No. 22-506

IN THE
Supreme Court of the United States

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

On Writ of Certiorari before Judgment
to the United States Court of Appeals
for the Eighth Circuit

Brief *Amicus Curiae* of Citizens United, Citizens United Foundation, and The Presidential Coalition, LLC in Support of Respondents

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INTEREST OF THE *AMICI CURIAE*[1]

Citizens United is a nonprofit social welfare organization, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Citizens United Foundation is a nonprofit educational and legal organization, exempt from federal income tax under IRC section 501(c)(3). These organizations were established, *inter alia*, to participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. The Presidential Coalition, LLC is a political committee under IRC section 527.

These *amici* are dedicated to restoring government to the people through a commitment to limited government, federalism, individual liberty, and free enterprise. Citizens United and Citizens United Foundation regularly participate as litigants (*e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)) and *amici* in important cases in which these legal principles are at stake. The Presidential Coalition has filed *amicus* briefs in numerous similar cases.

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

STATEMENT OF THE CASE

On August 24, 2022, at the direction of President Biden, the Department of Education announced that it would cancel "up to $20,000 in [federal student loan] debt [for] Pell Grant recipients with loans held by the Department and up to $10,000 ... to non-Pell Grant recipients ... [whose] individual income was less than $125,000 or $250,000 for households in 2020 or 2021."[2] *Nebraska v. Biden*, 2022 U.S. Dist. LEXIS 191616, *6-7 (E.D. Mo. 2022). The Department asserted this loan cancellation was authorized by the "Higher Education Relief Opportunities for Students Act of 2003" ("HEROES Act"), which allows waiver of student debt "'in connection with a war or other military operation or national emergency.'" *Id*. at *4. The national emergency relied on was the COVID virus. *Id*. at *6.

In September 2022, Nebraska, Missouri, Arkansas, Iowa, Kansas, and South Carolina (the "Plaintiff States") filed suit in the Eastern District of Missouri, seeking declaratory and injunctive relief "alleging the Department's student debt relief plan contravenes the separation of powers and violates the Administrative Procedure Act because it exceeds the Secretary's statutory authority and is arbitrary and capricious." *Id*. at *3. As to standing, the States alleged they would incur costs from the States' student debt

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[2] Education Dept. Press Release, "Biden-Harris Administration Announces Final Student Loan Pause Extension Through December 31 and Targeted Debt Cancellation to Smooth Transition to Repayment" (Aug. 24, 2022).

servicing programs, and four states would suffer loss of future tax revenue. *Id*. at *20-21.

The district court concluded that the Plaintiff States lacked standing and dismissed all counts of the complaint. *Id*. at *21-22. On November 14, 2022, the Eighth Circuit disagreed, finding that injury to Missouri's student loan agency did in fact constitute injury to the state, and that therefore Missouri had standing and granted a nationwide injunction to preserve the status quo pending appeal. *Nebraska v. Biden*, 52 F.4th 1044, 1047-48 (8th Cir. 2022).

The Department of Education asked this Court to vacate the Eighth Circuit's injunction, based on standing and asserting that the loan cancellation plan was authorized by the HEROES Act, and was neither arbitrary nor capricious. The Department asked that, if this Court should not stay the injunction, it would construe the application as a petition for a writ of certiorari before judgment. On December 1, 2022, this Court denied the stay but granted certiorari to consider "the questions presented in the application." *Biden v. Nebraska*, 143 S. Ct. 477 (2022).

STATEMENT

The challenged Biden student loan cancellation program ("the Program") constitutes a massive Executive Branch expenditure of federal funds which was never appropriated by Congress. Respondent States calculate the Program "costs taxpayers more than a half-trillion dollars over ten years." Brief for the Respondents at 31. In both type and scope, this

waiver was completely unlike any prior exercise of the HEROES Act,[3] as it cancels completely up to $10,000 in student debt owed by 20 million Americans, while significantly reducing the debt of another 20 million persons.[4]

The federal government operates a massive student loan program under the auspices of the Higher Education Act of 1965 (" HEA"). In 2003, following the terrorist attacks of September 11, 2001, Congress passed the Higher Education Relief Opportunities for Students (HEROES) Act of 2003, Pub. Law No. 108-76. The Act granted the Secretary of Education authority to "waive or modify" certain administrative provisions of the HEA, to allow it to defer student loan repayments by active duty military members. The Act also could be triggered to benefit "affected individuals" in time of "war or ... national emergency." 20 U.S.C. § 1098bb.

