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.

STATE OF 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 ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

* * *

The principal question presented by these cases—the validity of the Biden administration's mass cancellation of more than $400 billion in student loan debt—unavoidably implicates the Appropriations Clause of the Constitution, U.S. Const. art. I, § 9, cl. 7, "and the separation of powers principles enshrined in it." *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616, 635 (5th Cir. 2022), *petition for cert. filed*, No. 22-448 (U.S. Nov.

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

14, 2022). "[A]ppropriations are an integral part of our constitutional checks and balances, insofar as they tie the Executive Branch to the Legislative Branch via purse strings." *U.S. House of Rep. v. Burwell* ("*Burwell II*"), 185 F. Supp. 3d 165, 170 (D.D.C. 2016). But last October, the Executive Branch hijacked the congressional purse strings by brazenly attempting to deplete the U.S. Treasury of hundreds of billions of dollars in student loan debt assets.

This unconstitutional raid on the Treasury is the latest and most egregious example of the Executive Branch's many recurring violations of the Appropriations Clause, seemingly with congressional acquiescence.

Petitioners' transparently political as well as unconstitutional abrogation (i.e., expenditure) of student debt assets affords the Court a rare opportunity to enforce the Appropriations Clause's assignment of "the power of the purse" to "Congress and Congress alone." *Cmty. Fin. Servs. Ass'n*, 51 F.4th at 635. Even if, as the government contends, mass student debt cancellation somehow is authorized by the "HEROES Act," 20 U.S.C. § 1098bb, the administration's *unappropriated*, half-trillion-dollar, pre-midterm election giveaway to tens of millions of potential voters violates the Appropriations Clause in a spectacular manner.

The Atlantic Legal Foundation is filing this brief because the unprecedented mass student loan debt cancellation at issue in these cases not only violates

the Appropriations Clause and the separation of powers, but also is the antithesis of limited and responsible government. We urge the Court to address the questions presented in clear view of the Appropriations Clause. More specifically, if the Court concludes that the administration's exorbitant and unappropriated gift to student loan debtors is statutorily authorized, the Court then should consider whether the mass debt cancellation nonetheless violates the Appropriations Clause, or alternatively, should remand these cases to the courts of appeals for consideration of this constitutional question.

SUMMARY OF ARGUMENT

The Orders granting certiorari before judgment in these cases reflect the Court's intent to proceed (assuming Respondents have standing) directly to the question of whether Petitioners' mass student debt cancellation is legally sustainable. In the Atlantic Legal Foundation's view, even if the Court concludes that the debt cancellation is statutorily authorized, it should hold that the program violates the Appropriations Clause since indisputably, no congressional appropriation applies to the Executive Branch's abrogation of hundreds of billions of dollars in student loan debt assets held by the U.S. Treasury.

The Appropriations Clause is a pillar of the Constitution's separation of powers. It restrains Executive Branch spending by assigning the "power of the purse" solely to Congress. The Clause's "straightforward and explicit command . . . 'means

simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" *Office of Personnel Mgmnt. v. Richmond* ("*OPM*"), 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap Co. v. United States,* 301 U.S. 308, 321 (1937)).

According to the Congressional Budget Office, the mass student debt cancellation will cost more than $400 billion. Cong. Budget Off., *Costs of Suspending Student Loan Payments and Canceling Debt* (Sept. 26, 2022).[2] Other estimates exceed $500 billion. *See* Response To Application To Vacate Injunction at 7, *Biden v. Nebraska*, No. 22-506 (Nov. 23, 2022). No congressional appropriation authorizes this astronomical expenditure of student debt assets held by the U.S. Treasury. *See, e.g.*, House Approp. Comm., Fiscal Year 2023 Appropriations Bill Summary (Labor, Health and Human Services, Education, and Related Agencies) (indicating only that the FY 2023 budget includes $24.6 billion for federal student aid such as grants).[3]

"Loans receivable," including more than $1 trillion in "Federal Direct Student Loans," are identified as assets on the United States Government's Balance Sheets. Half of these student debt assets, in the form of Master Promissory Notes signed by students or their parents, are what the President unilaterally has decided to discard *en masse* despite there being no

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[2] Available at https://www.cbo.gov/system/files/2022-09/58494-Student-Loans.pdf.

[3] Available at https://tinyurl.com/mr3hntf4.

congressional appropriation allowing him to do so. Not surprisingly, the word "appropriation" nowhere appears in either the Department of Education's published legal memorandum or announcement concerning the debt cancellation program. *See* 87 Fed. Reg. 52,943 (Aug. 30, 2022); 87 Fed. Reg. 61,512 (Oct. 12, 2022).

