Nos. 22-506 and 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.

UNITED STATES 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 AMICUS CURIAE OF THE BUCKEYE INSTITUTE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether Respondents have Article III standing.

2. Whether the Biden Administration's Loan Forgiveness Program exceeds the Secretary of Education's statutory authority, is arbitrary and capricious, or was adopted in a procedurally improper manner.

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INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae, The Buckeye Institute, was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute assists executive and legislative branch policymakers by providing ideas, research, and data to enable lawmakers' effectiveness in advocating free-market public policy solutions. The Buckeye Institute is a non-partisan, nonprofit, tax-exempt organization, as defined by I.R.C. § 501(c)(3).

Through its Legal Center, the Buckeye Institute works to restrain governmental overreach at all levels of government. In fulfillment of that purpose, the Buckeye Institute files lawsuits and submits amicus briefs. As it relates to this case, The Buckeye Institute's Legal Center has filed an action[2] against the Department of Education on behalf of Amanda Latta, a student loan borrower who is legally obligated to pay back her student loans—in full—unless they

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel provided the notice required by Rule 37.2

[2] Compl., *Latta* v. *U.S. Dep't of Educ.*, No. 2:22-cv-04255 (S.D. Ohio Dec. 1, 2022).

are legally discharged. The subject student loan forgiveness program does not legally forgive or discharge those loans. The resolution of this case will directly impact Ms. Latta and similarly situated individuals.

SUMMARY OF ARGUMENT

When one borrows money, he or she agrees to pay it back. So it is with student loan borrowers—they sign a Master Promissory Note ("MPN") which sets forth the terms and conditions upon which they must pay back their loans. The MPNs have specific penalties for default and explicit terms for when the loans can be altered, modified or forgiven. And the Code of Federal Regulations sets forth the specific defenses a student loan borrower may assert to avoid repayment. On August 24, 2022, the Department of Education (the "Department") announced the student loan forgiveness program (the "Loan Forgiveness Program"). *Biden-Harris Administration Announces Federal Student Loan Pause Extension Through December 31 and Targeted Debt Cancellation to Smooth Transition to Repayment*, U.S. Dep't of Educ. (Aug. 24, 2022), http://tinyurl.com/3zyb83h2. It was formalized on October 12, 2022. Federal Student Aid Programs, 87 Fed. Reg. 61,512 (Oct. 12, 2022). Neither the announcement nor the official notice references the MPNs, let alone purports to amend them. And neither one adds any additional defenses set forth in the C.F.R. A loan forgiveness program could be enacted by Congress or additional defenses to repayment could be effectuated by formally modifying the relevant C.F.R.; but neither Congress nor the Department has done so. The student loan borrowers

remain contractually obligated to repay the full amount of their loans.

The Loan Forgiveness Program also violates two constitutional provisions. Under the Appropriations Clause, only Congress has the authority to authorize the expenditure of government funds. U.S. Const. art. I, § 9. While Congress explicitly appropriated funds to the Department for the purpose of direct loans to students, that appropriation did not include the power to forgive those loans. That claimed authority would require a separate appropriation. Further, the Department not only intends to forgive debt without congressional appropriation, but it also intends to issue checks to student loan borrowers who have already paid their loans, again without the necessary congressional appropriation.

Further, the "power to dispose of * * * Property belonging to the United States" is vested solely in Congress. U.S. Const. art. IV, § 3, cl. 2. Student loans are accounts receivable, which are indisputably "Property belonging to the United States." *Id.* Congress has not granted the authority to dispose of the loans receivable. Thus, the Department is violating both the Appropriations Clause and the Property Clause by doling out un-appropriated government funds and disposing of property belonging to the United States without congressional approval.

The Department's Loan Forgiveness Program also exceeds Secretary Cardona's statutory authority by violating two statutory provisions. First, the Secretary's reliance upon the National Emergencies Act to invoke the HEROES Act is misplaced. President Biden has not invoked the provisions of the

HEROES Act in a declaration of a national emergency or through an executive order published in the Federal Register, at least one of which is required to lay claim to the authority of the National Emergencies Act. 50 U.S.C. § 1631. Unless and until President Biden does so, the Secretary cannot utilize the HEROES Act to forgive hundreds of billions of dollars of student loans.

Second, the President can only invoke the HEROES Act in connection with a national emergency related to war or other military operations. The COVID-19 emergency never was that. Further, the HEROES Act provides debt relief to "men and women of the United States Military," 20 U.S.C. § 1098aa(b)(5)—not to any and all students who borrowed money directly from the government, which is precisely what the Secretary seeks to do. Only Congress can expand the HEROES Act beyond its intended beneficiaries.