Considering that the Biden student loan forgiveness program was totally unprecedented, it is significant to consider its timing. It came in August 2022 of a Congressional election year where most pundits were expecting a "red wave." That wave never materialized, and there may be some good, old-fashioned political reasons that Republicans were

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[3] *See* Congressional Research Service, "Statutory Basis for Biden Administration Student Loan Forgiveness," (Sept. 13, 2022).

[4] The White House, "Fact Sheet: President Biden Announces Student Loan Relief for Borrowers Who Need It Most" (Aug. 24, 2022).

disappointed. One commentator described the loan forgiveness program in unvarnished terms: "Supposedly President Joe Biden's popularity went up last week. How did he achieve this feat, raising his popularity from 32% to the low 40s? He did it the old-fashioned way. Joe bought the votes of 20 million students who have been stupid enough to take out usually catastrophically burdensome student loans." R. Emmett Tyrrell, Jr., "Biden buys the vote with student loan forgiveness," *Washington Times* (Aug. 30, 2022). The November 2022 Congressional election thus was the second federal election cycle in which student loan forgiveness was dangled before young voters, candidate Biden having promised similar student loan relief before the 2020 Presidential election.[5]

Former New York Lieutenant Governor Betsy McCaughey described the scheme as follows: "College-debt forgiveness is President Biden's Hail Mary pass to buy votes and avoid a disastrous rout in the midterm elections. But after the votes are counted, the scheme is likely to collapse." B. McCaughey, "Student-loan forgiveness is Biden's 'Hail Mary' pass to buy votes," *New York Post* (Aug. 25, 2022). As McCaughey predicted, it took until mid-November for the Eighth Circuit to enjoin the program, and what the courts would do after the election with the loan forgiveness scheme was of much less consequence — politically, but not constitutionally.

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[5] J. Biden, "Joe Biden Outlines New Steps to Ease Economic Burden on Working People," *Medium.com* (Apr. 9, 2020).

This Court granted certiorari to address the questions set out by Petitioners: "(1) whether respondents have Article III standing, and (2) whether the plan exceeds the Secretary's statutory authority or is arbitrary and capricious." Application at 38.

In considering the second question, these *amici* urge this Court to take note that executive usurpations of legislative authority are occurring with great frequency, and thus should reconsider its constitutional jurisprudence with regard to the Nondelegation Doctrine. The student loan forgiveness program provides an excellent opportunity for the Court to accept the invitation of Justice Thomas to "address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers," and to "reconsider [this Court's] precedents on cessions of legislative power." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

SUMMARY OF ARGUMENT

To limit exercises of what they often termed arbitrary governmental power, the Framers fashioned a multitude of structural guardrails. Among these, James Madison elevated separation of powers to the highest level of importance, stating "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty." Federalist No. 47, G. Carey & J. McClellan, The Federalist Papers (Liberty Fund: 2000) at 249.

Certainly all Executive Branch actions which intrude on the legislative function need to be scrutinized to determine whether they were authorized by prior congressional action. However, because the spending power is so clearly vested exclusively in Congress (Art. I, sec. 9, cl. 7), any unilateral Executive Branch action that depletes the public fisc should be inherently suspect.

In 2001, this Court reaffirmed the nondelegation doctrine, as modified by the "intelligible principle" test: "This text permits no delegation of those powers, and so we repeatedly have said that when Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman* at 472 (citation omitted). Although these two rules have coexisted for decades, it has become increasingly clear that the "intelligible principle" exception has swallowed the "nondelegation" rule. The Biden Administration hopes this Court will continue to allow yet another executive usurpation — even at the cost of a half trillion dollars.

