No. 24A11

In the Supreme Court of the United States

STATES OF ALASKA, SOUTH CAROLINA, AND TEXAS.
Applicants,

v.

MIGUEL CARDONA, SECRETARY OF EDUCATION ET AL.,
Respondents.

Reply In Support of the Application For Vacatur of the Tenth Circuit Stay

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INTRODUCTION

Respondents' defense of their decision to ignore this Court's decision *Biden v. Nebraska*, 600 U.S. 482 (2023), is most remarkable for what it lacks—most prominently, a limiting principle or a justification of the President's public boasting that this Court "didn't stop" him from unilaterally canceling payments on student debt. Yet this Court applied the major questions doctrine to set aside such a scheme precisely because "'the basic and consequential tradeoffs' inherent in a mass debt cancellation program 'are ones that Congress would likely have intended for itself.'" *Id.* at 506 (quoting *West Virginia v. EPA*, 597 U.S. 697, 730 (2022). The first time the Department of Education attempted to usurp that power, it cited the HEROES Act as its pretext. But the Department now all but concedes (at 36-37 & n.10) that it is again effectively canceling loans, and *Nebraska* never suggested its ruling would have been different had the Department simply used a *different* statute as a pretext to effectuate its "mass debt cancellation program." *Id.*

Unable to defend this defiance of *Nebraska*, the Response focuses on the States' standing. But the Department ignores the elephant in the room: It chose not to offer evidence to counter the State's proffer that they will incur a pocketbook injury caused by the Final Rule. *E.g.*, App.71a. And in the face of that one-sided showing, the district court found that the States "have established" standing by a preponderance of the evidence. *Id.* at 92a. The Department's own authority allows such findings to be displaced only if they are "clearly erroneous," *Murthy v. Missouri*, 144 S.Ct. 1972, 1988 n.4 (2024)—a hurdle that the Department so clearly cannot meet that it says nothing about it.

Similarly, rather than responding to many of the States' merits argument about the language of the statutes the Department insists distinguish *Nebraska*, the Department repeatedly misstates the scope of the district court's injunction. It also relegates to a footnote the undisputed fact that even on the Department's erroneous

reading, the injunction that the Tenth Circuit stayed will prevent the Department from giving away "approximately $59 billion." Resp.24 n.8. That number grossly undercounts the true costs by at least $100 billion, but, regardless, by itself puts this case squarely in the realm of the major questions doctrine. *See, e.g.*, *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 764 (2021) (applying the doctrine to a $50 billion program). "And the issues at stake are not merely financial." *Id.* Barely a year ago, this Court noted that "the economic and political significance" of "mass debt cancellation" is "staggering by any measure." *Nebraska*, 600 U.S. at 502. It has not become less staggering as the election approaches. To the contrary, just last week, the Secretary of Education sent a campaign ad masquerading as an official email to student-loan borrowers across the nation blasting "federal courts" for "block[ing] Americans from accessing all the benefits of the most affordable student loan repayment plan in history" and promising that "the Biden-Harris Administration" will continue to battle "Republican elected officials" through this suit.[1]

Finally, as the Application explains, the equities and public interest here overwhelmingly support emergency relief. Although the Department insists this case is different, the reality is that the Court already weighed these factors in *Nebraska* and left an injunction in place while granting certiorari before judgment. Similar analysis supports vacating the Tenth Circuit's unreasoned stay and again granting certiorari before judgment, either to summarily order the district court to vacate the Final Rule in light of *Nebraska* and *Ohio v. EPA*, 144 S.Ct. 2040 (2024), or to set the case for briefing and argument.

[1] *See, e.g.*, Monroe Harless, *Education Department Attacks Republicans, Touts Biden's Agenda in Official Letter*, THE FEDERALIST (Jul. 15, 2024), https://perma.cc/4T26-A3X5.

ARGUMENT

I. THE STATES ARE LIKELY TO SUCCEED ON THE MERITS.

A. The Department's Entire Response is Premised on an Incorrect View of the Scope of the Injunction.

A theme running through the Department's entire brief (*e.g.*, at 23) is that the district court—after documenting at length the astronomical economic impact of the SAVE Plan—enjoined only one of the three "key" provisions: the one decreasing the percentage of discretionary income required to be paid from 10% to 5%. The Department thus contends (at 3) that "the only challenged provision of the rule at issue here does not directly address forgiveness at all." Instead, the Department says (at 27-28), the lion's share of financial harm to the States comes from the Final Rule's definition of discretionary income, which supposedly is not before the Court. The Department's reasoning is incorrect at three levels.

First, the district court did not limit its preliminary injunction to the SAVE Plan's cap on discretionary income. Instead, it agreed with the Department that it would not be "workable" to reinstate forgiven loans or unwind loans for "153,000 borrowers" whose loans were involved in early implemented rules. App.29-30. The district court thus declined to "enjoin the *entire* SAVE Plan" because to do so "would require defendants to unwind those actions, modifying the status quo." *Id.* The district court thus plainly equated "irreversible, forgiven loans" with "loan forgiveness already in effect." But nothing in the Department's strung together snippets from the district court's order can undo the critical point: Like this Court in *Nebraska*, the district court concluded that the entire Final Rule is unlawful under the major questions doctrine, and it enjoined cancelations beginning after July 1, 2024. App.034a (Mem. Order, Dkt. 76 at 29 n. 9); App.045a (Mem. Order, Dkt. 76 at 40).

Before this Court, the Department says (at 22) that the district court was not distinguishing between loan modifications occurring before and after July 1, but

instead was distinguishing between the "implemented parts" (*i.e.*, the modification of discretionary income exempt from payment obligations and the reduced timeline) from the "entire plan." But that clashes with the district court's factual findings and legal analysis that emphasize the staggering cost of the SAVE Plan, which—the district court repeatedly explained—is a question for Congress under *Nebraska*. App.017a-18a (Mem. Order, Dkt. 76 at 12-13). To say that the district court nonetheless allowed the majority of the Final Rule to go into effect forever regardless of whether borrowers' loans were modified sets the injunction at war with itself. That is not a reasonable interpretation.