INTRODUCTION AND ARGUMENT

I. Introduction.

Ms. Latta is a college graduate with student loan debt. Like many young women, Ms. Latta had a dream. She wanted to help others and was determined to pursue Christian missions in Brazil alongside the study of marine biology. She studied foreign missions and Brazilian Portuguese while in high school and developed a respect for aquatic research. Her plan was to attend a Christian institution near her home in Ohio which also offered a marine biology major. Waynesburg University fulfilled all the requirements. She enrolled there, planning to graduate and then

move to Brazil's coast where she would work in missions and aquatic research simultaneously.

In her sophomore year, Ms. Latta changed her studies to international culture, political science, history, and psychology. With this she anticipated working in the international and governmental affairs area.

To reach her dream, she had to make many sacrifices. Her family could not pay for her post-secondary education so, while in college, Ms. Latta worked as many as four part time jobs at a time to pay tuition and room and board. She supplemented this with over $20,000 in student loans under the William D. Ford Federal Direct Loan Program (the "Ford Direct Loans"). See 20 U.S. Code § 1087a.

Other *amici* claim to represent, or speak on behalf of, working and middle-class student loan borrowers. But Ms. Latta—who fits in both of those categories—believes that people should pay their debts. And, if the government chooses to discharge some or all of those debts, it should do so through legal means, not through arbitrary and unlawful executive fiat. She and millions of other student loan borrowers signed a Master Promissory Note obligating her to repay her federal student loans. She is willing to honor that commitment—as have millions before her—and believes others should do so as well.

After the initial informal announcement of the Loan Forgiveness Program on August 24, 2022, the Department published its official notice. The Department's notice states that it will forgive up to $20,000 of student loan debt for each eligible student.

Federal Student Aid Programs, 87 Fed. Reg. at 61,513. Accordingly, Ms. Latta applied, and is eligible for, $10,000 in forgiveness and would accept it if it is determined to be legal. However, it appears that this program is not legal, and she does not wish to participate in an illegal government program—especially if it might increase her liability through default penalties, late fees, and an increased interest rate. On December 1, 2020, Ms. Latta filed an action challenging the legality of the Loan Foregiveness Program. Compl., *Latta*, No. 2:22-cv-04255 (S.D. Ohio Dec. 1, 2022).

II. Student Loan Borrowers are contractually bound to repay their loans—in full—by the terms of their Master Promissory Notes and the Code of Federal Regulations.

When Ms. Latta signed her Master Promissory Note, she agreed to repay her loans in full. See Ex. A to Compl., *Latta*, No. 2:22-cv-04255 (S.D. Ohio Dec. 1, 2022). She "promise[d] to pay to ED all loan amounts disbursed under the terms of th[e] MPN, plus interest and other charges and fees that may become due * * *." *Id*. at 2. The MPN directs that she "must repay the full amount of the loans made under this MPN, plus accrued interest." *Id*. at 4. If she fails to pay the entire amount disbursed plus interest and other charges and fees, she will be liable for "reasonable collection costs, including but not limited to attorney fees, court costs, and other fees." *Id*. at 2. The MPN further states:

> LATE CHARGES AND COLLECTION COSTS: We may collect from you: A late charge of not more than six cents for each dollar of each late payment if you do not

> make any part of a required installment payment within 30 days after it becomes due, and any other charges and fees that are permitted by the Act related to the collection of your loans. If you default on a loan, you must pay reasonable collection costs, plus court costs and attorney fees.

Id. at 4.

Additionally, if she defaults on her loan, the Department can require her to pay the entire unpaid balance of the loan at once, plus a six percent late fee, and a capitalization of interest (which will bear interest, also known as interest on interest). *Id.*

The MPN further states: "If we do not enforce or insist on compliance with any term of this MPN, it does not waive any of our rights. No provision of this MPN may be modified or waived, unless we do so in writing." *Id*. The only other provision allowing modifications to the MPN provides that "[a]ny [legal] amendment to the [Higher Education Act of 1965 (the "HEA")] that affects the terms of this MPN will be applied to your loans * * * ." *Id*. at 6. However, the Loan Forgiveness Program does not legally amend the HEA.

