No. 24A__

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.

Application to the Honorable Neil M. Gorsuch, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit, For Vacatur of Stay of Preliminary Injunction

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Applicants (Plaintiffs-Appellees below) are the States of South Carolina, Alaska, and Texas (collectively, "the States").[1]

Respondents (Defendants-Appellants below) are Miguel Cardona, Secretary of Education, in his official capacity, and the U.S. Department of Education (collectively, "the Department of Education" or "the Department").

RELATED PROCEEDINGS

U.S. District Court for the District of Kansas:

Alaska et al. v. U.S. Dep't of Education, No. 6:24-cv-01057-DDC-ADM

U.S. Court of Appeals for the Tenth Circuit

Alaska et al. v. U.S. Dep't of Education, No. 24-3089

[1] Alabama, Idaho, Iowa, Kansas, Louisiana, Montana, Nebraska, and Utah were dismissed by the district court for lack of standing. These States are appealing that dismissal but were not parties to the U.S. Court of Appeals for the Tenth Circuit's order that is the subject of this application.

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EMERGENCY APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION

To the Honorable Neil M. Gorsuch, Associate Justice of the United States and Circuit Justice for the Tenth Circuit:

"The Supreme Court tried to block me from relieving student debt. But they didn't stop me." Ingrid Jacques, *Courts Keep Telling Biden His Student Loan Scam Is Illegal. Will It Stop Him? Nah!*, USA Today (July 1, 2024). Such words could have come out of the mouth of Andrew Jackson, but instead are what President Biden said about *Biden v. Nebraska*, 600 U.S. 482 (2023). Bragging that "I've relieved student debt for over 5 million Americans," he insisted that "I'm going to keep going." Jacques, *supra.* Taking the President's words as marching orders, the Department of Education has sought to cancel $475 billion of student debt, regardless of what Congress or this Court has said about the matter. This current attempt to unilaterally cancel debt is every bit as unlawful as the first 12-digit effort this Court rejected in *Nebraska*. The district court here thus properly entered a nationwide preliminary injunction. A district court in Missouri also entered a preliminary injunction about another aspect of the Department's unlawful giveaway. The Department did not attempt to seek a stay from the Eighth Circuit, but it did in the Tenth Circuit and prevailed in an unreasoned 2-1 order. This Court should vacate that unreasoned stay.

In *Nebraska*, this Court protected the rule of law and separation of powers by holding that Congress alone—*not* the President or an agency under the President's control—can decide whether to cancel student debt. As this Court explained just days

ago, when this Court speaks, federal agencies should listen. *See, e.g.*, *Loper Bright Enters. v. Raimondo*, No. 22-1219, 2024 WL 3208360, at *9 (U.S. June 28, 2024). Unfortunately, these Defendants did the opposite with respect to the Court's clear holding in *Nebraska*.

Due to the Administration's intransigence, the Court must unfortunately step in again. On July 10, 2023, the Department of Education announced a rule with a deceptively banal title: "Improving Income Driven Repayment for the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan (FFEL) Program." 88 Fed. Reg. 43,820 (hereinafter the Final Rule or the SAVE Plan). The effect, however, is anything but banal. The rule has three major provisions that are at issue in this case: it (1) caps the repayment of undergraduate loans at 5% of a borrower's discretionary income, (2) redefines what is considered discretionary under the statute at income above 225% of the poverty line, and (3) provides a cancellation period as low as 10 years for individuals with original loan balances below a certain amount. *Id.* Combined, these provisions add up to an unlawful debt cancellation program that went into effect on July 1, 2024, and will cost the public hundreds of billions of dollars with cancellation beginning on August 1. App.026a (Mem. Order, Dkt. 76 at 21).

Just as it did in *Nebraska*, this Court should use its authority pursuant to this Court's Rule 23 and the All Writs Act, 28 U.S.C. §1651, to vacate the stay issued on June 30, 2024, by the Tenth Circuit of a preliminary injunction issued by the district court on June 24, 2024. The States have moved to expedite the appeal in the Tenth

Circuit but, given that the Department's unlawful actions have already gone into effect, the States now seek emergency relief from this Court.

STATEMENT

I. THE HIGHER EDUCATION ACT

In 1965, Congress enacted the Higher Education Act (HEA) that, among other things, created a student loan program backed by the federal government. *See* Higher Education Act of 1965, Pub. L. No. 89-329 §§421–35, 79 Stat. 1219, 1236–49 (1965). Congress amended the HEA in 1993 to authorize direct loans to students from the federal government. Congress also gave the Department of Education authority to create an "income-contingent repayment" (ICR) plan that bases repayment terms on the income of the borrower. Relevant here, Congress provided that the Department may create "an income contingent repayment plan, with varying annual repayment amounts based on the income of the borrower, paid over an extended period of time prescribed by the Secretary, not to exceed 25 years . . . ." 20 U.S.C. § 1087e(d)(1)(D). Two years later, the Department implemented this amendment and designed the first income-contingent repayment plan, which limited annual repayment to 20% of a borrower's income that exceeds the federal poverty line. *See* 59 Fed. Reg. 66,132 (Dec. 22, 1994).

