No. 24A11

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ALASKA, ET AL., APPLICANTS

v.

DEPARTMENT OF EDUCATION, ET AL.

RESPONSE IN OPPOSITION TO THE APPLICATION
TO VACATE THE STAY PENDING APPEAL ISSUED
BY THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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The Solicitor General, on behalf of the U.S. Department of Education (Department) and the Secretary of Education (Secretary), respectfully submits this response in opposition to the application to vacate the stay pending appeal entered by the United States Court of Appeals for the Tenth Circuit in this case.

This case involves the Department's income-contingent repayment plans for student loans -- a type of plan that has been mandated by statute since 1993 and allows millions of Americans to make variable student-loan payments based on their income. The statute requires the Department to "determine[]" the "appropriate portion" of the borrower's income for calculating payments, 20 U.S.C. 1087e(e)(4), and to "prescribe[]" the "extended" length of time payments must be made, "not to exceed 25 years," 20 U.S.C. 1087e(d)(1)(D).

More than a year ago, the Department adopted a rule that makes various changes to an existing income-contingent repayment plan, including modifying the calculation of a borrower's annual discretionary income, allowing borrowers to pay 5% of their annual discretionary income toward their undergraduate loans rather than 10%, and shortening the repayment period for certain borrowers. Nine months later, applicants -- Alaska, South Carolina, and Texas -- filed this suit challenging those three discrete provisions of the rule as contrary to the statute. The district court held that applicants had "just barely" established Article III standing. Appl. App. 49a. The court declined to preliminarily enjoin the provisions concerning the calculation of discretionary income and the length of the repayment period because applicants had waited to sue until after those provisions had already taken effect. But the court enjoined the provision lowering the percentage of discretionary income used to calculate payments for undergraduate loans. The court also extended the injunction to all provisions of the rule that had yet to take effect -- including many provisions that applicants have not even argued are contrary to the statute. And the court granted universal relief, specifically refusing to tailor the injunction to the parties with "standing to sue." Id. at 42a.

The Tenth Circuit properly stayed that sweeping and disruptive injunction, and applicants offer no good reason to disturb the stay. They rely on the sort of attenuated theories of standing that

this Court has recently and repeatedly condemned as inconsistent with Article III. And on the merits, they fail to acknowledge, much less address, the statute expressly directing the Department to determine "the appropriate portion of the annual income of the borrower" to serve as the basis for payments, 20 U.S.C. 1087e(e)(4) -- text that unambiguously authorizes the challenged provision of the rule the district court enjoined. Instead, applicants focus on other provisions of the rule that are not before this Court because the district court declined to enjoin them.

Applicants seek to bolster their standing and merits arguments by repeatedly invoking Biden v. Nebraska, 600 U.S. 477 (2023). But as the district court recognized, applicants' "theory of standing is more attenuated -- and therefore weaker" than the one this Court accepted in Nebraska. Appl. App. 61a. And on the merits, the rule relies on a different statute with different language to provide a different set of borrowers with different assistance from the one-time loan forgiveness the Court held invalid in Nebraska. Indeed, the only challenged provision of the rule at issue here does not directly address forgiveness at all; instead, it adjusts the amounts borrowers must pay each month.

Finally, the equities and the public interest overwhelmingly favor maintaining the stay. The district court's sweeping universal injunction would inflict serious and irreparable harm on the Department, its loan servicers, and millions of borrowers. On

the other side of the ledger, applicants assert that they may lose a small amount of interest income -- a harm that even the district court recognized is not "all that substantial." Appl. App. 30a. This Court should deny the application to vacate the stay.

STATEMENT

A. Legal Background

1. Congress enacted the Higher Education Act of 1965 (Education Act), Pub. L. No. 89-329, 79 Stat. 1219, to provide financial assistance for students in postsecondary and higher education. In 1993, Congress amended the Education Act to authorize the Secretary to lend money directly to student borrowers. Student Loan Reform Act of 1993, Pub. L. No. 103-66, 107 Stat. 341. As amended, the statute requires the Department to give borrowers the choice of various plans to repay those direct loans. 20 U.S.C. 1087e(d)(1). One type of plan that the Department must offer is "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).

As the name suggests, the amount that a borrower must repay under an income-contingent repayment (ICR) plan depends on the borrower's income. See 20 U.S.C. 1087e(e)(2). The statute instructs the Department to "determine[]" the "appropriate portion" of the borrower's income on which payments shall be based, 20 U.S.C.

1087e(e)(4), and to "establish procedures for determining the borrower's repayment obligation," as well as "such other procedures as are necessary to implement effectively income contingent repayment," 20 U.S.C. 1087e(e)(1). The statute also directs the Department to "prescribe[]" the "extended period of time" during which the borrower is required to make payments, subject to a cap "not to exceed 25 years." 20 U.S.C. 1087e(d)(1)(D).

2. Since 1993, the Department has offered several different income-contingent repayment plans. The Department published regulations creating an ICR plan in 1994. See 59 Fed. Reg. 61,664 (Dec. 1, 1994). In 2012, the Department created a new ICR plan, known as the Pay As You Earn (PAYE) plan. See 77 Fed. Reg. 66,088 (Nov. 1, 2012). And in 2015, the Department created the Revised Pay As You Earn (REPAYE) plan. See 80 Fed. Reg. 67,204 (Oct. 30, 2015).

The 1994 ICR plan, the PAYE plan, and the REPAYE plan differed in their details but shared the same basic structure. First, each plan involved a determination by the Department about the amount of a borrower's income that should be "protected from [loan] payments." 88 Fed. Reg. 43,820, 43,827 (July 10, 2023). Each plan calculated a borrower's discretionary income by subtracting that protected amount from the borrower's adjusted gross income. See 80 Fed. Reg. at 67,239; 77 Fed. Reg. at 66,137; 59 Fed. Reg. at 61,698. Second, each plan involved a determination by the Department about the percentage of a borrower's discretionary income

that should "go[] toward [monthly] loan payments." 88 Fed. Reg. at 43,827; see 80 Fed. Reg. at 67,239; 77 Fed. Reg. at 66,137; 59 Fed. Reg. at 61,698. Third, each plan involved a determination by the Department about the period "of time borrowers must pay before repayment ends." 88 Fed. Reg. at 43,827. Under each plan, the Department forgave any outstanding loan balance (principal plus interest) at the end of that period. See 80 Fed. Reg. at 67,209; 77 Fed. Reg. at 66,114; 59 Fed. Reg. at 61,666.

Under the 2015 version of the REPAYE plan, for instance, the amount of income protected from loan payments was 150% of the federal poverty line and a borrower's discretionary income was defined as the borrower's adjusted gross income minus that protected amount. 80 Fed. Reg. at 67,239. Monthly loan payments were capped at 10% of a borrower's discretionary income. Ibid. And borrowers could qualify for loan forgiveness after making payments for 20 or 25 years. Id. at 67,241.

B. The Rule

In June 2023, after engaging in both negotiated and notice-and-comment rulemaking, see 20 U.S.C. 1098a(b), the Secretary signed a rule to improve "income-driven repayment" (IDR) plans -- an umbrella term that encompasses both ICR plans and "income-based repayment" (IBR) plans, another type of plan that the Department must offer under the Education Act. 88 Fed. Reg. at 43,820-43,821; see 20

U.S.C. 1087e(d)(1)(E); App., infra, 2a, 5a. The rule was published in the Federal Register on July 10, 2023. 88 Fed. Reg. at 43,820.

The rule makes various changes to the REPAYE plan. 88 Fed. Reg. at 43,822. Among other things, it increases the amount of income protected from loan payments to 225% of the federal poverty line (i.e., $32,805 for a borrower with no dependents using the 2023 level). Id. at 43,881, 43,901. It lowers monthly payments for undergraduate loans to 5% of a borrower's discretionary income. Id. at 43,901. It "provid[es] for a shorter repayment period and earlier forgiveness for borrowers with smaller original principal balances (starting at 10 years for borrowers with original principal balances of $12,000 or less, and increasing by 1 year for each additional $1,000 up to 20 or 25 years)." Id. at 43,880; see id. at 43,902-43,903. And it gives the REPAYE plan a new name: the Saving on a Valuable Education (SAVE) plan. Id. at 43,822.

The rule explains that the changes to the income-protection threshold, the percentage of discretionary income that must be paid, and the repayment period are "distinct and significant improvements" that had been "determined independently." 88 Fed. Reg. at 43,827-43,828. The Department thus emphasized that those provisions are "independent and severable" from each other and from the rule's other provisions. Id. at 43,828.

The rule also makes various changes that apply to other IDR plans or to IDR plans generally. For example, it credits certain

periods of deferment or forbearance, including for borrowers receiving cancer treatment or serving in the military, toward the time needed to obtain loan forgiveness. 88 Fed. Reg. at 43,903. It allows certain delinquent borrowers to be automatically enrolled in an IDR plan. Id. at 43,904. And it effectuates automatic annual income recertification by allowing disclosure of federal tax information to the Department. Id. at 43,865.

Although the rule was generally scheduled to take effect on July 1, 2024, the Department exercised its statutory authority to designate certain provisions for early implementation. See 20 U.S.C. 1089(c)(1) and (2); 88 Fed. Reg. at 43,820-43,821. Those provisions included the increase in protected income to 225% of the federal poverty line, which took effect on July 30, 2023, as well as the shortened timelines to forgiveness for borrowers with smaller original loan balances, which took effect on January 21, 2024. See 88 Fed. Reg. at 43,820-43,821; 89 Fed. Reg. 2489, 2489 (Jan. 16, 2024).

C. Procedural History

1. In March 2024, nine months after the rule was adopted and after several of its key provisions had already taken effect, applicants and eight other States brought this suit in the U.S. District Court for the District of Kansas. Compl. ¶¶ 8-43. The States alleged that the rule was contrary to the Education Act; that it was arbitrary and capricious under the Administrative Procedure Act (APA), 5 U.S.C. 706; and that the Department had vio-

lated the APA by providing only 30 days for public comment. First Am. Compl. ¶¶ 133-227.

2. On June 7, 2024, the district court granted in part and denied in part the government's motion to dismiss. Appl. App. 48a-93a. The court held that, of the 11 States, only applicants had met their burden to establish Article III standing. Id. at 50a. The court reasoned that applicants have public instrumentalities that hold Federal Family Education Loans (FFELs), which are student loans subsidized and reinsured by the federal government, id. at 59a; that the SAVE plan will incentivize borrowers to "consolidate" their FFELs into federal direct loans so that they can take advantage of the SAVE plan, id. at 70a; that those borrowers who consolidate their FFELs will no longer pay any interest to the public instrumentalities, id. at 69a-70a; and that even though the instrumentalities will be repaid in full, they "will suffer harm in the form of reduced interest income," id. at 71a -- in Alaska's case, an asserted reduction of $100,000 over the next two years, id. at 68a. The court acknowledged that applicants had presented "conflicting" evidence on whether the SAVE plan would make consolidation more likely. Id. at 49a; see id. at 65a. The court also acknowledged that applicants' theory was "more attenuated -- and therefore weaker -- than [Missouri's] standing" in Biden v. Nebraska, 600 U.S. 477 (2023). Appl. App. 61a; see id. at 49a. The court nevertheless concluded that applicants had "just barely"

"shouldered their burden to show that the SAVE Plan likely will reduce the[ir] revenue." Id. at 49a.

The district court explained that because none of the other eight States had "a public instrumentality participating in the student loan market," they could not rely on the same theory of standing. Appl. App. 50a. And the court found no alternative basis for standing that could satisfy Article III. In particular, the court rejected the theory that the States "have standing because the SAVE Plan will reduce their income tax revenues," explaining that any such reduction would be merely "an incidental effect of the SAVE Plan, traceable to [the States'] own decisions about how to tax revenue." Ibid.; see id. at 78a-84a. The court also rejected the theory that the SAVE plan would make it "harder for [the States] to recruit and retain employees." Id. at 85a; see id. at 84a-92a. The court therefore dismissed the other eight States from the case. Id. at 50a.