Justice Gorsuch put his finger on the reason that the non-delegation doctrine should be revitalized: "enforcing the separation of powers [is] about respecting the people's sovereign choice to vest the legislative power in Congress alone. And it's about safeguarding a structure designed to protect their liberties, minority rights, fair notice, and the rule of law." *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting).

For these and other reasons, these *amici* urge the Court to take Justice Thomas' cautionary note in his *Whitman* concurrence, to revisit whether this Court's "intelligible principle" test has rendered the nondelegation doctrine largely toothless, tearing down the Constitution's carefully crafted fence between the legislative and executive functions.

ARGUMENT

I. THE CONSTITUTION GUARDS AGAINST EXECUTIVE INTRUSIONS INTO LEGISLATIVE POWER.

After the issue of standing (which is not addressed by these *amici*) the central question in this case is whether the Department of Education's loan forgiveness program was an authorized executive branch implementation of a power properly delegated by Congress. How such challenges are to be resolved has changed over time.

A. "Fill Up the Details."

The scope of executive branch authority to implement legislation was addressed by Chief Justice John Marshall in 1825, declaring "[i]t will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative," but other branches are allowed to "act under such general provisions to **fill up the details**." *Wayman v. Southard*, 23 U.S. 1, 42-43 (1825) (emphasis added). Justice Marshall's test appears to have been designed to ensure the executive

had just enough discretionary power to implement (or execute) a law, but no more, thereby protecting the Constitution's vesting of "**[a]ll** legislative Powers herein granted" to Congress. Art. I, sec. 1 (emphasis added).

The "fill up the details" limitation appears to have been consistent with John Locke's view that no legislative power, which itself is derived from the people, can then be transferred on to others:

> The power of the legislative being **derived from the people** by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only **to make laws**, and **not to make legislators**, the legislative can have no power to transfer their authority of making laws, and place it in other hands. [J. Locke, Two Treatises of Government at 408-09 (Laslett, ed. 1963) (emphasis added).]

None of the Framers had any tolerance for any delegation of legislative power. If actual legislative power were to be transferred to the executive, it could bring on the tyranny that Montesquieu sought to avoid by separating powers. "'When the legislative and executive powers are united in the same person or body ... there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws, to *execute* them in a tyrannical manner." Federalist No. 47. This view was reinforced by James Madison in Federalist No. 51, where he writes, "that separate and distinct exercise of the

different powers of government ... is admitted on all hands to be essential to the preservation of liberty."

During the Constitutional Convention's debate, Madison and Charles Pinckney proposed specific language granting the executive the "power to **carry into effect** national laws ... and to **execute** such other powers 'not Legislative nor Judiciary in their nature,' as may from time to time be delegated by the national Legislature."[6] "The words 'not legislative nor judiciary in their nature' were added to the proposed amendment in consequence of a suggestion by General Pinckney that improper powers might otherwise be delegated." *Id.* In the end, the Convention deleted the language as unnecessary. "Yet, we are left with the unanimous record that ... all believed the exercise of non-executive power improperly delegated by the legislature to be prohibited." *Id.* at 142-143.

In 1789, Madison proposed adding an amendment to ensure each branch of government stayed within its own lane:

> The powers delegated by this constitution to the Government of the United States, shall be exercised as therein appropriated, so that the Legislative shall not exercise the powers vested in the Executive or Judicial; nor the Executive the power vested in the Legislative

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[6] J. Hood, "Before There Were Mouseholes: Resurrecting the Non-Delegation Doctrine," 30 BYU J. PUB. L. 142 (2015-2016) (emphasis added).

> or Judicial; nor the Judicial the powers vested in the Legislative or Executive.[7]

Madison's amendment convincingly passed the House of Representatives, but was defeated in the Senate. *Id.* at 761. But the reason for its defeat was not a lack of recognition by the Founders that the Constitution reserved legislative power to Congress. Indeed, both the amendment's critics and Madison himself viewed the amendment as unnecessary and duplicative, because the Constitution's text so clearly already reserved legislative power to Congress.[8]

In a 1790 debate, Rep. Gerry argued, "If the legislature ... have [a power], it is a legislative power, and they have no right to transfer the exercise of it to any other body."[9]

The need to prevent any delegation of legislative power to the executive was addressed and reaffirmed repeatedly through the nation's first century. Some illustrations prove this point.

