No. 24A____

In The

Supreme Court of the United States

States of Alaska, South Carolina, and Texas,
Applicants,

v.

Michael Cardona, Secretary of Education, et al.,
Respondents.

On Application to the Hon. Neil M. Gorsuch, Associate Justice of the Supreme Court, for Vacatur of Stay of Preliminary Injunction

BRIEF FOR SENATORS MITCH MCCONNELL AND BILL CASSIDY, M.D, AS *AMICI* IN SUPPORT OF APPLICATION TO THE HON. NEIL M GORSUCH, ASSOCIATE JUSTICE OF THE SUPREME COURT, FOR VACATUR OF STAY OF PRELIMINARY INJUNCTION

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INTEREST OF *AMICI CURIAE*[1]

Senator Mitch McConnell is the Senior Senator from Kentucky and the elected Leader of the Republican Conference in the United States Senate. The longest serving Senate Leader in American history, he is entrusted by his colleagues with safeguarding the legislative prerogatives of the Senate in the face of executive overreach. He has frequently participated in litigation to vindicate constitutional principles, both as an *amicus*, as in *Biden v. Nebraska*, 600 U.S. 482 (2023), and as a party, as in *McConnell v. FEC*, 540 U.S. 93 (2003).

Senator Bill Cassidy, M.D., is the Senior Senator from Louisiana and the Ranking Member of the Senate Committee on Health, Education, Labor, and Pensions (HELP). Senator Cassidy has a longstanding interest in education policy and is the senior most Republican on the HELP Committee. He has led efforts to enact legislation to reform student-loan programs while opposing efforts by the Department of Education to do so by executive fiat. Senator Cassidy led Senate colleagues on the Lowering Education Costs and Debt Act and cosigned the *Biden v. Nebraska amicus* brief arguing that the student-loan program at issue was a clear overreach of executive power because it circumvented the authority of Congress.[2]

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[1] Under Rule 37.6 of the Rules of this Court, *amici* state that 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 made a monetary contribution to its preparation or submission.

[2] *See* Br. of Marsha Blackburn et al., *Biden v. Nebraska*, Nos. 22-506, 22-535 (Sup. Ct.) (Feb. 3, 2023), *available at* https://www.supremecourt.gov/DocketPDF/22/22-506/253935/20230203133433451_Final%20Senators%20Amicus%20Brief%20-%20Biden%20v.%20Nebraska.pdf.

INTRODUCTION AND SUMMARY OF ARGUMENT

Just as Congress does not hide an elephant in a mouse hole, it also does not hide a $475 billion student-loan jubilee in plain sight. The Biden Administration cannot justify a program of such economic and political significance with ambiguous statutory authority. Without clear statutory authority, the administration cannot implement its politically expedient SAVE program and the injunction below is merited.

First, the SAVE Plan is an unlawful overreach by the executive branch. In context, the administration lacks the statutory authority to implement mass student loan cancelation through an ancillary provision in the code, which describes only one of nine loan repayment programs outlined by statute. This thin reed of authority fails under either the major questions doctrine or the *Loper Bright* decision. The administration's tortured interpretation of existing law stretches beyond a permissible interpretation and must be tossed out.

Second, executive overreach in the context of student loans predictably crowds out any meaningful legislative solutions to the issue. When the Biden Administration ignores existing statutes to pursue politically motivated policy goals beyond its authority, Congress's role is reduced to an ancillary function. The Constitution vests all legislative powers—especially the power of the purse—in the Congress, not the executive branch. Unfaithfully executing existing laws while increasing spending by hundreds of billions of dollars disrupts the separation of powers and short-circuits the legislative process.

Third, vacating the stay serves the public interest because the SAVE program is the latest political effort by the Biden Administration to flout Congress and the courts when it comes to student loans. Allowing the administration to continue to implement a blatantly unlawful program, by hook or by crook, in order to secure a putative electoral benefit would irreparably harm the separation of powers, the majority of Americans without student loan debt, and the plaintiffs in this case. On the other hand, reinstituting the injunction will preserve the status quo as the lower courts continue to evaluate the merits of this case.

