise covered under the state Title XIX plan under Section 1906 of the federal Social Security Act and regulations established under the authority of

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Section 1906, as may be amended. Enrollment in a group health plan must be cost effective, as established by the Secretary of Health and Human Services, before enrollment in the group health plan is required. If all members of a family are not eligible for MO HealthNet and enrollment of the Title XIX eligible members in a group health plan is not possible unless all family members are enrolled, all premiums for noneligible members shall be treated as payment for MO HealthNet of eligible family members. Payment for noneligible family members must be cost effective, taking into account payment of all such premiums. Non-Title XIX eligible family members shall pay all deductible, coinsurance and other cost-sharing obligations. Each individual as a condition of eligibility for MO HealthNet benefits shall apply for enrollment in the group health plan.

6. Any Social Security cost-of-living increase at the beginning of any year shall be disregarded until the federal poverty level for such year is implemented.

7. If a MO HealthNet participant has paid the requested spenddown in cash for any month and subsequently pays an out-of-pocket valid medical expense for such month, such expense shall be allowed as a deduction to future required spenddown for up to three months from the date of such expense.

208.164. 1. As used in this section, unless the context clearly requires otherwise, the following terms mean:

(1) "Abuse", a documented pattern of inducing, furnishing, or otherwise causing a recipient to receive services or merchandise not otherwise required or requested by the recipient, attending physician or appropriate utilization review team; a documented pattern of performing and billing tests, examinations, patient visits, surgeries, drugs or merchandise that exceed limits or frequencies

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determined by the department for like practitioners for which there is no demonstrable need, or for which the provider has created the need through ineffective services or merchandise previously rendered. The decision to impose any of the sanctions authorized in this section shall be made by the director of the department, following a determination of demonstrable need or accepted medical practice made in consultation with medical or other health care professionals, or qualified peer review teams;

(2) "Department", the department of social services;

(3) "Excessive use", the act, by a person eligible for services under a contract or provider agreement between the department of social services or its divisions and a provider, of seeking and/or obtaining medical assistance benefits from a number of like providers and in quantities which exceed the levels that are considered medically necessary by current medical practices and standards for the eligible person's needs;

(4) "Fraud", a known false representation, including the concealment of a material fact that the provider knew or should have known through the usual conduct of his or her profession or occupation, upon which the provider claims reimbursement under the terms and conditions of a contract or provider agreement and the policies pertaining to such contract or provider agreement of the department or its divisions in carrying out the providing of services, or under any approved state plan authorized by the federal Social Security Act;

(5) "Health plan", a group of services provided to recipients of medical assistance benefits by providers under a contract with the department;

(6) "Medical assistance benefits", those benefits authorized to be provided by sections 208.152 and 208.162;

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(7) "Prior authorization", approval to a provider to perform a service or services for an eligible person required by the department or its divisions in advance of the actual service being provided or approved for a recipient to receive a service or services from a provider, required by the department or its designated division in advance of the actual service or services being received;

(8) "Provider", any person, partnership, corporation, not-for-profit corporation, professional corporation, or other business entity that enters into a contract or provider agreement with the department or its divisions for the purpose of providing services to eligible persons, and obtaining from the department or its divisions reimbursement therefor;

(9) "Recipient", a person who is eligible to receive medical assistance benefits allocated through the department;

(10) "Service", the specific function, act, successive acts, benefits, continuing benefits, requested by an eligible person or provided by the provider under contract with the department or its divisions.

2. The department or its divisions shall have the authority to suspend, revoke, or cancel any contract or provider agreement or refuse to enter into a new contract or provider agreement with any provider where it is determined the provider has committed or allowed its agents, servants, or employees to commit acts defined as abuse or fraud in this section.

3. The department or its divisions shall have the authority to impose prior authorization as defined in this section:

(1) When it has reasonable cause to believe a provider or recipient has knowingly followed a course of conduct

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which is defined as abuse or fraud or excessive use by this section; or

(2) When it determines by rule that prior authorization is reasonable for a specified service or procedure.