The MPN also explains the impact on the borrower's credit score if he or she defaults: "If you default, the default will be reported to nationwide consumer reporting agencies (credit bureaus) and will significantly and adversely affect your credit history. A default will have additional adverse consequences as explained in the Borrower's Rights and

Responsibilities Statement." *Id.* at 4. Indeed, the Department's website explicitly warns that those who default may suffer damage to their credit rating and it "may take years to reestablish a good credit rating." See U.S. Dep't of Educ., *Student Loan Delinquency and Default*, Federal Student Aid, http://tinyurl.com/yc6bn3vn (last visited Jan. 23, 2023). Finally, if Ms. Latta defaults on the loans, she will "lose eligibility for additional federal student aid" for further education. *Id.*

The Code of Federal Regulations has specific provisions for what defenses a borrower may assert for non-payment of a student loan. Specifically, 34 C.F.R. § 685.206(c) and (e), and 34 C.F.R. § 685.222 govern defenses to repayment. Each of these defenses to repayment generally applies only when an educational institution which the borrower attended had engaged in an illegal act, such as "a misrepresentation * * * of material fact upon which the borrower reasonably relied in deciding to obtain a Direct Loan * * * ." 34 C.F.R. § 685.206(e)(2)(i). "Those defense[s] to repayment standards have changed multiple times in recent years" via the appropriate and lawful Administrative Procedure Act process. U.S. Dep't of Educ., Issue Paper #6: Borrower Defenses to Repayment (2021), http://tinyurl.com/32jwn43y. However, the Loan Forgiveness Program is not delineated in the C.F.R. defenses, the Loan Forgiveness Program does not purport to amend those provisions, and there are no pending proposed rules under the Administrative Procedure Act that would modify those C.F.R. sections. By contrast, other federal student loan forgiveness programs have specific C.F.R. provisions governing how and when

students can obtain loan forgiveness. See, *e.g.*, Public Service Loan Forgiveness Program, 34 C.F.R. § 685.219.

Accordingly, any loan forgiveness supposedly granted under the Loan Forgiveness Program will not change Ms. Latta's payment obligations and will not be enforceable as against the government.

Moreover, borrowers cannot utilize the doctrine of equitable estoppel to avoid future repayment (and penalties, fines, increased interest, and collection costs) because equitable estoppel generally cannot be asserted against the government. *Heckler* v. *Cmty. Health Servs. Of Crawford Cnty., Inc.*, 467 U.S. 51, 60 (1984). "[T]he United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409 (1917); see also *Royal Indem. Co.* v. *United States*, 313 U.S. 289, 294–95 (1941). "Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law," and "those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Heckler*, 467 U.S. at 63.

Despite the Department's announcement of unilateral debt forgiveness, the government is, and will be, obligated to collect those loans. "The head of an executive, judicial, or legislative agency—(1) *shall* try to collect a *claim* of the United States Government for money or property arising out of the activities of, or referred to, the agency * * * ." 31 U.S.C. § 3711(a)

(emphasis added). "A claim includes, without limitation—(A) funds owed on account of loans made, insured, or guaranteed by the Government * * * ." 31 U.S.C. § 3701(b). The implementing regulation further requires that "[f]ederal agencies shall *aggressively* collect all debts arising out of activities of, or referred or transferred for collection services to, that agency. 31 C.F.R. § 901.1(a) (emphasis added). And "'[s]hall' typically means must, not should." *California* v. *Texas*, 141 S. Ct. 2104, 2137 (2021) (Alito, J., dissenting) (citation omitted).

Courts have recognized the obligation to collect as a constitutional mandate—in other words, it is not optional. "(W)hen a payment is erroneously or illegally made it is in direct violation of article IV, section 3, clause 2, of the Constitution. Under these circumstances it is not only lawful but the duty of the Government to sue for a refund thereof * * *." *Aetna Cas. & Sur. Co.* v. *United States*, 526 F.2d 1127, 1130 (Ct. Cl. 1975) (citing *Fansteel Metallurgical Corp.* v. *United States*, 172 F.Supp. 268, 270 (Ct. Cl. 1959)); see also *Int'l Harvester Co* v. *United States*, 342 F.2d 432, 442 (Ct. Cl. 1965) (it is the "duty of the Government to recover [erroneously made] payments").

The expectation of full-blown collection efforts is hardly speculative. Before the pandemic payment pause, the Department vigorously enforced loan repayments. From January 2018 through September 2018, it retrieved over $5.4 billion in defaulted loans. See U.S. Dep't of Educ., *Default Rates*, Federal Student Aid, http://tinyurl.com/2w3pyf3d (last visited Nov. 17, 2022). $662 million of that was from wage garnishments. *Id.*

While some may applaud the President's and the Secretary's generous give-away of the taxpayers' funds, the Loan Forgiveness Program does not legally relieve the borrowers of their duty to pay and does not excuse the government from its duty to collect the outstanding loans.

III. The Department's Loan Forgiveness Program violates the Appropriations Clause and the Property Clause by spending money and disposing of property belonging to the United States Treasury without congressional approval.

