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.

DEPARTMENT OF EDUCATION, ET AL., *Petitioners*,

v.

MYRA BROWN, ET AL.

ON WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND FIFTH CIRCUITS

BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

JENNIFER B. DICKEY
JORDAN L. VON BOKERN
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

ROBERT E. DUNN
Counsel of Record
EIMER STAHL LLP
99 S. Almaden Blvd.
Suite 600
San Jose, CA 95113
(408) 889-1690
rdunn@eimerstahl.com

Counsel for Amicus Curiae
(Additional counsel on signature page)

February 3, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations and Executive Orders

Books and Law Reviews

Other Authorities

STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every economic sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the Nation's business community.

The Chamber and its members have an interest in clarifying when the major questions doctrine applies to regulatory challenges. The Chamber routinely files such challenges to hold administrative agencies accountable to the rule of law. As this Court has recognized, the major questions doctrine derives from the separation of powers and thus ensures that each branch of government stays in its respective lane and that administrative agencies do not impose regulatory burdens that exceed lawful bounds.

---

[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

I. This case presents a timely opportunity to reinforce important constitutional guardrails that prevent administrative agencies and executive branch departments from exercising core legislative authority. In *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), this Court described an "identifiable body of law" that "developed over a series of significant cases" in which agencies had "assert[ed] highly consequential power beyond what Congress could reasonably be understood to have granted." *Id.* at 2609. The Court labeled that body of law the "major questions doctrine" and explained that in such "extraordinary cases" courts should insist on "clear congressional authorization" before upholding the agency's action. *Id.* at 2608–09. The Court applied that rigorous standard to the EPA's Clean Power Plan because, *inter alia*, the EPA purported to rely on a long-extant statutory provision designed to function as a gap filler, the EPA's rule departed from its historical interpretation of that provision, Congress had previously debated whether to impose a similar cap-and-trade plan, the EPA had no comparative expertise in crafting national energy policy, and the Clean Power Plan would give the EPA "unprecedented power over American industry." *Id.* at 2610–14.

Here, the Department of Education contends that the major questions doctrine does *not* apply to its blanket loan-forgiveness program because some of those features are arguably absent. For example, the

Department contends that it *does* have comparative expertise in administering the federal loan program. More fundamentally, the Department argues that the doctrine is inapplicable because its decision to forgive roughly $500 billion in student loans is not "regulatory" in nature—*i.e.*, it does not control private conduct—but simply provides government benefits.

These arguments are based on a fundamental misunderstanding about the constitutional foundations of the major questions doctrine. The doctrine "protect[s] the Constitution's separation of powers" by ensuring that agencies do not usurp Congress' Article I powers. *W. Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring). To prevent such usurpations, the doctrine should apply *whenever* it appears that an agency is wielding core Article I authority to set policy that Congress would normally be expected to establish on its own. This Court should clarify that the doctrine applies to all such agency actions even if they do not regulate private conduct or exhibit every feature of the improper agency action set aside in *West Virginia*.

The doctrine's clear statement rule is more important now than ever, as the executive branch has increasingly relied on the administrative state "to 'work [a]round' the legislative process to resolve" "question[s] of great political significance." *W. Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (quoting *Nat'l Fed. of Indep. Bus. v. Dep't of Labor, Occupational Safety and Health Admin.*, 142 S. Ct. 661, 668 (2022) (*"NFIB"*) (Gorsuch, J., concurring)). This Court has seen that for itself. In *West Virginia*,

it was the EPA exercising Congress' commerce power to implement national energy policy. In *NFIB*, it was OSHA exercising that power to implement a vaccine mandate. In *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021), it was the CDC imposing a nationwide eviction moratorium after Congress declined to extend the short moratorium it had enacted under its spending power. In *King v. Burwell*, 576 U.S. 473 (2015), it was the IRS extending billions of dollars in tax credits. This agency overreach shows little signs of stopping.

Although, under this Court's precedents, Congress could theoretically delegate these powers to the appropriate agency, remaking the national energy market, vaccinating American workers, curtailing evictions, and extending billions of dollars in tax credits are precisely the types of actions that one would normally expect Congress to undertake itself. The major questions doctrine is an important safeguard to ensure that agencies do not make these types of politically significant decisions without explicit congressional authorization.