3. On June 24, the district court granted in part and denied in part applicants' motion for a preliminary injunction. Appl. App. 6a-47a. With respect to "the parts of the SAVE Plan already in effect," the court denied relief. Id. at 7a. The court observed that the Department had designated various provisions of the rule for early implementation -- including "(i) the increase in the discretionary income line from 150% to 225% of the federal poverty line and (ii) the shorter path to forgiveness for borrowers who

took out small loans." Id. at 31a. The court noted that applicants "didn't file their lawsuit until March 28, 2024" -- after those provisions had already taken effect. Ibid. Given that delay, the court found that applicants could not "complain of irreparable harm" from those provisions. Id. at 7a. The court therefore "decline[d] to enjoin the parts of the SAVE Plan" that the Department "already ha[d] implemented." Id. at 44a; see id. at 31a n.8 (finding that the States had "waived" any argument against the "severability" of the rule).

With respect to "parts of [the] Final Rule" that were "set to become effective on July 1," the district court granted a universal preliminary injunction. Appl. App. 47a. The court acknowledged that this Court's decision in Nebraska "doesn't answer this case's statutory interpretation question -- at least not directly -- because that case involved an entirely different statute." Id. at 19a. The district court also recognized that the Education Act's "plain text authorizes the SAVE Plan." Ibid. (capitalization altered). The court nevertheless concluded that applicants were "likely to prevail" on their claim that "the SAVE Plan exceeds the Secretary's authority," id. at 29a, reasoning that the statute's "context does not provide clear congressional authorization" under the major-questions doctrine, id. at 22a (capitalization altered).

As for the remaining preliminary-injunction factors, the district court recognized that applicants' "theories of irreparable

harm aren't all that substantial," but held that they had shown "irreparable harm from the SAVE Plan provisions set to go into effect on July 1." Appl. App. 30a; see id. at 34a-35a. The court also noted that "[a] layperson might wonder how Alaska's relatively meager harm -- $100,000 in lost FFEL loan interest over two years -- can justify blocking millions of student loan borrowers nationwide" from receiving the benefits of the SAVE plan. Id. at 36a. But the court refused to "weigh the tradeoffs," ibid., and it "reluctantly" entered a universal preliminary injunction against the parts of the rule that had not yet been implemented, id. at 7a; see id. at 47a.

4. The government appealed, and the district court denied the government's motion for a stay pending appeal. Appl. App. 3a-4a. On June 30, the Tenth Circuit granted a stay; Judge Tymkovich noted his dissent. Id. at 1a-2a. Since then, applicants have cross-appealed the district court's partial denial of their motion for a preliminary injunction. D. Ct. Doc. 90, at 1 (July 8, 2024). The Tenth Circuit has granted applicants' unopposed motion to expedite the government's and applicants' appeals; briefing is set to be completed in two weeks, by July 31, 2024. C.A. Order 1-2 (July 11, 2024).[1]

[1] The eight States that the district court dismissed from the case have separately appealed the partial grant of the government's motion to dismiss. D. Ct. Doc. 88, at 1 (July 3, 2024).

D. The Missouri Injunction

In a separate suit brought by different States, the U.S. District Court for the Eastern District of Missouri has issued a universal preliminary injunction limited to a provision of the rule that the district court here did not enjoin -- namely, the shortened timelines to loan forgiveness for borrowers with smaller original loan balances. See Missouri v. Biden, No. 24-cv-520, 2024 WL 3104514, at *30 (June 24, 2024). Both the government and the plaintiff States have appealed the Missouri court's order to the Eighth Circuit. See C.A. Nos. 24-2332, 24-2351. Although the government believes the Missouri court's injunction is legally erroneous and should be reversed, it has not sought a stay pending appeal because that injunction does not impose the same operational difficulties and widespread harms to borrowers as the injunction at issue here. See pp. 37-38, infra. Thus, "[u]pon receipt of the [Missouri court's] preliminary injunction and in compliance with it, [the government] immediately ceased processing any additional loan forgiveness for borrowers enrolled in SAVE on the shortened timelines provided for in the Final Rule. For the duration of the injunction's effect, [the government] will not grant any loan forgiveness under the shortened timelines provided for in the Final Rule." 24-cv-520 D. Ct. Doc. 44, at 1 (E.D. Mo. June 28, 2024).[2]

[2] The Missouri plaintiffs' assertion (Amicus Br. 5) that the government is "evad[ing]" the Missouri court's injunction rests on a view of the injunction that the court itself has rejected.

ARGUMENT

Vacatur of a stay issued by a court of appeals is an extraordinary remedy. An applicant for vacatur of a stay bears the burden of showing that (1) the "'case could and very likely would be reviewed here upon final disposition in the court of appeals'"; (2) "the applicant is likely to prevail on the merits"; (3) the applicant "'may be seriously and irreparably injured by the stay,'" and (4) the equities otherwise favor vacatur. Western Airlines, Inc. v. Teamsters, 480 U.S. 1301, 1305, 1307 (1987) (O'Connor, J., in chambers) (citation omitted); see Alabama Ass'n of Realtors v. Department of Health & Human Servs., 594 U.S. 758, 763-766 (2021) (per curiam). Applicants cannot make any of those showings.

I. APPLICANTS HAVE FAILED TO SHOW THAT THIS COURT WOULD LIKELY REVIEW A REVERSAL OF THE DISTRICT COURT'S INJUNCTION

Applicants have failed to establish that, if the Tenth Circuit reverses the district court's injunction, this case "very likely would be reviewed here." Western Airlines, 480 U.S. at 1305 (O'Connor, J., in chambers) (citation omitted); see Labrador v. Poe, 144 S. Ct. 921, 931 (2024) (Kavanaugh, J., concurring in the grant of

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As the court recently confirmed, the injunction enjoins only the "implementation" of a particular change: the shortening of the REPAYE plan's timelines to forgiveness for undergraduate loans. 24-cv-520 D. Ct. Doc. 54, at 1 (E.D. Mo. July 10, 2024). The injunction thus does not prohibit the Department from granting forgiveness pursuant to the timelines that existed before that change. As the court explained, its injunction does "not extend" "beyond the scope of the Final Rule" because the plaintiffs "only sought injunctive relief from implementation of the Final Rule." Ibid.

stay) (emphasizing the importance of "certworthiness as a threshold consideration" when "considering emergency applications"). A reversal of the district court's injunction would not conflict with any decision of this Court, create a circuit conflict, or cause any practical consequences justifying this Court's intervention. Indeed, the court of appeals may well reverse the injunction on the ground that applicants lack Article III standing, without reaching the merits. See pp. 16-21, infra. If the court of appeals reverses for lack of standing, that factbound decision -- applying settled Article III principles to the particular circumstances of this case -- would not warrant this Court's review.

A decision reversing the injunction on the ground that applicants are unlikely to succeed on the merits likewise would not warrant this Court's review. Applicants' principal merits argument is that "a 'repayment plan' means that a borrower must remit something." Appl. 19 (brackets omitted). But as explained below, that argument is aimed at parts of the rule that the district court declined to enjoin. See p. 27, infra. It does not apply to what applicants themselves have described as "[t]he only provision genuinely at issue here": the decrease in payments for undergraduate loans from 10% to 5% of the borrower's discretionary income. Applicants C.A. Resp. to Stay Mot. 20 (June 29, 2024). Because the court's injunction does not implicate applicants' principal merits

argument, a decision reversing that injunction would be a poor vehicle for this Court's review.

II. APPLICANTS HAVE FAILED TO SHOW THAT THEY ARE LIKELY TO SUCCEED IN DEFENDING THE DISTRICT COURT'S INJUNCTION ON APPEAL

Applicants have also failed to establish that they are "likely to prevail" in defending the district court's injunction on appeal. Western Airlines, 480 U.S. at 1307 (O'Connor, J., in chambers). Applicants lack Article III standing; their challenges to the rule lack merit; and the injunction is vastly overbroad.

A. Applicants Lack Article III Standing

To obtain a preliminary injunction, "the plaintiff must make a 'clear showing' that [it] is 'likely' to establish each element of standing." Murthy v. Missouri, 144 S. Ct. 1972, 1986 (2024) (citation omitted). Applicants offer two theories of standing, neither of which satisfies that standard.

1. Applicants' primary theory of standing rests on the following chain of causation: Each applicant has a public instrumentality that holds FFELs; borrowers will consolidate their FFELs into federal direct loans to take advantage of the rule's changes to the REPAYE plan; and such consolidation will cause the instrumentalities "pocketbook injury." Appl. 13-14. That theory fails for two reasons.

First, applicants have not clearly shown that they are likely to suffer any pocketbook "injury" at all. Murthy, 144 S. Ct. at 1986. When a borrower consolidates a FFEL, the holder is paid the

principal and any accrued interest on the FFEL in full. See Appl. App. 94a, 96a (acknowledging that the holder is paid the "principal and accrued interest"); 20 U.S.C. 1078-3(b)(1)(D); 34 C.F.R. 685.220(f)(1) and (2). Consolidation thus results in full repayment of FFELs to applicants' instrumentalities.

Full repayment "would ordinarily be cause for celebration, not a lawsuit." TransUnion LLC v. Ramirez, 594 U.S. 413, 437 (2021). Applicants nevertheless assert (Appl. 13) that they will be injured on the theory that borrowers who consolidate their FFELs today will not owe any interest on those loans in the future. But the reason borrowers will not owe any interest in the future is because their FFELs will have already been repaid in full. In addition to removing any default risk, see 20 U.S.C. 1078(b)(1)(G), early repayment lets the holder recoup the time value of money -- the economic equivalent of the interest payments that it would otherwise collect in the future, see Atlantic Mutual Ins. Co. v. Commissioner, 523 U.S. 382, 384 (1998) ("[A] dollar today is worth more than a dollar tomorrow.") (citation omitted).

The effect of consolidation on applicants' pocketbooks therefore cannot be assessed without accounting for the value of early repayment in full. See Conkright v. Frommert, 559 U.S. 506, 519 (2010) (explaining that, "[i]n the actuarial world," failing to "account for the time value of money" is "heresy"). And because applicants have not even attempted to account for the value of

early repayment, see Appl. 13 (discussing only the loss of "interest income"), they have failed to show that they would suffer any pocketbook injury at all. That failure of proof should be dispositive. See Murthy, 144 S. Ct. at 1986 ("The plaintiff 'bears the burden of establishing standing.'") (citation omitted).[3]

Second, even if applicants could show that consolidation would result in pocketbook injury, they have not shown that such injury would be "fairly traceable" to the rule. Murthy, 144 S. Ct. at 1986 (citation omitted). This Court is "reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." Ibid. (citation omitted). Applicants' theory involves just such guesswork: Their chain of causation depends on borrowers consolidating their FFELs because of the rule, but borrowers may choose to consolidate for any number of other reasons.[4] And applicants' own evidence shows that "borrowers already were consolidating their loans long before" the rule. Appl. App. 65a; see id. at 104a. Although ap-

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[3] Applicants argued below that the value of early repayment should not be considered because "once injury is shown, no attempt [should be] made to ask whether the injury is outweighed by benefits." Appl. App. 73a (brackets and citation omitted). But early repayment is not just some benefit, unrelated to the collection of future interest payments; it is the very reason such payments will not be made. The value of early repayment thus goes to the existence of any pocketbook injury in the first place.

[4] See Fed. Student Aid, U.S. Dep't of Educ., Consolidating Student Loans, https://studentaid.gov/manage-loans/consolidation (identifying possible benefits and disadvantages of consolidating).

plicants submitted a declaration asserting that the SAVE plan was causing borrowers to consolidate, id. at 95a-96a, that conclusory assertion finds no support in applicants' own data, which show that consolidation payments have varied significantly over time, with no discernable pattern. Id. at 104a; see California v. Texas, 593 U.S. 659, 677 (2021) (dismissing reliance on a "predictive sentence without more"). Indeed, applicants "haven't adduced any evidence that purports to suss out the amount of consolidation caused by the HEROES Act, the SAVE Plan, and general market forces individually." Appl. App. 66a. Without such evidence, applicants' chain of causation linking consolidation to the rule is "too speculative" and "too attenuated" to satisfy Article III. FDA v. Alliance for Hippocratic Med., 602 U.S. 367, 383 (2024).

