Nos. 22-506, 22-535

IN THE

Supreme Court of the United States

JOSEPH R. BIDEN, PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,
v.
NEBRASKA, ET AL.,
Respondents.

DEPARTMENT OF EDUCATION, ET AL.,
Petitioners,
v.
MYRA BROWN, ET AL.,
Respondents.

On Writs of Certiorari Before Judgment to the United States Courts of Appeals for the Eighth and Fifth Circuits

BRIEF OF *AMICI CURIAE* AMERICANS FOR PROSPERITY FOUNDATION AND ADVANCING AMERICAN FREEDOM IN SUPPORT OF RESPONDENTS

Michael Pepson
Counsel of Record
Casey Mattox
Cynthia Fleming Crawford
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(571) 329-4529
mpepson@afphq.org

J. Marc Wheat
General Counsel
ADVANCING AMERICAN FREEDOM, INC.
801 Pennsylvania Avenue, N.W., Suite 930
Washington, D.C. 20004
(202) 780-4848
MWheat@advancingamericanfreedom.com

Counsel for Amici Curiae

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Under Supreme Court Rule 37.3, *amici* respectfully submit this brief in support of Respondents.[1]

INTEREST OF *AMICUS CURIAE*

Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas include the separation of powers and constitutionally limited government. As part of this mission, AFPF appears as *amicus curiae* before state and federal courts.

AFPF has a particular interest in this case because of the critical separation of powers issues that underlie it, which present a familiar question: which branch of government is responsible for making law and how? It is not this Court's role to set public policy. Nor is it the job of unelected federal bureaucrats or the Executive acting alone. Instead, the Constitution tasks the democratically elected, politically accountable branches—Congress and the President—with resolving important policy questions through the

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

deliberately arduous processes of bicameralism and presentment.

More broadly, AFPF recognizes that the encroachment of the Executive on Congress's Article I powers here will, if allowed to stand, have implications far beyond the facts of this case. The current Administration and future Administrations of either party might be encouraged to sidestep the People's elected representatives in Congress. And the same Executive power claimed here might be used to suspend or modify tax enforcement, alter other loan obligations, or otherwise arrogate to the President Congress's power of the purse. AFPF writes here to urge this Court to protect our constitutional Republic and system of representative self-government against this danger by enforcing the Constitution's separation of powers and rejecting Petitioners' unconstitutional overreach.

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including the uniquely American idea that all men are created equal and endowed by their Creator with unalienable rights to life, liberty, and the pursuit of happiness. This case is important to AAF because it presents to this Court the opportunity to overrule *Chevron v. NRDC*, 467 U.S. 837 (1984), which for too long has permitted the confusion of powers of the several branches of the Federal government. The genius of the Constitution is its structure, dividing power against itself into three coequal branches and thereby protecting the liberties of its citizens from usurpers of delegated and limited governmental power.

SUMMARY OF ARGUMENT

The wisdom and fairness of granting blanket student loan cancellation to tens of millions of borrowers at a cost of hundreds of billions of dollars is not before the Court. Instead, this case is about whom the Constitution empowers to make that decision—one of vast political and economic importance—and by what process. At the federal level, the answer is Congress, through duly enacted legislation, subject to constitutional constraints on federal power.

Our system of government relies on the consent of the governed, memorialized in the Constitution. Our Constitution exclusively tasks the People's elected representatives with answering major policy questions through legislation that survives bicameralism and presentment, a deliberately difficult process designed to ensure such laws reflect broad political consensus.

Toward this end, the Constitution flatly prohibits Congress from delegating legislative power to other entities: "*All* legislative Powers herein granted shall be vested in a Congress of the United States[.]" U.S. Const. Art. I, § 1 (emphasis added). "The Constitution did not create a President in the King's image but envisioned an executive regularly checked and balanced by other authorities." *United States v. Zubaydah*, 142 S. Ct. 959, 992 (2022) (Gorsuch, J., joined by Sotomayor, J., dissenting). Indeed, "it is a core tenet of this Nation's founding that the powers of a monarch must be split between the branches of the government to prevent tyranny." *Comm. on the Judiciary v. McGahn*, 415 F. Supp. 3d 148, 154

(D.D.C. 2019) (Jackson, J.); *see* Federalist No. 47 (Madison). And *a fortiori* unelected people are not allowed to make law in this country through administrative edict, as the Department sought to do here. For "the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people's representatives." *West Virginia v. EPA*, 142 S. Ct. 2587, 2626 (2022) (Gorsuch, J., concurring).

The Department's sweeping assertion of power to unilaterally rewrite the Higher Education Act ("HEA"), 20 U.S.C. 1001 *et seq*.—based on the President's dubious claim of a "national emergency"—flies in the face of these basic principles. It is not only unconstitutional but profoundly antidemocratic.

