UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

State of Missouri,)
State of Georgia,)
State of Alabama,)
State of Arkansas,)
State of Florida,)
State of North Dakota, and)
State of Ohio,)
)
Plaintiffs,)
)
vs.) Case No. 2:24CV103
)
United States Department of)
Education,)
)
Miguel A. Cardona, in his)
official capacity as)
Secretary, United States)
Department of Education, and)
)
Joseph R. Biden, Jr., in his)
official capacity as)
President of the United)
States,)
Defendants.)
______________________________)

MOTIONS HEARING
BEFORE THE HONORABLE J. RANDAL HALL
UNITED STATES DISTRICT COURT JUDGE
TUESDAY, SEPTEMBER 18, 2024; 9:59 a.m.

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1 (Call to Order at 9:59 a.m.)
2 THE CLERK: The court calls case no. 2:24CV103. The
3 State of Missouri, et al, v United States Department of
4 Education, et al. Joshua Divine and Reed Dempsey for the
5 Plaintiffs. Simon Jerome, Stephen Pezzi, and Shannon Statkus
6 for the Defendants. Here for a motions hearing.
7 THE COURT: Thank you. Good morning, everyone.
8 Pardon me for a moment. Technology. It won't sign in the way
9 I want it to. There we go. All right. I'm sorry. Good
10 morning.
11 (Group responds simultaneously.)
12 THE COURT: Pleasure to see all of you today. So it
13 looks like on behalf of the Plaintiffs I have Joshua Divine?
14 MR. DEVINE: Here, Your Honor.
15 THE COURT: Good morning.
16 MR. DEVINE: Good morning.
17 THE COURT: And Reed Dempsey?
18 MR. DEMPSEY: Good morning, Your Honor.
19 THE COURT: Good morning.
20 And on behalf of the Government, Simon Gregory Jerome?
21 MR. JEROME: Good morning, Your Honor.
22 THE COURT: Good morning.
23 And Shannon Statkus, who I know.
24 MS. STATKUS: Good morning, Your Honor.
25 THE COURT: Good morning.

1 And Stephen Michael Pezzi?
2 MR. PEZZI: Yes, Your Honor.
3 THE COURT: Is that correct?
4 MR. PEZZI: That's correct.
5 THE COURT: Well, welcome to the Southern District of
6 Georgia. I am glad to see all of you and to meet you and I
7 look forward to going through this hearing with you. As I see
8 this today I have three primary matters to consider and that is
9 whether to convert the current temporary restraining order that
10 the court issued on the 5th of September to a preliminary
11 injunction. Related to that is the Government Defendant's
12 motion to dismiss for venue and then a motion to clarify the
13 temporary restraining order as to the extent of that order and
14 what the Defendants could be allowed to do should the order
15 remain in place and should a preliminary injunction be issued.
16 As part of this I note that there was a consent motion
17 filed, Document 44, to file excess pages, and I am going to
18 orally grant that motion so that will take care of that
19 housekeeping.
20 So it's been well briefed and argued. I appreciate
21 that. Good lawyering always helps the Court to do a better
22 job. I guess what I'll do is I'll look to the Plaintiffs if
23 you want to make some opening remarks or arguments. I'm sorry.
24 I'm looking at the wrong table. Quite frankly, I am just used
25 to seeing the Government over here and not over here, but,

1 anyway, I'll get that right in a minute.

2 Anyway, I'll let you make some opening statements or

3 whatever you'd like to say to the Court. Then I'll let the

4 Defendant do the same thing and then I have sort of an agenda

5 that I want to follow to address what I see are the more

6 important issues today and that is particularly as it relates

7 to the injunctive relief and that is the issue of standing,

8 venue, and subject matter jurisdiction and then some related

9 matters.

10 So, with that, Mr. Divine, I assume -- you're first

11 chair -- you're going to take the wheel?

12 MR. DEVINE: Yes, Your Honor. Thank you.

13 THE COURT: You may come to the lectern and we'll take

14 off.

15 MR. DEVINE: Your Honor, we did discuss previously

16 that the Defendants may be doing their venue motion first and

17 then me following. I am happy to follow that order.

18 THE COURT: No, whatever you want to do. Whatever

19 you've agreed to is fine with me.

20 MR. DEVINE: Thank you, Your Honor.

21 THE COURT: Go right ahead then.

22 Good morning.

23 MR. PEZZI: Good morning, Your Honor. Stephen Pezzi

24 from the Department of Justice on behalf of the Defendants.

25 With the Court's indulgence, as my friend Mr. Divine said I

1 would like to address the venue issues --
2 THE COURT: Sure.
3 MR. PEZZI: -- and Defendants' motion to dismiss first
4 and then my colleague, Mr. Jerome, will address the remaining
5 issues momentarily.
6 THE COURT: All right. Perfect.
7 MR. PEZZI: So we have moved to dismiss for improper
8 venue for two separate and independent reasons and we think
9 Your Honor has to address those issues before getting to the
10 question of further injunctive relief for the merits of this
11 case. The first argument is that the only Plaintiff on which
12 venue in this court could be based -- and I think Plaintiffs
13 concede this -- is based on the residence of the State of
14 Georgia and so the complaint does not articulate any other
15 theory of venue. It is only -- venue here is only proper based
16 on Georgia's residence.
17 The first problem with that theory is that Georgia
18 lacks Article III standing and a Plaintiff who lacks
19 Article III standing cannot be the sole basis for venue in a
20 federal district court and the second wholly independent
21 problem with that theory which I'll get to in a moment is that
22 the State of Georgia resides based on the plain text of the
23 federal venue statute only in the judicial district in which it
24 has its principal place of business. In this case that is the
25 state capitol of Atlanta in the Northern District of Georgia.

1 So on the first question, Georgia's lack of
2 Article III standing, it is important to keep track of the
3 various standing theories that are flying around in this case.
4 Your Honor's TRO order, for example, addressed the theory
5 advanced by Missouri with respect to its state instrumentality
6 called MOHELA that services federal student loans.
7 THE COURT: Yes.
8 MR. PEZZI: Plaintiff North Dakota also has
9 allegations about a state instrumentality that plays some role
10 in the student loan market.
11 Obviously, we have arguments there. My colleague,
12 Mr. Jerome, will address them, if necessary, but none of that
13 helps the State of Georgia which articulates one and only one
14 theory of Article III standing. It is based on a future loss
15 of state income tax revenue as a result of Georgia's own state
16 income tax laws. Every court to consider that theory of
17 standing in the context of litigation related to student loan
18 discharge of which there's been quite a bit in the last few
19 years has all reached the same conclusion and it is that that
20 theory of standing is inconsistent with Supreme Court
21 precedent; in particular, two cases: One called Pennsylvania v
22 New Jersey and one called Florida v Mellon.
23 The central problem whether you want to think of it as
24 a problem of self-inflicted injury or a problem of traceability
25 is the same. It is that Georgia's theory turns on injuries it

1 believes it will suffer because of the application of its own
2 state income tax code and just to reiterate here the theory is
3 that the -- typically, a discharge of debt is taxable income
4 under the Internal Revenue Code.
5 There is a federal law that was enacted in 2021, the
6 American Rescue Plan Act, during the Covid era that changed
7 that temporarily until January of 2026 and so Georgia's theory
8 is that income that would -- debt that would have been forgiven
9 in the future sometime after 2026 now under the agency actions
10 contemplated here that they challenge will instead be forgiven
11 before 2026, thus will not be taxable income under federal
12 income tax law and Georgia in relevant part defines income for
13 Georgia's state income tax code starting with the baseline of
14 the federal definition.
15 Now the critical problem with that theory is it is
16 Georgia's decision and Georgia's decision alone to in part tie
17 its definition of income to the federal definition. We know
18 this because, for example, Plaintiff Florida doesn't have a
19 state income tax at all and Georgia itself -- I think it is
20 undisputed and we cite a few examples in our briefs -- deviates
21 from the federal definition of income in various ways, large
22 and small. Currently, they do not deviate from the definition
23 of income relating to the discharge of student loan debt, but,
24 again, that is solely a choice of the Georgia legislature and
25 there is no federal law constraint that requires the State of

1 Georgia to treat income that way.
2 So Plaintiffs' primary response, I think, to this
3 argument is that they have a sovereign interest in defining
4 income in the way they wish to define it which, I mean, we
5 don't dispute. The problem with the theory is that whether
6 they change their laws to, you know, "fix" this problem, for
7 lack of a better word, or not, that is a decision of the
8 Georgia legislature. Again, we cite three of the three cases
9 in our brief that have reached a conclusion on this issue in
10 the context of student loan discharge. They all come out the
11 same way and there is no basis for a contrary conclusion.
12 THE COURT: So, but, let me ask you under the Biden
13 versus Nebraska case -- and we found some Eleventh Circuit
14 cases that seem to follow the same theory and that is -- and I
15 alluded to it in the temporary restraining order. I mean, once
16 the court determines that Missouri has standing, then I am not
17 required, am I, to go into the standing of Georgia and the
18 other Plaintiffs? Isn't that what Biden versus Nebraska says?
19 I need not consider their standing and if I determine that
20 Missouri has standing, then the lawsuit can proceed?
21 MR. PEZZI: Respectfully, Your Honor, I don't think
22 that is correct and I am happy to explain why.
23 THE COURT: I'd like to hear it because that's -- I am
24 reading from Biden versus Nebraska: "Because we conclude that
25 the Secretary's plan harms MOHELA and thereby directly injures

