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 TO THE HONORABLE NEIL M. GORSUCH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE TENTH CIRCUIT

## AMICI CURIAE BRIEF OF THE BUCKEYE INSTITUTE, KANSAS JUSTICE INSTITUTE, AND NATIONAL TAXPAYERS UNION FOUNDATION IN SUPPORT OF APPLICANTS' REQUEST FOR VACATUR OF THE STAY

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## INTEREST OF *AMICI CURIAE*[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

The Buckeye Institute works to restrain governmental overreach at all levels of government. The Buckeye Institute files lawsuits and submits amicus briefs. As it relates to student loan forgiveness, The Buckeye Institute filed a lawsuit against the Biden administration's previous student loan forgiveness program. Compl., *Latta* v. *U.S. Dep't of Educ.*, No. 2:22-cv-04255 (S.D. Ohio Dec. 1, 2022). The Buckeye Institute also filed an amicus brief with the district court below and with this Court in *Biden* v. *Nebraska*, 143 S. Ct. 2355 (2023).

Kansas Justice Institute (KJI) is a nonprofit, pro bono, public-interest litigation firm committed to upholding constitutional freedoms, protecting individual liberty, and defending against government overreach and abuse.

Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how

[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amici curiae made any monetary contribution toward the preparation or submission of this brief.

taxes, government spending, and regulations affect everyday life. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, producing scholarly analyses and engaging in direct litigation and amicus curiae briefs upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce. NTUF therefore has an institutional interest in the outcome of this case.

## INTRODUCTION

The Constitution gives Congress the power of the purse. Through its appropriation powers, Congress enacted, among others, the William D. Ford Federal Direct Loan Program to loan students money to help fund their post-secondary education. Omnibus Budget Reconciliation Act, § 4, 20 U.S.C. § 1087a (1993). When Congress authorized these loans, it did so with the intent that student borrowers would repay the loans in accordance with the terms of the promissory note each student signs when receiving the government funds. Congress authorized the Secretary (the "Secretary") of the Department of Education (the "Department") to forgive or cancel student loans in only a few specified situations.

- Congress directed that the Secretary "shall cancel the balance of interest and principal due" on any public service employees' eligible federal direct loan after the borrower met specific guidelines set by Congress. 20 U.S.C. § 1087e(m)(1).
- Congress directed the Secretary to cancel student debt of borrowers suffering financial hardship that met the very specific requirements. 20 U.S.C. § 1098e(b)(7). The loan forgiveness program addressed in this case

does not satisfy these requirements and the Department does not claim that this statute authorized this new program.

- Congress directed the Secretary to forgive loans for those employed full-time in an area of national need. 20 U.S.C. § 1078–11(a)(1)(B).
- Congress authorized loan forgiveness for teachers with another type of loan if the teachers work in specified locations for a certain amount of time. 20 U.S.C. § 1078–10.

Congress also designated specific situations where the Secretary could forbear on the loan repayments or allow borrowers to extend repayment:

- Forbearance is permitted for certain military service members, directing the Secretary to "grant the [service member] borrower forbearance, in the form of a temporary cessation of all payments on the loan other than the payments of interest on the loan . . . ." 20 U.S.C.A. § 1087e(l)(2).
- Congress authorized loan repayment deferment, but not cancellation "for borrowers receiving cancer treatment" or "dislocated military spouses." 20 U.S.C.A. § 1087e(f).

Despite the clear congressional limitations on when and how student loan borrowers may obtain forgiveness or cancellation of their direct loans, the Department has fabricated a new student loan forgiveness program without Congress's approval. Improving Income Driven Repayment, 88 Fed. Reg. 43,820 (July 10, 2024) (to be codified at 34 C.F.R. §§ 682, 685).

The Department creatively named this the Revised Pay-As-You-Earn

(REPAYE)[2] plan, suggesting that the loans *will be repaid*. But the name is deceptive—the plan actually creates a broad loan forgiveness scheme. It increases the amount of income exempted from the calculation of the borrower's discretionary income from 150 percent of the Federal poverty guideline or level to 225 percent. *Id.* At the same time, it "[l]owers the share of discretionary income used to calculate the borrower's monthly payment for outstanding loans under REPAYE to 5 percent of discretionary income for loans for the borrower's undergraduate study . . . ." *Id.* "[I]n the past the Department has chosen to set that threshold at 20 percent of discretionary income and then 10 percent of discretionary income." *Id.* at 43,845. The result of these changes is that many borrowers' monthly payments will be greatly reduced. This may be a policy preference, but the next part of the plan is not—it triggers unauthorized loan forgiveness. Under the REPAYE loan forgiveness scheme, these borrowers—who promised to repay their loans and are getting a break on the monthly payments—will not have to repay any outstanding debt after making reduced payments for 120 months. This program is a give-a-way of at least $156 billion of accounts receivable—Treasury assets. Compl. ¶¶ 158–59.

