**Nos. 22-506 & 22-535**

In The
# Supreme Court of the United States

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

*Petitioners,*

v.

STATE OF NEBRASKA, ET AL.,

*Respondents.*

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 AMERICA FIRST POLICY INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICUS CURIAE*

The America First Policy Institute ("AFPI") is a non-profit, non-partisan research institute dedicated to advancing policies that put the American people first.[1] Its guiding principles are liberty, free enterprise, the rule of law, America-first foreign policy, and a belief that American workers, families, and communities are the key to the success of our country.

As part of its mission, AFPI seeks to ensure that American higher education remains faithful to its historic mission of pursuing truth, ensuring the free exchange of ideas, upholding academic rigor, and educating America's young people for liberty while preserving all that is good, noble, and beautiful in the Western tradition. To this end, AFPI's Higher Education Reform Initiative conducts oversight and research on the state of America's colleges and universities. Jonathan Pidluzny, Ph.D., serves as the director of this Initiative. While an academic, Dr. Pidluzny was a tenured associate professor of political science at Morehead State University, where he taught for 10 years and served as the elected faculty regent from 2017 to 2019. He is an expert on higher education policy.

AFPI's public interest law firm, the Constitutional Litigation Partnership ("CLP"), supports AFPI's mission and the goal of constitutional restoration through

[1] No counsel for any party authored this brief in whole or part, and no party or counsel other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

merits litigation and the filing of *amicus curiae* briefs in state and federal courts. CLP is led by its chair, the Honorable Pam Bondi, who previously served as Florida Attorney General from 2011 to 2019, AFPI General Counsel Jessica Hart Steinmann, who previously served as a presidentially appointed senior official at the Department of Justice, and Chief of Staff Catherine Cypher, who previously served as Special Assistant to the President and Director of Media Affairs for First Lady Melania Trump.

AFPI respectfully submits this *amicus curiae* brief to provide legal guidance and expert insight into the major policy implications underlying one of the principal questions before the Court: the legal validity of the Secretary of Education's $430 billion student loan forgiveness plan.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The HEROES Act, which the Secretary of Education ("the Secretary") relies on to unilaterally forgive $430 billion in student loan debt, "does not mention loan forgiveness. If Congress provided clear congressional authorization for $400 billion in student loan forgiveness via the HEROES Act, it would have mentioned loan forgiveness." Res. App. 21. That is dispositive. In other words, that elephant cannot hide. Indeed, in *Brown v. Department of Education*, the U.S. District Court for the Northern District of Texas masterfully examined this Court's precedent and the text of the HEROES Act, finding that the Secretary's unilateral student loan forgiveness plan was a major question, and that Congress, not the executive branch, had the responsibility to decide how to address such an issue of vast national economic and political significance. *See* Res. App. 1-26. In AFPI's view, that decision was entirely correct.

AFPI submits this *amicus curiae* brief to bring relevant facts and arguments to the Court's attention regarding why the Secretary's unlawful student loan forgiveness plan will only exacerbate the student loan crisis it purports to alleviate, contribute further to the pathologies in American higher education, and deprive Congress of its constitutional mandate to address the crisis, which that body has been actively doing in recent years.

First, the Secretary's loan forgiveness plan will intensify the distorted incentive structure in higher education. This has resulted in a dramatic increase in college tuition and costs over the last few decades. By signaling to prospective students that some or all their student loans will be forgiven, the Secretary incentivizes students to incur more debt financing. Universities then compete for these dollars by expending money on prestige and influence projects on campus. This, in turn, requires them to raise tuition costs—thus, placing students in a worse position than they would otherwise be but for loan forgiveness.

Similarly, universities will view debt relief as a harbinger of future infusions of money. This will create an incentive for unaccountable administrators to continue the profligate race to the bottom—spending on extravagant buildings and student centers that serve no scholarly objective and padding their payroll with college administrators who increasingly view their role as gatekeepers of ideological purity rather than as neutral bureaucrats.

Second, the Secretary's unilateral student loan forgiveness plan, in effect, unconstitutionally preempts congressional action on comprehensive higher education finance reform. The student loan crisis has been the subject of congressional interest for the last few years, and members of Congress, Republican and Democrat alike, have introduced legislation to address it responsibly. Unlike the Secretary, members of Congress are democratically elected and accountable to the people. They are, thus, in the best position to determine how to address what has become known as the student loan time bomb. It is difficult to imagine a more striking example of executive overreach generating abjectly bad policy, yet that is exactly what the Court confronts in this case.

Thus, AFPI respectfully urges the Court to affirm the judgements of the Eighth and Fifth Circuit Courts of Appeals in *Nebraska* and *Brown*, respectively.