1 Missouri conferring standing on that state we need not consider
2 the other theories of standing raised by the States."
3 MR. PEZZI: That's right. So we, obviously, have ---
4 THE COURT: So are we reading that differently?
5 MR. PEZZI: We have some disagreements that are not
6 relevant to my answer to this question which I will save for
7 Mr. Jerome to the extent it comes up, but what matters for this
8 question is that statement had nothing to do with venue. Venue
9 was not challenged in that case.
10 THE COURT: I understand.
11 MR. PEZZI: And so there is no reason to think what
12 the Supreme Court was saying there was that a plaintiff who
13 lacks Article III standing can be the sole basis for venue in
14 federal district court. Now courts have looked at that precise
15 question and we cite seven cases supporting our view that a
16 plaintiff who lacks Article III standing cannot be the sole
17 basis for venue in federal district court.
18 THE COURT: Okay.
19 MR. PEZZI: Plaintiffs cite zero cases to the
20 contrary. I am aware of none and they don't even respond to
21 the cases that we cite for this proposition. Now thinking
22 about it from a matter of first principles even if no court had
23 ever addressed this question I think that has to be the answer
24 and, in fact, it's why I think sometimes plaintiffs don't even
25 dispute this point when we raise this sort of argument in the

1 federal government. Imagine instead that this lawsuit --
2 instead of Missouri and six other states, one of which was
3 Georgia -- was Missouri and one local concerned citizen of
4 Augusta, Georgia who was opposed to the federal government's
5 policies with respect to student loan debt. I think,
6 obviously, everyone agrees that, you know, mere disagreement
7 with federal policy is not enough to get into federal court,
8 but I think on Missouri's theory and taken to the logical
9 conclusion the idea that standing for one is standing for all
10 even when there is a venue argument that would mean that you
11 could sue in any district -- any of the 93 federal districts in
12 America Missouri could sue.
13 All they need to do is recruit one local concerned
14 citizen to show up in the caption as the local venue-creating
15 plaintiff and then when the government moved to dismiss that
16 plaintiff for lack of standing and said plainly a local
17 concerned citizen can't get into federal court based on a mere
18 disagreement with federal policy, Missouri's response, I guess,
19 would be, no, it doesn't matter because Missouri has standing
20 and standing for one is standing for all. I think that can't
21 possibly be right as a matter of first principles. I have
22 never seen a case say that and I don't think Biden v Nebraska
23 answers the question.
24 Now on that point I guess the last thing I would say
25 is there's just no reason that Your Honor can't decide the

1 question of Georgia's Article III standing without having to --
2 there is just no -- it's not a particularly difficult question,
3 I guess, is what I would say. Georgia's theory of Article III
4 standing is one that many courts have addressed, and we think
5 it is straightforward here.
6 THE COURT: Okay.
7 MR. PEZZI: The second theory of -- so before I get to
8 the second theory, to be clear our second theory is about the
9 location of the state capitol --
10 THE COURT: Right.
11 MR. PEZZI: -- and whether Georgia resides in every
12 district in Georgia or instead in the Northern District of
13 Georgia. Your Honor does not have to decide that question if
14 Your Honor agrees with us on the first question that we were
15 just discussing. Now if Your Honor disagrees with us on the
16 first question such that Your Honor reaches this question about
17 the location of the state capitol, our position on that
18 separate argument is based almost entirely on the plain text of
19 the federal venue statute. So 28 U.S.C. § 1391(c)(1) -- if I
20 am bungling the citation, I apologize. It is, of course, in
21 our brief.
22 THE COURT: That's okay. I've seen it.
23 MR. PEZZI: It defines the word residency for "all
24 venue purposes". It then lists the different possible
25 plaintiffs and defendants who sometimes appear in federal court

1 and the only possible fit for the State of Georgia here is in
2 1391(c)(2) which is "an entity with the capacity to sue and be
3 sued in its common name under applicable law, whether or not
4 incorporated."
5 Georgia is an entity with the capacity to sue and be
6 sued in its common name under applicable law. It has done so
7 here and the language whether or not incorporated, of course,
8 suggests this is not limited to corporations, for example. The
9 Plaintiffs' primary response to this theory is almost entirely
10 based on precedent -- out of circuit precedent, to be clear.
11 They correctly note and we do not -- did not dispute this in
12 our papers and I will not dispute it here today -- that the
13 courts that have looked at this question have consistently
14 rejected the federal government's position. We think they have
15 done so based on a misreading of the plain text of the statute
16 and I think if Your Honor consults those decisions I hope Your
17 Honor will agree.
18 So there is only one Court of Appeals precedent on
19 this issue and that's a Ninth Circuit decision called
20 California v Azar that I think fairly openly adopts an atextual
21 reading of the statute for reasons of what it calls common
22 sense and it's similar to the position that the Plaintiffs
23 advance here which is just that in their view it doesn't make
24 sense to have states be subject to the same rule as these other
25 sorts of entities because states are different in some way,

1 and, respectfully, I think that is a perfectly fine argument to
2 be addressed to the U.S. Congress if there were to be some
3 amendment to the federal venue statute, but with respect to the
4 text that Congress actually enacted it is almost entirely
5 non-responsive to that argument.
6 Plaintiffs ---
7 THE COURT: So the contention of the Government is
8 that those decisions are wrongly decided based upon the
9 language of the statute?
10 MR. PEZZI: Correct, Your Honor.
11 THE COURT: I mean, that sums it up.
12 MR. PEZZI: That sums it up. To be clear, most of
13 them do not even purport to grapple with the text of the
14 statute so I don't think it should be a particularly heavy lift
15 for Your Honor to do the sort of independent thinking on this
16 issue that we suggest that Your Honor do, but, yes, if I could
17 point you to an Eleventh Circuit case that resolved this in our
18 favor, I, obviously, would have. The ---
19 THE COURT: We couldn't find one either on either
20 side.
21 MR. PEZZI: That is our view.
22 THE COURT: Right.
23 MR. PEZZI: Now, to be clear, there is a Fifth Circuit
24 opinion from 1892 --
25 THE COURT: Which they cite.

1 MR. PEZZI: -- which they cite and we explain in our
2 reply brief and I think this is quite clear -- I mean, our
3 argument is about the text of a statute that was enacted in the
4 1940s and that was amended as recently as 2011. So I just
5 don't think it is possible for the Fifth Circuit to have
6 resolved that in 1892. If you look at that 1892 opinion, I
7 mean, it does contain a passing remark about the state residing
8 everywhere in its borders, but it was a passing remark in the
9 context of a personal jurisdiction decision about corporations.
10 It did not even purport to, you know, make any sort of holding
11 about venue which is generally a statutory matter, and, again,
12 given that our argument is based on the text of the statute, it
13 couldn't possibly have been construing that statutory text in
14 1892.
15 THE COURT: All right.
16 MR. PEZZI: So we think this is an open question in
17 this court, but we think the plain text of the statute does not
18 allow for Plaintiffs' reading and, ultimately, you know, if
19 Congress were to enact a different provision that provided a
20 state specific rule for the residency of states, that could
21 very well change the matter, but unless and until Congress does
22 that, we are left with the statute it has enacted and we think
23 it clearly suggests that the State of Georgia resides for venue
24 purposes only in the Northern District of Georgia.
25 Unless Your Honor has questions about either ---

1 THE COURT: I do not. I think you've answered my
2 questions. Let me make my notes here.
3 MR. PEZZI: Certainly. In the absence of further
4 questions, just the last thing I would say is as we noted in
5 our brief 28 U.S.C. § 1406 gives Your Honor a measure of
6 discretion in the instance of improper venue --
7 THE COURT: Yes.
8 MR. PEZZI: -- to either dismiss without prejudice or
9 transfer to another district in which the case could've been
10 brought. We don't have a real dog in that fight, candidly, on
11 the side of the federal government. I will say we argued that
12 the most appropriate exercise of that discretion would be
13 dismissal without prejudice in this case, and I don't think
14 Plaintiffs disputed that in their filing.
15 THE COURT: All right. Thank you.
16 MR. PEZZI: Thank you, Your Honor.
17 THE COURT: I want to hear now from the Plaintiffs in
18 rebuttal to your venue arguments.
19 MR. DEVINE: Good morning, Your Honor. May it please
20 the Court.
21 THE COURT: Good morning. You've heard what their
22 contentions are. Tell me why you believe they're wrong.
23 MR. DEVINE: Well, I'll hit venue first and then I'll
24 go into finality. On the venue argument I'll discuss their
25 statutory question first. I don't think the Court needs to