In 2007, Congress amended the HEA again, this time creating "income-based repayment" (IBR) plans for borrowers with "partial financial hardship." College Cost Reduction and Access Act, Pub. L. No. 110-84, §203, 121 Stat. 784, 792–95 (2007) (codified as amended at 20 U.S.C. § 1098e). Congress defined "partial financial hardship" relief as applying to borrowers whose annual total payment "based on a 10-year

repayment period; exceeds . . . 15 percent of . . . the amount by which—the borrower's, and the borrower's spouse's (if applicable), adjusted gross income; exceeds . . . 150 percent of the [applicable] poverty line." *Id.* § 1098e(a)(3). Congress explicitly authorized the Department to "repay or cancel any outstanding balance of principal and interest due" under certain conditions and after "a period of time prescribed by the Secretary, not to exceed 25 years." *Id.* § 1098e(b)(7). "[T]o encourage individuals to enter and continue in full-time public service employment," 34 C.F.R. § 685.219(a), Congress also established the Public Service Loan Forgiveness program, which allows those who enter public service to have their loans canceled after ten years instead of twenty-five, 20 U.S.C. § 1087(e)(1)(B).

In 2010, Congress changed the cap on payments for income-based plans to 10% of income exceeding 150% of the poverty line for loans made after 2014 and decreased the maximum repayment period to twenty years. *See* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 2213, 124 Stat. 1029, 1081 (2010) (codified at 20 U.S.C. § 1098e(e)). After that, the Department (through the rulemaking process) established first the PAYE Program, and then the REPAYE program, extending the 2010 amendments to all borrowers regardless of when they took out the loans. 77 Fed. Reg. 66,088 (Jul. 1, 2013); 80 Fed. Reg. 67,204, 67,236–42 (Oct. 30, 2015).

Congress authorized the Department to reduce or cancel loans in only four narrow circumstances: (1) when the borrower has "died or been permanently and totally disabled, such that they cannot engage in any substantial gainful activity"; (2) when

the borrower has become bankrupt; (3) when the borrower was falsely certified by their schools, when the borrower's schools close down, or when the schools failed to pay loan proceeds they owed to lenders, and (4) when the borrower met the carefully specified requirements to qualify for public-service loan forgiveness. *Nebraska*, 600 U.S. at 484-85 (quotes omitted) (citing 20 U.S.C. § 1087).

II. THE BIDEN ADMINISTRATION'S THREE-PRONGED APPROACH TO UNLAWFUL DEBT CANCELLATION

Unsatisfied with the provisions for the repayment of loans that Congress made available, the Administration has repeatedly attempted to unilaterally erase hundreds of billions of dollars of student debt. Each attempt relies on a different statutory pretext. The third has not yet become final; this lawsuit challenges the second.

A. The HEROES Act Plan

First, in 2022, the Administration invoked the HEROES Act, a statute Congress passed in the wake of 9/11 that allowed Defendants to "modify" student loans in the event of a national emergency. *Nebraska*, 600 U.S. at 506 (quoting 20 U.S.C. § 1098bb(a)(1)). In particular, Defendants relied on the COVID-19 pandemic even though benefits were not tied to anything related to COVID.[2]

Six States challenged the Administration's first method of debt cancellation in *Nebraska*. Granting certiorari before judgment, this Court held that the Biden Administration exceeded any authority provided by Congress under the HEROES Act. *Nebraska*, 600 U.S. at 489, 494-98. Applying the major questions doctrine, the Court

[2] Press Release, *The White House, Fact Sheet: President Biden Announces Student Loan Relief for Borrowers Who Need It Most* (Aug. 24, 2022), https://tinyurl.com/mtscpw2k.

held that the Administration could not cancel $430 billion in student debt without clear authorization from Congress. *See, e.g.*, *id.* at 506. Because Congress has never provided clear authority for such a revolutionary program in the HEROES Act, the Administration could not "modify" loans by canceling them. *Id.* In short, because only Congress can decide how to spend the People's money, the Court firmly rejected the Administration's HEROES Act plan as unlawful.

B. The SAVE Plan

While the HEROES Act Plan litigation was ongoing, the Administration announced its second attempt at debt forgiveness: the SAVE Plan. *See* 88 Fed. Reg. 1,894 (Jan. 11, 2023). Under the SAVE Plan, the Department proposed to revise the REPAYE Plan in at least three significant ways. *First*, the SAVE Plan caps the repayment of undergraduate loans at 5% of a borrower's discretionary income. Final Rule at 43820, 4390-02. *Second*, it redefines what is considered "discretionary" for the purposes of the statute at 225% of the poverty line. *Id.* *Third*, the SAVE Plan cancels loans for everyone with a principal at or below $12,000 after ten years of payments. *Id.* at 4903. And for balances above $12,000, it adds a year to the period for each $1,000. For example, a principal of $13,000 could be canceled after eleven years. *Id*.

When it announced the proposed rule, the Department *admitted* that the SAVE Plan would cost $137.9 billion over ten years. *Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program*, 88 Fed. Reg. 1894, 1895 (Jan. 11, 2023) (Proposed Rule). That price tag, already staggering, would have been even higher but for an accounting move: For purposes of this rule, the

Department assumed that many loans would already be partially or completely forgiven under the HEROES Act Plan. Final Rule at 43,889. Even though those loans would also fall within the SAVE Plan's plain terms, this accounting decision allowed the Department to exclude from its regulatory analysis the $430 billion in debt that was set to be covered by the Administration's HEROES Act Plan. *Id*. at 43,886.

Although admitting that the SAVE Plan would cost taxpayers nearly $140 billion, the Department provided only thirty days for comments. *See* Proposed Rule at 1,930. As far as the States are aware, the Department has never before provided such a short comment period for a rule of such political and economic significance. Yet despite complaints from commenters about this unlawfully truncated process, the Department refused to add more time for public comment. *Id.* at 43,881.