ARGUMENT

I. THE SAVE PLAN IS AN UNLAWFUL OVERREACH BY THE EXECUTIVE BRANCH.

The Department of Education has been on notice that their SAVE Plan is unlawful from the start. First proposed on January 11, 2023,[3] and finalized on July 10, 2023,[4] the plan was designed to convert a safety-net program for low-income borrowers into a massive wealth transfer from taxpayers to the college-educated.

When the rule was first proposed, Senator Cassidy wrote to Secretary Cardona—along with various other Members of Congress, including Chairwoman Virginia Foxx of the House Committee on Education and Workforce—encouraging him "to withdraw the latest radical proposal put forth by [his] Department and work with Congress on meaningful and sustainable student-loan reforms."[5] He pointed out that the "proposal ultimately turns the Direct Loan program, which provides millions of Americans with the opportunity to move up the economic ladder, into an untargeted grant."[6] He cited the University of Pennsylvania's Penn Wharton Budget Model to point out that the cost of the program—$138 billion according to the Biden Administration—was off by over a multiple of three.[7] Just as Congress does not hide

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[3] Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program, 88 Fed. Reg. 1894 (Jan. 11, 2023) (to be codified at 34 C.F.R. pt. 685).
[4] Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program, 88 Fed. Reg. 43820 (July 10, 2023) (to be codified at 34 C.F.R. pt. 685).
[5] Letter from Bill Cassidy, U.S. Senator, et al. to Miguel Cardona, Secretary of Education (Feb. 11, 2023), https://www.help.senate.gov/imo/media/doc/idr_full_comment1.pdf.
[6] *Id.*
[7] *Id.* (citing Junlei Chen & Kent Smetters, Budgetary Cost of Newly Proposed Income-Driven Repayment Plan, Penn Wharton Budget Model, Jan. 30, 2023).

an elephant in a mouse hole, it also does not hide a $475 billion student-loan jubilee in plain sight. Senator Cassidy also laid out the various ways in which the proposed rule simply lacked legislative authorization.[8] Briefly, the administration cannot use an ancillary provision in the U.S. Code, which describes only one of nine loan repayment programs outlined by statute, to effect a mass student-loan cancellation.[9] Nevertheless, the Biden Administration persisted.

Unsurprisingly, a number of States brought suit to enjoin the final rule, and Judge Crabtree in the District of Kansas did so. *Amici* believe he was correct to enjoin the final rule. To begin with, Judge Crabtree concluded that the proposed rule implicates the Major Questions Doctrine, relying on this Court's decision in *Biden v. Nebraska* that "student loan debt cancellation plans that forgive enormous amounts of debt are major questions." *Alaska v. Cardona*, No. 24-1057-DDC-ADM, (D. Kan. June 30, 2024) at *13. Because a major question was implicated, Judge Crabtree analyzed whether or not the statute had authorized the plan. He concluded that the text of the Higher Education Act (HEA) did allow for an income-driven repayment plan, but the statutory context did not provide for a mass student-loan cancelation program. *See id.* at *14–17. The most Judge Crabtree could find was "a colorable, even a plausible basis for the SAVE Plan," *id.* at *19, but that is not enough to provide

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[8] *Id.*

[9] 20 U.S.C. § 1087e(d); *see also* Higher Education Act of 1965, Pub. L. No. 89-329 §§421–35, 79 Stat. 1219, 1236–49 (1965); 20 U.S.C. § 1078(b); *see also* Higher Education Act of 1965, Pub. L. No. 89-329, title IV, § 428, 79 Stat. 1219, 1241–42 (1965); 20 U.S.C. § 1078-3; *see also* Higher Education Act of 1965, Pub. L. 89–329, title IV,§428C, as added Pub. L. 99–498, title IV, §402(a), 100 Stat. 1388 (1986).

a "clear authorization" for the plan, *id.* at *20. In the end, the Biden Administration lacked "a clear showing of … authority" to justify the SAVE Plan. *Id.* at *24. Given the likelihood of success on the Major Questions issue, Judge Crabtree applied the rest of the preliminary injunction factors and decided to enjoin the SAVE Plan nationwide.[10]

