No. 24A11

In the
Supreme Court of the United States

STATE OF ALASKA, ET AL.,

Applicants,

v.

DEPARTMENT OF EDUCATION, ET AL.,

Respondents.

On Application for
Vacatur of Stay of Preliminary Injunction

BRIEF OF *AMICUS CURIAE* STATES OF MISSOURI, ARKANSAS, FLORIDA, GEORGIA, NORTH DAKOTA, OHIO, AND OKLAHOMA IN SUPPORT OF APPLICATION FOR VACATUR OF STAY OF PRELIMINARY INJUNCTION

ANDREW BAILEY
Attorney General

OFFICE OF THE MISSOURI ATTORNEY GENERAL
207 West High St.
Jefferson City, MO 65101

JOSHUA M. DIVINE
Solicitor General
Counsel of Record
REED C. DEMPSEY
SAMUEL FREEDLUND
Deputy Solicitors General
Josh.Divine@ago.mo.gov
(573) 751-3321

Counsel for *Amici Curiae*

(additional counsel listed after signature page)

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INTEREST OF *AMICI* STATES AND SUMMARY OF ARGUMENT

The States of Missouri, Arkansas, Florida, Georgia, North Dakota, Ohio, and Oklahoma have a vital interest in this proceeding because these seven States are actively engaged in litigation over the same federal regulation at issue in the applicant States' litigation. While the applicant States sued in the District of Kansas, *amici* States sued in the Eastern District of Missouri.

Both district courts issued preliminary injunctions the same day, and together those injunctions enjoin nearly all applications of the Final Rule. The District of Kansas concluded that the *entire* rule is unlawful. But because that court did not believe the applicant States established irreparable harm for all aspects of the Final Rule, it enjoined only those provisions that went into effect after July 1, 2024, such as the provision to slash payments in half. That court did not enjoin the forgiveness provisions of the Final Rule.

The Eastern District of Missouri, in contrast, zeroed in on the cornerstone of the Final Rule and concluded that Defendants lack statutory authority to forgive loans. So the Eastern District of Missouri "enjoin[ed] Defendants from any further implementation of the Final Rule's loan forgiveness provisions." *Missouri* v. *Biden*, No. 24-cv-520 (E.D. Mo), ECF 35, at 3, 61 (attached as Appendix Exhibit A).[1]

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[1] https://storage.courtlistener.com/recap/gov.uscourts.moed.211135/gov.uscourts.moed.211135.35.0.pdf

Thus, two different district courts in two different appellate circuits both concluded on the same day that Defendants acted unlawfully when they purported to authorize mass loan forgiveness to the tune of nearly $500 billion.

And both courts were right to do so. The Final Rule relies on the Higher Education Act ("HEA"). That Act includes several "repayment plans" including the "standard" repayment plan (10 years, fixed payment amounts) and, as relevant here, the "Income-Contingent Repayment" or "ICR" plan. The Final Rule relies on the ICR statutory provisions, which permit the Secretary to create a "repayment plan" lasting for a period "not to exceed 25 years" where payment amounts are set based on the income of an individual borrower. 20 U.S.C. § 1087e(d)(1)(D). So instead of paying back loans over the standard 10 years, borrowers under that program can take up to 25 years to pay back their loans, with payment amounts potentially changing each year.

But Defendants used this authority for something much more ambitious than simply permitting borrowers to repay over 25 years: they created a "repayment plan" that does not require "repayment" at all. It slashes payment amounts well below actual repayment thresholds. Indeed, it sets payment amounts to *zero* for millions of people. And then it directs the Secretary to forgive all unpaid balances after as few as 10 years of (potentially $0) payments. Just as bad, Defendants launched this plan just 10 days after this Court struck down their first attempt at mass loan forgiveness—in a transparent attempt to get around this Court's ruling.