For these reasons, this Court should reject Petitioners' efforts to revive the unconstitutional mass debt cancellation.

ARGUMENT

I. THE DEPARTMENT MUST RESPECT THE SEPARATION OF POWERS.

The Department is a creature of statute, which possesses only those powers Congress chooses to confer upon it. *See Federal Election Comm'n v. Cruz*, 142 S. Ct. 1638, 1649 (2022); *La. Pub. Serv. Com v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 374 (1986). After all, "[a]gencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'" *West Virginia v. EPA*, 142 S. Ct. at 2609 (quoting E. Gellhorn & P.

Verkuil, *Controlling Chevron-Based Delegations*, 20 Cardozo L. Rev. 989, 1011 (1999)). Accordingly, the Department bears the affirmative burden to establish statutory authorization for its actions. *West Virginia v. EPA*, 142 S. Ct. at 2609 ("We presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'" (quoting *United States Telecom Assn. v. FCC*, 855 F. 3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)); *La. Pub. Serv. Com*, 476 U.S. at 374. And "[r]egardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 125 (2000) (cleaned up). Congress need not expressly negate an agency's claimed powers; "[w]ere courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with . . . the Constitution[.]" *Ry. Labor Executives' Assn's v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc).

As this Court reaffirmed just last year, under the major questions doctrine, "cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such

authority."[2] *West Virginia v. EPA*, 142 S. Ct. at 2608 (quoting *Brown & Williamson*, 529 U.S. at 159–60). In those cases, "both separation of powers principles and a practical understanding of legislative intent make [courts] 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there. . . . [S]omething more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims." *Id.* at 2609 (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

The major questions doctrine "refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[3] *West*

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[2] As here, "[a]t stake" in these cases are "basic questions about self-government, equality, fair notice, federalism, and the separation of powers." *West Virginia v. EPA*, 142 S. Ct. at 2620 (Gorsuch, J., concurring).

[3] The major questions doctrine appears to have emerged in the wake of the judicially created "intelligible principle" regime as an alternative to enforcing Article I's Vesting Clause. *See Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) ("When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines."); *see also Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) ("Whichever the doctrine, the point is the same."). But "the Constitution does

Virginia v. EPA, 142 S. Ct. at 2609. "If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress." *NFIB v. OSHA*, 142 S. Ct. at 668 (Gorsuch, J., concurring).

"Like many parallel clear-statement rules in our law, this one operates to protect foundational constitutional guarantees."[4] *West Virginia v. EPA*, 142 S. Ct. at 2616 (Gorsuch, J., concurring).

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not speak of 'intelligible principles.' Rather, it speaks in much simpler terms: 'All legislative Powers herein granted shall be vested in a Congress.'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (citations omitted). If this Court were to jettison the extraconstitutional "intelligible principle" test, instead returning to the Constitution's original public meaning and rigorously enforcing Article I's bar against Congress delegating its legislative power to other entities, *see* U.S. Const. Art. I, § 1; *see also* U.S. Const. Art. I, § 9, cl. 7, the major questions doctrine may well have less of a role to play in guarding against violations of Article I's Vesting Clause and other separation of powers violations. This Court should do so.

[4] "Some version of this clear-statement rule can be traced to at least 1897, when this Court confronted a case involving the Interstate Commerce Commission, the federal government's 'first modern regulatory agency.'" *West Virginia v. EPA*, 142 S. Ct. at 2619 (Gorsuch, J., concurring) (quoting S. Dudley, *Milestones in the Evolution of the Administrative State*, 3 (Nov. 2020)). In that case this Court rejected the ICC's claimed legislative power to set tariff rates for common carriers—"a power of supreme delicacy and importance"—reasoning that "if Congress had intended to grant such a power . . . it cannot be doubted that it would have used language open to no misconstruction, but clear and direct." *ICC v. Cincinnati, N.O. & T.P.R. Co.*, 167 U.S. 479, 505 (1897).

Specifically, it "protect[s] the Constitution's separation of powers." *Id.* at 2617 (Gorsuch, J., concurring). It does this by "guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power," *NFIB v. OSHA*, 142 S. Ct. at 669 (Gorsuch, J., concurring), the Constitution exclusively vests in Congress alone, *see West Virginia v. EPA,* 142 S. Ct. at 2619 (Gorsuch, J., concurring) ("Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I's Vesting Clause has its own: the major questions doctrine."); *see also* U.S. Const. Art. I, § 1. *Cf. Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825). This doctrine "is vital because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable 'ministers.'" *West Virginia v. EPA*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (citation omitted).

Application of these principles to the Department's mass student loan cancellation confirms that it is plainly ultra vires; indeed, "a complete usurpation of congressional authorization implicating the separation of powers required by the Constitution."[5] J.A. 295.

