APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

June 30, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STATE OF ALASKA, et al.,

Plaintiffs - Appellees,

v.

UNITED STATES DEPARTMENT OF EDUCATION, et al.,

Defendants - Appellants.

No. 24-3089
(D.C. No. 6:24-CV-01057-DDC-ADM)
(D. Kan.)

ORDER

Before **TYMKOVICH**, **EBEL**, and **McHUGH**, Circuit Judges.

This matter is before the court on Appellants' emergency motion for a stay pending appeal. To decide the motion, the court considers four factors: (1) whether Appellants have made a strong showing that they will likely succeed on the merits; (2) whether they will suffer irreparable injury absent a stay; (3) whether a stay will substantially injure other interested parties; and (4) where the public interest lies. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). Appellants have the burden to show that the circumstances justify a stay. *See id.* at 433–34.

Having considered the parties' materials, the court grants Appellants' motion for a stay pending appeal. The district court's preliminary injunction is stayed pending this appeal. Appellees' motion to exceed the word limit is granted.

Judge Tymkovich would deny the emergency motion for a stay pending appeal.

Entered for the Court

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U.S. District Court

DISTRICT OF KANSAS

Notice of Electronic Filing

The following transaction was entered on 6/28/2024 at 2:28 PM CDT and filed on 6/28/2024
Case Name: Kansas, State of et al v. Biden et al
Case Number: 6:24-cv-01057-DDC-ADM
Filer:
Document Number: 84(No document attached)

Docket Text:
ORDER denying Defendant's [80] Motion to Stay Pending Appeal. The Court grants plaintiff's [82] MOTION for Extension of Time to File Response. Response deadline 6/28/2024 at 11:59 PM. Defendants have moved the court to stay its Preliminary Injunction under Fed. R. Civ. P. 62 while they appeal to the Tenth Circuit. Doc. [80]. Defendants assert that the court's earlier decisions got it wrong and so, defendants likely will succeed on appeal. The court disagrees. Defendants also assert that the court's Preliminary Injunction will cause significant and irreparable harm to defendants and related processes. Defendants also attached two declarations about this purported harm--but this is the first time the court has seen these declarations or heard about any of the difficulties that they predict. The court very much regrets any difficulty imposed by its decisions. But defendants have known for some time about the Supreme Court's ruling in Biden v. Nebraska and, likewise, have known that it fueled a fulsome challenge to the SAVE Plan. Defendants nonetheless elected to adhere to the July 1 implementation date despite these risks. In the court's view, the Preliminary Injunction balances the equities of the case appropriately. The court thus declines defendants' request for a stay. In the alternative, defendants ask the court to narrow its injunction. Defendants

assert that the court failed to tailor its injunction appropriately because it's a nationwide injunction that enjoins the entirety of the SAVE Plan. To be clear, the preliminary injunction doesn't touch any aspect of the SAVE Plan that already has taken effect. See Doc. [76] at 38-40 ("The court declines to enjoin the parts of the SAVE Plan defendants already have implemented."). The court apprehends defendants' reservations about a nationwide injunction. That's why the court's Memorandum and Order devoted so much ink to explaining its reasoning for that broad form injunction. None of defendants' latest arguments convince the court to narrow the injunction to apply only to the Alaska, South Carolina, and Texas public instrumentalities. Defendants also ask the court to narrow the injunction to certain aspects of the SAVE Plan. There's something to be said for this approach, the one used by the court in the Eastern District of Missouri case. See Preliminary Injunction, Missouri v. Biden, No. 24-520-JAR (E.D. Mo. June 24, 2024), ECF No. 36. But it surfaces in this Kansas case just now, for the first time. Asking the court to adopt it on the accelerated schedule defendants now fashion is both too little and too late. Defendants earlier asked the court to sever unlawful portions of the SAVE Plan from lawful ones, but they never provided any kind of roadmap for which portions should make the cut. They didn't, that is, until last night's late-night filing, when defendants peeled the SAVE Plan apart in a fashion never before furnished to the court. The court may modify its injunction in the future, but it's not going to do so now on some 15 hours' notice--and without giving plaintiffs a meaningful chance to respond to a request that defendants could have presented long ago. The court thus denies defendants' Motion for a Stay Pending Appeal Doc. [80]. Two final notes: First, defendants filed their motion late last night shortly before midnight, CDT, and asked for a ruling by 3:00 PM CDT today. That schedule, in effect, gives plaintiffs no meaningful time to respond. Still, plaintiffs have filed a motion asking for time to respond--until 11:59 PM today. Doc. [82]. The court grants plaintiffs' motion. While it's not ideal to rule defendants' motion without the benefit of plaintiffs' response, the court issues its ruling now to allow defendants to seek any appellate relief they wish to seek. And plaintiffs' response may inform future consideration of narrowing the injunction--whether by the Circuit or our court. Second, defendants ask, as a final alternative, for an administrative stay. The court already gave defendants such a stay, staying the effective date of its earlier rulings until ten o'clock p.m. on June 30. See Doc. 76 at 42 (staying effective date of court's injunction). This timeline remains in place and defendants haven't demonstrated why the court should extend the existing administrative stay. So, the court denies that form of relief as well. Signed by District Judge Daniel D. Crabtree on 6/28/24. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (ss)

6:24-cv-01057-DDC-ADM Notice has been electronically mailed to:

Kris W. Kobach kkobach@gmail.com, connie.deckard@ag.ks.gov, kris.kobach@ag.ks.gov

Drew C. Ensign densign@holtzmanvogel.com

Jeffrey Shaw jeff@kansasjusticeinstitute.org

Abhishek Kambli abhishek.kambli@ag.ks.gov, SpecialLitigationECF@ag.ks.gov, connie.deckard@ag.ks.gov

Erin Gaide erin.gaide@ag.ks.gov, SpecialLitigationECF@ag.ks.gov, connie.deckard@ag.ks.gov

Christian Brian Corrigan christian.corrigan@mt.gov, edoj@mt.gov

Stephen Michael Pezzi stephen.pezzi@usdoj.gov, fedprog.ecf@usdoj.gov

Lincoln J. Korell lincoln.korell@nebraska.gov

Joshua Nathaniel Turner josh.turner@ag.idaho.gov, isaac.considine@ag.idaho.gov

Charles K. Eldred charles.eldred@oag.texas.gov

Eric H. Wessan eric.wessan@ag.iowa.gov

Joseph D. Spate josephspate@scag.gov, esmith@scag.gov, rcook@scag.gov, thomashydrick@scag.gov

William E. Milks bill.milks@alaska.gov, cori.mills@alaska.gov, richard.carter@alaska.gov

Lance F. Sorenson lancesorenson@agutah.gov

Simon Gregory Jerome simon.g.jerome@usdoj.gov, fedprog.ecf@usdoj.gov

Edmund G. LaCour, Jr edmund.lacour@alabamaag.gov, rene.whyard@alabamaag.gov

Kelsey LeeAnn Smith smithkel@ag.louisiana.gov, nelsone@ag.louisiana.gov

Alexander M. Certo a.certo@buckeyeinstitute.org

David C. Tryon d.tryon@buckeyeinstitute.org

6:24-cv-01057-DDC-ADM Notice has been delivered by other means to:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STATE OF ALASKA, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF EDUCATION, et al.,

Defendants.

Case No. 24-1057-DDC-ADM

MEMORANDUM AND ORDER

Plaintiffs have moved the court for a preliminary injunction that would prevent defendants from implementing their student loan regulations, known as the SAVE Plan. Doc. 23. The SAVE Plan lowers monthly payments for eligible borrowers and reduces the maximum repayment period for eligible borrowers who took out loans with low original balances. To resolve plaintiffs' motion, the court must answer three questions.

First: does defendants' SAVE Plan present a "major question"—one of such economic and political significance that defendants must show that Congress clearly authorized the SAVE Plan? In *Biden v. Nebraska*, 143 S. Ct. 2355 (2023), the Supreme Court answered this question. This recent, binding Supreme Court decision holds "that the basic and consequential tradeoffs inherent in a mass debt cancellation program are ones that Congress would likely have intended for itself." *Id.* at 2375 (quotation cleaned up). So, this is an easy yes.

Second, given that the case presents a major question, have defendants shown that the Higher Education Act clearly authorizes their SAVE Plan? *Biden v. Nebraska* doesn't answer this question because that case addressed a different statute with a different regulatory history. While it's a close and difficult question, the court answers this second question no. Defendants have offered colorable, plausible interpretations of the Higher Education Act that could authorize the SAVE Plan, but those interpretations fall short of *clear* congressional authorization.

Last, the court must decide whether the preliminary injunction should apply nationwide. Scope aside, part of plaintiffs' requested injunction is unworkable, and so the court denies it. But, for the workable part of plaintiffs' injunction, the court reluctantly answers yes—it should apply nationwide. Nationwide injunctions are the subject of much controversy, and this court is less than enthusiastic about entering one.

With these three answers, the court grants in part and denies in part plaintiffs' Motion for Preliminary Injunction (Doc. 23). The court enjoins the SAVE Plan—in part—nationwide. It declines, however, to unwind the parts of the SAVE Plan already in effect because plaintiffs have failed to demonstrate those provisions caused irreparable harm. Plaintiffs brought this lawsuit long after defendants already had implemented those aspects of the SAVE Plan, so the court doesn't see how plaintiffs can complain of irreparable harm from them. Nor have plaintiffs explained how a preliminary injunction could unwind the parts of the SAVE Plan already in effect. But the court grants plaintiffs' request to enjoin those aspects of the SAVE Plan not yet implemented.

The court emphasizes one more thing about its decision. This Order does not decide whether student loan forgiveness is good policy or bad policy. The popularly elected branches of our government—the President and the Congress—properly control that decision. Thus, no one should read this Order to take a position on that question because our Constitution doesn't assign any part of it to the federal courts.

The court explains each one of its decisions, below, beginning with the relevant background.

I. Background

The court begins with a fly-over of student loan repayment legislation and the Secretary of Education's role in it.

Congress enacted the Higher Education Act (HEA) in 1965 to "strengthen the educational resources of our colleges and universities and to provide financial assistance for students in postsecondary and higher education." Pub. L. No. 89-329, 79 Stat. 1219 (1965). Twenty-eight years later, Congress passed the "Student Loan Reform Act," and allowed the Secretary of Education to issue federal student loans directly from the Department. Pub. L. No. 103-66, § 4011–21, 107 Stat. 312 (1993). The Student Loan Reform Act also created income-contingent repayment plans—the repayment plans at issue here. *Id.* at § 4021 (codified at 20 U.S.C. § 1087e(d)(1)(D)).

Here's the statutory provision establishing income-contingent repayment plans, which serves as this case's axis:

> Consistent with criteria established by the Secretary, the Secretary shall offer a borrower of a loan made under this part a variety of plans for repayment of such loan, including principal and interest on the loan. The borrower shall be entitled to accelerate, without penalty, repayment on the borrower's loans under this part. The borrower may choose . . . 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).

Before the action challenged here, the Secretary of Education—"the Secretary" in the remainder of this Order—has invoked this statutory authority three times:

1. In 1994, the Secretary created the first income-contingent repayment plan. William D. Ford Federal Direct Loan Program, 59 Fed. Reg. 61,664 (Dec. 1, 1994) (codified at 34 C.F.R. pt. 685).

2. In 2012, the Secretary created the PAYE Plan. Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 77 Fed. Reg. 66,088 (Nov. 1, 2012) (codified at 34 C.F.R. pts. 674, 682, 685).

3. In 2015, the Secretary created the REPAYE Plan. Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 80 Fed. Reg. 67,204 (Oct. 30, 2015) (codified at 34 C.F.R. pts. 668, 682, 685).

Each time, the Secretary imagined forgiving the remaining loan balance after a borrower had made payments for a specific period of time. *See* 59 Fed. Reg. at 61,666 ("Some borrowers in the [income-contingent repayment] plan may not earn sufficient income to fully repay their loans within the statutory 25-year time period. In this event, the Secretary will forgive any outstanding loan balance (principal plus interest) that is unpaid after 25 years."); 77 Fed. Reg. at 66,114 ("The revisions offer eligible borrowers lower payments and loan forgiveness after 20 years of qualifying payments."); 80 Fed. Reg. 67,209 ("We agree that borrowers are responsible for repaying their student loans, and we believe that most borrowers repaying their loans under the REPAYE plan will be successful in repaying their loans, in many cases before the end of the 20- or 25-year repayment period. However, we also believe the REPAYE plan will provide relief to struggling borrowers who experience financial difficulties that prevent them from repaying their loans. We note that the REPAYE plan requires 20 or 25 years of qualifying payments before a loan is forgiven.").

With this background about income-driven repayment plans, the court next explains relevant details about a different kind of repayment plan: income-*based* repayment plans.

Income-Based Repayment (IBR) Plans

In 2007, Congress amended the HEA and created income-based repayment plans for borrowers with "partial financial hardship." Pub. L. No. 110-84, 121 Stat. 784 (2007). The statute defines "partial financial hardship" to mean the borrower's annual total loan payment, based on a 10-year repayment period, exceeds 15% of the amount by which "the borrower's and the borrower's spouse's . . . adjusted gross income[] exceeds" 150% of the applicable poverty line. 20 U.S.C. § 1098e(a)(3). And the statute explicitly authorized the Secretary to "repay or cancel any outstanding balance of principal and interest due on all loans made" under certain conditions after "a period time prescribed the Secretary, not to exceed 25 years[.]" *Id.* § 1098e(b)(7).

In 2010, Congress amended the IBR statute. 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)). For borrowers taking out a loan on or after July 1, 2014, Congress lowered the cap on payments for IBR plans to 10%—down from 15%. 20 U.S.C. § 1098e(e)(1). And for those same borrowers, Congress reduced the maximum payment time window to 20 years—down from 25 years. *Id.* § 1098e(e)(2). The Secretary then applied these IBR updates to all student loans.

Five years later, in 2015, the Secretary created the REPAYE Plan by rulemaking and applied the 10% payment cap to all borrowers, regardless of when they took out loans. 80 Fed. Reg. 67,204. The REPAYE Plan also lowered the repayment window for borrowers with undergraduate debt from 25 years to 20 years. *Id.* at 67,205 ("For a borrower who only has loans received to pay for undergraduate study, provide that the remaining balance of the borrower's loans that have been repaid under the REPAYE plan is forgiven after 20 years of qualifying payments."). The REPAYE Plan set the repayment window for borrowers with graduate debt at 25 years. *Id.* ("For a borrower who has at least one loan received to pay for graduate study, provide that the remaining balance of the borrower's loans that have been repaid under the REPAYE plan is forgiven after 25 years of qualifying payments.").

The SAVE Plan

In 2023, the Secretary issued regulations creating the SAVE Plan—the plan challenged here. 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 (July 10, 2023) (to be codified at 34 C.F.R. pts. 682, 685). First, a few notes about the SAVE Plan's terminology. The SAVE Plan seeks to combine income-contingent repayment plans and income-based repayment plans under one umbrella term: income-driven repayment plans. *Id.* at 43,820. And the SAVE Plan is the new name for the REPAYE plan. *Id.*

The SAVE Plan first emerged in January 2023, when the Department issued a Notice of Proposed Rulemaking (NPRM). Doc. 57 at 12 (1st Am. Compl. ¶ 57). The NPRM "propose[d] to amend the regulations governing income-contingent repayment plans[.]" Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program, 88 Fed. Reg. 1894 (Jan. 11, 2023) (to be codified at 34 C.F.R. pt. 685). After the NPRM and the corresponding comment period, the Department published the "Final Rule" in July 2023. Doc. 57 at 14 (1st Am. Compl. ¶ 68); *see also* 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 (July 10, 2023) (to be codified at 34 C.F.R. pts. 682, 685).

Here, plaintiffs attack several pieces of the Final Rule.[1] Specifically, they challenge the following changes to income contingent repayment plans:

- those changes defining discretionary income as income above 225% of the applicable federal poverty guideline;
- those changes setting a borrower's monthly payment amount to $0 if the borrower's income falls below 225% of the applicable federal poverty guideline;

[1] This Memorandum and Order uses the terms "Final Rule" and "SAVE Plan" interchangeably.

- those changes capping, for undergraduate loans, a borrower's monthly payment amount at 5% of the borrower's income above 225% of the applicable federal poverty guideline; and

- those changes cancelling, for borrowers whose original principal balance was $12,000 or less, the remaining balance after the borrower has made 120 monthly payments or the equivalent.

Doc. 57 at 14 (1st Am. Compl. ¶ 70). So, summarizing, the Final Rule raises the floor of discretionary income, decreases borrowers' monthly payments, and, for loans with original balances of $12,000 or less, limits a borrower's repayment window to 10 years (from 20 or 25) of qualifying payments.

This Lawsuit

According to plaintiffs, the Final Rule is "plainly unlawful" under the Constitution and the Administrative Procedures Act (APA). They bring four claims targeting this purportedly unlawful conduct: (1) agency action in excess of statutory jurisdiction and in violation of separation of powers, violating Article I of the Constitution; (2) agency action in excess of statutory authority, violating the Administrative Procedures Act; (3) arbitration and capricious agency action, violating the APA; and (4) agency action in violation of APA procedures. Doc. 57 at 25–38 (1st Am. Compl. ¶¶ 133–227). Relying on these legal theories, plaintiffs ask the court to enjoin defendants "from implementing or acting pursuant to the" SAVE Plan. Doc. 23.

II. Legal Standard

Federal Rule of Civil Procedure 65(a) authorizes federal courts to issue preliminary injunctions. The courts enjoy broad discretion when deciding whether to grant a preliminary injunction. *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009) (citations omitted).

The relief afforded under Rule 65 embraces a limited purpose—a preliminary injunction serves "merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). The Tenth Circuit instructs that the moving party—here plaintiffs—must satisfy four factors to deserve a preliminary injunction: "'(1) a likelihood of success on the merits; (2) a likelihood that the moving party will suffer irreparable harm if the injunction is not granted; (3) the balance of equities is in the moving party's favor; and (4) the preliminary injunction is in the public interest.'" *Verlo v. Martinez*, 820 F.3d 1113, 1126 (10th Cir. 2016) (quoting *Republican Party of N.M. v. King*, 741 F.3d 1089, 1092 (10th Cir. 2013)). When the government is the party opposing the preliminary injunction—as here—the third and fourth factors merge. *Aposhian v. Barr*, 958 F.3d 969, 978 (10th Cir. 2020) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)), *abrogated on other grounds*, *Garland v. Cargill*, No. 22-976, 2024 WL 2981505 (U.S. 2024).

"A preliminary injunction is an extraordinary remedy[.]" *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). So, the moving party must demonstrate a "'clear and unequivocal'" right to such relief. *Petrella v. Brownback*, 787 F.3d 1242, 1256 (10th Cir. 2015) (quoting *Beltronics*, 562 F.3d at 1070). "In general, 'a preliminary injunction . . . is the exception rather than the rule.'" *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007) (quoting *GTE Corp. v. Williams*, 731 F.2d 676, 678 (10th Cir. 1984)).

III. Analysis

The court's analysis of plaintiffs' Motion for Preliminary Injunction unfolds in this fashion: it evaluates the three preliminary injunction factors, in turn. Then, after concluding that all three factors favor entry of a preliminary injunction, the court considers the scope of the relief warranted. The court begins with the first preliminary injunction factor: plaintiffs' likelihood of success on the merits.

A. Likelihood of Success on the Merits

Plaintiffs assert they are likely to succeed on their statutory-based claims and their APA claims. "Where a plaintiff seeks a preliminary injunction and asserts multiple claims upon which the relief may be granted, the plaintiff need only establish a likelihood of success on the merits of one of the claims." *George v. Davis Sch. Dist.*, No. 23-cv-00139, 2023 WL 5000989, at *6 (D. Utah Aug. 4, 2023) (citation and internal quotation marks omitted). The court's analysis of this factor begins and ends with plaintiffs' statutory claims[2]—ones asserting that the SAVE Plan exceeds defendants' authority under the HEA. To show that their claims are likely to succeed, plaintiffs argue the SAVE Plan violates the "Major Questions Doctrine."

To apply the Major Questions Doctrine (MQD), the court must engage in a two-step analysis. *First*, the court must determine whether this case presents a major question. *Second*, if it does, the court must determine whether the statute the agency invokes provides clear congressional authorization for the challenged agency action. The court takes up each question, in turn, below.

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2 There's a slight discrepancy between plaintiffs' Motion for Preliminary Injunction and their First Amended Complaint.

Plaintiffs' First Amended Complaint asserts four claims for relief. In Count I, plaintiffs assert defendants violated Article I of the Constitution by taking an agency action in excess of statutory jurisdiction and in violation of the separation of powers. Doc. 57 at 25–28 (1st Am. Compl. ¶¶ 133–54). In Count II, plaintiffs assert defendants took an agency action in excess of their statutory authority, violating the APA. *Id.* at 28–30 (1st Am. Compl. ¶¶ 155–73). Count III asserts defendants took an arbitrary and capricious agency action, violating the APA. *Id.* at 30–36 (1st Am. Compl. ¶¶ 174–215). And in Count IV, plaintiffs assert defendants violated APA procedures. *Id.* at 36–38 (1st Am. Compl. ¶¶ 216–27).

In contrast, plaintiffs' brief asserts plaintiffs are likely to succeed on the merits of *three* claims: "(1) the final rule exceeds Defendants' authority under the HEA, (2) the final rule is arbitrary and capricious, and (3) the rule's thirty-day comment period violated the APA." Doc. 24 at 10. The court assumes that this first "statutory" claim mentioned in plaintiffs' brief supporting their Motion for Preliminary Injunction includes Count I and Count II from the First Amended Complaint.

1. The MQD Applies Because the SAVE Plan has Vast Economic and Political Significance.

The "so-called Major Questions Doctrine applies where 'an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy"' or make 'decisions of vast "economic and political significance."'" *Bradford v. U.S. Dep't of Labor*, 101 F.4th 707, 725 (10th Cir. 2024) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S 120, 159–60 (2000))). "Although courts generally enforce plain and unambiguous statutory language according to its terms, where the statute at issue is one that confers authority upon an administrative agency, there are certain extraordinary cases that provide a reason to hesitate before concluding that Congress meant to confer such authority." *Id.* at 726 (quotation cleaned up). If the case is an "extraordinary" one, then "the agency must point to clear congressional authorization for the proposed regulation." *Id.* (internal quotation marks, citation, and ellipsis omitted). In *West Virginia v. EPA*, the Supreme Court labelled several of its prior decisions as Major Question cases. 597 U.S. 697, 721 (2022). The court reviews some of these examples, below, to demonstrate how the MQD works.

In *Brown & Williamson*, the Supreme Court rejected the FDA's attempt to regulate tobacco products under its authority to regulate "drugs" and "devices." 529 U.S. at 159–60. It did so because the Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 160.