The Eastern District of Missouri rightly concluded that nothing in the ICR statutory provisions give Defendants authority to forgive debt. That puts the ICR program in sharp contrast with those statutory programs that do authorize forgiveness—such as the "Income-Based Repayment" or "IBR" plan and the Public Service Loan Forgiveness program. Those programs expressly authorize forgiveness, but also have express statutory limits on the amount of forgiveness available. The Eastern District of Missouri rightly concluded that Defendants cannot evade those limits by trying to forgive loans instead under the ICR program. "Congress has made it clear under what circumstances loan forgiveness is permitted, and the ICR plan is not one of those circumstances." Ex. A, *Missouri* v. *Biden*, ECF 35, at 44.

But the Eastern District of Missouri failed to take the next logical step, so the Missouri coalition had to file a cross-appeal. If Defendants cannot forgive loans under the ICR program, they necessarily cannot set payment amounts well below what is needed for a borrower to in fact repay a loan. Forgiveness is the cornerstone of the Final Rule. Without it, payment amounts must be set high enough for individuals to actually repay their loans within 25 years. So at minimum, the Eastern District of Missouri should also have enjoined the parts of the Final Rule slashing payment amounts—like the District of Kansas did. Zero-dollar payment amounts *is* loan forgiveness.

Amici States thus have a vital interest in this emergency application because *amici* States are currently seeking in the Eighth Circuit similar relief to what the

applicant States obtained successfully in the District of Kansas and seek here. *Amici* States file this brief to make four basic points.

1. The parts of the Final Rule that slash payment amounts are unlawful not only for the reasons expressed by the District of Kansas and the applicant States, but also because the ICR statute by its plain text does not authorize loan forgiveness at all. The Secretary is thus required to set payment amounts high enough for individuals to actually repay their loans within 25 years. Zero-dollar payments are clearly insufficient. Indeed, Defendants' position in the emergency-application posture that they can still slash payments even if they cannot forgive loans would lead to an impending storm where millions of borrowers will *default* at the end of 25 years because the Secretary lacks authority to forgive their balances and yet their loans will not be repaid within 25 years.

2. Relief here is also necessary because it would help stop Defendants' brazenly unlawful actions that they took immediately in response to the Eastern District of Missouri injunction. In light of the injunction preventing them from using provisions in the Final Rule to forgive loans, Defendants announced they had decided to slice and dice different regulations to create a brand new repayment plan—which Defendants call a "hybrid" repayment plan—that no borrower has ever been on before. They combined the zero-dollar payment provision from the 2023 regulation with a forgiveness provision from a now-defunct 2015 regulation that Defendants

admit was "fully replace[d]" by the 2023 regulation. *Missouri* v. *Biden*, ECF 52, at 2.[2]

That is brazenly unlawful for many reasons. First, this new "hybrid" repayment plan has not gone through notice and comment. Second, the "hybrid" plan relies on the same exact statute that the Missouri district court already declared does not permit forgiveness. Third, the "hybrid" plan is a transparent attempt to evade an injunction. And fourth, the 2015 regulation no longer even exists. By Defendants' own admission, it was amended and "fully replace[d]" by the 2023 regulation. *Ibid.* So Defendants cannot even try to mix and match different provisions from different regulations.

The Eastern District of Missouri declined to grant relief against this new hybrid plan. In a one-page order, the district court declined, saying that the States' complaint challenged only the Final Rule not previous regulations and not the new hybrid plan. *Missouri* v. *Biden*, ECF 54.[3] The district court did not dispute that the 2015 regulation was fully replaced by the 2023 regulation and that the new "hybrid" plan was only created after the district court's preliminary injunction. As a result, Defendants continue cancelling hundreds of billions of dollars in loans despite the district court's declaration that they lack authority to do so. The district court's inaction has forced *amici* States to seek emergency relief in the Eighth Circuit, filed

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[2] https://storage.courtlistener.com/recap/gov.uscourts.moed.211135/gov.uscourts.moed.211135.52.0.pdf

[3] https://storage.courtlistener.com/recap/gov.uscourts.moed.211135/gov.uscourts.moed.211135.54.0.pdf

on July 12, 2024. *See* Appendix Exhibit B. States should not be forced to play whack-a-mole when Defendants promulgate obviously illegal regulations without notice and comment to avoid an injunction.