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[7] 1 Annals of Cong. 789 (1789) (Joseph Gales ed., 1834).

[8] *Id.* at 760.

[9] Jonathan Elliot, ed., 4 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution: As Recommended by the General Convention at Philadelphia, in 1787. Together with the Journal of the Federal Convention, Luther Martin's Letter, Yates' Minutes, Congressional Opinions, Virginia and Kentucky Resolutions of '98-'99, and Other Illustrations of the Constitution at 404 (Taylor & Maury 1854) (statement of Rep. Gerry) (Aug. 1, 1790).

The Alien and Sedition Acts were denounced for, among other transgressions, the unconstitutional delegation of legislative power. Rep. Edward Livingston decried the Acts, arguing that under the Alien Act, "the President alone is empowered to make the law, to fix in his own mind what acts, what words, what thoughts or looks, shall constitute the crime contemplated by the bill.... This, then, comes completely within the definition of despotism — an union of Legislative, Executive, and Judicial powers."[10] A Virginia General Assembly report denounced the Acts, noting that "[i]f nothing more were required ... than a general conveyance of authority, without laying down any precise rules it would follow, that the power of legislation might be transferred by the legislature from itself," and would be "unconstitutional."[11]

In 1810, an amendment was proposed to an embargo bill to allow the President to employ "public armed vessels" to protect overseas commerce, and to "'issue instructions ... for the government of the ships which may be employed in that service.'" Rep. John Jackson (a future federal judge) objected on nondelegation grounds, and the amendment was defeated by a 2-1 margin.[12]

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[10] 8 Annals of Cong. 2007-2008 (1798).

[11] James Madison, Report of the Committee to Whom Were Referred the Communications of Various States ... Concerning the Alien and Sedition Laws (1799).

[12] *See* 21 Annals of Cong. 2022 (1810) ("It seems to me with equal constitutionality we might refer to the President the authority of

In an 1818 floor debate, Virginia Rep. Alexander Smyth argued, "[l]egislative power, when granted, is not transferable; nor can it be exercised by substitute; nor in any other manner than according to the constitution granting it."[13]

In 1842, a proposal was introduced in Congress to allow executive branch officials to issue "rules and regulations" with criminal sanctions that, unless Congress repealed them, "[would] be the law of the land." Rep. John Quincy Adams objected that the proposal was an unconstitutional delegation, and the proposal was quickly withdrawn.[14]

Early state constitutions contain express nondelegation provisions, including those of

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declaring war, levying taxes, or of doing everything which the Constitution points out as the duty of Congress. All legislative power is by the Constitution vested in Congress. They cannot transfer it.").

[13] 31 Annals of Cong. 1144 (1818).

[14] *See* Cong. Globe, 27th Cong., 2nd Sess. 510 (1842).

Massachusetts,[15] Virginia,[16] Georgia,[17] Vermont,[18] and Kentucky.[19] The constitutions of Maryland and North Carolina similarly provided, "That the legislative,

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[15] Mass. Const. of 1780, pt. 1, art. XXX: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men."

[16] Va. Const. of 1776: "The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time...."

[17] Ga. Const. of 1777, art. I: "The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other."

[18] Vt. Const. of 1786, Ch. II, Sec. VI: "The legislative, executive, and judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the other." *See also* G. Lawson and P. Granger, "The 'Proper' Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause," 43 DUKE L.J. 267 (1993).

[19] Ky. Const. of 1792, Art. I, Sections 1 and 2: "1. The powers of government shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to-wit: those which are legislative to one, those which are executive to another, and those which are judiciary to another. 2. No person, or collection of persons, being of one of these departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly permitted."

executive and ... judicial powers ought to be forever separate and distinct from each other."[20]

B. The Non-Delegation Doctrine and the Intelligible Principle Exception.

In 1892, this Court flatly declared "That Congress cannot delegate legislative power to the President is a principle universally recognized as 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).

