

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 *AMICUS CURIAE* THE FOUNDATION
FOR GOVERNMENT ACCOUNTABILITY IN
SUPPORT OF RESPONDENTS**

STEWART L. WHITSON

Counsel of Record

DAVID CRAIG

RYAN YOUNG

THE FOUNDATION FOR

GOVERNMENT ACCOUNTABILITY

15275 Collier Blvd., Ste. 201

Naples, FL 34119

(239) 244-8808

stewart@theFGA.org

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Counsel for Amicus Curiae

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---	------

Other Authorities

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INTEREST OF *AMICUS CURIAE**

The Foundation for Government Accountability (FGA) is a 501(c)(3) nonprofit organization that helps millions achieve the American Dream by improving welfare, workforce, healthcare, and election policy at both the state and federal levels. Launched in 2011, FGA promotes policy reforms that seek to free individuals from the trap of government dependence, restore dignity and self-sufficiency, and empower individuals to take control of their futures.

Since its founding, FGA has helped achieve more than 696 reforms impacting policies in 42 states as well as 25 federal regulatory reforms. FGA supports its mission by conducting innovative research, deploying outreach and education initiatives, equipping policy makers with the information they need to achieve meaningful reforms, and by appearing *amicus curiae* before state and federal courts including the U.S. Supreme Court in *Azar v. Gresham*, 141 S. Ct. 1043 (2021).

The cases at issue here center on the federal executive branch's illegal and unconstitutional effort to unilaterally cancel hundreds of billions of dollars in student loans. This ill-conceived, politically motivated program is economically harmful and unjust. It will push more Americans into the trap of government de-

* Per this Court's Rule 37.6, this brief was not authored in whole or in part by any party, and no one other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

pendency, robbing them of the joy and self-respect derived from meaningful work. Accordingly, this case directly implicates FGA’s core mission of helping individuals live healthy, independent, and fulfilling lives while promoting limited, constitutional government and a free market.

INTRODUCTION & SUMMARY OF ARGUMENT

Federal executive agencies possess only those powers conferred upon them by Congress through statute. *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986). Here, the U.S. Department of Education under the Biden administration claims authority to unilaterally cancel several hundred billion dollars of student debt based upon provisions of the Higher Education Relief Opportunities for Students (HEROES) Act of 2003. Pub. L. No. 108-76, 117 Stat. 904 (2003) (20 U.S.C. §§ 1098aa-1098ee); *Federal Student Aid Programs*, 87 Fed. Reg. 61512 (Oct. 12, 2022). But the statute’s plain language makes clear that it confers no such authority.

Yet even if the HEROES Act did include a “plausible textual basis” to support the argument that Congress intended to grant the Secretary of Education the unbridled power to unilaterally erase the student debt of millions of borrowers, which it does not, well-established precedent should still lead the Court to set aside this edict under the major questions doctrine. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

Under that doctrine, if Congress wishes to grant an agency authority to “exercise powers of vast economic and political significance,” it must do so clearly, and unequivocally. *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 665 (2022) (quoting *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021)).

While the policy implications of the administration’s student debt cancellation program are not before the Court, they do make clear the need for the Court to apply the major questions doctrine to this case. *West Virginia*, 142 S. Ct. at 2608. Given the outrageous cost of the program, its inherent unfairness, and the myriad economic, social, and geopolitical consequences it would create, there can be no doubt that this is an “extraordinary case[]” in which the current administration is attempting to exercise “the power to resolve a matter of great ‘political significance’” or to “require ‘billions of dollars in spending’ by private persons or entities,” in which the Court must apply the major question doctrine as a threshold inquiry. *West Virginia*, 142 S. Ct. at 2621 (quoting *King v. Burwell*, 576 U.S. 473, 485 (2015)).

Finally, in applying the doctrine the Court need only search for a clear statement in the statute granting the Secretary of Education the authority he claims. A careful review of the statute makes clear that no such statement exists. Without the requisite statutory authority, which the administration clearly lacks here, it cannot carry out its student debt cancellation program. In the end, this unprecedented effort by the current administration to fulfill a “campaign

promise” is an unlawful act of executive branch overreach, and must be set aside. *Fact Sheet: President Biden Announces Student Loan Relief for Borrowers Who Need it Most*, White House Briefing Room (Aug. 24, 2022), bit.ly/3H6TLox; 5 U.S.C. §706(2)(C).

