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.

NEBRASKA, *et al.*,

Respondents.

DEPARTMENT OF EDUCATION, *et al.*,

Petitioners,

v.

MYRA BROWN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH AND EIGHTH CIRCUITS

BRIEF OF *AMICUS CURIAE* THE PROTECT DEMOCRACY PROJECT IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Protect Democracy Project ("Protect Democracy") files this brief in support of Respondents out of concern for executive branch abuses of emergency powers that harm our democracy.

Protect Democracy is a nonpartisan nonprofit organization whose mission is to prevent our democracy from declining into a more authoritarian form of government. As part of that mission, Protect Democracy engages in various forms of advocacy aimed at preventing abuses of executive power, including abuses of emergency powers. Along with a cross-partisan co-counsel team, Protect Democracy filed a lawsuit on behalf of El Paso County and the Border Network for Human Rights to enjoin former President Trump's use of an emergency declaration to access federal funds to build a border wall in contravention of congressional appropriations. It has also given congressional testimony and otherwise advocated for reforms to the National Emergencies Act. *See* Testimony of Soren Dayton Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, House Judiciary Committee (May 17, 2022) ("Dayton Testimony").

Protect Democracy urges the Court to review the student loan relief plan at issue, which relies on emergency authority contained in the HEROES Act of

1. Pursuant to Rule 37.6, no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund this brief, and no person other than amicus and its counsel contributed money to fund this brief.

2003, by applying an analytic framework that effectuates the entirety of the statutory scheme applicable to congressional delegations of emergency powers. The purpose of that scheme is to give the executive branch the ability to respond to unforeseen events with immediate short-term action that Congress is ill-suited to address, but not to authorize the executive branch to supplant Congress's constitutional role in addressing long-term problems.

Concurrently with this brief, and to that same end, Protect Democracy filed an amicus brief in *Arizona v. Mayorkas*, No. 22-592, in support of the Biden administration—which is seeking to terminate the use of emergency authorities—because the same principle applies: reviewing courts should give effect to congressional intent in delegating emergency powers to the executive branch, including by not stepping into the executive's delegated role.

Protect Democracy expresses no view on whether the Respondents have standing in this case; its sole interest here is in the proper construction of emergency statutory authorities in a manner that ensures the executive branch uses emergency powers in accordance with the original purpose for which Congress delegated them and separation of powers principles. Protect Democracy recognizes the significance of the student debt challenge, but also expresses no view on whether the particular student loan relief plan at issue here is good policy. Protect Democracy likewise recognizes the severity of the Covid-19 pandemic, including the staggering loss of life and damage inflicted on the American economy. Furthermore, it is important to recognize that both

student debt and the pandemic have disproportionately harmed lower income and minority communities. *See, e.g.*, Brief of the Lawyers' Committee for Civil Rights Under Law & 21 Other Organizations as Amici Curiae at 4-5 ("COVID-19 has compounded racial disparities and inflicted particularized harm on Black and Latinx borrowers."). But the answer to these problems is not the unchecked aggrandizement of executive power. And in this regard, Protect Democracy notes that it appears there may be other lawful ways the Biden administration could use executive action to achieve the goal of relieving student debt. *E.g.*, 20 U.S.C. § 1082.[2]

SUMMARY OF ARGUMENT

This case requires the Court to consider how to interpret legislative delegations of emergency authority to the executive branch. The student debt relief policy at issue relies on provisions of the Higher Education Relief Opportunities for Students ("HEROES") Act of 2003, 20 U.S.C. §§ 1098aa-1098ee. Like other statutory delegations of emergency powers, the HEROES Act reflects Congress's desire to enable the executive to act as necessary to protect national interests in unforeseen situations requiring immediate action that Congress itself is ill-suited to take. *See* Testimony of Elizabeth Goitein Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, House Judiciary Committee at 2 (May 17, 2022) ("Goitein Testimony"). *See also* Petitioners' Brief at 6 ("Several provisions of the HEROES Act underscore

2. *See also* Jed Shugerman, *Biden's Student-Debt Rescue Plan is a Legal Mess*, The Atlantic (Sept. 4, 2022), https://tinyurl.com/yck84djy.