Yet, as government became bigger and the federal budget became larger, there developed pressure on courts to ignore the original plan and allow the growth of the executive power. As a result, even before the pressures on this Court from President Roosevelt and his New Deal, this Court — while still paying rhetorical homage to the nondelegation doctrine — crafted a new test that over time has effectively eviscerated the doctrine. "If Congress shall lay down by legislative act **an intelligible principle** to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (emphasis added). While the "intelligible principle" standard has the sound of a legal principle, it must be noted that it is neither grounded in the constitutional text, nor is it a term with a meaning

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[20] J. Hood at 136-137.

developed at common law. Thus, it was no surprise that over time various courts would give their own meaning to these vague, indeed empty words.

From its beginning almost a century ago, the Court repeatedly has allowed executive branch officials not just to "fill in the details" as Justice Marshall described their legitimate role, but to "write the laws" — so long as they call them "regulations," "rules," "guidance," or the like, and can source them to some statutory authorization.

Congress has demonstrated itself to be willing to federalize every problem, and to use every excuse to assume control over every aspect of American life, including criminalizing areas that were to be left exclusively to the States. Thus, Congress has been complicit with the executive branch in the delegation of legislative purpose. Actually, delegation suits the political needs of Congress. When an agency issues a popular regulation, a Congressman can claim credit for authorizing it. When an agency issues an unpopular regulation, the Congressman can explain to his constituents that he was not responsible — it was some bureaucrat. Thus, the intelligible principle has not only elevated the executive branch over the Congress, but it has also made it exceedingly difficult for the American People to hold anyone in government politically accountable even for major decisions that affect their lives.

Professor Cass Sunstein, no opponent of executive power, describes the United States Code as having become "littered" with provisions authorizing

administrative agencies "to do whatever it thinks best." While he admits that may be an overstatement, it is still true that the doctrine "is now merely a bit of rhetoric." Moreover, "[s]ince 1935, the Supreme Court has not struck down an act of Congress on nondelegation grounds, notwithstanding the existence of a number of plausible occasions." C. Sunstein, "Nondelegation Canons," 67 CHI. L. REV. 315 (2000).

In 2001, in a case finding that the "intelligible principle" test was met, Justice Thomas stressed it was an atextual test that could fail to guard against executive usurpation of legislative power:

> **[T]he Constitution does not speak of "intelligible principles."** Rather, it speaks in much simpler terms: "*All* legislative Powers herein granted shall be vested in a Congress...." I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than "legislative." [*Whitman* at 487 (Thomas, J., concurring) (emphasis added).]

Addressing the issue again in 2015, Justice Thomas explained that: "The Constitution does not vest the Federal Government with an undifferentiated 'governmental power.' Instead, the Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches

of Government.... These grants are exclusive." *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 67 (2015) (Thomas, J., concurring). To this, Justice Alito succinctly set out the reasons for the nondelegation rule:

> The principle that Congress cannot delegate away its vested powers exists to **protect liberty**. Our Constitution, by careful design, prescribes a process for making law, and within that process there are many **accountability** checkpoints.... It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints. The Constitution's **deliberative process** was viewed by the Framers as a valuable feature ... not something to be lamented and evaded. [*Id.* at 61 (Alito, J., concurring) (emphasis added).]

Then in 2019, an intelligible principle was found to be sufficient, but the doctrine came under further attack. In dissent, Justice Gorsuch provided a sweeping review of the text, history, and tradition of the nondelegation doctrine. *Gundy* at 2134-35 (Gorsuch, J., dissenting). Justice Gorsuch proposed a three-part test: "Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments?" *Id.* at 2141 (Gorsuch, J., dissenting).

The case now before the Court provides yet another opportunity for this Court to re-examine the atextual intelligible principle test and discard it in favor of a textually faithful approach.