4. If a provider or recipient reports to the department or its divisions the name or names of providers or recipients who, based upon their personal knowledge has reasonable cause to believe an act or acts are being committed which are defined as abuse, fraud or excessive use by this section, such report shall be confidential and the reporter's name shall not be divulged to anyone by the department or any of its divisions, except at a judicial proceeding upon a proper protective order being entered by the court.

5. Payments for services under any contract or provider agreement between the department or its divisions and a provider may be withheld by the department or its divisions from the provider for acts or omissions defined as abuse or fraud by this section, until such time as an agreement between the parties is reached or the dispute is adjudicated under the laws of this state.

6. The department or its designated division shall have the authority to review all cases and claim records for any recipient of public assistance benefits and to determine from these records if the recipient has, as defined in this section, committed excessive use of such services by seeking or obtaining services from a number of like providers of services and in quantities which exceed the levels considered necessary by current medical or health care professional practice standards and policies of the program.

7. The department or its designated division shall have the authority with respect to recipients of medical

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assistance benefits who have committed excessive use to limit or restrict the use of the recipient's Medicaid identification card to designated providers and for designated services; the actual method by which such restrictions are imposed shall be at the discretion of the department of social services or its designated division.

8. The department or its designated division shall have the authority with respect to any recipient of medical assistance benefits whose use has been restricted under subsection 7 of this section and who obtains or seeks to obtain medical assistance benefits from a provider other than one of the providers for designated services to terminate medical assistance benefits as defined by this chapter, where allowed by the provisions of the federal Social Security Act.

9. The department or its designated division shall have the authority with respect to any provider who knowingly allows a recipient to violate subsection 7 of this section or who fails to report a known violation of subsection 7 of this section to the department of social services or its designated division to terminate or otherwise sanction such provider's status as a participant in the medical assistance program. Any person making such a report shall not be civilly liable when the report is made in good faith.

10. In order to comply with the provisions of 42 U.S.C. Section 1320a-7(a) relating to mandatory exclusion of certain individuals and entities from participation in any federal health care program, and in furtherance of the state's authority under federal law, as implemented by 42 CFR 1002.3(b), to exclude an individual or entity from MO HealthNet for any reason or period authorized by state law, the department or its divisions shall suspend, revoke, or

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cancel any contract or provider agreement or refuse to enter into a new contract or provider agreement with any provider where it is determined that such provider is not qualified to perform the service or services required, as described in 42 U.S.C. Section 1396a(a)(23), because such provider, or such provider's agent, servant, or employee acting under such provider's authority:

(1) Has a conviction related to the delivery of any item or service under Medicare or under any state health care program, as described in 42 U.S.C. Section 1320a-7(a)(1);

(2) Has a conviction related to the neglect or abuse of a patient in connection with the delivery of any health care item or service, as described in 42 U.S.C. Section 1320a-7(a)(2);

(3) Has a felony conviction related to health care fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct, as described in 42 U.S.C. Section 1320a-7(a)(3);

(4) Has a felony conviction related to the unlawful manufacture, distribution, prescription, or dispensation of a controlled substance, as described in 42 U.S.C. Section 1320a-7(a)(4);

(5) Has been found guilty of, or civilly liable of, a pattern of intentional discrimination in the delivery or nondelivery of any health care item or service based on the race, color, or national origin of recipients, as described in 42 U.S.C. Section 2000d;

(6) Has historically discriminated against particular races by promoting eugenics as a means of limiting procreation of such races, including but not limited to sterilizations and the use of targeted abortions;

(7) Has been found civilly liable for, or has paid any

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fee, fine, penalty, or settlement of greater than one million dollars, in connection with, any activity related to health care fraud, theft, embezzlement, breach of fiduciary responsibility, false claim, or other financial misconduct, under 42 U.S.C. Section 1320a-7(a), the federal False Claims Act, 31 U.S.C. Section 3729 et seq., other federal law, or the laws of this or any other state, or has otherwise violated any such law; or

(8) Is an abortion facility, as defined in section 188.015, or an affiliate or associate of such abortion facility.