## ARGUMENT

### I. The Secretary's Plan to Forgive $430 Billion in Student Loans Will Further Distort the Incentive Structure in Higher Education that Has Caused a Collective $1.76 Trillion in Student Loan Debt.

According to the Federal Reserve, student loan borrowers owe a collective $1.76 trillion in student loan debt, more than double the $800 billion outstanding at the beginning of 2010. Board of Governors of the Federal Reserve System, *Consumer Credit Outstanding (Levels)*, Federal Reserve (Last updated Jan. 09, 2023), https://www.federalreserve.gov/releases/g19/HIST/cc_hist_memo_levels.html. Significantly, $1.63 trillion of the total is held under federal student loan programs. *Federal Student Loan Portfolio*, Studentaid.Gov (Last updated Sept. 2022), https://studentaid.gov/data-center/student/portfolio. The main culprit is the skyrocketing cost of attending college and graduate school, which causes many American matriculants to incur significant student loan debt by the time they graduate. To illustrate, since 2003, the cost of tuition for in-state students enrolled in state flagship universities has risen by 175%. Emma Kerr & Sarah Wood, *A Look at College Tuition Growth Over 20 Years*, U.S. News & World Report (Sept. 13, 2022), https://www.usnews.com/education/best-colleges/paying-for-college/articles/see-20-years-of-tuition-growth-at-national-universities. For the 2021-22 school year, the average published tuition charges for full-time undergraduate students ranged from $10,740 for in-state students at a public four-year university ($27,560 for out-of-state students) to $38,070 at private four-year colleges. *Trends in College Pricing and Student Aid 2021*, The College Board 10 (Oct. 2021), https://research.collegeboard.org/media/pdf/trends-college-pricing-student-aid-2021.pdf.

### A. The Secretary's Student Loan Forgiveness Plan Will Cause Students to Incur More Debt, Exacerbating an Existing Debt Crisis.

The exorbitant cost of a college education is one of the exceedingly rare major policy issues in contemporary America that has garnered bipartisan outrage. Press Release, Sen. Chuck Grassley, Grassley, Smith, Ernst Introduce Bipartisan Bills to Empower Students, Provide Resources to Better understand College Costs (Apr. 29, 2021) (on file at: https://www.grassley.senate.gov/news/news-releases/grassley-smith-ernst-introduce-bipartisan-bills-to-empower-students-provide-resources-to-better-understand-college-costs). Yet the Secretary's loan-forgiveness program does nothing to reverse this trend. Indeed, in all likelihood, it will exacerbate the problem.

Where the true value of a product or service is difficult for a consumer to assess, he or she is likely to rely on the reputation of the producer or provider. Nowhere is this truer than in the higher education sector. Because assessing learning or cognitive gain is notoriously difficult, Matthew J. Mayhew, *et al.*, *How College*

*Affects Students* 105-109 (3rd ed. 2016), and because the internal assessments universities do undertake "are seldom disclosed to the public," Douglas Belkin, *Exclusive Test Data: Many Colleges Fail to Improve Critical-Thinking Skills*, Wall Street Journal (June 5, 2017), https://www.wsj.com/articles/exclusive-test-data-many-colleges-fail-to-improve-critical-thinking-skills-1496686662, a university's reputation plays an outsized role shaping the behavior of consumers. As a result, university leaders will prioritize achieving a higher annual ranking for the institution. Francie Diep & Nell Gluckman, *Colleges Still Obsess Over National Rankings. For Proof, Look at Their Strategic Plans*, The Chronicle of Higher Education (Sept. 13, 2021), https://www.chronicle.com/article/colleges-still-obsess-over-national-rankings-for-proof-look-at-their-strategic-plans. Ultimately, a university's reputation is largely a function of the prestige of attendance and the so-called "college experience" it offers. With this incentive structure, there is virtually no limit to what universities will expend to increase their institutions' appeal to the students they deem desirable for enrollment.

The result, as American economist Howard Bowen posited with his "revenue theory of cost" (also known as "Bowen's law"), is that:

> at any given time, the unit cost of education is determined by the amount of revenues currently available for education relative to enrollment. The statement is more than a tautology, as it expresses the fundamental

> fact that unit cost [i.e., the cost of college] is determined by hard dollars of revenue and only indirectly and distantly by considerations of need, technology, efficiency, and market wages and prices.