Defendants' relentless effort over two years to unlawfully cancel nearly $500 billion in student loans—extraordinary efforts that continue with their brazen response to the Missouri district court injunction—highlights the extraordinary need for emergency relief. Already, the Congressional Budget Office has estimated that the rule has caused a "$145 billion increase" in projected budgetary deficit. CBO, *An Update to the Budget and Economic Outlook: 2024 to 2034*, at 39 (June 2024).[4] Granting relief in this present application, brought by the applicant States, would provide substantial incidental relief to the *amici* States by preventing Defendants from granting de facto forgiveness despite the Eastern District of Missouri's declaration that Defendants lack authority to forgive loans.

3. Given the differences between the *amici* States and the applicant States, and given the *amici* States' pending application for emergency relief in the Eighth Circuit, this Court should explain its reasoning when deciding the underlying application. While both coalitions of States seek similar relief (albeit through somewhat different merits arguments), the coalitions press different theories of standing and irreparable harm. For example, the applicant States have relied on a theory of standing not ruled on in *Biden* v. *Nebraska*. In contrast, Missouri advances

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[4] https://www.cbo.gov/system/files/2024-06/60039-Outlook-2024.pdf

the exact same theory it prevailed on before this Court last year. As the Eastern District of Missouri put it, "[t]he allegations in the Complaint are substantially similar to, if not identical to, those the Supreme Court held were sufficient to establish Missouri's standing just last year in *Biden* v. *Nebraska*." Ex. A, *Missouri* v. *Biden*, ECF 35, at 36.[5] This Court should thus make clear whether its ruling is predicated on standing, irreparable harm, or the merits. Explaining the Court's reasoning will avoid sending confusing signals to the Eighth Circuit that could affect the case there.

4. Finally, the applicant States seek certiorari before judgment, which this Court granted in *Biden* v. *Nebraska*. *Amici* States take no position on certiorari before judgment at this time, but if this Court accepts the applicant States' request, it should take up the *amici* case as well because *amici* States have a foolproof theory of standing—the same exact theory of standing this Court affirmed last year—and because the district courts in Missouri and Kansas entered different relief against the same Final Rule.

ARGUMENT

The Tenth Circuit's unreasoned order granting Defendants' motion for a stay should be vacated.

[5] https://storage.courtlistener.com/recap/gov.uscourts.moed.211135/gov.uscourts.moed.211135.35.0.pdf

I. The Higher Education Act Does Not Authorize the Secretary to Promulgate the Final Rule.

A. The Final Rule's forgiveness provisions are unlawful.

The Final Rule easily flunks the major questions doctrine, and the "ordinary tools of statutory interpretation" further reinforce that Defendants simply have no authority to forgive loans under the ICR program. *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2375 (2023).

1. As both district courts readily concluded, Defendants' assertion that they have unlimited discretion to unilaterally cancel every penny of every single student loan—and their decision to partially exercise that "discretion" to cancel nearly $500 billion in student loans here—is obviously of "vast economic and political significance" and thus easily triggers the major questions doctrine. *E.g.*, *Alabama Assn. of Realtors* v. *Dep't of Health and Human Services*, 594 U.S. 758, 764 (2021).

The problem for Defendants is that, having triggered the major questions doctrine, they are not able to satisfy their burden of identifying "exceedingly clear language" authorizing forgiveness. *Ibid.* Indeed, to date they have never disputed that the ICR provisions do not include any express forgiveness authority. They instead say forgiveness authority is *implied* from the text that says ICR repayment plans are "not to exceed 25 years." *E.g.*, *Missouri* v. *Biden*, ECF 22, at 43 ("On Plaintiffs' view, one wonders, what is supposed to happen to any outstanding loan

balance after 25 years?").[6] That is fatal to their claim. The major questions doctrine requires Defendants to identify explicit authority, not implicit authority. Defendants' assertion that they have authority to forgive every penny of every student loan thus easily flunks the test under the major questions doctrine.