II. THE DEPARTMENT OF EDUCATION'S LOAN CANCELLATION PROGRAM IS UNPRECEDENTED AND NOT AUTHORIZED BY THE HEROES ACT.

A. The Secretary Has No Authority to Cancel Student Debt under the HEROES Act.

The HEROES Act authorizes the Secretary of Education to "waive or modify" statutory provisions of the Higher Education Act of 1965 under which the federal student loan regime was created. *See* 20 U.S.C. § 1098bb. Under the HEROES Act, the Secretary has limited statutory authority, to (1) "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" when (2) "necessary in connection with a ... national emergency" and (3) "necessary to ensure that ... recipients of student financial assistance ... who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." *Id.*

1. There is no qualifying national emergency.

Congress enacted the HEROES Act in the wake of the September 11, 2001 terrorist attacks, to assist

military personnel on active duty by allowing deferment of loan payments, "for our nation's defense." 20 U.S.C. § 1098aa(b)(1)–(6). The Act passed by a 421-1 vote in the House[21] and a unanimous voice vote in the Senate,[22] giving no indication it authorized blanket waivers of student debt.

Although the HEROES Act also contained language allowing waiver of student debt "in connection with a war or other military operation or national emergency" (20 U.S.C. § 1098bb), that provision had never previously been used to cancel loans for all borrowers within a class.[23] It certainly does not apply to borrowers who are not "affected individuals" due to a covered emergency. And, there is no reason to believe that it could be triggered by the numerous states of emergency in which America has been continuously for decades.[24]

Almost completely unknown to Americans, as of 2019, America was technically under 31 active "national emergencies" (*e.g.,* assistance to Albanian insurgents in Macedonia (2001), election corruption in

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[21] *See* 149 Cong. Rec. H2553–54 (Apr. 1, 2003); 149 Cong. Rec. E663 (Apr. 3, 2003).

[22] 149 Cong. Rec. S10866 (July 31, 2003).

[23] U.S. Dep't of Justice, Office of Legal Counsel,"Use of the Heroes Act of 2003 to Cancel the Principal Amounts of Student Loans."

[24] *See* W. Olson & A. Woll, "Executive Orders and National Emergencies: How Presidents Have Come to 'Run the Country' by Usurping Legislative Power," *Cato Institute* (Oct. 28, 1999).

Belarus (2006), and election-related violence in the Congo (2006).[25] There has been no demonstration below that a law enacted after 9-11 was designed to be triggered by such evergreen emergency declarations. Indeed, if those types of declarations triggered the Heroes Act, it could be invoked at any time by any President.

"It is a familiar principle of statutory construction that words grouped in a list should be given related meaning." *Third Nat'l Bank in Nashville v. Impac Ltd.*, 432 U.S. 312, 322 (1977).[26] As the term "national emergency" is used within the phrase "war or other military operation or national emergency," it should not be understood as providing blanket cancellation authority for other types of national emergencies, especially when congressional findings specify the HEROES Act was intended to benefit active duty military personnel. The DOE had "never before adopted a broad ... regulation of th[at] kind." *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 666 (2022).

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[25] K. Heath, "Here's a list of the 31 national emergencies that have been in effect for years," *ABC News* (Jan. 10, 2019).

[26] *Accord*, Scalia & Garner, Reading Law §31, p.195 (Thomson West: 2012).

2. The Secretary has no authority to "waive" entire loans for entire classes of borrowers.

The HEROES Act gives the Secretary authority to "modify" — but not waive — his determination of "'annual adjusted family income' … to reflect more accurately the financial condition of" affected individuals, (20 U.S.C. § 1098bb(a)(2)(C)), and the calculation of refunds to schools "so that no overpayment will be required to be returned or repaid." *Id.* § 1098bb(a)(2)(D). "Modify" means "to change moderately or in minor fashion." *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994) (the word "modify" in a federal law "has a connotation of increment or limitation"). A waiver is much more than a modification, here costing the federal government a half-trillion dollars.

The Secretary has statutory authority to "waive" a requirement of the HEROES Act to prevent "affected individuals" from being placed "in a worse position financially in relation to" their student loans "because of their status as affected individuals." *Id.* 20 U.S.C. § 1098bb(a)(2)(A). The Secretary also may waive "administrative requirements placed on affected individuals" to the extent he can do so "without impairing the integrity of the student financial assistance programs." *Id.* § 1098bb(a)(2)(B). However, neither of these waiver provisions apply here. The program places at least 20 million student borrowers not just *in statu quo*, but in a better position than they were before the COVID "emergency," by completely cancelling their debt. And it eviscerates "the integrity

of the student financial assistance programs" by removing a half-trillion dollars in assets payable to the federal government when Congress has not appropriated these monies.