While Congress authorized the Secretary to issue loans as part of its appropriation powers, that appropriation did not authorize outright forgiveness of those loans. Further, only Congress can dispose of government property, and it has not delegated the authority to the Secretary to discharge nearly $500,000,000,000 in accounts receivable.

A. Congress did not appropriate any funds for the Loan Forgiveness Program.

Article I, § 9, of the Constitution provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations by Law." This Clause reflects the Framers' decision to "carefully separate[] the 'purse' from the 'sword' by assigning to Congress and Congress alone the power of the purse." *Texas Educ. Agency* v. *U.S. Dep't of Educ.*, 992 F.3d 350, 362 (5th Cir. 2021) (quoting The Federalist No. 78 (Alexander Hamilton); see also The Federalist No. 48 (James Madison) ("[T]he legislative department alone has access to the pockets of the people."). The

Constitution precludes Congress from divesting its power of the purse to an executive agency. *Community Financial Services Ass'n of Am.* v. *CFPB*, 51 F.4th 616, 638–642 (5th Cir. 2022). Moreover, this Clause "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *Office of Pers. Mgmt.* v. *Richmond*, 496 U.S. 414, 428 (1990). Accordingly, "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Id.* at 424 (quoting *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937)).

The Omnibus Budget Reconciliation Act of 1993 authorized open-ended funding of the William D. Ford Federal Direct Loan Program only for limited purposes. Omnibus budget Reconciliation Act, § 4, 20 U.S.C. § 1087a (1993). As amended, 20 U.S.C. § 1087a(a) provides that:

> There are hereby made available, in accordance with the provisions of this part, such sums as may be necessary (1) *to make loans* to all eligible students (and the eligible parents of such students) in attendance at participating institutions of higher education selected by the Secretary, to enable such students to pursue their courses of study at such institutions during the period beginning July 1, 1994; and (2) *for purchasing loans* under section 1087i–1 of this title.

(Emphasis added).

The Loan Forgiveness Program also purports to discharge Federal Family Education Loans and Federal Perkins Loans. Federal Student Aid Programs, 87 Fed. Reg. at 61,514. Like the Direct Loan Program, Congress provided appropriations for the Federal Family Education Loans and the Federal Perkins Loans for only the limited purposes specified therein, which did not include the forgiveness of those loans. 20 U.S.C. §§ 1071, 1087aa. The appropriations for those loans expired in 2010 and 2015 respectively. 20 U.S.C. §§ 1071(d)(2), 1087aa(b)(3).

Congress did not authorize or appropriate funds for the purpose of the forgiveness or cancellation of the Ford Direct Loans—or the other loans included within the Loan Forgiveness Program. Appropriations "shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a). In other words, while Congress appropriated seemingly unlimited funds for the purpose of lending money to students, its appropriation did not include the purpose of forgiving those loans. Thus, a separate cancellation or forgiveness of existing loans involving federal funds requires a separate act of Congress.

Further, starting in 1992, Congress required that the President's budget "shall reflect the costs of direct loan * * * programs." 2 U.S.C. § 661c(a). The President's budget for the fiscal year 2023 increased the Department of Education's budget by billions of dollars but did not include any funding for the Loan Forgiveness Program. See *U.S. Secretary of Education Miquel Cardona Statement on Fiscal Year 2023 Omnibus Appropriations*, U.S. Dep't of Educ. (Dec. 23,

2022), https://tinyurl.com/DOEFY2023. The HEROES Act does not, and cannot, authorize the Secretary to wield the congressional power of the purse by unilaterally forgiving billions in student debt, which would "reduce amounts that would otherwise flow to the general fund of the Treasury." *Community Financial Services Ass'n of Am.*, 51 F.4th at 638; see *U.S. Department of Education Estimate: Biden-Harris Student Debt Relief to Cost an Average of $30 Billion Annually Over Next Decade*, U.S. Dep't of Educ. (Sep. 29, 2022), https://tinyurl.com/2r2rwxjd (the Department recognizes that "in terms of reduced cash flows into the government" the Loan Forgiveness Program will cost "roughly $305 billion"). The Department has effectively recognized that the funds to be repaid are not part of the funds appropriated for the actual loans which the Department is authorized to distribute—rather the funds to be repaid belong to the Treasury. The Department explains that failure to pay can result in a "Treasury offset" against government benefits, such as tax refunds and social security payments, in order to repay "defaulted federal student loan[s]." U.S. Dep't of Educ., *Collections on Defaulted Loans*, Federal Student Aid, https://tinyurl.com/EDCollections (last visited Jan. 23, 2023).