It is remarkable that the Petitioners' merits brief in these cases is completely oblivious to the glaring constitutional defect in the student debt cancellation program. Even if the government were to convince the Court that some scintilla of authority for its action can be found in the active-duty-servicemember-focused HEROES Act, that *still* would not address the Appropriations Clause problem that this case presents. "A law alone does not suffice—an *appropriation* is required." *Cmty. Fin. Servs. Ass'n*, 51 F.4th at 640.

Burwell II, along with its predecessor, *U.S. House of Representatives v. Burwell* ("*Burwell I*"), 130 F. Supp. 3d 53, 57 (D.D.C. 2015), appear to be the most relevant, if not only, published decisions regarding an unappropriated, and thus unconstitutional, Executive Branch expenditure. The district court held in *Burwell I* that the House had standing to pursue a claim that two cabinet Secretaries violated the Appropriations Clause by "spen[ding] billons of unappropriated dollars to support the Patient Protection and Affordable Care Act," specifically, a provision that authorized certain reimbursement payments to insurers. *Id.* When the district court in

Burwell II considered the merits of the House's constitutional claim, the defendant Secretaries again argued that the court merely should interpret certain statutes and determine whether an appropriation had been made.

Holding that the statutory reimbursement provision was unappropriated, and thus unconstitutional, *see* 185 F. Supp. 3d at 174-75, District Judge Collyer disagreed:

> While it is true that the Secretaries' defense in this case requires interpreting federal statutes, the House of Representatives' claim under the Appropriations Clause does not. . . . [A] [statutory] interpretation defense *does not turn a constitutional claim into a statutory dispute*.

Id. at 189 (emphasis added).[4]

Here, Petitioners cannot reasonably contend that there is a congressional appropriation covering their half-trillion-dollar debt-cancellation grant to tens of millions of borrowers. Thus, there is even more reason here than there was in *Burwell* to conclude that the Executive Branch's expenditure violates the

[4] The *Burwell* litigation was subsequently settled.

Appropriations Clause.[5] If the Court determines that consideration of the constitutionality of the student debt cancellation is warranted, this case would be an excellent vehicle for addressing the Executive Branch's chronic lack of respect for the Appropriations Clause, a provision which as discussed in this brief, is fundamental to the separation of powers.

ARGUMENT

The Executive Branch's Mass Student Loan Debt Cancellation Violates the Appropriations Clause

A. Enforcement of the Appropriations Clause is critical to the separation of powers

"The Appropriations Clause of the Constitution, Art. I, § 9, cl. 7, provides that: 'No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.'" *OPM*, 496 U.S. at 424. By "ensur[ing] Congress's *exclusive* power over the federal purse," *Cmty. Fin. Servs. Ass'n*, 51 F.4th at 637, the Appropriations Clause establishes a constitutional tenet "that is of critical importance to every agency, every officer, every employee of the federal government." U.S. Gov't Accountability Off.,

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[5] Analogous to the unappropriated reimbursements at issue in *Burwell*, the student debt cancellation program includes unappropriated refund payments to debt relief recipients for certain past student loan payments. *See* Dep't of Educ., Off. of Fed. Student Aid, Refunds for Past Payments, https://tinyurl.com/h23u5u2c (last visited Jan. 7, 2023).

GAO-16-463SP, Principles of Federal Appropriations Law ("GAO Redbook"), ch. 1, § A at 1-5 (4th ed., 2016 rev.).[6] This includes the President and his Secretary of Education.

Indeed, the Appropriations Clause's "reservation of congressional control over funds in the Treasury," *OPM*, 496 U.S. at 425—"[t]his empowerment of the legislature"—"is at the foundation of our constitutional order." Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1344 (1988). "The clause's role as 'a bulwark of the Constitution's separation of powers' has been repeatedly reaffirmed." *Cmty. Fin. Servs. Ass'n*, 51 F.4th at 637 (quoting *U.S. Dept. of Navy v. Fed. Lab. Rels. Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.)); *see id.* at 637-38 (collecting cases discussing the critical role played by the Appropriations Clause in the separation of powers).

> The Appropriations Clause embodies a fundamental separation of powers principle—subjugating the executive branch to the legislature's power of the purse. And separation of powers is at the heart of our constitutional government in order to preserve the people's liberty and the federal government's accountability to the people.

[6] Available at https://www.gao.gov/assets/2019-11/675699.pdf.

Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc. ("*CFPB*"), 33 F.4th 218, 221 (5th Cir. 2022) (Jones, J., concurring); *see also* GAO Redbook, *supra* at 1-6 ("As James Madison and subsequent constitutional scholars have recognized, the congressional power of the purse is a key element of the constitutional framework of checks and balances.").