2. The plain text reinforces this conclusion. The text on which the Secretary relies gives the Secretary authority to promulgate "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). This language does not provide authority for loan forgiveness. It simply states that the Secretary can vary amounts based on income (unlike the fixed amounts in other repayment plans) and can give borrowers up to 25 years to repay instead of 10.

In fact, far from authorizing forgiveness, the text expressly requires "repayment." The statute describes ICR plans as "plans for *repayment* of such loan, *including principal and interest*," and it goes on to say the "balance due" from each borrower on an "income contingent repayment" plan "*shall* equal the unpaid principal amount of the loan, any accrued interest, and any fees." § 1087e(d)(1)(D), (e)(5) (emphasis added). That matches the ordinary meaning of the term "repayment." "In the loan or finance context, repayment means paying the amount borrowed and the

[6] https://storage.courtlistener.com/recap/gov.uscourts.moed.211135/gov.uscourts.moed.211135.22.0.pdf

interest." *In re Goodvin*, No. 19-10623, 2020 WL 6821867, at *8 (Bankr. D. Kan. Sept. 1, 2020), *aff'd*, No. 20-CV-1247-JWL, 2021 WL 1026801 (D. Kan. Mar. 17, 2021).

Against all this, Defendants say the ICR statute authorizes forgiveness implicitly because it permits the Secretary to create repayment plans that are "not to exceed 25 years." Defendants assume this means any unpaid balance must be forgiven after 25 years. But in fact, that text *limits* the Secretary, requiring that he promulgate payment amounts *high* enough so that borrowers repay within 25 years.

The "not to exceed" language cannot implicitly authorize forgiveness because the same exact text is used in four other repayment plans, including the 10-year standard repayment plan, see § 1078(b)(9)(A), and the Secretary has acknowledged that he has no authority to forgive loans under those plans. When Congress "transplanted" that "not to exceed" language into the ICR statute, it brought "the old soil with it." *Taggart* v. *Lorenzen*, 587 U.S. 554, 560 (2019). Not even the Secretary thinks that language creates authority to forgive loans on the standard repayment plan, and so the language is insufficient with respect to the ICR plan as well.

And in stark contrast to the ICR provisions, other provisions in the HEA (passed both before and after the 1993 ICR amendments) expressly authorize forgiveness. For example, amendments passed in 1986 authorize forgiveness for teachers, military service members, and Peace Corps volunteers. 20 U.S.C. § 1087ee. And the IBR program, created in 2007, expressly permits forgiveness. § 1098e(b)(7). In fact, the IBR program creates the only vehicle for forgiveness for borrowers on ICR.

ICR borrowers can obtain forgiveness, but only *after* switching to the IBR program. § 1098e(b)(7)(A), (b)(7)(B)(iv) (authorizing forgiveness for borrowers who have "made payments under an income-contingent repayment plan" but requiring them to shift to the IBR program first). "When Congress includes particular language in one section of a statute but omits it from a neighbor," as Congress did in the Higher Education Act, "we normally understand that difference in language to convey a difference in meaning." *Bittner* v. *United States*, 598 U.S. 85, 94 (2023). That all these other provisions in the Higher Education Act expressly permit forgiveness, yet the ICR provision does not, "underscores the implausibility of the Government's interpretation." *Van Buren* v. *United States*, 593 U.S. 374, 394 (2021).

After considering the above, the Missouri court was correct to conclude that "the plain text of the statute does not support" forgiveness. Ex. A, *Missouri* v. *Biden*, ECF 35, at 44.[7] Simply put, "Congress has made it clear under what circumstances loan forgiveness is permitted, and the ICR plan is not one of those circumstances." *Ibid.*

B. The Final Rule's revised payment amounts are unlawful.

The Final Rule's payment amounts cannot stand alone where forgiveness is not authorized. Because the Secretary lacks statutory authority to forgive student loan balances under the ICR program, it necessarily follows that the Secretary acted unlawfully when he decided to slash payments amounts so low that monthly

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[7] https://storage.courtlistener.com/recap/gov.uscourts.moed.211135/gov.uscourts.moed.211135.35.0.pdf

payments will *never* result in the "repayment of such loan, including principal and interest." 20 U.S.C. § 1087e(d)(1)(D). *Amici* States do not dispute that the Secretary has a fair amount of discretion in setting payment amounts based on income, but that discretion has limits: namely, payment amounts must be large enough for borrowers to actually repay their loans within 25 years.

