No. 24A11

IN THE

Supreme Court of the United States

STATES OF ALASKA, SOUTH CAROLINA, AND TEXAS,
Applicants,
v.
DEPARTMENT OF EDUCATION, ET AL.,
Respondents.

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

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***AMICI CURIAE* BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE, THE CATO INSTITUTE, THE MACKINAC CENTER FOR PUBLIC POLICY, AND DEFENSE OF FREEDOM INSTITUTE FOR POLICY STUDIES IN SUPPORT OF APPLICANTS' REQUEST FOR VACATUR OF STAY**

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INTEREST OF THE AMICI CURIAE[1]

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization devoted to defending constitutional freedoms from the administrative state's depredations. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, and the right to have laws made by the nation's elected lawmakers through constitutionally prescribed channels (*i.e.*, the right to self-government). NCLA is keenly interested in this case because it involves a profoundly troubling assertion of administrative power and raises critically important issues of constitutional and administrative law. NCLA was one of many commenters that objected to the proposed Department of Education ("Department") rule that ultimately established the Saving on a Valuable Education ("SAVE") student-loan plan, which is the central focus of this case.

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward that end, Cato's Robert A. Levy Center for Constitutional Studies publishes books and studies about legal issues, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs in federal courts across the country, including in *Biden v. Nebraska*.

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission.

The Mackinac Center for Public Policy is a Michigan-based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a § 501(c)(3) organization founded in 1987.

Defense of Freedom Institute for Policy Studies ("DFI") is a national nonprofit organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting the civil and constitutional rights of Americans at school and in the workplace. Founded by former senior leaders of the U.S. Department of Education in 2021, DFI contributes its expertise to policy and legal debates concerning federal student-loan programs, including by submitting a comment to the Department warning that its proposed SAVE plan failed to consider the true cost of the plan and to comply with applicable law.

INTRODUCTION AND SUMMARY

On June 30, 2023, before the ink dried on this Court's decision in *Biden v. Nebraska*, 143 S.Ct. 2355 (2023), which invalidated the Department's plan to cancel $430 billion in federal student loans by unlawfully rewriting the HEROES Act of 2003, the Secretary of Education announced a new and equally unlawful debt-cancellation scheme.[2] Ten days later, the Department published a final rule establishing the so-called SAVE repayment plan, entitled *Improving Income Driven*

[2] *See* Department of Education, *Secretary Cardona Statement on Supreme Court Ruling on Biden Administration's One Time Student Debt Relief Plan* (June 30, 2023).

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). SAVE rewrites 1993 amendments to the Higher Education Act, Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 312, 347–48 (1993) ("1993 HEA Amendments"), to transform loan-*repayment* plans that Congress authorized into loan-*cancellation* plans that Congress did not authorize and that would wipe out $475 billion of debt owed to the U.S. Treasury. The district court preliminarily enjoined SAVE because it concluded Applicants "are likely to prevail" on their claim that "the SAVE Plan exceeds the Secretary's authority under the HEA." App.29a. A divided Tenth Circuit panel stayed that injunction in an unreasoned decision. App.1a.

The Court should vacate that stay that reinstates the district court's injunction because Applicant States are likely to succeed on the merits by showing that the 1993 HEA Amendments do not authorize SAVE. That law merely allows the Department to establish repayment plans over a longer period so individual monthly payments could be smaller for lower-income borrowers. Nothing in the 1993 HEA Amendments' text nor legislative history suggests Congress granted the Department discretion to design plans like SAVE that prioritize the cancellation of loans instead of their repayment. Indeed, if the 1993 law granted such power, it would be unconstitutional because it contains no intelligible principle to guide the Department's discretion regarding how generous it can make repayment plans. Otherwise, the Department could design a plan that resulted in virtually all federal student loans being cancelled,

or none at all, or anything in between. Such unfettered discretion clearly violates the Constitution's vesting of all legislative powers in Congress.