II. Here, the Department is exercising Congress' appropriations power by converting $500 billion in federal loans to grants. This action also implicates Congress' power to tax and borrow, as the half-trillion-dollar hole it creates in the federal budget will need to be backfilled somehow. Congress has considered—but thus far declined—to forgive student loans on a blanket basis. And the President's spokespeople have described the loan-forgiveness

program as the fulfillment of a campaign pledge. In short, the Department's loan-forgiveness program, a significant exercise of the power of the purse, is precisely the type of action the Constitution entrusts exclusively to Congress. The agency should thus be required to point to clear congressional authorization empowering it to issue a blanket loan forgiveness program.

ARGUMENT

I. The Major Questions Doctrine Should Apply Whenever An Agency, Wielding Authority The Constitution Vests In Congress, Sets Policy That We Would Normally Expect Congress Itself To Establish.

A. Courts and commentators have long recognized the existence of a "'major questions' canon" in this Court's jurisprudence. *Coalition for Responsible Regulation, Inc. v. EPA*, 2012 WL 6621785, at *9 (D.C. Cir. Dec. 20, 2012) (Brown, J., dissenting from the denial of rehearing en banc); *see also United States Telecom Assoc. v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Mem.) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (discussing the "major rules doctrine (usually called the major questions doctrine)").[2] But while that doctrine was evident in

[2] *See also* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) ("A court may also ask whether the legal question is an important one.

cases such as *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994), *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), *Gonzales v. Oregon*, 546 U.S. 243 (2006), *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014), and *King v. Burwell*, 576 U.S. 473 (2015), the Court formalized the doctrine just last term in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). As the Court recognized, "precedent teaches 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." *Id.* at 2608 (citation omitted). Accordingly, the agency "must point to 'clear congressional authorization' for the power it claims" when it asserts "extravagant statutory power over the national economy,'" or makes "major policy decisions." *Id.* at 2609 (*citing Utility Air*, 573 U.S. at 324; *United States Telecom*, 855 F.3d at 381).

Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."); Cass Sunstein, *Chevron Step Zero*, 92 Va. L. R. 187, 193 (2006) ("In a separate trilogy of cases, which I will call the 'Major Question' trilogy, the Court has raised a separate Step Zero question by suggesting the possibility that deference will be reduced, or even nonexistent, if a fundamental issue is involved, one that goes to the heart of the regulatory scheme at issue. The apparent theory is that Congress should not be taken to have asked agencies to resolve those issues.").

In determining that West Virginia's challenge to the EPA's Clean Power Plan was "a major questions case," the Court made several observations about the scope of the agency's action. *Id.* at 2610. First, the "EPA 'claim[ed] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority.'" *Id.* at 2610 (citation omitted). Second, the EPA's action "effected a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind." *Id.* at 2612 (citation omitted). Third, the EPA had "'no comparative expertise' in making [the] policy judgments" contained in its rule. *Id.* at 2612–13 (citation omitted). Fourth, the choice contained in the EPA's rule involved "major social and economic policy decisions" in a highly controversial area. *Id.* at 2613 (citation omitted). And, finally, "'Congress [had] considered and rejected' multiple times" the very program enacted by the EPA. *Id.* at 2614. Given these factors, the Court correctly required the agency to demonstrate clear congressional authorization for its action, which it could not do.

The Department reads these factors as necessary for the doctrine to apply. In other words, it contends that courts should require a clear statement of congressional authorization only when *all* the listed factors are present. And because some of those factors are arguably absent here, the Department contends that this is not a major questions case. For example, the Department asserts that there is no "marked incongruity" between its claimed authority and the

"history and context of the statutory provision that purportedly conferred it." Pet.Br.48. The Department also contends that it does not lack "comparative expertise" in administering federal student loans and asserts that it has "repeatedly invoked" the HEROES Act "to provide class-wide relief to affected borrowers." *Id.* at 51. And while Congress has debated loan forgiveness programs, the Department notes that the proposed bills "meaningfully differed from the relief the Secretary authorized." *Id.* at 52. More fundamentally, the Department points out that unlike the Clean Power Plan and other agency actions invalidated under the major-questions doctrine, its loan forgiveness program is not an assertion of *regulatory authority*, but instead is an "exercise of authority over a government benefit program." *Id.* at 48–49.