1 spend much time on that issue. I think this may be the only
2 issue I have ever run across in my career where literally every
3 single court for 130 years has unanimously adopted the same
4 conclusion and that conclusion is in opposition to the position
5 my friend on the other side is advancing.
6 That includes a case from the old Fifth Circuit
7 stating what my friend says is common sense which is that
8 Georgia resides everywhere in Georgia. Every state resides
9 everywhere in every state. Now it is true that the venue
10 statue is passed in 1948 as part of the reincorporation of the
11 general statutes across the books which, obviously, comes after
12 the case from the old Fifth Circuit, but that statute was
13 adopted on the backdrop of 50 years of precedent holding that a
14 state resides everywhere where that state, in fact, is and so I
15 don't think it is surprising that the statute simply doesn't
16 describe venue with respect to states at all.
17 My friend on the other side -- his argument rests
18 entirely on this idea that this second out of three provisions
19 which refers to businesses, that the second provision is
20 supposed to be exhaustive. It's supposed to be a catch-all
21 provision. It is supposed to include the states even though
22 states are not mentioned in there and contrary to what my
23 friend on the other side has said, other courts have, in fact,
24 taken a look at this statute. They've said, you know, normally
25 when you have a catch-all, the catch-all comes at the end. The

1 second out of three provisions is a really odd place to try to
2 find a catch-all. We cited the Florida against United States
3 case which looks at the statutory text. It also cites the
4 Atlanta -- Atlanta Railway decision from the 1890s as
5 precedent. Literally, every single court has rejected their
6 position.
7 On standing I agree with Your Honor's position on
8 page 3 of the TRO order. You don't need to consider Georgia
9 standing here because Missouri's standing is so clear. In
10 fact, they don't even dispute our position, our principal
11 theory of standing. They say that the court doesn't have
12 jurisdiction because of finality, but they don't dispute that
13 if we overcome the finality bar then Missouri's principal
14 theory of standing is correct. I think this court should stop
15 there at that point. There is no need to assess the standing
16 of any other state.
17 Now they ---
18 THE COURT: But let me ask, I mean, in this case venue
19 is standing on the shoulders, if you would, of Georgia having
20 standing, is it not?
21 MR. DEVINE: I think ---
22 THE COURT: I am just asking because, I mean, if --
23 because the court certainly has the ability to assess and
24 evaluate Georgia standing and if the court were to find Georgia
25 had no standing, then would venue fail?

1 MR. DEVINE: No, Your Honor.
2 THE COURT: Okay.
3 MR. DEVINE: So venue is not jurisdictional, first of
4 all --
5 THE COURT: Right.
6 MR. DEVINE: -- and I pointed out in the Kansas case
7 that court did actually dismiss Kansas and several other states
8 and so you had Alaska and Texas left over in Kansas and the
9 court proceeded at that point.
10 THE COURT: Okay.
11 MR. DEVINE: So because venue is not jurisdictional,
12 there is no need to transfer it.
13 Now my friend on other side creates a sort of, you
14 know, parade of horribles where Missouri teams up with, you
15 know, some local citizen in Augusta, Georgia and brings a suit
16 here, but the cases and the citations they cite for that
17 proposition apply only if the standing argument is frivolous.
18 That's what Wright and Miller says. So if Georgia had a
19 completely frivolous like no reasonable court could think this
20 is a plausible standing argument, that might be a different
21 kind of scenario, but that's not what we have here.
22 In fact, you know, as my friend points out in the
23 student loan context there have been some other courts that
24 have rejected this theory of standing, but then the
25 Fifth Circuit has adopted it in many other contexts. The

1 primary Supreme Court case that they cite is this Pennsylvania
2 against New Jersey case from the 1970s, but the Eleventh
3 Circuit has said that's a case about the Supreme Court's
4 original jurisdiction, not actual Article III standing. That
5 is what the Eleventh Circuit has said.
6 Kansas, obviously, is not in the Eleventh Circuit so
7 it wasn't bound by that interpretation of the Pennsylvania
8 case, and the Pennsylvania case, of course, comes 25 years, 26
9 years before the Wyoming against Oklahoma case where the
10 Supreme Court expressly blesses this taxpayer revenue theory of
11 standing that Georgia is advancing here and I think there is
12 really no dispute that Georgia sort of has a Hobson's choice
13 right now. There is no dispute that because of this rule
14 Georgia is going to lose out on revenue that it would have
15 otherwise received. So Georgia is now faced with two options:
16 It can either just lose out on that revenue or it can change
17 its laws. And so that Hobson's choice -- Georgia has to do
18 something. On the first instance it is either standing because
19 it's a financial injury and then the second instance it is
20 standing because it's an injury requiring Georgia to change its
21 laws.
22 The Fifth Circuit has repeatedly recognized that any
23 federal action that requires or induces a state to change its
24 law is a sovereign injury that the state has standing to
25 challenge. So if the only way for Georgia to avoid that

1 financial injury is to change its laws, then that's a sovereign
2 injury.
3 We also do dispute that dismissal would be appropriate
4 here. We don't think that's the case if the court adopted
5 their positions. I think transfer would be much more
6 appropriate at that point -- transfer to the Eastern District
7 of Missouri where we brought the first one. Now, again, I
8 don't think that the court needs to get there, but I think
9 their strong contention for dismissal, the reason they are
10 pushing that so heavily is because they want to eliminate the
11 temporary restraining order so that they can forgive loans
12 immediately and that gets -- that's a good way of transitioning
13 into the other issues.
14 Your Honor, there is not much left to decide here. As
15 I pointed out, they don't challenge our principal theory of
16 standing. If we pass the finality bar, they don't challenge
17 our principal theory of standing and they don't even offer a
18 single argument on the merits on the statutory question. They
19 have conceded that. So the question is really just finality at
20 this point: Is their rule final and does finality even matter
21 in this case? And to answer that question I want to step back
22 and give the court a full picture of exactly what's been going
23 on.
24 THE COURT: Okay.
25 MR. DEVINE: So twice in the last two years the

1 Secretary has tried to mass cancel hundreds of billions of
2 dollars in student loans and twice the Supreme Court has
3 rejected those efforts. Now each time the Secretary has
4 switched statutes. So now he is on his third statute which is
5 the weakest of all three of them -- so weak, in fact, that in
6 2021, the President, Congress, the Speaker of the House and
7 even the Department itself all expressly disclaimed the idea
8 that the statute that they're relying on creates authority to
9 forgive.
10 THE COURT: Was that the legal opinion attached to
11 your complaint?
12 MR. DEVINE: The read room and sign memorandum?
13 That's correct.
14 THE COURT: Yes.
15 MR. DEVINE: Yes. So what they decided here is the
16 best way to achieve their aim of canceling as much student debt
17 as possible is not actually to publish a rule and then defend
18 it in court. That didn't work the first two times for them.
19 So, instead, what they decided is that the best way to do this
20 is just to forgive loans faster than anybody can sue and so
21 months ago they told the public we're going to publish this in
22 October. We're going to publish this in October. But then
23 behind closed doors in documents marked confidential they told
24 the loan servicing companies pay no heed to what we're saying
25 in public; we will forgive these loans and we are going to do

1 so in September, not October, and, in fact, we're so sure of
2 this that we are actually going to alter your contracts to
3 compel you to forgive in September.
4 Your Honor, I have a one-page demonstrative I'd like
5 to give the Court and my friend on the other side --
6 THE COURT: Sure.
7 MR. DEVINE: -- that just shows a timeline.
8 THE COURT: Sure. Do you have an extra copy of that
9 that you can let my law clerk peek at?
10 MR. DEVINE: Yes, sir.
11 THE COURT: Thank you.
12 MR. DEVINE: Your Honor, recall that there are two
13 requirements for finality: One is that the decision to forgive
14 can't be tentative. So we're talking about the decision to
15 forgive right here and second is that there must be legal
16 consequences or obligations that flow from that decision and
17 this timeline definitively shows why their decision to forgive
18 was not tentative. Instead, it shows that they decided to
19 forgive a long time ago and then in the three months since then
20 they have been working to implement that final decision.
21 So the first item on this list, Your Honor, is the
22 change request. This comes on May 6 and right off the bat it
23 commits to loan forgiveness. This is the first page of
24 Exhibit D that we filed and that says and I'm quoting, "Federal
25 student aid is in the process of implementing additional types

1 of loan forgiveness," and then it lists the four categories of
2 loan forgiveness that we've talked about throughout our brief.
3 Now they're not saying, well, there is this proposed
4 rule; we're deciding whether or not to forgive. No, they are
5 saying we have already made that decision and we are
6 implementing that decision. And, in fact, Your Honor, this is
7 May 6. We're still in the comment period. So interested
8 individuals haven't even had the opportunity to finish
9 commenting yet before they're sending this to the loan
10 servicing organizations, and attached to this initial change
11 request is the first attachment.
12 This attachment says here are the categories of
13 forgiveness and then there is a long list of technical
14 "requirements" for the loan servicing companies: Here is the
15 information you're going to need to provide us; here is the
16 format you're going to need to provide it in; and, then,
17 critically, it says -- the first page -- the anticipated
18 implementation date is September 1. I'll get back to that in a
19 minute.
20 Then we have the rest of May. We have four
21 attachments that the Defendants send to the loan servicing
22 organizations -- versions two through five, essentially -- and
23 version five -- this is critically important. This version
24 five talks about the dates that you see on the right-hand side
25 of the timeline. Version five says between September 2 and

5th you -- the loan servicing organizations -- you must give us these files. You must correct any errors by September 6 and then right after that we're going to send you "forgiveness files" and you're going to need to process forgiveness "immediately".