208.659. The MO HealthNet division shall revise the eligibility requirements for the uninsured women's health program, as established in 13 CSR Section 70- 4.090, to include women who are at least eighteen years of age and with a net family income of at or below one hundred eighty-five percent of the federal poverty level. In order to be eligible for such program, the applicant shall not have assets in excess of two hundred and fifty thousand dollars, nor shall the applicant have access to employer-sponsored health insurance. Such change in eligibility requirements shall not result in any change in services provided under the program. No funds shall be expended to any abortion facility, as defined in section 188.015, or to any affiliate or associate of such abortion facility.

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To: susan.k@missourilife.org[susan.k@missourilife.org]
From: Wagner, Ray[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=F577E20AF58F4CE4AFCDDD101E8A3745-WAGNER, RAY]
Sent: Sun 12/10/2023 9:28:39 PM (UTC-06:00)
Subject: Fwd: Defunding bill
Abortion funding bill draft v.2.docx

Susan - I sent this email to the wrong address. I hope you receive the attachment now. I will try to reach you tomorrow.

Sent from my iPhone

Begin forwarded message:

> **From:** "Wagner, Ray" <Ray.Wagner@ago.mo.gov>
> **Date:** December 10, 2023 at 6:46:13 PM CST
> **To:** susank@missourilife.org
> **Subject: Defunding bill**
>
> Susan, I think this is the draft bill we were talking about. If I'm wrong about that, please let me know. I will call you in the morning.
>
> Raymond T. Wagner, Jr.
> Missouri Attorney General's Office
> P.O. Box 899
> Jefferson City, Missouri 65102
> (573) 751-0531
> (573) 645-9875 (cell)
> Ray.Wagner@ago.mo.gov
>
> Sent from my iPhone

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To: 'Leslie Korte'[Leslie.Korte@auditor.mo.gov]
Cc: Belz, Timothy[tbelz@olblaw.com]; Mary Catherine Martin[mcmartin@thomasmoresociety.org]; Rob Tillman[rob.tillman@auditor.mo.gov]; Freedlund, Samuel[Samuel.Freedlund@ago.mo.gov]
From: Lewis, Jason[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B5C0354B7D8F4AE4B03D7DD0D4144031-LEWIS, JASON]
Sent: Tue 11/28/2023 6:55:40 PM (UTC-06:00)
Subject: RE: Corley and Forck Ballot Initiative Cases

Counsel for the *Forck* case:
In light of the SAO's email, our office contacted Judge Walker's clerk regarding presenting the Secretary of State's change of judge application.
Here are the available times (whether in-person or Webex):

12/4/2023 at 3:00 pm
12/5/2023 at 8:30 am
12/8/2023 at 1:30 pm

Please let me know tomorrow by close of business if any of those options do *not* work for you.If I do not hear from anyone, I will file a notice setting it at 12/05 at 8:30 a.m.
Thanks,
Jason

From: Leslie Korte <Leslie.Korte@auditor.mo.gov>
Sent: Tuesday, November 28, 2023 11:05 AM
To: Lewis, Jason <Jason.Lewis@ago.mo.gov>
Cc: Hatfield, Charles <chuck.hatfield@stinson.com>; Belz, Timothy <tbelz@olblaw.com>; Mary Catherine Martin <mcmartin@thomasmoresociety.org>; Cossette, Alixandra S. <alix.cossette@stinson.com>; Rob Tillman <rob.tillman@auditor.mo.gov>; Freedlund, Samuel <Samuel.Freedlund@ago.mo.gov>
Subject: RE: Corley and Forck Ballot Initiative Cases

All-
The SAO will not waive presentment.
Also, it seems a scenario exists where all parties in each case will have exhausted their change of judge under 51.05, and the two cases could be before different judges. How does consolidation work if that occurs?
Thanks,
Leslie Korte
General Counsel
Office of Missouri State Auditor
Harry S. Truman State Office Bldg
301 West High Street, Suite 880
573-751-7474

From: Lewis, Jason <Jason.Lewis@ago.mo.gov>
Sent: Tuesday, November 28, 2023 10:43 AM
To: 'Hatfield, Charles' <chuck.hatfield@stinson.com>; Rob Tillman <rob.tillman@auditor.mo.gov>; Leslie Korte <Leslie.Korte@auditor.mo.gov>; 'Timothy Belz' <tbelz@olblaw.com>; 'Mary Catherine Martin' <mcmartin@thomasmoresociety.org>
Cc: Cossette, Alixandra S. <alix.cossette@stinson.com>; Freedlund, Samuel <Samuel.Freedlund@ago.mo.gov>
Subject: RE: Corley and Forck Ballot Initiative Cases