Howard Bowen, *The Cost of Higher Education: How Much Do Colleges and Universities Spend per Student and How Much Should They Spend?* 19 (1980) (alteration in original). Put differently, colleges and universities seek to raise every dollar they can and spend every penny they raise. Robert Martin & Andrew Gillen, *Breaking the Cost Spiral*, Inside Higher Ed (Aug. 7, 2009), https://www.insidehighered.com/views/2009/08/07/breaking-cost-spiral. Universities and colleges will build sushi bars and rock-climbing walls—and all manner of amenities unrelated to learning—if they can raise the money to pay for them. The revenue theory of cost suggests that expanding the pool of financing available to students makes it possible for institutions to spend more, which, in a system reliant on debt financing, explodes individual debt loads.

Subsequent research has reinforced Bowen's theory. For instance, a New York Federal Reserve analysis of "legislative changes in the maximum amounts students [were] eligible to borrow from the federal subsidized and unsubsidized loan programs" between 2001-02 and 2011-12 found that "a dollar increase in the subsidized [student loan] cap . . . resulted in a 58 cent increase in sticker price." David O. Lucca, *et al.*, *Credit Supply and the Rise in College Tuition: Evidence from the Expansion in Federal Student Aid Programs*, Federal Reserve Bank of New York 1, 21 (Feb. 2017), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr733.pdf?la=en. Thus, increasing students' access to federally subsidized student loans drives tuition rates up, including for students who do not participate in federal student loan programs. *Id.* at 22.

Against this backdrop, it is likely the Secretary's unliteral cancellation of student loan debt will funnel even more taxpayer money into a broken, bloated, and inefficient system. And it will not stop there. The Secretary recently unveiled a proposed rule that would forgive additional student loan debt on an ongoing basis by making radical changes to income-driven repayment plans. Press Release, U.S. Dept. of Education, New Proposed Regulations Would Transform Income-Driven Repayment by Cutting Undergraduate Loan Payments in Half and Preventing Unpaid Interest Accumulation (Jan. 10, 2023) (on file at: https://www.ed.gov/news/press-releases/new-proposed-regulations-would-transform-income-driven-repayment-cutting-undergraduate-loan-payments-half-and-preventing-unpaid-interest-accumulation). Analysts estimate this proposed regulation could cost an additional $450 billion over ten years, *see* Junlei Chen, *The Biden Student Loan Forgiveness Plan: Budgetary Costs and Distributional Impact*, Uni. of Penn. (Last updated Oct. 4, 2022), https://budgetmodel.wharton.upenn.edu/issues/2022/8/26/biden-student-loan-forgiveness, and create a system where only 22% of bachelor's degree recipients repay their loans in full, *see* Matthew Chingos, *et al.*, *Few College Students Will Repay Student Loans under the Biden Administrations Proposal*, Urban Institute 5 (Jan. 2023), https://www.urban.org/sites/default/files/2023-01/Few%20College%20Students%20Will%20Repay%20Student%20Loans%20under%20the%20Biden%20Administrations%20Proposal.pdf.

By signaling to prospective students that some or all of the debt they assume may ultimately be forgiven by executive fiat, the Secretary incentivizes students to overspend on college tuition and expenses. Invariably, college enrollment services pounce on these students, urging them to attend while pointing to government support programs to minimize the total cost of attendance.

This is not mere conjecture. In 2022, the Government Accountability Office estimated that "50 percent of colleges understate the net price" of attendance in admissions offers, many of which "subtract more than just gift aid to estimate the net price." U.S. Gov't Accounting Office, GAO-23-104708: *Action Needed to Improve Information on College Costs and Student Aid* 17 (Nov. 2022). Colleges that already misleadingly represent student loans, Parent PLUS loans, and work-study funding as grant aid to make financial aid offers appear more generous can reasonably be expected to highlight the possibility of future loan forgiveness to entice students to enroll. Currently, the Department of Education issues approximately $83.7 billion in new financing each year. *Trends in College Pricing and Student Aid 2021*, The College Board 31 (Oct. 2021), https://research.collegeboard.org/media/pdf/trends-college-pricing-student-aid-2021.pdf. If the expectation of additional relief brings more students to campus and allows colleges and universities to further increase tuition rates, in the end, students and taxpayers will be forced to take on more debt. This unvirtuous cycle resets the clock on the student debt time bomb, ensuring current debt levels are rapidly exceeded.