The Department's argument that it can both lend as much as it wants and then cancel as much debt as it wants is not consistent with either the power of the purse or the loan programs' statutory authority. The Department's actions are "the epitome of the unification of the purse and the sword in the executive—an abomination the Framers warned 'would destroy that division of powers on which

political liberty is founded.'" *Community Financial Services Ass'n of Am.*, 51 F.4th at 640 (quoting 2 *The Works of Alexander Hamilton* 61 (Henry Cabot Lodge ed., 1904)). Without the separation of powers, the rights of American citizens would be "worthless." *Morison* v. *Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

In addition, as part of the Loan Forgiveness Program, the Secretary intends to do more than merely forgive the debt. He is going to issue actual checks to borrowers for monies they paid on their promissory notes during the pandemic. U.S. Dep't of Educ., *One-time Federal Student Loan Debt Relief*, Federal Student Aid, https://perma.cc/L2E6-DGF6 (last visited Nov. 17, 2022). This is a disbursement of funds from the U.S. Treasury without congressional appropriation or other authorization. Even if the other aspects of the Loan Forgiveness Program were somehow authorized, the administration has not provided any legal authority for such an un-appropriated disbursement.

The Department's attempt to appropriate money without regard to Congress's appropriation powers upends the separation of powers. "The accumulation of all powers, legislative, executive, and judiciary, in the very same hands * * * may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 322 (Madison) (Easton Press ed., 1979). The separation of powers is "not simply an abstract generalization" but is instead "woven throughout the Constitution." *INS* v. *Chadha*, 462 U.S. 919, 946 (1983) (citation omitted). The Loan

Forgiveness Program simply cannot withstand constitutional scrutiny.

B. Only Congress can dispose of the student loan accounts receivable owned by the Treasury.

Separately, article IV, section 3, clause 2 of the Constitution (sometimes labeled the Property Clause) provides: "The Congress shall have Power to dispose of * * * Property belonging to the United States." A loan is an accounts receivable asset, which—of course—is property. It is indisputable that the subject student loans constitute "Property belonging to the United States." And only Congress has the "[p]ower to release or otherwise dispose of the rights and property of the United States * * *." *Royal Indem. Co.*, 313 U.S. at 294.

Congress has not conferred the unrestrained power to dispose of student loans upon the Secretary or the Department. Nor has there been a "formal agency ruling or adjudication stating that the United States abandoned its claim" to repayment of the loans. *Rio Grande Silvery Minnow (Hybognathus amarus)* v. *Bureau of Reclamation*, 599 F.3d 1165, 1187 (10th Cir. 2010). See also, U.S. General Accountability Office, The Government's Duty and Authority to Collect Debts Owed to it, 2008 WL 6969346, at *1 ("It follows [from *Royal Indemnity*] that, without a clear statutory basis, an agency has no authority to forgive indebtedness or to waive recovery."). So even if the discharge of debt did not require a separate Congressional appropriation, it would be barred by the Property Clause. The Secretary cannot point to any

provision allowing the legal disposal of hundreds of billions of dollars of government property.

The threat to the Constitution's separation of powers stemming from agencies establishing their own appropriations procedures independent of Congress and the novel nature of the Department's Loan Forgiveness Program are important reasons for this Court to strike down the Petitioners' actions. These loan forgiveness actions and the outright payments, whether "erroneously or illegally made," are "in direct violation of article IV, section 3, clause 2, of the Constitution." *Aetna Cas. & Sur. Co.*, 526 F.2d at 1130. Because there is no act of Congress which either "specifically states that an appropriation is made," 31 U.S.C. § 1301(d), or "confer[s] upon," *Royal Indem. Co.*, 313 U.S. at 294, the Secretary the right to cancel hundreds of billions of dollars of student-loan accounts receivable or to pay funds directly to the borrowers, the Loan Forgiveness Program is unconstitutional and exceeds the Secretary's statutory authority.

IV. The Secretary's invocation of the HEROES Act without an express directive from the President in accordance with the National Emergencies Act exceeds the Secretary's statutory authority.

The Secretary claims the authority to forgive student loans based on the declaration of a national emergency and the HEROES Act. The antecedent to using the HEROES Act here is a national emergency "declared by the President," 20 U.S.C. § 1098ee(4). But the Secretary cannot invoke the HEROES Act without

a formal and explicit presidential invocation of the HEROES Act. This never happened.

> The National Emergencies Act provides:
>
> > When the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised *unless and until* the President *specifies the provisions of law* under which he proposes that he, or other officers will act. Such specification may be made either [a] in the declaration of a national emergency, or [b] by one or more contemporaneous or subsequent Executive orders published in the Federal Register and transmitted to the Congress.
>
> 50 U.S.C. § 1631 (emphasis added).

