No. 24A173

In the Supreme Court of the United States

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, ET AL.,
Applicants,

v.

MISSOURI, ET AL.,

BRIEF FOR TEXAS, ALASKA, AND SOUTH CAROLINA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alaska, and South Carolina, who are applicants in *Alaska v. Department of Education*, No. 24A11 (U.S.). The Amici States have already secured a nationwide injunction (the *Alaska* injunction) against the portions of the SAVE Plan that the federal government's application asks this Court to allow to go into effect. As explained in the Amici States' application, however, the U.S. Court of Appeals for the Tenth Circuit erroneously stayed that injunction in an unreasoned order over the dissent of Judge Tymkovich. Because the federal government's application would have the Court disregard the *Alaska* injunction, the Amici States' interests in the enforceability of both that injunction and the Eighth Circuit's injunction are implicated. Indeed, as counsel explained in his letter to the Court of August 10, 2024, so long as the Eighth Circuit's injunction remains in place, this Court need not provide emergency relief to the Amici States.

Furthermore, allowing the provisions of the SAVE Plan that the federal government's application addresses to go into effect would irreparably harm the Amici States. Before the District of Kansas, the federal government offered no evidence contradicting the States' evidence of injury. The Amici States have a significant interest in preventing that irreparable harm. They also have additional merits and standing arguments that fully support those of Respondents here.*

* No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission. On August 15, 2024, counsel of record for all parties received notice of amici's intention to file this brief.

Summary of the Argument

In many respects a rehash of their response to the Amici States' application in the *Alaska* litigation, the federal government's application here is most remarkable for what it lacks: **(i)** any defense of President Biden's public boasting that this Court's decision in *Biden v. Nebraska*, 600 U.S. 482 (2023), "didn't stop" him from nationwide student-loan cancellation[1]; **(ii)** any defense of Secretary Cardona's use of official communication channels to proclaim to borrowers across the nation that "the Biden-Harris team" will continue to battle "Republican elected officials" through this litigation[2]; **(iii)** any reason why its reading of the Higher Education Act would not allow the Department of Education to cancel every penny of the $1.6 trillion in student loans the Department holds; **(iv)** any discussion of the Department's decision to ignore *Nebraska* when promulgating the SAVE Plan, even though this Court decided *Nebraska* ten days before the Department published the Final Rule; or **(v)** an explanation why the Court should grant certiorari before judgment for its application, but not the Amici States' application, even though the latter application directly addresses the portions of the SAVE Plan that the federal government asks this Court to allow the Department to implement.

[1] Ingrid Jacques, *Courts Keep Telling Biden His Student Loan Scam Is Illegal. Will It Stop Him? Nah!*, USA TODAY (July 1, 2024, 4:04 A.M. ET), https://bit.ly/46fPThb.

[2] Monroe Harless, *Education Department Attacks Republicans, Touts Biden's Agenda in Official Letter*, THE FEDERALIST (July 15, 2024), https://perma.cc/4T26-A3X5; *see also* Michael Brickman, *Democrats are Plotting a Brazen $147B Student-Loan Debt 'October Surprise,'* N.Y. POST (Aug. 14, 2024), https://bit.ly/4dNwCqb.

In *Nebraska*, this Court held that "'[t]he basic and consequential tradeoffs' inherent in a mass debt cancellation program 'are [questions] that Congress would likely have intended for itself.'" *Id.* at 506 (quoting *West Virginia v. EPA*, 597 U.S. 697, 730 (2022)). The Court thus refused to allow the federal government to give away $430 billion, *id.* at 504, and left in place a nationwide injunction entered by the Eighth Circuit preventing that from happening. That should have been the end of it. Agencies cannot act without authority from Congress and must respect court decisions. *See Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244, 2257 (2024).