The Department's arguments rest on a flawed premise—*i.e.*, that agency action must bear *all* the hallmarks of a major questions case described in *West Virginia* for the doctrine to apply. This Court announced no such requirement in *West Virginia*, and the doctrine's basis in the separation of powers militates in favor of a much broader application. For the reasons set forth below, the Court should reject the Department's narrow conception of the doctrine and hold that a clear statement of congressional authorization is required *whenever* it appears that an agency is wielding legislative authority to set policy

that Congress would normally be expected to establish.[3]

B. Under our tripartite system of government, the power to make the law is given to Congress, not to the President or his agencies. U.S. Const. art. I § 1 (granting "all legislative powers" to Congress). Executive branch agencies thus cannot exercise legislative authority. Instead, "[a]gencies have only those powers given to them by Congress." *W. Virginia*, 142 S. Ct. at 2609; *see also* 5 U.S.C. § 558(b) (prohibiting agencies from making rules "except

---

[3] In the seven months since *West Virginia*, lower courts have struggled to determine when the major questions doctrine applies. *See, e.g,*, *Kaweah Delta Med. Health Care Dist. v. Becerra*, No. CV 20-6564-CBM-SP(x), 2022 WL 18278175, at *1, *7–8 (C.D. Cal. Dec. 22, 2022) (applying the doctrine to HHS rule decreasing Medicare payments to hospitals overall in order to fund increased payments to the lowest quartile of hospitals); *Louisiana v. Becerra*, No. 3:21-CV-04370, 2022 WL 4370448, at *2, *10–11 (W.D. La. Sept. 21, 2022) (applying doctrine to HHS rule imposing vaccine and masking mandates at Head Start school programs); *Arizona v. Walsh*, No. CV-22-00213-PHX-JJT, 2023 WL 120966, at *1, *7 (D. Ariz. Jan. 6, 2023) (declining to apply the doctrine to DOL rule increasing minimum wage for federal contractors to $15 per hour); *Loper Bright Enters., Inc. v. Raimondo*, 45 F.4th 359, 364–65 (D.C. Cir. 2022) (declining to apply doctrine to rule adopted by National Marine Fisheries Service requiring the fishing industry to fund at-sea monitoring programs). Judges have also disagreed as to whether the doctrine applies to actions of the President as well as to those of the agencies. *See Georgia v. President of the United States*, 46 F.4th 1283, 1313–14 (11th Cir. 2022) (Anderson, J., concurring in part and dissenting in part); *Louisiana v. Biden*, 55 F.4th 1017, 1038–39 (5th Cir. 2022) (Graves Jr., J., dissenting).

within jurisdiction delegated to the agency and as authorized by law"). This constitutional allocation of legislative power to Congress is "vital to the integrity and maintenance of the system of government ordained by the Constitution." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).

Although the Constitution prohibits Congress from simply "transferring its legislative power to another branch of Government," this Court has held that "Congress may 'obtain[] the assistance of its coordinate [b]ranches'—and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws." *Gundy v. United States*, 139 S. Ct. 2116, 2121, 2123 (2019) (plurality op.) (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)). Over the past century, Congress has delegated substantial "power under broad general directives" to various agencies, *id.* at 2123, and the number and complexity of the rules and regulations promulgated by those agencies dwarfs the number of statutes enacted by Congress. *See id.* at 2130–31 (Alito, J., concurring in the judgment) (noting that "since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards").

Yet even if the Constitution tolerates such broad delegations of authority, this Court has consistently "presume[d] that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'" *W. Virginia*, 142 S. Ct. at 2609 (quoting *United States Telecom*, 855 F.3d at 419 (Kavanaugh,

J., dissenting from the denial of rehearing en banc)); *see also* W. Eskridge, *Interpreting Law: A Primer on How to Read Statutes and the Constitution* 288 (2016) ("[J]udges presume that Congress does not delegate its authority to settle or amend major social and economic policy decisions."). Indeed, leaving major policy decisions to agencies would create substantial separation-of-powers problems. The major questions doctrine, an interpretive tool based on this well-founded presumption, safeguards Congress' Article I power by ensuring that "important subjects" are "entirely regulated by the legislature itself." *Wayman v. Southard*, 23 U.S. 1, 10 Wheat. 1, 42–43 (1825). The alternative—presuming that Congress casually delegates vital decision-making power to agencies—would risk allowing legislation to "becom[e] nothing more than the will of the current President, or, worse yet, the will of unelected officials barely responsive to him." *W. Virginia*, 142 S. Ct. at 2618 (Gorsuch, J., concurring); *see also Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting) ("Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.").