Second, even if the district court's order could be read in the narrow way suggested by the Department, that would not solve the federal government's problem. For one thing, even if the injunction were limited to the Final Rule's unprecedented decision to decrease repayment obligations from 10% to 5% of non-exempt discretionary income, even the Department admits (in footnote 8) that it would cost $59 billion *before* accounting for this Court's decision in *Nebraska*, which—by the States' preliminary analysis—causes the cost to reach about $180 billion. Yet $59 billion is itself more than enough to trigger the major questions doctrine. *See Ala. Ass'n of Realtors*, 594 U.S. at 764 (applying the doctrine to a $50 billion program). Moreover, because money is fungible, it makes not a dime's worth of difference under any of the State' arguments about *how* the Department unlawfully exploits §455(d) to achieve loan cancelation—only that Congress has never authorized (much less clearly) a "mass debt cancellation program," *Nebraska*, 600 U.S. at 506. Similarly, every provision of the Final Rule fails because of the Department's APA violations.

Third, even if there were some ambiguity about the scope of the injunction, it will be resolved as part of the States' cross appeal. The States contend that the district court abused its discretion by refusing to enjoin loan modifications for borrowers

addressed by the Department before July 1, 2024, but the States expect the parties to brief and the Tenth Circuit to decide whether the district court's injunction was improperly tailored in other respects. *Accord* Resp.35 (noting some confusion in the rushed briefing regarding the stay about the scope of the parties' dispute). The Tenth Circuit's unreasoned stay order certainly does nothing to resolve such ambiguities, which in no way undermine the need to prevent the Department from giving away (by its *own* estimate) $60 billion of taxpayer money.

B. The States Have Standing to Challenge the Final Rule.

As with so much else, the Departments' argument that the States lack standing is notable for what it *lacks*: any citation to record evidence showing that the district court clearly erred in finding the Alaska Student Loan Corporation, South Carolina State Education Assistance Authority, and Texas Higher Education Coordinating Board provided sufficient evidence to obtain a preliminary injunction. App.337a-46a (Mem. Order, Dkt. 68 at 14-23). There is none. Although the Department tries (at 17-18) to portray this issue as one of inadequate pleadings, the "parties agreed at the hearing" that the Department's motion to dismiss made "a factual attack on the court's jurisdiction." App.053a. As the district court observed, Respondents *chose* to "present no evidence of their own" tending to disprove the States' standing as reflected in their sworn affidavits. App.053 n.4; *see also id.* 071a n.9 (the Department did not "submit[] any contrary evidence at all"). That choice had consequences, which are fatal to the Departments' arguments here for at least four reasons.

First, burdens of proof matter. Although the Department makes much (*e.g.*, at 2, 9) of the district court's statement that the States "just barely" met their burden, the Department elides what that burden *was*. Specifically, because "jurisdiction [was] challenged," the district court applied binding Tenth Circuit case law to place the burden on the States as "the party claiming jurisdiction to show it by a preponderance

of the evidence." App.054a (citing *Celli v. Shoell*, 40 F.3d 324, 327 (10th Cir. 1994)); *see also, e.g.*, App.070a, App.071a n.9. Although the courts of appeals are not entirely consistent on the question, the better view is that the preponderance standard that the States "just barely" met (Resp. 2) is *higher* than the standard applicable to preliminary injunctions. *See, e.g.*, *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 763 (7th Cir. 2020) (holding that a "'strong' showing thus does not mean proof by a preponderance—once again, that would spill too far into the ultimate merits for something designed to protect both the parties and the process while the case is pending"); *Par Pharm., Inc. v. QuVa Pharma, Inc.*, 764 F. App'x. 273, 277 (3d Cir. 2019) (holding that a party seeking a preliminary injunction requires a "reasonable chance of winning," which is "one that is 'significantly better than negligible but not necessarily more likely than not'" (quoting *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 & n.3 (3d Cir. 2017)). But it is certainly not *lower* as the Department wrongly suggests (at 17). *See United States v. Legro*, 284 F. App'x 143, 145 (5th Cir. 2008) (declining to decide whether a preponderance is required or some lesser burden); *Boston Beer Ltd. P'ship v. Slesar Bros. Brewing Co.*, 9 F.3d 175, 177 (1st Cir. 1993) (suggesting pre-*Winter* that a preponderance may be required).[2]

Murthy v. Missouri, 144 S.Ct. 1972 (2024), is not the contrary. In that case, the plaintiffs' "primary theory of standing involves their 'direct censorship injuries'" arising from content-moderation decisions of several major social-media platforms done "at the behest of the defendants." *Id.* at 1987. Noting that the parties had conducted "extensive discovery," *id.* at 1984, the Court described "[t]he primary weakness in the

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[2] If anything, this confusion among the lower courts is *more* reason to both grant the application and deem it a petition for writ of certiorari because "the interim status of the law—that is, whether the law is enforceable during the several years while the parties wait for a final merits ruling—*itself* raises a separate question of extraordinary significance to the parties and the American people." *Labrador v. Poe ex rel. Poe*, 144 S.Ct. 921, 929 (2024) (Kavanaugh, J., concurring).

record of past restrictions [as] the lack of specific causation findings with respect to any discrete instance of content moderation. The District Court made none." *Id.* at 1987. Here, by contrast, the district court questioned whether it would have made the *same* findings "if defendants submitted any contrary evidence at all," App.071a n.9, but found that the States satisfied their burden to show standing by a preponderance of the evidence, *id.*; *see also, e.g.*, *id.* 23-26 (summarizing findings). Even at the preliminary injunction stage, such findings are reviewed for clear error. *See, e.g.*, *Citizens for Constitutional Integrity v. United States*, 70 F.4th 1289, 1293 (10th Cir. 2023) (citing *Corp. Techs., Inc. v. Harnett*, 731 F.3d 6, 10 (1st Cir. 2013)).