Applicants assert (Appl. 13) that they would be injured "in the same way" as Missouri in Biden v. Nebraska, 600 U.S. 477 (2023). But as the district court recognized, applicants' theory of standing is "more attenuated -- and therefore weaker -- than [Missouri's]." Appl. App. 61a. Missouri's standing did not turn on the independent actions of borrowers or the effect of FFEL consolidation on future interest payments. Rather, Missouri's standing turned on the following facts: Its instrumentality, MOHELA, had a contract with the Department to service federally held loans; MOHELA received administrative fees for the loans that it serviced; and the cancellation of loans under the Department's plan would have cost

MOHELA the "fees that it otherwise would have earned under its contract with the Department." Nebraska, 600 U.S. at 489-490. In short, Missouri's standing turned on MOHELA's direct relationship with the Department as a loan servicer -- not on its role as a FFEL holder. Applicants' reliance on Nebraska is thus misplaced.[5]

2. South Carolina also asserts (Appl. 15) standing based on the loss of income-tax revenue.[6] That theory proceeds as follows: Congress has "excluded from the definition of taxable income any forgiveness of student debt" until 2026; South Carolina has tied its own definition of taxable income to the federal definition; so by causing more loans to be forgiven before 2026, the rule's "early loan forgiveness provisions" will result in less student-debt forgiveness that South Carolina can tax. Ibid. That theory does not help South Carolina for two reasons.

First, even if the tax-revenue theory were valid, it would support standing to challenge only the rule's shortened timelines

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[5] Contrary to applicants' assertion, the district court did not "determine[] that Alaska, South Carolina, and Texas have standing because they each have state instrumentalities that service covered federal loans." Appl. 9 (emphasis added); see Appl. 27. Just the opposite: The court emphasized that applicants "haven't alleged any loss of revenue from servicing loans," Appl. App. 60a, and that applicants' "public instrumentality theory relies on reduced interest revenue -- not fees," id. at 61a n.7. In fact, there is no evidence that applicants' instrumentalities service any federal loans at all. See id. at 94a-105a.

[6] Because Alaska and Texas "have no state income tax," Appl. App. 78a n.11, the tax-revenue theory does not apply to them.

to forgiveness for borrowers with smaller original loan balances. After all, "standing is not dispensed in gross." TransUnion, 594 U.S. at 431. And South Carolina has not traced the loss of income-tax revenue to any provisions other than the rule's shortened timelines to forgiveness. See Appl. 15. The district court, however, did not enjoin those provisions. See pp. 10-11, supra. So the tax-revenue theory is irrelevant to whether South Carolina had standing to seek the injunction that the court entered.

Second, as the district court recognized, the tax-revenue theory has "a traceability problem." Appl. App. 82a. A plaintiff has standing only if its injury is "fairly traceable to the defendant's allegedly unlawful conduct." California, 593 U.S. at 669 (emphasis added; citation omitted). When an injury arises from a plaintiff's own conduct, that requirement is not satisfied. Here, as the court found, South Carolina's asserted injury arises from its own decision to tie its definition of taxable income to the federal definition. Appl. App. 82a-84a. And "[n]o State can be heard to complain about damage inflicted by its own hand." Pennsylvania v. New Jersey, 426 U.S. 660, 664 (1976) (per curiam); see Florida v. Mellon, 273 U.S. 12, 18 (1927).[7]

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[7] Applicants also assert (Appl. 14) "injuries predicated on procedural claims." But a plaintiff asserting a procedural right must still show that "it has a 'concrete interest that is affected by the deprivation' of the claimed right," and that its "ostensible injury" "'fairly can be traced to'" the defendant's conduct. Department of Educ. v. Brown, 600 U.S. 551, 562, 567 (2023) (citations omitted). Applicants have not made those showings.

B. Applicants' Statutory Challenges Lack Merit

Even if applicants had standing, they are unlikely to succeed on their challenges to the rule. Applicants challenge the following changes to the REPAYE plan as contrary to the Education Act: (1) the increase in the amount of income protected from loan payments to 225% of the federal poverty line; (2) the decrease in monthly payments for undergraduate loans to 5% of a borrower's discretionary income; and (3) the shortening of timelines to forgiveness for borrowers with smaller original loan balances. See Appl. 6; Appl. App. 11a-12a; First Am. Compl. ¶ 70.

The district court enjoined the second change, but declined to enjoin the other two. See pp. 10-12, supra. Thus, only one of the challenged changes is implicated by applicants' request to reinstate the court's injunction: the decrease in monthly payments for undergraduate loans to 5% of a borrower's discretionary income. See Applicants C.A. Resp. to Stay Mot. 20-21 (acknowledging that "[t]he only provision genuinely at issue here" is "capping payments at 5%-vs-10% of discretionary income"). Applicants' statutory challenge to that change lacks merit.

1. In amending the Education Act in 1993, Congress required the Department to offer "income contingent repayment" plans to borrowers of direct loans. 20 U.S.C. 1087e(d)(1)(D). Congress established the basic framework, defining "income contingent repayment" plans as plans "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." Ibid. But Congress "empower[ed]" the Secretary "to prescribe rules to 'fill up the details.'" Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024) (citation omitted). In particular, Congress instructed: "Income contingent repayment schedules shall be established by regulations promulgated by the Secretary and shall require payments that vary in relation to the appropriate portion of the annual income of the borrower (and the borrower's spouse, if applicable) as determined by the Secretary." 20 U.S.C. 1087e(e)(4) (emphases added).

That provision plainly authorizes the Secretary to "determine[]" the "appropriate portion of the [borrower's] annual income" for calculating payments. 20 U.S.C. 1087e(e)(4). And in the 1994 ICR plan and in every ICR plan since, the Secretary has exercised that authority by specifying the appropriate portion as a percentage of a borrower's discretionary income. See 80 Fed. Reg. at 67,239; 77 Fed. Reg. at 66,137; 59 Fed. Reg. at 61,698. In the 2015 version of the REPAYE plan, for example, the Secretary determined the appropriate portion to be "no more than 10 percent" of a borrower's discretionary income. 80 Fed. Reg. at 67,239. And in the rule, the Secretary reduced that percentage for undergraduate loans, determining the appropriate portion to be 5% of a borrower's discre-

tionary income. 88 Fed. Reg. at 43,820, 43,901. Section 1087e(e)(4) clearly authorized the Secretary to make that determination.

Rather than engage with the text of Section 1087e(e)(4) -- which applicants do not even cite -- applicants invoke the major-questions doctrine. Appl. 16-18. But that doctrine does not apply here. Applicants point to the "economic and political significance" of the rule. Appl. 17 (citation omitted).[8] But economic and political considerations, on their own, have never been enough to trigger the major-questions doctrine. After all, the doctrine is a tool for discerning "the text's most natural interpretation" by situating the text in "context." Nebraska, 600 U.S. at 508 (Barrett, J., concurring); see id. at 511 ("The major questions doctrine situates text in context."). So in deciding whether the doctrine applies, this Court has considered not just the "economic and political significance" of the asserted authority, but other

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[8] Applicants cite a Penn Wharton study estimating the cost of the rule, after accounting for Nebraska's invalidation of the Department's HEROES Act plan, to be $475 billion over ten years. Appl. 8 (citing Appl. App. 26a). But the Congressional Budget Office (CBO) has provided an estimate of $276 billion over ten years. Letter from Phillip L. Swagel, Dir., CBO, to Rep. Virginia Foxx and Sen. William Cassidy, U.S. Congress, at 2 (Mar. 13, 2023), perma.cc/899C-YM8M. In any event, applicants acknowledge (Appl. 30 n.8) that "the cost implicated by this injunction does not include" the "entire" cost of the rule. The district court enjoined only one of the three provisions that applicants challenged as contrary to the Education Act. See p. 22, supra. That provision -- the decrease in certain monthly payments to 5% of a borrower's discretionary income -- accounted for approximately $59 billion of the rule's estimated cost of $156 billion before Nebraska. 88 Fed. Reg. at 43,890 (Tbl. 5.4).

surrounding circumstances, such as the "history and the breadth of th[at] authority." West Virginia v. EPA, 597 U.S. 697, 721 (2022) (citation omitted); see, e.g., Nebraska, 600 U.S. at 501 (same).

Here, neither the history nor the breadth of the authority that the Department has exercised "provide[s] a 'reason to hesitate before concluding that Congress' meant to confer such authority." West Virginia, 597 U.S. at 721 (citation omitted). The authority to "determine[]" the "appropriate portion" of a borrower's discretionary income that should go toward student-loan payments, 20 U.S.C. 1087e(e)(4), is not some "unheralded power," West Virginia, 597 U.S. at 724 (citation omitted). Instead, it is the same power the Department has exercised time and again in fashioning ICR plans since 1994. See pp. 5-6, supra. And far from providing a reason to be skeptical of the Department's authority, the text of Section 1087e(e)(4) expressly instructs the Department to "determine[]" the portion of a borrower's income that is "appropriate," 20 U.S.C. 1087e(e)(4) -- a term that this Court recently reaffirmed "leaves agencies with flexibility," Loper Bright, 144 S. Ct. at 2263 (citation omitted).

In any event, even if the major-questions doctrine applied, it would be satisfied here because Section 1087e(e)(4) clearly authorizes the Department to "determine[]" the "appropriate portion" for calculating undergraduate-loan payments to be 5% of a borrower's discretionary income. 20 U.S.C. 1087e(e)(4). Contrary to

applicants' assertion, neither that determination nor anything else in the rule "conflict[s]" with the "congressionally determined thresholds" in 20 U.S.C. 1098e. Appl. 22; see Appl. 20. Section 1098e governs a different kind of plan -- namely, "income-based repayment" plans -- which Congress made subject to a distinct set of statutory provisions. 20 U.S.C. 1087e(d)(1)(D) and (E). Section 1098e thus has no application here.

Applicants' reliance (Appl. 1-2, 12, 17-18) on Nebraska is likewise misplaced. In Nebraska, the Department invoked its authority under the HEROES Act to "'waive or modify'" existing statutory or regulatory provisions "to cancel $430 billion of student loan principal." Nebraska, 600 U.S. at 494 (citation omitted). In holding that the HEROES Act did not authorize the Department's actions, the Court emphasized that the Department's "'modifications'" had "created a novel and fundamentally different loan forgiveness program," id. at 496, and that its "invocation of the waiver power" did "not remotely resemble how it ha[d] been used on prior occasions," id. at 497. Here, in contrast, the Department has merely revised an existing ICR plan by exercising the same power to "determine[]" the "appropriate" basis for calculating loan payments as the Department exercised in creating the plan in the first place. 20 U.S.C. 1087e(e)(4); see pp. 6-7, supra. Because Nebraska "addressed a different statute with a different regulatory history," it does not cast doubt on the Department's exercise of

authority here. Appl. App. 7a; see Department of Educ. v. Brown, 600 U.S. 551, 567 (2023) ("HEROES Act loan relief and [Education Act] loan relief function independently of each other.").

2. Applicants' principal merits argument is that "a 'repayment plan' means that a borrower must remit something." Appl. 19 (brackets omitted). But that argument does not apply to the challenged provision that the district court enjoined; after all, a borrower who pays 5% of her discretionary income does remit something. Instead, applicants' principal merits argument is aimed at the two challenged changes in the rule that the court did not enjoin: the shortening of the timelines "to forgiveness for borrowers who took out small loans," and the increase in the amount of income protected from loan payments "to 225% of the federal poverty line" (which has reduced to $0 the monthly payments of borrowers during periods when their incomes fall at or below that protected amount). Appl. App. 31a. Applicants, however, have not asked this Court to enter an injunction against those other changes. Because applicants seek only reinstatement of the injunction that the district court entered, their principal merits argument is not implicated here.

In any event, the district court correctly rejected applicants' reliance on the word "repayment." See Appl. App. 20a-22a. The whole point of an "income contingent repayment" plan is that how much a borrower repays each year is contingent on her income,

and Congress made explicit that no borrower would be required to make payments indefinitely. 20 U.S.C. 1087e(d)(1)(D); see 20 U.S.C. 1087e(e)(7). The concept of loan forgiveness is thus inherent in the plan Congress designed: Some borrowers might "not earn sufficient income to fully repay their loans" within the prescribed period, and when that happens, any outstanding balance is forgiven. 59 Fed. Reg. at 61,666. That is how "every Secretary of Education" since the enactment of the Student Loan Reform Act of 1993 has understood ICR plans to work. Appl. App. 21a; see 80 Fed. Reg. at 67,209; 77 Fed. Reg. at 66,114; 59 Fed. Reg. at 61,666.

