No. 24A173

IN THE

Supreme Court of the United States

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

v.

STATE OF MISSOURI, ET AL.,
Respondents.

**On Application to Vacate the Injunction Pending Appeal
Entered by the United States Court of Appeals for the Eighth Circuit**

**_AMICUS CURIAE_ BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE
IN OPPOSITION TO APPLICANTS' REQUEST TO VACATE THE INJUNCTION**

Sheng Li
Counsel of Record
Russell G. Ryan
Markham S. Chenoweth
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
sheng.li@ncla.legal

Counsel for Amicus Curiae

August 19, 2024

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 4

INTRODUCTION AND SUMMARY 4

ARGUMENT 7

I. THE STATES HAVE STANDING IN THEIR CAPACITY AS PSLF-QUALIFYING EMPLOYERS 7

II. THE 1993 HEA AMENDMENTS DO NOT AUTHORIZE SAVE 11

A. The 1993 HEA Amendments Require Repayment Rather than Cancellation of Student-Loan Debt 11

B. Applicants' Contrary Interpretation of the HEA Results in an Unconstitutional Delegation of Legislative Power 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES

ABA v. U.S. Dep't of Educ.,
370 F. Supp. 3d 1 (D.D.C. 2019) 8

Am. Power & Light Co. v. SEC,
329 U.S. 90 (1946) 17

Biden v. Nebraska,
143 S.Ct. 2355 (2023) 4, 7

CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd.,
601 U.S. 416 (2024) 11

Dep't of Transp. v. Ass'n of Am. R.Rs.,
575 U.S. 43 (2015) 17

Gundy v. United States,
588 U.S. 128 (2019) 16

Int'l Union v. OSHA,
938 F.2d 1310 (D.C. Cir. 1991) 17, 18

Jarkesy v. SEC,
34 F.4th 446 (5th Cir. 2022) 17

Mistretta v. United States,
488 U.S. 361 (1989) 17

Sherley v. Sebelius,
610 F.3d 69 (D.C. Cir. 2010) 10

Whitman v. Am. Trucking Ass'ns.,
531 U.S. 457 (2001) 16

Yakus v. United States,
321 U.S. 414 (1944) 17, 19

STATUTES

20 U.S.C. § 1078 14

20 U.S.C. § 1078-10 12

20 U.S.C. § 1087e 6, 8, 9, 11, 12

20 U.S.C. § 1098e 12, 15

31 U.S.C. § 1301 12

College Cost Reduction and Access Act of 2007,
Pub. L. 110-84, 121 Stat. 784 (2007) ... 15

Health Care and Education Reconciliation Act of 2010,
Pub. L. No. 111-152, 124 Stat. 1029 (2010) ... 15

Omnibus Budget Reconciliation Act of 1993,
Pub. L. 103-66, 107 Stat. 312 (1993) ... 5

OTHER AUTHORITIES

Adam Looney,
Biden's Income-Driven Repayment plan would turn student loans into untargeted grants,
Brookings, September 15, 2022 ... 13

Barack Obama,
Remarks by the President in State of the Union Address, Speech given before Congress, January 27, 2010 ... 15

Cong. Rsch. Serv.,
The Federal Direct Student Loan Program (1995) ... 14

Department of Education,
Secretary Cardona Statement on Supreme Court Ruling on Biden Administration's One Time Student Debt Relief Plan (June 30, 2023) ... 5

Hearing of the Senate Committee on Labor and Human Resources to Amend the Higher Education Act of 1965,
103rd Cong. (1993) ... 13, 18

Matthew Chingos, et al.,
Few College Students Will Repay Student Loans under the Biden Administration's Proposal,
Urban Institute, January 19, 2023 ... 13

REGULATIONS

34 C.F.R. § 685.219 ... 8

Improving Income Driven Repayment for the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan (FFEL) Program,
88 Fed. Reg. 43,820 (July 10, 2023) ... 5, 9, 11, 16, 18