Rather than doing so, however, the Department plowed ahead with the SAVE Plan—which costs $45 billion *more* than the HEROES Act Plan that was at issue in *Nebraska*. *See* Appendix to U.S. Application (U.S.Appx.) at 6a. Indeed, the President has announced that "[t]he Supreme Court tried to block me from relieving student debt. But they didn't stop me." Jacques, *supra*. Yet the Court applied the major questions doctrine in *Nebraska* because "[t]he economic and political significance of the Secretary's action is staggering," the "Secretary's assertion of administrative authority has conveniently enabled him to enact a program that Congress has chosen not to enact itself," and "it would seem more accurate to describe the program as being in the wheelhouse of the House and Senate Committees on Appropriations" than of any federal agency. *Nebraska*, 600 U.S. at 502-04 (cleaned up). Nothing in that analysis remotely suggests the Court's ruling would have been different had the federal government used its second-choice statute to effectuate its "mass debt cancellation program." *Id.* at 506. The Court thus should grant certiorari before judgment and summarily order vacatur of the SAVE Plan based on *Nebraska* alone. At a minimum, it should deny the federal government's application.

But that is just the beginning of the SAVE Plan's flaws. As the Amici States' application explains, the Court will be hard pressed to find a clearer example of *un*reasoned decisionmaking. The Department finalized the SAVE Plan on July 10, 2023—ten days *after* this Court decided *Nebraska*. Yet the Final Rule expresses the Department's confidence that it may pursue hundreds of billions of dollars' worth of debt relief under the HEROES Act and says the Department was waiting on this Court's decision. *See, e.g.*, Application (App.) at 7, *Alaska v. Dep't of Educ.*, No. 24A11 (July 19, 2024). This Court, however, had already decided the issue. Such a black-and-white misstatement of a material point of law and fact cannot possibly stand under *Ohio v. EPA*, 144 S.Ct. 2040 (2024). Furthermore, the Department has yet to identify any case upholding any rule in the history of the United States of equivalent scope, complexity, or cost for which only a 30-day comment period was provided. To put this truncated comment period in perspective, the Department provided the public roughly one day per $15 billion—or roughly $660 million per hour and $11 million per minute—to comment on this massive handout.

Nonetheless, the federal government asks this Court to vacate the Eighth Circuit's injunction to allow provisions of the SAVE Plan worth hundreds of billions of dollars to go into effect. Its arguments uniformly fail for the reasons given by Respondents; the Eighth Circuit did not err by doing again essentially the same thing it did in *Nebraska*.

In seeking relief from this Court, however, the federal government's application ignores another elephant in the room: The Amici States have *already* secured an injunction against those provisions, and their application asks this Court to vacate the Tenth Circuit's unreasoned stay of that injunction. The federal government also challenges Missouri's standing, notwithstanding *Nebraska*, but ignores that the District of Kansas found—based on uncontroverted evidence—that the Amici States have standing to challenge the SAVE Plan in its *entirety*. The federal government's application thus only underscores why the Court should, at a minimum, grant the Amici States' application. More fundamentally, it demonstrates why the Court should construe both applications as petitions for certiorari and grant both, thus allowing the Court to definitively resolve every standing and merits issue related to the unlawful SAVE Plan and associated Final Rule.

ARGUMENT

I. The SAVE Plan's Final Rule is Unlawful Many Times Over.

The Eighth Circuit correctly granted an injunction pending appeal because Respondents have demonstrated a likelihood of success on the merits and the remaining injunction factors support such relief. Yet the Eighth Circuit's analysis does not identify all the reasons why the SAVE Plan (and associated Final Rule) is unlawful. In evaluating the federal government's application, the Court should not lose sight of important additional failings.

A. Congress has not authorized the Plan.

The Eighth Circuit correctly explained why the SAVE Plan fails under *Nebraska*. After all, with a price tag of $475 billion, "[t]he SAVE plan is even larger in scope than the loan-cancellation program" in *Nebraska*. U.S.Appx.6a. Yet the federal government again relies on "wafer-thin reed[s]" to justify "such sweeping power." U.S.Appx.8a (alteration in original) (quoting *Nebraska*, 600 U.S. at 499). The Eighth Circuit accordingly enjoined the federal government "from any further forgiveness of principal or interest, from not charging borrowers accrued interest, and from further implementing SAVE's payment-threshold provisions" with respect to "any borrower whose loans" are subject to the plan. U.S.Appx.9a. The Eighth Circuit was right to reject the federal government's statutory arguments—especially because *Nebraska* eliminates any doubt that the major questions doctrine applies. But to be clear, the Department's statutory arguments would fail even if the SAVE Plan cost only $475.00—not $475,000,000,000.00.