Given its basis in the separation of powers, the major questions doctrine counsels judicial skepticism in the face of all forms of agency action with "economic and political significance." *W. Virginia*, 142 S. Ct. at 2608. The EPA took such an action in *West Virginia* when it purported to "substantially restructure the

American energy market" by forcing a nationwide shift from coal to renewable sources of energy. *Id.* at 2610. The EPA was able to assert this "unprecedented power over American industry" by helping itself to Congress' Article I authority to regulate interstate commerce. *Id.* at 2612. But the Constitution requires such muscular exercises of the commerce power to be undertaken by Congress itself, not an agency. And indeed, far from leaving the issue for the agency to work out behind the scenes, Congress "considered and rejected" the imposition of a nationwide cap-and-trade system "multiple times." *Id.* at 2614. The EPA's action thus threatened to undermine the separation of powers.

When confronted with such cases, courts should assure themselves that Congress has paved the way for the agency's action through an unmistakable delegation of authority. Only then may the agency "implement and enforce the law[]" Congress has enacted. *Gundy*, 139 S. Ct. at 2123 (plurality op.). Absent such a clear congressional statement, there is a risk that the agency is not so much implementing the law as it is "attempting to 'work [a]round' the legislative process to resolve for itself a question of great political significance." *W. Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (citation omitted).

While these types of aggressive agency actions often regulate private conduct (Pet.Br.48–49), agencies can usurp Congress' authority in other ways as well. For example, the Constitution grants Congress, and Congress alone, the power to tax, borrow, and appropriate. U.S. Const. art. I, § 8. Any

agency purporting to exercise those powers should be required to point to a clear delegation of authority, even if the agency's action does not directly regulate private behavior.

This Court's decision in *King v. Burwell*, which addressed an IRS rule that expanded the eligibility of tax credits under the Affordable Care Act, illustrates the broad scope of the doctrine. 576 U.S. at 485–86. There, the IRS's rule did not regulate private conduct but instead "involv[ed] billions of dollars in spending each year and affect[ed] the price of health insurance for millions of people." *Ibid.* Although the IRS's rule did not regulate private conduct, the Court easily concluded that whether the tax credits were "available on Federal Exchanges" was a "question of deep 'economic and political significance.'" *Id.* The Court thus declined to defer to the IRS on this question. *Id.* at 486.[4] *King*'s application of the major questions doctrine to the IRS's purported exercise of Congress' power to tax and spend confirms the broad scope of the doctrine.

A rigid application of the factors identified in *West Virginia* is incongruent with that scope. For example, while the fact that Congress had declined to enact a cap-and-trade system after robust debate suggested

[4] The Court ultimately concluded, based on the context and structure of the Affordable Care Act, that the IRS's interpretation was correct, and that Congress had intended for the tax credits to be made available to those who purchased insurance through Federal Exchanges. *King*, 576 U.S. at 497–98.

that the EPA's imposition of a similar system exceeded its statutory authority, one can imagine other patterns of legislative conduct that would raise similar concerns. Sometimes Congress declines even to debate policy proposals floated by the executive due to significant political opposition from that body. An agency subsequently implementing that same policy would rightly be suspected of effecting an end-run around the legislative process. Similarly, as is the case here, when Congress has considered various proposals on a certain subject, it is safe to assume that Congress has not *sub silentio* delegated to an agency the authority to adopt a *different* policy addressing that same subject.

Likewise, while an agency's sudden discovery of a long-disclaimed (or never-before asserted) power may signal an unconstitutional overreach, *W. Virginia*, 142 S. Ct. at 2610–12, an agency invoking a more recent statute to refight a battle the executive lost during the legislative process is equally out of bounds. And though various agencies may have competence in particular subject matters, they lack competence to balance the competing interests involved in politically and economically significant decisions.[5] The major

---

[5] *See* Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 Harv. J.L. & Pub. Pol'y 147, 191 (2017) ("Basic judgments on regulation of society can produce the sort of coercive rules for the citizenry that were the subject of greatest concerns at the founding—concerns that were the basis for constitutional structures dividing and limiting legislative power. These judgments are not appropriate for administrative decision-making, even when

questions doctrine should be flexible enough to account for the various scenarios in which executive agencies may be tempted to step beyond their constitutional role.