Second, having chosen not to offer relevant evidence, the Department cannot rely on the bald assertion that "the instrumentalities will be repaid in full" to defeat the district court's conclusion that consolidation of their loan portfolios will harm the States by cutting off streams of income derived from interest payments. Clear-error review may not be a "rubber stamp," but it remains a "[d]emanding test," which does not permit an appellate court to "set [factual] findings aside unless, after examining the entire record," it is "left with the definite and firm conviction that a mistake has been committed." *Alexander v. S.C. State Conference of the NAACP*, 144 S.Ct. 1221, 1240 (2024) (quoting *Cooper v. Harris*, 581 U.S. 285, 309 (2017)). That review considers whether the evidence before the trial court supports its written findings. *Cf. Anderson v. City of Bessemer City*, 470 U.S. 564, 571-72 (1985). Here, the *uncontroverted* evidence is that these State entities will lose interest income because—as the Department's own brief admits (at 16-17)—they will be paid only the principal and the interest *accrued* at the time these loans are consolidated. App.334a-36. Alaska has offered testimony estimating that loss at $100,000 over the next two years, App.344a. (Mem. Order, Dkt. 68 at 21)—well over the amount necessary to satisfy Article III,

see Uzuegbunam v. Preczewski, 141 S.Ct.792, 797-98 (2021). This is not surprising; the lifeblood of the lending industry is interest payments.

In arguing to the contrary, the Department complains that the district court's order "fail[s] to account for the time value of money," which "[i]n the actuarial world … is heresy." Resp.17 (quoting *Conkright v. Frommert*, 559 U.S. 506, 519 (2010) (quotation marks omitted)). This armchair economics is breathtakingly oversimplified, ignoring concepts like a "certainty equivalent," *Certainty equivalent*, NASDAQ, https://www.nasdaq.com/glossary/c/certainty-equivalent, or time sensitivity in payment flows, *see generally* Heitor Almeida, *The Cash Flow Sensitivity of Cash*, 59 J. OF FIN. 1777 (Aug. 2004). That is, economists and businessmen recognize—even if the Department apparently does not—that there are instances in which the value of consistent cash flow cannot be brushed aside. Again, the notion that receiving a lump sum payment of principal somehow is economically superior for a lender than receiving ongoing interest payments is unsupported by factual evidence—likely because it is utterly divorced from how the lending industry works.

More fundamentally, the Department's position ignores that "standing analysis is not an accounting exercise," let alone an actuarial one. *Texas v. United States*, 809 F.3d 134, 156 (5th Cir. 2015) (quoting *NCAA v. Governor of N.J.*, 730 F.3d 208, 223 (3d Cir. 2013)), *aff'd by an equally divided Court*, *United States v. Texas*, 579 U.S. 547 (2016). Instead, "once injury is shown, no attempt is made to ask whether the injury is outweighed by benefits the plaintiff has enjoyed from the relationship with the defendant." *Id.* at 155-56; *see also, e.g.*, *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 60 (2d Cir. 2020); 13A CHARLES A. WRIGHT & ARTHUR MILLER, FED. PRAC. & PROCEDURE JURIS. 3D §3531.4, 147 (3d ed.2008). For good reason: Justiciability doctrines exist to ensure that "federal courts exercise their proper function in a limited and separated government," namely, to "resolve only a real controversy with real

impact on real persons," *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423-24 (2021) (quotation marks omitted)—not to entangle the Court in a litigant's choice about what is "best for them," *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020).

Third, for similar reasons, the Department's failure to offer contrary evidence precludes it from contending that South Carolina is not injured by the loss of tax revenues. Nor is the Department's argument correct in any event. Loan forgiveness is ordinarily taxable income. Appl. at 28. The Administration boasts that a majority of the approximately 8 million SAVE Plan applicants will have $0 monthly repayments. Appl. at 19 (citing The White House, *President Joe Biden Outlines New Plans to Deliver Student Debt Relief to Over 30 Million Americans Under the Biden-Harris Administration* (Apr. 8, 2024), https://bit.ly/4cvvkzE). And for other borrowers whose discretionary income barely exceeds 225% of the federal poverty line, they must only pay 5% of that nominal amount. Appl. App. at 27a. The plan reduces those borrowers' taxable income in South Carolina, with the result that the State suffers "a direct injury in the form of a loss of specific tax revenues," *Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992), of at least $1. By itself, that is sufficient for standing.

In response, the Department counters (at 21) that this injury is self-inflicted and "arises from its own decision to tie its definition of taxable income to the federal definition." But the only choice that South Carolina has is between two justiciable injuries: lose tax revenue, *Wyoming*, 502 U.S. at 448, or change its laws, *Texas*, 809 F.3d at 153; *see also Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267, 277 (2022) ("Paramount among the States' retained sovereign powers is the power to enact and enforce any laws that do not conflict with federal law."). A victim who has chosen between two poisons has still been poisoned, and the Court still has jurisdiction to hold the poisoner accountable for the poisoning. There is nothing "voluntary"

about South Carolina's injury. *Cf. FEC v. Cruz*, 596 U.S. 289, 296-97 (2022) (an injury is "self-inflicted" for standing purposes where it is "voluntar[y]" and "unilateral").