Applicants' contrary interpretation would effectively rewrite the statute "to require 'full repayment' of the loan's principal and some interest." Appl. App. 21a-22a (emphasis added). But the statute nowhere requires "full repayment." To the contrary, Congress expressly empowered the Department to determine, within statutory limits, how much borrowers must ultimately repay. See, e.g., 20 U.S.C. 1087e(d)(1)(D) (requiring that the period of repayment be "extended"); 20 U.S.C. 1087e(e)(4) (requiring that the basis for calculating payments be "appropriate"). Congress thus authorized the Department to make each of the challenged changes in the rule.[9]

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[9] Contrary to applicants' assertion (Appl. 23), Congress's delegation of authority under Section 1087e does not raise constitutional doubts. "[T]his Court has held that a delegation is constitutional so long as Congress has set out an 'intelligible principle' to guide the delegee's exercise of authority." Gundy v.

C. Applicants' Alternative APA Arguments Lack Merit

In the alternative, applicants argue (Appl. 23-27) that the rule violates the APA. But this Court is "a court of review, not of first view." Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005). And in entering the injunction, the district court did not pass upon applicants' alternative APA arguments. In any event, those arguments lack merit.

1. The Department's January 2023 notice of proposed rule-making estimated the rule's costs. 88 Fed. Reg. 1894, 1919 (Jan. 11, 2023). A commenter "expressed concern" with that estimate, which assumed the effectiveness of the Department's HEROES Act plan, at issue in Nebraska. 88 Fed. Reg. at 43,875. The commenter suggested that the Department "produce a secondary cost estimate in the event that the [HEROES Act] plan does not go into effect." Ibid. In the rule signed on June 14, 2023, see App., infra, 2a, 5a, the Department put the estimated cost of the rule at $156 billion, which assumed the effectiveness of the HEROES Act plan, and declined to produce an alternative cost estimate, 88 Fed. Reg. at 43,875, 43,886. The Department emphasized that its "cost estimates account[ed] for [its] current and anticipated programs and

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United States, 588 U.S. 128, 145 (2019) (plurality opinion) (citation omitted). Section 1087e readily satisfies that standard. See, e.g., Whitman v. American Trucking Ass'ns, 531 U.S. 457, 472 (2001) (upholding a delegation to an agency to issue whatever air quality standards are "requisite to protect the public health") (citation omitted).

policies." Id. at 43,875. This Court issued its decision in Nebraska on June 30, 2023, see 600 U.S. at 477, and the rule was published in the Federal Register on July 10, 2023, see 88 Fed. Reg. at 43,820.

Applicants assert (Appl. 24) that the Department "deliberately understated the costs" of the rule by not revising its cost estimate "after the Court decided Nebraska." But the Secretary signed the rule and transmitted it for publication on June 14, 2023, App., infra, 2a, 5a -- two weeks before this Court's decision in Nebraska. A subsequent press statement by the Secretary imprecisely referred to the rule as being "finalized" on June 30, the day of the Court's decision. Appl. 25 (citation omitted). But the undisputed fact remains that the rule had already been signed and transmitted by then.

Applicants also contend that, by not producing an alternative cost estimate, the Department "ignored an important aspect of the problem before it." Appl. 24 (citation omitted). But the Education Act does not require the Department to produce a cost estimate in the first place -- let alone an alternative one. See American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 510 (1981) (explaining that when Congress intends to require "cost-benefit analysis," it generally does so "clearly" "on the face of the statute"). And the Department reasonably explained that the cost estimates it had produced "account[ed] for [its] current and anticipated programs and policies." 88 Fed. Reg. at 43,875. There

is nothing "post hoc" about that explanation, Appl. 25, which is set forth in the rule.

Applicants' reliance (Appl. 26) on Ohio v. EPA, 144 S. Ct. 2040 (2024), is misplaced. That case concerned the severability of a Federal Implementation Plan (FIP) issued by the Environmental Protection Agency (EPA). Id. at 2051. The Court held that when commenters expressed concern about "'an important aspect of the problem'" -- i.e., whether EPA's chosen methodology might require changes to the FIP's emissions-control if fewer States remained in the plan -- "EPA offered no reasoned response." Id. at 2053-2054 (citation omitted). Here, in contrast, the Department did not rely on the cost estimate in establishing the contours of the rule, so it was not an important aspect of the problem in the first place. And when a commenter suggested that an alternative cost estimate be prepared, the Department offered a reasoned response about its "current and anticipated programs and policies." 88 Fed. Reg. at 43,875.

In any event, any error in not producing an alternative cost estimate was harmless. See 5 U.S.C. 706 (providing that "due account shall be taken of the rule of prejudicial error"). The Department found that the costs of both the HEROES Act plan and the rule were justified by "the need to provide relief to borrowers." Missouri v. Biden, No. 24-cv-520, 2024 WL 3104514, at *25 (E.D. Mo. June 24, 2024). The subsequent invalidation of the

HEROES Act plan caused a share of that plan's costs to be shifted to the rule. But there is no reason to believe that, if the Department had produced an alternative cost estimate that accounted for that shift, it would have reached a different judgment about whether the costs were justified.

2. Applicants also contend (Appl. 26-27) that the Department violated the APA by providing 30 days, rather than 60, for comment on the proposed rule. But the APA does not require a 60-day comment period. See 5 U.S.C. 553(c); Missouri, 2024 WL 3104514, at *27. And "courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA." Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 591 U.S. 657, 685 (2020) (citation omitted). In any event, any error was harmless. During the comment period, which followed a lengthy process of negotiated rulemaking, the Department received 13,621 comments, 88 Fed. Reg. at 43,821, and applicants do not identify any additional issues that they (or others) would have raised had the comment period been longer.

D. The District Court's Injunction Is Overbroad

Applicants are also unlikely to succeed in defending the district court's injunction on appeal because the injunction is overbroad in two fundamental respects.

1. First, the injunction is overbroad because of its universal scope. Article III and traditional principles of equity

require that injunctive relief be "limited to the inadequacy that produced [the plaintiff's] injury." Gill v. Whitford, 585 U.S. 48, 66 (2018) (citation omitted); see Califano v. Yamasaki, 442 U.S. 682, 702 (1979). To the extent any injunctive relief in this case was warranted, such relief could have been tailored to prevent any further consolidation of FFELs held by applicants' instrumentalities -- the source of the only injury the district court identified. D. Ct. Doc. 81, at 15 (June 27, 2024). Instead, the court entered a universal injunction preventing the application of many of the rule's provisions to millions of borrowers throughout the country -- the vast majority of whom do not have any connection with applicants' instrumentalities. Appl. App. 47a.

The district court attempted to justify the universal scope of its injunction by emphasizing the "need for nationwide uniformity." Appl. App. 42a. But that simply disregards the "foundational principles" discussed above. Poe, 144 S. Ct. at 923 (Gorsuch, J., concurring in the grant of stay). The court also cited the universal injunction entered by the Eighth Circuit in Nebraska v. Biden, 52 F.4th 1044, 1048 (2022) (per curiam). But this Court did not approve that injunction or address the proper scope of interim relief in that case, and the Court has since stayed the universal aspect of a district court's injunction based on five Justices' explicit conclusion that universal injunctions are likely impermissible. See Poe, 144 S. Ct. at 923 (Gorsuch,

J., concurring in the grant of stay); id. at 933 n.4 (Kavanaugh, J., concurring in the grant of stay).

2. Second, the injunction is overbroad because it would enjoin parts of the rule that "no party has shown, and no court has held, likely offensive to federal law." Poe, 144 S. Ct. at 923 (Gorsuch, J., concurring in the grant of stay). The only part of the rule "set to become effective on July 1, 2024," Appl. App. 47a, that applicants challenged as contrary to the Education Act was the decrease in monthly payments for undergraduate loans to 5% of a borrower's discretionary income, see p. 22, supra. Yet the court entered an injunction against all "parts of [the] Final Rule * * * set to become effective on July 1, 2024," Appl. App. 47a, including provisions (like those effectuating automatic annual income recertification, see p. 8, supra) that applicants never alleged were contrary to the Education Act or the source of any injury -- let alone irreparable harm. Because applicants have not shown (and the district court did not find) any basis for enjoining those other parts of the rule, the injunction sweeps far too broadly.

III. APPLICANTS HAVE NOT DEMONSTRATED THAT THEY FACE IRREPARABLE HARM OR THAT THE EQUITIES OTHERWISE FAVOR VACATUR OF THE STAY

Even if applicants were likely to succeed on the merits, they still would not be entitled to reinstatement of the district court's injunction. As noted, the injunction covers only a single provision that applicants challenged as contrary to the Education Act: the decrease in monthly payments for undergraduate loans to

5% of a borrower's discretionary income. See p. 34, supra; Applicants C.A. Resp. to Stay Mot. 20-21 (describing that provision as "[t]he only provision genuinely at issue here"). Applicants have not shown that they would likely suffer any irreparable harm from that provision -- and even if they had, any harm to them would be far outweighed by the harm to the government, its loan servicers, and borrowers from enjoining the provision at this late date.

1. Leaving the Tenth Circuit's stay in place would not cause irreparable harm to applicants. As explained above, applicants have not shown that they would suffer any injury -- let alone irreparable injury -- traceable to the decrease in monthly payments for undergraduate loans to 5% of a borrower's discretionary income. See pp. 16-21, supra. Even the district court acknowledged that applicants' "theories of irreparable harm aren't all that substantial." Appl. App. 30a. It further acknowledged that, to the extent any of the applicants had "adduce[d] evidence of a current harm to its public instrumentality," ibid., the harm was "relatively meager" -- "$100,000 in lost FFEL loan interest over two years," id. at 36a.

Applicants argued below that loan forgiveness cannot be undone. Applicants C.A. Resp. to Stay Mot. 21. But applicants have failed to show that they would suffer any harm -- let alone irreparable harm -- from forgiveness itself. The district court rejected applicants' attempt to link forgiveness to the loss of income-tax revenues. Appl. App. 78a-84a. And the only theory of irreparable

harm that the district court accepted traces applicants' injury to FFEL consolidation -- not forgiveness itself. Id. at 30a, 70a-73a.

Indeed, the district court declined to enjoin the rule's shortened timelines to loan forgiveness, finding that applicants had failed to show irreparable harm from that provision. Appl. App. 30a-33a. The court also declined to enjoin the rule's increase in protected income to 225% of the federal poverty line, which has reduced to $0 the monthly payments of borrowers during periods when their incomes fall at or below that protected amount. Ibid. Even if, as applicants contend, those borrowers have had their loans "effective[ly]" canceled, Letter from Applicants to Scott S. Harris, Clerk, Supreme Court of the United States, at 2 (July 12, 2024) (citing Applicants C.A. Reply in Supp. of Unopposed Mot. to Expedite 3), the court found that applicants had failed to show irreparable harm from the increase in protected income, Appl. App. 30a-33a.

The "only provision genuinely at issue here" is the decrease in certain monthly payments to 5%, Applicants C.A. Resp. to Stay Mot. 20, and that provision does not directly address forgiveness at all. Applicants' concern (Appl. 2) about loan "cancellation beginning on August 1" thus bears no relation to the injunction that they are seeking to reinstate.[10]

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[10] The suggestion (Appl. 2) that loan cancellations will "begin[] on August 1" is also incorrect. Because the Department exercised its early-implementation authority, some borrowers re-

2. On the other side of the balance, reinstating the district court's injunction would cause irreparable harm to the government, its loan servicers, and borrowers. See Nken v. Holder, 556 U.S. 418, 435 (2009) (recognizing that the government's interest and the public interest "merge"). The Secretary signed the rule 13 months ago. App., infra, 2a, 5a. For more than a year, the Department has worked alongside its servicers to implement the provisions of the rule that were scheduled to take effect on July 1, 2024. Id. at 10a. That work was necessary because administering a repayment plan for millions of borrowers involves the linking of various "technically complex" database systems, which are used "to calculate payment amounts, send bills, and collect payments." Id. at 9a; see id. at 28a.