B. The Unprecedented Nature of the Program Demonstrates that It Is Not Statutorily Authorized.

President Biden's own Office of Legal Counsel concedes that "the direct cancellation of the principal balances of student loans would be a new application of the statute."[27] The Congressional Research Service agrees that "[c]ategorical cancellation ... reflects a use of [the Secretary's] HEROES Act authority that is unlike past invocations."[28]

This "lack of historical precedent," coupled with the breadth of authority that the Secretary now claims, is a "telling indication" that the mandate extends beyond the agency's legitimate reach. *See Nat'l Fed'n of Indep. Bus. v. OSHA* at 666.

Even President Biden has questioned his own authority to issue blanket cancellations of student debt. "Biden entered the presidency deeply skeptical of the idea of writing off large chunks of student loan debt. He questioned publicly whether he had the

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[27] Office of Legal Counsel, "Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans."

[28] Congressional Research Service, "Statutory Basis for Biden Administration Student Loan Forgiveness" at 1.

authority to do it."[29] But despite his doubts as to legal authority, "[d]uring the campaign, he promised to provide student debt relief."[30]

As recently as July 28, 2021, House Speaker Nancy Pelosi defended the jurisdictional authority of Congress, warning that the Biden Administration had no legal authority for a blanket cancellation of student debt. "People think that the President of the United States has the power for debt forgiveness. He does not.... [H]e does not have that power. That has to be an act of Congress."[31]

Just last year, the EPA "Clean Power Plan" rule was struck down by this Court where the Secretary's "view of [the agency's] authority was not only unprecedented; it also effected a fundamental revision of the statute, changing it from [one sort of] scheme of ... regulation into an entirely different kind." *West Virginia v. EPA*, 142 S. Ct. 2587, 2612 (2022) (internal quotation omitted). That description applies here. As Justice Gorsuch stated then: "[A]n agency's attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning

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[29] M. Stratford and E. Daniels, "How Biden finally got to 'yes' on canceling student debt," *Politico* (Aug. 25, 2022).

[30] The White House, "Fact Sheet: President Biden Announces Student Loan Relief for Borrowers Who Need It Most" (Aug. 24, 2022).

[31] N. Pelosi Press Release, Transcript of Pelosi Weekly Press Conference Today (July 28, 2021).

sign that it is acting without clear congressional authority." *Id.* at 2623 (Gorsuch, J., concurring).

In creating the federal student loan regime, Congress did not make it easy for students to avoid repayment of loans, which are not even dischargeable in bankruptcy. *See* 11 U.S.C. § 523(a)(8).

Nor does Congress "typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme." *West Virginia* at 2609 (quoting *MCI Tele. Corp. at* 229). Where Congress has acted to discharge student loans, it has done so to address only limited and narrowly targeted instances. *See, e.g.*, 20 U.S.C. §§ 1098cc (tuition breaks for military service members), 1087 (cancellation of loans of deceased, disabled, or bankrupt students), 1087e(f) (deferment), and 1087e(m)(2) (loan cancellation amount). Moreover, in 2020, in the heart of the COVID pandemic, Congress considered, but declined to enact, a proposal to provide up to $10,000 in student-loan debt. *See* H.R. 6800, 116th Cong. § 150117 (2020).

C. If the Waiver Program Is Found to Be Statutorily Authorized, the HEROES Act Is an Unconstitutional Delegation of Legislative Power.

The Secretary asserts that the HEROES Act "grants the Secretary expansive power to 'waive or modify' any provisions of title IV and its implementing

regulations,"[32] that "class-wide debt relief in these circumstances is appropriate" under the Act (*id.*), and that a blanket cancellation of a half-trillion dollars in debt that Congress has directed to be repaid — and indeed has expressly declined to cancel statutorily — constitutes a "waiver" or "modification" of Congress's loan repayment directive. *Id.*

If the Court finds that this interpretation of the Act is correct, and Congress actually has delegated to the Executive Branch the authority to write a new law, then the HEROES Act most certainly would constitute an unconstitutional delegation of "powers which are strictly and exclusively legislative." *Wayman,* 23 U.S. at 42.