C. A robust version of the major questions doctrine is especially important today given the recent tendency of executives to use agency action when confronted with congressional resistance.[6] For example, two years ago, Congress imposed a four-month "eviction moratorium for properties that participated in federal assistance programs or were subject to federally backed loans." *Ala. Ass'n of Realtors v. Dep't of Health and Human Servs.*, 141 S. Ct. 2485, 2486–87 (2021). But when Congress refused the President's request to renew the moratorium, the CDC did the job itself, imposing a sweeping, open-ended eviction moratorium, backed by criminal

---

attached to some regulatory structure that invokes executive powers such as prosecution.").

[6] As an empirical matter, the number of "economically significant" rules published by federal agencies has steadily grown since the early 1980s. *See* George Washington University Regulatory Studies Center, Columbian College of Arts & Sciences, *Economically Significant Rules by Agency*, https://tinyurl.com/5n72pcfb. "Economically significant" rules are those that have an "annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities." Exec. Order No. 12866, 58 Fed. Reg. 51735 (1993).

penalties, that applied to every private landlord in the country. *Ibid.*[7]

In a similar manner, when Congress rebuffed the President's request for a nationwide vaccine mandate, OSHA stepped in to impose a "vaccine mandate for much of the Nation's work force," *NFIB*, 142 S. Ct. at 662, and various executive branch agencies, exercising Congress' procurement power, imposed a mandate on federal contractors, *see Georgia v. President of the United States*, 46 F.4th 1283 (11th Cir. 2022); *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022).

The common thread connecting these cases is that each agency purported to set policy that Congress would normally be expected to establish through the exercise of its Article I authority—*e.g.*, the commerce power, spending power, procurement power, etc.—after Congress refused to accede to the executive's wishes. Indeed, the underlying rationale for the executive branch's recent propensity to find "elephants in mouseholes" appears to be Congress'

---

[7] Given that Congress relied on its spending power—not its commerce power—to impose the initial eviction moratorium, even Congress likely could not have extended its moratorium to cover *all* private property. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116–136, 134 Stat. 281, § 4024(a)(2) (defining "covered property" by reference to federally funded programs). The CDC thus did not merely usurp Congress' Article I authority, it likely violated basic principles of federalism by exercising a general police power the Constitution reserved to the States.

unwillingness to further the executive's agenda. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *cf*. Tamara Keith, *Wielding a Pen and a Phone, Obama Goes it Alone*, National Public Radio (Jan. 20, 2014), https://tinyurl.com/mr2zph72 ("I am going to be working with Congress where I can to accomplish this, but I am also going to act on my own if Congress is deadlocked."). But congressional gridlock resulting from today's polarized political environment does not justify the abandonment of our constitutional structure.

Unfortunately, although COVID-19 may be receding, the epidemic of agency overreach shows no signs of stopping. Earlier this year, for example, the FTC announced a proposed rule to ban all employment-based noncompete agreements,[8] even though "[i]n its more than 100-year history, the FTC has never enforced a rule to regulate competition, and Congress never intended the agency to have that power."[9] Meanwhile, the Consumer Financial Protection Bureau has announced an interpretation of its authority to prohibit any "unfair, deceptive, or abusive act or practice" that would allow it to regulate what it deems discriminatory "effects" with no consideration for the guardrails that this Court has

---

[8] Federal Trade Commission, *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition* (Jan. 5, 2023), https://tinyurl.com/ywvn5w2e.

[9] Suzanne P. Clark, *The Chamber of Commerce Will Fight the FTC*, Wall Street Journal (Jan. 22, 2023), https://tinyurl.com/mrnk9yyd.

imposed upon disparate-impact liability.[10] The EPA and Army Corps of Engineers continue to create expansive definitions of the Waters of the United States that subject ever more private land to federal control and expensive permitting requirements, usurping the States' primary role in regulating land and water resources. *See* 33 C.F.R. Part 328; 40 C.F.R. Part 120. And, here, the Department has attempted to add $500 billion to the federal debt through a blanket loan forgiveness program in an apparent effort to fulfill President Biden's campaign promise. *See infra*, Part II.