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[5] If it were otherwise, the statute would violate Article I's bar against delegation of Congress's legislative power. *See* J.A. 296. *Cf. NFIB v. OSHA*, 142 S. Ct. at 669 (Gorsuch, J., concurring)

II. THE DEPARTMENT HAS USURPED CONGRESS'S EXCLUSIVE LEGISLATIVE POWER.

A. The Major Questions Threshold Inquiry.

Whether an agency action implicates the major questions doctrine is a threshold inquiry. *See, e.g., West Virginia v. EPA*, 142 S. Ct. at 2607–10; *see id.* at 2620 n.8 (Gorsuch, J., concurring) ("[O]ur precedents have usually applied the doctrine as a clear-statement rule, and the Court today confirms that is the proper way to apply it."); *see also id*. at 2691 n.9 (Gorsuch, J., concurring) (noting "antecedent question whether the agency's challenged action implicates a major question.").

As Justice Gorsuch observed, this Court's "cases supply a good deal of guidance about when an agency action involves a major question for which clear congressional authority is required." *Id.* at 2620 (Gorsuch, J., concurring). As particularly relevant here, the "Court has indicated that the doctrine applies when an agency claims the power to resolve a matter of great 'political significance' or end an 'earnest and profound debate across the country.'" *Id.* (Gorsuch, J., concurring) (quoting *NFIB v. OSHA*, 142 S. Ct. at 665 (internal quotation marks omitted); *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006)). It "has [also] said that an agency must point to clear congressional authorization when it seeks to regulate

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("[I]f the statutory subsection the agency cites really *did* endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority."); *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 672 (6th Cir. 2021).

a significant portion of the American economy or require billions of dollars in spending by private persons or entities." *Id.* at 2621 (Gorsuch, J., concurring) (cleaned up).

B. The Department's Mass Student Debt Cancellation Triggers the Major Questions Doctrine.

Here, everything about the Department's mass student debt forgiveness program implicates the major questions doctrine, as demonstrated by "the amount of money involved for regulated and affected parties, the overall impact on the economy, the number of people affected, and the degree of congressional and public attention to the issue."[6] *See United States Telecomms. Ass'n*, 855 F.3d at 422–23 (Kavanaugh, J., dissenting from denial of rehearing en banc) (listing generally relevant factors to major question inquiry); *see also* J.A. 291 ("[B]ecause the . . . [mass debt cancellation] is an agency action of vast economic and political significance, the major-questions doctrine applies.").

1. The Department Attempted to Decide Matters of Great Political Importance.

To begin with, student loan debt—and what, if anything, to do about it—is an issue of great political significance and the subject of a robust national

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[6] Petitioners appear to agree that this is a case of economic and political significance. *See* J.A. 290 & n.18.

debate.[7] *See, e.g.,* Michael Stratford and Eugene Daniels, *How Biden Finally Got to 'Yes' on Canceling Student Debt*, Politico (Aug. 25, 2022) (reporting "[s]tudent loans were regularly in the top five issues in the correspondence that the White House received from Americans each week")[8]; *see also* David Lerman, *Cardona Defends Student Loan Plan as One-Time Covid-19 Remedy: Education Secretary's Appearance is Part of Push to Sell Democratic Policies Ahead of Midterms*, Roll Call (Sept. 7, 2022).[9] Indeed, according to Brookings as of early September, "[t]wo thirds [of voters] say that student loan debt is a serious problem[.] . . . The two [then-]most recent polls . . . put support" for the President's mass debt cancellation "among registered voters at 51 percent and 52 percent[.]" William Galston, *Do Americans Support President Biden's Student Loan Plan?*, Brookings (Sept. 6, 2022).[10]

Student loan debt is plainly of great interest to Congress. *See* Letter from 94 Members of Congress to Speaker Pelosi, 1 (Aug. 26, 2022) (explaining the President's "student loan giveaway is

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[7] *Cf. Tiger Lily*, 5 F.4th at 675 (Thapar, J., concurring) ("As is often true, there are two sides to today's story. . . . While landlords and tenants likely disagree on much, there is one thing both deserve: for their problems to be resolved by their elected representatives.").