### B. The Secretary's Student Loan Forgiveness Plan Will Cause Universities to Continue to Spend Wastefully.

The most consequential open secret in higher education "is that there is virtually no accountability." Steven Mintz, *The Need for Greater Accountability in Higher Education*, Inside Higher Ed (Jan. 5, 2022), https://www.insidehighered.com/blogs/higher-ed-gamma/need-greater-accountability-higher-education. As a result, universities are profligate and wasteful with the revenue they extract from America's young and its taxpayers. The extravagant spending is everywhere on campus: gaudy, amenity-filled buildings, *see* Jon Marcus, *Why Colleges Are Borrowing Billions*, The Atlantic (Oct. 10, 2017), https://www.theatlantic.com/education/archive/2017/10/why-colleges-are-borrowing-billions/542352/, luxury student services, *see* Naomi S. Riley, *LSU's 'Lazy River' and the Student-Fee Sham*, Wall Street Journal (Dec. 15, 2017), https://www.wsj.com/articles/lsus-lazy-river-and-the-student-fee-sham-1513381917, and handsomely paid administrators who do little to support the research and teaching functions of the institutions they purportedly serve, *see* Jay Greene & James Paul, *Diversity University: DEI Bloat in the Academy*, The Heritage Foundation (July 27, 2021) https://www.heritage.org/education/report/diversity-university-dei-bloat-the-academy. Indeed, one recent analysis of total spending growth at over 1,500 colleges and universities found that, since 2008, outlays on administration and student services have grown faster than spending on instruction—even though increases in instructional expenditures were more strongly associated with improved graduation rates. American Council of Trustees and Alumni, *The Cost of Excess: Why Colleges and Universities Must Control Runaway Spending*, Institute for Effective Governance (Aug. 2021), https://www.goacta.org/wp-content/uploads/2021/08/The-Cost-of-Excess_2.pdf.

Another study focused on the growing number of administrators found that, between 1976 and 2018, the number of executive-level administrators increased by 164% while the number of other professional staff increased by 452%. (Student enrollment was up 78% and the full-time faculty grew by 92% over the same period.) Michael Delucchi, *et al.*, *What's that Smell? Bull**** Jobs in Higher Education*, Routledge 3 (June 1, 2021), https://www.tandfonline.com/doi/pdf/10.1080/00346764.2021.1940255. The rapid growth of a non-faculty professional administrative class has degraded the university's core teaching function by exerting ideological pressure on students and faculty. Indeed, 19% of advertisements for faculty jobs now require applicants to submit Diversity Equity and Inclusion ("DEI") statements, which commentators have likened to an ideological litmus test, *see* James D. Paul & Robert Maranto, *Other Than Merit: The Prevalence of Diversity, Equity, and Inclusion Statements in University Hiring*, American Enterprise Institute 3 (Nov. 2021), https://www.aei.org/wp-content/uploads/2021/11/Other-than-merit-The-prevalence-of-diversity-equity-and-inclusion-statements-in-university-hiring.pdf?x91208, and 22% of the universities surveyed by the American Association of University Professors have incorporated DEI criteria into faculty tenure reviews, *see* Hans-Joerg Tiede, *The 2022 AAUP Survey of Tenure Practices*, American Association of University Professors 5 (May 2022), https://www.aaup.org/file/2022_AAUP_Survey_of_Tenure_Practices.pdf. It is now common for administrators to "take part in deciding what is and is not acceptable on college campuses, and, unfortunately for students, this can mean limiting free speech, encouraging censorship, and generally promoting ideals (such as ideological one-sidedness) that limit intellectual growth." George Leef, *Administrative Bloat in Higher Education is Not a Myth*, National Review (Aug. 22, 2022), https://www.nationalreview.com/corner/administrative-bloat-in-higher-education-is-not-a-myth/ (internal quotation marks and citation omitted).

From extravagant amenities that serve no scholarly purpose to administrators with vaguely defined mandates who serve as ideological enforcers, the Secretary's $430 billion loan forgiveness plan will only incentivize more of the same. Phillip L. Swagel, Cong. Budget Office, Costs of Suspending Student Loan Payments and

Canceling Debt 3 (Sept. 26, 2022). Such a profound shift in incentives, on both the consumer and supply side, constitutes vast economic and political significance that demands congressional imprimatur or repudiation.

## II. Congress Is Actively Debating Major Reforms to How the Government Subsidizes Higher Education. The Secretary's Unilateral Student Loan Forgiveness Plan Preempts This Democratic and Deliberative Function.

The Secretary's unilateral student loan forgiveness plan is not only unwise policy, but it also usurps congressional action on comprehensive higher education finance reform. Legislative interest in this subject has erupted in recent years. In 2021, the House Education & Labor Committee held hearings on a proposal to significantly expand Pell grants. Then-Chairman Robert C. "Bobby" Scott announced that the problem of "state disinvestment" in higher education calls for "bold legislative solutions to lower the cost of college and support student success." *Keeping the Pell Grant Promise: Increasing Enrollment, Supporting Success*: *Hearing Before the Subcomm. on Higher Education and Workforce Investment*, 117th Cong. 4 (July 29, 2021) (opening statement of Robert C. "Bobby" Scott, Chairman, H. Comm. on Education and Labor).