Fourth, the Department is wrong that post-*Murthy*, the States failed to establish traceability because their theory "require[s] guesswork as to how independent decisionmakers will exercise their judgment." Resp.18 (quoting *Murthy*, 144 S.Ct. at 1986)). As this Court explained in *Department of Commerce v. New York*, there is a critical distinction between a "theory of standing" that "rest[s] on mere speculation about the decisions of third parties" and one that "relies … on the predictable effect of Government actions on third parties." 588 U.S. 752, 768 (2019) (citing, *inter alia Bennett v. Spear*, 520 U.S. 154, 169-70 (1997)). One such predictable effect—indeed, one the most predictable effects of all—is that people will act in their economic self-interest when it comes to decisions whether to "enroll in valuable benefit programs." *California v. Texas*, 593 U.S. 659, 678 (2021). That is precisely the effect highlighted in Alaska's standing declaration, upon which the district court relied when it found that States demonstrated that "borrowers are likely to consolidate their FFEL loans into direct loans because of the SAVE plan." App.070a. That borrowers might also consolidate loans for *other* reasons does not deprive States of standing to sue over this injury. *Cf. Larson v. Valente*, 456 U.S. 228, 242-43 (1982) (finding standing to challenge a "discrete injury on which appellees now complain" despite confounding causes).

Far from departing from these established principles, *Murthy* expressly cited *Department of Commerce*, 144 S.Ct. at 1986. The Court also repeatedly endorsed the *logic* of the distinction drawn in *Department of Commerce*. *See, e.g.*, *id.* at 1992 (rejecting the notion that "[b]y acknowledging the real possibility that Facebook acted independently," the Court was "applying a new and heightened standard"). *Murthy* merely found that "by attributing *every* platform decision at least in part to the

defendants," the lower courts "glossed over complexities in the evidence" offered by the parties that "the platforms continued to exercise their independent judgment even after communications with the defendants began." *Id.* at 1987-88 & n.4. Here, no such complexities exist because the Department offers *no* evidence to counter Alaska's account—let alone the "stronger evidence" this Court has required "to support [a] counterintuitive theory" that private individuals will voluntarily "forgo" government largesse. *California*, 593 U.S. at 678.[3]

C. The SAVE Plan is Substantively Unlawful.

Just as in *Nebraska*, the SAVE Plan is substantively unlawful because when either Congress or this Court speaks, federal agencies should listen. *See, e.g., Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244, 2257 (2024). Yet the Department did the opposite: It ignored this Court's clear instruction that only Congress may forgive loans en masse—something Congress has conspicuously chosen not to do either in the HEROES Act at issue in *Nebraska* or in any of the alternative statutes cited here. None of the Department's defenses—some of which are impermissible post hoc rationalizations—change that analysis.

1. The Plan Exceeds Statutory Authority.

To start, the Department curiously claims (at 24) that "[r]ather than engage with the text of Section 1087e(e)(4)—which applicants do not even cite—applicants invoke the major questions doctrine." True, the States' Application *started* with the major questions doctrine because the Department's all but open evasion of the Court's decision in *Nebraska* is the easiest way for the Court to grant a stay. But the district

[3] For similar reasons, the Department's fleeting reference (at 19) to *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024), is unavailing. Like *Murthy*, *FDA* emphasized that "[d]etermining causation in cases … by unregulated parties against the government is … not a 'mechanical exercise'" but is instead "heavily fact-dependent and a 'question of degree.'" 602 U.S. at 384 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). The facts here are far more analogous to *Nebraska* than to *FDA*.

court most certainly engaged in a textual analysis when it held that the SAVE Plan "represent[s] the first time the Secretary has gone beyond the number set by Congress" in 1098e. App.27a. And the States analyzed §1087e(d)(1)(D), which is in any event materially identical to §1087e(e)(4), except that it adds "appropriate" to "portion of the annual income."[4] The Department misses the point when it comes to the district court's analysis, and it conspicuously has no answer to why $0 would be "appropriate" under its misguided interpretation of the statutes here, let alone how its theory conforms to the statutory duty that the Secretary "shall require payments."

a. In trying to dismiss the textual failings of its position, the Department asserts (at 26) that the SAVE Plan must be analyzed solely under 20 U.S.C. §1087e(d)(1)(D) because §1098e does not apply. But it is a bedrock principle of statutory interpretation that words and phrases cannot be read in isolation. *E.g.*, *King v. Burwell*, 576 U.S. 473, 497 (2015) (citing *Dep't of Revenue of Ore. v. ACF Indus., Inc.*, 510 U.S. 332, 343 (1994)). Context is key. *See, e.g.*, *Nebraska*, 600 U.S. at 511 (Barrett, J., concurring). When §1098e was enacted to allow income-based repayment, it was more generous to borrowers than the plans under §1087e(d)(1)(D), but it required a showing of hardship, 20 U.S.C. §§1098e(b)(1), (6). The distinction is presumed intentional. *See, e.g.*, *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 86 (2017) ("[U]sually at least, when we're engaged in the business of interpreting statutes, we presume differences in language like this convey differences in meaning."). And that distinction is precisely what the Department elides.

By allowing what is effectively relief under §1098e through the mechanism created in §1087e, the Department impermissibly renders the carefully reticulated system superfluous. *See, e.g.*, *Fischer v. United States*, 144 S.Ct. 2176, 2187 (2024).

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[4] Section 1087e(e)(4) also incorporates a spouses' income, but no one maintains that is relevant to this suit.

For example, Congress authorized in some situations a repayment amount as low as 10% of discretionary income, 20 U.S.C. §1098e(e)(1), but the Final Rule creates a 5% threshold for undergraduate loans, *see* Final Rule at 43,901-02. Congress also allowed 150% of the poverty line to be the baseline for determining discretionary income, 20 U.S.C. §1098e(e)(2), yet the Final Rule pushes that to 225%, *see* Final Rule at 43,902. Congress further set a floor for possible debt cancellation, 20 U.S.C. §1098e(e)(2), but the Final Rule reduces that floor to 10 years for certain borrowers, *see* Final Rule at 43,903. If §1087e allowed the Secretary to create such terms, it would have been entirely unnecessary for Congress to have been so specific.