The force of Judge Crabtree's opinion has only been augmented by this Court's recent opinion in *Loper Bright Enterprises v. Raimondo*, No. 22-1219, 2024 WL 3208360 (U.S. June 28, 2024). There, this Court turned its back on so-called *Chevron* deference whereby supposedly ambiguous statutes were left to agencies to interpret permissibly. As the Court noted, "It therefore makes no sense to speak of a 'permissible' interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible." *Loper Bright*, 2024 WL 3208360 at *16. It concluded, "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." *Id.* at *22.

The principles articulated in *Loper Bright* squarely bolster Judge Crabtree's analysis of the HEA's statutory context. While he found a "colorable" or "plausible" statutory justification for the SAVE Plan, such agency interpretations are no longer

[10] *Amici* take no view on the merits of the scope of the injunction. Senator McConnell has previously questioned the propriety of national injunctions. *See, e.g.*, The Stop Helping Outcome Preferences (SHOP) Act of 2024, S. 4095 (118th Cong.). Regardless of how this Court addresses that question at some later date, this petition is an exceptionally poor vehicle for it to do so, and *amici* therefore simply urge the Court to vacate the stay of the injunction below.

sufficient to justify rulemaking authority—even had they not already run afoul of the Major Questions Doctrine.

At minimum, the lower courts should review the SAVE Plan in light of *Loper Bright* in order to fully analyze the issues at stake here. And they should do so without the plan moving full-steam ahead to get out in front of the very likely further adverse rulings coming the Biden Administration's way. Vacating the stay below to reinstitute Judge Crabtree's injunction will give the lower courts the breathing room they need to properly adjudicate the administrative law questions presented by this case while limiting further harm to the plaintiffs.

II. EXECUTIVE OVERREACH IN THE CONTEXT OF STUDENT LOANS PREDICTABLY CROWDS OUT MEANINGFUL LEGISLATIVE SOLUTIONS TO THE ISSUE.

Significant reform to student-loan programs is the province of Congress, but Congress cannot act when the Administration gets what it wants by executive fiat. Just as a bank cannot be expected to renegotiate the terms of a mortgage with a bank robber, Congress cannot renegotiate the policies of the student-loan programs when the Biden Administration simply chooses to put hundreds of billions of dollars on its side of the ledger at will.

There are many legislative proposals in Congress to address student debt and reform student loan programs, including some spearheaded by Senator Cassidy. In June 2023, Senator Cassidy and a number of his colleagues introduced the Lowering Education Costs and Debt Act (S. 1972), a package of bills aimed at addressing not only the existence of student loan debt but also the issues driving the ever-increasing

cost of higher education that drives the debt. Importantly, a major component of this package proposes to make structural reforms to student loans and simplify the student loan borrowing process by streamlining payment options for borrowers. As Senator Cassidy said at the time, "Unlike President Biden's student loan schemes, this plan addresses the root causes of the student debt crisis. It puts downward pressure on tuition and empowers students to make the educational decisions that put them on track to academically and financially succeed."[11] The House has proposals as well, such as the College Cost Reduction Act (H.R. 6591).[12] The Biden Administration has been entirely uninterested in working with Congress in these efforts to reform student loan programs and address the root causes of student-loan debt.

Indeed there has been bipartisan opposition to the Biden Administration's go-it-alone attitude. Last summer Congress passed a resolution of disapproval under the Congressional Review Act to overturn the original student-loan jubilee. It passed 52 to 46 in the Senate and 218 to 203 in the House—bipartisan majorities in both chambers. President Biden, of course, vetoed the resolution.[13] And when he could not

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[11] Press Release, Ranking Member Cassidy, Colleagues Unveil Landmark Package to Lower Education Costs and Student Debt, U.S. Senate Committee on Health, Education, and Pensions (June 14, 2023), https://www.help.senate.gov/ranking/newsroom/press/ranking-member-cassidy-colleagues-unveil-landmark-package-to-lower-education-costs-and-student-debt.