If the injunction were reinstated, that work would be upended. To revert to the pre-SAVE plan approach, the Department and its servicers would have to reprogram their systems, retrain their staff, and recalculate monthly payments. App., infra, 11a-12a. That process would take at least several months, during which the Department would have no choice but to place many borrowers into forbearance until servicers are able to bill them for the new

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ceived loan forgiveness under the SAVE plan as early as February 2024, after the shortened timelines to forgiveness took effect in January 2024. See p. 8, supra. Moreover, the Missouri court has since enjoined those shortened timelines, so the Department will not be granting any loan forgiveness under those timelines while that injunction remains in effect. See p. 13, supra.

amounts. Ibid. The Department would also have to "halt electronic applications for IDR and for consolidation loans for roughly 6 weeks." Id. at 7a. And it would have to devote considerable staff time and other resources to the reprogramming effort, which would detract from other critical priorities. Id. at 12a-13a.

Borrowers would also stand to suffer significant and irreparable harm. Many have already received bills that reflect the decrease in monthly payments to 5% of their discretionary income. App., infra, 10a, 13a. Many would experience intense confusion when they are told that their payments must be recalculated and that they must be placed in forbearance -- which would delay any eventual loan forgiveness. Id. at 13a; see id. at 27a-28a. And many would suffer additional harm when they are sent new bills and "charged up to twice what they expected to pay monthly." Id. at 13a. The widespread harm that would be caused by reinstating the injunction thus outweighs any "relatively meager" harm -- "$100,000 in lost FFEL loan interest over two years" -- that applicants might experience as a result of the stay. Appl. App. 36a.

3. Applicants' delay in bringing suit further weighs in favor of preserving the Tenth Circuit's stay. See, e.g., Gildersleeve v. New Mexico Mining Co., 161 U.S. 573, 578 (1896). Even as the Department took substantial steps toward implementing the rule, applicants waited nine months after the rule's adoption to file their complaint. As the district court found, applicants "have failed

to proffer a reasonable explanation for the delay." Appl. App. 33a. Their own lack of urgency belies any need for emergency action.

4. Applicants suggest (Appl. 28-29) that the equities cannot favor leaving the stay in place if the rule is unlawful. But that wrongly collapses the equities into the merits. This Court has made clear that "a preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits." Benisek v. Lamone, 585 U.S. 155, 158 (2018) (per curiam). Even when a plaintiff has made such a showing, consideration of the equities alone can justify the denial of extraordinary relief. See Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 23 (2008).

The district court read NFIB v. OSHA, 595 U.S. 109 (2022) (per curiam), to mean that it was not the court's role to "weigh the tradeoffs." Appl. App. 36a. But that decision stands only for the proposition that "[t]he equities do not justify withholding interim relief," NFIB, 595 U.S. at 120, when "the harms and equities are very weighty on both sides," Poe, 144 S. Ct. at 929 (Kavanaugh, J., concurring in the grant of stay). In such cases, an assessment of "likelihood of success on the merits" may well be dispositive. Ibid. Here, however, the harms and equities are weighty on only one side, so the balance tips decisively in favor of leaving the stay in place.

IV. CERTIORARI BEFORE JUDGMENT IS NOT WARRANTED

Finally, applicants briefly ask (Appl. 29) this Court to treat their application as a petition for a writ of certiorari before judgment. But applicants have not shown that this "case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. If the Tenth Circuit reverses the injunction, this case would not be worthy of this Court's review at all. See pp. 14-16, supra. And there is no valid reason for this Court to short-circuit the court of appeals' review, particularly given the speed with which that court is moving. See p. 12, supra.

CONCLUSION

The application to vacate the stay pending appeal and petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

JULY 2024

APPENDIX

Declaration of Levon Schlichter,
D. Ct. Doc. 46-1 (Apr. 26, 2024) 1a

Email of June 14, 2023, from the Office of the Federal
Register, D. Ct. Doc. 46-1 (Apr. 26, 2024) 4a

Declaration of Denise L. Carter,
D. Ct. Doc. 81-1 (June 27, 2024) 6a

Declaration of Lorelei Salas,
D. Ct. Doc. 81-2 (June 27, 2024) 16a

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STATE OF KANSAS, *et al.*,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, *et al.*,

Defendants.

Case No. 24-1057-DDC-ADM

EXHIBIT 1:

Declaration of Levon Schlichter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STATE OF KANSAS, *et al.*, Plaintiffs, v. JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, *et al.*, Defendants.	Case No. 24-1057-DDC-ADM

DECLARATION OF LEVON SCHLICHTER

1. I, Levon Isaac Quattrone Schlichter, am a General Attorney, Division of Regulatory Services (DRS), Office of General Counsel, at the United States Department of Education (Department). My employment in this role began on February 28, 2011.
2. As a General Attorney within DRS, my responsibilities include ensuring the submission of regulations to the Secretary for signature and, upon receipt of signature, ensuring the transmission of regulations to the Office of the Federal Register (OFR) for publication in the *Federal Register* pursuant to the Federal Register Act, 44 U.S.C. §§ 1501-11. The statements in this declaration are based on my personal knowledge or information provided to me in my official capacity.
3. On June 14, 2023, the Secretary signed the Final Rule titled *Improving Income Driven Repayment for the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan (FFEL) Program*. On the same day, following receipt of the Secretary's signature, the Final Rule was uploaded to the OFR document submission portal for publication. The Final Rule was later published at 88 Fed. Reg. 43,820 (July 10, 2023).
4. An email from OFR, confirming that the Final Rule was received for publication, is attached hereto as Exhibit 1-A.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 26 day of April 2024.

Levon Schlichter

Levon Schlichter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STATE OF KANSAS, *et al.*,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, *et al.*,

Defendants.

Case No. 24-1057-DDC-ADM

EXHIBIT 1-A:

June 14, 2023 Email from the Office of the Federal Register

From: Collins, Jackie
To: Burton, Vanessa; Malawer, Hilary
Subject: FW: Office of the Federal Register:Submission Status: ID:W614202316553766
Date: Monday, April 22, 2024 4:48:54 PM

From: noreply@fedreg.gov <noreply@fedreg.gov>
Sent: Wednesday, June 14, 2023 4:06 PM
To: Collins, Jackie <Jackie.Collins@ed.gov>
Subject: Office of the Federal Register:Submission Status: ID:W614202316553766

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STATE OF ALASKA, *et al.*, Plaintiffs, v. MIGUEL A. CARDONA, in his official capacity as Secretary of Education, *et al.*, Defendants.	Case No. 24-1057-DDC-ADM

EXHIBIT 1:

Declaration of Denise L. Carter
Department of Education

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STATE OF ALASKA, *et al.*, *Plaintiffs*, v. MIGUEL A. CARDONA, in his official capacity as Secretary of Education, *et al.*, *Defendants*.	Case No. 24-1057-DDC-ADM

DECLARATION OF DENISE L. CARTER

I, Denise L. Carter, do declare under penalty of perjury and pursuant to 28 U.S.C. § 1746, that the following is true and accurate:

1. I am the Principal Deputy Chief Operating Officer at Federal Student Aid ("FSA") in the United States Department of Education. In this role, my responsibilities include the coordination of major policies, programs, and activities related to federal student aid. This includes, but is not limited to, overseeing the administration of the student loan programs, including the SAVE plan. As such, I am familiar with the systems and processes used to administer the SAVE plan and other loan repayment plans. I make this declaration based on my personal knowledge and based on information provided to me in my official capacity.

2. As described below, student loan repayment involves multiple complex systems that require many steps and significant time to create and change. Small changes affect many people and systems; large changes, even more so.

3. Complying with the injunction will require the Department and its servicers to implement significant technical changes to their student loan databases, following over a year of preparation to implement SAVE. This will entail reprogramming all the systems that process new enrollees in Income Driven Repayment plans. During this process, which is anticipated to take at least several months and which will be quite costly, the Department will have to halt electronic applications for IDR and for consolidation loans for roughly 6 weeks, during which the Department will only be able to accept paper applications. The Department and its loan servicers will also have to make technical changes for many borrowers currently enrolled in SAVE, and will need to place SAVE borrowers whose

payment amount is affected by the injunction into forbearance. Overall, these compliance measures will create significant disruptions to loan servicing, require wasteful and costly stop-gap measures, and create widespread borrower confusion.

A. Loan Servicing & Repayment Plans

4. Administering a borrower's loan on an Income Driven Repayment ("IDR") Plan such as SAVE begins with the borrower choosing a repayment plan and submitting information to FSA to determine eligibility and the terms of repayment. This is the process for new enrollees going forward. There is another process for transitioning the repayment plans of current SAVE enrollees described in paragraph 14 below. For new enrollees, applications are submitted through StudentAid.gov and then processed through the Department's Digital and Customer Care ("DCC") platform. DCC is a system that is maintained by FSA through a vendor.

5. For borrowers who permit FSA to obtain their data from the Internal Revenue Service, FSA determines the borrower's eligibility for her chosen repayment plan and monthly payment amount, drawing on information in the following database systems:

    a. The Common Origination and Disbursement ("COD") system, which is the Department's system that facilitates the disbursement of loans. COD is maintained by FSA through a vendor.

    b. The National Student Loan Database System ("NSLDS"), which is a database system that records and stores information about federal student loans and grants. NSLDS is maintained by FSA through a vendor.

    c. For Direct loan borrowers only who provide their consent, the Federal Tax Information Module ("FTIM"), which is a system that securely pulls information from the IRS and uses that information to make income- and repayment-related calculations. The FTI module is maintained by FSA through a vendor. The database system from which the FTI module pulls tax information is maintained by the IRS.

6. The borrower may also opt to forgo the automated process and submit records with income-related information. FFEL loan borrowers do not have the option of going through the automated process and must submit their own income-related information. In these cases, records are submitted directly to the servicer, which processes the records to determine the borrower's eligibility and the repayment plan's terms, time period, and other details.

7. Once these eligibility and repayment determinations described in paragraphs 5-6 above are completed, the borrower's information is packaged and sent to the borrower's

servicer in a data file. The tasks of servicing the loan then fall to the borrower's servicer, contracted by the Department to administer many aspects of the federal student loan programs. The servicer processes the repayment-plan details in that data file; confirms the borrower's eligibility for the plan; communicates with the borrower to confirm the plan; begins managing borrower's repayment (including calculating monthly payment amounts, sending borrowers bills and collecting payments; interacting with borrowers to provide them information and support; and maintaining borrower accounts, including information about the loan status and progress toward any eligible forgiveness program); and regularly updates NSLDS throughout these processes. The Department currently employs five student loan servicers that service SAVE enrollees. Apart from CRI, which services 41,000 borrowers, each of the other servicers services between 7 and 14 million borrowers.

8. To complete the tasks described in paragraphs 4-7, the Department and servicers rely on database systems. These systems are technically complex in their own right, as are the bridges linking them together (that is, between servicers' databases and the Department's). To implement a repayment plan, the Department and its servicers write a considerable volume of computer code that is specific to each repayment plan. That is, when a borrower who opts to use IRS data selects a particular plan on StudentAid.gov, the relevant information is recorded in DCC; then that information is processed through COD, NSLDS, and the FTIM, which includes FTIM pulling any relevant tax information from the IRS; the result of that processing is a determination that the borrower is eligible for the selected repayment plan under certain terms; that information is packaged in a data file and sent to the servicer; and the servicer uses that information to calculate payment amounts, send bills, and collect payments. Each system (and the interfaces between them) contains computer code for each available payment plan so that the borrower gets billed the right amounts and so, eventually, the loan is processed according to the right plan.

B. Implementation of SAVE & the Final Rule

9. To make changes in those systems, the Department proceeds through a "change-request" (CR) process with specific parameters required by contract.