And then, Your Honor, so that's the end of May. Then we see a flurry of activity right in the middle of June. So my friend on the other side on page 18 of their brief they say that, well, the question about forgiveness remains tentative "until a contract modification is signed". Well, Your Honor, we figured out when this contract modification was signed. It became effective three months ago, June 14. Even under my friend's statement in their brief the decision about forgiveness was no longer tentative at that point because at that moment MOHELA and the other loan servicing organizations were contractually bound and required to forgive as soon as they received the forgiveness files.

Then we get the very next business day, Your Honor, June 17 -- that's a Monday. This is critical. It says at the very beginning of the first sentence of this new document that the defendants have sent to the loan servicing companies, "In September 2024 the Biden-Harris Administration will launch the federal student loan debt initiative." Your Honor, there is nothing tentative about the statement. After all, the contracts became effective the previous business day. So if

1 there was any ambiguity now or before now about whether their
2 decision was tentative or not, all of that ambiguity is gone.
3 They made crystal clear to the loan servicing
4 organizations we are going to do this. We are going to do this
5 in September. And then pages 3 to 6 of Exhibit L say that the
6 loan servicers must be "performance ready" by no later by
7 September 9. Why September 9? Well, the document makes that
8 clear, too, because September 9 is the debt relief surge date.
9 That's when the debt relief surge is scheduled for and then the
10 very next day -- again, we're on the third business day in a
11 row now -- the Defendant sends the loan servicing organizations
12 attachment version six and there are two things I want to
13 highlight about this.
14 This is Exhibit F that we filed attached to our
15 complaint. There are two things I want to highlight about
16 this. One, the substance between version five and version six
17 is identical. Nothing about the substance changes. The only
18 thing that changes is they changed the abbreviations from D1 to
19 M1, D2 to M2, just purely technical changes, but the actual
20 substance of forgiveness has not changed. The second thing I
21 want to highlight is that if we look back at the first document
22 at the beginning of May that had an "anticipated"
23 implementation date, here on version six there is no
24 anticipated implementation date. There is just an
25 implementation date at that point.

1 So to sum up these three critical consecutive business
2 dates, you have Friday, the contract is changed. Now MOHELA
3 and the loan servicing organizations, you are contractually
4 bound and obligated to forgive the moment we tell you to do so.
5 Number two, the next business day they tell the loan servicing
6 organizations the administration is doing this and we're doing
7 this in September, and then, number three says, hey, remember
8 those dates that we told you about back at the end of May?
9 Yeah, we're not changing those dates. We're sticking to them
10 because we need you to be prepared and ready to go by the
11 September 9 surge date.
12 And then what happens during the next two and a half
13 months? Well, there is no version seven attachment. There is
14 no version eight attachment. All those things are final.
15 Instead, what we see is an August 1 email to millions of
16 borrowers saying we have no idea why you would want to opt out,
17 but if you want to opt out, you need to do so by the end of
18 August. This August 1 email has the same exact categories of
19 forgiveness as in the initial May document.
20 Your Honor, in these next two months there is no
21 communication between the Defendants and the loan servicing
22 organizations saying, hey, actually, we're going to have to
23 delay the surge dates; we're going to do this some other time;
24 nobody is ready yet. There aren't any -- we sued four business
25 days before the September 9 surge date. If it wasn't going to

1 happen then, there would have been some kind of communication
2 to that effect.
3 In fact, when they did the second mass cancellation,
4 Your Honor -- this is July -- June and July 2023. So the
5 Supreme Court announces its opinion at the end of June.
6 Minutes later the Secretary says I have just finalized the
7 second mass cancellation attempt. He didn't call it that. I
8 am paraphrasing but I've just finalized this next opinion. The
9 next opinion -- the next opinion isn't published for 10 days
10 after that.
11 So here we are four business days before this is --
12 before this is supposed to go out. This is going to be
13 published on the morning of September 9, if not earlier. They
14 haven't submitted any evidence that this wasn't going to happen
15 at that time. In fact, just the opposite. Kvaal's Declaration
16 at paragraph 17 and 19 says and I quote, "They had always
17 intended to require the servicers to be prepared to issue loan
18 forgiveness and to do so at the beginning of September," and
19 then my friend's brief at page 17 "reiterates the Department's
20 intention to promulgate a final rule in early September 2024."
21 Your Honor, they have admitted that they were planning to
22 publish this final rule in early September. The only reason
23 they haven't done so is because we found out about this and we
24 sued and we got the TRO.
25 Against all of this, Your Honor, they hang their hat

1 on one idea: This hasn't been published. The problem is they
2 never squarely deny -- in fact, they admit they were going to
3 publish this at the beginning of September. That was always
4 their plan to do that.
5 There is also no requirement that final agency action
6 be published. Every year there are countless final agency
7 actions that are never published in the Federal Register or are
8 only published days after final -- days after the decision is
9 finalized, but as I already said both the first mass
10 cancellation attempt and the second mass cancellation attempt
11 were finalized before they were actually published. In fact,
12 we sued to challenge the first mass cancellation attempt before
13 publication and they didn't even dispute that it was final.
14 Your Honor, their definition of finality here which
15 they've never advanced in either of the previous two mass
16 cancellation attempts -- their definition of finality here is,
17 essentially, it doesn't becomes final until the Secretary
18 transmits the forgiveness files to the loan servicers for
19 forgiveness. In other words, their definition is that it
20 doesn't become final until the very moment it becomes
21 completely unreviewable by a court. That can't be the correct
22 answer here.
23 Your Honor, I think -- I want to stress I think a page
24 of history here is worth a volume of logic. If we look at all
25 three mass cancellation attempts together, again, there is just

1 no credibility that they haven't made a final decision given
2 their relentless pursuit of mass cancellation over the past two
3 years. Again, I already mentioned the first cancellation
4 attempt. We sued before it was published. They did not
5 dispute that it was final. In fact, they even agreed to delay
6 forgiveness for a couple of weeks in October to let the court
7 have time to rule, but that backfired on them. We ended up
8 prevailing in court so they didn't get to send out millions of
9 emails right before the mid-term election saying,
10 "Congratulations. The Biden-Harris Administration has forgiven
11 your loans." They didn't get to do that.
12 So then the second rule -- they finalize it in June
13 2023 and then they publish it the next month in July 2023. Now
14 under the statute it's not supposed to go into full effect
15 until one year later -- July 2024 -- but then in February they
16 announce, actually, we've already started forgiving. We've
17 already forgiven billions of dollars in loans under this.
18 So the States -- we had to scramble. We put together
19 a lawsuit in just over a month and we ended up prevailing. We
20 prevailed all the way up to the Supreme Court, but they were
21 successful in unlawfully forgiving billions of dollars of loans
22 because they were able to do that before we were able to put
23 our lawsuit together.
24 So this time they learned from those two previous
25 decisions and they learned that the best way to get forgiveness

1 is just to do so faster than the courts can rule on it, and I
2 think, Your Honor, perhaps, the most revealing aspect here that
3 shows that this is not tentative, it is final, is that they
4 have now had multiple opportunities to committing to wait 60
5 days after publication before forgiving.
6 They're required to do that under the Congressional
7 Review Act. In fact, under the Higher Education Act they're
8 not allowed to implement anything for a whole year up until
9 next July. The Chairwoman of Congressional Committee last
10 month -- we include this as an attachment --
11 THE COURT: I saw it.
12 MR. DEVINE: -- last month asked the Department of
13 Education, "Can you commit to actually following the law here
14 and not forgiving anything until after 30 to 60 days after
15 publication?" The Secretary refused to do that. I called the
16 Congresswoman's office on Friday and asked, "Has the Secretary
17 changed their mind? Have they committed to doing this?" They
18 said no.
19 I think looking at the documents it is clear why.
20 They made the decision to forgive loans long ago. They have
21 been implementing that decision ever since because they want to
22 send millions of emails in the weeks -- in the weeks between
23 now and the November election they want to send millions of
24 emails saying, "Congratulations. Kamala Harris has forgiven
25 your loans." So this idea that, oh, gosh, we just have no idea