[12] Biden's Student Loan Scam, House Committee on Education and Workforce, https://edworkforce.house.gov/biden-s-student-loan-scam/.

[13] Press Release, Ranking Member Cassidy Blasts Biden Veto of CRA to Overturn Unfair Student Loan Scheme, U.S. Senator Bill Cassidy (June 7, 2023), https://www.cassidy.senate.gov/newsroom/press-releases/ranking-member-cassidy-blasts-biden-veto-of-cra-to-overturn-unfair-student-loan-scheme/.

do the same to this Court's decision in *Biden v. Nebraska*, he decided instead to push different lawless, unilateral attempts to reach the same debt-cancellation goal.

The perception by the Biden Administration that they have the power to achieve these sweeping policy goals alone has short-circuited the legislative process. This should come as no surprise. As Justice Thomas noted in his recent concurrence in *Loper Bright*, "No matter the gloss put on it, *Chevron* expands agencies' power beyond the bounds of Article II by permitting them to exercise powers reserved to another branch of Government." *Loper Bright*, 2024 WL 3208360 at *23 (Thomas, J., concurring). That overarching dynamic of executive overreach eliminates the political necessity of legislation, which in turn eliminates its possibility. As Paul Clement noted at oral argument in *Loper Bright*,

> I think you just have to look at this Court's docket. It's been one major rule after another. It hasn't been one major statute after another. I would have thought Congress might have addressed student loan forgiveness if that were really such an important issue to one party in Congress. I would have thought maybe they would have fixed the eviction moratorium. I could go on and on on these issues. They don't get addressed because Chevron makes it so easy for them not to tackle the hard issues and forge a permanent solution.[14]

As Mr. Clement also noted, "it's really convenient for some members of Congress not to have to tackle the hard questions and to rely on their friends in the executive branch to get them everything they want."[15] Perhaps. *Amici* would prefer to legislate, but unfortunately the possible efficacy of executive overreach also makes it

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[14] Oral Arg. 26:2–13, *Loper Bright*, 2024 WL 3208360 (cleaned up).
[15] *Id.* at 17:21–25.

convenient for the Biden Administration to get what it wants without having to engage in the give-and-take of legislation.

III. VACATING THE STAY SERVES THE PUBLIC INTEREST BECAUSE THE SAVE PLAN IS THE LATEST POLTICAL EFFORT BY THE BIDEN ADMINISTRATION TO FLOUT CONGRESS AND THE COURTS WHEN IT COMES TO STUDENT LOANS.

The Biden Administration is determined to effect student-loan cancellation before the November elections regardless of what Congress or this Court have to say about it. Following its defeat before this Court in *Biden v. Nebraska*, the Biden Administration has simply doubled down on this flawed vote-buying policy.

The cancellation of private debt has long been a preferred and dangerous tool for political actors trying to strike a populist pose. Its menace was an animating factor in the establishment of our Constitution, with James Madison observing,

> The influence of factious leaders may kindle a flame within their particular States…. A rage for paper money, *for an abolition of debts*, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it….[16]

It was a fear he echoed from John Adams who had previously observed that,

> if all were to be decided by a vote of the majority…. the time would not be long before courage and enterprise would come, and pretexts be invented by degrees, to countenance the majority in dividing all the property among them…. *Debts would be abolished first*; taxes laid heavy on the rich, and not at all on the others; and at last a downright equal division of every thing be demanded, and voted.[17]

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[16] *The Federalist* No. 10 (James Madison), at 79 (Clinton Rossiter ed., 2003) (emphasis added).

[17] John Adams, 6 *The Works of John Adams, Second President of the United States: with a Life of the Author, Notes and Illustrations, by his Grandson Charles Francis Adams* 9 (1856) (emphasis added).