INTEREST OF THE AMICUS CURIAE[1]

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

INTRODUCTION AND SUMMARY

On June 30, 2023, before the ink dried on this Court's decision in *Biden v. Nebraska*, 143 S. Ct. 2355 (2023), which invalidated the Department's plan to cancel $430 billion in federal student loans by unlawfully rewriting the HEROES Act of 2003, the Secretary of Education announced a new and equally unlawful debt-

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

cancellation scheme.[2] Ten days later, the Department published a final rule establishing the so-called SAVE repayment plan, entitled *Improving Income Driven Repayment for the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan (FFEL) Program*, 88 Fed. Reg. 43,820 (July 10, 2023). SAVE cited amendments made to the Higher Education Act by the Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 312, 347–48 (1993) ("1993 HEA Amendments"), in a manner that transforms the income-contingent loan-*repayment* plans that Congress authorized into loan-*cancellation* plans that Congress did not authorize. The SAVE plan would wipe out $475 billion of student-loan debt owed to the U.S. Treasury and shift that debt to taxpayers who either never went to college, depleted personal savings to pay for college, or borrowed for college and responsibly repaid their loans. It would do so by dramatically lowering participating borrowers' monthly payments—to zero in many cases—and then forgiving their loan balances at the end of the repayment period, which is typically 20 years. SAVE would also halt the accrual of interest on certain student loans, which is the equivalent of cancelling loans in the amount of interest that otherwise would have accrued.

A group of States challenged SAVE in the Eastern District of Missouri, and the district court preliminarily enjoined the Department from cancelling any student loans under SAVE while leaving in place SAVE's lower monthly payments and nonaccrual of interest. App.76a. Despite the partial injunction, the Department

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

continued to cancel student loans under a "hybrid" plan that combined aspects of SAVE that were not enjoined, such as lower monthly payments and nonaccrual of interest, with a prior income-contingent repayment program known as REPAYE. App.4a. The Eighth Circuit granted an injunction pending appeal that, with respect to borrowers whose loans are governed by SAVE provisions, prevents Applicants from forgiving federal student loans (including through REPAYE), from waiving accrued interest, and from implementing SAVE's lower-payment provisions. App.9a.

The Court should not disturb the Eighth Circuit's injunction because Applicants are unlikely to succeed on the merits by showing that States lack Article III standing or that the 1993 HEA Amendments authorize SAVE. In addition to injuries found by the court below, SAVE further injures the States by undermining the competitive advantages Congress bestowed on them through the Public Service Loan Forgiveness ("PSLF") program, which incentivized student-loan borrowers to seek and maintain employment with state government agencies. *See* 20 U.S.C. § 1087e(m)(3)(B)(i) (creating PSLF incentives for workers in "public service" jobs). Loss of that competitive advantage would inflict a separate concrete injury against all the States in their capacity as employers needing to recruit and retain college-educated employees. This competitive injury, which the States raised below, confers subject-matter jurisdiction that allowed the court below to halt the Applicants' unconstitutional attempt to rewrite laws and cancel debt owed to the Treasury.

Applicants' statutory argument based on the 1993 HEA Amendments is meritless. That law merely allows the Department to establish repayment plans over

a longer period of time so that individual monthly payments could be smaller for lower-income borrowers. Nothing in the 1993 HEA Amendments' text nor legislative history suggests Congress granted the Department boundless discretion to design plans like SAVE that prioritize the *cancellation* of loans instead of their repayment. Indeed, if the 1993 law granted such power, it would be unconstitutional because it contains no intelligible principle to guide the Department's discretion regarding how generous it can make repayment plans. Otherwise, the Department could design a plan that cancelled virtually all federal student loans, or none at all, or anything in between. Such unfettered discretion clearly violates the Constitution's vesting of all legislative powers in Congress.