The best defense against these administrative incursions is the major questions doctrine. Accordingly, even if an agency action does not share all the same features highlighted in *West Virginia*, the doctrine should not be cast aside. To be sure, many of the hallmarks of improper agency action listed in *West Virginia* will often be present in major questions cases because agencies usurping Congress' authority tend to act outside their areas of core competence, issue rules with massive economic consequences, invoke long-extant statutes, change their position on the extent of their authority, and regulate in areas subject to heated congressional debate. But each of these features is merely a

---

[10] *See* Pltf's Combined Reply In Support of Mot. for Summary Judgment, *Chamber of Commerce of the United States of America v. Consumer Financial Protection Bureau*, No. 22-cv-00381, ECF No. 28 at 22–26 (E.D. Tex. Jan. 10, 2023), *available at* https://tinyurl.com/343kwmd4.

symptom of the fundamental disease—the agency is purporting to act as a "sort of junior-varsity Congress," wielding the powers that belong to the legislative branch. *Mistretta*, 488 U.S. at 427 (Scalia, J., dissenting). When that is the case, courts should require the agency to "point to 'clear congressional authorization' for the power it claims." *W. Virginia*, 142 S. Ct. at 2609. This "clear-statement rule[]" will "help courts 'act as faithful agents of the Constitution.'" *Id.* at 2616 (Gorsuch, J., concurring) (citing A. Barrett, *Substantive Canons and Faithful Agency*, 90 B. U. L. Rev. 109, 169 (2010)).[11]

II. The Major Questions Doctrine Applies To The Department's Action Here Because We Would Normally Expect Congress To Decide Whether To Spend $500 Billion On A Blanket Loan Forgiveness Program.

The Department's decision to forgive up to $500 billion of federal loans implicates the very separation-of-powers concerns that animate the major questions doctrine. As an initial matter, the Department's decision to forgive debt is a dramatic (if slightly

[11] Although the major questions doctrine unquestionably narrows the scope of the *Chevron* doctrine, nothing in *West Virginia* or this Court's other major questions cases clearly abandons the *Chevron* framework. But where, as here, the agency is not merely providing an "administrative interpretation" to an ambiguous statute but rather is exercising authority vested in Congress under Article I, *Chevron* deference is plainly inappropriate, and courts should require clear congressional authorization.

unorthodox) exercise of the appropriations power. When Congress appropriated the funds it extended as loans to federal borrowers, it did so on the condition that it would be repaid with interest. Unilaterally forgiving those loans retroactively converts them into grants. Financially speaking, the Department's action is no different than the IRS creating a new tax credit or unilaterally lowering the tax rate for certain classes of federal taxpayers. Moreover, by "reduc[ing] cash inflows to the Treasury," the Department's action blows a half-trillion-dollar hole in the budget, which "will increase the amounts that the federal government borrows over time."[12] If the government is unable or unwilling to borrow the necessary funds, it will be forced to increase taxes to cover this new spending. Given the looming fight in Congress over when and by how much to raise the debt ceiling, Congress undoubtedly has a strong interest in the decision to add $500 billion to the federal debt.[13]

The Department's loan forgiveness program also has the appearance of being an administrative "work around" in the face of congressional inaction. First, the loan forgiveness program, announced two-and-a-

---

[12] Cong. Budget Office, *Costs of Suspending Student Loan Payments and Canceling Debt* at 1–2 (Sept. 26, 2022) https://tinyurl.com/n932w7ht.

[13] *See* Mini Racker, *Why the Debt Ceiling Matters and What Happens if Congress Refuses to Raise it*, Time (Jan. 17, 2023) , https://tinyurl.com/yc7ptx4h (explaining that failure to raise the debt ceiling would prevent the Treasury from borrowing enough funds to cover existing spending commitments).

half months before the 2022 midterm election, "follow[ed] through" on a promise that President Biden made during the 2020 campaign.[14] Indeed, when announcing the program, a spokesperson for the administration opined that "a post-high school education should be a ticket to a middle-class life" but that the "cost of borrowing for college is a lifelong burden that deprives them of that opportunity."[15] The spokesperson asserted that the plan "will benefit tens of millions of middle-class Americans, their families, and the economy as a whole."[16] That type of rhetoric is typically used to unveil substantial new spending programs or tax reductions. It is not the language of an administrative agency striving to faithfully implement existing law.