In *Alabama Association of Realtors v. Department of Health & Human Services*, the Court rejected the CDC's authority to issue a nationwide eviction moratorium in response to the COVID-19 pandemic. 594 U.S. 758, 759–60 (2021). The CDC had claimed this kind of authority under a provision of the Public Health Service Act because it allowed the CDC to "'make and enforce . . . regulations'" that it deemed "'necessary to prevent the introduction, transmission, or spread of communicable diseases[.]'" *Id.* at 760–61 (quoting 42 U.S.C. § 264(a)). The Court called the CDC's "claim of expansive authority" under this statute "unprecedented" and found the statute "a wafer-thin reed on which to rest such sweeping power." *Id.* at 765. The Court emphasized that the eviction moratorium covered millions at risk for eviction and likely had an economic impact around $50 billion. *Id.* at 764.

In *Utility Air Regulatory Group v. EPA*, the Court rejected the agency's attempt to include greenhouse gases under the Clean Air Act's definition of "air pollutant." 573 U.S. at 321. The Court concluded EPA's interpretation "would be incompatible with the substance of Congress' regulatory scheme," *id.* at 322 (quotation cleaned up), because EPA's interpretation relied on "ambiguous statutory text[,]" *id.* at 324. And, the Court emphasized, EPA's claimed authority would give it "unheralded power to regulate 'a significant portion of the American economy[.]'" *Id.* (quoting *Brown & Williamson*, 529 U.S. at 159). Against this broader backdrop, the court turns to an MQD case involving student loans: *Biden v. Nebraska*.

Biden v. Nebraska involved student loan forgiveness under the Higher Education Relief Opportunities for Students Act (HEROES Act) of 2003, a law enacted out of Congress's concern for student loan borrowers in the wake of the September 11 terrorist attacks. 143 S. Ct. at 2363. The HEROES Act allows the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" during a "national emergency[.]" 20 U.S.C. § 1098bb(a)(1). In August 2022, the Secretary cancelled student loan debt under the HEROES Act to address financial harm stemming from the COVID-19 pandemic.

Biden v. Nebraska, 143 S. Ct. at 2364. This plan sought "to reduce and eliminate student debts directly." *Id.* Here's how that batch of loan forgiveness worked:

> For borrowers with an adjusted gross income below $125,000 in either 2020 or 2021 who have eligible federal loans, the Department of Education will discharge the balance of those loans in an amount up to $10,000 per borrower. Borrowers who previously received Pell Grants qualify for up to $20,000 in loan cancellation.

Id. at 2364–65 (citations omitted).

Six states challenged this student loan forgiveness plan based on the HEROES Act. *Id.* at 2365. The Supreme Court—after determining that at least one state had standing—then applied the MQD. That is, the Court concluded the "economic and political significance of the [HEROES Act plan was] staggering by any measure." *Id.* at 2373 (citation and internal quotation marks omitted). Given the significance of the Secretary's HEROES Act loan forgiveness, the Court found a "reason to hesitate before concluding that Congress meant to confer such authority." *Id.* at 2372 (citation and internal quotation marks omitted). The Court thus searched—in vain, as it turned out—for "clear congressional authorization for such a program." *Id.* at 2375 (internal quotation marks omitted). And the Court concluded with this: "[T]he basic and consequential tradeoffs inherent in a mass debt cancellation program are ones that Congress would likely have intended for itself." *Id.* (citation and internal quotation marks omitted).

Here, defendants correctly point out that this case differs from *Biden v. Nebraska*. As the Supreme Court already has noted, "HEROES Act loan relief and HEA loan relief function independently of each other." *Dep't of Educ. v. Brown*, 600 U.S. 551, 567 (2023). Indeed, the Supreme Court specified that its HEROES Act decision did "not opine on the substantive lawfulness of any action the Department might take under the HEA[.]" *Id.* at 565 n.2. This difference notwithstanding, *Biden v. Nebraska* definitively answers the question: is the SAVE

Plan a major question? The SAVE Plan, like the HEROES Act loan forgiveness, has "staggering" "'economic and political significance[.]'" *Biden v. Nebraska*, 143 S. Ct. at 2373 (quoting *West Virginia v. EPA*, 597 U.S. at 721). And so, the answer must be yes.

The Supreme Court has determined that student loan debt cancellation plans that forgive enormous amounts of debt are major questions. *Id.* at 2375 ("[T]he basic and consequential tradeoffs inherent in a mass debt cancellation program are ones that Congress would likely have intended for itself." (citation and internal quotation marks omitted)). Defendants estimate the net federal budget effect of the SAVE Plan at $156 billion. 88 Fed. Reg. at 43,886. Recall that the $50 billion cost of the CDC's eviction moratorium triggered the MQD in *Alabama Association of Realtors*, 594 U.S. at 764. The court thus easily concludes that the SAVE Plan—with a price tag three times as high—is a "decision[] of vast economic and political significance." *Bradford*, 101 F.4th at 725 (citation and internal quotation marks omitted). And so, the court must proceed to step two of the MQD, scouring the HEA for clear congressional authorization.

2. The Statute Doesn't Provide Clear Congressional Authorization for the SAVE Plan.

Step two is where things get tricky. So, what, exactly, does "clear congressional authorization" mean? The Supreme Court has dedicated much of its MQD analysis to defining what doesn't qualify as clear congressional authorization.[3] But the Supreme Court's decisions to date have used a two-part approach. First, the cases evaluate the statute's plain text. Second, they consider the statute's context. *See West Virginia v. EPA*, 597 U.S. at 721–23. The court's analysis here, below, uses the same approach.

[3] The court is not aware of, nor have the parties cited any MQD case where the Supreme Court has found clear congressional authorization. Does this absence suggest that the Supreme Court views the MQD as the equivalent of strict scrutiny for regulations? Our Circuit has answered no. In *Bradford*, our Circuit assumed without deciding that the MQD applied and found clear congressional authorization for the challenged regulation. 101 F.4th at 725–28. More on *Bradford* later.

a. The HEA's Plain Text Authorizes the SAVE Plan.

Biden v. Nebraska doesn't answer this case's statutory interpretation question—at least not directly—because that case involved an entirely different statute. But it nonetheless illustrates the kind of routine textual analysis the Supreme Court directs district courts to conduct when applying the MQD. For example, the HEROES Act authorizes the Secretary to "waive or modify" student loan programs in connection with a national emergency. 20 U.S.C. § 1098bb(a)(1). The *Biden v. Nebraska* Court carefully considered the meaning of both words. 143 S. Ct. at 2368–69.

First, the Court held that the word "modify" "does not authorize basic and fundamental changes[.]" *Id.* at 2368 (citation and internal quotation marks omitted). Instead, the Court explained, modify "carries a connotation of increment or limitation, and must be read to mean to change moderately or in minor fashion." *Id.* (citation and internal quotation marks omitted). The Court rejected the change imposed under the HEROES Act loan forgiveness as a modification. It "modified the cited provisions only in the same sense that the French Revolution modified the status of the French nobility—it has abolished them and supplanted them with a new regime entirely." *Id.* at 2369 (citation and internal quotation marks omitted).

Second, the Court rejected the Secretary's reliance on the word "waiver" in the statute. Previously, the Secretary had used his waiver power to identify particular legal requirements—*i.e.*, "the requirement that a student provide a written request for a leave of absence"—and waive such requirements. *Id.* at 2370. But, under the HEROES Act loan forgiveness, the Secretary never identified a particular legal requirement he had waived. *Id.* Ultimately, the Court held that what the Secretary had "actually done [was] draft a new section of the Education Act from scratch by 'waiving' provisions root and branch and then filling the empty space with radically new text." *Id.* at 2371. The Court thus invalidated the HEROES Act plan because the HEROES

Act text—allowing the Secretary to "waive or modify"—didn't clearly authorize student loan forgiveness. *Id.* at 2375. So, step two of the MQD analysis begins like any other statutory interpretation exercise: with the statute's text.

In the HEA, Congress gave the Secretary the following authority to set income-contingent repayment plans:

> Consistent with criteria established by the Secretary, the Secretary shall offer a borrower of a loan made under this part a variety of plans for repayment of such loan, including principal and interest on the loan. The borrower shall be entitled to accelerate, without penalty, repayment on the borrower's loans under this part. The borrower may choose . . . 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). Plaintiffs argue this statute doesn't clearly authorize the SAVE Plan because it consistently uses the word "repayment." Doc. 24 at 14. According to plaintiffs, the statute's operative term—"repayment"—"*affirmatively precludes* massive debt forgiveness." *Id.* (emphasis in original).

Plaintiffs argue that repay means "to pay back." Doc. 24 at 14 (citing Repay, *American Heritage Dictionary* (4th ed. 2001)); *see also Repay*, *Black's Law Dictionary* (6th ed. 1990) (defining repay first as "[t]o pay back"); Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 Green Bag 2d 419, 428 (2013) (approving use of *Black's Law Dictionary* sixth edition for legal terms from 1951–2000). Taking one more step, plaintiffs argue that repay means to pay back the entirety of the principal borrowed, with some interest. Doc. 24 at 14–15. Plaintiffs also point out that the statute requires "repayment . . . including principal and interest on the loan." 20 U.S.C. § 1087e(d)(1). Plaintiffs see the statutory terms "principal" and "interest" as signals that Congress intended for borrowers to repay the entire principal and at least some interest. But plaintiffs' argument ignores the rest of the statute.

The statute also requires annual payments "paid over an extended period of time prescribed by the Secretary, not to exceed 25 years[.]" 20 U.S.C. § 1087e(d)(1)(D). What happens when 25 years' worth of payments doesn't "repay[]" a loan? Loan forgiveness. Indeed, every Secretary of Education since the HEA's enactment has interpreted this provision to mean that the Secretary must forgive the remaining balance of the loan after 25 years. 59 Fed. Reg. at 61,666 ("Some borrowers in the [income-contingent repayment] plan may not earn sufficient income to fully repay their loans within the statutory 25-year time period. In this event, the Secretary will forgive any outstanding loan balance (principal plus interest) that is unpaid after 25 years."); 77 Fed. Reg. at 66,114 ("The revisions offer eligible borrowers lower payments and loan forgiveness after 20 years of qualifying payments."); 80 Fed. Reg. 67,209 ("We agree that borrowers are responsible for repaying their student loans, and we believe that most borrowers repaying their loans under the REPAYE plan will be successful in repaying their loans, in many cases before the end of the 20- or 25-year repayment period. However, we also believe the REPAYE plan will provide relief to struggling borrowers who experience financial difficulties that prevent them from repaying their loans. We note that the REPAYE plan requires 20 or 25 years of qualifying payments before a loan is forgiven.").

In the court's view, the Secretary's longstanding interpretation of the statute is the correct one. The statute sets an upper limit for repayments. Congress wanted borrowers on income-contingent repayment plans to make payments for no more than 25 years. As defendants aptly put it, "a plan for *partial* repayment of a loan or *slower* repayment of a loan are both still 'plans for repayment of such loan, including principal and interest on the loan.'" Doc. 47 at 34 (emphases in original) (quoting 20 U.S.C. § 1087e(d)(1)). Plaintiffs' interpretation inserts the word "full" in the statute, rendering it to require "full repayment" of the loan's principal and some interest. But that's just not what the statute says. The court thus agrees with the Secretary's time-honored interpretation that the statute imagines repayment for less than 25 years, with forgiveness at the end. *See Walker v. United Parcel Serv., Inc.*, 240 F.3d 1268, 1276 (10th Cir. 2001) ("'Where an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.'" (quoting *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982))).

The court doesn't buy plaintiffs' argument about the HEA's plain text. It next addresses plaintiffs' arguments about the statute's context.

b. The HEA's Context Does Not Provide Clear Congressional Authorization for the SAVE Plan.

The Justices have emphasized that a statute's context plays an important role in the MQD analysis. *See West Virginia v. EPA*, 597 U.S. at 721 (emphasizing that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" and, in ordinary cases, "context has no great effect on the appropriate analysis" but "there are 'extraordinary cases' that call for a different approach" (quotation cleaned up)); *see also Biden v. Nebraska*, 143 S. Ct. at 2376 (Barrett, J., concurring) (responding to "the charge that the [Major Questions] doctrine is inconsistent with textualism" by "understand[ing] it to emphasize the importance of *context* when a court interprets a delegation to an administrative agency" (emphasis in original) (citation omitted)). To that end, a statute's context can tell the court a lot about Congress's authorization in an MQD case. As avid footnote readers already know, our Circuit addressed this very issue in *Bradford*, 101 F.4th at 725–28.[4]

[4] None of the parties here cited *Bradford* in its papers. *See* Doc. 24; Doc. 47; Doc. 50. The court's analysis nonetheless uses *Bradford* because it's binding Circuit precedent and it provides a helpful framework for a developing doctrine. As the court already mentioned, the Supreme Court has directed

In *Bradford*, the Tenth Circuit assumed without deciding that the MQD applied to a Department of Labor rule requiring recreational service outfitters operating on federal land to pay their employees a $15 minimum wage, rescinding an exemption the outfitters previously enjoyed. *Id.* at 713. After assuming the MQD applied, the Circuit asked whether the Congress clearly had authorized the Department of Labor's rule. In its clear congressional authorization analysis, the Circuit identified four touchstones: (1) whether the agency "seeks to locate expansive authority in modest words, vague terms or ancillary provisions[;]" (2) whether the rule is "an enormous and transformative expansion in regulatory authority without clear congressional authorization[;]" (3) whether the agency is "claim[ing] to discover regulatory authority for the first time in a long-extant statute[;]" and (4) whether "the agency issuing the . . . rule lacks expertise in the relevant area of policymaking."[5] *Id.* at 725–28 (quotation cleaned

most of its MQD efforts to deciding what is *not* clear congressional authorization. *Bradford*, on the other hand, demonstrates what *is* clear congressional authorization. And, in any event, the parties' papers make arguments that fall well within *Bradford*, though they don't structure them in *Bradford*'s style.

[5] The court recognizes that our Circuit didn't explicitly name these four touchstones as considerations for the clear congressional authorization analysis. The court nonetheless interprets *Bradford* this way because these four touchstones resemble Justice Gorsuch's four "clues" for a clear congressional authorization analysis, as laid out in his *West Virginia v. EPA* concurrence. *West Virginia v. EPA*, 597 U.S. at 746–49 (Gorsuch, J., concurring). There, Justice Gorsuch identified four "telling clues" for a court's clear congressional authorization inquiry: (1) whether the agency relies on "[o]blique or elliptical language" or "seek[s] to hide elephants in mouseholes[;]" (2) "the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address[;]" (3) "the agency's past interpretations of the relevant statute[;]" and (4) whether "there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise." *Id.* at 746–48 (Gorsuch, J., concurring) (citations and internal quotation marks omitted).

Justice Gorsuch's four "clues" don't match our Circuit's four *Bradford* touchstones perfectly, but they're awfully close:

up). The court applies each of these touchstones, below, to discern whether the Congress clearly has authorized the measures adopted in the SAVE Plan.

First, the court considers whether the Department of Education's SAVE Plan "seeks to locate expansive authority in 'modest words,' 'vague terms or ancillary provisions.'" *Id.* at 725 (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)). Even if a regulation has "a colorable textual basis[,]" a statute's context can make "it very unlikely that Congress" delegated such expansive power to the agency. *West Virginia v. EPA*, 597 U.S. at 722–23. "Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle devices.'" *Id.* at 723 (brackets omitted) (quoting *Whitman*, 531 U.S. at 468). To survive MQD scrutiny, the Secretary must show "something more than a merely plausible textual basis for the agency action[.]" *Id.*

Here, defendants haven't shown that something more. As demonstrated above, defendants have identified a colorable, even plausible textual basis for the SAVE Plan. The

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	Touchstones from *Bradford v. U.S. Dep't of Labor*, 101 F.4th at 725–28.	**"Clues" in *West Virginia v. EPA*, 597 U.S. at 746–49 (Gorsuch, J., concurring).**
1	Whether the agency "seeks **to locate expansive authority in modest words**, vague terms or ancillary provisions."	Whether the agency relies on "[**o]blique or elliptical language**[.]"
2	Whether the challenged rule is "an **enormous and transformative expansion in regulatory authority** without clear congressional authorization."	"[E]xamine **the age and focus of the statute** the agency invokes in relation to the problem the agency seeks to address. . . . [I]t is unlikely that Congress will make **extraordinary grants of regulatory authority** through vague language in a long-extant statute."
3	Whether the agency is "claim[ing] **to discover regulatory authority for the first time** in a long-extant statute."	"[C]ourts may examine the agency's **past interpretations** of the relevant statute."
4	Whether "the agency issuing the . . . rule **lacks expertise** in the relevant area of policymaking."	"[S]kepticism may be merited where there is **a mismatch** between an agency's challenged action and its congressionally assigned **mission** and **expertise**."

The court thus applies these four touchstones in its clear congressional authority analysis.

SAVE Plan creates "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). While it's plausible to interpret the SAVE Plan to comply with the statute, plausibility won't suffice. Take, for example, "not to exceed 25 years[.]" *Id.* Recall that the SAVE Plan limits some borrowers' repayment window to 10 years. To be sure, 10 years of repayments doesn't exceed 25. And the Secretary's discretion to set a repayment time window is constrained by the phrase "*extended* period of time[.]" 20 U.S.C. § 1087e(d)(1)(D) (emphasis added). But defendants' plausible textual basis doesn't rise to the level of "clear." The statute sets a clear ceiling, but not a clear floor. That is why the statute's language is, at most, a "subtle device[]" and so, it can't support an "[e]xtraordinary grant[] of regulatory authority[.]" *West Virginia v. EPA*, 597 U.S. at 723 (internal quotation marks and citation omitted). Without a clear floor—only a plausible floor and a "subtle device"—the court can't find clear congressional authorization for the SAVE Plan.

Second, the court asks whether the SAVE Plan is "an 'enormous and transformative expansion in regulatory authority without clear congressional authorization.'" *Bradford*, 101 F.4th at 726 (ellipsis omitted) (quoting *Utility Air*, 573 U.S. at 324). In *Utility Air*, summarized above, the Supreme Court struck down the EPA's interpretation of the term "air pollutant" because—though plausible—the interpretation gave the EPA "unheralded power to regulate a significant portion of the American economy[.]" 573 U.S. at 324 (citation and internal quotation marks omitted).

Here, defendants estimate the SAVE Plan will cost $156 billion over 10 years. 88 Fed. Reg. at 43,820. But, when defendants calculated that number, they assumed the Supreme Court would uphold the HEROES Act loan forgiveness. The Supreme Court invalidated the HEROES

Act loan forgiveness in *Biden v. Nebraska*, and none of those loans were cancelled. And that has significant implications for the SAVE Plan's cost. Plaintiffs proffer a new SAVE Plan cost estimate that accounts for *Biden v. Nebraska*, and that cost is $475 billion over ten years. Doc. 24 at 23 (citing Penn Wharton, *Biden's New Income-Driven Repayment ("SAVE") Plan: Budgetary Cost Estimate Update*, University of Pennsylvania (July 17, 2023), https://budgetmodel.wharton.upenn.edu/issues/2023/7/17/biden-income-driven-repayment-budget-update). As points of reference, the REPAYE Plan cost an estimated $15.4 billion. 80 Fed. Reg. at 67,225. This difference—$475 billion versus $15.4 billion—expands agency authority to such an extent that it alters it.[6] So, the court concludes that the SAVE Plan represents "an 'enormous and transformative expansion in regulatory authority without clear congressional authorization.'" *Bradford*, 101 F.4th at 726 (ellipsis omitted) (quoting *Utility Air*, 573 U.S. at 324).

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[6] The court recognizes that this second *Bradford* touchstone seems to overlap with step one of the MQD analysis. The court differentiates between the two this way: step one of the MQD analysis asks about the sheer size of the regulatory action—*i.e.*, is it one of huge economic and political significance? The second *Bradford* touchstone asks, in contrast, not only whether the regulatory action is enormous but, crucially, whether the regulatory action is *transformative*. This requires the court's context analysis to look back at the agency's previous actions and compare them to the challenged action.

Justice Barrett provided a helpful example in her *Biden v. Nebraska* concurrence, where she explained the importance of context:

> [I]magine a grocer instructs a clerk to "go to the orchard and buy apples for the store." Though this grant of apple-purchasing authority sounds unqualified, a reasonable clerk would know that there are limits. For example, if the grocer usually keeps 200 apples on hand, the clerk does not have actual authority to buy 1,000—the grocer would have spoken more directly if she meant to authorize such an out-of-the-ordinary purchase.

143 S. Ct. at 513 (Barrett, J., concurring). So, comparing prior apple orders to the existing apple orders provided important context. And the court must look for "out-of-the-ordinary" grants of authority. All this is to say: the sheer cost of the SAVE Plan is relevant to MQD step one; the cost of the SAVE Plan compared to the cost of the REPAYE Plan is relevant to *Bradford*'s second touchstone.

Beyond cost, the SAVE Plan is a transformative expansion in regulatory authority in another important way: it represents the first time the Secretary has gone beyond the number set by Congress. Recall that Congress modified the laws for income-based repayment programs in 2010. 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)). For borrowers who had taken out a loan on or after July 1, 2014, Congress lowered the cap on payments for IBR plans to 10%—down from 15%. 20 U.S.C. § 1098e(e)(1). And for those same borrowers, Congress reduced the maximum repayment window to 20 years—down from 25 years. *Id.* § 1098e(e)(2). In 2015, the REPAYE Plan took these numbers—10% instead of 15% and 20 years instead of 25 years—and applied them to eligible loans taken out before July 2014.[7] Putting it another way, the REPAYE Plan took Congress's generosity with income-based repayment plans from § 1098e(e) and applied that generosity to some income-driven repayment plans. So, the REPAYE Plan took Congressionally-blessed numbers and applied them more broadly.

Not so here. Both the monthly payment cap and the payment period limitation overreach any generosity Congress has authorized before. Here, the SAVE Plan caps a borrower's monthly payment amount at 5% of the borrower's income above 225% of the applicable federal poverty guideline. Congress has gone as low as 10%, but it's never gone as low as 5%. The SAVE Plan also cancels the remaining balance after the borrower has made 120 monthly payments for borrowers whose original principal balance was $12,000 or less. Congress has gone as low as 20 years, but it's never gone as low as 10 years. Because the Final Rule goes beyond Congress's limits—for the first time—the SAVE Plan is a "'transformative expansion in regulatory authority

[7] Borrowers with graduate debt were excepted. The REPAYE Plan still required those borrowers to pay for 25 years.

without clear congressional authorization.'" *Bradford*, 101 F.4th at 726 (ellipsis omitted) (quoting *Utility Air*, 573 U.S. at 324).

Third, the court asks whether the Secretary is "claim[ing] to discover regulatory authority for the first time in a long-extant statute." *Id.* at 726–27 (citation and internal quotation marks omitted). This *Bradford* touchstone favors defendants. The Secretary has used its HEA authority three times before: to create the first income-contingent repayment plan, to create the PAYE Plan, and to create the REPAYE Plan.

Last, the court considers whether the Department of Education "lacks 'expertise' in the relevant area of policymaking." *Id.* at 728. That is not the case here. The current record demonstrates that the Department of Education has a great deal of expertise in the area of student loans. This final touchstone also favors defendants.