ARGUMENT

I. **The Administration Lacks the Statutory Authority Needed to Implement its Student Debt Cancellation Program**

“The accumulation of all powers, legislative, executive, and judiciary, in the same hands...may justly be pronounced the very definition of tyranny.” James Madison, *The Federalist Papers*, No. 47, (Feb. 1, 1788), The Avalon Project, Yale Law School, Lillian Goladman Library, bit.ly/3XVHOcd. In creating the structure of our constitutional republic, the Framers were well aware of the danger posed by concentrated power, so they carefully crafted a government with three distinct branches: legislative, executive, and judiciary. U.S. CONST. art. I, §1; II, §1, cl. 1 & III, §1. Under Article I, “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”

Thus, federal legislative power rests exclusively in the hands of Congress, and federal executive agencies possess only those powers conferred upon them by Congress through statute. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001); *La. Pub. Serv. Comm’n*, 476 U.S. at 374. Moreover, Congress must speak clearly when authorizing an agency to exercise

powers of “vast ‘economic and political significance.’” *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489 (citing *Util. Air Regul. Grp.*, 573 U.S. at 324) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). Where an agency such as the U.S. Department of Education attempts to exercise power “in excess of [its] statutory . . . authority,” a court must “hold unlawful and set aside [such] agency action.” 5 U.S.C. §706(2)(C).

A. The plain text of the HEROES Act does not authorize the administration to carry out its student debt cancellation program

The Biden administration claims authority to unilaterally cancel several hundred billion dollars of student debt based upon provisions of the Higher Education Relief Opportunities for Students (HEROES) Act of 2003. Pub. L. No. 108-76, 117 Stat. 904 (2003) (20 U.S.C. §§ 1098aa-1098ee); *Federal Student Aid Programs*, 87 Fed. Reg. 61512 (Oct. 12, 2022). A cursory reading of the statute reveals this to be a specious claim.

For starters, the administration’s mass debt cancellation effort puts borrowers in a *better* position than they were prior to the pandemic, well beyond simply ensuring that borrowers “are not place[d] in a *worse* position financially...because of their status as affected individuals.” 20 U.S.C. §1098bb(a)(2)(A). Moreover, the cancellation is not sufficiently connected to a “national emergency,” as the economic harm it claims

to alleviate is caused by factors other than the supposed emergency it cites, COVID-19. 20 U.S.C. §1098bb(a)(1). Lastly, offering debt relief to *all* borrowers based solely on their annual income extends the benefit beyond “affected individuals” as defined under the statute. 20 U.S.C. §§1098bb(a)(2)(A) & 1098ee(2).

Without the requisite statutory authority, the administration cannot carry out its debt cancellation program. Contrary to the government’s dubious claim, no such authority exists.

B. The major questions doctrine reinforces the notion that the administration lacks the authority needed to carry out its plan

Yet even were we to pretend for a moment that the statutory language of the HEROES Act somehow furnishes a “plausible textual basis” to support the argument that Congress intended to grant the Secretary of Education the unbridled power to unilaterally erase the student debt of millions of borrowers, well-established precedent would still caution the Court to set aside this edict absent a “clear congressional authorization’ for the power it claims.” *West Virginia*, 142 S. Ct. at 2609 (2022) (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

Under the major questions doctrine, Courts have long recognized “that there are ‘extraordinary 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.” *West Virginia*, 142 S. Ct. at 2608 (quoting *Brown & Williamson*, 529 U.S. at 159-60). If Congress wishes to grant an agency authority to “exercise powers of vast economic and political significance,” it must do so clearly, and unequivocally. *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 665 (quoting *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489). Absent such a clear statement, a court should not read into the text “the delegation claimed to be lurking there.” *West Virginia*, 142 S. Ct. at 2609 (quoting *Util. Air*, 573 U.S. at 324). Whenever “an agency claims the power to resolve a matter of great ‘political significance’” or to “require ‘billions of dollars in spending’ by private persons or entities,” courts must apply the doctrine as a threshold inquiry. *West Virginia*, 142 S. Ct. at 2621 (quoting *King*, 576 U.S. at 485).