ARGUMENT

I. THE STATES HAVE STANDING IN THEIR CAPACITY AS PSLF-QUALIFYING EMPLOYERS

The courts below correctly held that the States have standing because their allegation regarding injuries to state loan-servicing instrumentalities are "substantially similar to, if not identical to, those the Supreme Court held were sufficient to establish Missouri's standing just last year in *Biden v. Nebraska*, … 143 S. Ct. 2355 (2023)," App.6a. But even if that were not so, the States would still have standing in their capacity as public-service employers.[3] As the States argued below,

[3] In addition to state agencies, other PSLF-qualifying public-service employers, such as Section 501(c)(3) nonprofit organizations, are also injured by student-loan cancellation that erodes borrowers' financial incentive under PSLF to work at such employers. As such, those other PSLF-qualifying employers have Article III standing to challenge the Department's unlawful loan-cancellation schemes. Recognizing such standing would deter the Department from repeatedly attempting to unlawfully

SAVE injures them as employers by undermining recruitment, shrinking the PSLF-subsidized labor pool, and thus increasing labor and recruiting costs. *See* Dkt. 1 (Complaint) ¶¶ 129–145; *see also* Dkt. 10 (Pl.'s Mem. Supp. Mot. for Stay) at 25–28.

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

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

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cancel federal student-loan debt on the mistaken belief that no one has standing to stop it.

So, government action that eliminates or reduces state employers' statutory competitive advantage via PSLF inflicts an economic injury that confers standing.

States are PSLF-qualifying employers and thus are among the employers that Congress benefitted through PSLF incentives. *See* 20 U.S.C. § 1087e(m)(3)(B)(i). State agencies rely on the ability to enable loan forgiveness to attract and retain college-educated employees who would otherwise be enticed to take higher-paying private-sector jobs. SAVE undermines PSLF benefits that States rely on by cancelling debt for all participating borrowers who take out $12,000 or less after they make 10 years of monthly payments—regardless of whether they work for public service employers or not. 88 Fed. Reg. at 43,820. Because these borrowers get their entire loan balance forgiven after 10 years, regardless of where they work (or whether they work at all), they no longer have an economic incentive under PSLF to seek or continue employment with public-service employers like state agencies.

Consider a recent graduate who stands to earn $10,000 in PSLF forgiveness on top of his normal salary after working ten years at a state agency, which works out to extra compensation of $1,000 per year. This PSLF-deferred compensation means it costs the state agency, for example, only $59,000 annually in salary and benefits to offer $60,000 in effective annual compensation, as compared to for-profit employers that are not PSLF-eligible. But SAVE cancels the same graduate's $10,000 loan balance after ten years of monthly payments, even if he never holds a public-service job. The state agency no longer benefits from PSLF's $1,000 per year wage subsidy in its competition against for-profit employers to recruit or retain that graduate. To

remain equally competitive as an employer, the agency's labor cost must increase by $1,000 per year to match the effective compensation it provided to the employee before SAVE. While the magnitude of this increase is different—and more complex to calculate—if present value, tax effects, inflation, and the like were to be considered, the direction of the effect remains the same: state agencies' labor costs rise. Being forced by Applicants' unlawful action to "invest more time and resources" to successfully recruit employees "is an actual, here-and-now injury." *Sherley v. Sebelius*, 610 F.3d 69, 74 (D.C. Cir. 2010).

Such injury extends to retention of employees. Consider next a current state employee who had an original loan balance of $10,000 and has been making monthly payments while working in public service for the past eight years. Without SAVE, she would have a financial incentive to stay in public service for two more years so she could get the remaining balance of her loans forgiven under PSLF. However, because of SAVE, she would get her debt canceled after two more years of monthly payments regardless of where she works. She can thus switch to a higher-paying, for-profit job without any negative repercussions on her eligibility for debt cancellation.

SAVE thus completely negates recruitment and retention benefits that PSLF deliberately conferred on state employers with respect to borrowers affected by the 10-year forgiveness provision. The loss of this competitive advantage in the labor market inflicts direct and immediate competitive harm on the States as employers, which satisfies the injury-in-fact requirement for Article III standing.

