Nos. 22-506 and 22-535

In the Supreme Court of the United States

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

STATE OF NEBRASKA, ET AL.,

Respondents.

DEPARTMENT OF EDUCATION, ET AL.,

Petitioners,

v.

MYRA BROWN, ET AL.,

Respondents.

On Writs of Certiorari Before Judgment to the United States Courts of Appeals for the Eighth and Fifth Circuits

BRIEF OF HAMILTON LINCOLN LAW INSTITUTE AND COMMITTEE FOR JUSTICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Hamilton Lincoln Law Institute ("HLLI") is a 501(c)(3) public-interest law firm committed to, among other things, defending the constitutional separation of powers and principles of limited government against executive-branch abuse.[1] *E.g.*, *Competitive Enter. Inst. v. FCC*, 970 F.3d 372 (D.C. Cir. 2020). This case not only presents critical separation-of-powers issues, but has personal resonance for the many attorneys of HLLI who expect to pay tuition for children attending college. The government's illegal changes to federal student loan policy will create perverse incentives that will substantially raise tuition for future students. *E.g.*, David O. Lucca, *et al.*, *Credit Supply and the Rise in College Tuition: Evidence from the Expansion in Federal Student Aid Programs*, FED. RESERVE BANK OF N.Y. STAFF REP. #733 (rev. Feb. 2017); Alex Tabarrok, *The Student Loan Giveaway is Much Bigger Than You Think*, Marginal Revolution blog (Aug. 27, 2022). Regrettably, because this actuarially certain expectation of future economic harm is not "imminent," existing standing doctrine might preclude HLLI attorneys from bringing suit on behalf of themselves. Missouri, on the other hand, has suffered cognizable injury.

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[1] Under this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or its counsel made a monetary contribution to its preparation or submission.

App. 4a-5a; Ilya Somin, *Federal Court Issues Dubious Decision Dismissing Six-State Lawsuit Against Biden Loan Forgiveness Program for Lack of Standing*, Volokh Conspiracy blog (Oct. 20, 2022). HLLI supports Missouri's suit and the plaintiffs' successful suit in *Brown v. Cardona*, 2022 U.S. Dist. LEXIS 205875 (N.D. Tex. Nov. 10, 2022).

The Committee for Justice (CFJ) is a non-profit legal and policy organization founded in 2002. It is dedicated to promoting the rule of law and preserving the Constitution's limits on federal power and its protection of individual liberty. Central to this mission is the constitutional separation of powers, which has allowed our democracy to endure and which is being threatened by the executive branch in the instant cases. Consistent with its mission, CFJ files *amicus curiae* briefs in key cases, supports constitutionalist nominees to the federal judiciary, and educates the American public and policymakers about the benefits of constitutionally limited government and the proper roles of our federal courts and administrative agencies.

SUMMARY OF ARGUMENT

This brief seeks to aid the Court by adding important context through focusing on the legislative text and history of the HEROES Act, which demonstrate the mastodon-in-the-mousehole problem here. *Cf. Whitman v. American Trucking Assoc., Inc.*, 531 U.S. 457, 468 (2001).

ARGUMENT

I. Under the major-questions doctrine, the text and legislative history of the HEROES Act demonstrate the unlawfulness of the executive branch's reliance on it to enact its Mass Debt Cancellation.

A. The HEROES Act is targeted to military personnel.

The HEROES Act was a wartime measure passed in the wake of the September 11 attacks and again shortly after the start of the Iraq War. *See* Pub. L. 107-122, 115 Stat. 2386 (Jan. 15, 2002); Pub. L. 108-76, 117 Stat. 904 (Aug. 18, 2003). At first the Act was to sunset in 2005, but Congress extended it for two additional years (Pub. L. 109-78, 119 Stat. 2043 (Sept. 30, 2005)), and in 2007, Congress made the Act permanent with no amendments. Pub. L. 110-93, 121 Stat. 999 (Sept. 30, 2007).