My email may have been less clear than I intended it to be.I am looping in Chuck/Alix (the Corley case) only to discuss future consolidation of all cases.I am soliciting everyone's thoughts on consolidation of both the Corley and Forck cases, given what seems to be a decent likelihood of all cases ending up before the same judge.
I only need the existing parties to the Forck case to weigh in on waiving presentment of the change of judge in that case.
Jason

From: Hatfield, Charles <chuck.hatfield@stinson.com>
Sent: Tuesday, November 28, 2023 10:39 AM
To: Lewis, Jason <Jason.Lewis@ago.mo.gov>; Rob Tillman <rob.tillman@auditor.mo.gov>; Leslie Korte <Leslie.Korte@auditor.mo.gov>; 'Timothy Belz' <tbelz@olblaw.com>; 'Mary Catherine Martin' <mcmartin@thomasmoresociety.org>
Cc: Cossette, Alixandra S. <alix.cossette@stinson.com>; Freedlund, Samuel <Samuel.Freedlund@ago.mo.gov>
Subject: RE: Corley and Forck Ballot Initiative Cases

We are not counsel for any party in the Forck case, and don't have a position on what happens there.
In the Corley case, not sure I'm following what you mean. Defendants have used their change of judge now and we oppose allowing Defendants to change judges again.

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Charles W.Hatfield
Partner

STINSON LLP
230 W. McCarty Street
Jefferson City, MO 65101-1553
Direct: 573.636.6827 \ Mobile: 573.230.2610 \ Bio

Assistant: STL.LSSTeam10@stinson.com\ 314.345.7040

STINSON.COM
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From: Lewis, Jason <Jason.Lewis@ago.mo.gov>
Sent: Tuesday, November 28, 2023 10:33 AM
To: Rob Tillman <rob.tillman@auditor.mo.gov>; Leslie Korte <Leslie.Korte@auditor.mo.gov>; 'Timothy Belz' <tbelz@olblaw.com>; 'Mary Catherine Martin' <mcmartin@thomasmoresociety.org>
Cc: Hatfield, Charles <chuck.hatfield@stinson.com>; Cossette, Alixandra S. <alix.cossette@stinson.com>; Freedlund, Samuel <Samuel.Freedlund@ago.mo.gov>
Subject: Corley and Forck Ballot Initiative Cases
External Email – Use Caution

Counsel,
As I believe you all know, the Secretary of State has filed an application for change of judge in both of the ballot initiative cases (23AC-CC06380 and 23AC-CC06366).This morning, Judge Beetem transferred the *Corley* case to Division III for assignment.
Before I reach out to Judge Walker to set a time to present our change of judge application in the *Forck* case, I wanted to see whether the parties to that case will waive presentment.I would like to inform Judge Walker of the parties' position.Tim/Mary Catherine and Rob/Leslie, please let me know.
To all parties (including Chuck/Alix for the *Corley* case): get the ball rolling on next steps, I think it makes sense for both cases to be consolidated once the change of judge process has settled—likely just a consolidation for purposes of trial and scheduling. would expect all cases to land before the same judge, assuming that no other party exercises their change of judge right.What do you all think about consolidation?
Many thanks,
Jason

Jason K. Lewis | *Chief Counsel for Governmental Affairs*
Missouri Attorney General's Office
815 Olive St, Suite 200
St. Louis, MO 63101
(314) 340-7832
jason.lewis@ago.mo.gov
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ATTORNEY GENERAL OF MISSOURI

ANDREW BAILEY

December 11, 2023

Angelo Carusone
President and CEO
Media Matters for America
PO Box 44811
Washington, DC 20026
Via email to: action@medimatters.org

Re: Notice of Pending Investigation

Dear Mr. Carusone,

This letter serves as a formal document hold notice under federal and Missouri law. The Missouri Attorney General's Office has opened an investigation into Media Matters for America ("Media Matters") regarding your firm's potentially unlawful business practices.