Further, the National Emergencies Act explicitly states: "No law enacted after September 14, 1976, shall supersede this subchapter unless it does so in specific terms, referring to this subchapter, and declaring that the new law supersedes the provisions of this subchapter." 50 U.S.C. § 1621(b). The HEROES Act of 2003 neither specifically refers to the National Emergencies Act nor does it declare that it supersedes it.

Accordingly, the Secretary has no authority to act without a directive from the President specifying the provisions of the HEROES Act, in compliance with the procedural mechanism specified in the National

Emergencies Act. The President has not satisfied those requirements.

In passing the National Emergencies Act, Congress intended to curb—not expand—the abuse of the national emergency powers. In the words of then Assistant Attorney General Scalia, the requirement that the President specifies the provisions of law under which he proposes that he, or other officers will act, "makes a substantial and desirable change," as "it will [require the President to] put Congress and the public on notice as to precisely what laws are going to be invoked." *To Terminate Certain Authorities with Respect to National Emergencies Still in Effect, and to Provide for Orderly Implementation and Termination of Future National Emergencies: Hearing on H.R. 3884 Before the Subcomm. on Administrative Law and Governmental Relations*, 94th Cong. 93 (1975) (testimony of Antonin Scalia, Assistant Attorney General). Despite 62 declared emergencies since the passage of the National Emergencies Act, 36 of which are still active, there has been limited judicial review of a president's invocation of the national emergency powers. L. Elaine Halchin, Cong. Research Serv., 98-505, National Emergency Powers 12 (Updated Nov. 19, 2021).

On March 13, 2020, President Trump declared a national emergency pursuant to the National Emergencies Act and explicitly granted "[t]he Secretary of HHS * * * the authority under section 1135 of the [Social Security Act] to temporarily waive or modify certain requirements of [certain specified health care laws]." See Declaring a National Emergency Concerning the Novel Coronavirus

Disease (COVID-19) Outbreak, 85 Fed. Reg. 15,337 (Mar. 18, 2020). President Trump did not "specify" the HEROES Act or any "provision of law" regarding the Department of Education. See 50 U.S.C. § 1631.

Neither did President Biden ever effectively invoke the terms of the National Emergencies Act when he directed the Secretary of Education to forgive student loan debt. His only action was a press conference and the issuance of a "fact sheet." U.S. Executive Office of the President, *Remarks by President Biden Announcing Student Loan Debt Relief Plan*, The White House (Aug. 25, 2022), https://tinyurl.com/fwvjx5tr; U.S. Executive Office of the President, *FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most*, The White House (Aug. 24, 2022), https://tinyurl.com/ForgivenessFactSheet. President Biden did not issue any executive order specifying the HEROES Act or other "provision of law" empowering the Secretary to implement the Loan Forgiveness Program.

Further, the current Secretary cannot rely on President Trump's direction to the prior Secretary of Education to pause student loan payments. On March 20, 2020, before the passage of the CARES Act, Secretary DeVos, pursuant to both a presidential directive and an existing program, paused student loan payments and temporarily set the interest rates to 0 percent. *Breaking News: Testing Waivers and Student Loan Relief*, U.S. Dep't of Educ. (Mar. 20, 2020), https://tinyurl.com/DOEMar20Pause; see also Katie Lobosco, *Trump Allows Borrowers to Suspend Student Loan Payments for Two Months*, CNN (Mar.

20, 2020), https://tinyurl.com/2jjnhm3s. President Trump did not invoke the National Emergencies Act and did not specify the HEROES Act.

Rather, the initial March 20, 2020, pause simply utilized an existing forbearance program. *Delivering on President Trump's Promise, Secretary DeVos Suspends Federal Student Loan Payments, Waives Interest During National Emergency*, U.S. Dep't of Educ. (Mar. 20, 2020), https://tinyurl.com/5n8a5taf; see also 34 C.F.R. § 685.250(b). Then Secretary of Education DeVos asserted that this was an "administrative forbearance"; she did not claim she was acting under the National Emergencies Act or the HEROES Act. *Delivering on President Trump's Promise, Secretary DeVos Suspends Federal Student Loan Payments, Waives Interest During National Emergency*, *supra*. This "administrative forbearance" was also consistent with the existing deferment program under the Higher Education Act. See 20 U.S.C. § 1087e(f)(2)(D); see also U.S. Dep't of Educ., *What is the Difference Between a Deferment and a Forbearance?*, Federal Student Aid, https://tinyurl.com/DOEDifferences, (last visited Jan. 13, 2023) (noting that with deferment, no interest is accrued on student loans; whereas in forbearance, interest is accrued).