In sum, two of the touchstones guiding the MQD favor plaintiffs. Two favor defendants. But this calculus doesn't produce a dead heat. That's so because one of the touchstones favors plaintiffs so compellingly that it overpowers the others. It's the second factor: whether the SAVE Plan represents "an enormous and transformative expansion in statutory authority without clear congressional authorization." *Bradford*, 101 F.4th at 726 (quotation cleaned up). Unquestionably it does.

The record here contains just one estimate of the price tag for the SAVE Plan's forgiveness: $475 billion, over ten years. *Biden v. Nebraska* reported the total value of all outstanding federal student loans at $1.6 trillion. 143 S. Ct. at 2362. So, the SAVE Plan forgives nearly one-third of all student loan debt. And while this $1.6 trillion figure is a 2022 number—the record here doesn't contain a current figure—the court has no doubt that $475 billion in forgiveness qualifies as "enormous" and a "transformative expansion." *Bradford*, 101

F.4th at 726 (quotation cleaned up). Indeed, the SAVE Plan's forgiveness towers over earlier iterations. For instance, the REPAYE Plan cost $15.4 billion.

This unprecedented and dramatic expansion shifts the overall balance of *Bradford*'s four touchstones in favor of plaintiffs. The court finds that plaintiffs are likely to prevail on the first of their statutory claims, *i.e.*, that the SAVE Plan exceeds the Secretary's authority under the HEA. The court so finds even though defendants have mustered a plausible construction suggesting that Congress conferred such authority. But they haven't assembled what *Biden v. Nebraska* and the MQD require: a clear showing of such authority. The court thus concludes that plaintiffs are likely to prevail on the merits of their bellwether claim.

Next, the court analyzes the second preliminary injunction factor.

B. Irreparable Harm

At the hearing on this motion, plaintiffs emphasized that the SAVE Plan will cause irreparable harm to their public instrumentalities. A "plaintiff satisfies the irreparable harm requirement by demonstrating 'a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages.'" *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009) (quoting *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003)). According to plaintiffs, their public instrumentalities hold FFEL loans, and the SAVE Plan incentivizes student loan borrowers to consolidate their loans away from FFEL loans. And, according to plaintiffs, borrowers already have consolidated their loans, seeking to reap the benefits of the SAVE Plan. Once a borrower consolidates an FFEL loan, that loan is gone, depriving the public instrumentalities of interest income. And plaintiffs can't recover money damages from defendants due to sovereign immunity. So, plaintiffs argue, they've suffered an irreparable harm.

As an initial matter, the court must reiterate its concerns about plaintiffs' evidence of the harms to their public instrumentalities. As mentioned in the Memorandum and Order deciding defendants' Motion to Dismiss, South Carolina's evidence about its public instrumentality doesn't demonstrate that the SAVE Plan is leading to FFEL loan consolidation, nor does it show that FFEL loan consolidation leads to decreased interest revenue. Doc. 68 at 18–20. And Texas's evidence merely shows that—*assuming* borrowers consolidate their loans—loan consolidation will cause revenue loss to Texas's public instrumentality *in the future*. *See* Doc. 53-7 at 2 (Keyton Decl. ¶ 4) ("*To the extent that* federal policy results in borrowers consolidating their loans out of FFELP into the Direct Loan Program, those consolidations will cause the State of Texas to lose revenue." (emphasis added)). Only Alaska's evidence adduces evidence of a *current* harm to its public instrumentality. *See* Doc. 53-8 at 3 (Efird Decl. ¶ 9) ("[T]he enticed consolidation has already harmed and will continue to harm ASLC[.]"). So, plaintiffs' theories of irreparable harm aren't all that substantial.

Defendants argue that plaintiffs' delay in seeking a preliminary injunction further undermines their claims of irreparable harm. To evaluate this argument, the court divides its analysis of plaintiffs' irreparable harm in two: (i) irreparable harm from the SAVE Plan provisions already in effect and (ii) irreparable harm from the SAVE Plan provisions set to go into effect on July 1.

1. Plaintiffs Have Failed to Show an Irreparable Harm from SAVE Plan Provisions Already in Effect.

Defendants point out that the Secretary published the Final Rule in July 2023—nine months before plaintiffs filed suit in March 2024. A party's "delay in seeking preliminary relief cuts against finding irreparable injury." *RoDa Drilling*, 552 F.3d at 1211 (citation and internal quotation marks omitted). In response, plaintiffs emphasize that the Final Rule is scheduled to go into effect on July 1, 2024. For that reason, plaintiffs argue, they didn't delay their suit at all. But plaintiffs' argument misses an important point: parts of the SAVE Plan already took effect in February 2024, and plaintiffs didn't file their lawsuit until March 28, 2024.[8] Doc. 1.

Specifically, two provisions of the SAVE Plan already are in effect: (i) the increase in the discretionary income line from 150% to 225% of the federal poverty line and (ii) the shorter path to forgiveness for borrowers who took out small loans—*i.e.*, ten years of payments for a borrower who took out $12,000 or less. Indeed, plaintiffs' First Amended Complaint confirms that the Department began implementing the rule in February. Doc. 57 at 3 (1st Am. Compl.). The Secretary implemented this outcome by using his authority to designate provisions for early implementation—authority plaintiffs don't challenge here. And defendants published advance warning that they would implement these provisions early. When the Final Rule was published on July 23, 2023, it specifically tagged the increase to 225% of the federal poverty line for early implementation. 88 Fed. Reg. at 43,821. And, according to defendants, they announced early implementation of forgiveness for borrowers with low original balances a month in advance. All of this is to ask why: if these parts of the SAVE Plan promised an irreparable harm to plaintiffs, why didn't they move to enjoin the SAVE Plan *before* they took effect?

Plaintiffs attributed the delay to their need to gather data on FFEL loan consolidation. Otherwise, they reason, they would've had to rely on speculative, insufficient harm. The court isn't persuaded. Plaintiffs didn't include any allegations about FFEL loan consolidation when

[8] Defendants argue that the SAVE Plan is severable. So, defendants assert, "to the extent the Court concludes that only some portions of the Rule are unlawful . . . [the court] should still decline Plaintiffs' invitation to enjoin the Rule in its entirety." Doc. 47 at 57. Plaintiffs' brief never responds to this argument. Plaintiffs argued against severability at the court's hearing on this motion, but the court considers this argument waived. *Murphy v. City of Tulsa*, 950 F.3d 641, 645 n.4 (10th Cir. 2019) ("'[A]rguments made for the first time at oral argument are waived.'" (quoting *Ross v. Univ. of Tulsa*, 859 F.3d 1280, 1294 (10th Cir. 2017))).

they filed their Complaint. *See generally* Doc. 1. Plaintiffs' original Complaint alleged Louisiana has a state instrumentality that would suffer irreparable harm from the SAVE Plan "because broader loan cancellation under the SAVE plan would decrease demand for its services." Doc. 1 at 21 (Compl. ¶¶ 108– 11). Plaintiffs didn't assert their FFEL loan consolidation theory for plaintiffs South Carolina, Texas, and Alaska until May 10, 2024. Doc. 50. And plaintiffs ultimately abandoned their theory based on harm to Louisiana's public instrumentality. So, if plaintiffs delayed filing this lawsuit to gather information about FFEL loan consolidations to supply factual assertions in their declarations, that information didn't actually find its way into the March 2024 Complaint. The court declines to excuse plaintiffs' delay on this basis.

Nor does the court credit plaintiffs' assertion that they needed time to develop their tax revenue theory of harm. Here's an overview of plaintiffs' tax revenue theory: nine states tie their definition of taxable income to the federal definition of income or adjusted gross income. Doc. 57 at 17 (1st Am. Compl. ¶ 90). And the federal tax code defines taxable income to include student loan forgiveness granted under income-driven repayment plans. But the American Rescue Plan Act of 2021 provides that all student loan forgiveness won't "count toward the federal definition of taxable income until December 31, 2025." Doc. 57 at 17 (1st Am. Compl. ¶ 89). So, the states can't tax student loan debt forgiveness income until 2026. Plaintiffs alleged the Final Rule "will reduce income tax revenue by decreasing the amount of outstanding student loan debt." Doc. 57 at 18 (1st Am. Compl. ¶ 96). This is so, they say, because the "Final Rule accelerates the timeline for cancelation on income-driven repayment plans to as low as 10 years for certain loan balances." *Id.* (1st Am. Compl. ¶ 92). Under the old version of the rule, the federal government wouldn't forgive these loans for 20 to 25 years. So, plaintiffs allege, "but for the Final Rule, significant amounts of federal loan cancellation would occur *after* December 31, 2025" for residents of the relevant states. *Id.* (1st Am. Compl. ¶ 95) (emphasis in original). In this but-for world, the relevant states would have more student loan forgiveness income to tax. *Id.* The challenged Final Rule, in contrast, "shift[s] forward some debt forgiveness that would otherwise occur in a period in which it would be taxable income . . . into a period where it is not taxable[.]" *Id.* (1st Am. Compl. ¶ 96).

Plaintiffs assert that they delayed filing suit so that this tax revenue theory of harm could coalesce and thus become less speculative. The court isn't convinced. All pieces of this tax revenue theory—the states' income tax definition, the American Rescue Plan, and the SAVE Plan's shift in forgiveness—were present long before plaintiffs filed their Complaint in March 2024.

Plaintiffs thus have failed to proffer a reasonable explanation for the delay. "'[D]elay is an important consideration in the assessment of irreparable harm for purposes of a preliminary injunction.'" *Mont. Wyo. State Area Conf. of NAACP v. U.S. Election Integrity Plan*, No. 22-cv-00581, 2022 WL 1061906, at *5 (D. Colo. Apr. 8, 2022) (collecting cases) (quoting *GTE Corp.*, 731 F.2d at 679); *see also* 11A Mary Kay Kane et al., *Federal Practice & Procedure* § 2948.1 (3d ed. 2024) ("A long delay by plaintiff after learning of the threatened harm also may be taken as an indication that the harm would not be serious enough to justify a preliminary injunction."). The court is not impressed by plaintiffs' timing. The delay—combined with plaintiffs' abstractions about harm—fail to establish an irreparable harm. The court thus concludes that plaintiffs haven't demonstrated irreparable harm attributable to the parts of the SAVE Plan already in effect.

2. Plaintiffs Have Shown an Irreparable Harm from the SAVE Plan Provisions Not Yet in Effect.

The court reaches a different conclusion for the parts of the SAVE Plan that have yet to go into effect. Plaintiffs haven't delayed their lawsuit challenging the SAVE Plan's unimplemented parts, so their delay doesn't prevent a finding of irreparable harm. And plaintiffs correctly point out that their harms are "irrecoverable." Doc. 24 at 29. That is so because the sovereign immunity bars plaintiffs from recovering monetary damages from the federal government. *See Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Social & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994) ("Because the Eleventh Amendment bars a legal remedy in damages, and the court concluded no adequate state administrative remedy existed, the court held that plaintiffs' injury was irreparable. We agree.").

Plaintiffs also point out that "[o]ne cannot unscramble this egg; loan forgiveness has an 'irreversible impact.'" Doc. 24 at 29 (quoting *Nebraska v. Biden*, 52 F.4th 1044, 1047 (8th Cir. 2022)). Indeed, before the case reached the Supreme Court, the Eighth Circuit concluded that the HEROES Act student loan forgiveness posed irreparable harm "considering the irreversible impact the Secretary's debt forgiveness action would have[.]"[9] *Nebraska v. Biden*, 52 F.4th at

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[9] *Nebraska v. Biden* provides more support for differentiating between parts of the SAVE Plan already in effect and those parts set to go into effect on July 1. In that case, the Eighth Circuit enjoined the HEROES Act student loan forgiveness before it went into effect. The Circuit explained,

> the equities strongly favor an injunction considering the irreversible impact the Secretary's debt forgiveness would have as compared to the lack of harm an injunction would presently impose. Among the considerations is the fact that collection of student loan payments as well as accrual of interest on student loans have both been suspended.

Nebraska v. Biden, 52 F.4th at 1047–48. Not so here—the SAVE Plan is far from suspended. Plaintiffs ask the court to enjoin defendants "from implementing or acting pursuant to the Final Rule[.]" Doc. 23 at 1. Yet they acknowledge that the Department already has "unilaterally erased the debt of 153,000 borrowers." Doc. 57 at 3 (1st Am. Compl.). And, as plaintiffs elegantly phrase it, "[o]ne cannot unscramble this egg; loan forgiveness has an irreversible impact." Doc. 24 at 29 (quotation cleaned up). As explained below, when considering the scope of the preliminary injunction, plaintiffs' failure to take

1047. The court thus concludes that plaintiffs have shown an irreparable harm if the SAVE Plan is allowed to take full effect on July 1, 2024.

C. Public Interest

As the final merged factor in the preliminary injunction analysis, the court must examine whether plaintiffs have shown that their "threatened injury outweighs the harms that the preliminary injunction will cause the government or that the injunction, if issued, will not adversely affect the public interest." *Aposhian*, 958 F.3d at 990. Plaintiffs argue they've satisfied this standard because they face harm to their public instrumentalities and defendants "have no interest in enforcing a rule that completely bypasses constitutional separation of powers principles." Doc. 24 at 30. Defendants respond that the SAVE Plan serves the public interest because it solves a long list of harms: student loan defaults and delinquencies; adverse effects on credit scores; decreased liquidity for large purchases; decreased enrollment in higher education; drags on national growth; and increased reliance on federal welfare programs. Doc. 47 at 54. How to weigh these competing interests?

The Supreme Court's decision in *National Federation of Independent Business v. Department of Labor, Occupational Safety & Health Administration*, 595 U.S. 109 (2022), is helpful here. It involved a challenge to OSHA's COVID-19 vaccine mandate. *Id.* at 112–13. Several entities filed petitions for review and moved for a stay pending judicial review[10] of OSHA's mandate. *Id.* at 113.

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into account the loan forgiveness already in effect makes their proposed injunction unworkable. *See below*, § III.D.2.

[10] Of course, a stay pending judicial review is a different procedural creature than a preliminary injunction. *Compare* Fed. R. Civ. P. 62, *and* Fed. R. App. P. 8(a), *with* Fed. R. Civ. P. 65. But the standard governing a stay still requires the court to weigh the public interest. The stay factors include:

Petitioners maintained "that OSHA's mandate w[ould] force them to incur billions of dollars in unrecoverable compliance costs and w[ould] cause hundreds of thousands of employees to leave their jobs." *Id.* The federal government countered "that the mandate w[ould] save over 6,500 lives and prevent hundreds of thousands of hospitalizations." *Id.* at 120. The Court declined to compare the two: "It is not our role to weigh such tradeoffs." *Id.* And the Court emphasized that Congress hadn't given OSHA the power it sought to exercise. *Id.* The Court thus agreed with petitioners that they were entitled to a stay, because, among other things, the Court concluded the "equities do not justify withholding interim relief."

The court can't weigh the tradeoffs here either. A layperson might wonder how Alaska's relatively meager harm—$100,000 in lost FFEL loan interest over two years—can justify blocking millions of student loan borrowers nationwide from getting billions in debt relief. But in "our system of government," weighing these tradeoffs "is the responsibility of those chosen by the people through democratic processes." *Id.* In the court's view, Congress—a branch of government elected by the people—didn't delegate to the Secretary clear power to enact the SAVE Plan. The equities thus favor a preliminary injunction of some sort. But what sort of injunction do they favor? That's a more daunting question, and the court takes it up next.

> (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.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). The Supreme Court applied this standard in *National Federation of Independent Businesses*, which means that it had to evaluate the public interest and balance the equities. 595 U.S. at 120. So, even though *National Federation of Independent Businesses* occupied a different procedural posture and thus applied a different procedural standard, the Supreme Court still weighed the public interest—exactly what the court must do here.

D. Scope of Relief

Having concluded that plaintiffs have shouldered their burden under the preliminary injunction standard, the court must fashion an injunction with an appropriate scope. Rule 65(d)(1)(C) requires the court to "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." The Supreme Court has emphasized that "the specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (citation omitted).

Plaintiffs' Motion for Preliminary Injunction requests two forms of injunctive relief. *One*, it asks the court to enjoin defendants "their agents, employees, and attorneys from implementing or acting pursuant to the Final Rule[.]" Doc. 23 at 1. And *two*, it seeks to enjoin defendants "from undertaking any form of student debt relief not expressly authorized by Congress." *Id.* The court begins with plaintiffs' second request.

This vague request—asking the court to enjoin defendants from undertaking any form of unlawful debt relief—is not helpful. Indeed, plaintiffs never mention it in their supporting briefs. *See generally* Doc. 24; Doc. 50. Our Circuit has held that "injunctions simply requiring the defendant to obey the law are too vague" to enforce and they thus violate Fed. R. Civ. P. 65(d). *Keyes v. Sch Dist. No. 1, Denver, Colo.*, 895 F.2d 659, 668 (10th Cir. 1990); *see also* 11A Mary Kay Kane et al., *Federal Practice & Procedure* § 2955 (3d ed. 2024) ("[O]rders simply requiring defendants to 'obey the law' uniformly are found to violate the specificity requirement."). The court will not enter such a broad, unguided injunction. The court thus denies this part of plaintiffs' motion.

The court next evaluates plaintiffs' request that the court enjoin defendants from implementing the SAVE Plan. It divides this analysis into two considerations: whether to issue a nationwide injunction and whether to enjoin the SAVE Plan in its entirety. The analysis concludes by considering whether the court may enjoin the President of the United States, a defendant and a target of plaintiffs' motion.

1. The Injunction Should Apply Nationwide.

Plaintiffs request a nationwide injunction.[11] The court must tread carefully here because a nationwide injunction risks an overbroad injunction. "Traditionally, when a federal court finds

[11] The proper terminology for this request is unsettled. Some, like the parties here, use the term "nationwide injunction" because plaintiffs seek an injunction that applies nationwide. Others, like Justice Jackson and Justice Gorsuch, use the term "universal injunction." *See Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 936 (2024) (Jackson, J., dissenting) ("Idaho maintains that this case is certworthy because it raises the question of whether a district court can issue an injunction that grants relief directed to all potentially impacted parties—a so-called 'universal injunction.'"); *United States v. Texas*, 599 U.S. 670, 694 (2023) (Gorsuch, J., concurring) ("[T]he routine issuance of universal injunctions has proven unworkable, sowing chaos for litigants, the government, courts, and all those affected by these sometimes conflicting decrees." (citation, internal quotation marks, and brackets omitted)). Here, the court uses the parties' term—nationwide injunction.

Plaintiffs' request for a nationwide injunction is a loaded one. Nationwide injunctions are the subject of much debate. Justice Gorsuch has questioned whether nationwide injunctions are consistent with separation of powers principles and Supreme Court precedent. *United States v. Texas*, 599 U.S. at 694–95 (Gorsuch, J., concurring) ("Universal injunctions continue to intrude on powers reserved for the elected branches."); *see also Labrador*, 144 S. Ct. at 926–27 (Gorsuch, J., concurring) (calling "universal" injunctions "a relatively new phenomenon" that "virtually guarantee[] that a rising number of 'high-profile' cases will find their way to" the Supreme Court and lamenting that "universal injunction practice is almost by design a fast and furious business"). Justice Thomas shares the same concerns. *Trump v. Hawaii*, 585 U.S. 667, 713 (2018) (Thomas, J., concurring) ("I am skeptical that district courts have the authority to enter universal injunctions. These injunctions did not emerge until a century and a half after the founding. And they appear to be inconsistent with longstanding limits on equitable relief and the power of Article III counts.").

The debate rages outside the Supreme Court, too. "Some scholars, jurists, and attorneys criticize the practice of district courts issuing nationwide injunctions as an inappropriate abuse of power. Others defend nationwide injunctions as a powerful way to check federal agency overreach and ensure robust relief for plaintiffs." *District Court Reform: Nationwide Injunctions*, 137 Harv. L. Rev. 1701, 1702 (Apr. 2024).

The court wades into this controversy reluctantly, and with caution.

a remedy merited, it provides party-specific relief, directing the defendant to take or not take some action relative to the plaintiff." *United States v. Texas*, 599 U.S. 670, 693 (2023) (Gorsuch, J., concurring). In contrast, a nationwide injunction forbids a defendant from taking some action against *everyone*—not just plaintiffs. With the gravity of this request in mind, the court briefly outlines the parties' arguments for and against a nationwide injunction.

Plaintiffs' First Amended Complaint asks the court to "set aside" the SAVE Plan. Doc. 57 at 28, 30 (1st Am. Compl. ¶¶ 154, 173). This language comes from the APA, which allows courts to "hold unlawful and set aside agency action[.]" 5 U.S.C. § 706(2). Plaintiffs assert that when "'a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.'"[12] Doc. 24 at 31 (quoting *Harmon v. Thornburg*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)). And when a court finds agency action unlawful, it often issues a nationwide injunction. *See, e.g.*, *Texas v. United States*, 787 F.3d 733, 768–69 (5th Cir. 2015) (affirming district court's nationwide injunction of program benefitting undocumented immigrant parents of American citizens in suit where the state of Texas—and only Texas—had standing because there was "a substantial likelihood that a partial injunction would be ineffective because [program] beneficiaries would be free to move between states"); *Faust v. Vilsack*, 519 F. Supp. 3d 470, 478

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12 The court acknowledges the controversial nature of this proposition—and, indeed, other propositions throughout this Order:

> Courts have supposed that the APA's instruction to "set aside" agency action authorizes vacatur. There are, however, good reasons to conclude that "set aside," properly understood, merely instructs a court to ignore an illegal agency action for the purpose of resolving the case before it—much like a court ignores (rather than vacates or erases) an unconstitutional statute when resolving a case. At oral argument, the Chief Justice responded to this rather shocking assault on a long accepted, foundational aspect of judicial control of agency action with an understated "[w]ow."

33 Richard Murphy et al., *Federal Practice & Procedure* § 8381 (2d ed. 2024).

(E.D. Wisc. 2021) (applying "universal" injunction to Department of Agriculture program forgiving debts of Black farmers); *Guilford Coll. v. McAleenan*, 389 F. Supp. 3d 377, 384–85, 397–98 (M.D.N.C. 2019) (issuing nationwide injunction against U.S. Citizenship and Immigration Services' policy memorandum changing USCIS policy on calculating unlawful presence under the Immigration and Nationality Act); *Texas v. United States*, 201 F. Supp. 3d 810, 815–16, 836 (N.D. Tex. 2016) (applying nationwide injunction to federal policy requiring that "all persons must be afforded the opportunity to have access to restrooms, locker rooms, showers, and other intimate facilities which match their gender identity rather than their biological sex").