But the Secretary has done the opposite. Under the Final Rule, *millions* of borrowers "pay" $0 per month—indeed, 57% of all borrowers on the new plan. *See FACT SHEET: President Biden Cancels Student Debt for more than 150,000 Student Loan Borrowers Ahead of Schedule,* The White House (Feb. 21, 2024).[8] That is not "repayment." It is not even "partial repayment." And even for those who under the Final Rule pay something larger than $0, the "average" undergraduate borrower (which is more than 80% of borrowers) will pay back only 61 cents per dollar borrowed. 88 Fed. Reg. 43,880. Considering all borrowers (undergraduate and graduate), the "average" borrower still "repays" only 71 cents on the dollar. *Id.*

Because the Missouri court rightly concluded that forgiveness is off the table under the ICR program, it necessarily follows that the payment amounts set by the Secretary are too low. This follows from the plain text of the ICR provision, which requires the Secretary to "establish procedures for determining the borrower's repayment obligation on that loan for such year, and such other procedures as are

[8] https://www.whitehouse.gov/briefing-room/statements-releases/2024/02/21/fact-sheet-president-biden-cancels-student-debt-for-more-than-150000-student-loan-borrowers-ahead-of-schedule/

necessary to implement effectively income contingent repayment." 20 U.S.C. § 1087e(e)(1). Where forgiveness is off the table, procedures "necessary to implement effectively income contingent repayment," require calculations of payment amounts that lead to repayment of a borrower's loan balance within 25 years.

Finding otherwise would lead to an absurd result where the Secretary, knowing that forgiveness is not permitted, could create a plan with the expectation that the majority of borrowers would not repay their loans on time (if ever). *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.")

Yet this is the exact situation now in play. The increased income-exemption threshold (from 100% or 150% to 225%) and decreased payment amount (from 10% to 5% of income above that exemption threshold) reduce borrower monthly payments to levels that will guarantee that most borrowers cannot repay their statutory "balance due." § 1087e(e)(5). Indeed, because 57% of current SAVE Plan borrowers qualify for $0 monthly payments and because the "average" borrower after that still pays only 71 cents on the dollar, almost *no one* will repay their loans. This is an absurd result, "which Congress could not have intended." *Griffin*, 458 U.S. at 574. So absurd in fact that it creates an impending storm where millions of borrowers will *default* at the end of 25 years because the Secretary has no authority to forgive their unpaid balances and yet the Secretary is telling borrowers *not* to repay their loans

within 25 years. The Final Rule says, "Defaults do not benefit taxpayers or borrowers." 88 Fed. Reg. 43,832. Yet Defendants' position on payment amounts creates just that absurd situation.

Explained another way, income-exemption and payment cap thresholds can only be implemented in the ICR program if they ensure that a borrower can repay their balance within 25 years. Congress recognized this when it designed the separate I*B*R program years after the I*C*R program. In 2007, Congress expressly authorized the implementation of very specific income-exemption amounts (150% of federal poverty line) and payment amounts (15% of income above that line) in tandem with a forgiveness provision. § 1098e. The rationale is obvious: in certain circumstances, the thresholds will lead to shortfalls between what a borrower owes and what the borrower has repaid at the end of the repayment program, and so the Secretary's authority to forgive can cover that gap. But in enacting the ICR provision, Congress did not authorize forgiveness or set out specific income-exemption and payment amount thresholds that would preclude repayment of loans. The result is a grant of authority to the Secretary to design a plan where the "varying annual repayment amounts" must be high enough to cover the "balance due."