"Restraining unruly executive power by giving the legislature control of the purse strings has its pedigree in the English Revolution." *CFPB*, 33 F.4th at 225 (Jones, J., concurring); *see also id.* at 225-32 (discussing "[t]he historical origins of Congress's control over the purse strings"). The Framers "viewed Congress' exclusive 'power over the purse' as an indispensable check 'on the overgrown prerogatives of the other branches of the government.'" *Cmty. Fin. Servs. Ass'n*, 51 F.4th at 636 (quoting The Federalist No. 58 (James Madison)). "The Framers also believed that vesting Congress with control over fiscal matters was the best means of ensuring transparency and accountability to the people." *Id.* (citing The Federalist No. 48 (James Madison)); *see also CFPB*, 33 F.4th at 233 ("Congress's control of the purse strings renders the President and his functionaries directly accountable to the Congress and, therefore, further accountable to the people.").

As Justice Story described the Clause:

> As all the taxes raised from the people, as well as revenues arising from other

> sources, are to be applied to the discharge of the expenses, and debts, and other engagements of the government, it is highly proper, that congress should possess the power to decide how and when any money should be applied for these purposes. If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure. The power to control and direct the appropriations, constitutes a most salutary check upon profusion and extravagance . . . .

OPM, 496 U.S. at 427 (quoting James Madison, 2 Commentaries on the Constitution of the United States § 1348 (3d ed. 1858)). "In the Framers' view, then, firmly placing the new government's fiscal powers in the hands of the people's representatives and protecting the purse from executive control were commensurate with preserving liberty." *CFPB*, 33 F.4th at 229 (Jones, J., concurring). "Indeed, by most accounts, Congress's fiscal powers are its most formidable tool." *Id.* at 231-32.

"Authorization and appropriation by Congress are nonnegotiable prerequisites to government spending." *Burwell II*, 185 F. Supp. 3d at 168. But there is a "distinction between authorizing legislation and appropriating legislation." *Id.* at 168-69. "Authorizing legislation establishes or continues the

operation of a federal program," whereas "[a]ppropriations legislation has 'the limited and specific purpose of providing funds for authorized programs.'" *Id.* at 169 (quoting *Andrus v. Sierra Club*, 442 U.S. 347, 361 (1979)). "An appropriation must be expressly stated; it cannot be inferred or implied." *Id.* (citing 31 U.S.C. § 1301(d) ("A law may be construed to make an appropriation out of the Treasury . . . only if the law specifically states that an appropriation is made . . . .")).

"Congress has not only the power but also the duty to exercise legislative control over federal expenditures." Stith, *supra* at 1345. Even though "the exercise by Congress of its power of the purse is a structural imperative . . . the President has no constitutional authority to draw funds from the Treasury" where Congress has not "provide[d] funds for a particular activity." *Id.* at 1349, 1351; *see, e.g.*, *OPM*, 496 U.S. at 424, where the Court "held that the Appropriations Clause does not permit plaintiffs to recover money for Government-caused injuries for which Congress 'appropriated no money.'" *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 198 n.9 (2012).

In short, under the separation of powers, "[s]pending in the absence of appropriations is ultra vires." Stith, *supra* at 1351. "For the executive branch to act to achieve the ends of government identified by Congress, Congress must affirmatively authorize the funds to do the job." *Id.* at 1350; *see also* GAO Redbook, *supra* at 1-6 ("[T]he Constitution vests in Congress the power and duty to affirmatively

authorize all expenditures."); *cf. United States v. MacCollom*, 426 U.S. 317, 321 (1976) ("The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."); *Hercules, Inc. v. United States*, 516 U.S. 417, 427 (1996) (discussing the Anti-Deficiency Act, 31 U.S.C. § 1341, which "bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, an existing appropriation"); Herbert L. Fenster and Christian Volz, *The Anti-Deficiency Act: Constitutional Control Gone Astray*, 11 Pub. Cont. L.J. 155, 157 (1979) (most Executive Branch over-expenditure has been "the product of sheer brass and knowing misconduct on the part of executive branch personnel").

B. The Executive Branch's abrogation of hundreds of billions of dollars in student loan debt assets is an unappropriated expenditure of government money

A debt is a monetary asset. *See, e.g.*, *Putnam v. Comm'r of Int. Rev.*, 352 U.S. 82, 89 (1956) (a "debt is an asset of full value in the creditor's hands"); *Chicago, Rock Island & Pacific Ry. v. Sturm*, 174 U.S. 710, 716 (1899) ("A debt may be as valuable as tangible things."); *Reygadas v. DNF Assocs., LLC*, 982 F.3d 1119, 1122 (8th Cir. 2020) ("Unpaid consumer debt is an asset of the creditor.").