1 whether we are actually going to forgive or not, there is no
2 credibility to that assertion at all.
3 They haven't provided any evidence to support their
4 position at all, and, Your Honor, just to bring this back to
5 the doctrine, recall two requirements: The decision to forgive
6 can't have been tentative -- I think we've clearly shown that
7 -- and legal consequences or obligations must flow from that.
8 When they changed that contract of MOHELA's and other loan
9 servicers, MOHELA's legal obligations changed. The legal
10 consequences of $73 billion in forgiveness to millions of
11 different student loan borrowers, that's a legal consequence
12 that flows from that decision.
13 Now, Your Honor, I do think there is an easy doctrinal
14 way out of the finality question. I think we've made clear
15 this is final, but even if it's not final it doesn't matter.
16 As we pointed out in our brief under both the All Writs Act and
17 this court's incidental jurisdiction -- what the Supreme Court
18 has referred to incidental jurisdiction -- this court can enter
19 temporary relief when an agency is trying to do exactly what
20 they're trying to do now which is evade judicial review.
21 The ITT Development case that we cite from the old
22 Fifth Circuit which is binding here cites the All Writs Act of
23 1789. It says -- this is, essentially, the point of the All
24 Writs Act is to allow courts to issue "status quo orders" to
25 prevent agencies from avoiding judicial review and then the

1 Supreme Court in the Arrow Transportation case that we cite
2 goes even further and says this isn't just an All Writs Act
3 matter; in fact, the courts have inherent authority to do this.
4 If the court would have jurisdiction in the future to oversee
5 or review this agency action as this court clearly would under
6 the APA, then the court has incidental jurisdiction to impose a
7 temporary restraint to permit the case to fully ripen.
8 So, Your Honor, my friend on the other side says,
9 well, we promise we're not going to forgive anything until we
10 publish and, Your Honor, that is very cold comfort because, as
11 everybody here knows and they haven't disputed, after they
12 publish they can forgive within a matter of hours or days and
13 so this is a situation where the All Writs Act and this court's
14 incidental jurisdiction recognized by the Supreme Court -- this
15 is exactly the type of case where that kind of temporary relief
16 is appropriate.
17 It has long been their intention -- as they admit in
18 their brief, it's long been their intention to publish this
19 rule in early September and it's long been their intention to
20 forgive immediately thereafter. I think in order for this
21 court to preserve jurisdiction under the All Writs Act and
22 incidental jurisdiction, this is a clear case where temporary
23 restraint is appropriate.
24 Now the Court -- at the very beginning the Court said,
25 you know, we're here to do a few things. Your Honor mentioned

1 converting this to a PI. I think there are really kind of two
2 different ways of moving forward. Again, standing -- they
3 haven't challenged our principal theory of standing. Merits --
4 they've offered no position at all on the statutory argument
5 and so I think that's conceded.
6 So I think this court could, basically, do one of two
7 things: One is convert this to a PI and conclude at the same
8 time that the other side has waived their statutory arguments.
9 They've waived all of their arguments on the merits and so
10 convert this into a PI and then, you know, we're committed to
11 doing discovery quite quickly. We are able to do that. We can
12 get to final judgment as quickly as possible.
13 The other thing the Court could do is if the Court is
14 not interested in a full PI right now despite their concessions
15 is to extend the TRO past publication, past any kind of
16 supplemental briefs that might be necessary until the Court is
17 ready to issue a decision on the PI question, and if the Court
18 does that I would note that the 14-day time limit for TROs --
19 that only applies in ex parte circumstances. It doesn't apply
20 here where my friend on the other side is given an opportunity
21 to be heard, and I would also say that there would be no harm
22 in either a TRO or a PI extending into the future.
23 As I mentioned under the Congressional Review Act they
24 can't implement this for 60 days anyway. Under the Higher
25 Education Act they can't implement it until next July and so

1 for this court to enter a TRO or enter a PI would simply put
2 them in the same position they would be in anyway if they were
3 going to follow the CRA and if they were going to follow the
4 Higher Education Act. I am happy to answer any questions that
5 the Court may have on any topic.
6 THE COURT: Maybe after I hear their rebuttal.
7 MR. DEVINE: All right. Thank you, Your Honor.
8 THE COURT: Thank you.
9 All right. I guess, Mr. Jerome, you're now prepared?
10 MR. JEROME: Good morning, again, Your Honor.
11 THE COURT: Good morning.
12 MR. JEROME: I thought I would start with
13 jurisdiction. I defer if the Court has a preference as between
14 standing or finality.
15 THE COURT: It doesn't matter. Whatever you're
16 prepared to offer is fine.
17 MR. JEROME: In that case -- thank you, Your Honor --
18 I'll proceed by talking about the APA's requirement that an
19 action be final to permit judicial review. I think it is
20 important at the outset to clarify what finality we're talking
21 about. That concept has been a bit of a moving target through
22 this legislation -- excuse me -- through this litigation.
23 At the beginning my friends on the other side referred
24 to the Third Mass Cancellation Rule and that sounds a lot like
25 the product of a rule-making process. I take it as forfeited

1 now that my friends are not talking about the NPRM that was
2 published in April. That's the notice of proposed rule making.
3 I take it that now what we're now talking about is some sort of
4 amorphous decision purportedly taken by the agency represented
5 in the evidence that opposing counsel has submitted.
6 Your Honor, I think a proper understanding of that
7 evidence shows that in the relevant sense under the APA --
8 under the Administrative Procedures Act -- that the agency has
9 not made in a legally relevant sense any final decision at all.
10 I understand what my friend on the other side to be talking
11 about principally to be related to the contract modifications
12 that the Department undertook with its servicers.
13 I'd say, first of all, the modifications as I think is
14 apparent don't themselves effectuate any forgiveness. There
15 has been no loan forgiveness under those modifications.
16 THE COURT: But now their argument is that it
17 contractually obligated the servicers to forgive when the files
18 were delivered to them with instructions to pull the trigger.
19 MR. JEROME: I understand, Your Honor. So I think --
20 actually, if I could for a second, I think it's helpful to
21 clarify what forgiveness files we're talking about.
22 THE COURT: Okay. Go right ahead.
23 MR. JEROME: The evidence in the record so far talking
24 about files -- production files, forgiveness files -- refers to
25 testing that the Department has done with its servicers. It is

1 my understanding that the modifications that the agency entered
2 into with its servicers would -- if the agency sent
3 instructions to take certain actions would contractually
4 obligate the servicers to comply with those instructions.
5 Now we don't have the details of the contract
6 modifications before us. My friend on the other side obtained
7 the records that he did through whatever process he did, but
8 suffice it to say I think if that information was helpful we
9 might see it here. I am not prepared to say that the contract
10 modifications line up exactly to the NBRM and, certainly, it's
11 impossible to say because there is no final rule what the
12 content of that final rule would be or how the modifications
13 map up to ---
14 THE COURT: But you acknowledge that the servicers
15 based upon the contract modification would be contractually
16 obligated to carry out forgiveness should under the final rule
17 they be instructed to do so? Does the Government or does --
18 does the Government acknowledge that or agree to that?
19 MR. JEROME: It is my understanding, Your Honor, that
20 if the Department provided instructions to the servicers ---
21 THE COURT: They would be obligated?
22 MR. JEROME: Yes, Your Honor. That's my
23 understanding.
24 THE COURT: All right.
25 MR. JEROME: Now, importantly, though, those contract

1 modifications can be undone. This is not final. I think it's
2 useful to think about finality in contrast to some of the other
3 student loan litigation that my friend references.
4 We hear a lot about the HEROES Act litigation. This
5 was the litigation concerning action the Department attempted
6 to take under the HEROES Act. Your Honor, in that case it's
7 true that the required notices of waivers and modifications had
8 not yet been published by the Secretary of Education in the
9 Federal Register. That said, the White House had posted on its
10 website as my friends know all too well President Biden's plan
11 to forgive student loans. You know, I would say, first of all,
12 we didn't litigate the topic of finality and so there is really
13 not anything binding to be taken from that case, but I think
14 the government's conduct in that litigation is understandable
15 in light of an instruction from the White House that this sort
16 of forgiveness would be coming down the pike.
17 Here, Your Honor, we don't have that and I think
18 examining the concept of finality in the context of the APA is
19 a really useful exercise. By only permitting judicial review
20 of final agency action Congress sought to prohibit exactly this
21 sort of litigation where prior to the agency and prior to the
22 Executive Branch announcing definitively a plan that you have
23 litigation that puts a stop to ongoing agency processes that
24 allows all sorts of disruptive use of resources both on the
25 court's part and on the Government's part. I think if you