Some proposed bills would improve accountability, lower costs, and even reimagine how the government funds postsecondary education. In 2022, Senator Tom

Cotton introduced two such bills. The first, the Student Loan Reform Act, is designed to restructure "the Federal student loan program [that] has incentivized colleges to raise tuition and students to take on unsustainable amounts of debt." Press Release, Sen. Tom Cotton, Cotton Unveils Bill to Lower College Tuition Cost, Reform Student Loans (Sept. 20, 2022) (on file at: https://www.cotton.senate.gov/news/press-releases/cotton-unveils-bill-to-lower-college-tuition-cost-reform-student-loans). It would create new financial accountability mechanisms—including penalties for excessive rates of student default and incentives to keep administrative spending down—for universities eligible to receive Title IV federal student aid. *Id*. The measure would encourage schools to better align program portfolios with workforce demand, ensure students who are admitted have the preparation necessary to complete college, and price their programs at rates that will enable their graduates to repay their loans.

Senator Cotton's second proposal, the American Workforce Act, would create a federal voucher program to help employers develop a workforce training pathway to family-sustaining employment as an alternative to a four-year degree. Press Release, Sen. Tom Cotton, Cotton Bill Overhauls Workforce Education (Sept. 8, 2022) (on file at: https://www.cotton.senate.gov/news/press-releases/cotton-bill-overhauls-workforce-education). The Secretary's exercise of undelegated authority undermines legislative efforts to achieve more comprehensive reform by directing additional funding into the existing, broken system.

Similarly, Congresswoman Virginia Foxx, who chairs the House Education and Workforce Committee in the 118th Congress, introduced the Responsible Education Assistance through Loan Reforms Act in 2022. It provides targeted student loan relief, limits the interest certain loans can accrue, and gives borrowers in default an avenue to rehabilitate their loans. Press Release, Rep. Elise Stefanik, Stefanik, Foxx, Banks Announce Responsible Alternative to Biden's Blanket Student Loan Scheme,(Aug. 5, 2022) (on file at: https://stefanik.house.gov/2022/8/stefanik-foxx-banks-announce-responsible-alternative-to-biden-s-blanket-student-loan-scheme). Other proposals would phase out the Federal Direct Plus loan program entirely, H.R. 7895, 117th Cong. (2022), under which students are permitted to amass the largest debt or create new repayment options, with Congress specifying the details of fixed repayment and income-based repayment plans, H.R. 7288, 117th Cong. (2022).

Lawmakers have also proposed legislation to forgive student loan debt outright, though details differ across the bills. For instance, in July 2019, Senator Elizabeth Warren and House Majority Whip James Clyburn introduced bicameral legislation designed to eliminate up to $50,000 in loan debt per borrower. Press Release, Sen. Elizabeth Warren, Senator Warren, House Majority Whip Clyburn Introduce Legislation to Cancel Student Loan Debt for Millions of Americans (July 23, 2019) (on file at: https://www.warren.senate.gov/

newsroom/press-releases/senator-warren-house-majority-whip-clyburn-introduce-legislation-to-cancel-student-loan-debt-for-millions-of-americans). Other proposals would provide targeted loan forgiveness to educators, H.R. 2987, 117th Cong. (2021), create a new program to refinance some federal and private student loans at a 0% interest rate, S. 4344, 117th Cong. § 460A (2022), allow borrowers to discharge loans in bankruptcy, H.R. 6424, 117th Cong. (2022), or authorize the Department of Education to repay up to $25,000 per borrower, H.R. 6708, 117th Cong. (2022). Congressional leaders would not debate canceling student loan debt—along with how much to forgive and who should benefit—if they believed a previous Congress had already authorized the Secretary to do so.

The student loan crisis is an active issue of major political and economic significance that has warranted bipartisan congressional attention and action, as these systemic reform proposals demonstrate. As public salience on the issue increases, comprehensive congressional action becomes more likely. The Secretary's unilateral action will transform higher education funding and preempt legislative action at a time when the branch charged with addressing such major policy questions is actively debating them. It is difficult to imagine a more striking example of executive overreach generating abjectly bad policy. The Court should not permit it.

## CONCLUSION

AFPI respectfully requests that the Court consider the Secretary's unliteral action to cancel $430 billion in student loan debt against the aforementioned consequences and hold that Congress, not the executive branch, has the constitutional responsibility to decide how to address such an issue of vast national economic and political significance. The Secretary's actions should be permanently enjoined.

DATED: February 2, 2023

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