Congress did enact an "income contingent repayment plan" that authorized the Department to reduce monthly payments depending on the borrower's income and other criterion. But that program did not grant the Department the power to forgive these direct loans, and the statute anticipates that the borrowers will eventually

[2] The final rule notes that the REPAYE plan may also be referred to as the Saving on a Valuable Education (SAVE) plan. 88 Fed. Reg. 43,821. "To reduce confusion for readers and to recognize that all the public comments would have been discussing the REPAYE plan, the Department [ ] refer[red] to the SAVE plan as REPAYE throughout th[e] final rule." 88 Fed. Reg. 43,822.

repay their loans. By setting borrowers' payments to an amount that will significantly reduce the amount paid back and then outright forgiving the remaining balance, this loan forgiveness scheme violates the law and contravenes Congress's intent to have the loans paid back.

The Department lacks the constitutional or statutory authority to implement its new program. The Constitution does not allow the executive to unilaterally give away the Nation's assets. U.S. Const. art. I, § 9, cl. 7. And Congress did not authorize this new loan forgiveness program.

## SUMMARY OF ARGUMENT

As with any loan, student borrowers enter into a legally binding contract with the Department. This contract establishes the borrower's repayment obligations and the government's right to collect. Unlike other loan contracts, if the government modifies the contract without legal authority, and then attempts to collect, the borrower has no legal defense. Those who deal with the government may not rely on the conduct of government agents that is contrary to law. Thus, borrowers will not be able to utilize the doctrine of equitable estoppel to avoid future repayment if a new administration or a court determines that the loans were unlawfully forgiven. Allowing an invalid loan forgiveness program to proceed places borrowers at even greater future risk.

The Higher Education Act, 20 U.S.C.A. § 1070 et seq., sets very specific guidelines for how loans should be made and when they can be forgiven. The Department, however, has read a 25-year limit on the income-contingent repayment plan to authorize it to forgive loans once that 25 years, or a shorter time set by the

Secretary, is up. The statute does not authorize such forgiveness. Instead, it limits how long a borrower may utilize that repayment plan to ensure that the borrower does not stay on the plan indefinitely and that the loan is eventually repaid.

Further, the Constitution mandates that only Congress can appropriate funds and dispose of property belonging to the United States. Through its appropriations powers, Congress authorized the direct loan program. It did not, however, appropriate funds to be given away without the possibility of repayment. Additionally, by forgiving the loans, the Department has disposed of the property, accounts receivable, belonging to the United States. The Constitution leaves these decisions to Congress, not the Department.

The district court concluded that Applicants were likely to succeed on the merits and were irreparably harmed and granted a preliminary injunction in part. Without justifying its action, the Tenth Circuit Court of Appeals stayed the district court's determination. But the stay itself creates irreparable harm. An appellate court should only stay a preliminary injunction if the trial court abused its discretion and if the movant for the stay shows that it has satisfied the four-part test for a stay. The most important factors of that test are for the movant to show that the movant is likely to succeed on the merits and will suffer irreparable harm if the stay is not granted. Instead, a stay here causes great, if not irreparable, harm because "unforgiving" a loan that the Department said was forgiven will create chaos, angst, anger, and confusion. And if the Department ultimately succeeds on the merits, a relatively short delay of borrowers' loan forgiveness will result in, at most, a minor

disruption to the Department's internal operations and an inconvenience to borrowers who are statutorily and contractually required to pay their loans on time.

Therefore, the Court should vacate the stay of the district court's preliminary injunction and grant the petition for writ of certiorari.

## ARGUMENT

### I. Student loan borrowers are contractually bound to repay their loans—in full—by the terms of their Master Promissory Notes, and there is no statutory exception in this situation.