From the acronym title of the bill to the text of the HEROES Act itself, every aspect of the law is targeted primarily to military personnel. Section 1098aa(b) sets forth Congress's findings justifying the legislation; each finding speaks exclusively with respect to the armed forces and the men and women who serve in them. Congress recognized that "The men and women of the United States military put their lives on hold, leave their families, jobs, and postsecondary education in order to serve their country and do so with distinction." 20 U.S.C. §1098aa(b)(5). The final finding concludes "There is no more important cause for this Congress than to support

the members of the United States military and provide assistance with their transition into and out of active duty and active service." 20 U.S.C. §1098aa(b)(6).

Other provisions of the HEROES Act similarly are exclusively devoted to members of the armed services. For instance, §1098cc deals exclusively with "Tuition refunds or credits for members of armed forces" and the definitions in Section 1098ee relate largely to terms such as "Military Operation," "Active Duty," and "Qualifying National Guard Duty."

The Act defines "affected individual" as

> an individual who—
>
> > (A) is serving on active duty during a war or other military operation;
> >
> > (B) is performing qualifying National Guard duty during a war or other military operation;
> >
> > (C) resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency; or
> >
> > (D) suffered a direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary.

20 U.S.C. §1098ee(2). Subparts (A) and (B), like the rest of HEROES Act, exclusively refer to members of the armed forces.

Subparts (C) and (D) are the only provisions of the HEROES Act that reach beyond members of the armed

force, but only in limited circumstances. The borrower must reside or be employed in disaster area that has been declared in connection with a national emergency, or the borrower must have suffered an economic hardship as a direct result of a war, military operation, or national emergency (e.g., spouses of service members called to active duty or deployed overseas; residents of a city hit by a disruptive terrorist attack). Subpart D also requires the Secretary to make a determination that borrowers suffered a direct economic hardship because of the military operation or national emergency.

Congress's discussion of the bill showed, consistent with the text, that representatives thought they were simply relieving active-duty military from "making student loan payments … while they are away." 149 Cong. Rec. at H2522 (Apr. 1, 2003) (Rep. Garrett). *See also id.* at H2524 (Rep. Isakson) (the Act ensures that the "loan payments" of troops who "serve us in the Middle East and in Iraq" "are deferred until they return" (emphasis added)); *id.* at H2524-25 (Rep. Boehner) ("None of us believe that our active duty soldiers should … have to make payments on their student loans while in fact they are not here."); *id.* at H2525 (Rep. Burns) ("The HEROES bill would excuse military personnel from their Federal student loan obligations while they are on active duty"). The 2007 discussion was no different. *See* 153 Cong. Rec. at H10790 (Sept. 30, 2007) ("This bill is specific in its intent to insure that, as a result of a war or military contingency operation or national emergency, our men and women in uniform are protected.") (Rep. Kline); *id.* ("What this bill does is allow the Secretary of Education to accommodate the unique needs of our student soldiers.") (Rep. McKeon).

B. The HEROES Act does not authorize debt *cancellation*.

Furthermore, the Act only authorizes the Secretary to waive or modify any provision relating to student financial assistance programs "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." 20 U.S.C. §1098bb(a)(2)(A) (emphasis added). Any action the Secretary took must fulfill its objective "without impairing the integrity of the student financial assistance programs." 20 U.S.C. §1098bb(a)(2)(B).

And the first decades of use of the HEROES Act reflects those limited uncontroversial goals of avoiding "plac[ing] affected individuals] in a worse position." 20 U.S.C. §1098bb(a)(2)(A). Despite the September 11 attacks and multiple wars and the devastation of Hurricanes Katrina and Harvey, the Department of Education never used the HEROES Act to cancel a single soldier's—much less a civilian's—loan debt. Not one legislator suggested in the run-up to its passage that the HEROES Act authorized the Department to do so.[2]

Little wonder that the statute permits the Department only to "waive" or "modify" certain provisions. 20 U.S.C. §1098bb(a)(1). But these "modest words" cannot bear the weight the Department now places on them. *W. Va. v.*

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[2] That a legislator may do so opportunistically as *amicus* decades later carries no weight.