It's unsurprising that the Founders took such a dim view of the practice because they were well-acquainted with private-debt cancellation as the calling card of the greatest villains of antiquity. First among them was the Roman conspirator Cataline. Perpetually unable to attain high magistracy in the late Roman Republic, Cataline surrounded himself with a circle where "[h]abitual luxury and licentiousness ... produced debts of enormous magnitude" whereby he became "the champion of the indebted aristocracy."[18] To cater to both this base of the idle rich and present himself as a champion of the people, Cataline made debt cancellation "one of the watchwords of his platform."[19] As the historian Sallust described, "Thereupon Catiline promised abolition of debts, the proscription of the rich, offices, priesthoods, plunder, and all the other spoils that war and the license of victors can offer."[20] It was a platform designed to appeal to "large numbers and varied types of men in debt."[21] The result, when politics failed, was a populist conspiracy designed to overthrow the Roman Republic, stopped by the prudent actions of the Roman Consul at the time, Cicero.[22]

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[18] Erich S. Gruen, *The Last Generation of the Roman Republic* 420 (1995).
[19] *Id.* at 425.
[20] Sallust, *The War with Cataline* XXI (J.C. Rolfe, trans., 1965).
[21] Gruen, *supra* n. 18 at 426.
[22] The specter of debt cancellation left such a mark on Cicero that he would go on to complain to his friend, Atticus, that his own son-in-law, P. Cornelius Dolabella, would seek to cancel debts as Tribune (an act he considered a ground for divorce). *See* M. Tullius Cicero, *Letters to Atticus*, 11.23 (Evelyn Shuckburgh & Evelyn S. Shuckburgh, eds., 1908), http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.02.0022%3Atext%3DA%3Abook%3D11%3Aletter%3D23.

As with the ancient populists, then-candidate Biden first proposed his student-loan jubilee as a vote-buying campaign tactic. Although initially cool to the idea, as the 2020 campaign heated up, Biden "embraced more dramatic steps to alleviate the burden of student loan debt …."[23] During the campaign he pledged to issue $10,000 of across-the-board student debt cancellation—as first proposed by Senator Elizabeth Warren—although the mechanics of any such cancellation were unclear.[24]

Once inaugurated, President Biden did not move immediately to enact these promised jubilees. Instead, "The Biden administration's approach to student loan relief began with improving, extending or expanding a handful of programs that were already on the books."[25] As some of his supporters in the press complained at the time, "One year later, while Biden has provided hundreds of thousands of borrowers with debt relief, that $10,000 promise remains unfulfilled."[26]

This changed when President Biden, in the run-up to the 2022 midterm elections, enacted his plan at issue in *Biden v. Nebraska*. The details of that plan are well known to this Court. Senator McConnell said of the program at the time, "President Biden's student loan socialism is a slap in the face to every family who

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[23] Adam S. Minsky, *Biden Affirms: "I Will Eliminate Your Student Debt"*, Forbes, Oct 7, 2020, https://www.forbes.com/sites/adamminsky/2020/10/07/biden-affirms-i-will-eliminate-your-student-debt/.
[24] Joe Biden, *Joe Biden Outlines New Steps to Ease Economic Burden on Working People*, Medium, Apr. 9, 2020, https://medium.com/@JoeBiden/joe-biden-outlines-new-steps-to-ease-economic-burden-on-working-people-e3e121037322.
[25] Cory Turner, *Biden pledged to forgive $10,000 in student loan debt. Here's what he's done so far*, Nat'l Pub. Radio, Dec. 7, 2021, https://www.npr.org/2021/12/07/1062070001/student-loan-forgiveness-debt-president-biden-campaign-promise.
[26] *Id.*

sacrificed to save for college, every graduate who paid their debt and every American who chose a certain career path or volunteered to serve in our Armed Forces in order to avoid taking on debt."[27]

Importantly, while that case was moving through the courts, the Biden Administration took a shocking tone of defiance against the judiciary. When the Eighth Circuit ruled against them, the response from the White House spokesperson was, "Tonight's temporary order does not prevent borrowers from applying for student debt relief.… It also does not prevent us from reviewing these applications and preparing them for transmission to loan servicers."[28]

The posture of defiance only grew following this Court's decision. In an official statement issued by the White House, President Biden flatly called the court's ruling "wrong" and pledged that "[t]his fight is not over."[29] President Biden complained that,

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[27] Morgan Watkins, *'Student loan socialism': McConnell slams Biden for forgiving $10K of student loan debt*, Louisville Courier J., Aug. 24, 2022, https://www.courier-journal.com/story/news/politics/mitch-mcconnell/2022/08/24/ky-politics-mcconnell-slams-biden-student-loan-forgiveness/65418181007/.