10. The CR process is a multi-step process that involves FSA drafting requirements and an Independent Government Cost Estimate ("IGCE") and issuing a CR to the vendor; an iterative question-and-answer process to reach consensus with the vendor on the CR's requirements; an impact analysis and cost proposal from the vendor that estimates the time and cost needed to implement the CR; FSA securing funding; and FSA finalizing the CR. Once the CR is finalized, FSA gives the vendor the authority to proceed with implementing it.

11. The first main category of the Department's work to implement SAVE and the Final Rule involved borrowers who want to enroll in or switch to SAVE after July 1, 2024. To do this, the Department, its system contractors, and its servicers utilized the CR process to create functionalities in all the above-referenced systems according to SAVE's particular terms. In all, the engineering and testing processes required to coordinate and operationalize the systems under SAVE's parameters took more than a year. More specifically, the development process required designing the platform and determining the necessary requirements for a vendor to build the platform; documenting these requirements in instructions to the vendor through a contractual change-management process; working with the vendor to develop the platform; overseeing the vendor's implementation of the platform; and testing all of the systems to ensure they operate and interact properly through an application programming interface (API).

12. FSA and its vendors have been working to build systems that accommodate the SAVE provisions scheduled to take effect July 1, 2024, since the draft plan was first announced in January 2023, and have been working to implement SAVE's specific repayment provisions since the rule was finalized in July 2023. That is, it has required more than a year of work on the relevant systems' functionalities so that, on July 1, 2024, when a borrower enrolls in SAVE, the repayment plan administered is consistent with provisions that take effect on July 1. In tandem with these technical and engineering steps required to implement SAVE, the Department and its servicers have trained their staff and customer service representatives on the new regulations and new systems.

13. FSA had to undergo the same process with each servicer. FSA provided CRs to each of the servicers to implement these changes. The servicers provided time and cost estimates to FSA, which FSA approved or negotiated and then approved. The servicers then updated their systems and trained their staff and customer service representatives.

14. The second main category of the Department's work to implement SAVE applies to borrowers currently enrolled in SAVE. For these borrowers, the Department and its vendors have prepared the systems so that these borrowers' repayment plans transition to the reflect the new SAVE provisions set to go into effect July 1. For these borrowers, the servicers programmed their systems to begin calculating new payment amounts for SAVE enrollees for the month of July. Before issuance of the preliminary injunction in this case, the servicers had already been in the process of recalculating these borrowers' payment amounts to reflect the 5% rate that SAVE provides instead of the previous rate. For many of these borrowers, the servicers' systems had already recalculated and implemented their new rate for July payments, and the servicers' systems are processing the remaining enrolled borrowers' rates on a daily basis. Many borrowers whose rates have been recalculated have already received bills for July that reflect the new payment amount.

C. Compliance with the Court's Injunction & Harms Absent a Stay of the Injunction

15. To comply with the court's injunction, and its prohibition on implementing the SAVE plan's provisions that cover a borrower's repayment plan, FSA must go through the process of implementing a new IDR payment plan all over again.

16. To change the system for new enrollees, FSA will first need to reprogram its own computer systems, such as NSLDS, FTIM, DCC and COD, to establish borrower's repayment plan eligibility and amount according to the parameters for prior payment plans that were slated to be phased out after July 1 and that were not built into the functionalities that have been created to implement the FUTURE Act and new USDS servicing framework. This will require submitting CRs to vendors, responding to their questions, approving their cost estimates, and providing them Authority to Proceed ("ATP"). The vendors will then need to craft their own system requirements, program the systems for the new payment plan criteria, and do the required testing. Once FSA's internal systems have been reprogrammed, FSA will need to communicate its determination concerning borrower eligibility and repayment amount to servicers.

17. FSA also needs to communicate the new system requirements to servicers, who need to update their computer systems by going through the full new cycle of development. This will again include CRs, cost estimates, issuance of ATPs, crafting new system requirements, programming, and testing. The servicers will also need to write new manuals and train their staff.

18. After the servicers have reprogrammed their systems, servicers will need to test them against FSA systems. Servicers will also need to notify the borrowers of their new repayment terms.

19. Reprogramming the code changes that were slated to be implemented beginning on July 1 and calculating the new rates will take at least several months. This is so because all of FSA's and servicers' systems had to be programmed to match the new SAVE requirements and will need to be reprogrammed to revert back to the pre-SAVE rates.

20. In order to bring the process for new enrollees into compliance with the injunction, the Department will have to halt the electronic submissions of IDR applications and the electronic applications for consolidation loans, because these processes and the systems that facilitate them are all programmed to account for the SAVE provisions scheduled to take effect July 1. The Department estimates it will take at least 6 weeks to implement a stop-gap measure that will accommodate electronic IDR applications and consolidations. During that time the Department will only be able to accept paper applications for IDR and consolidations.

21. The Department will also be forced to make significant changes for borrowers who are already enrolled in SAVE. For borrowers who are already enrolled in SAVE and whose rates have been recalculated, recalculating these borrowers' payment amounts in order to collect accurate payments will require a change carried out through the change-management process and cannot be done on a short timeframe. It will be particularly difficult to collect correct payment amounts for the recalculated borrowers who have already received bills for their July payments. The Department cannot simply change a borrower's payment and collect a new payment immediately and without notice. In addition to the time needed for these new payment amounts are recalculated, to demand the new payment amount, these borrowers must be given notice weeks in advance so that they know the accurate amount to pay. The Department estimates it will take at least several months for the servicers to reprogram their systems in order to recalculate these borrowers' payment amounts so that they revert back to the pre-July 1 SAVE parameters.

22. As a result of these administrative impracticalities and the short amount of time available before this Court's injunction takes effect, during the time it will take the Department and its servicers to recalculate monthly payments and bill borrowers with the correct amounts, the Department will be required to place borrowers whose payment amount is affected by the injunction into forbearance. Rapid changes to systems can lead to erroneous billing, and without such a forbearance, the Department would be unable to bill many of these borrowers at the appropriate amount and unable to avoid even greater borrower confusion.

23. During this period of forbearance, although interest will not accrue, these borrowers will not make payments and thus will not have any payments counted toward IDR forgiveness.

24. The process of conforming the Department's and servicers' database systems to the modified repayment rules applicable under the Court's injunction, alongside the forbearance necessary while that process is ongoing, will cause significant and irreparable harm to the Department, its servicers, and borrowers.

1. Costs to the Department and Servicers

25. Complying with the injunction will cause the Department to incur significant additional costs – some of the same types of costs it has already incurred in implementing the SAVE plan.

26. Rebuilding the framework to comply with the *Alaska* injunction will consume considerable staff time, interfering with other critical Department priorities including: the launch of the 2025-26 FAFSA Form; implementing the IDR payment count adjustment; managing the transition to the USDS servicing platform, which is the first such transition

in years; and implementation of the Gainful Employment and Financial Value Transparency rules.

27. Deprogramming the not-yet-implemented July 1 provisions out of ED systems would also affect millions of other student loan borrowers not on SAVE because of interdependencies across systems. For example, the system that counts time toward SAVE forgiveness also affects the forgiveness count for other IDR plans.

2. Costs to Borrowers

28. The steps required to comply with the injunction will cause intense confusion among borrowers, stemming from several sources. The SAVE plan's general contours have been public since the Notice of Proposed Rulemaking's publication in January of 2023, creating expectations among borrowers that its provisions—including lower payments—will go into effect. These expectations will not be met when borrowers are placed into forbearance and eventually (after forbearance is completed) charged up to twice what they expected to pay monthly.

29. Additional confusion will result among the 124,000 borrowers who have already received billing notices calculated under the now-enjoined provisions of SAVE as of June 26, 2024.

30. The confusion experienced by borrowers will cause significant difficulties for servicers (already burdened by the technical adaptations required to update their database systems) as they are overwhelmed with email and phone inquiries from borrowers seeking information about the modified terms of SAVE under the injunction.

31. Forbearance will harm borrowers because months spent in forbearance will not count toward forgiveness under income-driven repayment plans, thus delaying any eventual loan forgiveness.

32. The measures necessary to comply with the injunction will impact borrowers who are not even enrolled in SAVE.

a. Complying with the injunction will also significantly impact many borrowers who are not enrolled in SAVE, because many elements of the Final Rule set for implementation on July 1 applied to other or multiple IDR plans. There are many provisions of the rule that are not part of the SAVE plan itself and have significant effects on the non-SAVE IDR plans, and those are also now affected.

b. For instance, borrowers who are in deferment on their loans while receiving treatment for cancer or serving in the military will now stop getting credit toward forgiveness on *any* IDR plan.

c. A statutorily-mandated provision to allow automatic recertification of borrower income on all income-driven repayment plans is also among the suspended provisions.

d. The injunction will impact other non-SAVE specific provisions in the final rule that were effective July 1, 2024, which include but are not limited to:

> i. Providing borrowers who are diligently making payments on their confirmed bankruptcy plans credit toward loan forgiveness.
>
> ii. Changing how payments prior to a loan consolidation are counted so that borrowers do not lose all credit toward IDR forgiveness if they consolidate.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 27th day of June 2024.

DENISE CARTER

Digitally signed by DENISE CARTER
Date: 2024.06.27 23:13:35 -04'00'

Denise L. Carter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STATE OF ALASKA, *et al.*, Plaintiffs, v. MIGUEL A. CARDONA, in his official capacity as Secretary of Education, *et al.*, Defendants.	Case No. 24-1057-DDC-ADM

EXHIBIT 2:

Declaration of Lorelei Salas
Consumer Financial Protection Bureau

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STATE OF ALASKA, *et al.*, Plaintiffs, v. MIGUEL A. CARDONA, in his official capacity as Secretary of Education, *et al.*, Defendants.	Case No. 24-1057-DDC-ADM

DECLARATION OF LORELEI SALAS

I, Lorelei Salas, hereby declare as follows:

Biographical Information

1. I am the Supervision Director at the Consumer Financial Protection Bureau (CFPB) and have held that position since November 7, 2021. During this time, I have also held the titles of Assistant Director of the Office of Supervision Policy and Acting Assistant Director for the Office of Supervision Examinations, but my official duties have not changed. I am an attorney barred in New York State with a J.D. from Benjamin N. Cardozo Law School. I make this declaration based on my personal knowledge and on information available to me in my official capacity.

2. The CFPB's jurisdiction and responsibilities are set forth in Title X of the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5301 *et seq.*, also known as the Consumer Financial Protection Act (CFPA). The CFPB was created to provide a single point of accountability for enforcing federal consumer financial laws,

protecting consumers in the financial marketplace, and facilitating transparent and competitive markets for consumer financial products and services. Previously, that responsibility was divided among multiple federal agencies. Consequently, the CFPA vests the CFPB with rulemaking, supervisory, and enforcement authority over 18 enumerated federal consumer financial protection laws and transferred to the Bureau supervisory authority over certain depository institutions as to consumer financial protection.

3. The CFPB is currently organized into seven functional areas that carry out or assist in carrying out the mandates of the CFPA: Supervision; Enforcement; Consumer Response & Education; Research, Monitoring & Regulations; Legal; External Affairs; and Operations.

4. I am the senior official overseeing the CFPB's supervisory functions. I have direct or indirect oversight of all activities of the offices that conduct supervisory work: the Office of Supervision Examinations and the Office of Supervision Policy (collectively "Supervision"). My responsibilities include overseeing the planning and conducting of the Bureau's supervisory activities, including examinations of supervised entities, managing operations and policy decisions, and leading a staff of more than 500 attorneys, examiners, analysts, and other employees charged with ensuring compliance with federal consumer financial laws.

5. Supervision performs examinations of large depository institutions and their affiliates and certain non-depository consumer financial service companies as provided for in the CFPA. The CFPA gives the CFPB supervisory authority over non-depository institutions in three ways. First, it provides authority over non-depository institutions that offer or provide three specific types of consumer financial products or services (consumer real estate loan origination, brokerage, or servicing, or loan modification or foreclosure relief services in

connection with such loans; private education loans; and payday loans).[1] Second, it authorizes the CFPB to supervise non-depository institutions on the basis of conduct that poses risks to consumers.[2] Third, it grants supervisory authority over a non-depository institution that "is a larger participant of a market for other consumer financial products or services, as defined by rule[.]"[3] The CFPB has promulgated regulations defining larger participants in five markets: consumer reporting, debt collection, student loan servicing, international money transfer, and automobile financing.