II. The 1993 HEA Amendments Do Not Authorize SAVE

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

Applicants claim SAVE is authorized by the 1993 HEA Amendments, which provide in relevant part that "income contingent repayment shall be based on the [borrower's] adjusted gross income," and must "not … exceed 25 years." 20 U.S.C. § 1087e(d)(1)(D), 1087e(e)(2). According to Applicants, the statute requires "only that payments must be set based upon the borrower's annual adjusted gross income," 88 Fed. Reg. at 43,827, "for the duration of the prescribed period and then [the Department] forgives any outstanding balance at the end of that period." Applicants' Br. 23. Applicants admit no limiting principle to govern how low monthly payments may be or how short the repayment period can be set. If Applicants' view were accepted, the Department could, for instance, set the monthly payment cap at 1 percent of income over $1 million, so that nearly all loans would be cancelled rather than repaid at the end of the repayment term. It could also shorten the repayment period to just one year or even one day, so loans are cancelled almost immediately.

Such boundless interpretation runs afoul of the 1993 law's plain text, which calls for "repayment" of debt with no mention of any authorization to *cancel* debt owed to the Treasury. *See* 20 U.S.C. § 1087e. Any cancellation of federal student-loan debt gives away "money otherwise destined for the general fund of the Treasury" and thus involves an appropriation of funds. *CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 425 (2024). Congress made clear that a "law may be construed to make an appropriation out of the Treasury … only if the law specifically states that an

appropriation is made[.]" 31 U.S.C. § 1301(d). Hence, when Congress authorizes debt forgiveness, it typically uses explicit language. *See, e.g.*, 20 U.S.C. § 1078-10(b) ("The Secretary shall … assume[] the obligation to repay a qualified loan" for qualifying teachers); § 1087e(m)(1) ("The Secretary shall cancel the balance of interest and principal due …" for borrowers who satisfy PSLF); § 1098e(b)(7) ("the Secretary shall repay or cancel any outstanding balance …" of eligible borrowers).

The lack of similarly explicit language in the 1993 income-contingent repayment provisions confirms that Congress did not authorize the Department to establish repayment plans that are designed to *cancel* debt.[4] Rather, the 1993 law requires the Department to establish plans that provide for eventual *repayment* of debt, albeit along a longer time horizon, "not to exceed 25 years," 20 U.S.C. § 1087e(d)(1)(D), so that monthly payments can be smaller for borrowers with lower income.

Then-Deputy Secretary of Education Madeline Kunin explained to Congress in 1993 that income-contingent repayment would be cost-neutral in the long run: "As to what the cost of [these plans] would be, we see it as a wash" because the government "would eventually get paid" and "[t]here would be interest charged on that, so it isn't like [borrowers] are getting a free ride." *Hearing of the Senate*

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[4] The States relied on the Major Questions Doctrine to make a similar argument that a clear statement is needed to authorize the mass cancellation of student loans. Dkt. 10 at 25–28. *Amicus* NCLA agrees but notes that it is not necessary to invoke the Major Questions Doctrine because 31 U.S.C. § 1301(d) already provides that a clear statutory statement is needed to authorize the expenditure of funds from the Treasury to pay for student-loan debt cancellation. No such statement exists here.

Committee on Labor and Human Resources to Amend the Higher Education Act of 1965, 103rd Cong. 48 (1993).[5] Cost neutrality is obviously incompatible with granting the Department authority to design a repayment plan that ends up forgiving most loans.[6] To be sure, Deputy Secretary Kunin acknowledged that some small portion of loans might become uncollectable at the end of the payment period and "the Secretary will make some designation as to when you call it quits and [borrowers] are forgiven." *Id.* As any participant in the loan industry knows, writing off *some* bad loans is an unavoidable part of the business. But such write-offs are not the goal—repayment is.