In support of their nationwide injunction, plaintiffs also invoke the Eighth Circuit's opinion in *Nebraska v. Biden*, 52 F.4th 1044 (8th Cir. 2022). This decision became the ruling reviewed by the Supreme Court in *Biden v. Nebraska*. The Eighth Circuit reversed a district court's decision denying a preliminary injunction against loan forgiveness based on the HEROES Act. *Nebraska v. Biden*, 52 F.4th at 1045–46, *rev'g* 636 F. Supp. 3d 991 (E.D. Mo. 2022). The Eighth Circuit then granted a preliminary injunction pending appeal, concluding, after "balancing the equities," that "the merits of the appeal before this court involve substantial questions of law which remain to be resolved, but the equities strongly favor an injunction considering the irreversible impact the Secretary's debt forgiveness action would have as compared to the lack of harm an injunction would presently impose." *Id.* at 1047 (citation and internal quotation marks omitted). The Circuit thus imposed the requested injunction pending future orders by that court or the Supreme Court. *Id.* at 1048.

The President and his fellow defendants quickly petitioned the Supreme Court, asking it to vacate the injunction entered by the Eighth Circuit. The Court declined in a Memorandum

Decision issued by Justice Kavanaugh. *Biden v. Nebraska*, 143 S. Ct. 477 (2022) (Mem.). The Justice's Memorandum Decision elected to treat the application to vacate the injunction as also amounting to a petition for a writ of certiorari before judgment. *Id.* The Court granted that request. *Id.* And ultimately, of course, the Supreme Court's decision on the merits held for plaintiffs. The Court thus reversed the "judgment of the Eastern District of Missouri" and denied as moot defendants' "application to vacate the Eighth Circuit's injunction[.]" *Biden v. Nebraska*, 143 S. Ct. at 2376.

This series of appellate decisions embraced the proposition that the HEROES Act student loan forgiveness program required a nationwide injunction. *Id.* at 1048. The Circuit explained that "an injunction limited to the plaintiff States, or even more broadly to student loans affecting the States, would be impractical and would fail to provide complete relief to the plaintiffs." *Id.* The Circuit emphasized that MOHELA—Missouri's public instrumentality that conferred standing on the state of Missouri because of impending harm to MOHELA's service fees—was "purportedly one of the largest nonprofit student loan secondary markets in America." *Id.* Because of "MOHELA's national role in servicing accounts," the Eighth Circuit could "discern no workable path in this emergency posture for narrowing the scope of relief." *Id.* Plaintiffs ask the court to apply the same analysis here and reach the same result.

Defendants, for their part, Doc. 46 at 55, emphasize the Supreme Court's bedrock principle "that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs[,]" *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). And defendants emphasize two things. The Eighth Circuit's decision doesn't control our court. And the Supreme Court's decision never addressed the propriety of a nationwide injunction. *Biden v. Nebraska*, 143 S. Ct. at 2355. They're right about the first part. Eighth Circuit decisions aren't binding precedent here. But the court's not so sure about defendants' second point. The Eighth Circuit plainly enjoined the Secretary from implementing his "debt forgiveness action." *Nebraska v. Biden*, 52 F.4th at 1047. And the Supreme Court explicitly reversed the district court's decision denying an injunction. *Biden v. Nebraska*, 143 S. Ct. at 2376.

Defendants also emphasize that the Eighth Circuit relied on MOHELA's national role in finding a preliminary injunction necessary, and plaintiffs haven't proffered any evidence that their public instrumentalities play a similarly important national role. Defendants are right about that point, too. But ultimately, defendants' arguments can't carry the day.

The court concludes that it must issue a nationwide injunction. A broad rule, like the SAVE Plan, requires a broad injunction, given the compelling need for nationwide uniformity in the Department's administration of student loan programs. *See Nebraska v. Biden*, 52 F.4th at 1048 (worrying that "tailoring an injunction to address the alleged harms to the remaining States would entail delving into complex issues and contested facts that would make any limits uncertain in their application and effectiveness"). Also, a limited injunction like the one defendants promote would stand the court's conclusion here on its head. Imagine the scenario advanced by defendants. In it, the court would confine its injunction to the three states with standing to sue. This scenario would free the Secretary to implement the SAVE Plan in the other 47 states. Thus, the Secretary could grant loan forgiveness to students under a regulation that the Secretary—under this court's conclusion, at least—lacked legal authority to promulgate. Defendants have articulated no good reason why student debtors in 47 states should do better than those in the three plaintiff states with standing to sue. And the court can imagine no such reason.

2. The Court Doesn't Enjoin the SAVE Plan in its Entirety.

The court has concluded that a nationwide injunction should issue, and now it must decide what the injunction should, well, enjoin. Plaintiffs move the court "for a Preliminary Injunction enjoining Defendants . . . , their agents, employees, and attorneys from implementing or acting pursuant to the Final Rule[.]" Doc. 23 at 1. But as discussed already, there's a problem with this request: defendants already have implemented parts of the SAVE Plan. Plaintiffs' papers fail to account for this reality.[13] And so plaintiffs have failed to present the court with any meaningful direction—*i.e.*, what a preliminary injunction undoing the already-active parts of the SAVE Plan would look like. This presents a formidable problem for the court.

Plaintiffs' First Amended Complaint explicitly mentions that defendants "unilaterally erased the debt of 153,000 borrowers" in February 2024. Doc. 57 at 3 (1st Am. Compl.). To enjoin the entire SAVE Plan thus would require defendants to unwind those actions, modifying the status quo. To be sure, usually, the "status quo refers to the last peaceable uncontested status existing between the parties before the dispute developed." *Am. Civil Liberties Union of Kan. and W. Mo. v. Praeger*, 815 F. Supp. 2d 1204, 1208 (D. Kan. 2011) (citing *Nova Health Sys. v. Edmondson*, 460 F.3d 1295, 1298 n.5 (10th Cir. 2006)). But by this point, the SAVE Plan has been in effect for months. *See Louisiana ex rel. Landry v. Biden*, No. 22-30087, 2022 WL 866282, at *3 (5th Cir. Mar. 16, 2022) ("The Interim Estimates were published in February 2021. This lawsuit was filed in April 2021. The Plaintiff States moved for a preliminary injunction in July 2021. And the preliminary injunction was entered in February 2022. By the time the

[13] Plaintiffs' briefing devotes most of its requested relief to arguing that any injunction should apply nationwide. *See* Doc. 24 at 31–32; Doc. 50 at 27–28. And when arguing about their delay in bringing suit, plaintiffs emphasize that they brought suit before the Final Rule's July 2024 effective date, without acknowledging that parts of the Final Rule already have taken effect. Doc. 50 at 27. Their approach grossly oversimplifies the state of play.

preliminary injunction was entered, the Interim Estimates had been in place for one year. The status quo at this point is the continued use of the Interim Estimates."). And plaintiffs never dispute that defendants gave them explicit advance warning of their early implementation of the SAVE Plan.

The court thus declines to enjoin the parts of the SAVE Plan defendants already have implemented. "Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 579–80 (2017). The "court need not grant the total relief sought by the applicant but may mold its decree to meet the exigencies of the particular case." *Id.* at 580 (citation and internal quotation marks omitted). The equities of this case simply don't favor unwinding the parts of the SAVE Plan that defendants already have implemented. Plaintiffs waited until defendants already had done so to bring suit. And, because of this delay, plaintiffs have failed to show an irreparable injury from the parts of the SAVE Plan already in effect that a preliminary injunction could forestall. *See above* § III.B.

Even without the delay, the court would decline to enjoin the entire SAVE Plan because plaintiffs have failed to present a workable injunction. Plaintiffs ask for an injunction barring defendants "from implementing or acting pursuant to the Final Rule[.]" Doc. 23 at 1. But defendants already have "implement[ed]" a part of the Final Rule and "act[ed] pursuant to the Final Rule[.]" *Id.* Defendants have persuaded the court that, at this point, a preliminary injunction that would enjoin the entire SAVE Plan would create pointless uncertainty. Such a disruptive preliminary injunction is disfavored, and the court won't enter one here. *RoDa Drilling*, 552 F.3d at 1208 n.3 ("Certain types of preliminary injunctions are disfavored: (1)

preliminary injunctions that alter the status quo, (2) mandatory preliminary injunctions, and (3) preliminary injunctions that give the movant all the relief it would be entitled to if it prevailed in a full trial." (citation omitted)). This outcome may not qualify as a perfect one. But it's the best one the court can craft based on the information supplied to date.

The court thus will enter a preliminary injunction that forbids defendants from implementing the parts of the Final Rule set to take effect on July 1, 2024. Such a preliminary injunction will "preserve the relative positions of the parties until a trial on the merits can be held." *Camenisch*, 451 U.S. at 395.

3. The Court Lacks Jurisdiction Over the President.

Defendants assert that this court lacks authority to enjoin the President, whom plaintiffs have named as a defendant. Doc. 47 at 58–59. They're right. "With regard to the President, courts do not have jurisdiction to enjoin him . . . and have never submitted the President to declaratory relief[.]" *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) (first citing *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866), then citing *Franklin v. Massachusetts*, 505 U.S. 788, 827–28 (1992)). Plaintiffs never dispute this proposition. *See generally* Doc. 50. The court thus dismisses the President of the United States as a party defendant in this action. The court also directs the Clerk to recaption the case so that it doesn't portray the President as a defendant.

IV. Conclusion and Next Steps

The courts grants in part and denies in part plaintiffs' Motion for Preliminary Injunction (Doc. 23). The court will enter the following preliminary injunction: Defendants United States Department of Education and United States Secretary of Education Miguel Cardona, and their agents, employees, and attorneys, are enjoined from implementing or acting pursuant to the parts of Final Rule—promulgated by the Department of Education titled "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—set to become effective on July 1, 2024.[14]

The court is mindful of the gravity of this ruling. Drawing the legal conclusions leading to it required the court to apply a developing legal doctrine to complex legislative and regulatory terrain. And all on a limited evidentiary record.

The court is equally mindful that human infallibility is what it is. It thus temporarily stays the effective date of this Preliminary Injunction to permit the parties to seek any appellate relief they deem appropriate. *See, e.g.*, *Fish v. Kobach*, 189 F. Supp. 3d 1107, 1152 (D. Kan. 2016) (staying preliminary injunction for 14 days to give parties time to appeal). Absent further order by this court or any reviewing court, this court's injunction will take effect at ten o'clock p.m. Central Daylight Time on June 30, 2024.

As a final note, the court emphasizes that any decision about a preliminary injunction is just that: preliminary. Given the importance of the issues in this case, the court orders the parties immediately to confer and seek a scheduling conference with United States Magistrate Judge Angel D. Mitchell. The court orders the parties to formulate and present to Judge Mitchell a schedule that will enable the court to reach a final decision (including a trial on the merits, if one is required) as soon as practicable.

IT IS THEREFORE ORDERED BY THE COURT THAT plaintiffs' Motion for Preliminary Injunction (Doc. 23) is granted in part and denied in part, as set forth in full in this Order.

[14] To comply with the separate document rule, the court will enter plaintiffs' preliminary injunction separately. *MillerCoors LLC v. Anheuser-Busch Cos.*, 940 F.3d 922, 923 (7th Cir. 2019) (remanding for district court to enter preliminary injunction on separate document); *Beukema's Petrol. Co. v. Admiral Petrol. Co.*, 613 F.2d 626, 627 (6th Cir. 1979) ("[I]t appears to the court that the express provisions of Rule 58 for entry of judgment on a separate document applies not only to final judgments in the ordinary sense but also to preliminary injunctions entered pursuant to Rule 65[.]").

IT IS FURTHER ORDERED THAT defendants United States Department of Education and United States Secretary of Education Miguel Cardona, and their agents, employees, and attorneys, are enjoined from implementing or acting pursuant to the parts of Final Rule—promulgated by the Department of Education titled "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—set to become effective on July 1, 2024.

IT IS FURTHER ORDERED THAT the injunction will take effect at 10:00 PM Central Daylight Time on June 30, 2024.

IT IS FURTHER ORDERED THAT defendant Joseph R. Biden, in his official capacity as the President of the United States, is dismissed from the case for lack of jurisdiction.

IT IS SO ORDERED.

Dated this 24th day of June, 2024, at Kansas City, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STATE OF KANSAS, et al., **Plaintiffs,** **v.** **JOSEPH R. BIDEN, et al.,** **Defendants.**	**Case No. 24-1057-DDC-ADM**

MEMORANDUM AND ORDER

A plaintiff must have standing to bring a lawsuit. As future Justice Scalia once explained, standing asks, "What's it to you?"[1] And if a plaintiff can't answer that question, that plaintiff doesn't have standing.

This case requires the court to answer a daunting question: When do states have standing to sue the federal government? The Supreme Court addressed this question in *Biden v. Nebraska*, 143 S. Ct. 2355 (2023). There, several states challenged a Department of Education student loan forgiveness plan. The Supreme Court held that one state had standing. Missouri had standing to sue on behalf of its "public instrumentality"—a nonprofit, government corporation that owned and serviced student loans. That public instrumentality had suffered harm because the Department's plan forgave student loan debt, thereby reducing the number of student loans, and, as a result, reducing the service fees the public instrumentality would collect. And so, harm to Missouri's public instrumentality conferred standing on Missouri. This case,

[1] Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 882 (1983) (revised version of Ninth Donahue Lecture at Suffolk University Law School) (cited in *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021)).

though it involves different states and a different student loan forgiveness plan, sits in the shadow of *Biden v. Nebraska*.

Plaintiffs here are 11 states challenging the Department of Education's new student loan regulations, called the SAVE Plan. As relevant here, the SAVE Plan does two things. *First*, it lowers monthly payments for eligible borrowers. *Second*, it shortens the maximum repayment period for eligible borrowers who took out small original loans. That is, if a student borrowed $12,000 or less, the new regulations require that borrower to make payments for 10 years—instead of 20 or 25 years. After 10 years of payments, the Department will forgive the remainder of the debt. Plaintiffs claim the new regulations violate the Constitution's separation of powers and the Administrative Procedures Act.

Defendants have moved to dismiss, arguing plaintiffs lack standing because the SAVE Plan doesn't cause the states any direct harm. Doc. 45. In response, plaintiffs argue the new regulations will harm them in three ways: (1) reduced revenue for the states' public instrumentalities who own student loans, (2) reduced tax revenue, and (3) a competitive harm to their ability to recruit and retain employees to state public service employment. The first theory works, thanks to *Biden v. Nebraska*. But the other two don't.

In short, plaintiffs have shouldered their burden to show the SAVE Plan likely will reduce the revenue of South Carolina, Texas, and Alaska's public instrumentalities—but just barely. Their standing theory is weaker than the one that prevailed in *Biden v. Nebraska*. And the allegations and declarations supporting their standing theory are conflicting. Plaintiffs even tried to sandbag their standing obligation. Their initial Complaint didn't allege standing facts adequately. Instead, plaintiffs wanted to hold onto their standing allegations until the preliminary injunction hearing. The court rejected that approach since standing, in federal court, is an essential ingredient of subject matter jurisdiction. So, they eventually filed an Amended Complaint disclosing their standing assertion. This approach is far from perfect.

But despite these issues, plaintiffs have shouldered their burden to show that the new regulations, more likely than not, will injure South Carolina, Texas, and Alaska's public instrumentalities. The other eight states—those without a public instrumentality participating in the student loan market—haven't shouldered their burden to show that the regulations will cause them any direct harm.

The other eight plaintiffs assert that they have standing because the SAVE Plan will reduce their income tax revenues. But this is an incidental effect of the SAVE Plan, traceable to plaintiffs' own decisions about how to tax revenue. Alternatively, these eight plaintiffs also assert that the SAVE Plan harms them directly because it reduces their ability to recruit staff to public service within state agencies. No court has ever bought into this theory, and this court declines to become the first. These plaintiffs simply have no skin in the game. Their answer to Justice Scalia's colloquial expression of standing—What's it to you?—is this: It's nothing.

The court thus grants defendants' Motion to Dismiss (Doc. 45) in part and denies it in part. Plaintiffs South Carolina, Texas, and Alaska have standing based on their public instrumentalities. The other eight states don't, and, exercising discretion conferred by Circuit authority, the court dismisses them from this action. This is precisely how the court handles any lawsuit where some plaintiffs have viable claims and others don't. Fed. R. Civ. P. 1 (directing courts to "secure the just, speedy, and inexpensive determination of every action and proceeding"). The court explains this result, below, beginning with the relevant background.

I. Background

The court begins with the statutory scheme that defendants here used to enact the SAVE Plan. The court then recounts the details of the SAVE Plan and concludes this section with a short summary of this lawsuit.

The Higher Education Act (HEA)

Congress enacted the Higher Education Act in 1965 "to assist in making available the benefits of postsecondary education to eligible students . . . in institutions of higher education[.]" 20 U.S.C. § 1070. Initially, the HEA didn't authorize the federal government to loan money directly to students. Doc. 57 at 10 (1st Am. Compl. ¶ 46). Instead, the federal government guaranteed private loans. *Id.* That changed in 1993, when Congress amended the HEA and authorized the federal government to loan money directly to students. *Id.* This 1993 amendment also required the Department of Education to offer students a variety of repayment plans. *Id.*; *see also* 20 U.S.C. § 1087e(d)(1). Only one variety of repayment plan matters here: income contingent repayment plans. Doc. 57 at 10 (1st Am. Compl. ¶ 47); *see also* 20 U.S.C. § 1087e(d)(1)(D). As the name implies, these plans base a borrower's loan repayments on the borrower's income. The relevant statute provides for "an income contingent repayment plan, with varying annual payments 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).

The SAVE Plan

Plaintiffs challenge the Department's SAVE Plan, which sets new rules for income contingent (also known as income driven) repayment plans. This section recounts the SAVE Plan's history and explains how it works.

In January 2023, the Department issued a Notice of Proposed Rulemaking (NPRM). Doc. 57 at 12 (1st Am. Compl. ¶ 57). The NPRM "propose[d] to amend the regulations governing income-contingent repayment plans[.]" Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program, 88 Fed. Reg. 1894, 1894 (Jan. 11, 2023) (to be codified at 34 C.F.R. pt. 685). After the NPRM and the comment period, the Department published the "Final Rule" in July 2023. Doc. 57 at 14 (1st Am. Compl. ¶ 68); *see also* Improving Income Driven Repayment for the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan (FFEL) Program, 88 Fed. Reg. 43820 (July 10, 2023) (to be codified at 34 C.F.R. pts. 682, 685).

Relevant here, the Final Rule[2] makes the following changes to income contingent repayment plans:

- Defines discretionary income as income above 225% of the applicable federal poverty guideline;
- Sets a borrower's monthly payment amount to $0 if the borrower's income falls below 225% of the applicable federal poverty guideline;
- For undergraduate loans, caps a borrower's monthly payment amount at 5% of the borrower's income above 225% of the applicable federal poverty guideline; and
- For borrowers whose original principal balance was $12,000 or less, cancels the remaining balance after the borrower has made 120 monthly payments or the equivalent.

Doc. 57 at 14 (1st Am. Compl. ¶ 70). To summarize, the Final Rule decreases borrowers' monthly payments and, for loans with original balances of $12,000 or less, limits a borrower's repayment window to 10 years (from 20 or 25) of qualifying payments.

This Lawsuit

[2] This Memorandum and Order uses the terms "Final Rule" and "SAVE Plan" interchangeably.

Eleven states now sue Secretary of Education Miguel Cardona, the United States Department of Education, and President Joseph R. Biden. According to these states, the Final Rule is "plainly unlawful" under the Constitution and the Administrative Procedures Act, especially in light of *Biden v. Nebraska*, 143 S. Ct. 2355 (2023). They bring four claims: (1) agency action in excess of statutory jurisdiction and in violation of separation of powers, violating Article I of the Constitution; (2) agency action in excess of statutory authority, violating the Administrative Procedures Act (APA); (3) arbitration and capricious agency action, violating the APA; and (4) agency action in violation of APA procedures. Doc. 57 at 25–38 (1st Am. Compl. ¶¶ 133–227).

With this background, the court next recites the legal standard governing defendants' Motion to Dismiss.[3]

II. Legal Standard

Defendants move for dismissal under Fed. R. Civ. P. 12(b)(1), arguing plaintiffs lack standing, and so this court lacks subject matter jurisdiction. Rule 12(b)(1) motions take one of two forms: a facial attack or a factual attack. *Stuart v. Colo. Interstate Gas Co.*, 271 F.3d 1221, 1225 (10th Cir. 2001). "A facial attack asserts that the allegations in the complaint, even if true, are insufficient to establish subject matter jurisdiction. By contrast, a factual attack on the complaint challenges the veracity of the allegations upon which subject matter jurisdiction depends." *Cnty. Comm'rs v. U.S. Dep't of the Interior*, 614 F. Supp. 3d 944, 951 (D.N.M. 2022) (citation and internal quotation marks omitted). Here, defendants bring a factual attack.[4]

[3] Though defendants filed their Motion to Dismiss before plaintiffs filed their First Amended Complaint, the parties previously asked the court and it agreed to apply the Motion to Dismiss arguments to plaintiffs' First Amended Complaint. Doc. 60 at 3.

[4] Though defendants present no evidence of their own, the parties agreed at the hearing that this is a factual attack on the court's subject matter jurisdiction.

A factual attack allows the court to "reference . . . evidence outside the pleadings" including "affidavits, other documents, and [even conduct] a limited evidentiary hearing to resolve disputed jurisdictional facts." *Stuart*, 271 F.3d at 1225 (citation and internal quotation marks omitted). "When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations." *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995), *abrogated on other grounds by Cent. Green Co. v. United States*, 531 U.S. 425, 437 (2001). Instead, "when considering a Rule 12(b)(1) motion to dismiss, the court may weigh the evidence and make factual findings." *Los Alamos Study Grp. v. U.S. Dep't of Energy*, 692 F.3d 1057, 1063 (10th Cir. 2012).

"If jurisdiction is challenged, the burden is on the party claiming jurisdiction to show it by a preponderance of the evidence." *Celli v. Shoell*, 40 F.3d 324, 327 (10th Cir. 1994). So, when facing a factual attack, a plaintiff must "present affidavits or other evidence sufficient to establish the court's subject matter jurisdiction by a preponderance of the evidence." *U.S. ex rel. Hafter D.O. v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 n.5 (10th Cir. 1999); *see also Sapp v. F.D.I.C.*, 876 F. Supp. 249, 251 (D. Kan. 1995) ("The allegations contained in the complaint are initially accepted as true, but if challenged the plaintiff has the duty to support the allegations with competent proof."). Our Circuit has analogized plaintiffs' Rule 12(b)(1) burden to the nonmovant's burden under Fed. R. Civ. P. 56(e). *Hafter D.O.*, 190 F.3d at 1160 n.5 ("Whether we consider [defendant's] motion as a motion to dismiss under Rule 12(b)(1) or a motion for summary judgment, [plaintiffs'] burden remains essentially the same—they must present affidavits or other evidence sufficient to establish the court's subject matter jurisdiction by a preponderance of the evidence.").