Congress's intent to authorize the Secretary to respond quickly and fully to national emergencies."). But the HEROES Act is not the only statute at issue. Because the HEROES Act confers special powers on the executive branch in the context of a "national emergency," which "means a national emergency declared by the President of the United States," 20 U.S.C § 1098ee(4), the exercise of those powers is unlocked by the National Emergencies Act of 1976 ("NEA")—the overarching framework Congress established both to facilitate and to constrain executive action in response to "national emergencies." *See* 50 U.S.C. §§ 1601-1651; Petitioners' Brief at 6 (citing 50 U.S.C. §§ 1621-1622). The full statutory framework is therefore relevant here. Petitioners ask this Court to read the HEROES Act in a vacuum and thus afford the federal government virtually unlimited discretion to relieve student debt, without regard to either the broader statutory scheme of which the HEROES Act is a part or the constitutional consequences of expansive executive authority the statutory scheme was intended to avert. *See* Petitioners' Brief at 33-37.

Congress did not intend emergency authorizations to allow end-runs around the standard law-making process, where it is available, or to allow the executive branch to implement long-term policy goals. In considering cases involving statutory emergency authorizations, courts should be careful not to usurp the president's lawfully delegated discretion to act in true emergencies, but they should apply a standard that ensures the president does not use emergency powers as a pretext for achieving policy objectives that have a tenuous relationship to the declared emergency. This approach to statutory interpretation—a tailored emergency actions analysis—best effectuates Congress's original purpose in emergency authorizations.

Recognizing that there are unforeseen and fast-moving situations that require quick action beyond the capabilities of the normal legislative process, Congress has, through various statutes, including the NEA and the HEROES Act, delegated authority to the president to act in emergencies. Precisely because of the unforeseeable nature of emergencies, these delegations of authority are broad to give the president room to maneuver; this is a feature, not a bug. Yet at the same time, such broad delegations of emergency power are prone to abuse, often at the expense of civil rights and liberties, especially those of racial and religious minorities and other historically disadvantaged groups. Indeed, our history is riddled with instances in which the executive branch has used actual or purported emergencies as a basis for curtailing liberties or otherwise harming people based on their race, religion, nationality, and other characteristics. These broad delegations of legislative power also threaten our constitutional separation of powers when the executive invokes them as a pretext to skirt the legislative process and implement long-term policy agendas, while also arguing that its authority is so open-ended as to be unreviewable by the courts. This threat became more acute when this Court decided in *INS v. Chadha*, 462 U.S. 919 (1983), that legislative vetoes are unconstitutional, thus removing a guardrail Congress wrote into the NEA. *See* Dayton Testimony at 2-4.

To give effect to the congressional purpose underlying emergency delegations while also preserving the separation of powers and avoiding the dangers associated with abuses of "emergencies," courts should review exercises of emergency powers in a manner that gives adequate deference to the executive branch but holds it

accountable to the purpose for which Congress delegated the powers in the first place. To that end, in cases construing an emergency statutory authorization such as the one here, courts should consider the following factors: Is there an actual "emergency"? Is there a sufficient nexus between that emergency and the exercise of concordant powers? Is the executive branch invoking the emergency as a pretext to achieve tenuously related policy goals? And finally, does the executive action further a long-term shift of authority away from the legislative branch? Each of these considerations will help the Court assess whether the executive action falls within the scope of what Congress authorized.

This tailored statutory construction framework is better suited to give effect to congressional intent in delegating emergency powers than the approach advanced by Petitioners, which argues for the broadest possible reading of the text of the HEROES Act without regard to the overarching context of the NEA, thus ignoring the scope of authority Congress intended to delegate. *See* Petitioners' Brief at 33-37. And applying a framework tailored for emergency actions, the Court should conclude that, however well intended, the student loan relief plan exceeds what Congress authorized.