The States are further likely to succeed on the merits given the Court's recent decision in *Ohio v. EPA*, No. 23A349, 2024 WL 3187768, at *9 (U.S. June 27, 2024). The Department estimated the amount of debt that SAVE would cancel, *i.e.*, its budgetary cost, by assuming that $430 billion would already be cancelled under the previous debt-cancellation plan that this Court invalidated a year ago, thereby excluding that $430 billion entirely from its cost calculation for SAVE. Amicus DFI and others warned in their public comments during the Department's rulemaking that the amount cancelled would be much higher if this Court struck down the HEROES Act plan. The Department ignored those legitimate concerns and promulgated SAVE without any reconsideration of how much debt it would cancel, even after this Court halted the previous HEROES Act scheme. Such refusal to address legitimate concerns over how much debt a debt-cancellation rule would cancel is arbitrary and capricious and justifies a stay of the challenged rule under *Ohio*.

Finally, Applicant States indisputably suffer concrete and irreparable injuries because of the Department's unlawful conduct. In addition to injuries set forth in their application, SAVE further injures the States by undermining the competitive advantages Congress bestowed on them through the Public Service Loan Forgiveness ("PSLF") program, which incentivized student-loan borrowers to seek and maintain employment with state government agencies. *See* 20 U.S.C. § 1087e(m)(3)(B)(i)

(creating PSLF incentives for workers in "public service" jobs). Loss of that competitive advantage would inflict a concrete injury against the States in their capacity as employers needing to recruit and retain college-educated employees. This competitive injury, which the States raised below, confers subject-matter jurisdiction that allows the Court to halt the Department's unconstitutional attempt to rewrite laws and cancel debt owed to the Treasury.

ARGUMENT

I. Applicant States Have Standing in Their Capacity as PSLF-Qualifying Employers

The district court correctly held that Applicant States have standing because SAVE injures their state instrumentalities that service federal loans. App.56a-72a. But even if that were not so, the States would still have standing in their capacity as public-service employers. As the States argued below, SAVE injures them as employers by undermining recruitment, shrinking the PSLF-subsidized labor pool, and increasing labor costs. *See* Dkt. 57 (First Amended Complaint) ¶¶ 103-115; *see also* Dkt. 24 at 10.

Congress established PSLF in 2007 to encourage individuals who owe outstanding student-loan debt to seek and maintain employment with public-service employers, including state-government agencies. 20 U.S.C. § 1087e(m)(3)(B)(i). PSLF does this by promising borrowers that their outstanding loan balances will be completely cancelled after 120 monthly payments (10 years) while working at qualifying employers. *Id.*; *see also* 34 C.F.R. § 685.219. Because of PSLF, all else being equal, working for a qualifying employer is more financially advantageous to student-

loan borrowers than working at the same pay (or even higher pay) at a nonqualifying employer.

By offering these incentives to student-loan borrowers in the job market, Congress purposefully gave qualifying public-service employers a valuable advantage over nonqualifying employers in competing to recruit and retain college-educated talent. PSLF benefits public-service employers "by providing significant financial subsidies to the borrowers they hire," thereby "increasing recruitment and lowering labor costs." *ABA v. Dep't of Educ.*, 370 F. Supp. 3d 1, 19 (D.D.C. 2019). The Department's own regulations acknowledge that PSLF was expressly created for the benefit of public-service employers. 34 C.F.R. § 685.219(a). So, government action that eliminates or reduces state employers' PSLF competitive advantage inflicts an economic injury that confers standing.

States are PSLF-qualifying employers and thus are among the employers that Congress intended to benefit through PSLF incentives. *See* 20 U.S.C. § 1087e(m)(3)(B)(i). State agencies rely on the ability to offer loan forgiveness to attract employees who would otherwise take higher-paying private-sector jobs. SAVE undermines PSLF benefits that States rely on by cancelling all debt for borrowers who take out $12,000 or less after they make 10 years of monthly payments. 88 Fed. Reg. at 43,820. Because these borrowers get their entire loan balance forgiven after 10 years, regardless of where they work (or whether they work at all), they have no incentive under PSLF to seek or continue employment with public-service employers like state agencies.