[8] https://www.politico.com/news/2022/08/25/biden-canceling-student-debt-00053826

[9] https://rollcall.com/2022/09/07/cardona-defends-student-loan-plan-as-one-time-covid-19-remedy/

[10] https://www.brookings.edu/blog/fixgov/2022/09/06/do-americans-support-president-bidens-student-loan-plan

unconstitutional and illegal")[11]; Sen. Chuck Grassley & Sen. Rob Portman, *Biden's Student Loan Debt Transfer Is An Abuse of Executive Power*, Washington Examiner (Sept. 8, 2022).[12] Tellingly, "Congress has considered and rejected bills authorizing something akin to the agency's proposed course of action." *West Virginia v. EPA*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (cleaned up); *see, e.g.,* Student Loan Debt Relief Act of 2019, S. 2235 (116th Cong); Student Loan Relief Act, H.R. 8514 (116th Cong.); Frontline Healthcare Worker Student Loan Assistance Act, H.R. 8393 (116th Cong.); Student Loan Debt Relief Act of 2019, H.R. 3887 (116th Cong.). Indeed, at the time of the Department's mass debt cancellation Congress was then considering legislation relating to student loan forgiveness.[13] *See, e.g.,* Income-Driven Student Loan Forgiveness Act, H.R. 2034 (117th Cong.); Second Chance at Public Service Loan Forgiveness Act, S. 4581 (117th Cong.); Strengthening and Improving Public Service Loan Forgiveness Act of 2022, H.R. 8330 (117th Cong.); Debt Cancellation Accountability Act of 2022, S. 4483 (117th Cong.);

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[11] https://www.politico.com/f/?id=00000183-19c4-de9f-a9eb-f9f772e10000

[12] https://www.washingtonexaminer.com/restoring-america/fairness-justice/bidens-student-loan-debt-transfer-is-an-abuse-of-executive-power

[13] For that matter, on October 11, 2022, the President signed into law the Joint Consolidation Loan Separation Act, S. 1098 (117th Cong.). *See* The White House, Bills Signed: H.R. 91, H.R. 92, H.R. 2142, H.R. 3508, H.R. 3539, H.R. 5809, H.R. 7698, S. 1098 (Oct. 11, 2022), https://www.whitehouse.gov/briefing-room/legislation/2022/10/11/bills-signed-h-r-91-h-r-92-h-r-2142-h-r-3508-h-r-3539-h-r-5809-h-r-7698-s-1098/.

Student Loan Accountability Act, H.R. 8102 (117th Cong.); Student Loan Accountability Act, S. 4253 (117th Cong.); Fairness for Responsible Borrowers Act, H.R. 8496 (117th Cong.).

This is unsurprising given that no statute authorizes the Executive to cancel student debt *en masse*. Until recently, this fact was uncontroversial. Even the then-Speaker of the House, who supports student loan cancelation, acknowledged as much: "People think that the President of the United States has the power for debt forgiveness. He does not. . . . [H]e does not have that power. That has to be an act of Congress." Press Release, Transcript of Pelosi Weekly Press Conference Today (July 28, 2021).[14] The President also "entered the presidency deeply skeptical of the idea of writing off large chunks of student loan debt. He questioned publicly whether he had the authority to do it[.]"[15] Accordingly, the President asked Congress to pass legislation forgiving $10,000 in student debt for all borrowers.[16]

It was only after Congress declined to pass the legislation he wanted that the President changed his tune, specifically directing the Department to unilaterally pursue mass student loan cancellation. *See* Fact Sheet: President Biden Announces Student

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[14]https://web.archive.org/web/20210728234206/https://www.speaker.gov/newsroom/72821-2

[15] Stratford & Daniels, *supra*.

[16] *See* Annie Nova, *Biden Will Call on Congress to Forgive $10,000 in Student Debt for All Borrowers*, CNBC (Jan. 8, 2021), https://www.cnbc.com/2021/01/08/student-loan-forgiveness-could-be-more-likely-but-challenges-remain-.html.

Loan Relief for Borrowers Who Need It Most (Aug. 24, 2022). "The President's intervention only underscores the enormous significance of" these issues. *United States Telecomms. Ass'n*, 855 F.3d at 424 (Kavanaugh, J., dissenting from denial of rehearing en banc); *see West Virginia v. EPA*, 142 S. Ct. at 2622 (Gorsuch, J., concurring).

This holds particularly true given the curious timing of the President's actions: the cusp of the midterm elections, an occasion for candidates to seek public support for their preferred policy solutions in advance of the next Congress. This further shows that the President is (again) "attempting to work [a]round the legislative process to resolve for [himself] . . . a question of great political significance," another telltale sign of a major question. *West Virginia v. EPA*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (cleaned up); *see, e.g., NFIB v. OSHA*, 142 S. Ct. 661 (per curiam) (rejecting unlawful OSHA vaccine mandate); *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (per curiam) (rejecting unlawful CDC eviction moratorium).