After failing to persuade Congress to enact legislation to relieve billions of dollars in student loan debt, the Biden administration instead invoked a provision of the HEROES Act that allows the Secretary of Education to "waive or modify any statutory or regulatory provision applicable to" student aid programs administered by the Department of Education if "a national emergency" caused student borrowers to be "placed in a worse position financially."

20 U.S.C. § 1098bb(a)(1)-(2)(A). The circumstance claimed to justify the loan relief plan is the Covid-19 pandemic and the resulting emergency proclamation initially issued by former President Trump in March 2020 under the NEA and since continued by the Biden administration. While the pandemic was certainly a validly declared emergency in 2020, the relationship between the Covid-19 emergency and the need permanently to relieve student loan debt is highly strained. It is clear that the program is instead meant to carry out a long-term policy agenda—one that meaningfully shifts power away from the legislative branch. For all of these reasons, application of a tailored statutory construction framework weighs against upholding the student loan relief plan.

ARGUMENT

I. Congress did not intend open-ended delegations of emergency powers to the executive branch

Emergency powers are necessary in a well-functioning government, but are also ripe for abuse. Congressional delegations of emergency powers are therefore designed to give the executive branch flexibility to respond quickly to unforeseen events while also limiting their use to immediate responses to actual emergencies.

A. Congress has recognized that, unless properly checked, emergency powers are subject to abuse

Congress has long recognized that the legislative process often moves too slowly to ensure an effective federal response to unforeseen disasters and other

emergencies, and that some deviation from business as usual—in which Congress passes specific laws and appropriates funds and the president implements those decisions—is necessary. Accordingly, Congress has authorized presidents to declare "national emergencies" and to exercise special powers to address them. *See* 50 U.S.C. § 1621; *see also* Goitein Testimony at 3-4. But as Congress has also recognized, emergency executive action—even when taken in good faith—poses a threat to the separation of powers, and emergencies can be used to justify suspending civil rights and liberties.

The NEA grants the president broad authority to declare emergencies and then to access at least 123 statutory powers once he or she has done so.[3] For example, the HEROES Act at issue here authorizes the Secretary of Education to take certain actions the Secretary "deems necessary" on behalf of those who have suffered "direct economic hardship as a direct result of a . . . national emergency." 20 U.S.C. §§ 1098bb(a)(1), 1098ee(2)(D). Congress purposely did not define the term "emergency" in the NEA and it has typically described the latitude given to the executive branch to use emergency authorities in terms like the "deems necessary" language found in the HEROES Act. *Id.* § 1098bb(a)(1). At the same time, under current law, Congress cannot terminate an emergency declaration under the NEA without a veto-proof vote of both chambers. *See* Dayton Testimony at 3. These features of the NEA and related emergency authorizations underscore congressional intent to give the president maximum flexibility to act in immediate response to

3. Brennan Center for Justice, *A Guide to Emergency Powers and Their Use* (2018), https://tinyurl.com/bdzbp7uu.

unforeseen events. But, as expert Elizabeth Goitein has explained, they have also fostered an environment in which "[n]ational emergencies are . . . easy to declare and hard to stop," and that allows the president to use sweeping powers Congress never intended to authorize. *See* Goitein Testimony at 8.

American history provides numerous examples of the dangers posed by presidential abuse of emergency power. President Truman used the exigencies of the Korean War as justification to seize control of the steel industries during a strike in 1952, which this Court struck down in *Youngstown Sheet & Tube Company v. Sawyer*, 343 U.S. 579 (1952). President Roosevelt used the Japanese attack on Pearl Harbor as justification to round up Japanese Americans and place them in internment camps, a move this Court upheld at the time, *Korematsu v. United States*, 323 U.S. 214 (1944), but has since repudiated, *see Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018). More recently, President Trump declared a state of emergency at the Southern border for the express purpose of accessing funding Congress had refused to give him to build a border wall, denigrating Mexican and Central American migrants, as well as Latino members of the American border community, in the process.[4] And we know now that President Trump considered using emergency powers to seize voting machines following his election defeat in 2020. *See* Goitein Testimony at 16-17.