Statutory history also emphasizes why the district court was correct to distinguish between §1087e and §1098e. Although legislative history is a disfavored method of statutory interpretation, "[s]tatutory history is an important part of [a text's] context." *United States v. Hansen*, 599 U.S. 762, 775 (2023). And in particular, where Congress creates a more specific statute later in time, that statute is deemed to control over and inform the function of the earlier statute. *See, e.g.*, *United States v. Estate of Romani*, 523 U.S. 517, 530 (1998). Here, 20 U.S.C. §1087e(d)(1)(D), which has existed since 1994, is the more general statute allowing the Secretary to set certain terms for repayment. By contrast, §1098e was passed in 2007, and it controls the more specific issue of income-based repayments. It would have been entirely unnecessary for Congress to have passed §1098e in 2007 if the earlier existing §1087e(d)(1)(D) meant what the Department claims.

b. The Department fares no better in responding to 20 U.S.C. §1087e(d)(1)(D), which requires a "repayment plan" with "varying annual repayment amounts"—meaning that the borrower must remit something. *See, e.g.*, BLACK'S LAW DICTIONARY 1553 (11th ed. 2019) (defining "repayable" as "required to be paid back, usu. by a specified time"); *accord United Student Aid Funds, Inc. v. Espinosa*, 559

U.S. 260, 264 (2010) (discussing how "Chapter [13] permits individual debtors to develop a plan to repay all or a portion of their debts over a period of time specified in the plan"). Obviously, the thing to be repaid—or remitted—is the "principal and interest on the loan." 20 U.S.C. §1087e(d)(1). Yet here, Defendants boast that out of 8 million borrowers who signed up for the SAVE Plan, 4.5 million will pay nothing at all. *See, e.g.*, The White House, *President Joe Biden Outlines New Plans to Deliver Student Debt Relief to Over 30 Million Americans Under the Biden-Harris Administration* (Apr. 8, 2024), https://bit.ly/4cvvkzE. That cannot be squared with Congress's careful scheme for when specific benefits are available under specific provisions.

The Department counters (at 27) that this common-sense understanding of repayment is irrelevant because the income-cap is the only one before the Court and that under that provision, there (sometimes) can be *some* repayment—albeit half as much as before. Leaving aside that this seems to admit that changing discretionary income to produce a $0 payment *would* violate the statutory obligation of remittance, this position is premised on the Court's acceptance of Defendants' illogical interpretation of the injunction, which it should not. *Supra* pp. 9-11.

Perhaps more concerning is that the Department's view of the Secretary's ability to "fill up the details" about what constitutes "appropriate portion … for calculating payments" has no discernible limiting principle. The Department's interpretation would permit a federal agency to forgive 100% of every loan at the stroke of a pen merely by setting payments at 1% of discretionary income, defined as 3000% federal poverty, for two months. Conversely, nothing would stop future Department officials from setting repayments at 100% of discretionary income defined as anything over 1% of the federal poverty line over two months.

If the Department were correct, there would be a host of new problems—not least of which the lack of an intelligible principle as required to satisfy the nondelegation doctrine. *See, e.g.*, *West Virginia*, 597 U.S. at 739-40 (Gorsuch, J., concurring) (discussing the interaction between the nondelegation and major question doctrines). But even as a statutory matter, it makes no sense because it elides the difference between a loan and a grant—concepts which are distinctly different under the same statutory scheme. *Compare* 20 U.S.C. §1070, *with id.* §1087-4. To "grant" is to "give or confer (something), with or without compensation." *Grant*, BLACK'S, *supra*, at 844. By contrast, a "loan" is "[a] thing lent for the borrower's temporary use; esp[ecially] a sum of money lent at interest." *Loan*, *id.* at 1123. As grants carry with them a notion of permanence, they are inherently more expensive than loans—as the United States has emphasized in other contexts. *E.g.*, U.S. Dep't of Transportation, *How Grants Differ from Other Federal Funding and Financing*, https://perma.cc/6UPZ-2UKD (last visited July 19, 2024) ("In contrast with grants, **loans need to be paid back** to the government (reimbursement or repayment.") (emphasis in original). Congress thus frequently places limits on such grants, establishes conditions on their receipt, or both. Here, for example, Congress has provided a specific formula for determining a student's eligibility for a Pell Grant in a given award year, which "round[s] to the nearest $5" and is capped at $4,860 or 5,500, depending on the circumstances. 20 U.S.C. §1070a(b)(8)(C)(i)(II).

Even the Department seems to recognize the distinction as the Final Rule makes a point of insisting that its provisions are *not* grants. *See* 88 Fed. Reg. 43,830. But the Department also acknowledges that under the SAVE Plan, the typical borrower will pay back only 61 cents for every dollar borrowed. *Id.* at 43,823, 80. That translates to a $3,900 grant for every $10,000 borrowed without regard to the statutory caps placed on such grants in §1070a(b)(8)(C)(i)(II) or the limitations placed on

forgiveness at the backend in §1098e. Because an agency only has that power which Congress grants, the SAVE Plan is unlawful even without the major questions doctrine. *See, e.g.*, *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (An agency "literally has no power to act unless and until Congress confers power" to do so.).

Lastly, the Court should be guided by common sense. Not only is it beyond implausible that Congress implicitly authorized a federal agency to give away almost half a trillion dollars, but if that theory really had legs, surely the Department would have relied on it first before it repurposed the HEROES Act in *Nebraska*. That the Department relied on this statute as a fallback provision speaks volumes.

2. The Major Questions Doctrine Forecloses Contrary Arguments.

As the district court recognized, and as the Application emphasized, the SAVE Plan's illegality is even clearer under the major questions doctrine. Because Congress "does not ... hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), this doctrine holds that a "colorable" or "plausible" textual basis is "not sufficient" to authorize agencies to resolve questions of great economic or political significance that are traditionally the sphere of the legislative branch, *West Virginia*, 597 U.S. at 722, 723. Hever, in a new twist, the Department argues (at 24-25) that the major questions doctrine does *not* apply. The Department also argues (at 25-26) that even if it did, the HEA clearly authorizes the SAVE Plan. The Department is wrong on both counts.

a. Defendants were right not to contest below that the SAVE Plan implicates a major question—particularly after *Nebraska*, which explicitly held, "'[t]he basic and consequential tradeoffs' inherent in a mass debt cancellation program 'are ones that Congress would likely have intended for itself,'" thus triggering the major questions doctrine. *Nebraska*, 600 U.S. at 506 (quoting *West Virginia*, 597 U.S. at 730). The Final Rule is plainly a "mass debt cancellation program": It cancels *at least*

$156 billion in debt in the Department's (under)estimate, and likely around $475 billion in the real world. App.025a-26a (Mem. Order, Dkt. 76 at 12-13). The SAVE Plan thus triggers the major questions doctrine.