Defendants seek dismissal of plaintiffs' claims under Rule 12(b)(1) because, they assert, plaintiffs lack Article III standing. Article III of our Constitution limits federal courts' jurisdiction to "cases" and "controversies." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). To present a case or controversy under Article III, a plaintiff must establish that it has standing to sue. *Id.* (citations omitted). To have standing, "a plaintiff needs a 'personal stake' in the case." *Biden v. Nebraska*, 143 S. Ct. at 2365 (2023) (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021)). "To demonstrate their personal stake, plaintiffs must be able to sufficiently answer the question: 'What's it to you?'" *TransUnion*, 594 U.S. at 423 (citation and internal quotation marks omitted). "[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016) (citation and internal quotation marks omitted).

Article III's standing analysis requires three things:

> (1) an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[;]"
>
> (2) "a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court[;]" and
>
> (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (internal quotation marks and citations omitted).

Plaintiffs must establish standing "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561. At "the pleading stage, the plaintiff must clearly allege facts demonstrating each element" of standing. *Spokeo*, 578 U.S. at 338 (citation, internal quotation marks, and ellipsis omitted). "If at least one plaintiff has standing, the suit may proceed." *Biden v. Nebraska*, 143 S. Ct. at 2365 (citation omitted).

III. Analysis

Plaintiffs assert three[5] distinct theories of standing. *First*, plaintiffs argue that the Final Rule harms their public instrumentalities—organizations who own and service student loans. *Second*, they argue that the Final Rule causes them direct injury because the Final Rule will decrease their tax revenues. *Last*, plaintiffs allege the Final Rule hurts their ability to recruit employees into state employment. The court considers each theory, in turn, below.

A. Public Instrumentalities

Plaintiffs' public instrumentality theory alleges, in a nutshell, that three of the plaintiff states have government corporations who own and service student loans, and the Final Rule will cause these organizations to lose revenue. The organizations are public instrumentalities of the states, plaintiffs argue, so a harm to three instrumentalities is a direct injury to the three states themselves. Because this standing theory relies on *Biden v. Nebraska*, 143 S. Ct. 2355, the court reviews that case's standing discussion, in detail, below.

1. *Biden v. Nebraska*

Biden v. Nebraska involved student loan forgiveness under the Higher Education Relief Opportunities for Students Act (HEROES Act) of 2003, a law enacted out of Congress's concern for student loan borrowers in the wake of the September 11 terrorist attacks. 143 S. Ct. at 2363.

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[5] In their original Complaint, plaintiffs alleged a fourth kind of injury: "increased law enforcement costs[.]" Doc. 1 at 21 (Compl. ¶ 113). Plaintiffs alleged that the SAVE Plan "will create enormous opportunities for fraudsters to exploit student debt borrowers that would not otherwise exist." *Id.* Plaintiffs' First Amended Complaint doesn't mention this injury. *See generally* Doc. 57 (1st Am. Compl.). And during the hearing on this motion, plaintiffs' counsel confirmed. Plaintiffs have abandoned this theory.

The HEROES Act allows the Secretary of Education to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" during a "national emergency[.]" 20 U.S.C. § 1098bb(a)(1). During the COVID-19 pandemic, the Secretary used the HEROES Act to suspend interest accrual and repayment obligations on federal student loans several times. *Biden v. Nebraska*, 143 S. Ct. at 2364. In August 2022, the Secretary took a step further, and cancelled student loan debt under the HEROES Act to address financial harm stemming from the COVID-19 pandemic. *Id.* This plan sought "to reduce and eliminate student debts directly." *Id.* Here's how that batch of loan forgiveness worked:

> For borrowers with an adjusted gross income below $125,000 in either 2020 or 2021 who have eligible federal loans, the Department of Education will discharge the balance of those loans in an amount up to $10,000 per borrower. Borrowers who previously received Pell Grants qualify for up to $20,000 in loan cancellation.

Id. at 2364–65 (citations omitted).

Six states challenged this HEROES Act plan. *Id.* at 2365. The district court concluded the states lacked standing. *Id.* The Eighth Circuit disagreed, concluding the state of Missouri likely had standing based on the Missouri Higher Education Loan Authority (MOHELA). *Id.* The Supreme Court granted certiorari before judgment and, relevant here, concluded Missouri had standing because "the Secretary's plan harm[ed] MOHELA and thereby directly injure[d] Missouri[.]" *Id.*

The Court explained that MOHELA, a nonprofit government corporation, participated in the student loan market. *Id.* MOHELA owned over $1 billion in Federal Family Education Loans (FFELs) and serviced $150 billion in federal loans. *Id.* at 2365–66. The Court's standing analysis focused on service fees. *Id.* The Department of Education had hired MOHELA "to collect payments and provide customer service to borrowers. MOHELA receive[d] an administrative fee for each of the five million federal accounts it services[.]" *Id.* (citations omitted).

Enter the HEROES Act student loan forgiveness plan. Under this "plan, roughly half of all federal borrowers would have their loans completely discharged." *Id.* at 2366. This meant "MOHELA could no longer service those closed accounts, costing it, by Missouri's estimate, $4 million a year in fees that it otherwise would have earned under its contract with the Department of Education." *Id.* The Court concluded that this financial harm from reduced service fees qualified as "an injury in fact directly traceable to the Secretary's plan[.]" *Id.* The Court went on to explain that MOHELA was a public instrumentality of Missouri, so a "harm to MOHELA in the performance of its public function [was] necessarily a direct injury to Missouri itself." *Id.* On that basis, Missouri had standing to sue and challenge that iteration of loan forgiveness.

With *Biden v. Nebraska*'s standing analysis firmly in mind, the court outlines plaintiffs' public instrumentality arguments here.

2. Plaintiffs' Standing Theory Based on South Carolina, Texas, and Alaska's Public Instrumentalities

Plaintiffs allege that—like Missouri and MOHELA—South Carolina, Alaska, and Texas have "state instrumentalities or quasi instrumentalities" who will suffer financial harm under the SAVE Plan. Doc. 57 at 23 (1st Am. Compl. ¶ 116). These instrumentalities "(1) provide student loans to residents of the state, (2) hold loans issued by the Federal Family Education Loan Program ("FFELP[6] loans"), and/or (3) service student debt taken out by residents, former residents, and out-of-state students." *Id.* The court pauses here to explain FFEL loans because they provide an important part of plaintiffs' public instrumentality harm theory.

[6] Plaintiffs use the acronym "FFELP" in their First Amended Complaint to describe Federal Family Education loans. Defendants use the acronym "FFEL" to reference these loans. *Biden v. Nebraska* used the acronym "FFEL". This Order uses FFELP and FFEL interchangeably.

FFEL loans are student loans held by private corporations and guaranteed by the federal government. "While FFELs . . . are no longer issued, many remain outstanding." *Biden v. Nebraska*, 143 S. Ct. at 2362. Holders of FFEL loans own the assets outright. Doc. 65 at 14. The federal government doesn't pay the holder to service the loans. *Id.* And federal law requires FFEL holders to pay rebate fees on certain FFEL loans to the government—fees the holders can't pass on to the borrower. *Id.* (first citing 20 U.S.C. § 1078-3(f), then citing 34 C.F.R. §§ 682.406(a)(12), 682.202).

To understand plaintiffs' standing theory, the court also must explain FFEL loan consolidation. Borrowers with FFEL loans can "consolidate" their loans into federal direct loans. "Consolidate" is something of a term of art here because, it appears, consolidate seems to mean *convert* FFEL loans into federal direct loans. That is, borrowers can exchange their FFEL loans—ones owned by private corporations—into direct loans owned by the federal government. When borrowers consolidate their FFEL loans, the federal government pays the loan's holder the principal loan amount owed and accrued interest. Putting it more succinctly, a consolidation cashes out the private corporation holding the FFEL loan.

Returning to plaintiffs' public instrumentality theory, plaintiffs allege that South Carolina, Texas, and Alaska have public instrumentalities who hold FFEL loans. Plaintiffs allege the three instrumentalities "derive income from their loan portfolios, such as through collecting interest owed or service fees." Doc. 57 at 23 (1st Am. Compl. ¶ 117). So, plaintiffs allege, the instrumentalities' "amount of income thus collected is directly proportional to the size of the debt portfolio: *i.e.*, decreasing the size of the portfolio will decrease the income collected by the instrumentalities/quasi-instrumentalities." *Id.* (1st Am. Compl. ¶ 119).

Enter the Final Rule. Plaintiffs allege the "Final Rule is virtually certain to decrease the size of these student-debt portfolios by inducing individuals to consolidate their FFELP loans into direct federal loans in order to take advantage of the extraordinary (and unlawful) generosity of the Final Rule." *Id.* (1st Am. Compl. ¶ 120). Put a slightly different way, plaintiffs argue that the SAVE Plan will incentivize debtors to consolidate these FFEL loans into direct federal loans, shrinking the instrumentalities' debt portfolios, and decreasing their revenue. Doc. 50 at 17–18. Defendants have several problems with this theory.

Defendants correctly point out that plaintiffs' theory of public instrumentality harm is different—and weaker—than the public instrumentality harm that prevailed in *Biden v. Nebraska*. *Biden v. Nebraska* says nothing about FFEL loans and consolidation. That case involved a simpler student loan forgiveness plan and a simpler state instrumentality harm. Start with the plan. The student loan forgiveness under the HEROES Act forgave $10,000 to $20,000 per eligible loan. Here, the SAVE Plan operates with more finesse. It reduces monthly payment amounts and, for loans with original balances of $12,000 or less, limits a borrower's repayment window to 10 years (from 20 or 25) of qualifying payments. Next consider the harm to the state instrumentality. In *Biden v. Nebraska*, the HEROES Act loan forgiveness would result in millions of fully forgiven loans. So, MOHELA no longer could service those closed accounts, costing it revenues formerly derived from servicing direct loans. Here, in contrast, plaintiffs haven't alleged any loss of revenue from *servicing* loans. Instead, plaintiffs allege that the Final Rule will cost them interest revenue because third parties have incentive to consolidate their FFEL loans into direct loans—and thus pay interest to the federal government as the sole lender of direct loans.[7]

[7] It's not clear from plaintiffs' First Amended Complaint or briefing how, exactly, the SAVE Plan will reduce the instrumentalities' revenue. Plaintiffs talk about "revenue" without differentiating between

At bottom, plaintiffs' theory of standing is more attenuated—and therefore weaker—than MOHELA's standing in *Biden v. Nebraska*. Despite these issues, the court nonetheless concludes that South Carolina, Texas, and Alaska have pleaded plausibly and sufficiently established a likely injury to their state instrumentalities.

3. Plaintiffs Plausibly Have Alleged an Injury in Fact to South Carolina, Texas, and Alaska's Public Instrumentalities, Fairly Traceable to the SAVE Plan

Because plaintiffs' theory of harm differs from MOHELA's harm in *Biden v. Nebraska*, the court must look beyond that case's holding. It must consider additional precedent defining the standing inquiry that applies to this dispute. Defendants argue that plaintiffs' public instrumentality theory fails two elements of standing: injury in fact and traceability. The court thus briefly recites the governing law.

To demonstrate Article III standing, a "plaintiff must have suffered an 'injury in fact'" and that injury must be "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560–61 (citations and internal quotation marks omitted). Plaintiffs allege an imminent injury, claiming the Final Rule will cause them financial harm in the future. Under *Clapper*, a future injury satisfies the "imminence" requirement only if it is "certainly impending." 568 U.S. at 401. The Supreme Court has "repeatedly reiterated that threated injury be *certainly impending* to

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revenue from interest and revenue from fees. Plaintiffs' First Amended Complaint glosses over the difference, alleging the instrumentalities "derive income from their loan portfolios, such as through collecting interest owed or service fees." Doc. 57 at 23 (1st Am. Compl. ¶ 117). And plaintiffs' briefing applies more gloss, arguing that each instrumentality "holds a portfolio of FFELP loans, and the interest/fees that they receive from those portfolios is directly proportional to their portfolio's size." Doc. 50 at 17 (emphasis added).

Fortunately, at the hearing, plaintiffs confirmed that their public instrumentality theory relies on reduced *interest* revenue—not fees.

constitute injury in fact, and that allegations of *possible* future injury are not sufficient." *Id.* at 409 (emphases in original) (citation, brackets, and internal quotation marks omitted).

In addition to a future injury, plaintiffs also allege an indirect injury. When "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation . . . of *someone else*," the Supreme Court has instructed courts to require "much more." *Lujan*, 504 U.S. at 561–62 (emphasis in original). "In that circumstance, causation and redressability ordinarily hinge on the response of the regulated . . . third party the government action or inaction—and perhaps on the response of others as well." *Id.* at 562. When such

> essential elements of standing depend[] on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume to either control or to predict . . . , it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such a manner as to produce causation and permit redressability of injury.

Id. (citations and internal quotation marks omitted).

So, to show standing, plaintiffs must show two things: (1) borrowers likely will consolidate their FFEL loans into direct federal loans and (2) this consolidation likely will reduce the instrumentalities' revenue. To meet this burden, plaintiffs have provided declarations from each of the three state instrumentalities. The court reviews the evidence submitted by each instrumentality below, starting with South Carolina. After its review of each package of evidence, the court evaluates the evidence together. And, ultimately, the court concludes South Carolina, Texas, and Alaska have standing—at least for now.

a. South Carolina's SEAA

Plaintiffs allege that South Carolina has a public instrumentality called the State Education Assistance Authority (SEAA). Doc. 57 at 23–24 (1st Am. Compl. ¶ 121). The First Amended Complaint alleges that "since 2011, SEAA's portfolio has decreased from approximately $31.3 million to $6.4 million, which has reduced the amount of income generated for South Carolina's benefit[.]" *Id.* at 24 (1st Am. Compl. ¶ 122). Plaintiffs allege the SAVE Plan "will further decrease the size of SEAA's portfolio as borrowers convert FFELP loans to take advantage of available debt forgiveness." *Id.*

Plaintiffs submitted a declaration from South Carolina officials confirming the information about SEAA. Doc. 53-6 (Spate Decl.). The declaration's exhibits confirm that SEAA holds FFEL loans, *id.* at 7 (Spate Decl. Ex. 2), and SEAA's FFEL portfolio has decreased steadily since 2011, *id.* at 8 (Spate Decl. Ex. 2). The exhibit provides three figures. The first figure shows SEAA's FFEL loan portfolio decreasing over time:

History of SEAA's FFELP portfolio from 2010 to present:

Month End	Principal Balance
6/30/2011	$31,324,566.17
6/30/2012	29,589,044.81
6/30/2013	26,776,811.11
6/30/2014	24,974,750.48
6/30/2015	22,797,591.92
6/30/2016	20,975,542.24
6/30/2017	19,218,505.43
6/30/2018	16,654,982.40
6/30/2019	15,026,548.26
6/30/2020	12,872,804.70
6/30/2021	11,889,724.29
6/30/2022	10,771,880.55
6/30/2023	8,059,252.66
3/31/2024	6,423,362.52

Id.

The exhibit's second figure attributes this decrease to borrower consolidation, showing that borrowers have consolidated SSEA's FFEL loans for years. At the hearing on the Motion to Dismiss, plaintiffs' counsel explained the following figure shows the total value of FFEL loans consolidated each year (first column) and the value of FFEL loans paid down by FFEL borrowers (second column):

Proportion of SEAA's FFELP loans that were consolidated versus paid down

Period	Consolidation Payment	Other Principal Payments
7/1/2010 - 6/30/2011	-$1,019,123.26	-$814,057.50
7/1/2011 - 6/30/2012	-1,076,871.56	-$658,649.80
7/1/2012 - 6/30/2013	-1,365,846.14	-$1,446,387.56
7/1/2013 - 6/30/2014	-590,101.34	-$1,211,959.29
7/1/2014 - 6/30/2015	-1,231,047.88	-$946,110.68
7/1/2015 - 6/30/2016	-909,836.74	-$912,212.94
7/1/2016 - 6/30/2017	-1,081,806.83	-$675,229.98
7/1/2017 - 6/30/2018	-1,064,526.12	-$1,498,996.91
7/1/2018 - 6/30/2019	-415,796.86	-$1,212,637.28
7/1/2019 - 6/30/2020	-622,083.17	-$1,531,660.39
7/1/2020 - 6/30/2021	-174,407.04	-$808,673.37
7/1/2021 - 6/30/2022	-954,393.67	-$1,320,063.19
7/1/2022 - 6/30/2023	-2,112,224.90	-$600,402.99
7/1/2023 - 3/31/2024	-1,111,945.46	-$523,944.68

Id.

But, though SEAA's FFEL portfolio has gone down each year since 2011, the interest revenue doesn't follow that same pattern:

Interest revenue generated by SEAA's FFELP loans per year

Period	Total Interest Revenue
7/1/2010 - 6/30/2011	$1,172,811.00
7/1/2011 - 6/30/2012	$764,676.00
7/1/2012 - 6/30/2013	$692,306.00
7/1/2013 - 6/30/2014	$630,738.00
7/1/2014 - 6/30/2015	$585,056.00
7/1/2015 - 6/30/2016	$572,691.00
7/1/2016 - 6/30/2017	$595,654.00
7/1/2017 - 6/30/2018	$689,735.00
7/1/2018 - 6/30/2019	$756,432.00
7/1/2019 - 6/30/2020	$529,763.00
7/1/2020 - 6/30/2021	$301,659.00
7/1/2021 - 6/30/2022	$303,673.00
7/1/2022 - 6/30/2023	$575,359.00
7/1/2023 - 3/31/2024 *	$432,455.00

Id.

This SEAA evidence creates some evident problems for South Carolina's standing theory. Remember, plaintiffs need to show two things: (1) the SAVE Plan makes it likely that borrowers will consolidate their loans and (2) if borrowers consolidate their loans, the public instrumentalities likely will suffer financial harm in the form of reduced interest payments. The SEAA evidence undermines both propositions.

The SEAA evidence casts doubt on plaintiffs' allegation that the SAVE Plan makes FFEL loan consolidation more likely. The SEAA evidence shows that SEAA's FFEL loan portfolio has decreased steadily since 2010. So, borrowers already were consolidating their loans long before the SAVE Plan's incentives. This conclusion poses a causation problem for plaintiffs. And this problem demonstrates the difficulty of establishing standing when a theory of harm relies on decisions by third parties. Where "the independent action of some third party not before the court—rather than that of the defendant—was the direct cause of the plaintiff's harm, causation may be lacking." *Habecker v. Town of Estes Park, Colo.*, 518 F.3d 1217, 1225 (10th Cir. 2008) (citation and internal quotation marks omitted). Trying to cure this problem, plaintiffs direct the court to Alaska's declaration. It explains why the SAVE Plan incentivizes borrowers to consolidate their FFEL. Critically, the Alaska declaration alleges that borrowers already are consolidating their loans. More on Alaska in a moment.

The SEAA evidence also casts doubt on plaintiffs' theory that, as the instrumentalities' FFEL loan portfolios decrease, their interest revenue necessarily will decrease vis-à-vis interest revenue in the what if world where the SAVE Plan didn't happen. SEAA's FFEL portfolio has decreased steadily over the years, but SEAA's interest revenue on FFEL loans has moved up and moved down. Put differently, a graph of interest revenue wouldn't have the negative slope plaintiffs need.

At the hearing, plaintiffs introduced an additional layer of confusion about this data. Plaintiffs argued that the SEAA evidence demonstrates loan consolidation from the HEROES Act loan forgiveness. Plaintiffs argued that the jump from -$954,393.67 in consolidation in fiscal year 2021 to -$2,112,224.90 in fiscal year 2022 resulted from defendants announcing the HEROES Act forgiveness. This announcement, plaintiffs contend, led borrowers to consolidate their loans to take advantage. To be sure, this would support plaintiffs' view that borrowers respond to incentives created by federal student loan forgiveness programs—*i.e.*, when borrowers thought they could benefit from the HEROES Act, they consolidated their loans. But plaintiffs' argument makes it harder to attribute loan consolidation to the SAVE Plan loan forgiveness, and not the HEROES Act loan forgiveness.

And plaintiffs' argument is just that: an argument. Plaintiffs haven't adduced any evidence that purports to suss out the amount of consolidation caused by the HEROES Act, the SAVE Plan, and general market forces individually. This gap particularly presents a problem given the timing of the two loan forgiveness plans. Plaintiffs explained during the hearing that the fiscal year 2022 number captures HEROES Act-related consolidation. According to plaintiffs, this increase in loan consolidation—from -$954,393.67 in fiscal year 2021 to -$2,112,224.90 in fiscal year 2022— shows the effects of the HEROES Act loan forgiveness—*i.e.*, borrowers consolidated their FFEL loans to take advantage of the HEROES Act. That's all well and good, until the court considers the SAVE Plan. Defendants announced the proposed rule in January 2023—within fiscal year 2022. That leaves two loan forgiveness plans in play during one fiscal year. And the court has no way to tell how much loan consolidation to attribute to the HEROES Act and how much to attribute to the SAVE Plan.

Given these issues with the South Carolina evidence, plaintiffs' theory finds its way to some thin ice. Fortunately, for them, plaintiffs' evidence from Texas helps them show that consolidation would cause reduced income revenue.

b. Texas's THECB

Plaintiffs allege that Texas has an agency named the Texas Higher Education Coordinating Board (THECB). Doc. 57 at 24 (1st Am. Compl. ¶ 127). THECB is a "student debt servicing public entity[.]" *Id.* Plaintiffs allege "THECB owns over $1,1295,236 [*sic*] in FFELP loans" and "collected $114,479 in interest in 2023." *Id.* at 25 (1st Am. Compl. ¶ 130). The record isn't clear if this is $11.2 million in FFEL loans or $1.12 million. Plaintiffs allege that if the SAVE Plan "were to decrease the size of that student debt portfolio, the amount of income that the THECB would collect would decrease." *Id.* (1st Am. Compl. ¶ 131).

Plaintiffs submitted a declaration from THECB. *See* Doc. 53-7 (Keyton Decl.). The declaration confirms the above amounts. *Id.* at 2 (Keyton Decl. ¶ 3). And, critically, the declarant testifies:

> To the extent that federal policy results in borrowers consolidating their loans out of FFELP into the Direct Loan Program, those consolidations will cause the State of Texas to lose revenue. Upon consolidation, the federal government compensates the holder (THECB) only for principal and accrued interest. Thus, such consolidations will result in reduced revenue [to the] THECB and therefore the State of Texas. The THECB would no longer collect interest on FFELP loans that have been consolidated, diminishing the value of its portfolio.

Id. (Keyton Decl. ¶ 4). So, declarant says, the "SAVE Plan could cause pecuniary harm to the State of Texas and THECB measured by a reduction in revenue to the State's FFELP program." *Id.* (Keyton Decl. ¶ 5). Defendants point out that this declaration "skims over consolidation entirely." Doc. 65 at 14. That is, the declarant assumes, without explaining, that borrowers will consolidate their loans.

Defendants have the better end of that narrow issue. The Texas declaration doesn't help plaintiffs shoulder their burden to show that borrowers will consolidate their FFEL loans into direct loans—the first piece of the standing puzzle. In contrast, the Texas declaration *does* help plaintiffs with the second piece of the standing puzzle: it's evidence that consolidation will cause revenue loss to Texas through THECB. The mismatched puzzle piece here is the SEAA exhibit, which contradicts the Texas evidence because the SEAA data shows that decreased FFEL portfolios don't necessarily mean decreased FFEL interest revenue. Doc. 53-6 at 8 (Spate Decl. Ex. 2).