During the comment period, commenters urged the Department to conduct an alternate cost estimate to account for the possibility that courts may vacate the Administration's HEROES Act Plan. *Id.* at 43,875. Indeed, *Nebraska* was already pending in this Court. The Department, however, brushed aside such concerns, stating that it was "confident in its authority to pursue debt relief" and that it was "awaiting the Supreme Court's ruling on the issue." *Id.* at 43,875. The Department thus refused to even attempt to update its cost estimates. *Id.* Even more astonishing, the Department published its refusal in the Federal Register ten days *after* this Court's decision in *Nebraska*. *Compare Nebraska*, 600 U.S. 477 (published on June 30, 2023), *with* Final Rule at 43,820, 44,875 (issued on July 10, 2023).

Despite this Court's decision in *Nebraska*, the Final Rule thus estimates the total cost to be $156 billion, *id.* at 43820, even though no one disputes that millions of borrowers whose loans were covered by the HEROES Act plan are also covered by the SAVE Plan, *id.* at 43,889. The actual cost of the SAVE Plan thus is $475 billion. App.026a (Mem. Order, Dkt. 76 at 21).

C. Future Debt Forgiveness Actions

As if giving away nearly half-a-trillion dollars in unauthorized debt forgiveness was not enough, the Department recently invoked its authority to "enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption," 20 U.S.C. §1082(a)(6), to engage in further unilateral debt forgiveness. As just one example, the Department would "waive" up to $20,000 or the amount by which the current balance of a borrower's loan exceeds the balance owed upon entering repayment. Although these additional measures have not yet become final—and thus are not directly the subject of this lawsuit—they further demonstrate the Department's intent to flout the limitations placed by Congress, the Constitution, and this Court on its power, all apparently to curry favor with young voters through generous, unfunded giveaways.

III. LOWER COURT PROCEEDINGS

On March 28, 2024, a group of 11 States challenged the Final Rule in the District of Kansas,[3] and moved for a preliminary injunction. The Department filed a combined motion to dismiss and a response to the States' motion for a preliminary

[3] The complaint was amended on May 16, 2024.

injunction. The Department argued that all the Plaintiff States lacked standing and that the Final Rule is substantively and procedurally lawful.

On June 7, the district court issued a memorandum and order granting in part and denying in part the Department's motion to dismiss. App.048a (Mem. Order, Dkt. 68). Relevant here, the district court determined that Alaska, South Carolina, and Texas have standing because they each have state instrumentalities that service covered federal loans and will incur economic injury due to the Final Rule. App.056a-72a (Mem. Order, Dkt. 68 at 9-25). Specifically, the district court found that the benefits of the Final Rule are not available to borrowers who have certain federal loans and that the Department allowed (and actively advertised and encouraged) those borrowers to consolidate their loans with the federal government. App.061a-70a (Mem. Order, Dkt. 68 at 14-23). Because of the Save Plan, this resulted in a decline of interest income—a pocketbook injury—for these state instrumentalities.[4] App.071a-72a (Mem. Order, Dkt. 68 at 24-25).

On June 24, the district court issued a memorandum and order granting a preliminary injunction. App.006a (Mem. Order, Dkt. 76). It concluded that the Final Rule triggered the major questions doctrine because Congress never clearly authorized the Department of Education to spend $475 billion on loan forgiveness. App.026a (Mem. Order, Dkt. 76 at 21). The district court also found that Alaska, South Carolina, and Texas will suffer irreparable harm due to lost interest income. App.071a-

[4] The district court dismissed the other eight States which based their standing on lost tax revenue. App.048a (Mem. Order, Dkt. 68). As noted earlier, the dismissed States disagree with the court's reasoning and plan to appeal that dismissal.

72a (Mem. Order, Dkt. 68 at 24-25); App.026a (Mem. Order, Dkt. 76 at 21). The district court further concluded that it was unnecessary to balance the equities anew due to existing precedent. App.036a (Mem. Order, Dkt. 76 at 31). After all, it "is the responsibility of those chosen by the people through democratic processes"—not the courts—to weigh the potential tradeoffs to the public, and here "Congress—a branch of government elected by the people—didn't delegate to the Secretary clear power to enact the SAVE Plan." App.036a (Mem. Order, Dkt. 76 at 31 (cleaned up)).[5]

Also on June 24, the Eastern District of Missouri issued a preliminary injunction with respect to a different portion of the SAVE Plan that concerns early loan forgiveness. *See Missouri v. Biden*, No. 4:24-cv-00520, 2024 WL 3104514, at *1 (E.D. Mo. June 24, 2024). The federal government has not moved to stay that injunction, presumably because it does not implicate anywhere near the amount of taxpayer money that the Department hopes to give away via the provisions of the Final Rule at issue in this litigation.

On June 27, the Department in this case moved the district court to stay the injunction. In that motion, it alleged for the first time that the district court's injunction would impose administrative costs on Defendants. The district court denied that motion, explaining that the Department has "known for some time about the Supreme Court's ruling in *Biden v. Nebraska* and, likewise, [has] known that it fueled

[5] The district court disagreed that the States sufficiently established irreparable harm for the provisions of the Final Rule that took effect before July 1, 2024. That issue is the subject of a cross-appeal in the Tenth Circuit.

a fulsome challenge to the SAVE Plan," but they "nonetheless elected to adhere to the July 1 implementation date despite these risks." App.003a-04a (Order, Dkt. 84).

On June 28, the Department sought a stay pending appeal from the Tenth Circuit. The circuit court ordered the States to respond the next day. On Sunday, June 30, the Tenth Circuit granted the Department's motion in an unreasoned order over the dissent of Judge Tymkovich. App.001a-02a (Order, No. 24-3089). Earlier today, the States moved for an expedited appeal in the Tenth Circuit. But to avoid irreparable harm, the States ask the Court to vacate the stay entered by the Tenth Circuit. The States also ask the Court to grant certiorari in advance of judgment—as it did in *Nebraska*—to minimize the significant and ongoing harm caused by Department's unlawful actions.