As you are no doubt aware, a federal lawsuit has been filed against Media Matters, raising serious allegations that your firm falsely and deceptively manipulated the algorithm on X (formerly known as Twitter) through coordinated, inauthentic behavior and that you did so in an attempt to defame the organization and cause advertisers to pull their support from the platform, thus harming free speech. The lawsuit alleges that you lied to the public, falsely suggesting that fringe, extremist content regularly appears next to content from corporate advertisers when in fact the opposite is true. At the same time, you appear to have used this coordinated, inauthentic activity to solicit charitable donations from consumers across the country.

I have reason to believe that your firm's alleged actions may have violated Missouri consumer protection laws, including laws that prohibit nonprofit entities from soliciting funds under false pretenses. *E.g.*, Mo. Rev. Stat. § 407.020.1. I am especially concerned that Media Matters' actions, if proven true, have hampered free speech by targeting an expressly pro free speech social media platform in an attempt

Supreme Court Building
207 W. High Street
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-0774
www.ago.mo.gov

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to cause it financial harm while defrauding Missourians in the process.

You are thus hereby instructed to preserve all records that may relate to your alleged effort to engage in coordinated, inauthentic behavior on social media platforms in order to generate false statements that were used to solicit charitable contributions under false pretenses. You are instructed in particular to preserve all records that may relate to your webpage, which expressly solicits funds, at the following URL: https://www.mediamatters.org/twitter/musk-endorses-antisemitic-conspiracy-theory-x-has-been-placing-ads-apple-bravo-ibm-oracle. Records you must preserve include but are not limited to:

- Internal communications regarding your strategy to target advertisers on X, formerly known as Twitter, and your efforts to manipulate those advertisers into pulling their ads from the platform.
- Communications with third parties regarding your strategy to target advertisers on X, formerly known as Twitter, and your efforts to manipulate those advertisers into pulling their ads from the platform.
- Communications with IBM, Lions Gate Entertainment, Apple, Disney, Warner Brothers Discovery, Paramount Gold, NBCUniversal, Comcast, Sony, Ubisoft and Wal-Mart regarding your strategy to target advertisers on X, formerly known as Twitter, and your efforts to manipulate those advertisers into pulling their ads from the platform.
- Internal communications regarding your policies, strategies or operations related to generating stories or content intended to "cancel," "deplatform," "demonetize," or otherwise interfere with businesses or organizations located in Missouri, or utilized by Missouri residents.
- Communications and documents related to soliciting charitable funds from residents of Missouri in relation to the webpage at the URL stated above.

Your obligation to preserve evidence extends to documents kept in any form, both physical and electronic. This includes letters, emails, instant messages, text messages, drafts, informal files, desk files, handwritten notes, faxes, memoranda, forms, calendar entries, address book entries, and voicemails. Your obligation applies to both hardcopy documents and electronic ones, including those kept on computers, laptops, tablets, smartphones, and any other electronic device, including both work and personal devices, personal email accounts and personal computers and tablets. Please ensure that all employees and contractors of Media Matters are aware of their obligations to preserve evidence in this case.

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You and your staff are further instructed to cease any protocol for the automatic deletion of emails or backup files on your computer systems. Please forward a copy of this letter to Media Matters IT managers and instruct them to suspend any such protocols.

Be advised that any failure to preserve documents of probative value to this case, even if inadvertent, will constitute spoliation of evidence and may result in a finding of contempt from the court or in sanctions.

Your cooperation in this matter is appreciated. Please feel free to contact me with any questions or concerns.