With these those two states behind us, the court turns to plaintiffs' strongest evidence: Alaska's declaration.

c. Alaska's ASLC

Plaintiffs allege that Alaska's instrumentality is a public corporation, known as the Alaska Student Loan Corporation (ASLC). It owns $16.8 million in FFEL loans. Doc. 57 at 24 (1st Am. Compl. ¶¶ 123–24). Plaintiffs allege the SAVE Plan will cause Alaska to lose significant revenues. *Id.* (1st Am. Compl. ¶ 125). Specifically, plaintiffs allege "ASLC estimates that the Final Rule will result in ASLC losing approximately $100,000 over just the next two years that it would otherwise collect as a FFELP loan holder." *Id.* (1st Am. Compl. ¶ 126).

Plaintiffs also submitted a declaration from ASLC. The declarant testifies, "The SAVE Plan entices borrowers to consolidate their loans away from FFELP into the Direct Loan Program (DLP), comprising loans held by the federal government." Doc. 53-8 at 2 (Efird Decl. ¶ 6). According to the declarant, three features of the SAVE Plan entice borrowers to consolidate their FFEL loans into direct loans:

1. The SAVE Plan offers benefits to direct loans only—*i.e.*, capped payments, waiving residual interest, and full forgiveness after ten years of payments;

2. The SAVE Plan doesn't treat consolidated loans as new loans, so borrowers' repayment clocks won't restart if they consolidate—a feature that previously disincentivized borrowers from consolidating; and

3. The federal government is advertising and encouraging borrowers to consolidate.

Id. at 2–3 (Efird Decl. ¶¶ 6–8). So, the declarant provides, "the federal government is strongly . . . incentivizing borrowers to consolidate their loans away from FFELP and into [direct] loans held by the federal government."[8] *Id.* at 3 (Efird Decl. ¶ 8).

This testimony resembles—at some level anyway—theoretical, in-a-vacuum, "basic economic theory" allegations that struggle to carry plaintiffs' standing burden. *See Mackinac Ctr. for Pub. Pol'y v. Cardona*, 102 F.4th 343, 2024 WL 2237667, at *8 (6th Cir. May 17, 2024) ("Plaintiffs' allegations regarding supply and demand and the impact of financial incentive on third-party student-loan debtors are wholly speculative."). But the ASLC declaration goes a step further. It testifies, "Because these benefits are not available to borrowers with commercially-held FFELP loans, borrowers are rapidly consolidating their loans away from FFELP loans held by ASLC and into Direct Loans held by the federal government." *Id.* at 2 (Efird Decl. ¶ 6).

ASLC's declarant testifies these "consolidations will cause Alaska to lose significant revenues." *Id.* at 3 (Efird Decl. ¶ 9). Here's how: an FFEL loan is a loan held by a corporation (here, ASLC) and guaranteed by the federal government. When a borrower consolidates an FFEL loan into a direct loan from the federal government, the federal government compensates the holder (here, ASLC) for principal and accrued interest. *Id.* So, consolidation means the

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[8] The ASLC declaration contains several legal conclusions. For example, the declarant testifies that "the federal government is strongly, *and likely unlawfully*, incentivizing borrowers to consolidate their loans away from FFELP and into loans held by the federal government." Doc. 53-8 at 3 (Efird Decl. ¶ 8) (emphasis added). The lawfulness of the SAVE Plan is a legal conclusion reserved for the court to decide. The court declines to consider the declaration's legal conclusions.

holder (here, ASLC) will no longer collect interest on those consolidated FFEL loans. *Id.* Because of this phenomenon, "ASLC estimates that the SAVE Plan will result in ASLC losing approximately $100,000 over just the next two years that it would otherwise collect as a FFELP holder." *Id.* (Efird Decl. ¶ 11). This declaration represents plaintiffs' best evidence.

The Alaska declaration provides evidentiary support for both pieces of the standing puzzle: (1) borrowers are likely to consolidate their FFEL loans into direct loans because of the SAVE Plan and (2) when borrowers consolidate, it will cause the public instrumentality to lose interest revenue. Defendants fault this declaration for "nakedly" stating that ASLC will lose $100,000 "because of the SAVE Plan, without explaining how or why." Doc. 65 at 14. While there's some truth to defendants' criticism, Alaska has adduced some facts. The court can't say the same for defendants. They've proffered no evidence of their own. Without any contradictory evidence, defendants have given no facts to reach a different conclusion. In short, the court currently has no reason to doubt ASLC's $100,000, nor any other part of the declaration.

Having summarized all three components of the public instrumentality evidence, the court, next, synthesizes this information.

d. Summary of State Public Instrumentality Theory

Considering all three sources of evidence together, plaintiffs have shouldered their burden to allege standing. Recall that plaintiffs had to show two things to show an injury: (1) the SAVE Plan makes it likely that borrowers will consolidate their loans and (2) if borrowers consolidate their loans, the states' public instrumentalities will suffer harm. Plaintiffs have shouldered their burden on both fronts.

First, plaintiffs have shown by a preponderance of the evidence that the SAVE Plan will cause FFEL borrowers to consolidate their loans into direct loans. This inquiry relies on the choices of third parties not before the court, which means plaintiffs must allege "facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562. Alaska's ASLC declarant testifies that consolidation makes economic sense for borrowers because the SAVE Plan provides benefits for direct loans that FFEL loan borrowers can't access. And, critically, the ASLC declarant alleges "borrowers are rapidly consolidating their loans away from FFELP loans held by ASLC and into Direct loans held by the federal government." Doc. 53-8 at 2 (Efird Decl. ¶ 6).

To be sure, plaintiffs' SEAA evidence presents some problems for this theory because it shows borrowers consolidating their FFEL loans without the SAVE Plan. The Alaska evidence overcomes these issues. Alaska's ASLC declaration, in contrast, explains the SAVE Plan's incentives for borrowers to consolidate and testifies that the SAVE Plan already is causing borrowers to consolidate. And defendants haven't rebutted this evidence with any evidence of their own. So, despite the SEAA evidence,[9] plaintiffs have shouldered their burden to show "that third parties will likely react in predictable ways to" the SAVE Plan. *Dep't of Comm. v. New York*, 139 S. Ct. 2551, 2566 (2019).

Second, plaintiffs have shown that, when borrowers consolidate their loans, the states' public instrumentalities—and therefore the states—will suffer harm in the form of reduced interest income. Plaintiffs' own evidence from SEAA casts doubt on this theory. SEAA's FFEL loan portfolio has decreased steadily overtime, but its interest income has both increased and decreased over the same period. Doc. 53-6 at 8 (Spate Decl. Ex. 2). Despite these issues, the

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[9] South Carolina has squeaked over the preponderance of the evidence standard thanks to Alaska's evidence and a lack of evidence from defendants. The court notes that the "need to satisfy the[] three [standing] requirements persists throughout the life of the lawsuit." *Wittman v. Personhuballah*, 578 U.S. 539, 543 (2016). Given its narrow victory here, the court questions whether South Carolina's evidence (at least the evidence plaintiffs have presented here) could survive if defendants submitted any contrary evidence at all.

Texas THECB and Alaska ASLC evidence suffices to confer standing to the three public instrumentalities.

The THECB declarant alleges that, if borrowers consolidate their FFEL loans into direct loans, "those consolidations will cause the State of Texas to lose revenue" because the "THECB will no longer collect interest on FFELP loans that have been consolidated, diminishing the value of its portfolio." Doc. 53-7 at 2 (Keyton Decl. ¶ 4). And the THECB's declarant further testifies the "SAVE Plan could cause pecuniary harm to the State of Texas and THECB measured by a reduction in revenue to the State's FFELP program." *Id.* (Keyton Decl. ¶ 5). Defendants argue that this declaration doesn't help plaintiffs shoulder their burden because the THECB "declarant skims over consolidation entirely"—that is, the declarant assumes that borrowers will consolidate their loans. Doc. 65 at 14. But, as just explained, plaintiffs have marshaled some evidence that some borrowers likely will consolidate their FFEL loans into direct loans. And Alaska's evidence also shows borrowers already are consolidating. Because it's likely that borrowers will consolidate, it's likely that Texas will suffer harm.

The same goes for Alaska's ASLC. The ASLC declarant testifies that "consolidations will cause Alaska to lose significant revenues." Doc. 53-8 at 3 (Efird Decl. ¶ 9). The declarant explains how consolidation will affect revenues. *Id.* And "ASLC estimates that the SAVE Plan will result in ASLC losing approximately $100,000 over just the next two years that it would otherwise collect as a FFELP holder." *Id.* (Efird Decl. ¶ 11). Plaintiffs thus have shouldered their current burden to allege a non-speculative, imminent, future injury to the public instrumentalities,[10] traceable to the SAVE Plan. And so, on the current record, South Carolina, Texas, and Alaska have standing.

[10] The court again notes that South Carolina has succeed in showing standing by the thinnest of margins.

Before the court leaves the public instrumentality analysis altogether, it responds to another of defendants' arguments.

4. Harm v. Benefit

Defendants argue plaintiffs haven't shown that these three instrumentalities likely will suffer an injury. They argue that holding "a FFEL loan in no way guarantees interest income" for the instrumentalities. Doc. 65 at 14. According to defendants, many "FFEL borrowers are on income-based repayment plans under which they pay $0 monthly. And a FFEL borrower is as susceptible to default as any other." *Id.* Defendants thus assert that the FFEL borrowers most likely to benefit from the SAVE Plan—and thus the borrowers most likely to consolidate—"would tend to be those borrowers at highest risk of delinquency and default[.]" *Id.* at 14–15. Delinquency and default, of course, would reduce the instrumentalities' revenue. *Id.* at 15. When a borrower consolidates an FFEL loan, however, the instrumentality avoids delinquency and default. Indeed, "when a FFEL loan is consolidated, its prior owner receives payment for the full value of the loan's principal and outstanding interest." *Id.* (first citing 20 U.S.C. § 1078-3(b)(1)(D), then citing 34 C.R.F. § 685.220(f)(1)). So, defendants argue, the SAVE Plan actually could *benefit* the instrumentalities.

Tying this to standing, defendants argue plaintiffs

> need to show that a potential loss of uncertain interest revenues to these entities is not outweighed by the certain profits of consolidation—including guaranteed payment and the elimination of rebate fees—to say nothing of the potential for reinvestment of the cash value of the loan at higher market interest rates.

Id. (citing 20 U.S.C. § 1107a(k), (l) (setting FFEL interest rates)). While the court recognizes the logic of defendants' bottom-line, economic argument, it can't carry the day for them.

Plaintiffs cite authority that "[o]nce injury is shown, no attempt is made to ask whether the injury is outweighed by benefits the plaintiffs has enjoyed from the relationship with the defendant." 13A Edward H. Cooper, *Federal Practice & Procedure*, Jurisdiction § 3531.4 (3d ed. 2023). District courts within our Circuit have cited a rule from a Second Circuit case: "'the fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing.'" *Budicak, Inc. v. Lansing Trade Grp., LLC*, 452 F. Supp. 3d 1029, 1044 n.36 (D. Kan. 2020) (quoting *Ross v. Bank of Am., N.A. (USA)*, 524 F.3d 217, 222 (2d Cir. 2008)); *Plant Oil Powered Diesel Fuel Sys., Inc. v. ExxonMobil Corp.*, 801 F. Supp. 2d 1163, 1179 (D.N.M. 2011) (same).

Plaintiffs' counterargument misses the point, defendants contend. Defendants' argument doesn't weigh harm against benefit. Instead, it asserts that there's simply no injury to begin with because the SAVE Plan will make money for the states' public instrumentalities. The problem with defendants' rejoinder is a basic one: they haven't adduced any evidence to support their theory. More problematic yet, plaintiffs have marshaled evidence nullifying the theory.

Alaska's "ASLC estimates that the SAVE Plan will result in ASLC losing approximately $100,000 over just the next two years that it would otherwise collect as a FFELP holder." Doc. 53-8 at 3 (Efird Decl. ¶ 11). Defendants may disagree with this calculation, but they don't proffer any evidence or accounting of their own. The court lacks any basis to find that this $100,000 doesn't account for the potential benefits of the SAVE Plan. Similarly, the Texas declarant alleges that, if borrowers consolidate their FFEL loans into direct loans, "those consolidations will cause the State of Texas to lose revenue" because the "THECB will no longer collect interest on FFELP loans that have been consolidated, diminishing the value of its portfolio." Doc. 53-7 at 2 (Keyton Decl. ¶ 4). Without any evidence to the contrary, the court accredits the declarant's testimony that the SAVE Plan will cause THECB, and therefore Texas, to lose interest revenue. Again, there's no reason to believe that the THECB declarant failed to account for the SAVE Plan's potential benefits.

The court thus rejects defendants' argument that plaintiffs have failed to show an injury because the SAVE Plan might benefit the public instrumentalities. As a result, South Carolina, Texas, and Alaska have suffered an injury in fact, fairly traceable to the SAVE Plan. The court denies defendants' Motion to Dismiss South Carolina, Texas, and Alaska.

But what about the other states? If some plaintiff states have standing, do they all have standing?

5. "Standing for One is Standing for All"

When the court asked this question at the hearing, plaintiffs urged the court to answer this question yes. They directed the court to *Biden v. Nebraska*, which held: "If at least one plaintiff has standing, the suit may proceed." 143 S. Ct. at 2365 (citing *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)). And plaintiffs all bring the same legal claims. Plaintiffs thus argue—correctly—that this suit will proceed. And they ask the court to end its standing inquiry there: conclude South Carolina, Texas and Alaska have standing and allow the suit to proceed with the other states tagging along. The court declines this invitation.

Our Circuit, albeit in an unpublished opinion, has rejected the idea that "standing for one is" necessarily "standing for all." *Thiebaut v. Colo. Springs Utils.*, 455 F. App'x 795, 802 (10th Cir. 2011). The Supreme Court, as shown in *Biden v. Nebraska*, doesn't *require* district courts to consider the standing of all plaintiffs. 143 S. Ct. at 2365; *see also Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) ("Only one of the petitioners needs to have standing to permit [the Court] to consider the petition for review."). The court realizes that moving on after deciding that at least one plaintiff has standing may "encourage[] judicial efficiency by permitting a court to proceed to the merits of a case involving multiple plaintiffs seeking identical relief when it is clear that at least one plaintiff has standing." *Thiebaut*, 455 F. App'x at 802. "But . . . nothing in the cases addressing this principle suggests that a court *must* permit a plaintiff that *lacks* standing to remain in a case whenever it determines that a co-plaintiff has standing." *Id.* (emphases in original); *see also M.M.V. v. Garland*, 1 F.4th 1100, 1110–11 (D.C. Cir. 2021) ("The [*Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*] line of cases stands only for the proposition that a court 'need not' decide the standing of each plaintiff seeking the same relief." (quoting *Clinton v. City of N.Y.*, 524 U.S. 417, 431 n.19 (1998))).

This alternative approach explains why the court "retain[s] discretion to analyze the standing of all plaintiffs in a case and to dismiss those plaintiffs that lack standing." *Thiebaut*, 455 F. App'x at 802 (first citing *Utah Ass'n of Cntys. v. Bush*, 455 F.3d 1094, 1098 (10th Cir. 2006) (noting district court concluded one plaintiff had standing, so court declined to address other plaintiff's standing in interest of judicial economy); then citing *Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1451–53 (10th Cir. 1994) (analyzing individual plaintiffs' standing separately and dismissing some plaintiffs for lack of standing even though other plaintiffs had standing); and then citing *We Are Am./Somos Am. v. Maricopa Cnty. Bd. of Supervisors*, 809 F. Supp. 2d 1084, 1091 (D. Ariz. 2011) ("Th[e] general rule [that only one plaintiff needs standing] does not strictly prohibit a district court, in a multiple plaintiff case such as this, from considering the standing of the other plaintiffs even if it finds that one plaintiff has standing.")); *see also M.M.V.*, 1 F.4th at 1111 (concluding the general rule—that court needn't decide standing of each plaintiff seeking same relief—"does not *prohibit* the court from paring down a case by eliminating plaintiffs who lack standing or otherwise fail to meet the governing jurisdictional requirements" (emphasis in original)).

Here, the court, in its discretion, concludes that paring down the case and dismissing the plaintiffs without standing aligns with the charter purposes recognized in Fed. R. Civ. P. 1. At bottom, plaintiffs contend that uninjured plaintiffs can borrow another plaintiff's injury to satisfy Article III's standing requirement. But that's not the way the court would approach any kind of lawsuit—especially a complicated one. Narrowing the case to its viable claims and viable parties often narrows the burden of adjudicating the relevant issues, no matter whether the case is an auto accident or antitrust case.

The court also believes that winnowing the case is consistent with the holding in *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021). There, the Court reversed a district court's decision (as affirmed by the Ninth Circuit) certifying a class that included some 6,300 uninjured class members. *Id.* at 421–22, 427–28. The Court rejected plaintiffs' argument that Congress, by adopting the Fair Credit Reporting Act, had conferred a right to recover on uninjured class members. *Id.* at 434–35. Justice Kavanaugh's opinion crafted a hypothetical to explain why:

> Suppose first that a Maine citizen's land is polluted by a nearby factory. She sues the company, alleging that it violated a federal environmental law and damaged her property. Suppose also that a second plaintiff in Hawaii files a federal lawsuit alleging that the same company in Maine violated that same environmental law by polluting land in Maine. The violation did not personally harm the plaintiff in Hawaii.
>
> Even if Congress affords both hypothetical plaintiffs a cause of action (with statutory damages available) to sue over the defendant's legal violation, Article III standing doctrine sharply distinguishes between those two scenarios. The first lawsuit may of course proceed in federal court because the plaintiff has suffered concrete harm to her property. But the second lawsuit may not proceed because that plaintiff has not suffered any physical, monetary, or cognizable intangible harm traditionally recognized as providing a basis for a lawsuit in American courts. An uninjured plaintiff who sues in those circumstances is, by definition, not seeking to remedy any harm to herself but instead is merely seeking to ensure a defendant's "compliance with regulatory law" (and, of course, to obtain some money via the statutory damages). Those are not grounds for Article III standing.

Id. at 427–28 (internal citations omitted); *see also id.* at 429 ("A regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority."). If all members of a class must have standing, then, of course, all plaintiffs here must have standing. And if Article III bars a subset of plaintiffs—even if *all* plaintiffs have the same claim—then that subset shouldn't piggyback on the injured plaintiffs' standing.

So, the court, in its discretion, continues its standing analysis. The court evaluates plaintiffs' argument that all 11 plaintiffs have standing based on assertions that (1) the SAVE Plan will decrease some of these states' income tax revenue and (2) the SAVE Plan harms these states' ability to recruit and retain talent.

If plaintiffs demonstrate that the other eight plaintiffs (or some of them) have standing on either one of these alternative standing theories, they will remain as plaintiffs. If any plaintiff fails to do so, the court will dismiss that plaintiff. This approach comports with Fed. R. Civ. P. 1, and it's consistent with the court's approach to any other lawsuit.

B. Income Tax Revenue

Plaintiffs argue they have standing because the Final Rule will cause nine of the 11 plaintiff states[11] to suffer a loss of state tax revenue. To flesh out this theory, the court briefly must explain a few things about these states' income tax structure.

These nine states tie their definition of taxable income to the federal definition of income or adjusted gross income. Doc. 57 at 17 (1st Am. Compl. ¶ 90). And the federal tax code defines taxable income to include student loan forgiveness under income-driven repayment

[11] These nine states are Kansas, Alabama, Idaho, Iowa, Louisiana, Montana, Nebraska, South Carolina, and Utah. Doc. 57 at 17 (1st Am. Compl. ¶ 87). The two other plaintiffs have no state income tax. The court already has concluded South Carolina, for now, has standing, but it includes South Carolina in the tax revenue analysis nonetheless.

plans. Simply put, student debt forgiveness is taxable income and, therefore, revenue for these plaintiff states. But the American Rescue Plan Act of 2021 provides that all student loan forgiveness won't "count toward the federal definition of taxable income until December 31, 2025." Doc. 57 at 17 (1st Am. Compl. ¶ 89). So, the states can't tax student loan debt forgiveness income until 2026.

According to plaintiffs, the Final Rule affects plaintiffs' tax revenues because it's timing that matters. Plaintiffs allege the Final Rule "will reduce income tax revenue by decreasing the amount of outstanding student loan debt." Doc. 57 at 18 (1st Am. Compl. ¶ 96). This is so, they say, because the "Final Rule accelerates the timeline for cancelation on income-driven repayment plans to as low as 10 years for certain loan balances." *Id.* (1st Am. Compl. ¶ 92). Under the old version of the rule, the federal government wouldn't forgive these loans for 20 to 25 years. So, plaintiffs allege, "but for the Final Rule, significant amounts of federal loan cancellation would occur *after* December 31, 2025" for residents of the relevant states. *Id.* (1st Am. Compl. ¶ 95). In this but-for world, the relevant states would have more student loan forgiveness income to tax. *Id.* The challenged Final Rule, in contrast, "shift[s] forward some debt forgiveness that would otherwise occur in a period in which it would be taxable income . . . into a period where it is not taxable[.]" *Id.* (1st Am. Compl. ¶ 96). In sum, plaintiffs argue the Final Rule injures them directly because nontaxable forgiveness in 2024 and 2025 means less taxable forgiveness in 2026.

In response, defendants argue that the Final Rule's effects on state tax revenue are merely incidental. And, according to defendants, a "federal policy's incidental effects on state tax revenues are not judicially cognizable injuries." Doc. 46 at 24. In support of this argument, defendants invoke *Florida v. Mellon*, 273 U.S. 12 (1927).

1. *Florida v. Mellon*

In *Mellon*, Florida sought to invoke the Supreme Court's original jurisdiction in a suit against officers of the United States—specifically, the Secretary of the Treasury. *Id.* at 15. Florida sought to challenge a federal inheritance tax. *Id.* Florida had no inheritance tax. *Id.* So, Florida alleged the federal law directly injured it "because the imposition of the federal tax, in the absence of a state tax which may be credited, w[ould] cause the withdrawal of property from the state" and diminish Florida's tax base. *Id.* at 16. The Supreme Court rejected Florida's argument, concluding this "anticipated result [was] purely speculative, and, at most, only remote and indirect." *Id.* at 18. The Court explained, even if "as alleged, the supposed withdrawal of property will diminish the revenues of the state, [it's not certain] that the deficiency cannot readily be made up by an increased rate of taxation." *Id.* The Court thus concluded Florida had failed to demonstrate a direct injury and declined to exercise its original jurisdiction. *Id.*

Plaintiffs argue that *Mellon* doesn't apply here. According to plaintiffs, they have alleged a more direct theory of harm because, in *Mellon*, Florida's standing theory "relied on an unproven assumption about the actions of independent third parties[.]" Doc. 50 at 12. Plaintiffs argue that they allege a more direct harm here because "it is the Final Rule alone that will reduce taxable income without any additional action [by] any third party." *Id.* At the hearing, plaintiffs added that *Mellon* only speaks to indirect effects of a federal policy, whereas plaintiffs have shown the Final Rule to have a direct effect.