Aspiring autocrats abroad also often invoke shaky emergency authorities to consolidate and aggrandize their

4. *See, e.g.*, Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. Times (Feb. 15, 2019), https://tinyurl.com/3bn8xymy.

power. Democracy scholars Steven Levitsky and Daniel Ziblatt have detailed many recent examples:

> In Peru, a Maoist insurgency and economic crisis enabled [Alberto] Fujimori to dissolve the Constitution and Congress in 1992; in Russia, a series of deadly apartment bombings in 1999 – allegedly by Chechen terrorists – triggered a surge of public support for [Vladimir] Putin, who was then the prime minister, which allowed him to crack down on critics and consolidate his power; and in Turkey, a series of terrorist attacks in 2015, along with a failed 2016 coup attempt, allowed [Recep Tayyip] Erdogan to tighten his grip via a two-year state of emergency.[5]

Thus, the need for a specially tailored framework for reviewing exercises of emergency powers—even in cases in which executive action is well-intended—is grounded in a broader context and history illustrating the dangers posed by such powers.

B. Congress has recognized the need both to delegate and to constrain the use of emergency powers

By the mid-1970s, Congress expressly recognized the threat to the separation of powers posed by national emergencies and the use of executive power to address

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5. Steven Levitsky & Daniel Ziblatt, *Why Autocrats Love Emergencies*, N.Y. Times (Jan. 12, 2019), https://tinyurl.com/9aez6cnb.

them. By that time, presidents possessed emergency powers under hundreds of "emergency statutes" conferring powers that far outpaced the threats posed by these oft-stale "emergencies." Thus, as part of the reforms enacted in the wake of the Watergate scandal, Congress passed the NEA to limit the future use of emergency powers to only those situations "when emergencies actually exist, and then only under safeguards of congressional review." S. Rep. No. 94-1168, at 2 (1976). The point of the law was to prevent the president from "rul[ing] the country without reference to normal constitutional process," *id.*, and "to place limits on presidential use of emergency powers," Goitein Testimony at 4-5. As the legislative history makes explicit, "*The National Emergencies Act is not intended to enlarge or add to Executive power.* Rather the statute is an effort by the Congress to establish clear procedures and safeguards for the exercise by the President of emergency powers conferred upon him by other statutes." S. Rep. No. 94-1168, at 3 (emphasis added). The NEA therefore did not grant the president any new or specific emergency authorities, but instead made a series of changes to the process by which presidents could access them in order to protect the separation of powers.

First, the NEA terminated all then-existing emergencies, essentially wiping the slate clean. 50 U.S.C. § 1601.

Second, Congress gave the president power to declare national "emergencies" in order to unlock the extraordinary powers that other federal statutes grant him on an "emergency" basis. *Id.* § 1621. Congress's use of "emergency"—rather than, say, "national crises" or "national issues of grave importance"—is telling. The

ordinary meaning of "emergency" in 1976 (as it remains today) was "[a] situation or occurrence of a serious nature, developing suddenly and unexpectedly, and demanding immediate action." American Heritage Dictionary 427 (1st ed. 1976); *see also* Webster's New Collegiate Dictionary 372 (8th ed. 1976) ("[A]n unforeseen combination of circumstances or the resulting state that calls for immediate action."). While grants of statutory authority to respond to inherently unforeseen circumstances will necessarily be broad, that does not render Congress's delegation of powers unlimited. Congress's use of "emergency" makes clear that presidents may invoke these extraordinary powers only where the problem of national importance is "sudden" or "unexpected" and requires the kind of "immediate action" that the legislative process was often ill-suited to provide.