1 think about why that requirement exists in the statute it is to
2 prevent exactly what we see going on now. So, as I said, the
3 modifications don't themselves effectuate forgiveness. They
4 could be undone through subsequent modifications. It is also
5 worth mentioning that the Kvaal Declaration establishes that
6 the Department would not have and will not effectuate any
7 forgiveness absent a final rule. That is meaningful here.
8 In sum, the Executive Branch remains free to change
9 course. It has not obligated itself to any course and so both
10 of the prongs of finality are missing here. The Department has
11 definitively not consummated its decision-making process vis a
12 vis the NPRM that was published in April and it has
13 definitively not determined rights and obligations in a way
14 that's meaningful here and I add that sort of caveat at the end
15 because, as we just discussed, Your Honor, I do believe that
16 the contract modifications would obligate servicers to take
17 particular action that the Department has said it will not
18 instruct them to do absent a final rule, but to the extent that
19 Missouri is hanging its case that it has an interest to in the
20 instructions that the Department gives the servicers and those
21 legal rights and obligations, I think we'd run into other
22 justiciability problems.
23 THE COURT: But let me ask the question, though. The
24 concern that the Plaintiffs have is exactly what you just said.
25 There is no intent to forgive until the final rule is

1 published, but the documents they provided in support of their
2 complaint and their request for TRO suggest that that was going
3 to be almost simultaneous. The rule would be published and the
4 word would go out forgive these debts without any ability for
5 anyone to come in under the normal course of final rule making
6 and file a complaint in a district court wherever in the
7 country and stop that process and so you understand their
8 concern was we know the Government is saying we do not plan to
9 forgive debts before the final rule is published, but the
10 question is then how quickly do you plan to forgive debts?
11 MR. JEROME: Yes, Your Honor. So I'll say, first off,
12 I can't say that there will certainly be a final rule. I need
13 to -- it is important to underscore that important legal
14 distinction. I am prepared to represent that the Department
15 will not take action under any final rule that is promulgated
16 out of the NPRM for at least 72 hours and so ---
17 THE COURT: 72 hours?
18 MR. JEROME: Yes, Your Honor.
19 THE COURT: Not the normal 60 days that you see under
20 the APA; correct?
21 MR. JEROME: Your Honor, I would dispute that the APA
22 has an ordinary 60-day timeline for implementation of rules. I
23 understand the arguments Plaintiffs have raised that I believe
24 to be premature at this juncture related to the Congressional
25 Review Act, but I am prepared to represent that the Department

1 will wait at least ---
2 THE COURT: 72 hours.
3 MR. JEROME: Yes, Your Honor.
4 THE COURT: Okay.
5 MR. JEROME: So, Your Honor, if I could just very
6 quickly ---
7 THE COURT: Sure. I'm sorry. Go ahead.
8 MR. JEROME: Sure. This isn't a case that we cited
9 and I certainly don't want to sandbag the other side, but as
10 recently as a couple of years ago the Supreme Court emphasized
11 in a case in an entirely different subject matter about FOIA.
12 This is a case called U.S. Fish and Wildlife versus The Sierra
13 Club but the agencies delivered a process ---
14 THE COURT: What is that cite?
15 MR. JEROME: I'm sorry, Your Honor. I'll have to grab
16 it for you in just a second.
17 THE COURT: Okay. That's fine if you'll let us know.
18 MR. JEROME: The idea being that it is meaningful in a
19 legal sense that the agency's deliberating process does not end
20 until it has taken a final position and I think the evidence
21 that my friends have offered just does not meet that bar. It
22 does not show -- I'd say it shows as much as the NPRM itself
23 did which is that the Department was considering promulgating a
24 final rule along the lines that it had identified.
25 THE COURT: But if my TRO -- and I know you filed a

1 motion to clarify, but if my TRO is not designed to stop the
2 publication of the rule but is designed to prevent
3 implementation within 72 hours, then what's -- what's the
4 government's concern? If all we're saying is -- because I hear
5 you saying that the desire is for a court not to interfere, if
6 you will, in the rule-making process, but if my injunction does
7 not or restraining order does not impact the final work and the
8 publication of that rule, then where is the problem because,
9 really, then the issue becomes implementation, does it not?
10 MR. JEROME: I understand what Your Honor is saying.
11 I would say we represent equities larger than this case and,
12 certainly, it's not in our interest to see litigation of this
13 sort where there is an injunction in the absence in our view of
14 jurisdiction be entered with regard to any federal branch
15 activity. So that is a line I will defend that the absence of
16 final agency action means the court has no power to act in the
17 end and so we think that the injunction would be inappropriate
18 on that basis.
19 THE COURT: All right.
20 MR. JEROME: Your Honor, to quickly respond to a
21 couple of counter-arguments on the finality point that I saw in
22 my friend's briefs and that I heard at the lectern today,
23 there's the notion that we've advanced a requirement that
24 publication in the Federal Register embody any sort of final
25 agency action. I wouldn't go that far, but I would just say

1 even if Your Honor was looking outside the Federal Register
2 that evidence is not sufficient here. We don't see a
3 definitive public-facing decision by the agency in a way that
4 determines legal rights and obligations.
5 THE COURT: But didn't you send out an email to
6 borrowers to opt out? I mean, that was sent out, was it not,
7 the 1st of August?
8 MR. JEROME: I believe that date is right, Your Honor.
9 THE COURT: All right. So is that not a -- if I am a
10 borrower and I receive that email -- the congratulations -- or
11 I guess that wasn't the congratulations, but it, basically,
12 says if you want to opt out -- I guess what I am saying is that
13 looks pretty final to me, does it not?
14 MR. JEROME: I disagree, Your Honor. Respectfully, I
15 think what that says is something very similar to what the
16 April NPRM said which is that the Department is considering
17 taking these steps and similarly in the context of the contract
18 modifications the Department seeks to be in a position to
19 implement any such final rule, but I disagree that that commits
20 -- that that consummates -- in the words of Bennet v Spear that
21 that consummates the government's decision-making process and
22 that legal rights and obligations flow from that. I think, in
23 fact, if you think about that second prong in particular it
24 would be silly for a borrower to come in to court and say,
25 well, I have a right to forgiveness because I got an email from

1 Secretary Cardona saying that the Department was considering
2 doing that. I think that's laughable and I feel similar logic
3 applies here that there are no legal rights or obligations that
4 have been determined by that email.
5 THE COURT: Okay.
6 MR. JEROME: Your Honor, I finish on the finality
7 point more or less where I started which is to say that this
8 requirement of final agency action in the APA serves interests
9 of the Government and the courts alike in avoiding messy,
10 difficult entanglements in ongoing agency -- ongoing
11 proceedings that are committed to the agency and so for that
12 reason we believe that there is no finality and no subject
13 matter jurisdiction for the court to enter any order.
14 There is an additional jurisdictional obstacle in this
15 case which is an absence of standing and it is, of course, very
16 tightly related to the absence of finality. My friend said
17 several times that we don't dispute that the standing theory of
18 Biden v Nebraska -- the loss of servicing revenues to MOHELA
19 applies here. I don't understand where that contention is
20 coming from and I'll stick to what we said on page 14 of our
21 brief which is that albeit that the Supreme Court recognized a
22 particular theory on facts before it in that litigation, we
23 believe those facts are not present here. As a reminder, the
24 White House had committed to a certain plan. It intended to
25 take action under the HEROES Act. Here we do not have such a

1 final commitment and we believe that the absence of that tight
2 nexus renders too speculative the claims that MOHELA will
3 imminently or certainly impendingly face injury absent an order
4 from the court.
5 Similarly, the Plaintiffs don't cite any case where an
6 NPRM has established standing. I think that's meaningful.
7 Again, I understand that argument to have been abandoned, but
8 just to sort of reinforce we're not looking at the rule making
9 process here. We're looking at the supposed decisions --
10 amorphous decisions - as encapsulated by the Department's
11 communications with its servicers.
12 In terms of administrative cost to MOHELA which is the
13 second theory, I think it's a little different just to make
14 sure we're on the same page. The theory that the Supreme Court
15 accepted in Biden v Nebraska on very different facts was that
16 MOHELA services loan accounts and when those are closed
17 prematurely due to forgiveness that MOHELA will lose out on the
18 servicing revenues, effectively the money it would have made to
19 service those accounts in the future.
20 Here what my friend is referring to, I believe, are
21 the in the change request process the Department seeks to
22 identify costs that MOHELA will incur as a result of the
23 contract modification. Importantly, the evidence my friends
24 point to is evidence not from the contract modification itself.
25 In other words, we don't know what costs, if any, MOHELA would