2. The Mass Student Debt Cancellation Has Vast Economic Significance.

In addition, mass student debt cancellation is plainly of vast economic significance. *See also* J.A. 161 ("Whatever the eventual outcome of this case, it will affect the finances of millions of Americans with student loan debt as well as those Americans who pay taxes to finance the government and indeed everyone who is affected by such far reaching fiscal decisions."). To put this in perspective, OLC itself found that "[a]s of the end of the second quarter of 2022, about 43.0

million borrowers had loans under the three federal student loan programs, and their debts collectively amounted to approximately $1.62 trillion." Christopher H. Schroeder, Asst. Attorney General, U.S. Dept. of Justice, Office of Legal Counsel, Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans, Mem. Op. for the General Counsel, Dept. of Education, 46 Op. O.L.C. ___, Slip Op. at 2 (Aug. 23, 2022) ("OLC Memo") (citation omitted)[17]; *accord* Letter from Phillip Swagel, Director, Congressional Budget Office, to Congress, 3 (Sept. 26, 2022) ("CBO Letter"), https://www.cbo.gov/system/files/2022-09/58494-Student-Loans.pdf; *see also* FACT SHEET: The Biden-Harris Administration's Plan for Student Debt Relief Could Benefit Tens of Millions of Borrowers in All Fifty States, White House (Sept. 20, 2022) ("The Biden-Harris Administration expects that over 40 million borrowers are eligible for its student debt relief plan, and nearly 20 million borrowers could see their entire remaining balance discharged.").[18]

In terms of cost, "CBO estimates that the cost of student loans will increase by about an additional

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[17] Oddly, given *West Virginia v. EPA*'s obvious relevance to this case, the OLC Memo—issued August 23, 2022—does not cite or mention it, even though that decision was released almost two months earlier on June 30, 2022.

[18] According to the Department, as of November 22, 2022, "over 26 million people have provided the Department with the necessary information to be considered for debt relief, and 16 million borrowers have been approved." U.S. Dept. of Ed., Biden-

$400 billion in present value as a result of the action[.]" CBO Letter at 1.[19] According to the National Taxpayers Union Foundation, this could cost, on average, $2,000 per taxpayer.[20] The Committee for a Responsible Federal Budget previously estimated that all of the Department's debt changes "will cost between $440 billion and $600 billion over the next ten years[.]"[21] And a Wharton analysis found that "depending on future details of the actual IDR program and concomitant behavioral changes, the

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Harris Administration Continues Fight for Student Debt Relief for Millions of Borrowers, Extends Student Loan Repayment Pause (Nov. 22, 2022).

[19] The University of Pennsylvania Wharton School of Business "estimate[d] that a one-time maximum debt forgiveness of $10,000 per borrower will cost around $300 billion for borrowers with incomes less than $125,000." Forgiving Student Loans: Budgetary Costs and Distributional Impact (August 23, 2022), https://budgetmodel.wharton.upenn.edu/issues/2022/8/23/forgiving-student-loans.

[20] NTUF, *Cost of Student Debt Cancelation Could Average $2,000 Per Taxpayer* (Aug. 23, 2022), https://www.ntu.org/foundation/detail/cost-of-student-debt-cancelation-could-average-2000-per-taxpayer.

[21] CRFB, *New Student Debt Changes Will Cost Half a Trillion Dollars* (Aug. 24, 2022), https://www.crfb.org/blogs/new-student-debt-changes-will-cost-half-trillion-dollars; *see also* CRFB, *Debt Cancellation is Too Costly, CBO Confirms* (Sept. 24, 2022), https://www.crfb.org/blogs/new-student-debt-changes-will-cost-half-trillion-dollars.

IDR program could add another $450 billion or more, thereby raising total plan costs to over $1 trillion."[22]

C. The Department's Blanket Loan Forgiveness Scheme Fails the Major Questions Doctrine's Clear Statement Requirement.

Against this backdrop, the Executive's "claim to extravagant statutory power over the national economy" should be greeted skeptically. *Util. Air Regulatory Grp.*, 573 U.S. at 324. And where, as here, the major questions doctrine applies, "a colorable textual basis" is not enough to justify the agency's assertion of power. *See West Virginia v. EPA*, 142 S. Ct. at 2609. Instead, "[a]t this point, the question becomes what qualifies as a clear congressional statement authorizing an agency's action." *Id.* at 2622 (Gorsuch, J., concurring). "First, courts must look to the legislative provisions on which the agency seeks to rely 'with a view to their place in the overall statutory scheme.'" *Id.* (Gorsuch, J., concurring) (quoting *Brown & Williamson*, 529 U.S. at 133). "Second, courts may examine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address." *Id.* at 2623 (Gorsuch, J., concurring). "Third, courts may examine the agency's past interpretations of the relevant statute." *Id.* (Gorsuch, J., concurring). "Fourth, skepticism may be merited when there is a mismatch between an

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[22] The Biden Student Loan Forgiveness Plan: Budgetary Costs and Distributional Impact (Aug. 26, 2022), https://budgetmodel.wharton.upenn.edu/issues/2022/8/26/biden-student-loan-forgiveness.

agency's challenged action and its congressionally assigned mission and expertise." *Id.* (Gorsuch, J., concurring). The Department's mass student loan cancellation independently fails all four of these tests. *See also* J.A. 294 (concluding "the Department lacks 'clear congressional authorization' for the Program under the HEROES Act").