Third, in order to facilitate oversight of and accountability for the president's use of emergency powers, Congress imposed new transparency requirements. Under the NEA, presidents can declare emergencies only via proclamations, which must "immediately be transmitted to the Congress and published in the Federal Register." 50 U.S.C. § 1621(a). And, when presidents exercise emergency powers, they must contemporaneously tell both Congress and the public which emergency they are addressing and which "provisions of law" they are invoking. *Id.* § 1631. By requiring that claims of authority be made in advance, Congress guarded against the president using emergency powers to explain executive action only after the fact when sued for overreach. That statutory choice suggests that Congress feared presidents would use executive authority as pretext to aggrandize their power—including as end-runs around Congress itself.

Fourth, Congress gave itself the power to terminate a national emergency declaration by joint resolution passed by a simple majority vote of each chamber not subject to presidential veto. *Id.* § 1622(a). Accordingly, Congress meant to prevent the president from governing indefinitely without regard for regular order. This provision of the NEA is clear evidence that Congress saw meaningful external checks on the executive as crucial to a workable emergencies framework. Relatedly, the NEA obliged *Congress itself* to revisit—via joint resolution—the continued propriety of each emergency declaration every six months. *Id.* § 1622(b). Congress therefore also intended that stale emergencies be terminated, lest they linger and invite executive overreach. But this Court's ruling in *Chadha*, 462 U.S. at 954-55, severely limited Congress's own ability to police the president's use of emergency powers. In holding joint resolutions carrying the force of law to be unconstitutional "legislative vetoes," the Court restored the president's veto power over emergency declarations.[6] Thus, the courts are now the principal actors outside the executive branch who can police the separation of powers in the emergency context.[7]

In each of these ways, Congress developed an approach to enable the executive to act as necessary in emergencies while indicating its intent to prevent the

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6. Congress codified the requirement that termination votes be presented to the president in 1985. *See* 50 U.S.C. § 1622(a)(2).

7. While the Court has a critical responsibility to police abuses of emergency powers, that is not an invitation to usurp executive power itself or to second guess the other branches more than is necessary to preserve the proper balance of power between them. *See* Br. of Protect Democracy, *Arizona v. Mayorkas,* § II.

executive branch from seizing on emergencies to subvert the legislative process and the constitutional separation of powers.

II. This Court's construction of emergency statutory delegations, including the HEROES Act, should be guided by the text and history of emergency delegations and separation of powers principles

As described above, in delegating emergency powers to the president in the NEA and subsequent emergency authorizations, Congress intended to authorize the executive to act in a true emergency, but not to license end-runs around the standard lawmaking process. To best give effect to Congress's intent, in cases challenging the invocation of emergency powers, courts should apply a tailored "emergency actions" analysis. *Cf. West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (noting that "in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent" call for a tailored interpretive approach). A tailored analysis best gives effect to the central term in the statutory text ("emergency") as well as the separation of powers principles animating the history and structure of the statutory scheme.[8] In these ways, the framework offers both a textualist guide to interpretation and also preserves important constitutional values.[9]

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8. *See* Jed Shugerman, *Major Questions and an Emergency Question Doctrine: The Biden Student Debt Case Study of Pretextual Abuse of Emergency Powers* (Feb. 1, 2023), https://tinyurl.com/52j8t8h3.

9. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 168 (2010).

A. Courts should weigh several factors to determine whether emergency executive actions exceed what Congress authorized

To determine whether an emergency executive action accords with legislative intent and is authorized by the applicable statute, courts should weigh a set of factors derived from the unique purpose and history of the NEA and subsequent emergency delegations. Not all of these factors will be relevant in all emergency action cases and courts will still need to exercise judgment in balancing them. Taken together, however, applying an analytic framework tailored to emergency actions can best give effect to Congress's intent.

1. Is the precipitating situation a qualifying "emergency"—an unforeseen set of circumstances calling for immediate action?