6. Through examinations and other supervisory work, the office assesses compliance with federal consumer financial laws, obtains information about supervised entities' activities and compliance systems or procedures, and detects and assesses risks to consumers and to the functioning of the markets for consumer financial products and services. Supervision communicates findings to the supervised entities and directs corrective action where appropriate, all within the traditional supervisory framework of institutional confidentiality.

Background on Supervision of Student Loan Servicers

7. Pursuant to the CFPA, as well as the CFPB's rules defining "larger participants" in markets for consumer financial products or services,[4] the CFPB regularly supervises both bank and non-bank financial services entities in numerous markets, including student loan servicing.

8. The CFPB regularly performs supervisory examinations of servicers (including for-profit companies and not-for-profit entities) handling federal student loans—both those loans owned directly by the United States Department of Education (ED), including Direct

[1] 12 U.S.C. § 5514(a)(1)(A).
[2] 12 U.S.C. § 5514(a)(1)(C).
[3] 12 U.S.C. § 5514(a)(1)(B).
[4] *See* 12 C.F.R. § 1090.106.

Program loans and ED-held Federal Family Education Loan (FFEL) Program loans, and those loans that are federally-guaranteed but commercially-held (commercial FFEL loans).

9. During a student loan servicing examination, CFPB staff conduct a weeks- to months-long engagement with the servicer in order to obtain information about specific topics relating to the servicer's activities and the impact of those activities on consumers. These topics can include billing practices, payment processing, payment application and allocation, communications about repayment options including income-driven repayment, processing of applications for repayment options including income-driven repayment, consumer reporting on student loans, debt collection practices, and servicing transfers (*i.e.*, the movement of loans on or off a servicer's systems).

10. The information requested can include responses to written questions, copies of policies and procedures, samples of borrower account-level information, consumer-facing written communications or call recordings, and statistics relating to servicer performance and borrower experiences, among other things. CFPB staff analyze this information in order to assess compliance with federal consumer financial law, obtain information about these companies' compliance systems or procedures, and detect and address risks to consumers and markets.[5] After this analysis, CFPB staff share preliminary findings with servicer representatives, intake any additional information that the servicer chooses to share, and may determine whether a servicer has engaged in a violation of federal consumer financial law, or has engaged in practices that create a risk of a violation.[6]

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[5] 12 U.S.C. § 5514 (b)(1).
[6] *See* Consumer Financial Protection Bureau, CFPB Supervision and Examination Manual (Sept. 2023), *available at* https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual_2023-09.pdf; *see also* Consumer Financial Protection Bureau, *Supervisory Highlights,* Issue 9, Fall 2015, at 2.5 *available at*

Background on Income-Driven Repayment Plans

11. Under federal law and regulation, federal student loan borrowers are entitled to important protections against delinquency and default that are broadly called income-driven repayment plans. These programs, enacted under Title IV of the Higher Education Act and implemented via regulations promulgated by ED beginning in the 1990s,[7] index a student loan borrower's monthly payments to their family size and discretionary income,[8] including by providing for $0 payments when a borrower's income falls below certain levels.[9] Under an income-driven repayment plan, a borrower can also obtain an interest subsidy in which the government covers interest-based costs in the event the borrower's monthly payment does not cover

https://files.consumerfinance.gov/f/201510_cfpb_supervisory-highlights.pdf (finding that servicers processed auto-debits at the wrong time; allocated payments in a way that increased fees and deprived borrowers of effective choice in how to allocate payments; made deceptive statements about fees; violated the Fair Credit Reporting Act's implementing Regulation V); *Supervisory Highlights,* Issue 13, Fall 2016, at 2.5 *available at* https://files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_13__Final_10.31.16.pdf (finding improper denial of income-driven repayment applications; wide-reaching systems errors that caused the servicer to bill and collect the wrong payment amount); *Supervisory Highlights,* Issue 15, Spring 2017, at 2.3 *available at* https://files.consumerfinance.gov/f/documents/201704_cfpb_Supervisory-Highlights_Issue-15.pdf (finding premature termination of deferments and improper interest capitalization; deceptive statements regarding interest capitalization); *Supervisory Highlights,* Issue 23, Winter 2021, at 3.3 *available at* https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-23_2021-01.pdf (finding improper auto-debits; payment allocation errors; failure to inform borrowers of their available repayment options); *Supervisory Highlights,* Issue 24, Summer 2021, at 2.10, *available at* https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-24_2021-06.pdf (finding deceptive statements relating to Public Service Loan Forgiveness; billing and collecting inaccurate monthly payment amounts); *Supervisory Highlights,* Issue 27, Fall 2022, at 4, *available at* https://files.consumerfinance.gov/f/documents/cfpb_student-loan-servicing-supervisory-highlights-special-edition_report_2022-09.pdf (finding wrongful denials for forgiveness programs; providing incorrect payment counts and estimated eligibility dates for forgiveness; excessive delays in processing forgiveness applications).

[7] *See, e.g.*, 60 Fed. Reg. at 61820 (Dec. 1, 1995).

[8] *See* Office of Federal Student Aid, Income-Driven Repayment Plans, *available at* https://studentaid.gov/manage-loans/repayment/plans/income-driven (last visited June 27, 2024).

[9] *See id*.

them.[10] By enrolling in income-driven repayment, a borrower can lower their monthly federal student loan payment to potentially $0, stay current on their loans, and avoid their loans going into delinquency and potentially default.

12. Generally, delinquency on federal student loans results in derogatory reporting on a consumer's credit report after 89 days.[11] Usually after 270 days of delinquency, unpaid loans enter default, which can result in further derogatory reporting; the imposition of fees; and garnishment of wages, tax refunds, or Social Security payments.[12] Unlike with garnishment by private creditors, these garnishment procedures can occur without court orders.[13]

13. Different income-driven repayment plans set different guidelines for what percentage of a borrower's discretionary income the plan requires to be paid toward a borrower's monthly student loan payment, and as well as different thresholds for the income floor that will trigger a borrower's monthly payment to be set at $0.[14] Because of these differences across plans, a borrower's monthly payment will not only vary based on whether they are in the 10-year standard payment or enrolled in income-driven repayment; it will also vary based on which income-driven repayment plan a borrower enters.

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[10] *See* Office of Federal Student Aid, About Income-Driven Repayment (IDR) Plan Calculations, *available at* https://studentaid.gov/idr/application/assumptions (last visited June 27, 2024).

[11] Federal Student Aid, Student Loan Delinquency and Default, *available at* https://studentaid.gov/manage-loans/default (last visited June 26, 2024). ED has announced that during the return to repayment, some of the consequences of missing payments have been temporarily suspended or mitigated. *See* Federal Student Aid, Restarting Student Loan Payments, *available at* https://studentaid.gov/manage-loans/repayment/prepare-payments-restart (last visited June 27, 2024).

[12] *Id*.

[13] Procedural requirements for such garnishment, known as "administrative offset," can be found at 31 U.S.C. § 3716.

[14] *See supra* at n.4.

14. On July 10, 2023, ED published a final rule with a new income-driven repayment plan, called the Saving on a Valuable Education plan (SAVE), Improving Income Driven Repayment for the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan (FFEL) Program, 88 Fed. Reg. 43820, 43901 (July 10, 2023) (SAVE Final Rule).

Prior CFPB Findings on Federal Student Loan Servicing

15. The CFPB has received complaints about student loan servicers from borrowers seeking to enroll in income-driven repayment plans since the CFPB began taking complaints.[15] In the decade that the CFPB has supervised federal student loan servicers, Supervision has observed a large number of violations of federal consumer financial law and harm experienced by student loan borrowers as a result of those violations.[16] And over the last two years, Supervision has observed particular weaknesses in the execution of servicing activities related to income-driven repayment plans, even for longstanding plans that predate SAVE. Supervision has documented a series of violations of federal consumer financial law, including the CFPA, relating to the servicing of accounts where borrowers were seeking or enrolled in income-driven repayment plans, suggesting that some servicers are already struggling with providing income-driven repayment plans to borrowers in accordance with federal law and regulation.[17]

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[15] Consumer Financial Protection Bureau, *Supervisory Highlights,* Issue 13, Fall 2016, at 2.5.1 *available at* https://files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_13__Final_10.31.16.pdf.
[16] *See supra* at n.2.
[17] Consumer Financial Protection Bureau, *Supervisory Highlights Student Loan Servicing Special Edition*, Issue 27, Fall 2022, at Sec. 4.3, *available at* https://files.consumerfinance.gov/f/documents/cfpb_student-loan-servicing-supervisory-highlights-special-edition_report_2022-09.pdf.

16. For example, Supervision has found that servicers have: wrongfully denied borrowers' applications for income-driven repayment plans; wrongfully inflated the payments borrowers owe under their income-driven repayment plans; failed to inform borrowers of documentation required for their income-driven repayment plans; sent misleading denial letters to borrowers recertifying their income-driven repayment plans; and wrongly told borrowers their loan types were not eligible for income-driven repayment when they actually were.[18]

17. Notably, our examination findings suggest that servicing-driven barriers to income-driven repayment plans can preclude significant shares of borrowers from accessing those plans.[19] For example, when a servicer failed to adequately communicate to borrowers certain requirements of an income-driven repayment plan's application, 88% of applicants were denied for missing the uncommunicated requirement. Of those, 74% were delinquent six months later, compared with 23% of borrowers who had successfully enrolled in the plan.[20]

18. Two recent events have highlighted the ways in which large-scale shifts in the federal student loan servicing portfolio are often followed by servicing breakdowns and heightened risks to borrowers. First, after the COVID-19 emergency payment pause expired, the entire federal student loan portfolio was returned to repayment. The CFPB determined that the return to repayment of federally owned student loans presents significant consumer risks and initiated

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[18] *Id.*

[19] The Government Accountability Office has also issued consistent findings. *See* United States Government Accountability Office, Education Needs to Take Steps to Ensure Eligible Loans Receive Income-Driven Repayment Forgiveness (March 2022), GAO-22-103720, *available at* https://www.gao.gov/assets/gao-22-103720.pdf.

[20] Consumer Financial Protection Bureau, Supervisory Highlights Student Loan Servicing Special Edition, Issue 27, Fall 2022, at 23, *available at* https://files.consumerfinance.gov/f/documents/cfpb_student-loan-servicing-supervisory-highlights-special-edition_report_2022-09.pdf.

its supervisory response.[21] While this work is ongoing, the CFPB has already identified three significant, widespread risks to consumers and potential violations of federal and state consumer law. During the return to repayment, servicers sent billing statements with inaccurate due dates and payment amounts to borrowers, including borrowers with approved loan discharges in process. In addition, servicers struggled to handle the volume of borrower inquiries that accompanied the return to repayment, resulting in borrowers experiencing hours-long call wait times and the backlog of income-driven repayment applications grew to over 1.25 million.

19. Second, in 2021, two major federal student loan servicers exited their contracts with ED, triggering the transfer of more than 25 million borrowers' accounts from one servicer to another. The CFPB conducted near-real-time supervision of these transfers alongside ED's Office of Federal Student Aid and state regulators.[22] Through this work, the CFPB identified widespread servicing failures that affected basic loan information provided to hundreds of thousands of borrowers, including servicers sending incorrect information about payment amounts, due dates, capitalization history, or paid-ahead status.[23]

20. In both cases, these events and subsequent servicing breakdowns revealed servicing systems with a long history of inaccurate and missing data.[24]

Kansas Injunction Effects and Consumer Impacts

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[21] Consumer Financial Protection Bureau, *Issue Spotlight: Federal Student Loan Return to Repayment*, January 2024, *available at* https://files.consumerfinance.gov/f/documents/cfpb_federal-student-loan-return-to-repayment-report_2024-01.pdf.

[22] *Id*. at 11.

[23] *Id*. At the same time, call volume and applications for payment relief increased. Some servicers were inadequately staffed, making them unable to effectively manage this volume. *Id*.

[24] *Id*. at 11.