[28] Michael Stratford, *Federal appeals court temporarily halts Biden's student debt relief program*, Politico, Oct. 21, 2022, https://www.politico.com/news/2022/10/21/federal-appeals-court-temporarily-halts-bidens-student-debt-relief-program-00063021.

[29] Amy Howe, *Supreme Court strikes down Biden student-loan forgiveness program*, SCOTUSblog, June 30, 2023, https://www.scotusblog.com/2023/06/supreme-court-strikes-down-biden-student-loan-forgiveness-program/.

prior to the ruling, the "money was literally about to go out the door,"[30] and he warned, "Today's decision has closed one path. Now we're going to pursue another."[31]

And so he did. Nearly a year later, President Biden declared, in announcing the SAVE Plan, "The Supreme Court blocked [debt cancellation], but that didn't stop me."[32]

Which brings us to the instant matter. As President Biden has struggled mightily to enact his debt-cancellation scheme without regard for Congress or the courts, it's clear beyond cavil that the objective is to get the money "out the door" for electoral purposes. According to the Urban Institute's Center on Education Data and Policy, the predecessor to the SAVE Plan ensured most borrowers would pay at least the amount they borrowed. Under the SAVE Plan the typical associates degree borrower would only pay 69 percent of the amount borrowed and most bachelor's degree borrowers would not pay back their principal balance.[33]

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[30] David Mendez & Maddie Gannon, *Biden introduces 'new path' for student debt relief after Supreme Court ruling*, Spectrum News, June 30, 2023, https://ny1.com/nyc/all-boroughs/politics/2023/06/30/biden-introduces--new-path--for-student-debt-relief-after-supreme-court-ruling.

[31] Annie Nova, *Biden says he's working on a new path to student loan forgiveness after Supreme Court decision*, CNBC, June 30, 2023 https://www.cnbc.com/2023/06/30/biden-says-hes-working-on-a-new-path-to-student-loan-forgiveness-after-supreme-court-decision.html.

[32] Editorial, *Biden's Student Loan Boast: The Supreme Court 'Didn't Stop Me'*, Wall St. J., Feb. 23, 2024, https://www.wsj.com/articles/joe-biden-student-debt-forgiveness-supreme-court-0c5204fe; *see also* @JoeBiden, X (Jan. 31, 2024 10:30am), https://x.com/JoeBiden/status/1752715883829477670?.

[33] Jason Delisle & Jason Cohn, *The SAVE Plan for Student Loan Repayment: Which Fields and Colleges Benefit Most?*, Urban Institute, September 2023, https://www.urban.org/sites/default/files/2023-10/The%20SAVE%20Plan%20for%20Student%20Loan%20Repayment.pdf.

The injunction from the District Court simply hits pause on that process and maintains the status quo as this litigation moves forward. The issues here are admittedly complex. But should the program be deemed unlawful (as *amici* believe it is), this will be a parchment judgment if debt has already been canceled under the program because surely the canceled debts won't be reinstated. On the other hand, should the mass-cancellation of student loan debt somehow pass legal muster, then the relief will only have been delayed if the injunction remains in place. Leaving the injunction stayed will make actual relief impossible in many instances, as the Biden Administration cynically hopes.

Restoring the injunction prevents President Biden from sending the money out the door, never to be seen again, through a legally dubious program in the final stretch of his desperate reelection campaign.

CONCLUSION

For the foregoing reasons *amici* urge this Court to vacate the stay of the Court of Appeals and allow Judge Crabtree's injunction to go into effect.

Respectfully submitted,

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