The HEROES Act, like the NEA, authorizes the president to take certain actions in the event of an "emergency"—a term these statutes do not define explicitly. Cases involving statutes authorizing the executive to act in an "emergency" often present two related interpretive questions: (i) is there a qualifying emergency, and (ii) if so, is the action taken within the scope of what Congress authorized the executive to do in the event of an emergency? The term "emergency" is best construed "in accordance with [its] ordinary meaning." *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013). As described above, under dictionary definitions contemporaneous with the NEA, as well as extensive case law, an "emergency" is "an unforeseen combination of circumstances or the

resulting state that calls for immediate action." *See* Webster's New Collegiate Dictionary, *supra*. *See also Van de Walle v. Am. Cyanamid Co.*, 477 F.2d 20, 23 (5th Cir. 1973) (because employee's shift "was neither unfamiliar nor unexpected," it could "hardly be characterized as an 'emergency' as that term is commonly used"); *Taylor v. Bair*, 414 F.2d 815, 821 (5th Cir. 1969) (an "emergency" is "a condition arising suddenly and unexpectedly . . . and which calls for immediate action . . . without time for deliberation." (quoting *Goolsbee v. Texas & N.O.R. Co.*, 243 S.W.2d 386, 388 (Tex. 1951)); *United States v. Gov't of V.I.*, 363 F.3d 276, 289 n.10 (3d Cir. 2003) (wastewater problem was not an "emergency" because it was longstanding and "could not be construed as surprising or unexpected"). Thus, the first question for courts to consider in emergency powers cases is whether the precipitating event is indeed the type of unforeseen circumstance that Congress would have anticipated requires immediate action.

2. How close is the nexus between the emergency and the action taken?

The history and structure of the NEA, and the plain meaning of the term "emergency," indicate that to give effect to congressional intent, courts must also consider the nexus between the emergency and the executive action. While Congress understandably chose not to place additional limitations around the term "emergency," it did not intend to allow the president to point to one emergency as a basis for undertaking ancillary actions. *See Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) ("Indeed, the Government's read of §361(a) would give the CDC a breathtaking amount of authority. It is hard to see what measures this interpretation would

place outside the CDC's reach."). An important factor for a court in assessing whether an emergency action is within the scope of what Congress authorized, then, is the nexus between the executive action and the precipitating emergency. If there is a close nexus between the two, then it is more likely to be within the scope of what Congress delegated, even if Congress has not said so explicitly. If the nexus is strained—and if the policy is broader in scope or longer in time than reasonably explained by the emergency—then it is less likely the executive is exercising power consistent with legislative intent. *See, e.g., Arizona v. Mayorkas*, 143 S. Ct. 478, 479 (2022) (Gorsuch, J., dissenting) ("But the current border crisis is not a COVID crisis.").

3. Does the context of the executive branch's actions suggest the invocation of the emergency is pretextual?

Courts should consider the administrative and legislative record surrounding emergency executive action to assess whether it was truly the type of "immediate action" required to respond to unforeseen circumstances or, instead, is an attempt to use an emergency to pursue separate policy goals. Thus, for example, if the executive branch has sought statutory authorization to take a particular action and Congress has affirmatively rejected that authority, and the executive then invokes an emergency authority to achieve the same outcome, that is an indication of pretext. This was the case when President Trump sought a specific amount of funding from Congress for border wall construction, provoked a prolonged government shutdown when Congress passed the Consolidated Appropriations Act specifically

limiting spending to an amount significantly lower than his request, and then finally issued an emergency proclamation to access the amount of funds he desired. *See* Plaintiffs' Motion for Summary Judgment at 4-6, *El Paso County v. Trump*, No. 19-cv-00066 (W.D. Tex. 2019). Similarly, the full administrative record, including candidate or presidential statements, can also assist courts in distinguishing between an immediate action required to address an unforeseen situation and action taken to advance other policy goals. *See Trump v. Hawaii*, 138 S. Ct. 2392 at 2433 (Breyer, J., dissenting) ("I would, on balance, find the evidence of antireligious bias, including statements on a website taken down only after the President issued the two executive orders preceding the Proclamation, along with the other statements also set forth in Justice Sotomayor's opinion, a sufficient basis to set the Proclamation aside."); *id.* at 2440 (Sotomayor, J., dissenting) (urging the Court to consider a broader set of administrative evidence); *see also New York v. Dept. of Commerce*, 139 S. Ct. 2551, 2575-76 (2019) ("Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision.").