1. In *Nebraska*, the Court held that "'[t]he basic and consequential tradeoffs' inherent in a mass debt cancellation program 'are ones that Congress would likely have intended for itself.'" *Nebraska*, 600 U.S. at 506 (quoting *West Virginia*, 597 U.S. at 730). Because the SAVE Plan is also a "mass debt cancellation program," the same principle controls here. The federal government attempts (at 30-31) to portray *Nebraska*'s holding as limited to the HEROES Act. Even if that were so (and it is not), that would go only to whether the Higher Education Act (HEA) satisfies the clear-statement rule. Whether the doctrine applies in the first place, however, is "*inherent*" to the question and adheres to *any* "mass debt cancellation program." *Nebraska*, 600 U.S. at 506 (emphasis added).

Even apart from *Nebraska*'s holding with respect to student loans in particular, the SAVE Plan satisfies every plausible consideration used to determine whether a question is major, including (1) "economic" significance; (2) "political" significance; (3) "histor[ical]" precedent; and (4) "the breadth of the authority … asserted." *West Virginia*, 597 U.S. at 721. All support the Eighth Circuit's injunction.

First, the SAVE Plan's economic significance is self-evident. Even the Department's $156 billion estimate is three times the $50 billion price tag that was sufficient to trigger the doctrine in *Alabama Association of Realtors v. HHS*, 594 U.S. 758 (2021) (per curiam). And the SAVE Plan's true cost of approximately $475 billion, U.S.Appx.6a, is nearly ten times that amount and even larger than the $430 billion at issue in *Nebraska*. As this Court has explained, given such a massive price tag, "[t]here is no serious dispute that the Secretary claims the authority to exercise control over 'a significant portion of the American economy.'" *Id.* at 503 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

Second, as in *Nebraska*, the political significance of the SAVE Plan is confirmed by the fact that "the Secretary's assertion of administrative authority has 'conveniently enabled [him] to enact a program' that Congress has chosen not to enact itself." *Id.* (quoting *West Virginia*, 597 U.S. at 731). If anything, that the highest levels of the Executive Branch are using it as a partisan tool in an election year shows that the SAVE Plan is *more* politically significant than the HEROES Act Plan—a point underscored (hopefully unintentionally) by the application's request for oral argument in this Court precisely when the issue will be most politically salient. Judges "are not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Com. v. New York*, 588 U.S. 752, 785 (2019) (cleaned up).

Third, as the District of Kansas explained, the SAVE Plan "represent[s] the first time the Secretary has gone beyond the number set by Congress" to rewrite the material terms of the loans Congress authorized. Appendix to Alaska et al. Application (AK.Appx.) at 027a, *Alaska*, *supra*. Yet "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,'" courts "typically greet its announcement with a measure of skepticism." *UARG*, 573 U.S. at 324 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 123 (2000)). The Department cannot overcome that skepticism by claiming that what it seeks to do here merely incrementally extends prior practice when the SAVE Plan costs *30 times* as much as the previous highwater mark. Indeed, the Secretary boasts that this plan is "the most affordable student loan repayment plan *in history*." Harless, *supra* (emphasis added).

The SAVE Plan is similarly transformative in the way it turns putative "loans" into partial grants. For undergraduate debt, "expected payments per $10,000 borrowed drop from $11,844 … to $6,121." Improving Income Driven Repayment for the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan (FFEL) Program/ SAVE Plan, 88 Fed. Reg. 43,820, 43,880 (July 10, 2023) (*Final Rule*). In other words, what had been an actual loan with repayment of principal and interest is transformed into a roughly 40% outright gift and 60% interest-free loan. For many borrowers, the transformation is even starker: "Borrowers with only undergraduate debt who have lifetime income in the bottom quintile are projected to repay $873 per $10,000 …." *Id.* at 43,881. And as the Amici States' application explains, millions of borrowers pay nothing at all. This is plainly transformative. It was meant to be.

Fourth, "the breadth of the authority that [the Department] has asserted" is also fatal to the SAVE Plan. *West Virginia*, 597 U.S. at 721. Here, the Department offers no reason why, under its unprecedented reading of the statute, it could not abolish *all* $1.6 trillion of student debt in the Department's portfolio. Yet that is essentially *all* "the Government's $1.7 trillion in annual discretionary spending." *Nebraska*, 600 U.S. at 503.