To obtain a student loan from the government, borrowers must enter a legally binding contract with the Department of Education. When student loan borrowers sign their Master Promissory Note (MPN), they agree to repay their loans in full. See Compl. Ex. A, *Latta* v. *U.S. Dep't of Educ.*, No. 2:22-cv-04255 (S.D. Ohio Dec. 1, 2022). Borrowers "promise to pay to ED all loan amounts disbursed under the terms of th[e] MPN, plus interest and other charges and fees that may become due . . . ." *Id.* at 2. The MPN directs that the borrowers "must repay the full amount of the loans made under th[e] MPN, plus accrued interest." *Id.* at 4. If they fail to pay the entire amount disbursed plus interest and other charges and fees, they will be liable for "reasonable collection costs, including but not limited to attorney fees, court costs, and other fees." *Id.* at 2. The MPN further states:

> LATE CHARGES AND COLLECTION COSTS: We may collect from you: A late charge of not more than six cents for each dollar of each late payment if you do not make any part of a required installment payment within 30 days after it becomes due, and any other charges and fees that are permitted by the Act related to the collection of your loans. If you default on a loan, you must pay reasonable collection costs, plus court costs and attorney fees.

*Id.* at 4.

Additionally, if the borrower defaults on his or her loan, the Department can require the borrower to pay the entire unpaid balance of the loan at once, plus a six percent late fee, and a capitalization of interest (which will bear interest, also known as interest on interest). *Id.*

The MPN further states, "If we do not enforce or insist on compliance with any term of th[e] MPN, it does not waive any of our rights. No provision of th[e] MPN may be modified or waived, unless we do so in writing." *Id*. The only other provision allowing modifications to the MPN provides that "[a]ny [legal] amendment to the [Higher Education Act of 1965 (HEA)] that affects the terms of th[e] MPN will be applied to your loans . . . ." *Id*. at 6. However, the REPAYE plan does not legally amend the HEA.

The MPN also explains the impact on the borrower's credit score if he or she defaults: "If you default, the default will be reported to nationwide consumer reporting agencies (credit bureaus) and will significantly and adversely affect your credit history. A default will have additional adverse consequences as explained in the Borrower's Rights and Responsibilities Statement." *Id.* at 4. Indeed, the Department's website explicitly warns that those who default may suffer damage to their credit rating and it "may take years to reestablish a good credit rating." See U.S. Dep't of Educ., *Student Loan Delinquency and Default*, Federal Student Aid, http://tinyurl.com/yc6bn3vn (last visited Apr. 19, 2024). Finally, if borrowers default on the loans, they will "lose eligibility for additional federal student aid" for further education. *Id.*

The Code of Federal Regulations has specific provisions for what defenses a borrower may assert for non-payment of a student loan. Specifically, 34 C.F.R. § 685.206(c) and (e), and 34 C.F.R. § 685.222 govern defenses to repayment, as authorized by 20 U.S.C. 1087e(h).[3] Each of these defenses to repayment generally applies only when an educational institution which the borrower attended had engaged in an illegal act, such as "a misrepresentation . . . of material fact upon which the borrower reasonably relied in deciding to obtain a Direct Loan . . . ." 34 C.F.R. § 685.206(e)(2)(i). The details of "[t]hose defense[s] to repayment standards have changed multiple times in recent years" via the appropriate and lawful Administrative Procedure Act process. U.S. Dep't of Educ., *Issue Paper #6: Borrower Defenses to Repayment* (2021), http://tinyurl.com/32jwn43y. But the concept behind these defenses remained the same—fraud and similar actions by the educational institution. Unsurprisingly, the REPAYE plan is not part of the C.F.R. defenses—it does not purport to amend those provisions, and there are no pending proposed rules under the Administrative Procedure Act that would modify those C.F.R. sections. Instead, the Department has decided to forgive student loans without congressional approval.

Accordingly, any loan forgiveness supposedly granted under the REPAYE plan will not legally change borrowers' payment obligations and will not be enforceable against the government.

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[3] "[T]he Secretary shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan made under this part, except that in no event may a borrower recover from the Secretary, in any action arising from or relating to a loan made under this part, an amount in excess of the amount such borrower has repaid on such loan."

Moreover, borrowers cannot utilize the doctrine of equitable estoppel to avoid future repayment (and penalties, fines, increased interest, and collection costs) because equitable estoppel generally cannot be asserted against the government. *Heckler* v. *Cmty. Health Servs. Of Crawford Cnty., Inc.*, 467 U.S. 51, 60 (1984). "[T]he United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409 (1917); *see also Royal Indem. Co.* v. *United States*, 313 U.S. 289, 294–95 (1941). "Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law," and "those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Heckler*, 467 U.S. at 63.