LEGAL STANDARD

"The well-established principles" that guide the court's determination of whether "to stay a judgment entered below are equally applicable when considering an application to vacate a stay." *Certain Named & Unnamed Non-Citizen Children & Their Parents v. Texas*, 448 U.S. 1327, 1330 (1980) (Powell, J., in chambers). The four factors are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (citation omitted).

ARGUMENT

I. THE STATES ARE LIKELY TO SUCCEED ON THE MERITS

The Court will rarely see a more clear-cut case where the Court is likely to grant certiorari and rule in favor of the States. After all, in *Nebraska*, the Court already concluded that the Biden Administration's unilateral effort to spend hundreds of billions of dollars of taxpayer money on loan forgiveness is sufficiently important to justify certiorari before judgment. *Nebraska*, 600 U.S. at 489. And the Court ultimately agreed with the States that they have standing and that the Administration's original loan forgiveness program presented a major question that had to be resolved by Congress. *Id.* at 494-98. As Congress has done nothing in the intervening 12 months to authorize the Administration to write off nearly half a trillion dollars of loans, if the Tenth Circuit were to vacate the district court's preliminary injunction, it will "ha[ve] decided an important federal question in a way that conflicts with [a] relevant decision[] of this Court." Sup. Ct. R. 10(c). And that is to say nothing of the Final Rule's two independent procedural violations.

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

As the district court explained, Alaska, South Carolina, and Texas have standing to challenge the Final Rule for multiple reasons.

First, the last time this issue was before the Court, the Court held that a State has standing where the Department's loan-forgiveness plan harms a state loan entity "in the performance of its public function and so directly harms the State that created and controls" that entity. *Nebraska*, 600 U.S. at 494. The same is true here: In the district court, the Alaska Student Loan Corporation (ASLC), South Carolina State

Education Assistance Authority (SEAA), and Texas Higher Education Coordinating Board (THECB), each provided declarations about how they will suffer economic injury because of the Final Rule. App.061a-70a (Mem. Order, Dkt. 68 at 14-23). As explained, the Court has already held that such injury suffices for standing. *See Nebraska*, 600 U.S. at 494. The district court considered the evidence and found that the States here will also be injured in the same way, thus confirming that standing exists. App.072a (Mem. Order, Dkt. 68 at 25).

In the district court, these state entities provided declarations spelling out their harms in detail. App.098a-99a (Dkt. 50-6 (Spate Decl.)); App.094a (Dkt. 50-7 (Keyton Decl.)), App.095a-97a (Dkt. 50-8 at 2 (Efird Decl. ¶6)). As those declarations document, each entity has a portfolio of Federal Family Education Loan Program (FFELP) loans. App.058a (Mem. Order, Dkt. 68 at 11). The Final Rule entices borrowers with FFELP loans to consolidate with the federal government by providing generous terms such as $0 payments and debt cancellation. App.060a (Mem. Order, Dkt. 68 at 13); App.095a (Doc. 50-8 at 2 (Efird Decl. ¶6)). If consolidation occurs, the state entities will lose interest income. App.059a (Mem. Order, Dkt. 68 at 12). In ASLC's case, the estimated loss was $100,000 over the next two years. App.068a. (Mem. Order, Dkt. 68 at 21). Based on this evidence, the district court properly concluded that the States "have shouldered their current burden to allege a non-speculative, imminent, future injury to public instrumentalities, traceable to the SAVE plan." App.070a (Mem. Op. Dkt. 68 at 23).

Although the Tenth Circuit did not comment on the district court's analysis, under this Court's precedent, that is plainly enough to establish standing. This was, after all, the reason that Missouri was held to have standing in *Nebraska*, 600 U.S. at 494. Indeed, if anything, standing is *easier* here. One key question in *Nebraska* was whether an injury to MOHELA—the loan entity at issue—had a sufficiently direct impact on Missouri to establish standing to sue by the *State* (which was the only party). *Id.* at 493. Here, there is no dispute that ASLC, SEAA, and THECB are state instrumentalities and that harms to them are also direct harms to Alaska, South Carolina, and Texas. If the Tenth Circuit were to find otherwise, it would create a direct conflict with binding precedent from this Court that would entitle the States to review on certiorari. Sup. Ct. R. 10(c).

Disregarding the States pocketbook injury here would flout more than just this Court's decision in *Nebraska*. This Court has repeatedly held that the amount of the pocketbook injury is irrelevant to the Article III inquiry. *Uzuegbunam v. Preczewski*, 141 S.Ct. 792, 796 (2021) (finding standing based only on nominal damages). For example, the Court held that New York could establish standing based on its claim that a likelihood of aliens refusing to respond to census takers might result in diminished federal funding from Congress. *See Dep't. of Com. v. New York*, 588 U.S. 752, 768 (2019). Here, as in *Nebraska*, the costs to the States are significantly larger, and the nexus significantly tighter.

Second, although the district court did not find standing on this basis, the States are asserting injuries predicated on procedural claims, *see Lujan v. Defs. of*

Wildlife, 504 U.S. 555, 572 n.7 (1992) (plurality op.), and are entitled to "special solicitude." *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). The Tenth Circuit also said nothing about these bases for standing, which are firmly established in this Court's cases.