Here, the administration is attempting to unilaterally erase the debt of millions of borrowers at a cost of several hundred billion dollars to fulfill a “campaign promise” delivered in the lead up to a highly contested election. This is an attempt to take action of “vast economic and political significance” without “clear congressional authorization” to do so. *Nat’l Fed.’n of Indep. Bus.*, 142 S. Ct. at 665 (quoting *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489). This it cannot do.

In the end, this handout appears to have been motivated less by a desire to alleviate the pandemic-caused economic hardships of affected individuals than it was about fulfilling a campaign promise, paid

for on the backs of federal taxpayers. *Fact Sheet: President Biden Announces Student Loan Relief for Borrowers Who Need it Most*, White House Briefing Room (Aug. 24, 2022), bit.ly/3H6TLox. But the President lacks the authority needed to fulfill this promise, rendering this action illegal. The Court must check this abuse of executive power and stop this unprecedented effort.

II. The Administration’s Student Debt Cancellation Plan is Inherently Unfair and Will Harm the Economy and the People It Purportedly Benefits

Besides offering yet another example of unconstitutional overreach on the part of the current administration and its agencies, the student debt cancellation program is also inherently unfair and harmful, not only to the economy but to the very people it claims to benefit.

While the policy implications of this program are not before the Court, they are legally relevant here to the extent that they make clear that the Biden administration is seeking to make a decision of vast “economic and political significance,” thus evoking the major questions doctrine. *West Virginia*, 142 S. Ct. at 2608 (quoting *Brown & Williamson*, 529 U.S. at 159-60).

A. This outrageously costly program will further damage an already weak economy.

One thing all parties seem to agree on is that the administration's debt cancellation plan comes with a high price tag. The Congressional Budget Office (CBO) agrees as well. According to the CBO, the cost of implementing the administration's student debt cancellation program will be at least \$400 billion. *Costs of Suspending Student Loan Payments and Canceling Debt*, Congressional Budget Office (CBO) (Sep. 26, 2022), bit.ly/3Wvy8E5. That assumes one out of every 10 borrowers eligible for debt cancellation fails to apply for the handout. *Id.* Other estimates put the total cost as high as \$519 billion. *The Biden Student Loan Forgiveness Plan: Budgetary Costs and Distributional Impact*, Penn. Wharton Univ. of PA. (Aug. 26, 2022), bit.ly/3DcckGG. If you factor in the new income-driven repayment (IDR) program, the total plan costs climb to a staggering \$1 trillion. *Id.* To say this plan is costly is a bit of an understatement.

Such a large handout will only exasperate our nation's economic woes by increasing the budget deficit, boosting near-term inflation, and driving down the labor force participation rate, pushing inflation even higher. *Cancelling Student Debt Would Undermine Inflation Reduction Act*, CFRB (Aug. 16, 2022), bit.ly/3kGxtTh; See Fick *et al*, *Congress Must Rein in President Biden's Regulatory Spending Spree to Tame Inflation*, FGA (Jul. 26, 2022), bit.ly/3j4AP1U; See also, Dublois & Ingram, *The "Bidenflation" Crisis: How Expanded Welfare Benefits and Labor Shortages*

Are Driving Up Prices, FGA (Mar. 28, 2022), bit.ly/3H5mJ8y. A runaway deficit would also threaten the long-term survival of other programs such as Social Security and Medicare, and “lead to persistently high inflation, rising interest rates, slower economic growth, increased interest payments, reduced fiscal space, greater geopolitical risk, and growing generational imbalances.” *Risks and Threats from Deficits and Debt*, CFRB (Jul. 14, 2022), bit.ly/3R2GsKm.

In other words, the result of this handout will be nothing short of an economic disaster.

B. The debt cancellation program is inherently unfair and regressive.

Perhaps even more unsettling than the economic harm borne of this ill-conceived program is the glaring injustice it creates by graciously granting a politically motivated handout, funded by taxpayers, to a subgroup of people.

Hardworking Americans who forged a career path that did not include college, those who attended college either without borrowing or if they did borrow, have already paid off their debt or the debt of their children by scrimping and saving, those who avoided debts by attending a less prestigious school than they might have attended otherwise, those who joined the military, serving our country while putting themselves in harm’s way to earn education benefits, and others are all left to foot the bill for those who did not make these same sacrifices.