EPA, 142 S. Ct. 2587, 2609 (2022). The Department's waivers or modifications can do no more than ensure that borrowers "are not place[d] in a worse position financially in relation to that financial assistance because of their status as affected individuals." 20 U.S.C. §1098bb(a)(2)(A) (emphasis added). Canceling debt puts debtors in a better position, rather than the same position in relation to their debt as before the "war or other military operation or national emergency." 20 U.S.C. §1098bb(a)(1). And as discussed above, the legislative discussion assumed that the Secretary would defer, rather than cancel, obligations.

Congress has "conspicuously and repeatedly declined to enact" explicit legislation seeking to do what the Biden administration claims the HEROES Act does here. *W. Va.*, 142 S. Ct. at 2610; *see, e.g.*, S. 2235, 116th Cong. §101 (2019) (cancelling up to $50,000 of student loan debt for those who make under $100,000) (died without vote after being referred to committee); H.R. 2034, 117th Cong. §2 (2021) (cancelling the outstanding balance on loans for all borrowers under a certain income cap) (died without vote after being referred to committee). Moreover, after the HEROES Act first passed, Congress made it harder, rather than easier, to cancel student-loan debt—for example, making it tougher to discharge federally guaranteed loans in bankruptcy. 11 U.S.C. §523(a)(8); Pub. L. 109-8 § 220, 119 Stat. 23, 59 (Apr. 20, 2005).

When Congress did want to provide relief for student debt—including during the COVID crisis—it did so with specificity and modulation reflecting legislative compromise, rejecting proposals that went only a fraction as far as the administration is attempting here. *See, e.g.*, 20

U.S.C. §§1087e(d)(1)(D) & (E) and 1098e (income repayment plans); 20 U.S.C. §1087e(e)(1) (income-contingent repayment plans); 20 U.S.C. §1087e(h) (relief where borrower can demonstrate fraud); compare also CARES Act, Pub. L. 116-136 §3513, 134 Stat. 281, 404 (Mar. 27, 2020) (mandating forbearance, but not forgiveness, on swath of federal student loans) and *id.* §2206, 134 Stat. at 346-47 (providing tax benefits to employers who pay employee student loans) with H.R. 6800, 116th Cong. §150117 (2020) (proposing to cancel up to $10,000 of student loan debt for economically distressed borrowers) (passed House 208-199 and died in Senate after July 2020 committee hearings).

And Congress has never tasked the Department of Education with identifying broad classes of borrowers entitled to loan forgiveness. Rather, when Congress wants the Secretary to cancel debt for a class of borrowers, it explicitly describes those groups. *E.g.*, 20 U.S.C. §1078-10 (teachers); 20 U.S.C. §1078-10(c)(3) (teachers in mathematics, science, or special education); 20 U.S.C. §1078-11 (service in areas of national need); 20 U.S.C. §1087ee (certain public service); 20 U.S.C. §1098(d) (disabled veterans). By attempting to do so itself, the Department is seeking to expand and "transform" its statutorily prescribed role. *W. Va.*, 142 S. Ct. at 2610.

C. Under the major-questions doctrine, the Mass Debt Cancellation requires clear congressional authorization.

These facts alone justify applying the major-questions doctrine because courts "presume that Congress intends

to make major policy decisions itself, not leave those decisions to agencies." *W. Va.*, 142 S. Ct. at 2613 (cleaned up); *see also Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2490 (2021) (rejecting Biden administration's attempt to use COVID to rationalize gigantic unrelated wealth transfer through agency's rent moratorium).

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). "Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be 'shaped, at least in some measure, by' … whether Congress in fact meant to confer the power the agency has asserted." *W. Va.*, 142 S. Ct. at 2607-08 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). In these "major questions" cases, "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 (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159-60).

In the instant cases, the breadth of the authority that the Department has asserted through its interpretation of the HEROES Act is "breathtaking." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. The Secretary claims the power to cancel student debt of any kind and amount for any borrower. The economic and political significance of canceling hundreds of billions of dollars in student debt is equally breathtaking. *See id.* (applying the major-questions doctrine for a smaller economic effect). In both its breadth

and economic impact, the administration's asserted authority to cancel debt is precisely the sort of major question that the legislative branch presumably reserves for itself.