21. The injunction entered by the United States District Court for the District of Kansas enjoins ED from implementing those provisions of the SAVE plan that had been "set to become effective on July 1, 2024."[25]

22. Among other provisions, it appears that the injunction prohibits ED from implementing a planned decrease in borrowers' monthly payments under the SAVE plan that would cut those payments in half: from 10% of the borrower's income above 225% of the federal poverty line to 5% of the borrower's income above 225% of the federal poverty line, for borrowers with undergraduate loans only.[26] For borrowers with graduate and undergraduate loans, borrowers would pay a weighted average of between 5% and 10% of their discretionary income based on the original principal balances of their loans taken to attend school.[27] This anticipated decrease had been announced publicly, was contained in the proposed and final rules implementing the SAVE plan, and communicated in individual borrower communications.

23. Our experience supervising student loan servicers as described above suggests that implementing the injunction (by not implementing the planned reduction in monthly payments) significantly raises the risk that monthly payments are not accurately calculated, payment systems are not operated in compliance with federal consumer financial law, and that servicers might fail to provide accurate and actionable information to consumers about the status of their loans and their other payment options.

Impacts on Borrowers Currently Enrolled in SAVE

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[25] Doc. 77.

[26] SAVE Final Rule, 88 Fed. Reg. at 43901; *see also* https://studentaid.gov/announcements-events/save-plan ("Starting next summer, borrowers on the SAVE Plan will have their payments on undergraduate loans cut in half (reduced from 10% to 5% of income above 225% of the poverty line).")

[27] SAVE Final Rule, 88 Fed. Reg. at 43902 (July 10, 2023).

24. For borrowers who have already enrolled in SAVE, market intelligence received by the CFPB suggests the federal student loan servicing system, including ED and its servicing contractors, has already been adjusting operations to recalculate monthly payments and send borrowers communications in anticipation of their post-July payment amounts. Based on consumer complaints, many borrowers were already notified that their accounts were placed into a forbearance for the month of July while their payment amounts are adjusted.

25. Based on my experience as the head of Supervision, I have serious concerns about the ability of servicers to pivot away from the anticipated new payment amounts in a way that does not incur significant risk of harm to federal student loan borrowers whose accounts they service, on the timeline the injunction appears to contemplate. It is the CFPB's understanding that efforts have been underway for months, both at ED and its servicing contractors, to implement the new payment amounts in July 2024 and the changing of payment amounts normally occurs through processes that are more foreseeable and processed on lengthier timelines than the one that the injunction appears to contemplate.[28]

26. Given the substantial change in borrowers' expected monthly payments, a significant number of borrowers will likely reach out to their servicer for information (for example, about their monthly payment amounts, income-driven repayment plan options, ways to avoid delinquency and default, or servicing errors). A change in borrowers' anticipated monthly payments is likely to prompt a significant volume of outreach from student loan borrowers to servicers and other institutions in the student loan ecosystem. Many borrowers already enrolled in the SAVE plan have received direct communications informing them of the

[28] As noted above, *see supra* n.2, even under more typical circumstances, we have observed that servicers struggle to implement accurate payment amounts.

anticipated decrease in their monthly payments, and they may have also seen widespread public descriptions of the upcoming payment change. For some borrowers, 5% of their discretionary income might have been an affordable long-term monthly expense, while 10% might not. For some borrowers, 10% of their discretionary income might amount to a higher payment than the 10-year permanent standard payment they would incur were they not enrolled in SAVE. For these and other reasons, borrowers processing the effect of the injunction may need clarification on information about their student loans in order to make informed decisions regarding repayment—and those borrowers may reach out to their servicer for help. Based on my experience as the head of Supervision, I believe that borrowers seeking information (for example, about their monthly payment amounts, income-driven repayment plan options, ways to avoid delinquency and default, or servicing errors) are likely to encounter significantly increased call wait times, inaccurate information, and dropped calls, all of which will harm borrowers.

27. Given that more than 8 million borrowers are enrolled in SAVE already, enjoining the decrease in monthly payment amounts (alongside the other provisions of the Final Rule subject to the Court's preliminary injunction) set to be implemented in July will impact millions of Americans. Based on our experience through supervisory observations, this unanticipated change is likely to prompt a surge in borrower-side demand for contact with their servicers, with borrowers likely to seek accurate, individualized information on what their future monthly payment amounts will be, and what their options are if they find them unaffordable.[29]

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[29] *Issue Spotlight supra* at n.12, p 4 (observing that the return to repayment of federal student loans prompted numerous borrowers to contact their servicer to "apply for income-driven

Impacts on Borrowers Not Currently Enrolled in SAVE

28. Beyond those borrowers already enrolled in SAVE, borrowers who are contemplating enrolling in SAVE and borrowers on other income-driven repayment plans may also reach out to servicers with questions about the injunction and its effects on their monthly payment amounts, accrual of qualifying months toward forgiveness, and repayment options. For example, borrowers may consider enrolling in SAVE even when they have not previously because they have newly entered repayment because they have recently graduated, or have been in repayment but have experienced losses in income. Whether or not the injunction carries implications for these borrowers, the complexity of the interaction between the Final Rule and the injunction's scope may raise questions among borrowers as to whether and how their student loan repayment options have changed. Borrowers who have exclusively Direct Loans, and who are not currently enrolled in SAVE, may also have questions arising from ambiguity about what their monthly payment amount would be under the SAVE plan in light of the injunction, and whether they can enroll in the plan at all.

29. Moreover, some of the provisions of the SAVE Final Rule scheduled to be implemented on July 1, 2024 apply to income-driven repayment plans other than SAVE. For example, the SAVE Final Rule addresses how federal student loans made under the FFEL Program (a precursor to the Direct Loan Program) and Direct Loans are treated for purposes of calculating credit toward forgiveness when a borrower consolidates their FFEL Loans or Direct Loans into a Direct Consolidation Loan. Prior rules provided that the time spent in repayment prior to consolidation would not count toward forgiveness under income-driven

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repayment, make payments, understand their loan-cancellation or discharge options, or resolve disputes").

repayment plans. These provisions of the SAVE Final Rule count time spent in eligible repayment plans prior to consolidation towards any other income-driven repayment program, not just SAVE.[30] Whether or not these periods of time count toward forgiveness—and ambiguity about the status of those provisions—is highly material information for borrowers considering consolidation.

30. For these and other reasons, borrowers may have questions about whether and how the injunction may affect their student loan repayment options. Based on our experience, we anticipate that borrowers who are not enrolled in SAVE but whose decisions might be affected by whether particular provisions of the Final Rule are implemented might contact their servicers to determine how the injunction will impact their eligibility for forgiveness under income-driven repayment programs. Accordingly, the total population of borrowers who may seek clarification about the effect of the injunction exceeds the 8 million borrowers enrolled in SAVE.

Systems Impacts Affecting All Borrowers

31. In Supervision's experience in student loan servicing supervisory examinations, surges in demand for servicer contact are often followed by breakdowns in the servicing system. CFPB examinations detected servicing breakdowns following analogous widespread changes in the terms or activities of federal student loan repayment. Even when the servicing system had significantly more advanced notice, opportunity to prepare, and clarity on the nature of upcoming changes, those changes were followed by widespread failures on the part of servicers to provide borrowers with accurate, timely, complete, and actionable information

[30] *See* 34 C.F.R. § 685.209(k)(4)(iv)(K)(vi)(A).

about their loans and to take critical account actions for borrowers like enrollment in repayment plans and accurately crediting time toward loan forgiveness.[31]

32. For example, as described in paragraph 18, Supervision has been monitoring the return to repayment of federal student loans, wherein borrowers have had to resume making payments following a 3.5-year COVID-19 repayment pause. This required borrowers to set up new auto-debits, consider loan consolidations, and apply for new payment plans when prior plans no longer met their needs, among other things. As discussed in the CFPB's January 2024 *Issue Spotlight*, the return to repayment prompted numerous borrowers to contact their loan servicers to seek updated, individualized information about their loans and to obtain counseling on their repayment options.[32]

33. Supervision observed that certain servicers were not prepared for the increased level of borrower interaction during periods of the return to repayment. In 2022, federal student loan servicers had an average speed to answer of nearly 6 minutes and a 10.4 percent abandonment rate.[33] But in October 2023, the average federal loan servicer's call hold time increased to over an hour, causing 47 percent of borrowers to abandon the call before ever reaching an agent to get the information they needed. In some cases, borrowers waited for several hours on hold to reach their servicers. Because several servicers failed to meet borrowers' needs for contact, borrowers went without important information about their repayment status, payment amounts, and available options for obtaining affordable student

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[31] Consumer Financial Protection Bureau, Supervisory Highlights Student Loan Servicing Special Edition, Issue 27, Fall 2022, *available at* https://files.consumerfinance.gov/f/documents/cfpb_student-loan-servicing-supervisory-highlights-special-edition_report_2022-09.pdf.
[32] *Issue Spotlight supra* at n.12.
[33] Federal Student Aid, FY 2022 Annual Report, p. 54, January 23, 2023, *available at* https://www2.ed.gov/about/reports/annual/2022report/fsa-report.pdf.

loan payments. Borrowers also were unable to get particularized information about errors in calculating their new income-driven repayment plan payments or resolve those errors.

34. Supervision has also observed these dynamics in the context of large-scale shifts relating to forgiveness programs. For example, in October 2021, ED announced the Public Service Loan Forgiveness (PSLF) Waiver program, which modified what periods of repayment were considered eligible for credit toward forgiveness under the PSLF program and opened a pathway for previously-excluded borrowers to become eligible for the program. The Waiver imposed a deadline of October 2022 for borrowers to take action in order to receive benefits under the Waiver. Prior to the October 2022 deadline, servicers received hundreds of thousands of new PSLF-related applications. Servicers were not prepared to adequately handle the volume of applications that they received, and applicants experienced excessive processing delays well beyond the expected processing time. In some cases, these delays lasted nearly a year.[34] A lack of certainty about the status of forgiveness-related applications carries implications for a host of financial decisions borrowers need to make, including which student loan repayment plan to pursue, whether or not they could make other significant financial expenditures (such as buying a home), and whether they could change jobs.

35. When the federal student loan servicing system fails to meet surges in borrower demand for individualized information, borrowers can experience harm beyond the confusion, frustration, and time and energy that they expend seeking clarity on their student loan status. Borrowers risk missing payments and other negative consequences, such as derogatory credit reporting, when they do not have adequate avenues to communicate with servicers or

[34] *Id.* at 19.

perform the tasks they need on their servicers' websites, such as verifying their payment amounts, making payments electronically, or applying for payment relief options like income-driven repayment, deferment, or forbearance. Indeed, the loan servicing failures during the return to repayment likely contributed to the fact that 30 percent of borrowers were delinquent on their loan payment by the end of 2024—3 months after the return to repayment. By comparison, only 15 percent of borrowers were delinquent after the first quarter of 2020, which was the last period of active repayment prior to the COVID-19 payment pause.[35]

36. Based on the CFPB's observations as described above, I would anticipate that the effects of a shift in expected federal student loan activities resulting from the injunction entered by this Court would be compounded by the uncertainty prompted by the injunction entered by the United States District Court for the Eastern District of Missouri, which differs in scope and will prompt additional requests for clarification from federal student loan borrowers.

37. Whether they are currently enrolled in the SAVE plan or not, borrowers may reasonably have questions about the effect of each injunction on their plans for paying their federal student loans. Because the injunction entered by the United States District Court for the Eastern District of Missouri concerns the availability of loan discharge under the SAVE plan, and the availability and timeline of discharge is a highly material element of income-driven repayment plans, borrowers are likely to seek clarification about the impact of the Missouri injunction in addition to the impact of the injunction entered by this Court. This additional

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[35] Federal Student Aid Data Center, Federal Student Loan Portfolio, Portfolio by Delinquency Status, https://studentaid.gov/data-center/student/portfolio. *See also* Kvaal, James, A First Look at Student Loan Repayment After the Payment Pause, U.S. Department of Education (Dec. 15, 2023). https://blog.ed.gov/2023/12/a-first-look-at-student-loan-repayment-after-the-payment-pause/#more-32203.

complexity would further increase demand for servicer contact and exacerbate the risk of servicing breakdowns that adversely affect borrowers.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 27, 2024 at Washington, D.C.

LORELEI SALAS

Supervision Director

Consumer Financial Protection Bureau