Finally, although this factor is obviously less relevant after *Loper Bright*, it is also significant that the Department has no relevant expertise here. After all, the Department has never *successfully* promulgated a rule like this one. The closest is the HEROES Act Plan, which was smaller but still unlawful. The Department also plainly has no more expertise than the EPA did in *West Virginia* and *UARG*, yet the EPA lost. As the Court has explained, when the price tag of a program runs into the billions of dollars—let alone nearly half a trillion dollars—"the program" falls within "the 'wheelhouse' of the House and Senate Committees on Appropriations." *Nebraska*, 600 U.S. at 504.

2. Because the major questions doctrine applies, the question is whether the HEA supplies "'clear congressional authorization.'" *West Virginia*, 597 U.S. at 723 (quoting *UARG*, 573 U.S. at 324). Here, the statutory provisions do not authorize mass cancellation at all, let alone give "clear … authorization" for it. *Id.*

The Department's argument fails at the outset because it relies on a provision that does not mention loan forgiveness. Instead, the HEA allows the Secretary to create "an income contingent *repayment* plan, with varying annual repayment amounts based on the income of the borrower, paid over an extended period of time prescribed by the Secretary, not to exceed 25 years." 20 U.S.C. §1087e(d)(1)(D) (emphasis added); *see also id.* §1087e(e)(4) ("[Such plans] shall require *payments* that vary in relation to the appropriate portion of the annual income of the borrower … as determined by the Secretary." (emphasis added)).

Nevertheless, the Department claims that the Secretary has "discretion as to how much a borrower must pay," with no floor—only a ceiling that the repayment period "cannot exceed 25 years" and that the amount repaid "must be set based upon the borrower's annual adjusted gross income and … account for the spouse's income if the borrower is married and files a joint tax return." *Final Rule* at 43,826-27. But the Department's reading ignores the crucial word "repayment." Although the HEA allows for loan forgiveness in certain specific circumstances, *Nebraska*, 600 U.S. at 484, §1087e(d)(1)(D) is not one of them. In fact, Congress insisted that "repayment" "includ[e] *principal and interest* on the loan." 20 U.S.C. §1087e(d)(1) (emphasis added).

Furthermore, Congress requires a showing of "partial financial hardship" before the Secretary can create plans with terms similar to the SAVE Plan's (*i.e.*, low payments followed by forgiveness). To qualify, the borrower must show that the "annual amount due" on the loan exceeds "15 percent" of income exceeding "150 percent of the poverty line." *Id.* §§1098e(a)(3)(A)-(B), (b)(1). Yet the Department here seeks to make forgiveness *easier* for essentially every borrower than Congress did for those suffering financial hardship—which turns the HEA upside down. The Department also makes two statutes superfluous: Congress's amendments to the HEA in 2007 and 2010. *See* NCLA Amicus Br. at 15, *Alaska*, No. 24A11 (U.S. July 16, 2024) ("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."). And the SAVE Plan also nullifies the many limits Congress has put on grant programs, to say nothing of Congress's directive that federal agencies must "try to collect a claim of the United States Government for money ... arising out of the activities of, or referred to, the agency." 31 U.S.C. §3711(a).

Against all of this, the federal government argues (at 37-38) that past policies have assumed that loan cancellation is permissible at the end of 20 or 25 years of payments. Yet assumptions about what claimed ambiguities in a statute might allow an agency to do are the opposite of a clear statement, all the more so after *Loper Bright*. Regardless, as the District of Kansas correctly explained, what the Department attempts to do here goes far beyond what any administration has done before. AK.Appx.027a.

3. The Department's theory also has no limiting principle. Under its view, it could forgive 100% of every loan at the stroke of a pen merely by setting payments at 0.1% of discretionary income, defined as income above 3000% of the federal poverty line, for two months. Yet this Court construes statutes to avoid constitutional doubts, not invite them. *See, e.g.*, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

Here, the Department's argument is hard to square with Article I's allocation of spending power to Congress. U.S. Const., art. I, §9. And if Congress in §1087e(d)(1)(D) truly gave the Department discretion to give away hundreds of billions of dollars (or more) merely because the Secretary believes it would be "appropriate," then there's no intelligible principle. "[A]pplication of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989). It is hard to imagine a scenario where such a narrowing construction would be more warranted than when an agency seeks to give away $475 billion—and, by implication, claims power to give away $1.6 trillion—based on the word "appropriate." After all, "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred," and Congress "must provide substantial guidance" with respect to "standards that affect the entire national economy." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001).