1. The HEROES Act's Place in the Overall Statutory Scheme.

Congress does not "typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme." *West Virginia v. EPA*, 142 S. Ct. at 2609 (quoting *MCI Tele. Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 229 (1994)). If Congress wanted to grant the Department unfettered (and unconstitutional) legislative power to mass cancel student debt, it would have clearly said so. *See Util. Air Regulatory Grp.*, 134 S. Ct. at 2444. It did not, instead saying the opposite.

The student loan statutory structure Congress has enacted makes clear that Congress generally expects borrowers to pay back their federally funded loans. For example, as a general matter, student loans are not dischargeable in bankruptcy. *See* 11 U.S.C. § 523(a)(8). And when Congress has wanted to authorize student loan relief, it has done so explicitly through targeted statutes narrowly authorizing relief to discreet subsets of borrowers under limited circumstances. *See, e.g.,* 20 U.S.C. §§ 1087 (repayment by the Secretary of loans of bankrupt, deceased, or disabled borrowers; treatment of borrowers attending

schools that fail to provide a refund, attending closed schools, or falsely certified as eligible to borrow), 1087e(f) (deferment), 1087e(h) (borrower defenses), 1087e(m)(2) (loan cancellation amount), 1098cc (tuition refunds or credits for members of Armed Forces). *See generally* Congressional Research Service, Federal Student Loan Forgiveness and Loan Repayment Programs (Nov. 20, 2018) (discussing statutorily authorized programs). None of those provisions apply here.

Recognizing this, the Department bases its newly-claimed power to cancel broad swaths of student loans on an obscure, "rarely invoked statutory provision," *cf. West Virginia v. EPA*, 142 S. Ct. at 2624 (Gorsuch, J., concurring), of the Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108-76, 117 Stat. 904 (2003) (codified at 20 U.S.C. §§ 1098aa–1098ee) ("HEROES Act of 2003" or "HEROES Act"). *See* 87 Fed. Reg. 61,512, 61,514 (Oct. 12, 2022) (relying on 20 U.S.C. § 1098bb(a)(1) to justify mass debt cancellation). The provision authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under Title IV of the Act as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide the waivers or modifications authorized by paragraph (2)."[23] 20 U.S.C. § 1098bb(a)(1) (emphasis added). As relevant here, the

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[23] "To 'modify' means 'to change moderately.'" *Terry v. United States*, 141 S. Ct. 1858, 1863 (2021) (quoting *MCI Telecomms. Corp.*, 512 U.S. at 225).

Secretary is authorized to do this "as may be necessary to ensure that—recipients of student financial assistance under title IV of the Act who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals[.]"[24] 20 U.S.C. § 1098bb(a)(2)(A) (emphasis added).

Nothing in that provision purports to authorize, let alone clearly authorize, the Department to unilaterally reimagine student loan law to cancel hundreds of billions of dollars of debt, even if the President declares an "emergency." *See Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005) (plurality) (suggesting "broad or general language" insufficient to find clear statement); *see also West Virginia v. EPA*, 142 S. Ct. at 2609 ("Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or "subtle device[s].'" (quoting *Whitman*, 531 U.S. at 468). As the Congressional Research Service has explained: "The HEROES Act lacks express reference to 'cancellation,' 'discharge,' 'forgiveness,' or similar terms that Congress has used in portions of statutes, such as the Public Service Loan Forgiveness program, that allow or require ED to 'cancel' student loan

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[24] As relevant here, "[t]he term 'affected individual' means an individual who . . . suffered *direct economic hardship as a direct result of a war* or other military operation or national emergency, as determined by the Secretary." 20 U.S.C. § 1098ee(2)(D) (emphasis added); *see also* CRFB, *Student Debt Cancellation is Not Financially Justified* (Oct. 11, 2022), https://www.crfb.org/blogs/student-debt-cancellation-not-financially-justified.

balances." Congressional Research Service, Statutory Basis for Biden Administration Student Loan Forgiveness, 4 (Sept. 13, 2022).

Indeed, simple "common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude," *Brown & Williamson*, 529 U.S. at 133, as blanket student loan forgiveness suggests Congress did not do so here. Congress could not have intended to grant unfettered power to erase hundreds of billions of dollars in student debt for millions of borrowers, a topic of intense debate with immense economic consequences, to the Department "in so cryptic a fashion." *Id.* at 160.

2. Age and Focus of the Act in Relation to Mass Debt Cancellation.

"Of course, sometimes old statutes may be written in ways that apply to new and previously unanticipated situations. But an agency's attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign that it is acting without clear congressional authority." *West Virginia v. EPA*, 142 S. Ct. at 2623 (Gorsuch, J., concurring) (citation omitted). So too here.