1 have stood to incur if action was taken under the contract
2 modification. They point to something that is necessarily
3 un-final and tentative and say that that means there are
4 certainly impending costs to MOHELA, Your Honor, I respectfully
5 disagree.
6 There is also a theory of consolidation that has come
7 up, the idea being that borrowers will consolidate. For very
8 similar reasons we say that this is speculative. It's sort of
9 a step even further removed from the loss of servicing
10 revenues. I would add, Your Honor, that there is a reference
11 to the Government urging consolidation and I would submit that
12 that urging even if communications from the federal government
13 can be read to encourage consolidation that that is legally
14 irrelevant from a standing point of view and also introduces a
15 causation problem. At that point it is arguably the
16 government's encouragement, not the benefits of the action
17 being challenged -- again, this sort of amorphous decision that
18 is legally relevant.
19 The Bank of North Dakota theory suffers from very
20 similar speculation. I would just add that the Mackinaw Center
21 case that we cite from the Sixth Circuit is very instructive on
22 the notion of competitor standing. Importantly, that case
23 repeats the principle that appears in many other competitive
24 injury cases. That competitive injury doctrine furnishes a
25 link between competition and injury but does not furnish a link

1 between a particular policy in competition as in the burden is
2 on the Plaintiffs to show increased competition and, Your
3 Honor, I don't believe that they've done that.
4 Finally, of course, the tax revenue theory that's been
5 advanced and has been rejected in multiple other courts not
6 only infects Plaintiff Georgia's standing but it infects the
7 several other states -- I believe it's four in total including
8 Georgia --
9 THE COURT: I agree.
10 MR. JEROME: -- that have articulated that. I'll rest
11 on my colleague's arguments on that point. Your Honor, while I
12 am on standing I do want to turn back to an issue that came up
13 in my colleague's presentation and I think that is a useful
14 one. I will, of course, bracket the topic of venue. I feel
15 all of the presentations have made clear that venue and
16 standing are different. It is a good opportunity to remind
17 Your Honor that venue was not argued in the Kansas case --
18 THE COURT: Right.
19 MR. JEROME: -- and so to the extent there is anything
20 to be learned, I think it is quite little.
21 Your Honor, what we often see and the cases that my
22 friends point to -- most notably Biden v Nebraska itself -- say
23 that standing is enough for the court to proceed to the merits
24 of a claim. I think there is a crucial difference between the
25 district court's own considerations and considerations of

1 appellate jurisdiction that come in and when you think about
2 the context in which those statements are made help make sense
3 of why it is okay for an appellate court to say that, but it is
4 inappropriate to say in the district court that a case can
5 proceed just because one plaintiff has standing.
6 Your Honor, as you know subject matter jurisdiction is
7 a requirement all the way up to the Supreme Court and standing
8 can be lost. You can lose subject matter jurisdiction. I
9 think in the context of the Eleventh Circuit of the Supreme
10 Court saying one is enough means out of judicial modesty the
11 court is not going to wade into these other theories that are
12 not necessary for it to opine on the ultimate legal question
13 but that those theories remain unaddressed.
14 Your Honor, in contrast in the district court I think
15 the ultimate question is one that we've briefed at length in
16 our opposition brief on the question of remedies. For a
17 plaintiff to remain in a case you would think ultimately they
18 have a claim to some remedy or they could have a claim to some
19 remedy. Here in the absence of standing there is nothing to
20 give these states at the end of the lawsuit.
21 My friend made a reference to proceeding to final
22 judgment. I would argue that any injunction that Your Honor
23 offers now that the scope of the appropriate relief whether now
24 or at the end of the case is necessarily determined by the
25 extent of the injury that the Plaintiffs show individually.

1 The Eleventh Circuit reiterated this principle a few years ago
2 in the Georgia versus President of the United States case and
3 they said the extent of the appropriate remedy is determined by
4 the extent of the injury shown. For that reason I think it is
5 both inappropriate to allow Plaintiffs who have not shown
6 standing even to proceed along in a suit, but more than that to
7 grant relief on the basis of their -- of their what, I don't
8 know. Not of their injury; right? Just of their presence in
9 the lawsuit I think is inappropriate.
10 Your Honor, very quickly I'll touch on the preliminary
11 injunction factors because they came up in my colleague's
12 presentation.
13 THE COURT: Yes.
14 MR. JEROME: I think I understand him to have asked
15 somehow that this court enter an order saying that we forfeited
16 arguments on the merits. I find this difficult to understand.
17 I think as a base matter there is no final rule. It's almost
18 nonsensical to assume that we could have articulated in good
19 faith arguments about a rule that does not exist. In essence,
20 what my colleague is asking -- excuse me. What my friend on
21 the other side is asking you to do is to issue an advisory
22 opinion about any student debt relief ever and I think that
23 that would be inappropriate. I just would reiterate that I
24 don't believe we've waived any arguments about any final rule
25 should one be promulgated.

1 Finally, on irreparable harm I think for the same
2 reasons the states lack standing. There is no irreparable harm
3 that they've shown here. And I'm sorry, Your Honor. I think I
4 said "finally", but I do very briefly --
5 THE COURT: That's okay. That's all right.
6 MR. JEROME: -- want to touch on the scope of relief,
7 if I could. I did just talk a few minutes ago about the
8 appropriate scope of any injunctive order being limited to the
9 injury shown that Your Honor credits. In addition to the
10 Georgia versus President of the United States case I thought
11 there was a well-reasoned case fairly recently by Judge Wood in
12 the Kansas versus Department of Labor litigation. We've cited
13 that case in our brief as well.
14 THE COURT: Yes.
15 MR. JEROME: Further, I think it's appropriate to ask
16 the Court that any order that it enters reflect the parties'
17 agreement in the context of the motion for clarification of its
18 September 5 order that promulgation of a final rule be
19 permitted. We appear to agree that that should not be off the
20 table.
21 Finally, Your Honor, it appears that we agree on this
22 point as well, but I would just add emphasis to the request
23 from my friend on the other side that if the Court enters an
24 injunction in this case that it be a preliminary injunction and
25 not a temporary restraining order that would allow the

1 government if it sees fit --
2 THE COURT: To appeal.
3 MR. JEROME: -- in the future to seek immediate
4 appellate review. Yes, Your Honor.
5 THE COURT: I understand.
6 MR. JEROME: Unless the Court has any other
7 questions ---
8 THE COURT: What is your response to their argument on
9 the All Writs Act giving me --
10 MR. JEROME: Yes, Your Honor.
11 THE COURT: -- the authority to issue a restraining
12 order or an injunction for the purpose of preserving the right
13 to judicial review?
14 MR. JEROME: I'll say, Your Honor, that my read of
15 those cases I can't dispute that the courts have acknowledged
16 in the terms that my friends suggest that there could exist a
17 source of jurisdiction. I do -- I'll say, you know, it seems
18 to have come up in dictum most of the time that the facts of
19 those cases haven't necessarily matched this one on all fours.
20 It's not for me to say that the Supreme Court was wrong to say
21 something like that, but I do feel it is worthwhile to note
22 that these cases are from the old Fifth Circuit. They are from
23 a Supreme Court decades and decades ago and in the intervening
24 years.
25 The court -- you know, the term that the court uses in

1 this 1960s case is potential jurisdiction. I think that the
2 modern Supreme Court would be a bit more skeptical of potential
3 jurisdiction, but, Your Honor, I think more than that if Your
4 Honor credited that this was an available source of
5 jurisdiction putting aside the finality issues that we've
6 identified, I would say I think the paucity of cases shows that
7 it's an extraordinary scenario in which the court should
8 exercise that sort of authority and I would add that I think
9 the 72-hour window allows for another emergency order of the
10 sort that we saw in this very case and so the court would be on
11 surer jurisdictional ground to wait until the promulgation of a
12 final rule if one is published.
13 THE COURT: All right.
14 MR. JEROME: Thank you, Your Honor.
15 THE COURT: Thank you.
16 I'll now hear from you, Mr. Divine, on your response.
17 MR. DEVINE: Thank you, Your Honor. Just a couple of
18 quick points. You know, I understand my friend on the other
19 side -- they have institutional interests. I represent the
20 Government of Missouri. I have been in similar situations and
21 so I respect that, but what we're dealing with here is an
22 extraordinary stark departure from ordinary APA practice.
23 I heard my friend on the other side to commit not to
24 complying with the Congressional Review Act. They said they
25 would commit only to a 72-hour delay. I want to read for the

1 Court the plain text of the Congressional Review Act which we
2 cite on page 37 of our complaint. So the Congressional Review
3 Act applies when there is a major rule. It applies extra
4 procedures not ordinarily applicable in the APA context. They
5 don't dispute this. They have -- they have classified this
6 rule as a major rule. I think the $150 billion we can see why
7 and this says that a major rule shall take effect at the later
8 of the date occurring 60 days after the date on which Congress
9 receives the report submitted under paragraph one or the rule
10 is published in the Federal Register. That is a plain text
11 requirement that they either submit this to Congress or they
12 publish this and then they wait 60 days. My friend on the
13 other side said they're going to wait three days. I think that
14 by itself is extraordinarily telling.
15 I also understand my friend on the other side to have
16 conceded that these contracts do, in fact, obligate MOHELA and
17 the other loan servicers to forgive as soon as the Secretary
18 tells them to forgive. I think right there that's QED. There
19 is nothing left except to conclude that the Secretary has made
20 a final decision; they've altered these contracts; MOHELA is
21 now under legal obligations that it was not under before
22 June 14.
23 Your Honor, on the All Writs Act situation I
24 understand my friend on the other side has said, well, you
25 know, this is -- you don't see more recent cases about this;