Consider a recent graduate who stands to earn $10,000 in PSLF forgiveness on top of his normal salary after working ten years at a state agency, which works out to extra compensation of $1,000 per year. This PSLF-deferred compensation means it costs the state agency, for example, only $59,000 annually in salary and benefits to offer $60,000 in effective annual compensation, as compared to for-profit employers that are not PSLF-eligible. But SAVE cancels the same graduate's $10,000 loan balance after ten years of monthly payments, even if he never holds a public-service job. The state agency no longer benefits from PSLF's $1,000 per year wage subsidy in its competition against for-profit employers to recruit that graduate. To remain equally competitive as an employer, the agency's labor cost must increase by $1,000 per year to match the effective compensation it provided to the employee before SAVE. While the magnitude of this increase is different—and more complex to calculate—if present value, tax effects, inflation, and the like were considered, the direction of the effect remains the same: state agencies' labor costs rise. Being forced by the Department's unlawful action to "invest more time and resources" to successfully recruit employees "is an actual, here-and-now injury." *Sherley v. Sebelius*, 610 F.3d 69, 74 (D.C. Cir. 2010).

Such injury extends to retention of employees. Consider next a current state employee who had an original loan balance of $10,000 and has been making monthly payments while working in public service for the past eight years. Without SAVE, she would have a financial incentive to stay in public service for two more years so she can get the remaining balance of her loans forgiven under PSLF. However,

because of SAVE, she would get her debt canceled after two more years of monthly payments regardless of where she works. She can thus switch to a higher-paying, for-profit job without any negative repercussions on her eligibility for debt cancellation.

SAVE thus completely negates recruitment and retention benefits that PSLF confers on state employers with respect to borrowers affected by the ten-year forgiveness provision. The loss of this competitive advantage in the labor market inflicts direct and immediate competitive harm on the States as employers, which satisfies the injury-in-fact requirement for Article III standing.

II. The 1993 HEA Amendments Do Not Authorize SAVE

A. The 1993 HEA Amendments Require Repayment Rather than Cancellation of Student-Loan Debt

The Department claims SAVE is authorized by the 1993 HEA Amendments, which states in relevant part that "income contingent repayment shall be based on the [borrower's] adjusted gross income," and would "not … exceed 25 years." 20 U.S.C. § 1087e(d)(1)(D), 1087e(e)(2). According to the Department, this language allows it to design an income-contingent repayment plan with low monthly payments so that very little debt will have been repaid by the end of the repayment period, at which point the substantial remaining balance is cancelled. 88 Fed. Reg. at 43,827 (statute requires "only that payments must be set based upon the borrower's annual adjusted gross income[.]"). There is no limiting principle. If the Department's position were accepted, it could, for instance, set the monthly payment cap at 1 percent of income over $1 million, so that nearly all loans would be cancelled rather than repaid at the end of the repayment term.

This boundless interpretation runs afoul of the 1993 law's plain text, which calls for "repayment" of debt with no mention of any authorization to cancel debt owed to the Treasury. *See* 20 U.S.C. § 1087e. Any cancellation of federal student-loan debt gives away "money otherwise destined for the general fund of the Treasury" and thus involves an appropriation of funds. *CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 425 (2024). Congress made clear that a "law may be construed to make an appropriation out of the Treasury … only if the law specifically states that an appropriation is made[.]" 31 U.S.C. § 1301(d). Hence, when Congress authorizes debt forgiveness, it uses explicit language. *See, e.g.*, 20 U.S.C. §§ 1078-10(b) ("The Secretary shall … assume[] the obligation to repay a qualified loan" for qualifying teachers); 1087e(m)(1) ("The Secretary shall cancel the balance of interest and principal due …" for borrowers who satisfy PSLF); 1098e(b)(7) ("the Secretary shall repay or cancel any outstanding balance …" of eligible borrowers).