Respectfully,

ANDREW BAILEY
Missouri Attorney General

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Bcc: 'jillv@newsmax.com'[jillv@newsmax.com]; 'jaclyna@newsmax.com'[jaclyna@newsmax.com]; 'alx@bennyjohnson.com'[alx@bennyjohnson.com]; 'bridget.gleason@fox.com'[bridget.gleason@fox.com]; 'Kristen.gubala@fox.com'[Kristen.gubala@fox.com]; 'Amy.munneke@fox.com'[Amy.munneke@fox.com]; 'John.maresco@fox.com'[John.maresco@fox.com]; 'John.bruno@fox.com'[John.bruno@fox.com]; 'Dennis.murphy@fox.com'[Dennis.murphy@fox.com]; 'Scott.sanders@fox.com'[Scott.sanders@fox.com]; 'Chelsea.leo@fox.com'[Chelsea.leo@fox.com]; 'Jennifer.cohen@fox.com'[Jennifer.cohen@fox.com]; 'jj.smith@fox.com'[jj.smith@fox.com]; 'owen.renfro@fox.com'[owen.renfro@fox.com]; 'jillian.randle@fox.com'[jillian.randle@fox.com]; 'tara.nicaj@fox.com'[tara.nicaj@fox.com]; 'megani@newsmax.com'[megani@newsmax.com]; 'erinp@newsmax.com'[erinp@newsmax.com]; 'malenal@newsmax.com'[malenal@newsmax.com]; 'tylerb@newsmax.com'[tylerb@newsmax.com]; 'Maslar, Mija'[Mija.Maslar@FOX.COM]; 'Nicholas.Hahn@fox.com'[Nicholas.Hahn@fox.com]; 'michael.lamarca@fox.com'[michael.lamarca@fox.com]; 'michaela.hebbeler@fox.com'[michaela.hebbeler@fox.com]; 'mary.butterfield@fox.com'[mary.butterfield@fox.com]; 'Moshe Maryles'[MosheM@newsmax.com]; 'Ashley Gian'[AGian@newsmax.com]; 'PRESS FOX Kaitlyn Chamberlin'[Kaitlyn.Chamberlin@FOXNEWS.COM]; 'kaitlyn.garvey@fox.com'[kaitlyn.garvey@fox.com]; 'james.coffey@fox.com'[james.coffey@fox.com]; 'Robbins, Christina'[Christina.Robbins@FOX.COM]; 'Dagger, Christian'[Christian.Dagger@FOX.COM]; 'Glasgow, Chris'[Chris.Glasgow@Siriusxm.com]; 'Kenneth Chan'[kchan@frc.org]; 'Whiteman, Caroline'[Caroline.Whiteman@FOX.COM]; 'ryan.tillman@fox.com'[ryan.tillman@fox.com]; 'ryan.cofini@fox.com'[ryan.cofini@fox.com]; 'Sarah Kolk'[skolk@glennbeck.com]; 'sarah.daniello@fox.com'[sarah.daniello@fox.com]; 'Higgins, Michael'[Michael.Higgins@FOX.COM]; 'bryn.jeffers@fox.com'[bryn.jeffers@fox.com]; 'bryn.mccarthy@fox.com'[bryn.mccarthy@fox.com]; 'Leopold, Courtney'[courtney.leopold@FOX.COM]; 'brigid.mcdonnell@fox.com'[brigid.mcdonnell@fox.com]; 'tom.oconnor@fox.com'[tom.oconnor@fox.com]; 'Novotny Reda, Laura'[Laura.novotny-Reda@FOX.COM]; 'laura.taglianetti@fox.com'[laura.taglianetti@fox.com]; 'taylor.walters@fox.com'[taylor.walters@fox.com]; 'antaria.phillips@fox.com'[antaria.phillips@fox.com]; 'Monica Wallace'[Monica@joepags.com]; 'AMroczkowski@premierenetworks.com'[AMroczkowski@premierenetworks.com]; 'ngiordano@pasreport.com'[ngiordano@pasreport.com]; 'steve@stevedeace.com'[steve@stevedeace.com]; 'media@briankilmeade.com'[media@briankilmeade.com]; 'Alyson.Mansfield@foxnews.com'[Alyson.Mansfield@foxnews.com]; 'Peter.Caterina@foxnews.com'[Peter.Caterina@foxnews.com]; 'eric.albeen@foxnews.com'[eric.albeen@foxnews.com]; 'Allen, Virginia'[Virginia.Allen@heritage.org]; 'Rivera, Anthony'[Anthony.Rivera@siriusxm.com]; 'Ramirez, Edwin'[Edwin.Ramirez@siriusxm.com]; 'Gregory.sahakian@siriusxm.com'[Gregory.sahakian@siriusxm.com]; 'emily@thefederalist.com'[emily@thefederalist.com]; 'jon.constantino@foxnews.com'[jon.constantino@foxnews.com]; 'jon.decker@foxnews.com'[jon.decker@foxnews.com]; 'Danielle Hitchen'[bookings@hughhewitt.com]; 'pascarella@foxnews.com'[pascarella@foxnews.com]; 'sam@joepags.com'[sam@joepags.com]; 'pags@joepags.com'[pags@joepags.com]; 'viewsandnews@icloud.com'[viewsandnews@icloud.com]; 'Christine.desanctis@foxnews.com'[Christine.desanctis@foxnews.com]; 'lynda@hannity.com'[lynda@hannity.com]; 'jjverdi@live.com'[jjverdi@live.com]; 'savagemikesavage@aol.com'[savagemikesavage@aol.com]; 'r.ocallaghan15@gmail.com'[r.ocallaghan15@gmail.com]; 'hayley.silverman@siriusxm.com'[hayley.silverman@siriusxm.com]; 'jpauldecker@gmail.com'[jpauldecker@gmail.com]; 'Binns, Michael'[Michael.Binns@siriusxm.com]; 'bschrader@mercurystudios.com'[bschrader@mercurystudios.com]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Sun 12/10/2023 1:09:00 PM (UTC-06:00)
Subject: AG Bailey - Media Matters
2023.12.11 Notice of Investigation - MMFA - Final.pdf