B. The SAVE Plan also flunks the APA.

Even if the Department had statutory authority to authorize mass-debt cancellation, the SAVE Plan would violate the APA because, *inter alia*, **(i)** it is arbitrary and capricious, 5 U.S.C. §706(2)(A), and **(ii)** a mere 30-day comment period for one of the largest and most expensive regulations in history is far too short, *id.* §706(2)(D).

1. As explained in the Amici States' application, to estimate that the SAVE Plan would cost 'only' $137.9 billion, the Department's Proposed Rule excluded the HEROES Act Plan's massive debt cancellation, which debt the Department assumed would be off the books before the SAVE Plan kicked in. Unsurprisingly, a commenter asked the Department to consider the SAVE Plan's cost if this Court were to reject the HEROES Act Plan—as seemed likely given the Court had already granted certiorari before judgment and left the Eighth Circuit's nationwide injunction in place. This issue is critical: Without HEROES Act cancellation, the SAVE Plan's costs triple. *See, e.g.*, U.S.Appx.6a, 63a.

The Department, however, refused to update its cost estimates because it was "confident" it could "pursue debt relief" under the HEROES Act even though it was "awaiting the Supreme Court's ruling on the issue." *Final Rule*, at 43,875. This Court, however, had decided *Nebraska* a full ten days *before* the rule was published. It is hard to imagine what could be more arbitrary and capricious than ignoring a decision of this Court that tripled the cost of a program that was already in major questions territory.

Although the federal government says nothing about this issue in its application, it has previously defended the Department's refusal to engage with *Nebraska* on the ground that the Secretary sent the SAVE Plan to the General Printing Office before *Nebraska* was decided—as if rushing a rule out the door to avoid a decision of this Court isn't itself an indictment. But that is not even what the Secretary said the very day this Court decided *Nebraska*. *See, e.g.*, App. at 25, *Alaska*, *supra*. Moreover, it ignores that "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, Inc. v. Perry*, 940 F.3d 1072, 1077 (9th Cir. 2019). To be sure, this is not the SAVE Plan's only violation of basic requirements of reasoned decisionmaking under the APA, but it is enough. A federal agency's decision to blind itself to precedent from this Court is the opposite of reasoned decisionmaking.

2. The Department's defense of its truncated 30-day comment period also cannot be squared with the APA requirement that commenters be given a "*meaningful* opportunity" to comment. *Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011) (emphasis added). Courts have not hesitated to invalidate agency actions where the comment periods were too short to provide such an opportunity. *See id.* (invalidating 28-day comment period); *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1103, 1117 (D.C. Cir. 2019) (14 days). The point of notice-and-comment rulemaking is to allow the public to provide relevant information and to explain the pitfalls of a proposal in time for the agency to avoid errors. This is not a mere formality, much less a box-checking exercise, but instead is the method "by which federal agencies are accountable to the public and their actions subject to review by the courts." *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 16 (2020).

The States are not asking courts to graft new procedural requirements onto the APA—only to enforce Congress's mandate that agencies provide a "meaningful opportunity" to comment on proposed rule. *See, e.g.*, *Prometheus Radio Project*, 652 F.3d at 453. Essentially everyone in the United States will be affected by the SAVE Plan—per capita, the plan costs more than $1,000 for each person in the country. No agency can impose such extraordinary costs on hundreds of millions of people without Congress's approval, let alone with just 30 days for comments. And, unsurprisingly, the Department has not identified any case upholding a rule of equivalent scope, complexity, or cost for which only a 30-day comment period was provided. This is structural error that dooms the entire SAVE Plan and must not be allowed to become a fixture of the administrative process.

II. This Application Underscores the Importance of the Amici States' Application.

For reasons explained by Respondents and set forth above, the federal government's application does not undermine the Eighth Circuit's injunction. What it does do, however, is underscore the significance of the Amici States' application in at least three respects: **(i)** the federal government's (misguided) argument that Respondents lack standing to challenge the SAVE Plan's payment-threshold provisions ignores that the Amici States have already secured a nationwide injunction against those provisions; **(ii)** the federal government's attacks on Respondents' standing makes the District of Kansas's factual finding—based on uncontroverted evidence—that the Amici States have suffered an injury all the more significant; and (**iii**) the Eighth Circuit's injunction dooms the Department's balance-of-harm arguments with respect to the *Alaska* injunction.