Unfortunately for plaintiffs, in general, reduced state tax revenue doesn't qualify as an injury in fact sufficient to confer standing on a state. Our Circuit has ruled that the "'unavoidable economic repercussions of virtually all federal policies, and the nature of the federal union as embodying a division of national and state powers, suggest to us that impairment of state tax revenues should not, in general, be recognized as sufficient injury-in-fact to support state standing.'" *Wyoming v. U.S. Dep't of Interior*, 674 F.3d 1220, 1234 (10th Cir. 2012) (quoting *Pennsylvania v. Kleppe*, 533 F.2d 668, 672 (D.C. Cir. 1976)). Fortunately, our Circuit also has explained when reduced tax revenue *does* confer standing to sue on a state. A "state must show a 'fairly direct link between the state's status as a recipient of revenues and the legislative or administrative action being challenged.'" *Id.* (quoting *Kleppe*, 533 F.2d at 672).

The requisite "fairly direct link" is missing here. Plaintiffs allege the Final Rule will reduce their tax revenue because it shifts loan forgiveness forward in time. That is, the Final Rule will forgive student loan debt in 2024 and 2025, when plaintiffs can't tax it. So, plaintiffs allege, "but for the Final Rule, significant amounts of federal loan cancellation would occur *after* December 31, 2025" and this "would result in taxable income being recognized from the loan cancelation and thus payment of income taxes to" the states. Doc. 57 at 18 (1st Am. Compl. ¶ 95). Put another way, absent the final rule, student loan debt would be forgiven after December 31, 2025, permitting the states to tax the forgiven loans as income. This kind of harm is too distant from the SAVE Plan to justify standing for the states here. The federal policy creates incentives, borrowers react to those incentives and consolidate their loans, and borrowers would've consolidated their loans later, when plaintiffs could tax it, but the American Rescue Plan prevents this. Defendants correctly call the states' decreased tax revenue an "incidental" harm. The SAVE Plan doesn't target plaintiffs or their tax policies. *See Arizona v. Biden*, 40 F.4th 375, 383 (6th Cir. 2022) (explaining that federal policy did "not directly injure the States. It does not regulate the States by telling them what they can or cannot do in their jurisdiction."). This distant, incidental harm doesn't persuade the court to deviate from our Circuit's general rule that reduced state tax revenue doesn't qualify as an injury in fact.

And, even if this harm did qualify as an injury, plaintiffs' tax injury argument has a traceability problem. The SAVE Plan didn't cause plaintiffs' injuries—plaintiffs' own tax policy caused them.

2. Self-Inflicted

Defendants argue that plaintiffs' alleged harm is self-inflicted because it arises from plaintiffs' "own choice to tie their tax laws to the Internal Revenue Code." Doc. 46 at 23. To support this theory, defendants cite *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976).

In *Pennsylvania v. New Jersey*, Pennsylvania sought to challenge a New Jersey tax that taxed the New Jersey-derived income earned by nonresidents. *Id.* at 662–63. Pennsylvania reimbursed its residents for taxes levied by other states. *Id.* at 663. Pennsylvania asserted the law injured Pennsylvania because it "diverted" taxes from Pennsylvania's treasury. *Id.* The Supreme Court declined to exercise its original jurisdiction over this state v. state dispute, concluding Pennsylvania had failed to demonstrate "that the injury for which it s[ought] redress was directly caused by the action of another State." *Id.*

The Court explained that "injuries to the plaintiffs' fiscs were self-inflicted, resulting from decisions by their respective legislatures." *Id.* at 664. To put a finer point on it, the Court wrote, "nothing prevents Pennsylvania from withdrawing that credit for taxes paid to New Jersey." *Id.* "No state can be heard to complain about damage inflicted by its own hand." *Id.* Defendants urge this court to apply this case's reasoning here because these nine states, like Pennsylvania, have made their own decisions about their tax codes. So any taxation issues are ones caused by the states and the states alone.

Plaintiffs respond that *Pennsylvania* is inapposite; it involved two states suing each other and invoking the Supreme Court's original jurisdiction. Plaintiffs argue that "Supreme Court original jurisdiction is reserved for 'a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign.'" Doc. 50 at 11 (quoting *Texas v. New Mexico*, 462 U.S. 554, 570 n.18 (1983)). In other words, according to plaintiffs, the bar for Article III standing is much lower than the bar for invoking the Supreme Court's original jurisdiction. Plaintiffs are wrong.

To be sure, *Pennsylvania* is a case in an unusual procedural posture. Nonetheless, *Pennsylvania* addressed financial injury to a plaintiff state. The Court held, quite simply, that the defendant state hadn't inflicted any injury upon the plaintiff state because plaintiff's injury was self-inflicted. *Pennsylvania*, 426 U.S. at 664. The injury to a state, of course, is an explicit component of the standing inquiry.

Plaintiffs also argue that, though defendants assert they have a choice, they really have no choice at all. Plaintiffs point out that "[g]iven economic and administrative realities," 36 states tie their definition of taxable income to a federal definition. Doc. 50 at 10. Plaintiffs frame their dilemma this way: under defendants' approach, plaintiffs must change their state tax laws to recapture the lost revenue, so the Final Rule will "depriv[e] the States of their sovereign choice to set their own tax policy." *Id.* And "the States will suffer financial injury under the Rule no matter what putative 'choice' they make." *Id.* The court finds this argument equally unpersuasive.

This argument stands federalism on its head. Nothing requires plaintiffs to use the federal definitions of taxable income. The SAVE Plan doesn't coerce or cajole plaintiffs into changing their tax code. Plaintiffs have made their choice to tie their definition of income to the federal definition and, if they don't like that definition, they're fully free to change it. Perhaps a change would produce some administrative costs, but those costs would trace to the state legislatures' decisions, not the SAVE Plan. The Final Rule doesn't pose any threat to a state's sovereign power to decide its own tax law. *See Garrison v. U.S. Dep't of Educ.*, 636 F. Supp. 3d 935, 942 (S.D. Ind. 2022) (dismissing claim for lack of standing where individual plaintiffs challenged HEROES Act loan forgiveness, arguing loan forgiveness would increase his state tax bill, because the "Department of Education does not give silent approval to Indiana's tax code; those decisions are entirely within the discretion of the Indiana legislature" and concluding plaintiffs' injuries were traceable only to state tax law decisions—not federal student loan programs).

The court thus rejects plaintiffs' standing theory based on reduced income tax revenue. Next, the court takes up plaintiffs' final standing theory.

C. Recruiting and Retention Competitive Harm

Plaintiffs proffer a second theory of harm: a competitive disadvantage in recruiting and retaining talent. *See* Doc. 57 at 20 (1st Am. Compl. ¶ 103). This theory requires an understanding of a different kind of student loan debt forgiveness: The Public Service Loan Forgiveness (PSLF) program. Under the PSLF, borrowers are eligible for forgiveness of their direct loans once they've made 120 qualifying monthly payments under a qualifying plan while—and this is the critical part—working full time for an eligible employer in public service. The incentive behind this program is evident: work in public service for ten years and have your remaining student loan debt forgiven.

Returning to the Final Rule, plaintiffs allege that they rely on the PSLF program "to attract and maintain talent" because state "agencies typically cannot pay as much to recruit and retain talent as private sector employees." *Id.* Plaintiffs allege three states rely on the PSLF program to attract employees: the Kansas Office of Attorney General and other Kansas agencies who use the PSLF to attract legal talent; South Carolina relies on the PSLF program to recruit and retain teachers; and Alaska's Attorney General's office relies on the PSLF program to recruit and retain employees. *Id.* at 20–21 (1st Am. Compl. ¶¶ 104–07). According to plaintiffs, "the more debt that can be forgiven under the PSLF Program, the more powerful of an inducement it is." *Id.* at 21 (1st Am. Compl. ¶ 108). But, because the Final Rule will reduce "the amount of student debt held by current and potential employees . . . , the relative attractiveness of public employment for the Plaintiff States decreases." *Id.*

Plaintiffs' recruitment-based standing theory relies, in their words, on "basic economic logic." Doc. 50 at 13. Plaintiffs argue that as "a matter of elementary economics, public service employment will no longer be as attractive an option to those with a lower amount of debt because of the direct effects of the Final Rule." Doc. 50 at 13–14. Plaintiffs proffer the following example:

> [Imagine] a current employee who had an original loan balance of $12,000 and has been in public service for 8 years. Without the Final Rule, he would have a strong incentive to stay in public service for 2 more years. However, because of the Final Rule, he would get his debt canceled in the same amount of time regardless of where he's employed.

Id. at 14. In sum, plaintiffs argue that the Final Rule reduces the attractiveness of the PSLF program, and plaintiffs expect their current and prospective employees to respond to these incentives, making it harder for plaintiffs to recruit and retain employees. So, plaintiffs reason, the Final Rule will injure plaintiffs.

Not so, defendants contend. Defendants argue that plaintiffs' theory has a traceability problem. Defendants point out that this theory of injury is an indirect one—it relies on the actions of a third party. This means it's harder for plaintiffs to show causation by such an indirect injury. "That an injury is indirect does not necessarily defeat standing, 'but it may make it substantially more difficult to establish that, in fact, the asserted injury was the consequence of the defendants' actions.'" *Habecker*, 518 F.3d at 1225 (brackets and ellipsis omitted) (quoting *Warth v. Seldin*, 422 U.S. 490, 504–05 (1975)). Where "'the independent action of some third party not before the court'—rather than that of the defendant—was the direct cause of the plaintiff's harm, causation may be lacking." *Id.* (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40–41 (1976)).

Defendants are right. Recently, the Sixth Circuit explicitly rejected this very theory.

1. *Mackinac Center for Public Policy v. Cardona*

In *Mackinac Center for Public Policy v. Cardona*, the Sixth Circuit addressed a challenge to action taken by the Department of Education affecting student loans. 102 F.4th 343, 2024 WL 2237667 (6th Cir. May 17, 2024). In *Mackinac*, the Department of Education sought to address problems with administration of the PSLF and income driven repayment (IDR) programs. *Id.* at *2. Loan administrators allegedly steered "borrowers into long-term periods of forbearance in violation of Department of Education rules[.]" *Id.* Under the PSLF and IDR programs at issue, forbearance periods don't count toward the 120 month payments. *Id.* But, given the problems administering the programs, the Department of Education decided to count certain forbearance periods as payments. *Id.* As a result, about "40,000 borrowers would be eligible for immediate discharge of debt under the PSLF program, and several thousand would be eligible for forgiveness under IDR plans." *Id.*

Plaintiffs sued to enjoin the policies counting forbearance periods toward the payment requirement. Those plaintiffs were "nonprofit, tax-exempt organizations that [were] qualified public service employers under the PSLF program." *Id.* at *3. Plaintiffs alleged "that the action would keep them from realizing the full statutory benefit to which they are entitled under PSLF and make it more difficult for them to recruit and retain employees." *Id.* (internal quotation marks omitted). Plaintiffs invoked competitor standing, which "recognizes that plaintiffs suffer an economic injury when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition against them." *Id.* at *4 (citation and internal quotation marks omitted). A party invoking competitor standing must show an imminent injury from increased competition. *Id.* Plaintiffs argued the Department's forbearance adjustment increased their competition for employees because it reduced plaintiffs' competitive benefit—*i.e.*, reduced the financial incentive for student loan borrowers to seek and remain in public service jobs. *Id.* at *5. The district court, sua sponte, dismissed plaintiffs' complaint for lack of standing. *Id.* The Sixth Circuit affirmed. *Id.*

The Sixth Circuit concluded plaintiffs had "failed to allege specific, concrete facts to show that the adjustment has caused or will cause them competitive injury." *Id.* (citation and internal quotation marks omitted). The Sixth Circuit faulted plaintiffs for their complaint's broad, conclusory allegations because they had "not alleged any facts showing how the adjustment affects their ability to recruit and retain college-educated employees." *Id.* at *6 (internal quotation marks omitted). Plaintiffs had "not identified any current employee that ha[d] received credit under the adjustment, nor d[id] they claim that they expect[ed] to imminently hire any employee who ha[d] received such credit." *Id.* Nor did plaintiffs allege "that any employees have stopped working for them (or stated an intention to do so) based on the adjustment." *Id.*

The Sixth Circuit even assumed the Department's adjustment would affect plaintiffs' ability to fill vacancies. Even with that benefit, "several factors beyond the adjustment could have a similar impact." *Id.* at *8. An "employee may choose to work for a different public service employer to satisfy part of their 120-month obligation of any number of reasons unrelated to the adjustment, such as pay, location, work-life balance, or any combination of factors." *Id.* The *Mackinac* plaintiffs thus failed to establish a competitive injury because they had failed to allege "how many of Plaintiffs' employees will be impacted by the adjustment and how many individuals may make employment decisions based on the adjustment." *Id.* The

Sixth Circuit summarized plaintiffs' problem this way: "At bottom, how the adjustment impacts Plaintiffs is up to individuals who are not parties to this lawsuit."

So too here. Plaintiffs rely, in their own words, on "elementary economics." Doc. 50 at 13. They theorize that their current and future employees will respond to the incentives created by the Final Rule and reject public employment. This will cause plaintiffs a "competitive harm." *Id.* And they have provided declarations that the states use public loan forgiveness as a recruitment tool. But these are the very kind of broad, conclusory allegations that the Sixth Circuit flunked in *Mackinac*. As there, plaintiffs here "have not identified any current employee that has received" relief under the SAVE Plan. *Mackinac*, 2024 WL 2237667, at *6. Nor have they alleged "that they expect to imminently hire any employee who" is SAVE-Plan-eligible. *Id.* And "they have not alleged that any employees have stopped working for them (or stated an intent to do so) based on" the SAVE Plan. *Id.* So, like *Mackinac*, plaintiffs' hypotheticals insufficiently plead an imminent injury in fact. *Id.*; *see also id.* at *8 ("Plaintiffs' allegations regarding supply and demand and the impact of financial incentive on third-party student-loan debtors are wholly speculative.").

Separately, plaintiffs have a third party problem. Recall that "where a causal relation between injury and challenged action depends upon the decision of an independent third party . . . , standing is not precluded, but it is ordinarily substantially more difficult to establish." *California v. Texas*, 593 U.S. 659, 675 (2021) (citation and internal quotation marks omitted). To meet this "more difficult" standard, "the plaintiff must show at least that third parties will likely react in predictable ways." *Id.* (citation and internal quotation marks omitted). It's the "likely" part that causes plaintiffs' problems here.

Plaintiffs' standing allegations provide no basis for the court to find that job seekers and employees likely will avoid public service employment because of the SAVE Plan. As defendants correctly point out, "career-related decisions are complicated, and PSLF is not the sole incentive in this economic picture." Doc. 65 at 11. The Sixth Circuit mentioned a few of these other incentives: "pay, location, work-life balance, or any combination of factors." *Mackinac*, 2024 WL 2237667, at *8. "At bottom, how the [SAVE Plan] impacts Plaintiffs is up to individuals who are not parties to this lawsuit." *Id.* Given all the factors that a person considers when making an employment decision, plaintiffs have failed to allege enough facts for the court to conclude that potential and current employments "will likely react in predictable ways." *Dep't of Comm.*, 139 S. Ct. at 2566.

The court must abide by the Supreme Court's "usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper*, 568 U.S. at 414. Plaintiffs have failed to shoulder their burden to allege a competitive harm. No court ever has embraced this competitive harm theory to hiring/retention theory. Our court declines to become the first.

In a final bid to avoid this result, plaintiffs seek shelter from *Massachusetts v. EPA*, arguing they are entitled to "special solicitude" in the standing analysis.

2. *Massachusetts v. EPA*

Plaintiffs rely on the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497, to support their competitive harm theory of standing. In *Massachusetts v. EPA*, a group of states sued the EPA for failing to regulate certain greenhouse gases under the Clean Air Act. *Id.* at 505. The Court held Massachusetts had standing based on a risk that global warming would raise sea levels and thereby harm Massachusetts' coastal lands. *Id.* at 526. The Court explained, "according to petitioners' uncontested affidavits . . . the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real." *Id.*

According to plaintiffs, *Massachusetts v. EPA* "relaxed" the standing requirements for states suing the federal government. Doc. 50 at 15. Relevant here, the *Massachusetts v. EPA* Court noted "that States are not normal litigants for the purposes of invoking federal jurisdiction." 549 U.S. at 518. The Court emphasized "Massachusetts' well-founded desire to preserve its sovereign territory[.]" *Id.* at 519. And the Court stressed that the states were exercising a procedural right. *Id.* at 520 (citing 42 U.S.C. § 7607(b)(1)). "Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests," the Court held Massachusetts was "entitled to special solicitude in our standing analysis." *Id.* Based on *Massachusetts v. EPA*, plaintiffs argue for a "double relaxation of Article III standing requirements"—one for special solicitude and one for procedural rights. Doc. 50 at 15.

Massachusetts v. EPA doesn't provide plaintiffs the safe harbor they find in the decision. Our Circuit has lamented "the lack of guidance on how lower courts are supposed to apply the special solicitude doctrine to standing questions." *Wyoming*, 674 F.3d at 1238. Despite this absence of guidance, the Tenth Circuit has held, "'special solicitude does *not* eliminate the state petitioner's obligation to establish a concrete injury, as Justice Stevens' [*Massachusetts*] opinion amply indicates.'" *Id.* (emphasis in original) (quoting *Del. Dep't of Nat. Res. & Envt'l Control v. F.E.R.C.*, 558 F.3d 575, 579 n.6 (D.C. Cir. 2009)). As our Circuit has explained, in *Massachusetts v. EPA*, the state of "Massachusetts proved that it had an 'actual' and 'imminent' injury." But plaintiffs lack such evidence here. Their competitive harm theory fails to plead an injury in fact, as shown by *Mackinac*. Their theory of future harm simply is too speculative to qualify as an imminent injury.

The court also doubts that *Massachusetts v. EPA* even applies here. At the hearing, plaintiffs argued that they are asserting quasi-sovereign interests, which brings them under the *Massachusetts v. EPA* umbrella. "A quasi-sovereign interest generally concerns either the physical and economic health of a State's residents or the State's 'interest in not being discriminatorily denied its rightful status within the federal system.'" *Navajo Nation v. Wells Fargo & Co.*, 344 F. Supp. 3d 1292, 1311 (D.N.M. 2018) (*Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982)). There's no "exhaustive formal definition nor a definitive list of qualifying interests[.]" *Snapp*, 458 U.S. at 607. "Examples of quasi-sovereign interests include abating a public nuisance, preventing environmental pollution, or avoiding economic damage of such severity and pervasiveness that it causes injury not only to individual citizens, but to the welfare, prosperity, and economic standing of the State as a whole." *Navajo Nation*, 344 F. Supp. 3d at 1311 (citing *Snapp*, 458 U.S. at 603–06).

Plaintiffs' ability to hire and retain an undefined number of employees doesn't qualify as the kind of quasi-sovereign interest that this caselaw imagines. Plaintiffs haven't directed the court to any authority holding that a state's ability to hire or retain employees in public service jobs qualifies as a quasi-sovereign interest. The court concludes plaintiffs aren't entitled to special solicitude. *See also Arizona v. Biden*, 40 F.4th at 386 (declining to apply *Massachusetts v. EPA* where states did "not protest regulation of them as States of preemption of local lawmaking authority[,] . . . [nor] any threatened incursions on their property or territory[,]" and case did "not involve the classic sovereign case, public nuisances in which a State invokes a desire to safeguard its domain and its health, comfort and welfare" (citation and internal quotation marks omitted)).

3. Procedural Rights

Plaintiffs also ask for a relaxed standing standard again because, they argue, they're asserting procedural rights. Doc. 50 at 15. They take this standard from *Lujan*, where Justice Scalia called procedural rights "special." 504 U.S. at 573 n.7. Justice Scalia explained, "The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Id.* He gave the following example:

> [O]ne living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

Id. So, plaintiffs argue, they "need not demonstrate that, if the Department [of Education] conducted a defensible cost estimate or provided a sufficient notice period, the result would be any different." Doc. 50 at 15.

But this argument can't solve plaintiffs' problem with their standing theory. Plaintiffs' problem is that their competitive harm theory is speculative and not traceable to the SAVE Plan because it relies on complicated employment decisions allegedly faced by an unknown number of third parties. So, even if the court relaxes standing requirements for plaintiffs because they assert procedural rights, they still haven't met their standing obligation. The court rejects this final standing theory.

IV. Conclusion

In sum, the court grants defendants' Motion to Dismiss (Doc. 45) in part and denies it in part. Plaintiffs South Carolina, Texas, and Alaska have established, for now, standing based on harm to their public instrumentalities. The court denies defendants' dismissal motion as it applies to the claims asserted by those three plaintiffs. In contrast, plaintiffs Kansas, Alabama, Idaho, Iowa, Louisiana, Montana, Nebraska, and Utah haven't shouldered their burden to show that they have standing. The court lacks subject matter jurisdiction over claims these eight plaintiffs wish to assert. It dismisses them from this case.

IT IS THEREFORE ORDERED BY THE COURT THAT defendants' Motion to Dismiss (Doc. 45) is granted in part and denied in part. Exercising discretion conferred by our Circuit, the court, consistent with Fed. R. Civ. P. 1, grants defendants' Motion to Dismiss as it applies to Kansas, Alabama, Idaho, Iowa, Louisiana, Montana, Nebraska, and Utah. The court dismisses without prejudice all claims made by these eight states and directs the Clerk to terminate them as parties to this action.

IT IS SO ORDERED.

Dated this 7th day of June, 2024, at Kansas City, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge

DECLARATION OF SARAH KEYTON

I, Sarah Keyton, declare:

1. I am over the age of 18, of sound mind, competent to testify, and have personal knowledge of the facts stated herein, except where stated on information and belief.

2. I am employed as the Deputy Commissioner for Administration at the Texas Higher Education Coordinating Board (THECB). I have been employed by THECB for two years. As part of my role, I have oversight responsibilities for the agency division that administers student financial aid funds and the agency finance division.

   THECB is an agency of the State of Texas and was created by statute. Tex. Educ. Code. § 61.021. THECB is run by a nine-member governing board, each of whom are appointed by the Governor of Texas with the advice and consent of the Senate of Texas.

3. As of May 1, 2024, THECB owns over $1,1295,236 in Federal Family Education Loan Program ("FFELP") loans. Through these loans, THECB collected $114,479 in interest in 2023.

4. To the extent that federal policy results in borrowers consolidating their loans out of FFELP into the Direct Loan Program, those consolidations will cause the State of Texas to lose revenue. Upon consolidation, the federal government compensates the holder (THECB) only for principal and accrued interest. Thus, such consolidations will result in reduced revenue THECB and therefore the State of Texas. The THECB would no longer collect interest on FFELP loans that have been consolidated, diminishing the value of its portfolio.