4. Does the action result in longer-term exercise of power or aggrandizement of power to the executive branch?

Courts can presume, given the text and history of the NEA and subsequent statutes, that Congress does not intend for emergency authorizations to enable the executive to take actions that shift power away from the legislative branch over the long-term or allow the executive branch to implement a long-term policy agenda. *Cf. Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2033

(2020) ("Such a categorical approach would represent a significant departure from the longstanding way of doing business between the branches, giving short shrift to Congress's important interests in conducting inquiries to obtain the information it needs to legislate effectively."). Longer-term shifting of power to the executive branch in an emergency could present in different ways. It could involve the executive taking an action that has a long or indefinite duration, such as promulgating a permanent regulation, creating permanent physical infrastructure, or placing itself in charge of decisions about government funds for a significant period of time. In these types of situations, it is less likely that Congress intended to authorize the executive to act in this way.

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Each of these factors derives from unique considerations arising from the text and purpose of emergency statutes, as well as from this Court's precedents and standard approaches to statutory interpretation, and so can aid courts in construing emergency statutes to determine whether they authorize a particular executive emergency action. No one of them will necessarily be dispositive in any given case, but taken together they can enable courts to check executive abuses of emergency powers—while avoiding infringing on Congress's and the executive's discretion in handling emergency situations.

B. Applying a tailored emergency action analysis to the student loan relief plan indicates that it exceeds congressional authorization

Not all of the factors identified above are implicated in this case. In particular, there is no question that Covid-19

was a bona fide emergency of the type contemplated by the NEA and the HEROES Act (factor 1) and both the Trump and Biden administrations exercised HEROES authority in response to the Covid-19 emergency prior to the issuance of the student loan relief plan. *See* Brief of the Lawyers' Committee for Civil Rights Under Law at 7; Brief of 22 State Attorneys General as Amici Curiae at 5, 8-9. However, three of the factors set out above suggest that the student loan relief plan exceeds the bounds of the emergency action that Congress authorized in the HEROES Act.

First, the nexus between the Covid-19 emergency and permanent debt relief (factor 2) is highly strained. There is little intuitive connection between a public health emergency and a program to address a long-term structural problem in higher education financing. The HEROES Act allows the Secretary of Education to waive or modify the terms of federally administered student loans if "a national emergency" caused student borrowers to be "placed in a worse position financially." 20 U.S.C. § 1098bb(a)(2)(A). While the statute may not require borrower-by-borrower determinations (*id.* § 1098bb(b)(3)), the Department of Education recognized the need to identify "certain categories" of borrowers in need of relief "in connection with a . . . national emergency" and acknowledged that "[t]he Secretary's determinations regarding the amount of relief, and the categories of borrowers for whom relief is necessary, should be informed by evidence regarding the financial harms that borrowers have experienced, or will likely experience, because of the COVID-19 pandemic." The Secretary's HEROES ACT Authority, 87 Fed. Reg. 52943, 52944 (Aug. 30, 2022). Yet the final program requires no causal nexus between

the pandemic and the need for debt relief. While it does include an income threshold, it has no requirement of a connection to Covid-19 for any borrower and could benefit those unaffected or placed in a better financial position by the pandemic.[10] This absence of a close nexus between the emergency action and the triggering emergency indicates that the program exceeds what Congress authorized.