Despite the Department's announcement of unilateral debt forgiveness, the government is and will be, obligated to collect those loans. "The head of an executive, judicial, or legislative agency—(1) *shall* try to collect a *claim* of the United States Government for money or property arising out of the activities of, or referred to, the agency . . . ." 31 U.S.C. § 3711(a) (emphasis added). "A claim includes, without limitation—(A) funds owed on account of loans made, insured, or guaranteed by the Government . . . ." 31 U.S.C. § 3701(b). The implementing regulation further requires that "[f]ederal agencies shall *aggressively* collect all debts arising out of activities of, or referred or transferred for collection services to, that agency." 31 C.F.R. § 901.1(a)

(emphasis added). And "'[s]hall' typically means must, not should." *California* v. *Texas*, 593 U.S. 659, 709 (2021) (Alito, J., dissenting) (citation omitted).

Because this new loan forgiveness scheme is unlawful, as discussed *infra*, the Department is currently—and perpetually—required to collect the debts. Courts have recognized the obligation to collect as a constitutional mandate—in other words, it is not optional. "(W)hen a payment is erroneously or illegally made it is in direct violation of article IV, section 3, clause 2, of the Constitution. Under these circumstances it is not only lawful but the duty of the Government to sue for a refund thereof . . . ." *Aetna Cas. & Sur. Co.* v. *United States*, 526 F.2d 1127, 1130 (Ct. Cl. 1975) (citing *Fansteel Metallurgical Corp.* v. *United States*, 172 F. Supp. 268, 270 (Ct. Cl. 1959)); see also *Int'l Harvester Co* v. *United States*, 342 F.2d 432, 442 (Ct. Cl. 1965) (It is the "duty of the Government to recover [erroneously made] payments").

The expectation of full-blown collection efforts is hardly speculative. Before the pandemic payment pause, the Department vigorously enforced loan repayments. From January 2018 through September 2018, it retrieved over $5.4 billion in defaulted loans. See U.S. Dep't of Educ., *Default Rates*, Federal Student Aid, http://tinyurl.com/2w3pyf3d (last visited Apr. 19, 2024). $662 million of that was from wage garnishments. *Id.*

While some may applaud the President's and the Secretary's generous giveaway of Treasury assets, the REPAYE plan does not legally relieve the borrowers of their duty to pay and does not excuse the government from its duty to collect the outstanding loans.

## II. The Department lacks the statutory authority to institute its loan forgiveness scheme.

The Department claims that 20 U.S.C. § 1987e(e)(5) gives it the statutory authority to implement its new loan forgiveness scheme. It does not. The Department dreamt up the authority through illusory readings of the HEA. But Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman* v. *Am. Trucking Associations*, 531 U.S. 457, 468 (2001) (citing *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994)).

Under 20 U.S.C. § 1087e(e), the Secretary may create an income-contingent repayment plan, which a borrower may elect to enter under § 1087e(d)(1)(D). The Department claims that § 1087e(e)(5) gives the Secretary the authority to determine the balance of a loan as he sees fit. *E.g.,* 88 Fed. Reg. at 43,832. That is false. Under that section of the HEA, "The Secretary may promulgate regulations limiting [only] the amount of interest that may be capitalized on such loan, and the timing of any such capitalization." 20 U.S.C. § 1087e(e)(5). In fact, that section specifically says that "[t]he balance due on a loan made under this part that is repaid pursuant to income contingent repayment *shall equal the unpaid principal amount of the loan*, any accrued interest, and any fees, such as late charges, assessed on such loan." *Id.* (emphasis added). It is beyond a stretch of the imagination for the Department to read this section and conclude that "it does not restrict the Secretary's discretion to define or limit the amounts used in calculating that balance," 88 Fed. Reg. at 43,832, when the unambiguous language of 20 U.S.C. § 1987e(e)(5) clearly restricts the

Secretary's discretion by requiring the inclusion of the unpaid principal amount of the loan.