Nonetheless, the government claims (Pet. Br. 49 (quoting *W. Va.*, 142 S. Ct. at 2608)) that the major-questions doctrine does not apply to the provision of government benefits. However, contrary to the administration's assertion, this Court made no distinction and used the same reasoning when applying the doctrine to a federal benefits program, the Affordable Care Act. *King v. Burwell*, 576 U.S. 473, 485–86 (2015). As the Court explained,

> In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended … an implicit delegation. This is one of those cases. The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep economic and political significance that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.

King, 576 U.S. at 485–86 (cleaned up).

The Cancellation, like the Affordable Care Act, provides the same reason to hesitate when interpreting a statute as in cases not involving government benefits. What matters is whether the executive branch is exercising authority that Congress must *clearly* delegate.

Consider also that "the major questions doctrine is closely related to what is sometimes called the nondelegation doctrine. … Both are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic process the Constitution demands." *Nat'l Fed'n of Indep. Bus. v. Dept. of Labor, OSHA*, 142 S. Ct. 661, 668-69 (2022) (per curiam) (Gorsuch, J., concurring). In *Schweiker v. Chilicky*, 487 U.S. 412 (1988), the Court applied the principles of nondelegation when it addressed the provision of government benefits, specifically the question of "[w]hether a *Bivens* remedy should be implied for alleged due process violations in the denial of social security disability benefits." *Id.* at 420. Though *Chilicky* dealt with delegation to the judicial branch rather than the executive branch, principles of nondelegation apply equally. Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CALIF. L. REV. 405, 436 (2008).

Like the catalog of legislation providing limited forms of student debt relief, both pre- and post-pandemic (*see supra*), so too had Congress acted several times to alleviate the harm caused by the unwarranted denial of disability benefits: "Congressional attention [had] been frequent and intense." *Chilicky*, 487 U.S. at 425. But "[a]t no point did Congress choose to extend to any person the kind of remedies" sought by the plaintiffs. *Id.* at 426. *Chilicky* concluded that "Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program." *Id.* at

429. In short, the Court applied the principles of nondelegation to a government benefit program, again putting the lie to the government's argument here.

Chilicky reinforces the notion that the HEROES Act does not confer upon the Secretary the expansive authority to implement blanket student loan debt cancelation. This reading falls squarely within the Court's precedents applying the nondelegation doctrine to "giv[e] narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional" because of separation of powers concerns. *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989).

Because the major-questions doctrine applies to the instant cases, the Department needed "clear congressional authorization" for the Cancellation. *W. Va.*, 142 S. Ct. at 2609. It is unimaginable that Congress gave the executive branch that authority in uncontroversial bills passed by voice vote.[3] Thus, the Department's memo, authored by Reed Rubenstein, correctly concluded that the HEROES Act was never intended to provide the Secretary broad discretion to execute a mass cancellation of federal student debt. Reed Rubenstein, Memorandum for Betsy

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[3] The 2001 HEROES Act passed by unanimous voice vote weeks after 9/11. 147 Cong. Rec. H7155 (Oct. 23, 2001); 147 Cong. Rec. S13311 (Dec. 14, 2001). The 2003 Act passed the House 421-1 via a suspension of the rules, and the Senate passed it by unanimous consent. 149 Cong. Rec. S10866 (July 31, 2003); 149 Cong. Rec. H2553-54 (Apr. 1, 2003). The 2007 Act that made the HEROES Act permanent was a three-paragraph bill that Congress passed by voice vote. Pub. L. 110-93, 121 Stat. 999.

DeVos, Secretary of Education, re: Student Loan Principal Balance Cancellation, Compromise, Discharge, and Forgiveness Authority 6 (Jan. 12, 2021) (available at https://tinyurl.com/a4n326cw). The HEROES Act does not provide the Secretary the statutory authority to perform a "blanket or mass cancellation, compromise, discharge, or forgiveness of student loan principal balances, and/or to materially modify the repayment amounts or terms thereof, whether due to the Covid-19 pandemic or for any other reason." *Id.* at 8.