Second, the administration's invocation of the Covid-19 emergency appears to be a pretext for a program meant to address a long-term structural problem (factor 3). The clearest evidence of pretext is the mismatch described above between "the stated justification" (a Covid-19 emergency) and the "actual behavior" (a policy that requires neither a causal link to the emergency nor a remedy specific to the emergency). Beyond that, the timing of the debt relief program (late in the pandemic) and the substance of its announcement raise questions of pretext. President Biden undermined the emergency invocation when he declared that, "[t]he pandemic is over" on September 18, just three weeks after the announcement and before the program was finalized.[11] President Biden

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10. *See* Shugerman, *supra* note 2.

11. Scott Pelley, *President Joe Biden: The 2022 60 Minutes Interview*, CBS News (Sept. 18, 2022), https://tinyurl.com/bdfff3d6. To be sure, it is possible that some form of emergency relief could be "necessary" even after an emergency is over, for example to provide relief to those who continue to suffer the effects of the emergency. The conclusion of the emergency does not in and of itself establish that the action exceeds the emergency authority. However, taking action after an emergency calls into question whether the action is truly within the scope of authority Congress intended to delegate to the executive. Recall that the purpose of emergency declarations is to enable the executive to act with alacrity during an unforeseeable

also acknowledged that the real reason for the program was not the Covid-19 emergency but long-term challenges with the costs of higher education: "But here's the deal: The cost of education beyond high school has gone up significantly. The total cost to attend a public four-year university has tripled—nearly tripled in 40 years—tripled . . . . An education is a ticket to a better life . . . . But over time, that ticket has become too expensive for too many Americans."[12] And it is telling that similar student debt relief legislation was introduced in Congress and failed to pass the Senate.[13]

Finally, the student loan relief plan would allow the executive branch to implement a policy with long-term impact on the public fisc, impinging on a power that is usually reserved to Congress in our constitutional system. *See* U.S. Const. art. I, § 9, cl. 7. Estimates indicate that the student loan relief plan will cost approximately $400 billion.[14] This cost is not merely an expenditure that arises for a limited moment in time because an

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situation. Presumably if Congress wishes to act after an emergency has concluded, it can do so itself.

12. President Joe Biden, Remarks by President Biden Announcing Student Loan Debt Relief Plan (Aug. 25, 2022), https://tinyurl.com/5dwdn5nk; *see also* Shugerman, *supra* note 2.

13. *See* Jordain Carney, *McConnell, Senate GOP declare House Democrats; $3T coronavirus bill 'dead on arrival'*, The Hill (May 12, 2020), https://tinyurl.com/ns5xzrp3; Adam S. Minsky, *House Passes HEROES Act With Limits On Student Debt Relief – What's Next?*, Forbes (May 15, 2020), https://tinyurl.com/2p8e4dn6.

14. Ayana Archie, *Joe Biden's student loan forgiveness plan will cost $400 billion, budget office says*, NPR (Sept. 27, 2022), https://tinyurl.com/mryvey39.

unforeseeable circumstance requires "immediate action" (the definition of emergency). Rather, the Department of Education acknowledges that the "debt relief will cost an average of $30 billion a year over the next decade."[15] And the Department further acknowledges that the cost will accrue for "more than three decades." *Id.* If left unchecked, and replicated in other contexts, this type of program could create a massive shift of control over budgetary matters from Congress to the executive branch. The long-term implications of the program thus suggest it is not within the scope of emergency actions Congress intended to authorize in the HEROES Act.

* * * * *

In short, the absence of a close nexus between the Covid-19 emergency and the debt relief plan, the indicia that the executive branch seized on emergency authority to advance a separate long-standing policy goal, and the long-term implications of the program all suggest the executive action at issue here exceeds the scope of the emergency powers Congress intended to delegate to the executive branch.

15. Press Release, U.S. Department of Education, U.S. Department of Education Estimate: Biden-Harris Student Debt Relief to Cost an Average of $30 Billion Annually Over Next Decade (Sept. 29, 2022), https://tinyurl.com/nzvspcn7.

CONCLUSION

For the foregoing reasons, Amicus Protect Democracy respectfully encourages the Court to apply a tailored analysis attuned to the unique features of emergency statutory authorizations in considering this case.

Respectfully submitted,

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