Never mind the inherent unfairness of the administration's plan, what behaviors are we encouraging from future borrowers through this unprecedented handout, and what are the long-term consequences, fiscally and otherwise? History shows that where public policy needlessly excuses people from fulfilling their financial obligations, more naturally decline to do so, as evidenced by the higher instances of loan default in "non-recourse" states – those forbidding lenders from using courts to recoup losses from mortgage borrowers in default. Ghent & Kudlyak, *Recourse and Residential Mortgage Default: Theory and Evidence from U.S. States*, The Federal Reserve Bank of Richmond (Jun. 10, 2010), bit.ly/3XXe6DU.

Moreover, contrary to what the administration suggests, the plan is also regressive, disproportionately benefiting the wealthy and those with advanced degrees over the working class. Adam Looney, *Student Loan Forgiveness Is Regressive Whether Measured by Income, Education, or Wealth*, Brookings (Jan. 2022), brook.gs/3H55qnZ. Whether the debt cancellation is full or partial, "debt forgiveness is regressive by income and education, meaning a disproportionate share of the benefit goes to people with higher levels of education and those currently earning high incomes." *New Report Shows Student Debt Cancellation is Regressive*, CFRB (Jan. 31, 2022), bit.ly/3Hq5Czv.

C. The program harms future borrowers and the very people it claims to help.

One devastating consequence of the administration's student debt cancellation program that is generally glossed over by its proponents is the effect it will have on future borrowers.

Studies have shown that an increase in the availability of funds that may be borrowed through federal student loan programs has contributed to rising tuition costs. *The Volume and Repayment of Federal Student Loans: 1995 to 2017*, CBO (Nov. 2020), bit.ly/3Dbnlbv. For instance, one study found that for every dollar increase in the amount of subsidized loans available to borrowers, tuition increased by 60 cents. Lucca *et al*, "Credit Supply and the Rise in College Tuition: Evidence From the Expansion in Federal Student Aid Programs," *Review of Financial Studies*, vol. 32, no. 2 (Feb. 2019), bit.ly/3j6e9yf. The more money the government makes available for people to spend on college, the more colleges charge.

As borrowers spend more on college, naturally their debt rises. Between 1995 and 2017, as the availability of federal loans grew, so too did the balance of outstanding student debt, climbing from \$187 billion to \$1.4 trillion. *The Volume and Repayment of Federal Student Loans: 1995 to 2017*, CBO (Nov. 2020), bit.ly/3Dbnlbv.

Cancelling student debt sends a clear message to future borrowers as well as colleges and universities: borrow and charge as much as you want; the debt will

be paid off or forgiven. This will encourage reckless borrowing and undoubtedly lead to a rise in tuition costs, hurting future borrowers.

In 2019 alone, the federal government disbursed \$88 billion in new student loans. Lucca *et al*, “Credit Supply and the Rise in College Tuition: Evidence From the Expansion in Federal Student Aid Programs,” *Review of Financial Studies*, vol. 32, no. 2 (Feb. 2019), bit.ly/3j6e9yf. If this unprecedented student debt cancellation program is allowed to go forward, the total amount disbursed will be significantly higher, and “colleges and universities will respond to this new reality by raising tuition commensurately.” Davies & Harrigan, *Three Unintended Consequences of Student Loan “Forgiveness,”* FEE Stories (Jan. 28, 2021), bit.ly/3XCeZSj.

Besides hurting future borrowers, the administration’s debt cancellation plan will also hurt the very borrowers it claims to benefit. Inevitably, if this plan is allowed to be carried out, future borrowers will demand that their debt be cancelled too. But there will be many more of them, making the cost even higher. And who will pay for that future handout? The very borrowers the administration is claiming will benefit from the current handout.

CONCLUSION

For these reasons and more, this Court should reverse the decision below.

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Respectfully submitted,

STEWART L. WHITSON

Counsel of Record

DAVID CRAIG

RYAN YOUNG

THE FOUNDATION FOR

GOVERNMENT ACCOUNTABILITY

15275 Collier Blvd., Ste. 201

Naples, FL 34119

(239) 244-8808

stewart@theFGA.org

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Counsel for Amicus Curiae