The Department relies on a second erroneous reading of the HEA to conclude that it may forgive student loans. The HEA allows the borrower to elect to enter into an income-contingent repayment plan, whereby the borrower pays the loan "over an extended period of time prescribed by the Secretary, not to exceed 25 years . . . ." 20 U.S.C. § 1087e(d)(1)(D). The Department has claimed that this section means that if a loan is not paid by an arbitrary deadline set by the Secretary, not to exceed 25 years, the loan is magically forgiven. But that is not how the statute works. All this section does is say that the borrower may enter into that plan, but once the 25-year mark (or a lower number of years set by the Secretary) has been met, the borrower may no longer use the income-contingent plan and must enter into a different repayment plan. The 25-year limit is Congress making sure that the loan is repaid by preventing someone from staying on the plan indefinitely. It does not, as the Department argues, grant the Secretary the authority to forgive loans at any time he chooses within 25 years.

To try and justify its erroneous reading of the HEA, the Department points to other statutory sections where Congress has granted the authority to forgive student loans. *E.g.,* 88 Fed. Reg. at 43,830 (citing Section 493C(b) of the HEA, codified at 20 U.S.C. § 1098e(b)). However, the other statutory sections that expressly grant the Secretary authority to forgive specific loans show that had Congress wanted to give

the Secretary that authority for income-contingent repayment plans, it would have done so explicitly.

Under 20 U.S.C. § 1098e(b)(7), the Secretary must forgive loans if an individual entered and made certain payments towards an income-contingent repayment plan. However, that section requires the individual to have previously elected to participate in "income-based repayment," which differs from income-contingent repayment. Importantly, before such forgiveness could be given, Congress made the borrower meet specific statutory requirements, including suffering partial financial hardship. As such, Congress requires a borrower to show that their loan payments exceed 15 percent of their adjusted gross income, which is the borrower's income over 150 percent of the poverty line. 20 U.S.C. § 1098e(a)(3). This reasoned decision by Congress ensured that loan forgiveness would be used in limited, exceptional circumstances.

The Department's loan forgiveness scheme under the REPAYE plan, on the other hand, does not require any showing of financial hardship. The Department has determined that borrowers can make payments equaling 5 percent of their discretionary income, which is the borrower's income over 225 percent of the federal poverty guideline. The Department will then forgive the remainder of the loan after 120 months of these low monthly payments are made. The low monthly payments the Department has created are the opposite of the financial hardship that Congress decided was sufficient for loan forgiveness. Because the Department could not fit its forgiveness program into what Congress has specifically required, it created its own

vast forgiveness. The REPAYE plan's loan forgiveness scheme greatly exceeds what Congress thought was acceptable and does so without any statutory authority.

The Department's scheme not only relies on statutory authority that does not exist, but it goes far beyond limited, exceptional circumstances. It would be astonishing if Congress decided to carefully craft several very limited loan forgiveness programs but then gave the Department free reign to create its own broad forgiveness schemes. See U.S. Dep't of Educ., *Student Loan Forgiveness*, Federal Student Aid, https://studentaid.gov/manage-loans/forgiveness-cancellation (last visited Apr. 19, 2024). "It follows [from *Royal Indemnity*] that, without a clear statutory basis, an agency has no authority to forgive indebtedness or to waive recovery." U.S. General Accountability Office, *The Government's Duty and Authority to Collect Debts Owed to it*, 2008 WL 6969346, at *1. The HEA simply does not authorize the loan forgiveness program.

## III. The Department's loan forgiveness scheme violates the Appropriations Clause and the Property Clause by spending money and disposing of property belonging to the United States Treasury without congressional approval.

While Congress authorized the Secretary to issue loans as part of its appropriation powers, that appropriation did not authorize outright forgiveness of those loans. Further, only Congress can dispose of government property, and it has not delegated the authority to the Secretary to discharge billions of dollars in accounts receivable.

### A. Congress did not appropriate any funds for the loan forgiveness scheme.

Article I, section 9, of the Constitution provides, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations by Law." This Clause reflects the Framers' decision to "carefully separate[] the 'purse' from the 'sword' by assigning to Congress and Congress alone the power of the purse." *Texas Educ. Agency* v. *U.S. Dep't of Educ.*, 992 F.3d 350, 362 (5th Cir. 2021) (quoting The Federalist No. 78 (Alexander Hamilton)); see also The Federalist No. 48 (James Madison) ("[T]he legislative department alone has access to the pockets of the people."). This Clause "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *Office of Pers. Mgmt.* v. *Richmond*, 496 U.S. 414, 428 (1990). Accordingly, "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Id.* at 424 (quoting *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937)).