III. THE EXECUTIVE BRANCH'S REPEATED ATTEMPTS TO USURP LEGISLATIVE POWER REQUIRE GUIDANCE FROM THIS COURT.

During the Biden Administration, on repeated occasions, this Court has been required to strike down usurpations of legislative power by executive branch agencies. However, thus far the Court has done so based on a finding of a lack of statutory authorization for the challenged action or some defect in the agency's adherence to the Administrative Procedure Act, avoiding a ruling on constitutional grounds. Consider the following three recent cases evaluating executive actions of the Biden Administration.

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[32] Office of Legal Counsel, "Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans" at 2-4.

In August 2021, this Court decided *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021), and struck down the "unprecedented" "claim of expansive authority" assumed by the Department of Health and Human Services and the Centers for Disease Control to impose a nationwide eviction moratorium due to the COVID-19 outbreak. *Id.* at 2489. The Court avoided the constitutional issue by finding that the eviction moratorium exceeded statutory authority. *Id.* at 2490.

In January 2022, citing the "Major Questions Doctrine" — which the Court likened to the Nondelegation Doctrine as being grounded in the separation of powers concerns — this Court struck down a COVID "vaccination" mandate from the Labor Department's Occupational Safety and Health Administration. The mandate required that all employers with 100 or more employees force every employee to receive the "vaccination." *Nat'l Fed'n of Indep. Bus. v. OSHA* at 662. Again, this Court found the mandate exceeded OSHA's statutory authority and noted that "[i]t is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind." *Id.* at 665-66.

In June 2022, this Court struck down the Environmental Protection Agency's Clean Power Plan rule, which addressed carbon dioxide emissions from existing coal- and natural-gas-fired power plants. *See West Virginia v. EPA*. Again the Court decided the case based on the "Major Questions Doctrine." The Court noted that the authority claimed by the EPA "conveniently enabled it to enact a program that ... 'Congress [had already] considered and rejected....'"

Id. at 2614. This Court struck down the agency action on the basis that it exceeded statutory authorization. *Id*. at 2615-2616. In his concurrence, Justice Gorsuch noted the huge separation of powers problem raised by the EPA's action and the importance of that scheme of separation to individual liberty. "Permitting Congress to divest its legislative power to the Executive Branch would dash [this] whole scheme. Legislation would risk becoming nothing more than the will of the current President, or, worse yet, the will of unelected officials barely responsive to him." *Id.* at 2618 (Gorsuch, J., concurring) (internal quotations omitted).

While there is no doubt merit in adhering to the constitutional avoidance doctrine, it is clear that the Executive Branch has learned nothing whatsoever from this Court's rebuffs based on statutory language, and, if past is prologue, more executive usurpations can be expected during the remaining years of the Biden Administration. This causes parties aggrieved by lawless Executive Branch actions to be under continual threat, and in constant litigation, with the nondelegation doctrine lurking in the background of each challenge. Accordingly, these *amici* suggest that this case be the one that falls within the rule Justice Gorsuch articulated in his 2019 dissent in *Gundy*:

> when a case or controversy comes within the judicial competence, **the Constitution does not permit judges to look the other way**; we must call foul when the constitutional lines are crossed. Indeed, the framers afforded us independence from the political branches in large part to encourage exactly this kind of

> "fortitude ... to do [our] duty as faithful guardians of the Constitution.... [W]e have an obligation to decide whether Congress has unconstitutionally divested itself of its legislative responsibilities." [*Gundy at* 2135 (Gorsuch, J., dissenting) (emphasis added).]

Indeed, this case provides this Court an excellent opportunity to serve as those "faithful guardians of the Constitution" by declaring the Department of Education's program to be a usurpation of legislative power, fulfilling the obligation set out by Chief Justice Marshall "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

CONCLUSION

For the foregoing reasons and for the reasons set out in the briefs for respondents, the lower court injunctions should be affirmed.

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