The Department insists (at 26-27) that *Nebraska*'s holding was fact bound and "involv[ed] a different kind of agency action … under a different statutory authority, with different political and economic significance." That action, the Department claims (at 26), "had 'created a novel and fundamentally different loan forgiveness program,' and that its "invocation of [a] waiver power" did "not remotely resemble how it ha[d] been used on prior occasions[.]" Not so: *Nebraska* recognizes that the "*inherent*" nature of *any* "mass debt cancellation program" necessarily triggers the doctrine. 600 U.S. at 506 (emphasis added). The Secretary may have swapped "modifications" with "determinations" and "waiver" with "repayment," but it creates the fundamentally same problem: The Administration has made a policy decision that it should decide based on political expediency whether loans should be repaid regardless of the conditions Congress decided to place on those funds in the first instance. *Nebraska* forbids such administrative creativity.

b. Even if the Court were writing on a blank slate, the SAVE plan qualifies as a major question multiple times over. The Department concedes (at 24) the economic and political significance of the Administration's decision. It would be hard not to given that the price tag brings the SAVE Plan well within major questions territory, *see Ala. Ass'n of Realtors*, 594 U.S. at 764, and the Secretary himself seeks to make it a central issue in the upcoming presidential election, *supra* p.2.

Nevertheless, the Department points (at 25) to the "history and breadth of the authority" putatively granted to the Secretary to support its claim that Congress meant to confer the power to enact the SAVE Plan. Yet the district court found that this is the first time that the Department exceeded the numbers set in §1098e. App.27a. Rather than pointing to an instance the district court may have missed, the

overtone of the Department's response is that "it's just 5%." Yet the effect of that 5% change is approximately $180 billion, and that isn't accounting for all the other changes in the SAVE Plan that in total add up to $475 billion.

Furthermore, under the major questions doctrine, the relevant issue is "the breadth of the authority that the agency has asserted." *West Virginia*, 142 S.Ct. at 2608. As noted above, the Department offers no limiting principle to its interpretation of the HEA, suggesting that it considers itself to have the authority to abolish *all* $1.6 trillion in student debt currently in the Department's portfolio. *Cf.* App.028a (using "the total value of all outstanding federal student loans" from *Nebraska* in the absence of any evidence from the federal government). That readily satisfies the major questions doctrine—even without *Nebraska*.

c. Congress has not authorized the SAVE Plan at all. *Supra* pp. 11-13. But at minimum, the district court was correct to determine that Congress has not *clearly* authorized the SAVE Plan for at least two reasons. *First*, as in *Nebraska*, the Final Rule claims to locate expansive authority in modest words. App.024a-25a (Mem. Op., Dkt. 76 at 19-20). Specifically, even though, on its face, §1087e(d)(1)(D) requires a borrower to remit something, the Department boasts that out of 8 million individuals who signed up for the Final Rule's plan, 4.5 million will pay nothing at all based on an expansive interpretation of the term "appropriate." That is precisely the type of mousehole in which a half-trillion-dollar elephant cannot—and should not try to—hide.

Second, this assertion of authority is transformative. App.025a-29a (Mem. Order, Dkt. 76 at 20-24). Leaving aside its enormous price tag, as the district court noted, the SAVE Plan represent[s] the first time the Secretary has gone beyond the number set by Congress" to rewrite the material financial terms of the loans Congress authorized. App.022a, 029a (Mem. Order, Dkt. 76 at 22, 24). As this Court has

repeatedly held, "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,'" this Court "typically greet[s] its announcement with a measure of skepticism." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quotation marks omitted). The Department cannot overcome that skepticism merely by claiming that the SAVE Plan "incrementally" changed aspects of prior agency practice: By its own figures the Save Plan costs 30 times as much as the prior highwater mark. *Compare* App.026a (previous highwater mark under this statute was a plan costing only $15 billion), *with* Final Rule at 43,886 (admitting that the SAVE Plan will cost $156 billion), *with* App.026a (Mem. Order, Dkt. 76 at 21) (real cost of SAVE Plan is $475 billion).

D. The Final Rule is Procedurally Unlawful.

Apart from the flaws the Court already identified in *Nebraska*, the States are also likely to succeed on the merits because the Department violated the procedural aspects of the Administrative Procedure Act multiple times over. To name just two, the Final Rule is arbitrary and capricious because it failed to consider important aspects of the problem. And it was adopted through procedures that gave insufficient time to provide notice and comment. The district court did not reach the APA questions, instead concluding that the States' statutory claim was a sufficient basis for injunctive relief. If the Court disagrees with the statutory analysis, it properly can—and should—reach and resolve the APA questions.

To start, the Final Rule is arbitrary and capricious because it neither "reasonably explained" the Department's actions nor took account of all "important aspect[s] of the problem before it." *Ohio*, 144 S.Ct. at 2053 (2024) (quoting *Motor Vehicle Mfrs. Ass'n. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). This is true for multiple reasons, but the most glaring is that the Department deliberately understated the costs by assuming the HEROES Act Plan would be

effectuated even though the Final Rule was not formally promulgated until after *Nebraska* issued. Final Rule at 43,820, 44,875. Even now, the Department does not deny this $300 billion accounting gimmick but instead offers two rejoinders, neither of which satisfies the APA.