Third, the States will suffer a sovereign injury by being required to change their laws. *See 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."). For example, the Final Rule's early loan forgiveness provisions are not taxable under the Internal Revenue Code because in 2021 Congress excluded from the definition of taxable income any forgiveness of student debt between December 31, 2020, and January 1, 2026. *See* 26 U.S.C. § 108(f)(5). Under the Final Rule loans, especially those with balances of $12,000 or less, will be forgiven much earlier than previously possible—which means that much of that forgiveness will fall in the federal and state tax forgiveness holiday. For example, a $12,000 loan on which the borrower has made ten years or more of payments can be forgiven today, while previously it would not have been eligible for forgiveness until 2026 to 2039, depending on the number of years that have been paid.

Such a rule disregards state laws that are designed to simplify filing for the states' citizens. It is undisputed that South Carolina, for example, conforms its definitions of "adjusted gross income," "taxable income," and other definitions related to income to the Internal Revenue Code. *See* S.C. Code Ann. §12-6-1110. The

Department has publicly posted about forgiving at least $20.6 million of loans among 2,520 borrowers in South Carolina already.[6] At least some of that income would have been taxable after January 1, 2026. And the only way to prevent that harm would be for a State to change its laws, thus forcing it to incur both a sovereign injury and administrative costs. Either way, there is harm to South Carolina by "imposing substantial pressure on them to change their laws." *Texas v. United States*, 809 F.3d 134, 153 (5th Cir. 2015) (affirmed by an equally divided court in *United States v. Texas*, 579 U.S. 547 (2016)). The Tenth Circuit would thus err if it were to hold for the Department on this point.

B. The Final Rule Flunks the Major Questions Doctrine.

Because the Final Rule is also a clear example of using "pen-and-phone regulations as substitutes for laws passed by the people's representatives," *West Virginia v. EPA*, 597 U.S. 697, 753 (2022) (Gorsuch, J., concurring), the Tenth Circuit would also plainly err as a matter of law should it uphold the SAVE Plan.

1. The Major Questions Doctrine is Implicated.

In certain cases, "'there may be reason to hesitate' before accepting" that Congress authorized an agency to do something extraordinary. *West Virginia*, 597 U.S. at 724 (citation omitted). In those cases, a federal agency must "point to clear congressional authorization for the power it claims." *Id.* at 723 (quoting *Utility Air Regul. Grp. v. EPA*, 597 U.S. 302, 324 (2022). Although the Court has not fully

[6] See Department of Education, *Biden-Harris Administration Releases State-by-State Breakdown of $1.2 Billion in SAVE Plan Forgiveness* (Feb. 23, 2024) available at https://tinyurl.com/43jw3wnb

explored the outer bounds of this doctrine, the hallmark of a major question is that the issue is one of substantial "economic and political significance." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); *see also MCI Telecomms Corp. v. AT&T*, 512 U.S. 218 (1994). The Court will also consider whether the challenged rule "significantly alter[s] the balance between federal and state power." *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 594 U.S. 758, 764 (2021) (per curiam); *see also Gonzales v. Oregon*, 546 U.S. 243, 270 (2006).

Here, these factors overwhelmingly cut against the SAVE Plan. Again, the Court already decided this issue in *Nebraska* when it held that "'the basic and consequential tradeoffs' inherent in a mass cancellation program 'are ones that Congress would likely have intended for itself.'" 600 U.S. at 506 (citing *West Virginia*, 597 U.S. at 730). That principle applies *a fortiori* here. After all, *Nebraska* involved $430 billion in mass student debt cancellation. *Id.* at 501. By contrast, the district court found that the SAVE Plan will cost taxpayers $475 billion. And even if the Department's estimate of $156 billion were accurate, the major questions doctrine still easily applies. *See, e.g.*, *Ala. Ass'n of Realtors*, 594 U.S. at 764 (regulatory decision would cost $50 billion).

Similarly, the only relevant change to the political history of the student-loan debate is that Congress chose *not* to respond to *Nebraska*'s unequivocal conclusion that the Department of Education cannot unilaterally cancel debt in the manner contemplated here. The judiciary cannot brush aside Congress's choice not to enact legislation, especially following such a prominent decision of this Court. *See, e.g.*, *Brown*

& Williamson, 529 U.S. at 144. Congress is aware of "unusually important precedents," *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979)—which by any measure includes *Nebraska*, one of the Court's most significant decisions.

Before the Tenth Circuit, the Department argued that the major questions doctrine does not apply. But it is not even a close call to say that a regulatory giveaway costing between $156 and $475 billion should give this Court a "'reason to hesitate before concluding that Congress' meant to confer such authority." *West Virginia*, 597 U.S. at 721 (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159). The district court therefore "easily" concluded that the SAVE Plan was a decision of "vast economic and political significance" which triggered the major questions doctrine. App.018a (Mem. Op., Dkt. 76 at 13). "In such circumstances," the Court has "required the Secretary to point to clear congressional authorization to justify the challenged program." *Nebraska*, 600 U.S. at 506 (quotes omitted).

2. Congress Has Not Clearly Authorized the Final Rule.

Congress, moreover, has not authorized the Final Rule. Because Congress "does not . . . hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), a "colorable" or "plausible" textual basis is not sufficient, *West Virginia*, 597 U.S. at 722, 723.

The district court relied on two factors in determining that the Department lacked clear authorization. As with *Nebraska*, the first is that the Final Rule claims to locate expansive authority in modest words. App.024a-25a (Mem. Op., Dkt. 76 at 19-20). Indeed, this case is again even easier than *Nebraska*. On its face, 20 U.S.C.