The U.S. Treasury indisputably treats student loan debt as a monetary asset of the government:

> The Balance Sheets show the government's assets, liabilities, and net position. . . . Assets included on the Balance Sheets are resources of the government that remain available to meet future needs. The most significant assets that are reported on the Balance Sheets are *loans receivable* . . . accounts receivable . . . and cash and other monetary assets.

Dep't of the Treasury, Bureau of the Fiscal Service, Financial Statements of the United States Government for the Fiscal Years Ended September 30, 2021, and 2020 (emphasis added).[7] More specifically, as of September 30, 2021, under the "Loans receivable" category, total net "Federal Direct Student Loans" on the United States Government Balance Sheets were $1.1048 trillion.[8] By comparison, the government's "Total Cash and Other

[7] Available at https://www.fiscal.treasury.gov/reports-statements/financial-report/balance-sheets.html.

[8] *See* Note 4, Loans Receivable, available at https://tinyurl.com/3nshxpf6.

Monetary Assets" as of September 30, 2021 were $475 billion.[9]

When a student or student's parent applies to the U.S. Department of Education for a direct loan, he or she executes a "Master Promissory Note." The Department's Federal Student Aid website explains to prospective borrowers that "[t]he *Master Promissory Note* (MPN) is a legal document in which you promise to repay your loan(s) and any accrued interest and fees to the U.S. Department of Education."[10] The Treasury Department coordinates closely with the Department of Education in accounting for and collecting student loan debt. *See, e.g.*, Bureau of the Fiscal Service, Treasury Financial Manual, ch. 3000 (Collecting Nontax, Administrative Receivables Through The Treasury Centralized Receivables Service).[11]

Like any promissory note, a student loan Master Promissory Note issued to the government is a negotiable instrument that is equivalent to money. *See generally FDIC v. Phila. Gear Corp.*, 476 U.S. 426, 442 (1986) (Marshall, dissenting) ("[A] promissory note generally constitutes money or its equivalent. . . . Promissory notes typically are negotiable instruments and therefore readily convertible into cash."); *see also* Uniform Commercial Code § 3-104(a)

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[9] *See* Note 2, Cash and Other Monetary Assets, available at https://tinyurl.com/38kchmbn.

[10] https://studentaid.gov/mpn (last visited Jan. 7, 2023).

[11] Available at https://tfm.fiscal.treasury.gov/v1/p3/c300.

("'[N]egotiable instrument' means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order . . . .").

As discussed above, the Appropriations Clause mandates that there be a congressional appropriation for "Money [to] be drawn from the Treasury." Although the Court's scant jurisprudence on the Appropriations Clause does not appear to have addressed the meaning of "Money," student debt assets should be construed as Money for purposes of the Clause's command. In a different, statute-specific context, the Court indicated that "money" means a "'medium of exchange,'" and that "what *qualifies* as a 'medium of exchange' may depend on the facts of the day." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018); *see also id.* at 2076 (Breyer, J., dissenting) (the definition of money should not "be trapped in a monetary time warp . . . a broader understanding of money is perfectly intuitive"). Common sense dictates that the Treasury's $1.1 trillion in student debt assets, reflected in Master Promissory Notes, qualify as money subject to the Appropriations Clause, just like the lesser total cash and other monetary equivalents included on the government's balance sheets. To interpret "Money" more narrowly not only would significantly curtail the reach of the Appropriations Clause, but also impair accomplishment of its separation of powers purpose.

Unless permanently enjoined, the Executive Branch's fiat canceling a massive amount of student

loan debt literally would discard valid and enforceable loan receivables, in the form of Master Promissory Notes, whose value might exceed a half trillion dollars—almost half of the student debt assets on the government's books. In other words, if the debt cancellation is allowed to proceed, the loans receivable on the government's balance sheets would be slashed, and the nation's financial burden would be increased, by this enormous amount.

This *congressionally unappropriated expenditure,* which essentially transforms student loan debt into unappropriated student grants, would drain the Treasury of "amounts that would otherwise flow" to the public fisc. *Cmty. Fin. Servs. Ass'n*, 51 F.4th at 638. Petitioners' incredibly costly but unappropriated student debt cancellation program represents exactly the type of "unbridled executive power," *CFPB*, 33 F.4th at 227, that the Appropriations Clause is intended to prevent.

CONCLUSION

The Court should consider the questions presented against the backdrop of the Appropriations Clause. Even if the Court concludes that the HEROES Act authorizes Petitioners' mass student loan debt cancellation, the Court should hold that the program violates the Appropriations Clause, and thus is unconstitutional and must be permanently enjoined.

Respectfully submitted,

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