1 this really should be reserved for extraordinary situations and
2 I don't disagree, but, again, we come to this situation where
3 the Secretary has done extraordinary things in this situation
4 and has designed this exact rule to try to evade judicial
5 review. 72 hours is not a long time. I mean, it took -- it
6 was something like a day and a half before it even got a judge
7 assigned to hear this matter in this case.
8 On standing, just a couple of really quick responses.
9 With respect to our first -- our principal theory of
10 standing -- they don't dispute anything. The only thing they
11 raised with respect to that argument is the finality argument.
12 So if this court rejects their finality contention, then our
13 principal theory of standing is undisputed.
14 On the administrative costs I would point this court
15 to Exhibit L at page 6. It is true that some of the
16 administrative costs are going to be reimbursed by the
17 Secretary. That is true, but Exhibit L at 6 discusses several
18 different areas where the Secretary expressly says, MOHELA,
19 you're on your own for this; you're going to have to cover
20 these administrative costs yourself.
21 The Bank of North Dakota situation -- they cite this
22 Mackinaw case from the Sixth Circuit. I believe the court
23 there had said one of the fundamental problems in that case was
24 that in the competitive standing situation the plaintiff hadn't
25 even identified what industry they were competing in and so

1 that was a fundamental flaw that caused the Sixth Circuit to
2 rule the way it did there. And then there is this question
3 about whether Biden against Nebraska applies only to appellate
4 courts as my friend on the other side is suggesting or this
5 court and just four years ago in 2020 there's the Army Corps of
6 Engineers case from this court -- from Your Honor -- that we
7 cited adopting the exact opposite position. If you go in
8 Westlaw and you search this, there are thousands of different
9 district court decisions that have adopted the version of Biden
10 against Nebraska and its predecessor case that we have adopted.
11 And then, finally, on the scope of relief the
12 Eighth Circuit has twice acknowledged and expressly found that
13 the only way to give Missouri and MOHELA full relief is to
14 create a rule -- an injunction against the entire rule and the
15 reason is quite simple. These accounts are very dynamic. The
16 Secretary can take accounts in and put them out, basically, at
17 the Secretary's leisure is my understanding.
18 There were two years ago two million accounts went
19 into MOHELA. Earlier this year one and a half million accounts
20 left. So if you don't do this against the entire rule itself
21 as the Eighth Circuit has determined, then MOHELA is not going
22 to get -- Missouri, rather, is not going to get full relief.
23 So the Eighth Circuit has twice determined that that kind of
24 full relief is necessary. Both times the U.S. Solicitor
25 General went up to the Supreme Court and said the scope of

1 relief is way too broad and both times the U.S. Supreme Court
2 rejected their argument.
3 And then on the question of whether to convert this
4 into a PI as my friend on the other side is suggesting or to do
5 a TRO, Your Honor, I think we would be fine with either of
6 those, but in the context of a PI they haven't raised any
7 defense on the statutory -- on the statutory situation. It's
8 quite clear that they have to go under Section 432. That's
9 what they said in their proposed rule making. We're also
10 talking about a negotiated rule making. This is different from
11 ordinary notice and comment rule making.
12 Under negotiated rule making they are -- with some
13 exceptions, they are pretty much stuck with the text that they
14 propose. They're not going to be able to change that. We know
15 what statute they're relying on and they chose not to offer any
16 defense at all on the statutory question and that's not
17 surprising given that the President, Congress, the Speaker of
18 the House, and the Department all expressly disclaimed their
19 statutory argument just three years ago.
20 If the Court has any questions, I am happy to answer
21 those. Otherwise, we appreciate the Court's time.
22 THE COURT: Have you addressed your argument on 5 USC
23 705 -- whether that's the appropriate remedy versus an
24 injunction, restraining order?
25 MR. DEVINE: I think the Court could go with either.

1 I think most of the circuit courts have said that 705 and 706
2 the standard is going to be the same as a TRO.
3 THE COURT: Right.
4 MR. DEVINE: Now what 705 and 706 do is they authorize
5 broader relief than the court's traditional equitable
6 authority. So there have been some recent concurrences and
7 opinions from some of the justices at the Supreme Court saying
8 under a court's regular equitable authority you can't reach
9 beyond the plaintiff unless that is necessary to make the
10 plaintiff whole. So, for example, in nuisance cases, for
11 example, you might enjoin the neighbor and that is going to
12 have incidental benefits on non-parties of the case, but that's
13 okay because that's the relief that you need in order to make
14 the plaintiff whole.
15 Now in 705 and 706 as the Fifth Circuit said in the
16 Career Colleges case that we cite what these statutes do is
17 they go further. These are not plaintiff-specific remedies.
18 They are defendant-specific remedies. They operate on the rule
19 itself and so an injunction or a rule under Section 705 is a
20 rule or is an order against the entire rule. The rule just,
21 basically, goes away. So 705, it stopped the rule. It pauses
22 it. That would be what would be appropriate here and then at a
23 final judgment stage 706 would be to vacate the rule entirely,
24 and, yes, that does have incidental effects on other parties
25 who might be interested, who might not be interested, but the

1 critical thing here is that 705 and 706 -- they operate on the
2 rule itself and pause or eliminate that rule and so all of
3 these questions about the Court's regular inherent equitable
4 authority, et cetera, and limits on that, they just don't apply
5 with respect to these statutory remedies.
6 THE COURT: All right.
7 MR. DEVINE: Thank you.
8 THE COURT: Thank you.
9 Mr. Jerome, do you want to respond to any of what he
10 just told me?
11 MR. JEROME: Thank you, Your Honor. I would just say
12 quickly that we understand the standards under Section 705 and
13 the equitable authority of the court more generally to be the
14 same for the reasons that we've cited in our brief.
15 THE COURT: Okay.
16 MR. JEROME: I would add that Section 705 seems to be
17 a particularly odd fit in the absence of a rule for the court
18 to act on.
19 THE COURT: All right.
20 MR. JEROME: Thank you, Your Honor.
21 THE COURT: That's what I wanted to hear from you.
22 All right. Have we -- sort of on a housekeeping matter before
23 I address what I have just heard, have we dealt formally with
24 the issue of sealing the Exhibits D and F?
25 MR. DEVINE: Yes, Your Honor. I believe the

1 magistrate judge did yesterday.
2 THE COURT: All right. So he took care of that then.
3 I thought he did, but I wanted to hear it from you. Okay. All
4 right. I have appreciated your very thorough arguments this
5 morning. It is helpful to the court to come up with a final
6 decision. What I plan to do is under the terms of my
7 restraining order I believe tomorrow would be the expiration
8 date. I will extend it temporarily until I can issue a final
9 order in this case. That will be at least 14 -- the 14-day
10 period. So I will leave that in place.
11 I will issue a short order to that effect, but then we
12 will immediately work on a final order addressing either
13 extending a restraining order for an even longer period of time
14 or whether to enter a preliminary injunction. Any questions?
15 MR. DEVINE: No, Your Honor.
16 THE COURT: None?
17 MR. JEROME: Your Honor, I'd ask quickly about the
18 promulgation point that was highlighted in our motion to
19 clarify.
20 THE COURT: The clarification?
21 MR. JEROME: Yes, sir.
22 THE COURT: I think we're all in agreement, are we
23 not, that the restraining order does not prohibit the final
24 publication of the rule. It just will prohibit the
25 implementation -- in other words, forgiving debts or the other

1 matters covered in the restraining order, but in terms of the
2 work that the government is doing to finalize and publish the
3 rule, it should not affect that. Is that ---
4 MR. DEVINE: That's my understanding.
5 THE COURT: Everyone is in agreement on that?
6 MR. JEROME: Yes. Thank you.
7 THE COURT: All right. Do I need to address that in
8 my short order extending the restraining order or is that clear
9 enough to the parties?
10 MR. DEVINE: That's clear enough to us. I won't speak
11 for them, though.
12 MR. JEROME: That's clear enough --
13 THE COURT: Is that clear enough?
14 MR. JEROME: -- for us as well. Yes, Your Honor.
15 THE COURT: All right. We'll get an order out
16 extending the restraining order while we complete our final
17 work. Thank you all very much. I hope you have a safe trip
18 back to your homes.
19 (The hearing is concluded.)
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1 CERTIFICATE OF REPORTER
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5 I, Lisa H. Davenport, Federal Official Reporter, in and
6 for the United States District Court for the Southern District
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16 Federal Official Reporter
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