§ 1087e(d)(1)(D) requires a "repayment plan" with "varying annual repayment amounts." By its plain terms, a "[r]epayment plan" means that a 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"). The preceding language further requires that the plan must provide for "repayment of such loan, *including principal and interest* on the loan." 20 U.S.C. § 1087e(d)(1) (emphasis added). Yet here, 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. *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. Thus, far from authorizing the Department to repurpose a statute that on its face requires "repayment" into one where most borrowers pay nothing whatever, Congress has specifically stated when certain benefits are available under specific provisions.

The district court also highlighted the enormous and transformative expansion of authority here. App.025a-29a (Mem. Order, Dkt. 76 at 20-24). As noted above, the district court found that the SAVE Plan will cost $475 billion. App.026a, 028a (Mem. Order, Dkt. 76 at 21, 23). This price tag alone is telling because the last time the Department used this statutory authority in the REPAYE plan, the cost was only $15 billion. App.026a (Mem. Op., Dkt. 76 at 21). The Department has also changed the

payment thresholds for loan relief. 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%. Final Rule at 43,902. Congress further set a floor of 20 years for possible debt cancellation, 20 U.S.C. §1098e(e)(2), but the Final Rule reduces that floor to 10 years for certain borrowers, Final Rule at 43,903.

As the district court noted, such redrafting of the material financial terms of the loans Congress authorized is unprecedented. App.029a (Mem. Order, Dkt. 76 at 24). Suffice it to say, "[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) (quoting *Brown & Williamson*, 529 U.S. at 159).

In opposing such a conclusion below, the Department suggested that it had the authority to unilaterally cancel nearly half a trillion dollars' worth of student debt because Congress only required an upper limit of 25 years before further repayment could be forgiven. Such a reading is implausible because nothing would prevent the Department from creating a loan repayment program with payments capped at 0.1% of discretionary income, defined as 500% of the federal poverty line. Under that rule, essentially no one would ever have to pay back student loans. Regardless, the

Department's argument ignores the fundamental teaching of the major question doctrine that a merely "plausible textual" explanation is insufficient to save a regulation whose political and economic importance gives "reason to hesitate before accepting a reading of a statute that would, under more ordinary circumstances, be upheld." *West Virginia*, 142 S.Ct. at 2609 (cleaned up).

The Department is also wrong to claim that the SAVE Plan "incrementally" changed aspects of prior agency practice—even though it costs 30 times as much. *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). This is akin to saying that driving a bulldozer through a house only "incrementally" changes the building. "Because context is relevant to interpreting the scope of a delegation," that Congress allowed these earlier practices does *not* mean that it has given the agency the authority to turn a loan into a grant. *Nebraska*, 600 U.S. at 513 (Barrett, J., concurring) (discussing why an instruction to "make sure the kids have fun" doesn't include "tak[ing] the kids on a road trip to an amusement park"). Because the Final Rule purports to do just that—and on a scale even larger than that what the Court already rejected as unlawful—the SAVE Plan lacks clear congressional authorization.

C. The Final Rule Also Flunks Other Canons of Interpretation.

The major questions doctrine is not the only canon of statutory interpretation the Final Rule flunks. *First*, the interpretative canon of *expressio unius exclusio alterius* prohibits the Department from discharging student debt in circumstances

other than those expressly listed in the statute. It should be noted that Congress specifically listed (1) the situations where debt cancellation is authorized and (2) the parameters of lower monthly payments on income contingent repayment plans. *See generally* 20 U.S.C. §§1087 & 1098e. That language prohibits the Department from inventing additional avenues to cancel debt and provide for lower payment amounts. The Final Rule changes the 10% of discretionary income threshold to 5%. It changes the 20-year floor to 10 years. And it changes 150% of the poverty line to 225%. Congress expressly selected those numbers and codified them in the statute. It did so for a reason. The Final Rule is in clear conflict with congressionally determined thresholds.

Second, the Final Rule conflicts with the statute by adding to the circumstances under which debt could be canceled. The HEA lists only four circumstances identified by this Court in *Nebraska*: "a borrower's death, disability, or bankruptcy; a school's false certification of a borrower or failure to refund loan proceeds as required by law; and a borrower's inability to complete an educational program due to closure of the school." 143 S.Ct. at 2369. "Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones v. United States*, 526 U.S. 227, 234 (1999). Yet under the SAVE Plan, the average undergraduate borrower will only pay back $6,121 for every $10,000 borrowed. Final Rule at 43,880. In the past, however, even the most generous income-based repayment plan had the average borrower paying back (given interest) $11,844 for every $10,000

borrowed. *Id.* The net effect is that the terms of loan repayment effectively morph into a $3,879 grant for every $10,000 borrowed.

Third, the Department's interpretation of its authority under the HEA invites doubts as to the statute's constitutionality. The canon of constitutional avoidance requires courts to avoid interpretations of ambiguous statutes that raise doubt as to the statute's constitutionality. *See, e.g.*, *United States v. Palomar-Santiago*, 593 U.S. 321, 329 (2021). The Department's interpretation of the HEA should be avoided. The Constitution prohibits federal government expenditures that are not authorized by Congress, *see* U.S. Const., art. I, § 9, and does not allow federal agencies to make fundamental policy choices without real direction from Congress, *see, e.g.*, *Gundy v. United States*, 139 S.Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting). But under the Department's analysis here, it could erase hundreds of billions of dollars or more of student debt unilaterally. Nor is there precedent for such a theory, which is often "the most telling indication of [a] severe constitutional problem." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)). The judiciary should construe the HEA to avoid, rather than invite, constitutional challenges.

D. The Final Rule Is Procedurally Unlawful.

Apart from the flaws the Court already identified in *Nebraska*, the States are 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

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.