The Appropriations Clause requires a careful examination of Congress's appropriation to determine if it, in fact, authorized the claimed expenditure. "At the time the Constitution was ratified, 'appropriation' meant '[t]he act of sequestering, or assigning to a particular use . . . in exclusion of all others.'" *Consumer Fin. Prot. Bureau* v. *Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 427 (2024) (quoting 1 N. Webster, An American Dictionary of the English Language (1828)). See also *id.* (collecting similar definitions limiting appropriations to a specific use or purpose). "'[N]ot a dollar of [the Treasury's funds] can be used in the payment of any thing not

. . . previously sanctioned' through an appropriation made by Congress." *Id.* at 425 (quoting *Reeside* v. *Walker*, 52 U.S. (11 How.) 272, 291 (1851)) (alteration in original). Thus, if the executive uses appropriated funds for a use or purpose not designated by Congress, then the executive has violated the Appropriations Clause. *Sierra Club* v. *Trump*, 929 F.3d 670, 689 (9th Cir. 2019).

The Omnibus Budget Reconciliation Act of 1993 authorized open-ended funding of the William D. Ford Federal Direct Loan Program, but only for limited purposes. Omnibus Budget Reconciliation Act, § 4, 20 U.S.C. § 1087a (1993). As amended, 20 U.S.C. § 1087a(a) provides that:

> There are hereby made available, in accordance with the provisions of this part, such sums as may be necessary (1) *to make loans* to all eligible students (and the eligible parents of such students) in attendance at participating institutions of higher education selected by the Secretary, to enable such students to pursue their courses of study at such institutions during the period beginning July 1, 1994; and (2) *for purchasing loans* under section 1087i–1 of this title.

(Emphasis added).

Congress did not authorize or appropriate funds for the purpose of the forgiveness or cancellation of the Ford Direct Loans. Appropriations "shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a). In other words, while Congress appropriated seemingly unlimited funds for the purpose of lending money to students, its appropriation did not include the purpose of forgiving those loans. Thus, a separate cancellation or forgiveness of existing loans involving federal funds requires a separate act of Congress.

Further, starting in 1992, Congress required that the President's budget "shall reflect the costs of direct loan . . . programs." 2 U.S.C. § 661c(a). The President's budget for the fiscal year 2023 increased the Department of Education's budget by billions of dollars but did not include any funding for its new loan forgiveness scheme. See *U.S. Secretary of Education Miquel Cardona Statement on Fiscal Year 2023 Omnibus Appropriations*, U.S. Dep't of Educ. (Dec. 23, 2022), https://tinyurl.com/DOEFY2023. The Secretary cannot wield the congressional power of the purse by unilaterally forgiving billions in student debt, which would reduce amounts that would otherwise flow to the general fund of the Treasury. See *Consumer Fin. Prot. Bureau*, 601 U.S. at 425 ("money otherwise destined for the general fund of the Treasury qualifies" for the Appropriations Clause). The Department has effectively recognized that the funds to be repaid are not part of the funds appropriated for the loans the Department is authorized to distribute—rather, the funds to be repaid belong to the Treasury. See *U.S. Department of Education Estimate: Biden-Harris Student Debt Relief to Cost an Average of $30 Billion Annually Over Next Decade*, U.S. Dep't of Educ. (Sep. 29, 2022), https://tinyurl.com/2r2rwxjd (the Department recognizes that "in terms of reduced cash flows into the government" the REPAYE plan's loan forgiveness scheme will cost the Treasury "roughly $305 billion"). The Department explains that failure to pay can result in a "Treasury offset" against government benefits, such as tax refunds and social security payments, in order to repay "defaulted federal student loan[s]." U.S.

Dep't of Educ., *Collections on Defaulted Loans*, Federal Student Aid, https://tinyurl.com/EDCollections (last visited Jan. 23, 2023).