II. Defendants have engaged in astonishing unlawful activity to evade the Eastern District of Missouri's injunction.

Despite the Eastern District "enjoin[ing] Defendants from *any* further implementation of the Final Rule's loan forgiveness provisions," Ex. A, *Missouri* v. *Biden*, ECF 35, at 3 (emphasis added), Defendants are *continuing* to forgive loans.

Their two stated rationales for their brazen action only highlight how Defendants have twisted themselves into knots in their relentless pursuit over the last two years to unlawfully forgive nearly $500 billion in student loans.

A. Defendants cannot create a new "hybrid" repayment plan without notice and comment.

On June 28, Defendants told the Eastern District of Missouri (only after the *amici* States' prodding) that they stopped forgiving loans for borrowers who are between 10 and 19 years in repayment but are still forgiving loans after 20 to 25 years. *Missouri* v. *Biden*, ECF 44.[9] In response to a motion by the States, Defendants then said they were now forgiving loans on a "hybrid" plan created "due to this litigation" and that this plan combined the new payment thresholds from the July 2023 regulation (the "SAVE" plan) with the forgiveness provision in the now-defunct 2015 regulation (the "REPAYE" plan). *Missouri* v. *Biden*, ECF 52 at 4–5, 9.

This attempt to evade the injunction and continue to forgive loans fails for many reasons.

First, the Secretary has no authority to promulgate new repayment plans without notice and comment. Defendants do not deny this, so they told the Eastern District that they are in fact forgiving loans under a "preexisting" plan. Not so. Before the Eastern District's order, nobody had ever been on this "hybrid" plan, which mixes and matches a forgiveness provision from the 2015 REPAYE plan with the

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[9] https://storage.courtlistener.com/recap/gov.uscourts.moed.211135/gov.uscourts.moed.211135.44.0.pdf

payment amounts from the 2023 SAVE plan—which did not even go into effect fully until July 1, 2024. For example, individuals previously on the REPAYE plan were given forgiveness only after making substantially higher payments over the course of 20 to 25 years. Indeed, Defendants admitted to the district court that "[i]t is true" that "they are trying to forgive loans between 20 and 25 years for borrowers who were never in any previous ICR program." *Id.* at 12. These individuals never signed up for a previous ICR plan, so they plainly cannot be on a "preexisting" plan.

Second, the "preexisting" REPAYE plan that Defendants purport to rely on no longer exists. Defendants *conceded* to the district court that SAVE "fully replace[d]" the REPAYE plan. *Id.* at 2. As Defendants state on their website, "The SAVE Plan replaced the Revised Pay As You Earn (REPAYE) Plan." *SAVE Plan Announcement* (last visited July 11, 2024).[10] The Missouri district court recognized this too: "The Final Rule creates a new income-driven repayment ('IDR') plan—referred to as the Savings on Valuable Education ('SAVE') plan—to *replace* the Revised Pay-As-You-Earn ('REPAYE') plan." Ex. A, *Missouri* v. *Biden*, ECF 35, at 1 (emphasis added). Defendants cannot forgive loans using a regulation that no longer exists.

The text of the Final Rule confirms this. The Final Rule describes itself as an "umbrella" regulation that "combin[es]" previous ICR repayment plans into one regulation and then makes changes. 88 Fed. Reg. 43,820. And then the regulation

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[10] https://studentaid.gov/announcements-events/save-plan

details three "forgiveness" provisions—25-year forgiveness, 20-year forgiveness, and forgiveness between 10 and 19 years:

> (1) 25-year forgiveness for borrowers "repaying at least one loan received for graduate or professional study" or "repaying under the [original 1994] ICR plan";
>
> (2) 20-year forgiveness for borrowers "repaying only loans received for undergraduate study"; and
>
> (3) 10-year to 19-year forgiveness for borrowers "repaying only loans received for undergraduate study" who had original principal balances of between $12,000 and $22,000.

88 Fed. Reg. 43,902–03 (amending 34 C.F.R. § 685.209); *see also* 88 Fed. Reg. 43,856 (noting that 20-year and 25-year forgiveness are provisions under the SAVE plan).