The lack of similarly explicit language in the 1993 income-contingent repayment provisions confirms that Congress did not authorize the Department to establish repayment plans that are designed to *cancel* debt.[3] Rather, the 1993 law requires the Department to establish plans that provide for *repayment* of debt, albeit

[3] The States rely on the Major Questions Doctrine to make a similar argument that a clear statement is needed to authorize the mass cancellation of student loans. Br. at 16-20. Amici agree but note that it is not necessary to invoke the Major Questions Doctrine because 31 U.S.C. § 1301(d) already states that a clear statutory statement is needed to authorize the expenditure of funds from the Treasury to pay for student-loan debt cancellation.

along a longer time horizon, "not to exceed 25 years," 20 U.S.C. § 1087e(d)(1)(D), so that monthly payments can be smaller for borrowers with lower income.

Then-Deputy Secretary of Education Madeline Kunin explained to Congress in 1993 that income-contingent repayment would be cost-neutral in the long run: "As to what the cost of [these plans] would be, we see it as a wash" because the government "would eventually get paid" and "[t]here would be interest charged on that, so it isn't like [borrowers] are getting a free ride." *Hearing of the Senate Committee on Labor and Human Resources to Amend the Higher Education Act of 1965*, 103rd Cong. 48 (1993).[4] Cost neutrality is obviously incompatible with granting the Department authority to design a repayment plan that ends up forgiving most loans.[5] To be sure, Deputy Secretary Kunin acknowledged that some small portion of loans might become uncollectable at the end of the payment period and "the Secretary will make some designation as to when you call it quits and [borrowers] are forgiven." *Id.* As any participant in the loan industry knows, writing off *some* bad loans is an unavoidable part of the business. But such write-offs are not the goal—repayment is.

An income-contingent repayment plan contains two essential variables: the monthly payment cap; and the repayment term. If the term is short, then monthly

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[4] Available at: https://files.eric.ed.gov/fulltext/ED363187.pdf.

[5] Analysts at the Brookings Institution and the Urban Institute estimate that SAVE would cancel 50 percent or more of participants' student-loan debt. Adam Looney, *Biden's Income-Driven Repayment plan would turn student loans into untargeted grants*, Brookings, September 15, 2022. Matthew Chingos, et al., *Few College Students Will Repay Student Loans under the Biden Administration's Proposal*, Urban Institute, January 19, 2023.

payments must be higher to ensure repayment. And if the term is long, then monthly payments may be lowered. By limiting the maximum term to 25 years, Congress also limited the extent to which the Department could lower monthly payments—they cannot be so low that repayment is Sanot feasible within the 25-year term. Consistent with this understanding, the Department's original income-contingent plan allowed a borrower's monthly payment to be capped at 20 percent of income above the federal poverty line. Cong. Rsch Serv., *The Federal Direct Student Loan Program* 10 (1995).[6] A lower cap, like the one offered under SAVE, would result in a plan that is not designed to achieve repayment within the maximum 25-year terms. It would impermissibly prioritize debt cancellation over the statutory text requiring the Department to ensure debt "repayment."

Subsequent legislation reinforces this conclusion. Because the original income-contingent repayment plan based on the 1993 HEA Amendments was seen as insufficiently generous, Congress enacted the College Cost Reduction and Access Act of 2007 ("CCRA"), Pub. L. 110-84, 121 Stat. 784 (2007), which authorized income-based repayment plans that reduce monthly payments to 15 percent of income above 150 percent of the poverty line. 20 U.S.C. § 1098e(a). Unlike the 1993 law, CCRA contained explicit language authorizing loan cancellation after 25 years of payments. *Id.* at §1098e(b)(7). Believing even more generosity was needed, President Obama urged Congress in his 2010 State of the Union address to lower the payment cap to "only 10 percent of their income [above 150 percent of the poverty line]" and to shorten

[6] Available at: https://files.eric.ed.gov/fulltext/ED378875.pdf.

the payment period so "all of their debt will be forgiven after 20 years." Barack Obama, *Remarks by the President in State of the Union Address*, Speech given before Congress, at 5, January 27, 2010.[7] Congress obliged and enacted these 10-percent and 20-year proposals in the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, § 2213 (2010) (HCERA), codified at 20 U.S.C. § 1098e(e).