5. The SAVE Plan could cause pecuniary harm to the State of Texas and THECB measured by a reduction in revenue to the State's FFELP program.

   I declare under penalty of perjury under laws of the United States, 28 U.S.C. § 1746, that the foregoing statements are true and correct.

   Signed this 10th day of May 2024.

Sarah Keyton

Declaration of Sana Efird in Support of Plaintiffs' Motion for a Preliminary Injunction and in Opposition to Defendants' Motion to Dismiss

1. My name is Sana Efird. I am over 21 years of age, of sound mind, and competent to testify. Unless otherwise stated, I have personal knowledge of the facts stated in this declaration.

2. From December 2021 to the present, I have been an employee of Alaska Commission on Postsecondary Education and the Alaska Student Loan Corporation (ASLC).

3. ASLC is a public corporation and enterprise instrumentality of the State of Alaska that was created by statute. ALASKA STAT. § 14.42.100. It is run by a Board of Directors, each of whom is appointed by the Governor of Alaska. ALASKA STAT. § 14.42.120. ASLC has the authority to adopt regulations to carry out its mission, which carry the force of law. ALASKA STAT. § 14.42.200.

4. Since 2012, ASLC has administered $113.0 million in funding for college scholarships, and since 2005, ASLC has administered $72.9 million in funding for college needs-based grants in the State of Alaska.

5. As of March 2024, ASLC owns over $16.8 million in Federal Family Education Loan Program (FFELP) loans. Through these loans, ASLC collects $1.9 million in interest and other FFELP portfolio income annually.

6. The SAVE Plan entices borrowers to consolidate their loans away from FFELP and into the Direct Loan Program (DLP), comprising loans held by the federal government. Three features of the SAVE Plan are enticing borrowers to consolidate their loans away from FFELP and into DLP. First, the SAVE Plan offers benefits—including payments being capped at 5% of the borrower's discretionary income, residual interest being waived each month that the borrower makes a qualifying payment, and full forgiveness being offered in as few as ten years—to only borrowers with loans held by the federal government. Because these benefits are not available to borrowers with commercially-held FFELP loans, borrowers are rapidly consolidating their loans away from FFELP loans held by ASLC and into Direct Loans held by the federal government.

7. Second, the SAVE Plan is refusing to treat consolidated loans as new loans,

meaning borrowers maintain their accrued repayment history when they consolidate. Under all prior regimes, borrowers' repayment clocks would restart, providing a disincentive to consolidation.

8. Third, the federal government is actively advertising and encouraging borrowers to consolidate their loans into federal loans, including borrowers ineligible for consolidation into the direct loan program such as borrowers in good standing who only possess a FFELP consolidated loan. Given this three-part scheme, the federal government is strongly, and likely unlawfully, incentivizing borrowers to consolidate their loans away from FFELP and into loans held by the federal government.

9. These consolidations will cause Alaska to lose significant revenues. Upon consolidation, the federal government compensates the holder (ASLC) only for principal and accrued interest. Thus, the enticed consolidation has already harmed and will continue to harm ASLC, as ASLC no longer collects interest on FFELP loans that have been consolidated, diminishing the value of its portfolio.

10. Prior to the announcement of the SAVE Plan, the paydown rate for ASLC's FFELP portfolio for fiscal year 2023 was 27%. After the announcement of the SAVE Plan that became effective July 2023, that annualized percentage for fiscal year 2024 is 21%.

11. In total, ASLC estimates that the SAVE Plan will result in ASLC losing approximately $100,000 over just the next two years that it would otherwise collect as a FFELP holder.

12. Because the State of Alaska relies on revenue from ASLC to support programs such as Alaska Education Loans, Alaska Performance Scholarship, Alaska Education Grant, WWAMI Medical Education Program and FAFSA completion and outreach resources to support Alaskans enrollment in higher education programs, ASLC's loss in revenue would directly harm Alaska's ability to fund and administer these programs.

13. The SAVE Plan, then, directly harms both the State of Alaska and ASLC.

I declare under penalty of perjury under laws of the United States, 28 U.S.C. § 1746, that the foregoing statements are true and correct.

Signed this 10th day of May 2024.

Sana Efird

Sana Efird
Executive Officer
Alaska Student Loan Corporation

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
WICHITA DIVISION

STATE OF KANSAS, STATE OF ALABAMA, STATE OF ALASKA, STATE OF IDAHO, STATE OF IOWA, STATE OF LOUISIANA, STATE OF MONTANA, STATE OF NEBRASKA, STATE OF SOUTH CAROLINA, STATE OF TEXAS, STATE OF UTAH, *Plaintiffs*, v. JOSEPH R. BIDEN IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, MIGUES CARDONA IN HIS OFFICIAL CAPACITY AS SECRETARY OF EDUCATION, UNITED STATES DEPARTMENT OF EDUCATION, *Defendants*.	C/A No. 6:24-cv-01057

DECLARATION OF JOSEPH D. SPATE

I, Joseph D. Spate, hereby declare and state under penalty of perjury that the following is true and correct to the best of my knowledge:

1. My name is Joseph D. Spate, and my business address is 1000 Assembly Street, Columbia, SC 29201. I am over the age of eighteen, have personal knowledge of the subject matter, and am competent to testify concerning the matters in this declaration.

2. I have served as Assistant Deputy Solicitor General with the Office of the South Carolina Attorney General since May 2023. I am licensed to practice law in the state of South Carolina and various federal courts.

3. I am submitting this declaration in reference to Plaintiffs' Motion for Preliminary Injunction as to a final rule published by the U.S. Department of Education on July 10, 2023, entitled "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 (Jul. 10, 2023) (Final Rule).

4. On April 19, 2024, I received an email from David A. "Trey" Simon, III, President and CEO of the South Carolina Student Loan Corporation, with the following subject line: "Requested information for the State Education Assistance Authority." Exhibit 1 to this declaration is a true and correct copy of that email.

5. The aforementioned email from Mr. Simon included a letter attachment entitled "Response to SC Attorney General on SEAA - 4-19-24," dated April 19, 2024, and bearing Mr. Simon's signature. Exhibit 2 to this declaration is a true and correct copy of that letter.

6. This the 8th day of May, 2024.

Joseph D. Spate

Joseph D. Spate
Assistant Deputy Solicitor General
Office of the South Carolina Attorney General

EXHIBIT 1

From: Trey Simon <TSimon@scstudentloan.org>
Sent: Friday, April 19, 2024 1:21 PM
To: Joseph Spate; Ray Jones; Macdonald, Robert; Chris Majure (Chris.Majure@sto.sc.gov)
Cc: Thomas Hydrick
Subject: Requested information for the State Education Assistance Authority
Attachments: Response to SC Attorney General on SEAA - 4-19-24.pdf

Joseph,

Please find the information requested by the State Education Assistance Authority attached.

Please let us know if you have any questions.

Have a great weekend.

Thank you,

Trey Simon
President and CEO

(803) 612-5052 (O) (931) 200-3827 (M)
tsimon@scstudentloan.org
scstudentloan.org
1901 Main Street, Suite 400, Columbia, SC 29201

EXHIBIT 2

SOUTH CAROLINA
Student Loan

(800) 347-2752

1901 Main Street
Suite 400
Columbia, SC 29201

April 19, 2024

Dear Mr. Spate:

In response to your request, we are providing the information below regarding the State Education Assistance Authority (SEAA). As we have discussed, South Carolina Student Loan Corporation (SCSLC) is a private nonprofit corporation organized under the laws of the State of South Carolina. SCSLC performs certain administrative functions on a contractual basis for SEAA, including acting as the servicing agent for SEAA's loan portfolio. SCSLC is providing the data as requested below regarding the federal loan portfolio that is wholly owned by SEAA.

The Federal Family Education Loan Program, FFELP, was a federal student loan program that offered federally-backed loans funded by private companies. FFELP ended with the 2009-2010 academic year to make way for direct loans, which are loans provided directly by the federal government to students. Although no new FFELP loans are offered to students, FFELP loans that existed prior to the 2009-2010 academic year with unpaid balances are still held by certain lenders.

SEAA is empowered by statute to "make," "insure," and "guarantee student loans under such terms and conditions as [SEAA] shall from time to time prescribe . . . ." SEAA is further empowered by statute "[t]o develop and administer all programs and to perform all functions necessary or convenient to promote and facilitate the making, guaranteeing and insuring of student loans and to provide such other student loan assistance and services."

As requested, please find the following data regarding SEAA's FFELP loan portfolio:

History of SEAA's FFELP portfolio from 2010 to present:

Month End	Principal Balance
6/30/2011	$31,324,566.17
6/30/2012	29,589,044.81
6/30/2013	26,776,811.11
6/30/2014	24,974,750.48
6/30/2015	22,797,591.92
6/30/2016	20,975,542.24
6/30/2017	19,218,505.43
6/30/2018	16,654,982.40
6/30/2019	15,026,548.26
6/30/2020	12,872,804.70
6/30/2021	11,889,724.29
6/30/2022	10,771,880.55
6/30/2023	8,059,252.66
3/31/2024	6,423,362.52

Proportion of SEAA's FFELP loans that were consolidated versus paid down

Period	Consolidation Payment	Other Principal Payments
7/1/2010 - 6/30/2011	-$1,019,123.26	-$814,057.50
7/1/2011 - 6/30/2012	-1,076,871.56	-$658,649.80
7/1/2012 - 6/30/2013	-1,365,846.14	-$1,446,387.56
7/1/2013 - 6/30/2014	-590,101.34	-$1,211,959.29
7/1/2014 - 6/30/2015	-1,231,047.88	-$946,110.68
7/1/2015 - 6/30/2016	-909,836.74	-$912,212.94
7/1/2016 - 6/30/2017	-1,081,806.83	-$675,229.98
7/1/2017 - 6/30/2018	-1,064,526.12	-$1,498,996.91
7/1/2018 - 6/30/2019	-415,796.86	-$1,212,637.28
7/1/2019 - 6/30/2020	-622,083.17	-$1,531,660.39
7/1/2020 - 6/30/2021	-174,407.04	-$808,673.37
7/1/2021 - 6/30/2022	-954,393.67	-$1,320,063.19
7/1/2022 - 6/30/2023	-2,112,224.90	-$600,402.99
7/1/2023 - 3/31/2024	-1,111,945.46	-$523,944.68

Interest revenue generated by SEAA's FFELP loans per year

Period	Total Interest Revenue
7/1/2010 - 6/30/2011	$1,172,811.00
7/1/2011 - 6/30/2012	$764,676.00
7/1/2012 - 6/30/2013	$692,306.00
7/1/2013 - 6/30/2014	$630,738.00
7/1/2014 - 6/30/2015	$585,056.00
7/1/2015 - 6/30/2016	$572,691.00
7/1/2016 - 6/30/2017	$595,654.00
7/1/2017 - 6/30/2018	$689,735.00
7/1/2018 - 6/30/2019	$756,432.00
7/1/2019 - 6/30/2020	$529,763.00
7/1/2020 - 6/30/2021	$301,659.00
7/1/2021 - 6/30/2022	$303,673.00
7/1/2022 - 6/30/2023	$575,359.00
7/1/2023 - 3/31/2024*	$432,455.00

*Total includes draft interest revenue through 3/31/24. Annual interest revenue will be calculated and audited after 6/2024.

Should you have any further questions concerning the data presented above, please feel free to contact SCSLC directly as the acting servicing agent for SEAA.

David A. Simon III

David A. Simon III

President and CEO
SC Student Loan

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STATE OF KANSAS, STATE OF ALABAMA, STATE OF ALASKA, STATE OF IDAHO, STATE OF IOWA, STATE OF LOUISIANA STATE OF MONTANA, STATE OF NEBRASKA, STATE OF SOUTH CAROLINA, STATE OF TEXAS, STATE OF UTAH, *Plaintiffs*, v. JOSEPH R. BIDEN IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, MIGUEL CARDONA IN HIS OFFICIAL CAPACITY AS SECRETARY OF EDUCATION, UNITED STATES DEPARTMENT OF EDUCATION; *Defendants*.	§ §	Civil Action No. 6:24-cv-1057

DECLARATION OF KATHLEEN F. ABRAMS

I, Kathleen F. Abrams, declare as follows:

1. I am the Director of the Income Tax Administration Division at the Alabama Department of Revenue. I am over the age of 18, and I have personal knowledge of the facts contained in this declaration. I could competently testify as to the contents of this Declaration if called upon to do so.

2. I have served as the Director of the Income Tax Administration Division at the Alabama Department of Revenue for eight years.

3. Prior to this, I served as the Assistant Director of the Individual and Corporate Tax Division at the Alabama Department of Revenue for four years and the Income Tax Field Audit Manager at the Alabama Department of Revenue for six years.

4. As a result of my current duties, I am familiar with the state's tax conformity code and how it relates to the federal one.

5. Alabama's tax code conforms to certain sections of the federal Internal Revenue Code.

6. Relevant here, Alabama Code § 40-18-14(a)(3)h. provides that gross income for an individual does not include "[i]ncome from discharge of indebtedness to the extent allowed by 26 U.S.C. 108."

7. Alabama Code § 40-18-1.1(b) provides that "the term '26 U.S.C.' means the Internal Revenue Code, Title 26 of the United States Code, as in effect from time to time," which means that Alabama's tax code automatically conforms to any revisions of any sections of the Internal Revenue Code that are referenced in Alabama law.

8. Section 9675 of The American Rescue Plan Act of 2021 (Public Law. 117-2), modified 26 U.S.C. § 108(f) to create a special rule for discharges of student debt for the 2021 through 2025 tax years. Because the modified student loan forgiveness provisions are in 26 U.S.C. § 108, Alabama follows the federal student loan forgiveness treatment as modified by the American Rescue Plan Act of 2021. Any student loan forgiveness that is excluded from federal income pursuant to 26 U.S.C. § 108 will also be excluded from Alabama income.

9. Alabama's longstanding statute syncing certain aspects of the Alabama tax code with the Internal Revenue Code provides uniformity and simplicity in our tax code as taxpayers

can follow the same definitions and guidance for both federal and state tax filing and compliance.

10. If this rolling conformity did not exist, the state would incur additional administrative costs to update its tax system to create numerous different definitions of taxable income and to create the necessary guidance for taxpayers explaining the differences between federal and state tax provisions.

11. Ordinarily, federal student debt cancelation is considered income and is treated as taxable by the federal government, except under the limited circumstances provided in 26 U.S.C. § 108(f). By extension, it is normally treated as taxable by Alabama.

12. But as referenced above, Section 9675 of the American Rescue Plan Act modifies 26 U.S.C. §108(f) to expand the circumstances under which such debt cancelation is excluded from counting toward gross income from January 1, 2021, to December 31, 2025. By extension, it is not taxable in Alabama during this period.

13. I am aware that the U.S. Department of Education recently promulgated a rule (the "Final Rule" or "Rule") entitled the Improving Income Driven Repayment for the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan. *See* 88 Fed. Reg. 43,820-905.

14. The Final Rule cuts the required cancellation timeline of 20-25 years to 10 years for loans with an original principal balance of $12,000 or less.

15. It also allows cancellation one extra year later for every $1,000 above $12,000. For example, if someone has an original principal balance of $13,000 they would receive cancellation after 11 years.

16. I am also aware that this provision of the Final Rule has retroactively forgiven loans that meet the criteria noted above.

17. The U.S. Department of Education has reported[1] that this has resulted in 2,550 Alabama borrowers having $20.8 million in loans cancelled already.

18. This cancelation cannot be taxed. At least some of that forgiveness would have been taxable after January 1, 2026, due to the fact that the ordinary timeline for these loans being forgiven is 20-25 years.

19. Alabama has lost out on tax revenue as a result of this Final Rule. That loss will continue into the future as more Alabama residents will likely have their loans forgiven under the provisions of the Final Rule until December 31, 2025.

20. Further the declarant sayeth naught.

I declare under penalty of perjury under the laws of the United States of American and the State of Alabama that the foregoing is true and correct.

Executed in Montgomery County, Alabama, this 11th day of April 2024.

[1] U.S. Department of Education, *Biden-Harris Administration Releases State-by-State Breakdown of $1.2 Billion in SAVE Plan Forgiveness*, Feb. 23, 2024, https://www.ed.gov/news/press-releases/biden-harris-administration-releases-state-state-breakdown-12-billion-save-plan-forgiveness.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STATE OF KANSAS, STATE OF ALABAMA, STATE OF ALASKA, STATE OF IDAHO, STATE OF IOWA, STATE OF LOUISIANA, STATE OF MONTANA, STATE OF NEBRASKA, STATE OF SOUTH CAROLINA, STATE OF TEXAS, STATE OF UTAH, *Plaintiffs*, v. JOSEPH R. BIDEN IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, MIGUEL CARDONA IN HIS OFFICIAL CAPACITY AS SECRETARY OF EDUCATION, UNITED STATES DEPARTMENT OF EDUCATION; *Defendants*.	§ §	Civil Action No. ____________

DECLARATION OF HOA PHU TRAN

I, Dr. Hoa Phu Tran, declare as follows

1. I am the Revenue Economist Manager at the Nebraska Department of Revenue. I am over the age of 18, and I have personal knowledge of the facts contained in this declaration. I could competently testify as to the contents of this Declaration if called upon to do so.

2. I have served as the Revenue Economist Manager at the Nebraska Department of Revenue for 11 years.

3. Prior to this, I worked as a Revenue Economist for the Nebraska Department of Revenue.

4. I have a Ph.D in Economics.

5. As a result of my current duties, I am familiar with the state's tax conformity code and how it relates to the federal one.

6. Under Nebraska Revised Statutes section 77-2715(2)(b) Nebraska imposes tax upon resident individuals based on their federal adjusted gross income as modified by sections 77-2716 and 77-2716.01, plus a percentage of the federal tax on premature or lump-sum distributions from qualified retirement plans. Nebraska Revised Statute section 77-2716 does not provide for any addition to federal adjusted gross income for the cancelation of debt that is excluded from federal adjusted gross income. Nebraska Revised Statute section 77-2716(18) only provides for a subtraction from federal adjusted gross income of any amount received by an individual as student loan repayment assistance under the Teach in Nebraska Today Act, to the extent such amount is included in federal adjusted gross income.

7. This provides uniformity and simplicity in our tax code as taxpayers can begin the process of filing state income taxes through listing their federal adjusted gross income.

8. Ordinarily, federal student debt cancelation is considered income and is taxable by the federal government. By extension, it is taxable in Nebraska.

9. However, Section 9675 of Public Law No: 117-2 (commonly known as the American Rescue Plan Act) prohibits such debt cancelation from counting toward gross income from January 1, 2021 to December 31, 2025. By extension, absent amendment of Nebraska law to provide for an addition to federal adjusted gross income for this debt cancelation, it is not taxable in Nebraska during this period.

10. Amending Nebraska law to provide for an addition to federal adjusted gross income for this debt cancelation would require updating Nebraska's tax booklets and forms, Nebraska regulations, and processing systems at an additional cost to the State.
11. I am aware that the Final Rule cuts the required cancellation timeline of 20-25 years to 10 years for loans with an original principal balance of $12,000 or less.
12. It also allows cancellation one extra year later for every $1,000 above $12,000. For example, if someone has an original principal balance of $13,000 they would receive cancellation after 11 years.
13. I am also aware that this provision of the Final Rule has retroactively forgiven loans that meet the criteria noted above.
14. Based on publicly available information, this has resulted in 750 Nebraska borrowers having $5.3 million in loans cancelled already.
15. This cancelation cannot be taxed. At least some of that forgiveness would have been taxable after January 1, 2026, due to the fact that the ordinary timeline of these loans being forgiven is 20-25 years.
16. Nebraska has lost out on tax revenue as a result of this Final Rule. Absent statutory change to Nebraska law to provide for an addition to federal adjusted gross income, that loss will continue into the future as more Nebraska residents will likely have their loans forgiven under the provisions of the Final Rule until December 31, 2025.
17. Further the declarant sayeth naught.

I declare under penalty of perjury under the laws of the United States of American and the State of Nebraska that the foregoing is true and correct.

Executed in Lincoln, Nebraska this this 8 day of April 2024.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
WICHITA DIVISION

STATE OF KANSAS, ET AL., *Plaintiffs*, v. JOSEPH R. BIDEN IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, ET AL.N; *Defendants*.	§ § § § § § § § § § § § §	Civil Action No. 2024-CV-1057-DDC-ADM

DECLARATION OF Aaron Yost

I, Aaron Yost, declare as follows

1. I am the Government Affairs Program Manager at the Idaho State Tax Commission. I am over the age of 18, and I have personal knowledge of the facts contained in this declaration. I could competently testify as to the contents of this Declaration if called upon to do so.
2. I have served as the Government Affairs Program manager at the Commission for 2 years.
3. As a result of my current duties, I am familiar with the Idaho's tax conformity law and how it relates to federal law.

4. Under Idaho Code Section 63-3011 the state updates its definition of gross income to match the federal definition.

5. This provides uniformity and simplicity in our tax code as taxpayers can begin the process of filing state income taxes through listing their federal income.

6. If this conformity did not exist, the state would incur additional administrative costs to update its tax system to create its own definitions of taxable income.

7. Ordinarily, federal student debt cancelation is considered income and is taxable by the federal government. By extension, it is taxable in Idaho.

8. However, Section 9675 of Public Law No: 117-2 (commonly known as the American Rescue Plan Act) prohibits such debt cancelation from counting toward gross income from January 1, 2021 to December 31, 2025. By extension, it is not taxable in Idaho during this period.

9. I am aware that the Final Rule cuts the required cancellation timeline of 20-25 years to 10 years for loans with an original principal balance of $12,000 or less.

10. It also allows cancellation one extra year later for every $1,000 above $12,000. For example, if someone has an original principal balance of $13,000 they would receive cancellation after 11 years.

11. I am also aware that this provision of the Final Rule has retroactively forgiven loans that meet the criteria noted above.

12. Based on publicly available information, this has resulted in 1,130 Idaho borrowers having $9.2 million in loans cancelled already.

13. This cancelation cannot be taxed. At least some of that forgiveness would have been taxable after January 1, 2026 due to the ordinary timeline of these loans being forgiven is 20-25 years.

14. Idaho has lost out on tax revenue as a result of this Final Rule. That loss will continue as more Idaho residents will likely have their loans forgiven under the provisions of the Final Rule until December 31, 2025.

15. Further the declarant sayeth naught.

I declare under penalty of perjury under the laws of the United States of American and the State of Idaho that the foregoing is true and correct.

IDAHO STATE TAX COMMISSION

Dated: 4/8/24

Aaron T. Yost

Aaron Yost
Government Affairs Program Manager

Executed in Boise, ID, this this 8 day of April 2024.

Kara Lansberry

KARA LANSBERRY
NOTARY PUBLIC - STATE OF IDAHO
COMMISSION NUMBER 48469
MY COMMISSION EXPIRES 10-30-2024