Applicants correctly note that an income-contingent repayment plan contains two essential principles: (1) the monthly payment cap must be based on income—with no stated minimum amount; and (2) the repayment term must not exceed 25 years—with no stated minimum length. Applicants' Br. 23. However, they mistakenly conclude that the 25-year limit exists to effectuate forgiveness at the end of the term. *Id.* According to Applicants, Congress authorized the Department to cancel outstanding loans after a certain repayment period set by the Department but somehow failed to prescribe a minimum term. That means the Department could shorten the repayment term as much as it likes—to one year or even one day—so all

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

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

student loans are immediately cancelled. Such an interpretation is wrong, *inter alia*, because Congress could not have granted such unfettered power and discretion to an agency. *See infra*, Argument II.B.

Rather, the lack of a minimum repayment period makes sense only if Congress authorized income-contingent repayment plans as loan-*repayment* plans, not loan-cancellation plans. If the term is short, then monthly payments must be relatively high to ensure repayment. Only by lengthening the term can the Department lower the monthly payment for lower-income borrowers while ensuring eventual repayment. Indeed, the standard repayment plan called for full repayment within 10 years with relatively high monthly payments. *See* 20 U.S.C. § 1078(b)(9). Income-contingent repayment plans could offer lower monthly payments only if the repayment period exceeds 10 years. Hence, Congress needed only to prescribe a maximum length, not a minimum, for income-contingent repayment plans.

By limiting the maximum term to 25 years, Congress also limited the extent to which the Department could lower monthly payments—they cannot be so low that repayment is not feasible within the 25-year term. Consistent with this interpretation, the Department's original income-contingent plan allowed a borrower's monthly payment to be capped at 20 percent of income above the federal poverty line. Cong. Rsch. Serv., *The Federal Direct Student Loan Program* 10 (1995).[7] A lower monthly payment, like the one offered under SAVE, would result in a plan that is not designed to achieve repayment within the maximum 25-year term. It

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

would impermissibly prioritize debt cancellation over the statutory text requiring the Department to ensure debt "repayment."

Subsequent legislation reinforces this conclusion. Because the original income-contingent repayment plan based on the 1993 HEA Amendments was seen as insufficiently generous, Congress enacted the College Cost Reduction and Access Act of 2007 ("CCRA"), Pub. L. 110-84, 121 Stat. 784 (2007), which authorized income-based repayment plans that reduce monthly payments to 15 percent of income above 150 percent of the poverty line. 20 U.S.C. § 1098e(a). Unlike the 1993 law, CCRA contained explicit language authorizing loan cancellation after 25 years of payments. *Id.* at § 1098e(b)(7). Believing even more generosity was needed, President Obama urged Congress in his 2010 State of the Union address to lower the payment cap to "only 10 percent of their income [above 150 percent of the poverty line]" and to shorten the payment period so "all of their debt will be forgiven after 20 years." Barack Obama, *Remarks by the President in State of the Union Address*, Speech given before Congress, at 5, January 27, 2010.[8] Congress obliged and enacted these 10-percent and 20-year proposals in the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, § 2213 (2010) (HCERA), codified at 20 U.S.C. § 1098e(e).

The 2007 CCRA and the 2010 HCERA make no sense if the 1993 HEA Amendments already authorized the Department to unilaterally design an even *more*

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

generous repayment plan like SAVE. SAVE reduces monthly payments to only five percent of income in excess of 225 percent of the poverty line, 88 Fed. Reg. at 43,820, resulting in far more debt being cancelled instead of being repaid at the end of the 20-year repayment period as compared to HCERA. It also reduces the payment period to only 10 years for certain borrowers, *id.*, which further increases the amount of debt cancelled rather than repaid. If the Department has had unfettered discretion since 1993 to lower monthly payments and to shorten the repayment term of income-contingent repayment plans, as it now claims, then why did Congress and President Obama previously consider it necessary to enact and push legislation to authorize far *less* generous income-based repayment relief? The obvious answer is that the 1993 law was never before understood to allow the Department to establish a repayment plan that is more generous than what Congress explicitly authorized by HCERA. Nor did that law allow the Department to halt the accrual of interest on student loan balances, as Applicants now argue. Br. at 31–32.