The 2007 CCRA and the 2010 HCERA make no sense if the 1993 HEA Amendments already authorized the Department to unilaterally design a more generous repayment plan like SAVE. SAVE reduces monthly payments to only five percent of income in excess of 225 percent of the poverty line, 88 Fed. Reg. at 43,820, resulting in far more debt being cancelled instead of being repaid at the end of the 20-year repayment period as compared to HCERA. It also reduces the payment period to only 10 years for certain borrowers, *id.*, which further increases the amount of debt cancelled rather than repaid. If the Department could have promulgated this plan since 1993, as it now claims, then why did President Obama press Congress to enact legislation to authorize *less* generous income-based repayment? The obvious answer is that the 1993 law was never before understood to allow the Department to establish a repayment plan that is more generous than what Congress explicitly authorized by HCERA.

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[7] Available at: https://www.govinfo.gov/content/pkg/DCPD-201000055/pdf/DCPD-201000055.pdf.

B. The Department's Contrary Interpretation Results in an Unconstitutional Delegation of Legislative Power

The Department's contrary interpretation of the 1993 HEA Amendments to authorize SAVE must be rejected as an unconstitutional delegation of legislative power. "Article I, § 1, of the Constitution vests all legislative powers herein granted … in a Congress of the United States. This text permits no delegation of those powers." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (cleaned up). Accordingly, "Congress … may not transfer to another branch 'powers which are strictly and exclusively legislative.'" *Gundy v. United States*, 588 U.S. 128, 135 (2019) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825)). The Supreme Court's more recent formulation of that longstanding rule states that Congress may grant regulatory power to an agency only if it provides an "intelligible principle" by which the agency must exercise it. *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

While the intelligible-principle test has been criticized as too lax,[8] it still demands the articulation of objective principles that allow courts to test whether the agency has faithfully executed Congress' command. *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946); *Yakus v. United States*, 321 U.S. 414, 426 (1944) (delegation would be unconstitutional if "it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed"). Thus, a statute that

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[8] *Dep't of Transp. v. Ass'n of Am. RRs*, 575 U.S. 43, 77 (2015) (Thomas, J., concurring) (Explaining that the intelligible-principle "test [that courts] have applied to distinguish legislative from executive power largely abdicates [the judiciary's] duty to enforce that prohibition [against legislative delegation].").

delegates to an agency "unfettered discretion" to make policy choices is unconstitutional. *Jarkesy v. SEC*, 34 F.4th 446, 460–61 (5th Cir. 2022), *affirmed on other grounds sub nom.*, *SEC v. Jarkesy*, 2024 WL 3187811 (U.S. June 27, 2024); *see also Int'l Union v. OSHA*, 938 F.2d 1310, 1317 (D.C. Cir. 1991).

Here, the Department claims that the 1993 HEA Amendments conferred unfettered discretion on the Secretary to invent whatever student-loan repayment plans he wishes. The Department says the explicit minimum-payment provisions that Congress enacted in 2007 and updated in 2010 do not bind it. Instead, the Department can design a repayment plan with even lower monthly payments and a shorter repayment period such that very little debt will have been repaid by the end of the repayment period, at which point the substantial remaining balance is cancelled.