Second, while we might not expect Congress to address individual requests for waivers and loan forgiveness, the decision to spend half a trillion dollars is an important fiscal decision that would presumably elicit robust debate in Congress. And, unsurprisingly, such debate has repeatedly taken place. *See, e.g.*, H.R. 2034, 117th Cong. (2021); H.R. 6800, 116th Cong. § 150117(h) (2020); S. 2235, 116th Cong. (2019). Congress' considered decision *not* to enact a bill discharging hundreds of billions of dollars

---

[14] The White House, *Background Press Call by Senior Administration Officials on Student Loan Relief* (Aug. 24, 2022), https://tinyurl.com/3rx8xcmu.

[15] *Ibid.*

[16] *Ibid.*

in student loans in response to the pandemic highlights the political nature of the Department's decision.

Third, the Department's Office of the General Counsel previously concluded in a well-researched and thoughtful memorandum that the agency lacked any statutory authority to issue blanket loan forgiveness.[17] Whether or not that analysis was correct, the agency's sudden about-face on the key question of its authority to issue across-the-board loan forgiveness raises the specter that the agency—under pressure to fulfill the President's campaign promise—is attempting to compensate for Congress's refusal to grant the desired relief. Accordingly, this case is a quintessential major questions case.

The fact that the Department has purported to appropriate and spend money, rather than regulate conduct, does not change this outcome. True, an agency purporting to exercise Congress' appropriations power in a politicized manner may not present the same direct threat to individual liberty as an agency implementing an onerous economic regulation. But such usurpation is every bit the threat to the separation of powers, which is itself the Constitution's main structural bulwark against tyranny. Indeed, when describing the powers the

---

[17] Reed Rubinstein, *Memorandum to Betsy DeVos Secretary of Education*, United States Department of Education, Office of the General Counsel (Jan. 12, 2021), https://tinyurl.com/35ax82ju.

Constitution vested in Congress, Alexander Hamilton listed the power of the purse *before* the power to "prescribe[] the rules by which the duties and rights of every citizen are to be regulated." Hamilton, The *Federalist Papers*, No. 78. James Madison similarly "regarded" the "power over the purse" "as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." Madison, *The Federalist Papers*, No. 58. Justice Story similarly observed that "it is highly proper that [C]ongress should possess the power to decide how and when any money should be applied" "to the discharge of the expenses, debts, and other engagements of the government." 2 Story, Commentaries on the Constitution of the United States § 1348 (3d ed. 1858). "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." *Ibid.*

As this Court put it more recently, the "fundamental and comprehensive purpose" of the Appropriations Clause is "to assure 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 Personnel Mgmt. v. Richmond*, 496 U.S. 414, 427–28 (1990); *see also* Kate Stith, *Congress' Power of the Purse*, 97 Yale L. J. 1343, 1349 (1988) ("If Congress could not prohibit the Executive from

withdrawing funds from the Treasury, then the constitutional grants of power to the legislature to raise taxes and to borrow money would be for naught because the Executive could effectively compel such legislation by spending at will.").

Given the importance of the power of the purse to our constitutional structure, one would expect Congress to make appropriations decisions, especially since federal expenditures affect politically sensitive decisions about how much to borrow and/or tax. The Court should thus uphold the Department's loan forgiveness program *only if* the agency can identify a "clear congressional authorization" for the power it claims. *W. Virginia*, 142 S. Ct. at 2609. To satisfy that rigorous standard, the agency must point to "something more than a merely plausible textual basis for the agency action." *Ibid.* An "ambiguous statutory text" cannot support the Department's politically significant assertion of authority. *Utility Air*, 573 U.S. at 324.

CONCLUSION

This Court should clarify that the major questions doctrine applies whenever an agency wields legislative authority to set a policy that Congress itself would normally be expected to establish. Because the Department's loan-forgiveness program, which effectively converts $500 billion of federal loans to grants is precisely the type of appropriation policy Congress could be expected to make, the Court should

uphold the program only if the Department can point to clear congressional authorization.

Respectfully submitted,

JENNIFER B. DICKEY
JORDAN L. VON BOKERN
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

ROBERT E. DUNN
Counsel of Record
EIMER STAHL LLP
99 S. Almaden Blvd.
Suite 600
San Jose, CA 95113
(408) 889-1690
rdunn@eimerstahl.com

AMY MILLER
EIMER STAHL LLP
10 East Doty Street
Suite 621
Madison, WI 53703

Counsel for Amicus Curiae

February 3, 2023