The HEROES Act of 2003 was passed in the wake of the 9/11 terrorist attacks for the benefit of servicemembers in circumstances involving military mobilizations. The Act's findings make plain its focus:

protecting servicemembers.[25] *See* 20 U.S.C. § 1098aa(b). *Cf. H. J. Inc. v. Nw. Bell Tel. Co*., 492 U.S. 229, 255 (1989) (Scalia, J., dissenting) (finding "the prologue of the statute, which describes a relatively narrow focus" relevant to interpreting the word 'pattern' in the phrase 'pattern of racketeering activity'" (citing Statement of Findings and Purpose, The Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922–923)). As the Act recognized: "The men and women of the United States military put their lives on hold, leave their families, jobs, and postsecondary education in order to serve their country and do so with distinction." 20 U.S.C. § 1098aa(b)(5); *see also id.* § 1098aa(b)(6) ("There is no more important cause for this Congress than to support the members of the United States military and provide assistance with their transition into and out of active duty and active service.").

Unsurprisingly, given this context, only a single member of the House voted against it, and it passed the Senate without amendment by unanimous consent.[26] *See* 149 Cong. Rec. S10866 (July 31, 2003);

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[25] As OLC has explained: "The precursor of the HEROES Act of 2003 was the Higher Education Relief Opportunities for Students Act of 2001. Enacted a few months after the terrorist attacks of September 11, that statute was intended to 'provide the Secretary of Education with specific waiver authority to respond to conditions in the national emergency declared by the President on September 14, 2001.'" OLC Memo, Slip Op. 3 (quoting Pub. L. No. 107-122, 115 Stat. 2386, 2386 (2002)).

[26] Its precursor, the Higher Education Relief Opportunities for Students Act of 2001, likewise passed by unanimous voice vote in both the House and the Senate. *See* 147 Cong. Rec. H7155 (Oct. 23, 2001); 147 Cong. Rec. S13311 (Dec. 14, 2001).

149 Cong. Rec. H2553–54 (Apr. 1, 2003); *see also* Statutory Basis for Biden Administration Student Loan Forgiveness, *supra*, 4. There was no suggestion this bill would authorize the President and Secretary to reimagine this country's student loan system and mass-cancel student loan debt for all borrowers making less than an arbitrary threshold amount of money.

3. The Department's Past Interpretations of the HEROES Act.

The Department's prior interpretations of the HEROES Act further underscore the extent of its overreach. As this Court explained in *West Virginia v. EPA*, "as Justice Frankfurter has noted, 'just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.'" 142 S. Ct. at 2610 (quoting *FTC v. Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941)). That resonates here.

Until now, the Department has never suggested the HEROES Act grants the Secretary plenary power to reimagine student loan law whenever the President deigns to declare an emergency,[27] arrogating to itself

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[27] It bears reminding that "[i]f human nature and history teach anything, it is that civil liberties face grave risks when governments proclaim indefinite states of emergency." *Doe v. Mills*, 142 S. Ct. 17, 21 (2021) (Gorsuch, J., dissenting from denial of application for injunctive relief).

not only Congress's exclusive legislative power, *see* U.S. Const. Art. I, § 1, but also Congress's power of the purse,[28] U.S. Const. Art. I, § 9, cl. 7. Instead, the Department more modestly used its HEROES Act waiver-and-modification authority to tweak the margins of loan cancellation programs authorized by other statutes.[29] "[T]here is no original, longstanding, and consistent interpretation meriting judicial respect." *West Virginia v. EPA*, 142 S. Ct. at 2624 (Gorsuch, J., concurring). Nor did the Department claim blanket loan cancellation powers during the COVID-19 pandemic, even as it found in the HEROES Act the power to pause payments. As the Congressional Research Service recently explained: "Categorical cancellation appears poised to substantially reshape ED's federal student loan portfolio. The action reflects a use of ED's HEROES Act authority that is unlike past invocations. For the first time, ED plans to use this authority to directly and permanently discharge a portion of borrowers' student loan debt." Statutory Basis for Biden Administration Student Loan Forgiveness, *supra*, 1.

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[28] The Act unhelpfully defines "'national emergency' [to] mean[] a national emergency declared by the President of the United States." 20 U.S.C. § 1098ee(4).

[29] *See, e.g.,* 68 Fed. Reg. 69,312, 69,316–17 (Dec. 12, 2003) ("For borrowers who are affected individuals in this category, the Secretary is waiving the requirements that apply to the various loan cancellations that such periods of service be uninterrupted and/or consecutive, if the reason for the interruption is related to the borrower's status as an affected individual."); 77 Fed. Reg. 59,311, 59,316 (Sept. 27, 2012) (similar); 82 Fed. Reg. 45,465, 45,470 (Sept. 29, 2017) (similar).