A. The *Alaska* Injunction covers the provisions addressed in this application.

A central theme of the federal government's application (at 19-22) is that Respondents have standing to challenge the SAVE Plan's loan-forgiveness provisions that accelerate forgiveness by shortening the timeline from 20 years to 10[3]—which remain stayed by the Eastern District of Missouri's injunction—but not to challenge the SAVE Plan's payment-threshold provisions, *viz.*, **(i)** its redefinition of what constitutes "discretionary" income as anything above 225% of the federal poverty line (up from 150%), and **(ii)** its revised cap that decreases monthly payments from 10% of discretionary income to 5%. As Respondents explain, such arguments are incorrect. They also run headlong into the *Alaska* injunction.

1. Before the Court are two coalitions of States that challenged the same Final Rule, resulting in preliminary injunctions from two district courts on the same day. Yet the injunctions were different. As the Amici States' application explains (at 1, 10, 30 n.8), both the District of Kansas and the Eastern District of Missouri entered injunctions on June 24, 2024, that enjoined different portions of the SAVE Plan. The Eastern District of Missouri's injunction enjoined the SAVE Plan's loan-forgiveness provisions, while the *Alaska* injunction enjoined the same, along with its payment-threshold provisions, albeit only as applied after July 1, 2024. *See* U.S.Appx.4a; AK.Appx.045a.[4] Together, the injunctions

[3] Connected to this provision is the SAVE Plan's rule that loans do not accrue interest while borrowers pay nominal, if not zero, dollars to the principal. U.S.Appx.17a.

[4] The federal government continues to insist (at 14-15) that the District of Kansas only enjoined the SAVE Plan's "payment-calculation provision"—in other words, the plan's revised cap on discretionary income from 10% to 5%. As explained in the Amici States' reply brief, the federal government's crabbed reading of the *Alaska* injunction would set that injunction at war with itself. Regardless, the Amici States have cross-appealed; accordingly, if the Court were to grant certiorari before judgment out of the Tenth Circuit, the entire dispute would be before the Court. *Cf.* U.S. App. at 39 n.7 (agreeing that if the Court grants

enjoin essentially every aspect and every application of the SAVE Plan.

The two district courts also found standing for similar but different reasons. Both sets of States argued that the SAVE Plan causes pocketbook injuries because of the loss of servicing fees and interest income. The Eastern District of Missouri, however, focused on servicing fees because the case before it involved the identical party, and nearly identical theory, that this Court accepted in *Nebraska*. *See* U.S.Appx.6a. The District of Kansas, by contrast, focused on lost-interest revenue given uncontroverted evidence that Alaska would lose $100,000 from the SAVE Plan's implementation. AK.Appx.070a.

These cases' paths diverged further on appeal. The Tenth Circuit stayed the *Alaska* injunction in an unreasoned order. AK.Appx.001a. After the Tenth Circuit's stay order, the sole reason the Department remained unable to give away billions of dollars was the Eastern District of Missouri's injunction. Reasoning that only the "forgiveness-of-principal" provisions were enjoined by that injunction, however, the Department continued forgiving loans by setting "payment-threshold provisions" that resulted in $0 payments. U.S.Appx.4a. Missouri requested emergency relief from the Eighth Circuit because such conduct violated the district court's order to cease implementing any provisions of the Final Rule "that permit loan forgiveness." U.S.Appx.75a. The Eighth Circuit administratively stayed the rule on July 18, 2024, U.S.Appx.11a, and then on August 9, 2024, enjoined the Department "from any further forgiveness of principal or interest, from not charging

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certiorari before judgment, it could address both the arguments in the federal government's appeal to the Eighth Circuit and those in Respondents' cross appeal, and so "consider all of the relevant provisions of the rule on the merits").

borrowers accrued interest, and from further implementing SAVE's payment-threshold provisions" with respect to "any borrower whose loans" are subject to the plan, U.S.Appx.9a.