Following the administrative forbearance of payments and deferment of interest, Congress passed the CARES Act, formalizing the Department's temporary actions. Federal Student Aid Programs, 87 Fed. Reg. at 61,513. As the CARES Act's payment pause expired, President Trump, on August 8, 2020, issued a memorandum once again directing the

Secretary to continue the pause under the existing programs. Donald J. Trump, *Memorandum on Continued Student Loan Payment Relief During the COVID-19 Pandemic*, The White House (Aug. 8, 2020), https://tinyurl.com/TrumpMemo.

Nevertheless, the Department now tries to invoke President Trump's March 13, 2020, national emergency declaration and his August 8, 2020, memorandum for the notion that the HEROES Act justifies the Department's actions. See Federal Student Aid Programs, 87 Fed. Reg. at 61,513–514.

The clear text of the March 13, 2020, declaration, cited above, debunks the claimed reliance on that declaration. It referenced only the Social Security Act, not the HEROES Act. Similarly, the August 8, 2020, memorandum did not specify or otherwise invoke the HEROES Act. Section two of the memorandum states that:

> In light of the national emergency declared on March 13, 2020, the Secretary of Education shall take action pursuant to applicable law to effectuate appropriate waivers of and modifications to the requirements and conditions of economic hardship deferments described in section 455(f)(2)(D) of the Higher Education Act of 1965, as amended, 20 U.S.C. 1087e(f)(2)(D), and provide such deferments to borrowers as necessary to continue the temporary cessation of payments and the waiver of all interest on student loans held by the Department of Education until December 31, 2020.

Trump, *supra*.

President Trump's August 8 directive specified only 20 U.S.C. § 1087e(f)(2)(D), which allows for deferment for up to three years if "the borrower has experienced or will experience a hardship." *Id*. The August 8 directive was a recognition of the hardships created by the COVID pandemic. Without a specific reference to the HEROES Act, the Department cannot rely on the August 8, 2020, memorandum for that authority.

Indeed, at the time of the August 8 memorandum, it was widely believed that President Trump did not have the authority to extend the payment pause at all, and the use of the HEROES Act was not even considered. See Annie Nova, *Trump order gives 35 million student loan borrowers a break until 2021. What we know so far*, CNBC (Aug. 10, 2020), https://tinyurl.com/5n8swzea ("Trump's executive order has already been called unconstitutional, and higher-education expert Mark Kantrowitz said he believes the president doesn't have the legal authority to implement a payment pause and interest waiver for borrowers"); see also Chandelis Duster, *Pelosi calls Trump's coronavirus relief executive actions 'absurdly unconstitutional'*, CNN (Aug. 9, 2020), https://tinyurl.com/mpmazc2z. Not even the Department's August 21, 2020, bulletin implementing the August 8 memorandum suggested that the then Secretary was acting pursuant to the HEROES Act. *Secretary DeVos Fully Implements President Trump's Presidential Memorandum Extending Student Loan Relief to Borrowers Through End of Year*, U.S. Dep't of Educ. (Aug. 21, 2020),

https://tinyurl.com/mva5b98a. The bulletin explained that the Secretary's implementation of the August 8 memorandum simply "extend[ed] the actions taken by Secretary DeVos at the start of the national emergency," which was pursuant to the Higher Education Act. *Id*.

Admittedly, once the legality of the payment pause came into question the Department began to lean on the HEROES Act for authority. See Federal Student Aid Programs, 85 Fed. Reg. 79,856 (Dec. 11, 2020). But even if the Department believes that President Trump invoked the HEROES Act to justify the loan deferments or loan forbearances, he did not do so. And without that invocation, Secretary Cardona cannot legally invoke the HEROES Act for the purposes claimed.

Notwithstanding President Biden's almost three-year extension of the COVID-19 national emergency, any claimed national emergency authority in the HEROES Act is invalid until the President specifies that he is invoking those laws. Because there is no qualifying presidential pronouncement "specif[ying] the provisions of law under which [the President] proposes that he, or [the Secretary] will act," 50 U.S.C. § 1631, the National Emergencies Act has not been properly followed to grant the Secretary any power under the HEROES Act.

Consequently, the Secretary has no legal authority to rely on any alleged national emergency to forgive student loans.

V. The term national emergency in the HEROES Act must be read in light of the surrounding language of the Act and the Act's legislative purpose. Because the HEROES Act relates to military operations and military personnel, COVID-19 is not a national emergency under the HEROES Act.

Even assuming that the President had properly invoked the HEROES Act through an announcement under the National Emergencies Act, the Department's reliance on the HEROES Act is flawed. The Secretary relies on the following language in the HEROES Act:

> Notwithstanding any other provision of law, * * * the Secretary of Education * * * may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the Act [20 U.S.C. 1070 et seq.] 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).