Hi,

Attached is the final version of the EMBARGOED letter that AG Bailey plans to send to Media Matters tomorrow. We find it especially relevant after Elon Musk let Alex Jones back on Twitter this weekend. Musk is committed to free speech, and because of that, he has become a target of the radical left.

AG Bailey views it as such:

DRAFT DO NOT RELEASE

-Media Matters is **perpetuating** a **fraudulent scheme** to **solicit** donations from **Americans** to **take down/target** the last social media platform committed to free speech, X/Twitter.

-Media Matters **masquerades** as a news organization, but they're actually a progressive activist group committed to silencing opposing voices.

-Missouri was **first out the gate** on this issue. We're going to use the authority given to us by statute to **protect** Missourians from being **ripped off** by this **scheme and to shed light on the subject**. We're encouraged other states, namely Texas, are taking action as well.

-Missouri has been a **champion for free speech at every turn**, willing to take on **the Radical Left in their war against the First Amendment.** They're willing to stoop to any level to silence conservative voices, but we're fighting back. We're seeing that in three prongs:

1. Social media platforms
   - We sued in federal court. The score is Missouri, 3, Biden 0, and we're headed to SCOTUS
2. President Trump
   - We filed a brief to remove the gag order on President Trump because Americans have a right to hear from all

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presidential candidates

3. The newest **front in the war for free speech** is the nonprofits **masquerading** as news platforms perverting the algorithms to trick advertisers to pull out of the **last platform committed to free speech. Make no mistake: they want to kill Twitter because they can't control it.**
    - ♍Anyone for free speech becomes a target of the radical Left. X seeks to allow free speech, so the Left is trying to destroy it. All Americans should be concerned because if this behavior goes unchecked, **the marketplace for free, fair and open debate will cease to exist.**

-The **First Amendment is the bedrock of our Constitution.** Missouri will continue to **lead** the way in the fight for our most fundamental freedoms.

1. We will never back down in the **fight** for free speech.

He is available this week if you have interest in an interview.

Best,

Madeline Sieren | Communications Director
Missouri Attorney General's Office
Jefferson City, MO
573-690-1205
Madeline.Sieren@ago.mo.gov

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To: 'O'Neil, Tyler'[Tyler.ONeil@heritage.org]
From: Sieren, Madeline[/O=MO AGO/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=890FCD3152D8495282586A213FC2C407-SIEREN, MADELINE]
Sent: Tue 1/31/2023 1:54:04 PM (UTC-06:00)
Subject: RE: Media Request: Columbia drag show situation
Bailey_AGO0001.jpg
FlkVTXqXwAIfeR7.jpg
52605309024_5c425e0f41_o.jpg

Here are a few images on our Flickr https://www.flickr.com/photos/146566231@N08/
This one from this article isn't mine but it's good. https://missouriindependent.com/2023/01/20/missouri-attorney-general-andrew-bailey-speaks-to-the-federalist-society/

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Tuesday, January 31, 2023 1:42 PM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation
Do you have a high-resolution photo of Bailey speaking that I can use? For some reason, Getty Images doesn't have any.