4. Mismatch Between the Mass Student Debt Cancellation and the Department of Education's Congressionally Assigned Mission.

Bolstering the conclusion that the Department is seeking to arrogate to itself Congress's legislative power is the mismatch between the Department's actual mission and the apparent goals of the mass student debt cancellation. The Department has no expertise in fiscal policy. Nor does the Department have authority to handle appropriations—a task the Constitution exclusively reserves to Congress.[30] U.S. Const. Art. I, § 9, cl. 7; *see also Cmty. Fin. Servs. Ass'n of Am. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616, 636 (5th Cir. 2022) ("The Framers . . . believed that vesting Congress with control over fiscal matters was the best means of ensuring transparency and accountability to the people." (citing Federalist No. 48 (Madison)). Instead, its "mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access."[31] The Department's mass student loan cancellation has nothing to do with that.

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[30] "This power over the purse is an essential element of the checks and balances built into our Constitution—even the monarchs of England learned long ago that they could not spend funds over the opposition of Parliament." Br. of the U.S. House of Representatives at 1, *Trump v. Sierra Club*, No. 19A60 (U.S., filed July 19, 2019).

[31] U.S. Dept. of Ed., About ED, https://www2.ed.gov/about/landing.jhtml.

Just as the CDC lacked the power to reimagine landlord-tenant law, *see Ala. Ass'n of Realtors*, 141 S. Ct. at 2489; OSHA lacked the power to mandate vaccinations, *see NFIB v. OSHA*, 142 S. Ct. at 665 ("The Act empowers the Secretary to set workplace safety standards, not broad public health measures."); and the IRS lacked power to make national health policy, *see King v. Burwell*, 576 U.S. 473, 486 (2015), the Department lacks the power to make policy outside the scope of its mission.

III. THIS COURT SHOULD TAKE GREAT CARE TO EXPLAIN TO THE PUBLIC *WHY* THE MASS DEBT CANCELLATION WAS UNCONSTITUTIONAL.

Amici respectfully submit that given the broad public interest in and economic stakes of the Administration's mass debt cancellation, the Court should take great pains in clearly articulating to the American People in nontechnical terms how and why the Administration's actions violated the law—and why this type of Executive overreach threatens the rule of law, democracy, and the Republic. *Cf.* J.A. 297.

By the government's estimation, this case directly affects forty million borrowers—approximately twenty-six million of whom have already applied for the debt cancellation, about sixteen million of whom have been approved. Plainly, for many this litigation is of great interest. And for those who have questions about the lawfulness of the Department's actions, this Court is better positioned than other actors to provide clarity on that subject, as well as how our constitutional Republic is supposed to function. *Amici* believe it is important for this Court to do so here, explaining in clear terms that in this country the ends

do not justify the means and that this case is not about the wisdom of mass debt cancellation but rather protecting the processes the Constitution sets forth to ensure that the People's elected representatives play their proper role in making policy decisions of vast economic and political importance.[32]

To be sure, "[t]he separation of powers and its role in protecting individual liberty and the rule of law can sound pretty abstract." Neil Gorsuch *et al.*, *A Republic, If You Can Keep It*, 41 (2019). "After all, the value of the separation of powers isn't always as obvious as the value of other sorts of constitutional protections." *Id.* at 45. But it bears reminding that "[t]he primary protection of individual liberty in our constitutional system comes from the separation of powers in the Constitution: the separation of the power to legislate from the power to enforce from the power to adjudicate." Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907, 1915 (2014); *see also Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021) ("[T]he separation of powers is designed to preserve the liberty of all the people.").

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[32] More broadly, *amici* respectfully suggest that this Court should outline, in plain terms, why our constitutional Republic and system of representative self-government—and honoring the Constitution's system of checks and balances and the rule of law—is preferable to alternative systems of government lacking these features, as well as the *consequences* of abandoning the Constitution in favor of the ends-justify-the-means approach to governance that is on full display in this case.

The Administration's usurpation of Congress's legislative and appropriations powers flies in the face of these protections. *See also* J.A. 263. If allowed to stand, it would set a dangerous precedent. *See also* J.A. 296–297. The Court must not allow this to happen and should make plain to the American People—whatever one thinks about the wisdom and fairness of the President's mass debt cancellation—the Administration's actions could not be allowed to stand.

CONCLUSION

This Court should reject Petitioners' unconstitutional actions on the merits.

Respectfully submitted,

Michael Pepson
Counsel of Record
Casey Mattox
Cynthia Fleming Crawford
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(571) 329-4529
mpepson@afphq.org

J. Marc Wheat
General Counsel
ADVANCING AMERICAN FREEDOM, INC.
801 Pennsylvania Avenue, N.W., Suite 930
Washington, D.C. 20004
(202) 780-4848
MWheat@advancingamericanfreedom.com

Counsel for Amici Curiae February 1, 2023