1. The Department Failed to Reasonably Consider Costs.

A rule is arbitrary and capricious if the "rule [is] not reasonably explained, the agency fail[s] to supply a satisfactory explanation for its action[,]" or the agency "ignored an important aspect of the problem before it." *Ohio v. EPA*, No. 23A349, 2024 WL 3187768, at *8 (U.S. June 27, 2024) (quoting *Motor Vehicle Mfrs. Ass'n. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Here, the Final Rule violates this principle in numerous ways, but the most glaring is that the Department deliberately understated the costs. The Department said in the Final Rule that the SAVE Plan will cost $156 billion—itself an astonishing figure. But even that astonishing figure is not accurate because it is based on the HEROES Act Plan that this Court rejected as unlawful in *Nebraska*. In other words, the Final Rule contains what amounts to a $319 billion accounting trick. And make no mistake: this trick is deliberate. The Department published the Final Rule ten days *after* the Court decided *Nebraska*. Yet rather than acknowledging that the Final Rule's $156 billion price tag is off by hundreds of billions of dollars, the Department refused to update its cost estimates. Final Rule at 43,820, 44,875.

The Defendants defended their inaccurate premise on the basis that they had already sent the Final Rule to the General Printing Office before *Nebraska* was decided. That contention is flatly refuted by Defendant Cardona himself, who

forthrightly announced that he approved the Final Rule *after* the Supreme Court's decision: declaring on June 30 that the Department "*today* … finalized our new [Rule]."[7] The Final Rule was thus finalized with *full knowledge* that its premise was indefensible. Moreover, the Department had ample authority to amend the rule pre-publication 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) ("[A]gencies are free to withdraw a proposed rule before it has been published in the Federal Register, even if the rule has received final agency approval."). And in all events, the Department's cost estimates to include HEROES Act forgiveness was off even pre-*Nebraska*: the Eighth Circuit had entered a nationwide injunction against the HEROES Act relief, which this Court declined to stay. *See Nebraska v. Biden*, 52 F.4th 1044, 1048 (8th Cir. 2022) (granting nationwide injunction pending appeal); *Biden v. Nebraska*, 143 S.Ct. 477 (2022) (granting certiorari but declining to stay injunction).

The Department has never tried to defend the $156 billion price tag in court. Instead, the Department claims that it does not need to consider costs at all under the HEA. Because this is a *post hoc* rationalization, it "cannot serve as a sufficient predicate for agency action." *DHS v. Regents of the Univ. of Calif.*, 591 U.S. 1, 23 (2020) (citation omitted); *see also SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). Moreover, costs are an "'important aspect of the problem'" for agencies to consider. *Michigan v. EPA*, 576 U.S. 743, 752 (2015) (citation omitted). Indeed, "[a]gencies have long

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[7] *See* Department of Education, *Secretary Cardona Statement on Supreme Court Ruling on Biden Administration's One Time Student Debt Relief Plan* (June 30, 2023) (emphasis added) available at https://tinyurl.com/2jeyaapa.

treated cost as a centrally relevant factor when deciding whether to regulate." *Id.* at 752-53. Courts thus will not "tolerate rules based on arbitrary and capricious cost-benefit analyses." *City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007).

That the SAVE Plan is arbitrary and capricious is even more apparent after this Court's decision last week in *Ohio*. In *Ohio*, this Court faulted EPA for not offering a "reasoned response" to legitimate concerns raised by commentators. *Id.* The same flaw exists here. The Department was specifically warned that its cost estimates would be wrong if the Court ruled against the Department in *Nebraska*. Final Rule at 43,876. Yet rather than offer a "reasoned response," the Department here did even less than EPA in *Ohio*. There, EPA at least added a "severability" provision to the Rule to account for the comments. *Id.* Here, by contrast, the Department simply brushed off the commenters' concerns and pressed forward with what it was going to do anyway. Final Rule at 43,876.

Below, the Department argued that this error was harmless because it would have adopted the SAVE Plan no matter the cost. But not considering the cost is the antithesis of the "reasoned decision-making" that the APA demands. *Michigan*, 576 U.S. at 750 (citation omitted). True, the Department wanted to hurry. But an "agency's desire to apply its rule expeditiously" does not address a "concern so much as sidestep it." *Ohio*, 2024 WL 3187768 at 8. The Department can hardly claim that the Final Rule cancels the "right" amount of student debt after pointedly refusing to even consider the costs of its decision.

2. The 30-day Comment Period Violated the APA.

The States are also likely to prevail on their claim that the Department's 30-

day notice period violated the APA. This is almost certainly the most significant rule in the Department's history. The only rule even close is the HEROES Act Plan the Court rejected in *Nebraska*, but this new plan costs almost $50 billion more. Yet the Department provided only a month for the public to comment on a plan to that will cost taxpayers nearly half a trillion dollars. It is hard to imagine a less serious approach to notice-and-comment rulemaking. *See, e.g.*, *Petry v. Block*, 737 F.2d 1193, 1201 (D.C. Cir. 1984) (urging at least 60 days for comment periods).

This truncated comment period is certainly inappropriate because the SAVE Plan cancels nearly half a trillion dollars of student debt, which is an amount of vast economic significance. In its briefing below, the Department did not identify a single rule with equivalent scope, complexity, or cost for which only a 30-day comment period was provided—let alone a rule of such magnitude that was upheld in court. This also highlights the rushed nature of the Final Rule. The Department sought to spend $475 billion of taxpayer money without potential litigants and the courts being able to stop them. Because such a rush to judgment is contrary to this Court's case law or basic principles of reasoned decision-making, this Court would reverse any contrary ruling by the Tenth Circuit upon certiorari review.