First, the Department again defends (at 30) its inaccurate premise on the basis that the Secretary apparently rushed to send the Final Rule to the General Printing Office before *Nebraska* was decided. Even if true—which the Secretary elsewhere has admitted it is not[5]—this ignores that the HEROES Act had been enjoined for months before the Final Rule was promulgated, which at minimum should have counseled in favor of caution. Regardless, even if the Department was entitled to ignore the implications of this Court's refusal to stay the Eighth Circuit's injunction, the Department had ample authority to amend the rule prepublication to correct its known error and violated the APA by refusing to do so. *See, e.g.*, *NRDC v. Perry*, 940 F.3d 1071 (9th Cir. 2019). The Department has no answer for that basic point.

Second, rather than trying to defend the $475 billion price tag, the Department insists that it did not need to consider costs in the first place. Yet absent some statutory exception, costs are always an "'important aspect of the problem'" for agencies to consider. *Michigan v. EPA*, 576 U.S. 743, 752 (2015) (citation omitted). As the Application explains, moreover, it the antithesis of rationality to ignore costs in a loan-cancelation program such as this, because unless the Department knows how much it is cancelling, it cannot know if it is meeting the statutory goals Congress imposed. Again, the Department says nothing in response. Instead, the Department relies (at 30) on *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490

[5] *See* Dep't of Educ., *Secretary Cardona Statement on Supreme Court Ruling on Biden Administration's One Time Student Debt Relief Plan* (June 30, 2023) (emphasis added), https://tinyurl.com/2jeyaapa.

(1981). Yet the Department says nothing about *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009), which explains just how limited *American Textile's* holding is.

Regardless, the SAVE Plan is also arbitrary and capricious because the Department did not "reasonably address[]" legitimate concerns. *Ohio*, 144 S.Ct. at 2057; *id.* at 2053. Specifically, the Department was warned that its cost estimates would be wrong if (as happened) the Court were to rule against the Department in *Nebraska*. The Department's answer to this point (at 31) doubles down on its argument that it was not required to consider costs for a program dedicated to spending money. That is not the law. And this obvious error is certainly not "harmless"—unless the Department admits that nothing about this Court's decision in *Nebraska* and the associated injunction of the HEROES Plan could have changed its mind. Yet if so, failure to reasonably consider and respond to issues raised by commenters *and this Court* would itself violate the APA's requirements of reasoned decision-making. Indeed, this is why the Court should order the district court to vacate the Final Rule.

Finally, the States are also likely to prevail on their claim that the Department's 30-day comment period violated the APA. The Department still fails to identify any rule of comparable economic or political significance in the nation's history for which an agency gave such a short comment period. The Department also again offers no limiting principle. Nor is the error harmless. That thousands of people were able to comment in such an abbreviated period only underscores that this is a major question with significance for hundreds of millions of Americans; it does not relieve the Department of its basic duty to ensure the public has a meaningful opportunity to participate in rulemaking.

E. The District Court's Injunction is Not Overbroad.

The Department is also wrong that the injunction is improper because it provided nationwide relief and refused to sever supposedly lawful aspects of the Final

Rule. Again, the Department elides the standard of review. "For 'several hundred years,' courts of equity have enjoyed 'sound discretion' to consider the 'necessities of the public interest' when fashioning injunctive relief"—including in determining the scope of that relief. *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 496 (2001) (quoting *Hecht Co. v. Bowles,* 321 U.S. 321, 329-30 (1944)); *see also, e.g.*, *Hills v. Gautreaux*, 425 U.S. 284, 306 (1976). For at least three reasons the Response fails to overcome that deferential standard—a standard that does not permit this Court to "slid[e] from mere disagreement with the way in which a trial court has dealt with a particular matter … into a condemnation of the court's action as an abuse of discretion." *Brown v. United States*, 356 U.S. 148, 153-54 (1958).

First, it is difficult to see how the district court could have exceeded the scope of its discretion by doing the same thing the Eighth Circuit did in *Nebraska*. *See Nebraska v. Biden*, 52 F.4th 1044, 1048 (8th Cir. 2022). After all, the U.S. Solicitor General made similar objections to the "sweeping nationwide relief" afforded in *Nebraska* in seeking this Court's intervention, Application at 3, *Biden v. Nebraska*, 600 U.S. 482 (Nov. 18, 2022) (No. 22A444). Yet this Court neither stayed nor reversed that injunction. Because the same standard applies whether an application seeks to impose or vacate a stay, the same result should obtain. *See Maggio v. Williams*, 464 U.S. 46, 48 (1983).[6]

Second, even apart from *Nebraska*, the district court provided ample explanation for the scope of its injunction. As the district court explained, for example, "[a] broad rule, like the SAVE Plan, requires a broad injunction, given the compelling

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[6] If anything, the Department's objections to the nationwide scope of the injunction have less force here given its decision *not* to seek a stay of the Eastern District of Missouri's *nationwide* injunction against the *same* rule. *See Missouri v. Biden*, No. 4:24-cv-00520, 2024 WL 3104514, at *1 (E.D. Mo. June 24, 2024). True, this case implicates an even larger amount of money, but that has nothing to do with the geographic *scope* of the injunction.

need for nationwide uniformity in the Department's administration of student loan programs." App.042a (Mem. Order, Dkt. 76 at 37). And the Department's APA violations—including its decision to ignore *Nebraska*—infects every provision and application of the Final Rule. This Court has granted its *own* nationwide stay in less egregious circumstances. *See NFIB v. OSHA*, 595 U.S. 109 (2022).

Third, with respect to Department's severability arguments, "the Government did not raise this argument regarding the scope of the injunction before the district court, and has therefore waived it." *State v. Trump*, 871 F.3d 646, 659 (9th Cir. 2017) (citing *Armstrong v. Brown*, 768 F.3d 975, 981 (9th Cir. 2014)), *reversed on other grounds*, 585 U.S. 667, 711 (2018). As the district court explained, this argument "surface[d] in this Kansas case just now, for the first time" in the Department's request for a stay pending appeal. App.004a (Mem. Order, Dkt. 84 at 2). The Department thus never timely "provided any kind of roadmap for which portions should make the cut." *Id.* Regardless, even if the States' major questions objection were specific to certain pieces of the Final Rule, their procedural objections under the APA plainly are not. Because there are no lawful parts of the Final Rule to sever, the States are likely to successfully defend the injunction in its entirety.