The Department's argument that it can both lend as much as it wants and then cancel as much debt as it wants is not consistent with either the power of the purse or the loan programs' statutory authority. The Department's actions "dangerously concentrate power in a single central government," which Madison assured would not occur as the Constitution ensures that "'the sword and purse are not to be given to the same member' of the government." *Sierra Club*, 929 F.3d at 689 (quoting 3 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 393 (Jonathan Elliot ed., 2d ed. 1836)). Without the separation of powers, the rights of American citizens would be "worthless." *Morison* v. *Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

The Department's attempt to appropriate money without regard to Congress's appropriation powers upends the separation of powers. The separation of powers is "not simply an abstract generalization" but is instead "woven throughout the Constitution." *INS* v. *Chadha*, 462 U.S. 919, 946 (1983) (citation omitted). The loan forgiveness program simply cannot withstand constitutional scrutiny.

### B. Only Congress can dispose of the student loan accounts receivable owned by the Treasury.

Separately, the Property Clause provides, "The Congress shall have Power to dispose of . . . Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. A loan is an accounts receivable asset, which—of course—is property. It is indisputable that the subject student loans constitute "Property belonging to the

United States." And only Congress has the "[p]ower to release or otherwise dispose of the rights and property of the United States . . . ." *Royal Indem. Co.*, 313 U.S. at 294.

Congress has not conferred the unrestrained power to dispose of student loans upon the Secretary or the Department. Nor has there been a "formal agency ruling or adjudication stating that the United States abandoned its claim" to repayment of the loans. *Rio Grande Silvery Minnow (Hybognathus amarus)* v. *Bureau of Reclamation*, 599 F.3d 1165, 1187 (10th Cir. 2010). In fact, while the Secretary has some authority to compromise claims, the Department unambiguously disclaimed reliance on that authority. 88 Fed. Reg. at 43,834 ("This IDR plan, however, is not the implementation of the Department's authority to compromise claims, it is an implementation of the Department's authority to prescribe income-contingent repayment plans under Sec. 455 of the HEA."). Even if the discharge of debt did not require a separate Congressional appropriation, it is barred by the Property Clause. The Secretary cannot point to any provision allowing the legal disposal of hundreds of billions of dollars of government property.

The threat to the Constitution's separation of powers stemming from agencies establishing their own appropriation procedures independent of Congress and the novel nature of the Department's loan forgiveness program are important reasons for this Court to strike down Defendants' actions. These loan forgiveness actions, whether "erroneously or illegally made," are "in direct violation of article IV, section 3, clause 2, of the Constitution." *Aetna Cas. & Sur. Co.*, 526 F.2d at 1130. Because there is no act of Congress that either "specifically states that an appropriation is

made," 31 U.S.C. § 1301(d), or "confer[s] upon," *Royal Indem. Co.*, 313 U.S. at 294, the Secretary the right to cancel hundreds of billions of dollars of student-loan accounts receivable, the loan forgiveness program is unconstitutional and exceeds the Secretary's statutory authority.

**IV. The Court should vacate the stay.**

"A stay [of a preliminary injunction] is not a matter of right . . . ." *Nken* v. *Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian Ry. Co.* v. *United States*, 272 U.S. 658, 672 (1926)). "The party requesting a stay bears the burden of showing" that it is entitled to the stay. *Id.* at 433–434. And while the issuance of a stay is a matter of judicial discretion, that discretion must be "guided by sound legal principles." *Id.* at 434 (citations omitted).

The Court's four-factor test to determine if a stay is appropriate is similar to the factors for a preliminary injunction:

> (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."

*Id.* (quoting *Hilton* v. *Braunskill*, 481 U.S. 770, 776 (1987)) (emphasis added). The first two factors are the most important elements for determining the appropriateness of a stay. *Id.*

The Department has failed this test. First, the district court's 42-page opinion carefully analyzed all aspects of the case and concluded that the remaining Plaintiffs have standing and that they—not the Department—are likely to succeed on the merits. The Department contests this, but the Tenth Circuit's stay order does not

refute the district court's determination. And the Department has not shown any irreparable harm *to the government*. The four-factor test explicitly states that the entity seeking the stay has the burden of showing that *it* will be irreparably harmed. Irreparable harm is harm which is—well—irreparable. The best the Department can come up with is that the injunction "upsets months of preparation," Emergency Mot. for an Immediate Admin. Stay & a Stay Pending Appeal at 17, to implement its unlawful program, and "it will spend considerable resources supervising and implementing the technical changes required" to comply with the preliminary injunction," *id.* at 18. Courts have never found these types of "injuries" to be irreparable and the Department cited no authority suggesting that they do. These, at best, are monetary damages. *Liberty Lincoln-Mercury, Inc.* v. *Ford Motor Co.*, 562 F.3d 553 (3d Cir. 2009) (Reversing the preliminary injunction of the district court in that case since "an injury measured in solely monetary terms cannot constitute irreparable harm").