That injunction pending appeal thus prevents implementation not only of the provisions covered by the Eastern District of Missouri's injunction, but also the *Alaska* injunction. The Eighth Circuit did so to prevent the Department from circumventing the Eastern District of Missouri's injunction "through a new so-called 'hybrid rule'" that "combines the parts of SAVE that the district court did not enjoin, such as the payment-threshold provisions"—covered by the *Alaska* injunction—"and nonaccrual of interest, with the forgiveness-of-principal provisions in REPAYE," which is the plan that existed before the Department replaced it with the Final Rule at issue here. U.S.Appx.4a.

2. In its application, the federal government seeks to leverage the fact that the Eastern District of Missouri's injunction is limited to the SAVE Plan's forgiveness provisions to argue that Respondents cannot challenge the SAVE Plan's payment-threshold provisions, which, it says, are not tied to Missouri's fee-based standing. The application thus urges the Court to allow the Department to implement the SAVE Plan's payment-threshold provisions—which, as the Amici States' application explains, are responsible for the lion's share of the plan's $475 billion price tag.

The federal government's argument fails because, as Respondents observe, the Department cannot use the SAVE Plan's payment-threshold provisions to do what the Eastern District of Missouri's injunction forbids: loan forgiveness. That the loan forgiveness provisions result in *de jure* forgiveness while the payment-thresholds provisions result in *de facto* forgiveness is a difference in the form, not the substance, of Respondents' injuries.

Even if the federal government were right, however, it would not follow that the Department can implement the SAVE Plan's payment-threshold provisions. Those provisions are separately barred by the *Alaska* injunction, and the Amici States have applied to the Court to vacate the Tenth Circuit's unreasoned and erroneous stay. The Amici States' standing is not limited to the SAVE Plan's forgiveness provisions.

The application's argument is thus too clever by half. The federal government asks the Court to deny the Amici States' application respecting the payment-thresholds provisions, while also urging the Court to vacate the Eighth Circuit's injunction because Respondents supposedly lack standing to challenge those provisions. The application is wrong because Missouri plainly has standing. And if it were otherwise, then it would be especially important for the Court to grant the Amici States' application.

B. The Amici States have standing to challenge the entire SAVE Plan.

The flaw in the federal government's "heads-I-win-tails-you-lose" theory is even more apparent because the Kansas district court found that the Amici States have standing to challenge the *entire* SAVE Plan—both its forgiveness and payment-thresholds provisions.

The federal government's arguments against the Amici States' standing confront two insurmountable obstacles: **(i)** the clear-error standard of review, and **(ii)** their choice to leave the States' standing evidence uncontroverted by failing to submit even a scintilla of evidence themselves. As the district court explained, "[w]ithout any contradictory evidence, defendants have given [the court] no facts to reach a different conclusion" than that the

SAVE Plan harms the States. AK.Appx.070a. And the Department has never meaningfully contested the district court's factual finding that "the states' public instrumentalities—and therefore the states—will suffer harm in the form of reduced interest income." AK.Appx.071a. For good reason: Alaska offered unrebutted testimony estimating that loss at $100,000 over the next two years and ample reasoning behind how that number was formulated. AK.Appx.095a-96a. Without any evidence supporting the Department's position, a court cannot reach a "definite and firm conviction that a mistake has been committed" to find clear error. *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) (quotation omitted).

Especially important here, the Amici States' standing is not limited to loan forgiveness. As the district court found, the Alaska Student Loan Corporation, South Carolina State Education Assistance Authority, and Texas Higher Education Coordinating Board will lose interest income because of the SAVE Plan. AK.Appx.074a-75a. This is so because the plan unlawfully provides benefits—including through its payment thresholds—that are not available to borrowers who deal with state loan instrumentalities, and the Department allows those borrowers to consolidate their loans with new federal loans. AK.Appx.060a. Thus, although these state entities will receive their principal back, they will lose streams of interest income, a classic pocketbook injury since at least the days of Hammurabi.