In the Department's view, "[t]he statute … gives the Secretary discretion as to how much a borrower must pay, specifying only that payments must be set based upon the borrower's annual adjusted gross income[.]" 88 Fed. Reg. at 43,827. It claims the same 1993 text authorizes both the preexisting $15 billion REPAYE plan *and* the new $475 billion SAVE plan, *see* App.26a, and presumably anything in between. REPAYE and SAVE represent neither the floor nor ceiling of the Department's discretion. If the only requirement is for payments to be based on income, as the Department claims, then it could lower the payment cap to just one percent of income above $1 million, which would result in zero payments from the vast majority of borrowers. Nearly all student-loan debt would remain unpaid and then cancelled

after 20 years. The Department's capacious view would also allow it to reduce the payment period to 10 years or even shorter to further maximize debt cancellation. Conversely, it could promulgate a payment cap equal to 100 percent of income above $1, which would not reduce the monthly payments for any borrower. Such unfettered discretion would plainly amount to an unconstitutional delegation of legislative power. *Int'l Union*, 938 F.2d at 1317 (rejecting on nondelegation ground agency's assertion of authority "to require precautions that take the industry to the verge of economic ruin … or to do nothing at all."). Even the lax intelligible-principle test cannot support the Department's boundless interpretation because "it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus*, 321 U.S. at 426. The Department's view of the Secretary's power is therefore untenable and must be rejected.

III. SAVE IS ARBITRARY AND CAPRICIOUS UNDER *OHIO V. EPA*

SAVE is also arbitrary and capricious because the Department promulgated it without addressing comments concerning a significant aspect of the problem, namely how much student-loan debt it will cancel. *See Sherley*, 689 F.3d at 784 ("[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public."). This Court recently granted a stay of the challenged regulation in *Ohio v. EPA* because the agency offered no "reasonable response" to

comments that cast doubt on its cost-benefit analysis. 2024 WL 3187768, at *9. It should do so here for the same reason.

In *Ohio*, EPA proposed a rule that it contended would "maximiz[e] cost-effectiveness" because it would cover 23 States in a single emission regime. *Id.* at *4. Commenters warned that some States could not be lawfully covered, and their exclusion would invalidate EPA's cost-effectiveness analysis based on covering all 23 States. *Id.* at *5. EPA provided no response and simply ignored these comments. *Id.* After EPA promulgated its rule, as those commenters predicted, one court after another issued stays that excluded a total of 12 States from coverage. *Id.* at *6. The Supreme Court stayed EPA's rule as to Ohio, Indiana, and West Virginia because EPA failed to provide an adequate explanation to the commenters' legitimate concerns over cost-effectiveness and thereby instead ignored an important aspect of the problem. *Id.* at *8.

Ohio is on all fours. Here, the Department's January 2023 notice of proposed rulemaking estimated SAVE would cancel $156 billion of student-loan debt over 10 years based on the assumption that over $400 billion of such debt would already be cancelled under the HEROES Act, and thus would not be cancelled by SAVE. App.25a–26a (citing 88 Fed. Reg. at 43,820). At the time, the HEROES Act scheme had been stayed pending Supreme Court review of its legality. Amicus DFI filed a comment warning that the Department "fail[ed] to take into account the increased cost of [SAVE] if the Supreme Court strikes down the [HEROES Act] Debt Cancellation Program." *See* DFI, *Comment on the Department's Notice of Proposed*

Rulemaking (Feb. 10, 2023) at 9[9]; *see also* 88 Fed. Reg. 43,875 (acknowledging DFI's comment). With over $400 billion no longer being cancelled under the HEROES Act, far more student-loan debt would be available for SAVE to cancel.

This Court struck down the HEROES Act loan-cancellation plan in *Biden v. Nebraska* on June 30, 2023. The Department promulgated SAVE just ten days later in a final rule that ignored *Nebraska* and falsely insisted that the HEROES Act plan "remains before the Supreme Court." 88 Fed. Reg. at 43,875. The Department acknowledged DFI's legitimate concerns that invalidation of HEROES Act loan cancellation would dramatically increase SAVE's cost, but explicitly declined to revise its estimate because "the Department is confident in our authority to pursue [HEROES Act] debt relief and is awaiting the Supreme Court's ruling on the issue." *Id.* Such misplaced confidence was not a "reasoned response" required by the APA ten days *after* this Court ruled *against* the Department. Ultimately, the Department did not even attempt to estimate SAVE's actual costs after this Court's ruling in *Nebraska*, let alone determine that they were still worth bearing. As in *Ohio*, the Department's failure to address DFI's legitimate concern regarding the amount of debt that SAVE will cancel is arbitrary and capricious.