Because the SAVE plan *replaced* REPAYE, and because the Final Rule streamlines previous forgiveness programs under one regulation, Defendants cannot reasonably claim to be forgiving loans on some previous, unchallenged program. The 2015 regulation does not exist anymore, and the plan created by that now-defunct regulation never permitted the mix of "zero-dollar payments plus forgiveness" that Defendants have now implemented. Theirs is a new repayment plan unlawfully passed without notice and comment. Worse, it relies on the very same statute that the Missouri district court declared does not authorize forgiveness.

B. Defendants are wrong to contend that *Amici* States failed to challenge all forgiveness provisions in the Final Rule.

Recognizing the obvious notice-and-comment deficiencies in the theory raised by their trial counsel, Defendants' separate appellate counsel told the Eighth Circuit on July 12, 2024, something different: that the States challenged only the provisions

in the Final Rule that *differ* from forgiveness provision in REPAYE. In other words, because previous regulations purported to authorize forgiveness for ICR borrowers after 20 to 25 years in repayment status, they say *amici* States challenged only the provision in the Final Rule purporting to authorize forgiveness between 10 and 19 years.

That is patently untrue, and the district court recognized it was untrue. Plaintiff States have consistently made clear that they are challenging *all* ICR forgiveness provisions in the Final Rule, not just the 10-to-19-year provision. The complaint, for example, attacks the Final Rule in its entirety. *Missouri* v. *Biden*, ECF 1, at 60.[11] And *amici* States' reply brief in support of the preliminary injunction motion made clear that *amici* States "challenge the ability of Defendants to use ICR authority to engage in *any* forgiveness." *Missouri* v. *Biden*, ECF 26, at 61 (emphasis in original).[12] That means that *amici* States challenged not only 10-year to 19-year forgiveness for borrowers "repaying only loans received for undergraduate study" who had original principal balances below $22,000 but also, for example, 20-year forgiveness for borrowers "repaying only loans received for undergraduate study." 88 Fed. Reg. 43,902–03 (amending 34 C.F.R. § 685.209). Indeed, the Missouri district court expressly found "it necessary to enjoin Defendants from *any* further implementation of the Final Rule's loan forgiveness *provisions*"—"any" of the

[11] https://storage.courtlistener.com/recap/gov.uscourts.moed.211135/gov.uscourts.moed.211135.1.0.pdf

[12] https://storage.courtlistener.com/recap/gov.uscourts.moed.211135/gov.uscourts.moed.211135.26.0.pdf

"forgiveness provisions," plural, not singular. ECF 35, at 3 (emphasis added). The Missouri district court never restricted its analysis only to the 10-to-19-year provision in the Final Rule.

* * *

In sum, Defendants chose to streamline previous plans under one "umbrella" regulation. Some of these provisions were new; some carried over from previous regulations. But the States challenged *all* ICR forgiveness provisions in this regulation, and the Missouri district court found it "necessary to enjoin Defendants from *any* further implementation of the Final Rule's loan forgiveness provisions." *Ibid.* (emphasis added). Defendants are thus on the horns of a dilemma: they must either present their current actions as a new plan that is unlawful because it did not go through notice and comment, or they must acknowledge that they are forgiving loans under regulatory provisions that the district court preliminarily enjoined.

Despite this, the Eastern District of Missouri refused to grant *amici* States relief against Defendants' new "hybrid" plan, stating that Defendants had "only sought injunctive relief from implementation of the Final Rule," not the previous regulations that the Final Rule replaced or the "hybrid" plan that did not exist until after the court entered its injunction. *Missouri* v. *Biden*, ECF 54.[13] Because even the Missouri district court elsewhere recognized that the Final Rule had "replace[d]" the

[13] https://storage.courtlistener.com/recap/gov.uscourts.moed.211135/gov.uscourts.moed.211135.54.0.pdf

previous regulations, Ex. A, *Missouri* v. *Biden*, ECF 35, at 1, the district court should have granted *amici* States relief.