Furthermore, although the Amici States provided uncontroverted real-world evidence of injury, nothing in Article III required them to do so. After all, the Amici States have standing because they can "show an actual or imminent increase in competition," which "will almost certainly cause an injury in fact." *Am. Inst. of Certified Pub. Accts. v. IRS*, 804

F.3d 1193, 1197 (D.C. Cir. 2015). The rule that competitors have standing is premised on "basic economic logic." *Id.* at 1198 (quotation omitted). And it amply supports standing here because the States compete with the federal government in the market for student loans, yet the SAVE Plan unlawfully makes federal loans far more attractive—to the tune of hundreds of billions of dollars. In all events, as the district court explained, "Alaska's ASLC declaration … explains the SAVE Plan's incentives for borrowers to consolidate and testifies that the SAVE Plan already is causing borrowers to consolidate. And defendants haven't rebutted this evidence with any evidence of their own." AK.Appx.071a.[5]

The Amici States' injuries confirm that *whatever* the Court thinks of the federal government's standing theories about Missouri, the Amici States have standing with respect to the entire SAVE Plan, including any provisions the Department hopes to implement by challenging the Eighth Circuit's injunction.

C. The Eighth Circuit's injunction nullifies the federal government's balance-of-harms arguments with respect to the *Alaska* injunction.

The federal government's effort to vacate the Eighth Circuit's injunction is relevant to the Amici States' application in a third respect, as well. Both before the Tenth Circuit and in opposition to the States' application to this Court, the Department argued that staying the *Alaska* injunction is warranted because of administrative burdens and supposed borrower confusion—arguments the federal government (at 5, 37) repeats here. Those

[5] The Amici States have also raised additional standing theories, but the theory adopted by the district court is sufficient, especially given clear error review and complete dearth of contrary evidence.

arguments are no longer remotely plausible. The Eighth Circuit administratively stayed the entire SAVE Plan over a month ago, meaning the Department has already been forced to incur any administrative costs in connection with pausing the plan, and borrowers have already been reminded (as if they needed it) that the SAVE Plan almost certainly violates federal law and that—as with *Nebraska*—borrowers should not expect to benefit from it.[6] The Eighth Circuit's injunction further reinforces these points.

This changed landscape means the Court should at least vacate the Tenth Circuit's unreasoned stay whatever it does with respect to the federal government's application. *See, e.g.*, *NLRB v. Jones & Laughlin Steel Corp.*, 325 U.S. 838 (1945) (vacating in light of "changed circumstances"). Even under the federal government's mistaken view of the breadth of the *Alaska* injunction, such an order would prevent the Department from implementing the SAVE plan's revised cap on discretionary income from 10% to 5%, which the federal government admits (at 29 n.6) costs $59 billion even before accounting for *Nebraska* (which makes it cost nearly $180 billion). In short, given the Eighth Circuit's injunction, the Department's arguments for staying the *Alaska* injunction already no longer work even under its own theory regarding the balance of harms.

III. The Court Should Grant Certiorari Before Judgment for Both Applications.

Finally, the Eighth Circuit's injunction confirms that the Court should grant certiorari before judgment with respect to both applications. In fact, the Court should summarily

[6] Regardless, the fact that the Secretary can send emails to borrowers nationwide about this litigation, *see* Harless, *supra*, defeats any appeal to borrower confusion.

order that the Final Rule be vacated in light of *Nebraska* (which the Final Rule ignores) and *Ohio* (an intervening decision the Final Rule cannot possibly satisfy).

The federal government purports to seek certainty for administrators and borrowers, and there is nothing more certain than a decision from this Court summarily reiterating that "'[t]he basic and consequential tradeoffs' inherent in a mass debt cancellation program 'are ones that Congress would likely have intended for itself.'" *Nebraska*, 600 U.S. at 506 (quoting *West Virginia*, 597 U.S. at 730). There is precedent, moreover, for such strong medicine. *See, e.g.*, *Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516, 516 (2012) (per curiam). Absent such an order, the Department's attempted circumvention of the Eastern District of Missouri's injunction—not to mention the Court's ruling in *Nebraska*—confirms that the federal government will continue to try to give away nearly a half trillion dollars of the public's money without authority from Congress. Indeed, a third round of nationwide mass-debt cancellation has already begun. *See, e.g.*, App. at 8, *Alaska*, *supra*.

Alternatively, the Court should set both cases for briefing and oral argument, which will ensure that every issue is presented with respect to the merits and standing, including the District of Kansas's square finding that the Amici States have standing to challenge every aspect of the unlawful SAVE Plan.

Conclusion

The Court should deny the federal government's application, grant certiorari before judgment in this case and No. 24A11, summarily order vacatur of the SAVE Plan and its Final Rule, or set both cases for briefing and oral argument. At a minimum, the Court should vacate the Tenth Circuit's stay given the federal government's application.

Respectfully submitted.

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