B. Applicants' Contrary Interpretation of the HEA Results in an Unconstitutional Delegation of Legislative Power

The Department's contrary interpretation of the 1993 HEA Amendments to authorize SAVE must be rejected as an unconstitutional delegation of legislative power. "Article I, § 1, of the Constitution vests all legislative powers herein granted … in a Congress of the United States. This text permits no delegation of those powers." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (cleaned up). Accordingly, "Congress … may not transfer to another branch 'powers which are strictly and exclusively legislative.'" *Gundy v. United States*, 588 U.S. 128, 135 (2019)

(quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825)). The Supreme Court's formulation of that longstanding rule states that Congress may grant regulatory power to an agency only if it provides an "intelligible principle" by which the agency must exercise it. *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

While the intelligible-principle test has been criticized as unduly lax,[9] it still demands the articulation of objective principles that allow courts to test whether the agency has faithfully executed Congress's command. *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946); *Yakus v. United States*, 321 U.S. 414, 426 (1944) (delegation would be unconstitutional if "it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed"). Thus, a statute that delegates to an agency "unfettered discretion" to make policy choices is unconstitutional. *Jarkesy v. SEC*, 34 F.4th 446, 460–61 (5th Cir. 2022), *affirmed on other grounds sub nom.*, *SEC v. Jarkesy*, 2024 WL 3187811 (U.S. June 27, 2024); *see also Int'l Union v. OSHA*, 938 F.2d 1310, 1317 (D.C. Cir. 1991).

Here, the Department claims that the 1993 HEA Amendments conferred unfettered discretion on the Secretary to invent whatever student-loan repayment plans he wishes. The Department says the explicit minimum-payment provisions that Congress enacted in 2007 and updated in 2010 do not bind it. Instead, the

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

Department argues it can design a repayment plan with even lower monthly payments and a shorter repayment period such that very little debt will have been repaid by the end of the repayment period, at which point the substantial remaining balance is cancelled and debt transferred to taxpayers.

In Applicants' view, "[t]he statute … gives the Secretary discretion as to how much a borrower must pay, specifying only that payments must be set based upon the borrower's annual adjusted gross income[.]" 88 Fed. Reg. at 43,827. Thus, they claim the same 1993 text authorizes both the original income-contingent plan that was expected to be cost-neutral in the long run[10] *and* the new $475 billion SAVE plan—and presumably anything in between.

SAVE's exorbitant price tag is not even the theoretical upper limit. If the only requirement is for payments to be based on income, as Applicants claim, then the Department could lower the payment cap to just one percent of income above $1 million, which would result in debt cancellation after zero payments from the vast majority of borrowers. Nearly all student-loan debt would remain unpaid and then cancelled after 20 years. Applicants' capacious view would also allow the Department to reduce the repayment period to 10 years—or even shorter—to further maximize debt cancellation. Conversely, it could promulgate a payment cap equal to 100 percent of income above $1, which would not reduce the monthly payment for any borrower who works for a living. Such unfettered discretion would plainly amount to an unconstitutional delegation of legislative power. *Int'l Union*, 938 F.2d at 1317

[10] *See supra* Kunin Testimony.

(rejecting on nondelegation ground agency's assertion of authority "to require precautions that take the industry to the verge of economic ruin … or to do nothing at all."). Even the lax intelligible-principle test cannot support the Department's boundless interpretation because "it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus*, 321 U.S. at 426. Applicants' view of the Department's power is therefore untenable and must be rejected.

CONCLUSION

For the foregoing reasons, Applicants are unlikely to succeed on the merits, and the Court should deny their request to vacate the Eighth Circuit's injunction pending appeal.

August 19, 2024

Respectfully submitted,

/s/ Sheng Li

Sheng Li
Counsel of Record
Russell G. Ryan
Markham S. Chenoweth
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
sheng.li@ncla.legal

Counsel for Amicus Curiae