20 U.S.C. § 1098bb(a)(1).

The HEROES Act only allows for waiver and modification in connection with war or other military operations or national emergencies. While Petitioners point to the COVID-19 pandemic, that is not a "national emergency" under the HEROES Act. The term "national emergency" must be interpreted in

connection with surrounding text as well as the history and purpose of the HEROES Act. This contextual interpretation compels the conclusion that only a military-related national emergency can trigger the Act's "waive or modify" authority.

When interpreting a statute, this Court has applied "the principle *of noscitur a sociis*—a word is known by the company it keeps—to 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.'" *Yates* v. *United States*, 574 U.S. 528, 543 (2015) (quoting *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995)). "[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar to those enumerated by the specific words." *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Est. of Keffeler*, 537 U.S. 371, 284 (2003). As such, the phrase "national emergency" in the HEROES Act must be interpreted in the context of preceding words, namely "war" and "other military operation." 20 U.S.C. § 1098bb(a)(1). The national emergency must be similar in nature to war and military operations—it must relate to the armed forces.

The Act's legislative history and purpose support this view. This Court often relies on congressionally enacted "legislative findings and purposes that motivate" a given statute. *Toyota Motor Mfg., Ky.* v. *Williams*, 534 U.S. 184, 197 (2002). When "the text of the Act itself makes clear" in an express purpose statement what Congress "sought to establish," there is no guess work needed. *Reynolds* v.

United States, 565 U.S. 432, 488 n. (2012) (Scalia, J., dissenting). When "Congress declare[s] that 'it is the policy of the United States'" in a statute, this Court must read the statute in light of that congressional declaration. *Nat'l Cable & Telecoms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 359–360 (2002) (Thomas, J., concurring in part and dissenting in part) (citation omitted). Thus, congressionally enacted legislative findings and purpose statements should be consulted as they "can shed light on the meaning of [a statute's] operative provisions." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 218 (2012).

Congress enacted the precursor of the HEROES Act of 2003, the Higher Education Relief Opportunities for Students Act of 2001, after the September 11, 2001, terrorist attacks. Higher Education Relief Opportunities for Students Act of 2001, Pub. L. No. 107-122, 115 Stat. 2386 (2002). In the 2001 act, "[t]he term 'national emergency' means the national emergency by reason of certain terrorist attacks declared by the President on September 14, 2001, or subsequent national emergencies declared by the President *by reason of terrorist attacks*." *Id.* § 5 (emphasis added).

When Congress passed the HEROES Act of 2003, it did so specifically "to support the members of the United States military and provide [student loan] assistance with their transition into and out of active duty and active service." 20 U.S.C. § 1098aa(b)(6). The remaining congressional findings confirm that Congress was concerned with military personnel—not

all students—and situations triggered by military threats to national security. Congress found that:

> (1) There is no more important cause than that of our nation's defense.
>
> (2) The United States will protect the freedom and secure the safety of its citizens.
>
> (3) The United States military is the finest in the world and its personnel are determined to lead the world in pursuit of peace.
>
> (4) Hundreds of thousands of Army, Air Force, Marine Corps, Navy, and Coast Guard reservists and members of the National Guard have been called to active duty or active service.
>
> (5) 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.
>
> (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.

20 U.S.C. § 1098aa(b).

The congressional findings, and—while not dispositive—the very name of the HEROES Act, exhibit Congress's concern with protecting and

assisting military HEROES and their families. When the phrase "national emergency" in the HEROES Act is interpreted in the context of preceding words, namely "war" and "other military operation," and in light of the express findings of Congress, it is clear that COVID-19 is not a national emergency under the Act. If Congress intended or now intends to allow the Secretary the authority to apply the HEROES act to all student loan borrowers, then Congress must amend the Act.

Finally, the "notwithstanding" clause in the HEROES Act does not supersede the requirements of the National Emergencies Act. The notwithstanding clause prevents another law from divesting the Secretary of his authority under the HEROES Act—once it has been legally invoked. See 20 U.S.C. § 1098bb. But the National Emergencies Act is an enabling law with specific mandatory procedural steps that were never utilized. Hence, the HEROES Act did not, and cannot authorize the Secretary to forgive non-military personnel student debt.

CONCLUSION

For the reasons stated in the Respondents' briefs and this *amicus* brief, this Court should affirm the decision of the United States District Court for the Northern District of Texas, *Brown* v. *U.S. Dep't of Educ.*, No 4:22-cv-0908-P, 2022 WL 16858525 (N.D. Tex Nov. 10, 2022), affirming the invalidation of the Student Loan Program.

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