Because the Missouri district court did not grant relief, *amici* States were forced to seek emergency relief from the Eighth Circuit, which *amici* States did on July 12, less than two days after the Missouri district court denied relief. If this Court grants the relief requested by the applicant States, that will simultaneously afford an incidental remedy to *amici* States.

The Court should do so. Defendants' relentless effort over two years to unlawfully cancel nearly $500 billion in student loans highlights the extraordinary need for emergency relief.

III. Any ruling on the Application should fully explain the basis for grant or denial.

The Tenth Circuit's split-decision granting the Government Defendants' emergency motion for an immediate stay was unreasoned. App.001a-02a (Order, No. 24-3089). With no explanation for the decision, the Tenth Circuit's order leaves litigants challenging the Final Rule with no guidance for why two judges on the Tenth Circuit believe the Kansas court's preliminary injunction was inappropriate.

Similar action by this Court would sow needless confusion because of differences between the lawsuit filed in Kansas and the lawsuit filed in Missouri. For example, while the States in the Kansas lawsuit rely on a new theory of standing, Missouri advances the same theory it prevailed on before this Court last year. As the Eastern District of Missouri put it, "[t]he allegations in the Complaint are

substantially similar to, if not identical to, those the Supreme Court held were sufficient to establish Missouri's standing just last year in *Biden* v. *Nebraska*." Ex. A, *Missouri* v. *Biden*, ECF 35, at 36.[14] Specifically, *amici* States have shown that the Final Rule will close millions of MOHELA accounts, costing Missouri (on a conservative estimate) hundreds of millions of dollars in fees that it otherwise would have earned on just a portion of its portfolio. *Missouri* v. *Biden*, ECF 26, at 10–11.[15]

Front and center, Defendants principally attack the applicant States' standing. All those attacks are of course irrelevant against Missouri's theory of standing, which this Court affirmed last year. So regardless of how this Court decides the application, the Court should explain its decision to avoid sending unclear signals to the Eighth Circuit.

IV. If the Court grants certiorari before judgment, it should take the case filed in Missouri as well.

Amici States take no position on certiorari before judgment at this time, but if this Court accepts the applicant States' request to grant certiorari before judgment, it should take up the *amici* case as well because *amici* States advance the same exact theory of standing that this Court affirmed last year, because the district courts in Missouri and Kansas entered different relief on the same Final Rule, and because Defendants have frustrated Missouri's relief by immediately promulgating an

[14] https://storage.courtlistener.com/recap/gov.uscourts.moed.211135/gov.uscourts.moed.211135.35.0.pdf
[15] https://storage.courtlistener.com/recap/gov.uscourts.moed.211135/gov.uscourts.moed.211135.26.0.pdf

unlawful regulation to evade the preliminary injunction. Granting certiorari in the case filed in Missouri would be consistent with what this Court did last time this Court reviewed the legality of mass student loan forgiveness. *See Dep't of Educ.* v. *Brown*, 143 S.Ct. 2343 (2023).

CONCLUSION

For the forgoing reasons, this Court should vacate the Tenth Circuit order and reinstate the Kansas court's preliminary injunction.

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Respectfully submitted,

ANDREW BAILEY
Missouri Attorney General

Joshua M. Divine
Solicitor General
Counsel of Record
Reed C. Dempsey
Deputy Solicitor General
Samuel Freedlund
Deputy Solicitor General
OFFICE OF THE MISSOURI
ATTORNEY GENERAL
Supreme Court Building
207 West High Street
P.O. Box 899
Jefferson City, MO 65102
(573) 751-8870
josh.divine@ago.mo.gov

Counsel for Amici States

ADDITIONAL COUNSEL

Tim Griffin
Attorney General
State of Arkansas

Ashley Moody
Attorney General
State of Florida

Chris Carr
Attorney General
State of Georgia

Drew H. Wrigley
Attorney General
State of North Dakota

Dave Yost
Attorney General
State of Ohio

Gentner Drummond
Attorney General
State of Oklahoma