By contrast, allowing the Department to unlawfully forgive loans will cause much more harm. If the Department's forgiveness of billions of dollars of accounts payable owed to the United States Treasury is finally determined to be illegal, it will cause confusion and chaos both within the Department and with the borrowers who thought their loans had been legally discharged but, in fact, were not. Imagine a notice from the Department stating, "The prior notice you received stating your loan was discharged was incorrect because the Court determined that the Department violated the law by forgiving your loan and therefore your loan is reinstated and you

must repay the full amount." The Department's concern about "chaos" created by a delay in loan forgiveness is dwarfed by the chaos created by an attempt to reinstate and collect previously "forgiven" loans.

Moreover, the Department's own actions caused any harm that it might now suffer. In the Department's rush to evade congressional control over loan forgiveness, it promulgated an unlawful loan forgiveness program. And a "movant does not satisfy the irreparable harm criterion when the alleged harm is self-inflicted." *Fiba Leasing Co.* v. *Airdyne Indus., Inc.*, 826 F. Supp. 38, 39 (D. Mass. 1993) (citing *San Francisco Real Estate* v. *Real Estate Invest. Trust of America*, 692 F.2d 814, 818 (1st Cir.1982).

The Department suggested below that the harms to the borrowers of delayed forgiveness and "a large and sudden increase in volume" of service calls mandate a stay. Emergency Mot. for an Immediate Admin. Stay & a Stay Pending Appeal at 18–19. Delayed forgiveness and minor inconveniences do not support a stay of the preliminary injunction, especially when the forgiveness itself is unlawful.

Finally, where the plaintiffs dispute the lawfulness of government actions, the public interest collapses into the merits. See, *e.g., ACLU* v. *Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003) ("the public interest [is] not served by the enforcement of an unconstitutional law") (interior quotation marks and citation omitted)), *aff'd*, 542 U.S. 656 (2004); *N.Y. Progress & Prot. PAC* v. *Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) ("[T]he Government does not have an interest in the enforcement of an unconstitutional law."). Here, the public's interest is best served by enjoining the implementation of an unlawful governmental action and protecting the U.S.

Treasury. And, this loan forgiveness scheme is grossly unfair to taxpayers, students who paid off their loans, students who chose more affordable college education or never went to college, and students with private student debt. See, *e.g.,* Zack Friedman, *Student Loan Forgiveness is Completely Unfair to These People*, Forbes (May 31, 2022).[4] The Department's concern about minor and reversible inconveniences pales compared to the irreversible impacts of the program if the Court does not vacate the stay of the preliminary injunction.

Where a stay is not justified by the four-factor test, vacatur is proper. See *Alabama Ass'n of Realtors* v. *Dep't of Health & Hum. Servs.*, 594 U.S. 758, 763 (2021). See also *Alabama Ass'n of Realtors* v. *Dep't of Health & Hum. Servs.*, 141 S. Ct. 2320, 2321 (2021) (Kavanaugh, J., concurring in denial of vacatur) (citing *Barnes* v. *E-Systems, Inc. Group Hospital Medical & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers) (stay depends in part on balance of equities)).

The Department did not satisfy its burden of showing that it was entitled to a stay of the preliminary injunction, which the district court recognized. The Tenth Circuit gave no support for its stay. While things move fast in these situations, reversing a district court's preliminary injunction—which is the effect of a stay of the injunction—should not be done lightly and should include at least some modicum of explanation. Indeed, the district court was required to "state the reason why" it issued the injunction. Fed. R. Civ. P. 65(d)(1)(A). Absent an explanation by the court of appeals, this Court should give deference to the district court and vacate the stay.

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[4] https://www.forbes.com/sites/zackfriedman/2022/05/31/student-loan-forgiveness-is-completely-unfair-to-these-people/

*Ashcroft* v. *ACLU,* 542 U.S. 656, 664 (2004) ("This Court, like other appellate courts, has always applied the abuse of discretion standard on review of a preliminary injunction.").

## CONCLUSION

For the foregoing reasons, the Court should vacate the Tenth Circuit Court of Appeals' stay of the district court's preliminary injunction and grant the petition for writ of certiorari.

Respectfully submitted,

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