II. THE BALANCE OF IRREPARABLE HARM AND EQUITIES FAVORS THE STATES.

In addition to being likely to succeed on the merits, the balance of harms and equities tilts heavily in the States' favor. The Final Rule is already in effect and its costs will continue to increase. As the district court found, the Final Rule will directly harm state instrumentalities that hold and service FFELP loans. App.056a-72a

(Mem. Order, Dkt. 68 at 9-25). By itself, this is sufficient to warrant this Court's intervention.

The States will also suffer a loss in tax revenue. Take again the example of South Carolina discussed above. *Supra* pp. 15-16. Typically, loan forgiveness is considered taxable income. *See* 26 U.S.C. §§ 61(a)(11), 63(a). Some borrowers will receive income in the form of loan forgiveness, which would occur, but for the Final Rule, after either 20 or 25 years, depending on the repayment schedule. But under the American Rescue Plan of 2021, loan forgiveness is not currently taxed as income, and will not be taxed until 2026. 26 U.S.C. § 108(f)(5). Under state laws, taxable income in the States is defined to match the federal definition under the Internal Revenue Code, S.C. Code Ann. § 12-6-1110—so the States will either have to change their tax codes or forgo tax revenue. Given the sovereign interests of the States in enforcing their own laws, and the sovereign immunity of the federal government, either way, the States are irreparably harmed.

By contrast, the Department cannot show that staying the district court's injunction is in the public interest. By definition, the public has no interest in enforcement of an unlawful rule. *See, e.g.*, *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 102 (D.C. Cir. 2021) (citation omitted). Even if some borrowers have a financial interest in seeing their loan balances wiped clean, that does not shift the balance. "[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Alabama Ass'n of Realtors.*, 594 U.S. at 766. As this Court has said, "It is up to Congress, not the [Department], to decide whether the public interest merits further action

here." *Id.* Indeed, because the SAVE Plan is unlawful and will irreparably harm the States, equity cannot support the Department's position. Setting national policy "is the responsibility of those chosen by the people through democratic processes." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.,* 595 U.S. 109, 120 (2022).

Below, the Department argued that an injunction will impose administrative costs. But any time the federal government is enjoined, there will be administrative costs—that has never been a reason for courts not to enforce the law. Further, any administrative costs are of the Department's own doing. The Department has known since *Nebraska* that it cannot cancel hundreds of billions of dollars' worth of student loans without clear authorization from Congress. Nonetheless, the Department rushed forward with the Final Rule, basing it on the HEA, which contains no such express grant of authority. The district court found the Department widely exceeded its authority. The "added burdens" created by the Department's misplaced confidence and deliberate failure to prepare a contingency plan "should not weigh in the balance of equities here." *Blum v. Caldwell*, 446 U.S. 1311, 1316 n.* (1980).

III. THE COURT SHOULD ALSO GRANT CERTIORARI NOW

Because this is such an important, time sensitive case, the Court should also deem this application to be a petition for writ of certiorari, grant review, and either summarily affirm the district court and order it to vacate the Final Rule in light of the Court's decisions in *Nebraska* and *Ohio* or expedite briefing and argument so this case can be heard in this upcoming Term. The States support either path.

First, this case involves "a question of great significance," *Labrador v. Poe*, 144 S.Ct., 921, 925 (2024), in need of this Court's attention. The Final Rule will cost

taxpayers hundreds of billions of dollars. As the district court explained, the cost of the program ($475 billion) implicates the major questions doctrine, and the Defendants lack clear congressional authority to implement this program. App.026a (Mem. Order, Dkt. 76 at 21). In fact, there is "no doubt that $475 billion in forgiveness qualifies as 'enormous' and a 'transformative expansion.'" App.028a (Mem. Order, Dkt. 76 at 23).[8] The legality of a program that costs taxpayers $45 billion more than the program the Court considered and rejected in *Nebraska* is clearly "a question of great significance" for this Court's resolution. *Labrador*, 144 S.Ct. at 925.

Second, the Tenth Circuit "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). As discussed above, the Tenth Circuit's unreasoned stay ruling creates a conflict with this Court's holding in *Nebraska*. That fact by itself also merits this Court's review.

Third, time is of the essence. Not only do the States and the public at large need to know as soon as possible whether the SAVE Plan is lawful, but the Biden Administration is not done. On April 17, 2024, the Department announced yet another rule to spend hundreds of billions of dollars waiving student debt. 89 Fed. Reg. 27654. That Proposed Rule is expected to be final well before this litigation concludes absent intervention from this Court. Legal certainty from this Court is essential whenever hundreds of billions of dollars are at stake, but it is particularly critical

[8] To be clear, because the district court issued an injunction that excepted certain already forgiven loans and, further, because other provisions of the SAVE Plan are enjoined by the preliminary injunction issued by the district court in Missouri, the cost implicated by this injunction does not include to the *entire* $475 billion cost of the SAVE Plan. But it easily implicates hundreds of billions of dollars.

where, as here, commentators across the political spectrum have observed that federal government is flouting this Court's decision in *Nebraska*. The Court should thus grant review and summarily reject the SAVE Plan or set the case for briefing and argument to ensure that federal law retains its integrity and to prevent the Department from unilaterally giving away hundreds of billions of dollars.

CONCLUSION

The Court should vacate the Tenth Circuit's stay issued on June 30, 2024. The Court should also treat this application as a petition for a writ of certiorari and either summarily affirm the district court and order it to vacate the Final Rule in light of *Nebraska* and *Ohio* or set the case for briefing and oral argument

[SIGNATURE PAGE FOLLOWS]

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