As Speaker Nancy Pelosi stated,

> People think that the president of the United States has the power for debt forgiveness … He does not. He can postpone, he can delay, but he does not have that power. That has to be [accomplished through] an act of Congress.

Lauren Camera, *Pelosi: Biden Lacks Authority to Cancel Student Debt*, U.S. NEWS & WORLD REP. (Jul. 28, 2021). *See also* Stratford & Daniels, *How Biden Finally Got to "Yes" on Canceling Student Debt*, Politico (Aug. 25, 2022) ("Biden entered the presidency deeply skeptical of the idea" that "he had the authority" to unilaterally forgive "large chunks of student loan debt.").

D. The Biden administration's expansive reading of the HEROES Act is thinly reasoned.

The Biden Administration's retreat from Speaker Pelosi's clear summary of presidential power regarding student loans is thinly reasoned. The administrative record is limited to a 13-page memorandum marked "Confidential" prepared by Undersecretary of Education James Kvaal dated August 24, 2022 (Kvaal Memo), the same day

President Biden and the Department announced the Cancellation through government websites and press briefings. J.A. 117–31, 195–207.

The Kvaal Memo references internal Department of Education analysis and outside sources as evidence of the negative impact of the pandemic on student loan borrowers as well as the justifications for the income thresholds and amounts of relief granted. Accompanying the Kvaal Memo was a memorandum from Richard Cordray, the Department's Chief Operating Officer for Federal Student Aid, to Secretary Cardona authorizing the program ("Cordray Memo"). The Cordray Memo is also dated August 24, 2022 and was signed by Secretary Cardona at 9:25 a.m. that same day. This thin "administrative record" only surfaced after the filing of litigation challenging the loan forgiveness plan. *See* ECF No. 27-1 (Exh. A), *Nebraska v. Biden*, No. 22-cv-01040 (E.D. Mo. Oct. 7, 2022); ECF No. 24-1 (Exh. A), *Brown v. U.S. Dept. of Educ.*, No. 22-cv-00908 (N.D. Tex. Oct. 19, 2022).

The Kvaal and Cordray Memos are dated one day after two legal memorandums that assert that the HEROES Act does in fact grant the Secretary the authority to perform mass student debt cancellation. *See* Notice of Debt Cancellation Legal Memorandum, 87 Fed. Reg. 52943, 52944 (Aug. 30, 2022) (originally dated Aug. 23, 2022); Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loan, 46 O.L.C. __ (Aug. 23, 2022).

Of course, the Cancellation did not simply come to fruition within 48 hours in August 2022. Rather, it was the culmination of months of behind-the-scenes legal

maneuvering and political lobbying that followed Congress's refusal to enact President Biden's request for forgiveness of student debt. The President's push for debt cancellation, dating back to his 2020 campaign, was motivated less by the COVID pandemic and more by concerns that the cost of college has "nearly tripled" in forty years, that the resulting debt imposes a "lifelong burden," and the like. J.A. 117–18. *See* 46 O.L.C. Slip Op. at 11-12, n.2 (noting that the Education Department requested OLC examine broad-based debt relief on August 16, 2021); Stratford & Daniels, *supra*. Faced with Congressional opposition, the President ultimately bypassed the legislative process in order to fulfill his campaign promise before a challenging midterm election cycle, knowing that he could blame the courts if his loan forgiveness program were struck down.

But despite the best efforts of the President and the administration's last-minute memos, "'enabling legislation' like the HEROES Act is not an 'open book to which the agency may add pages and change the plot line.'" *Brown v. Cardona*, 2022 U.S. Dist. LEXIS 205875, *31-*32 (N.D. Tex. Nov. 10, 2022) (quoting *W. Va.*, 142 S. Ct. at 2609).

CONCLUSION

The Biden administration's reliance on the HEROES Act is contrary to the text and intent of the statute. The Mass Debt Cancellation is therefore *ultra vires* and this Court should declare it unlawful.

Respectfully submitted,

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