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[9] Available for download at: https://www.regulations.gov/comment/ED-2023-OPE-0004-13325. The same point is made in comments filed by the Foundation for Research on Equal Opportunity, available for download at https://www.regulations.gov/comment/ED-2023-OPE-0004-7963, the Bipartisan Policy Center, available for download at https://www.regulations.gov/comment/ED-2023-OPE-0004-13475, Arnold Ventures, available for download at https://www.regulations.gov/comment/ED-2023-OPE-0004-13269, the National Conference of State Legislatures, available for download at https://www.regulations.gov/comment/ED-2023-OPE-0004-13386.

Indeed, halting SAVE presents a far stronger case for emergency relief than *Ohio*. Whereas there EPA merely ignored commenters' (correct) *predictions*, the Department here ignored *reality*, *i.e.*, invalidation of the HEROES Act plan. Additionally, there is no need to "dress[] up" DFI's comment, *see Ohio*, 2024 WL 3187768, at *15 (Barrett, J., dissenting), because the Department explicitly acknowledged that DFI called out its failure to account for its HEROES Act loan-cancellation plan being struck down. 88 Fed. Reg. at 43,875. Nor is there need for "speculation" of *Nebraska*'s significant impact on the amount of debt SAVE would cancel. *See Ohio*, 2024 WL 3187768, at *17 (Barrett, J., dissenting). Whereas *Ohio* hypothesized that, "[p]erhaps there is some explanation why the number and identity of participating States does not affect … cost-effective[ness]," *id.* at *8, there is no room for debate here. The Department promulgated SAVE based on its pre-*Nebraska* assumption that it would cost $156 billion, which is less than half of the $475 billion post-*Nebraska* estimate that the district court relied on. *See* App.26a (citing Penn Wharton, *Biden's New Income-Driven Repayment ("SAVE") Plan: Budgetary Cost Estimate Update*, University of Pennsylvania (July 17, 2023)).

The Department argued below that its cost analysis cannot be arbitrary or capricious because it was not required to conduct any cost-benefit analysis in the first place. Dkt. 47 at 45. Not so. The "cost" at issue here is the amount of student-loan debt that would be cancelled under a rule designed to cancel student-loan debt. That is clearly an important aspect of the problem that the Department must address. *See Mexican Gulf Fishing Co. v. United States Dep't of Com.*, 60 F.4th 956, 973 (5th Cir.

2023) ("important aspect of the problem … includes, of course, considering the costs and benefits associated with the regulation.") (citing *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) and *Michigan v. EPA,* 576 U.S. 743, 751 (2015)). The Department's refusal to provide a reasoned response to DFI's legitimate concern over how much debt SAVE would cancel is arbitrary and capricious.

The Department's claim to have sent SAVE to the printer on June 14, before *Nebraska* was decided, Dkt. 47 at 46, is also meritless because "agencies are free to withdraw a proposed rule before it has been published in the Federal Register, even if the rule has received final agency approval." *NRDC v. Perry*, 940 F.3d 1072, 1077 (9th Cir. 2019). Such behavior suggests that the Department may have rushed out its rule in advance of this Court's *Nebraska* decision so it could evade the hard questions raised by DFI and others. But an "agency's desire to apply its rule expeditiously" does not address a "concern so much as sidestep it." *Ohio*, 2024 WL 3187768 at *8. Such arbitrary and capricious conduct reinforces the need to vacate the Tenth Circuit's stay and reinstate the injunction.

CONCLUSION

For the foregoing reasons, Applicants are likely to succeed on the merits, and the Court should grant their request to vacate the Tenth Circuit's stay and reinstate the district court's preliminary injunction.

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Respectfully submitted,

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