Tyler ONeil

Managing

The
214
Washington,

202-608-6046

heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Tuesday, January 31, 2023 at 2:33 PM
To: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Subject: RE: Media Request: Columbia drag show situation

Hi Tyler,
I can't grant an exclusive but I haven't shared with our press list so I am giving you a 10 Minute headstart on covering the story.
Here's the release I'm about to send out- let me know if you have questions.
Also let me know if you aren't on our official press list and I can add you!
Thanks

Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Tuesday, January 31, 2023 11:45 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation
Thanks, Madeline! When do you plan to release the action? Would you offer it to me as a national news exclusive or do you already have someone set up to break it?

Tyler ONeil

AMERICAN OVERSIGHT

Managing

The
214
Washington,

202-608-6046

heritage.org

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Tuesday, January 31, 2023 at 12:29 PM
To: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Subject: RE: Media Request: Columbia drag show situation

Hi Tyler,
Sorry for the delay, thanks for following up.
We've got another action coming today. Stay tuned.
"I want Missouri to be the safest state in the nation for children. The age of the children present at the drag show is not relevant to the discussion, because schoolchildren were subject to inherently sexual material without their parents' consent. My office will use every tool at our disposal to ensure Missouri children are educated, not indoctrinated, and that parents have a say in the process."
–Missouri Attorney General Bailey
Thanks!
Madeline Sieren
Missouri Attorney General's Office
Madeline.Sieren@ago.mo.gov

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Sent: Tuesday, January 31, 2023 10:01 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation
Madeline,
I'm writing up my story today. Would the AG comment on the presence of elementary school kids and has he made any decisions?

Tyler ONeil

Managing

The
214
Washington,

202-608-6046

heritage.org

From: O'Neil, Tyler <Tyler.ONeil@heritage.org>
Date: Monday, January 30, 2023 at 11:40 AM
To: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Subject: Re: Media Request: Columbia drag show situation

Thanks, Madeline!
By the way, did the AG's office know that elementary students attended the overall event? I'm asking the school if any of the kids attended the drag event.
Has the AG made any more decisions about future action?

From: Sieren, Madeline <Madeline.Sieren@ago.mo.gov>
Date: Thursday, January 26, 2023 at 11:34 AM
To: O'Neil, Tyler <Tyler.ONeil@heritage.org>

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Subject: Re: Media Request: Columbia drag show situation

Hi Tyler,
Thanks for reaching out.
Yes, the AG sent a letter last Friday to both the superintendent and the mayor of Columbia. Columbia Public Schools Superintendent Yearwood responded with a letter to the governor, with the AG cc'ed, on Jan 22. That letter can be found in this article.https://abc17news.com/news/education/columbia-public-schools/2023/01/22/columbia-public-schools-sends-letter-to-governor-about-drag-performance/
We sent a letter back on Jan. 24 refuting his claims in the letter. I've got a tweet thread here with that letter and the main points of the letter attached.https://twitter.com/agandrewbailey/status/1618321521294049282?s=46&t=vVqAHBxFTZQOpP5v1_UsYQfar, he has called for the resignation or termination of any officials that knew, or should have known, that schoolchildren would be present at the drag show. He has also encouraged local parents to show up at the next school board meeting to register their disgust on the matter.
Attorney General Bailey is examining all legal options, and more action is forthcoming.
I will be sure to keep you updated as things unfold.
Let me know if I can clarify anything here,
Thanks very much!

Sent from my iPhone

> On Jan 26, 2023, at 10:21 AM, O'Neil, Tyler <Tyler.ONeil@heritage.org> wrote:
>
> Madeline,
> I'm writing a story about the Columbia drag show situation, where a school reportedly took kids to a drag show without notifying parents that the event would include a drag show. I know AG Bailey sent letters to the mayor and the superintendent and I want to hear if he is planning more action on this and if either the mayor or the superintendent responded.
> Best,
> Tyler O'Neil
> (303)956-8499

Tyler ONeil

Managing

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Washington,

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