II. THE REMAINING FACTORS FAVOR THE STATES.

In addition to being likely to succeed on the merits of what is *Nebraska 2.0* in all but name, equity and the balance of harms also favor the States. As discussed above, the district court found by a preponderance of the evidence that the Final Rule will directly harm State instrumentalities, *supra* pp. 3-5. On the other hand, it is never equitable nor in the public interest for federal agencies to exceed their statutory authority—let alone do so in a way that costs the United States hundreds of billions of dollars that citizens not yet born will be forced to repay for decades to come. *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) ("[N]o matter

how important, conspicuous, an controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate must always be grounded in a valid grant of authority from Congress.").

The district court also rejected the Department's complaint about the States' supposed delay in bringing suit. App.034a-35a (Mem. Order, Dkt. 76 at 29-30). For good reason. On its face, the Final Rule says its effective date is July 1, 2024. App.045a (Mem. Order, Dkt. 76 at 40). The States brought this challenge months before that effective date and soon after the Department begin expediting implementation of certain provisions of the SAVE Plan. It is not the States' fault that the Department plowed ahead with a rule that ignores *Nebraska*.

Rather than rebutting these points, the Department rehashes its merits arguments. The Department, for example, again claims (at 35-36) that depriving the States of interest income is not an injury—as if the business model of entire industries does not depend on receiving interest payments over a period of years rather than recouping the principal in a lump sum all at once. *See, e.g.*, Holly Johnson, *How Credit Card Companies Make Money*, TIME (Jan. 8, 2024), https://perma.cc/U9VA-TNA4. And its assertion (at 35) that the Court should ignore this injury as "relatively meager" compared to the benefit borrowers receive is borderline frivolous. Leaving aside that almost anything will look "meager" compared to this gargantuan program, the injury in *Nebraska* was not greater in any *material* sense given the $430 billion price tag for the "mass debt cancellation plan" there. 600 U.S. at 490, 506.

The Department's arguments about administrative burdens also fail. Such burdens—inherent in every regulatory scheme—did not justify misusing hundreds of billions of dollars in *Nebraska*, and should not do so here. That is particularly so because the Department told reporters just one day after the district court's purportedly

unimplementable injunction that it "would freeze the student loans of borrowers who are enrolled in the program—known as the SAVE plan—and required to make payments in July." Michael Stratford, *Education Dept. Freezes Loan Payments For 3M Student Borrowers After Court Rulings*, POLITICOPRO (June 28, 2024), https://bit.ly/4bRf2Af. The Department knows how to quickly to turn this program off.

To the extent that borrowers are "confuse[d]," Resp.38, when the Department communicates with them the true state of their loan obligations, that is unfortunate. But it is not an injury cognizable in a court of equity. *Cf. U.S. Gypsum Co. v. Nat'l Gypsum Co.*, 352 U.S. 457, 465 (1957) (noting the importance of unclean-hands doctrine and its analogues in form equitable relief). Not only have borrowers recently seen this same process play out in the *Nebraska* litigation, but such confusion is especially unlikely because the Secretary's email last week, *supra* p.2, confirms that Department *can and has* been promptly communicating with borrowers about this litigation. That it has done so to promote the current Administration's electoral prospects rather than inform current borrowers of their rights and obligations is hardly a ground to deny equitable relief to which the States are otherwise entitled.

III. THE COURT SHOULD GRANT CERTIORARI BEFORE JUDGMENT AS IN *NEBRASKA*.

Finally, the Response confirms that the Court should grant certiorari before judgment and either summarily order the district court to vacate the Final Rule in light of *Nebraska* and *Ohio* or, at a minimum, set this case for briefing and argument. After all, the Department concedes (at 24 n.8) that even under its crabbed view of the injunction, this case implicates "approximately $59 billion"—and that is before accounting for the effect of *Nebraska* on the SAVE Plan. As a result, this case directly implicates the bedrock principle that "[o]ur Constitution gives Congress control over the public fisc." *CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 420 (2024).

Although the Tenth Circuit has now accelerated the appeal, moreover, it has not agreed to *decide* it before August 1. *See* Letter from A. Nielson (July 12, 2024). Furthermore, the Department now suggests it may depart from its ordinary practice of giving 30-days' notice before changing loan terms. Accordingly, even with expedition, the Tenth Circuit may be unable to prevent the States—or hundreds of millions of taxpayers—from suffering irreparable economic harm. *See id.*

Perhaps more importantly, since the republic's earliest days, it has been a guiding principle that ours is to "be a government of laws and not of men." Mass Const. pt. 1, art. xxx. Of equally distinguished pedigree is the principle that "[i]t is emphatically the province of the judicial department to say what the law is"—particularly in a dispute between the political branches over the distribution of power. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). When the highest levels of the executive branch publicly thumbs their noses at a ruling from this Court whose ink is barely dry, it is of "imperative public importance," Sup.Ct.R. 11 for this Court to respond.

Furthermore, just yesterday, the Eighth Circuit administratively stayed implementation of the entire Final Rule on a nationwide basis. Order, *Missouri v. Biden*, No. 24-2332 (8th Cir. July 18, 2024). The Eighth Circuit's stay confirms that this issue is one of exceptional national significance and that this Court almost certainly will grant review. Given that reality, the Court should do what it did in *Nebraska* and grant certiorari before judgment.

CONCLUSION

The Court should, at minimum, vacate the Tenth Circuit's stay. It should also grant review and order vacatur of the Final Rule in the light of *Nebraska* and *Ohio*.

Respectfully submitted.

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