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.

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 *AMICI CURIAE* ELISABETH DEVOS, MARGARET SPELLINGS, RODERICK PAIGE, LAMAR ALEXANDER, DR. WILLIAM BENNETT, AND DEFENSE OF FREEDOM INSTITUTE FOR POLICY STUDIES IN SUPPORT OF RESPONDENTS

JOSEPH H. HUNT
ALSTON & BIRD LLP
950 F Street, NW
Washington, DC 20004
(202) 239-3278
jody.hunt@alston.com

ALEXANDER AKERMAN
Counsel of Record
ALSTON & BIRD LLP
333 S. Hope Street, 16th Floor
Los Angeles, CA 90071
(213) 576-1000
alex.akerman@alston.com

TERANCE A. GONSALVES
ALSTON & BIRD LLP
One Atlantic Center
1201 W. Peachtree Street
Atlanta, GA 30309
(404) 881-7000
terance.gonsalves@alston.com

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INTERESTS OF AMICI CURIAE[1]

The Defense of Freedom Institute for Policy Studies, Inc. ("DFI") is a nonprofit, nonpartisan 501(c)(3) institute dedicated to defending freedom and opportunity for every American family, student, entrepreneur, and worker, as well as to protecting their civil and constitutional rights at school and in the workplace. DFI was founded by former senior leaders of the U.S. Department of Education (the "Department"). As DFI possesses significant legal and policy expertise concerning Title IV of the Higher Education Act, §§ 20 U.S.C. 1071 *et seq*. (1965), as amended ("HEA"), and the operations of the Department, it has a significant interest in and experience with the issues presented by this matter.

Elisabeth DeVos, Margaret Spellings, Roderick Paige, Lamar Alexander, and Dr. William Bennett are all former U.S. Secretaries of Education (collectively the "Secretaries") who have valuable insight and experience concerning the scope of powers of the Department and the Executive Branch. Fundamental to each Secretary's service was their oath to support and defend the Constitution of the United States. The Secretaries have all devoted a significant portion of their lives to ensuring adherence to the Constitution and the rule of law. Each has worked tirelessly to expand educational opportunities for all students, as well as on issues critical to higher education. In sum, the Secretaries offer vast experience and expertise on

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

higher education reform, financial aid, and Executive Branch power.

Elisabeth DeVos served as the U.S. Secretary of Education from 2017 until 2021. Accordingly, she was serving as Secretary at the onset of the COVID-19 pandemic. During the pandemic, the Department studied the authority of the Executive Branch to cancel, or discharge student loan debt on a mass basis, and the Department's Office of the General Counsel ("OGC") issued a widely accepted legal opinion determining that the Secretary did not possess the requisite authority for such action. Reed Rubinstein, *Memorandum for Betsy DeVos, Secretary of Education, re: Student Loan Principal Balance Cancellation, Compromise, Discharge, and Forgiveness Authority* (Jan. 12, 2021), https://tinyurl.com/a4n326cw ("Rubinstein Memo"). As the Secretary immediately preceding the Biden Administration, former Secretary DeVos has a unique perspective and rich understanding of the current issues before the Court.

Margaret Spellings served as Domestic Policy Advisor to the U.S. President from 2001 until 2005 and as U.S. Secretary of Education from 2005 until 2009. As Secretary, she launched the Commission on the Future of Higher Education to address challenges of access, affordability, quality, and accountability in our nation's colleges and universities. She served as the president of the 17-institution University of North Carolina System from 2016 to 2019.

Roderick Paige served as U.S. Secretary of Education from 2001 until 2005, which was during the time the HEROES Act was passed. Prior to serving as Secretary, he served as superintendent of the Houston Independent School District from 1994 until 2001 and was named National Superintendent of the Year in

2001. He also served as interim president of Jackson State University, his alma mater, from 2016 until 2017. He has dedicated his life to improving the quality of education for students nationwide.

Lamar Alexander served as U.S. Senator from 2003 until 2021 and as U.S. Secretary of Education from 1991 until 1993. As chairman of the Senate Health, Education, Labor and Pensions Committee, he was influential in education legislation such as the Every Student Succeeds Act. He served as governor of Tennessee from 1979 until 1987. Prior to serving as Secretary, he served as the president of the University of Tennessee from 1988 until 1991.

Dr. William Bennett served as the Chair of the National Endowment for the Humanities from 1981 until 1985 and as U.S. Secretary of Education from 1985 through 1988. A scholar, lawyer, and author, Dr. Bennett is a three-time Senate-confirmed presidential appointee executive in two administrations and has been a leading public voice and policy expert on higher education issues for over four decades.

DFI and the Secretaries are preeminent authorities on and have significant interest in the issues presented herein. DFI and the Secretaries respectfully submit that the Biden Administration's efforts to cancel student loans disregard fundamental constitutional limitations on the Executive Branch's power and correspondingly violate the rights and freedoms of Americans. The approximately $400 billion cancellation will illegally spend taxpayer money without clear Congressional authorization and will increase the national debt. The cancellation will also exacerbate current abuses afflicting the higher education system, including pushing the cost of tuition even higher.

SUMMARY OF ARGUMENT

The Biden Administration's plan to cancel student loan debt (the "Debt Cancellation Plan") is unprecedented. Never before has a President *even suggested* that the Executive Branch has the authority to cancel federal student loan debt on this scale—the Congressional Budget Office's conservative assessment is that the Debt Cancellation Plan will cost the American people roughly $400 billion. Cong. Budget Off., *Costs of Suspending Student Loan Payments and Canceling Debt* (Sept. 26, 2022), https://www.cbo.gov/system/files/2022-09/58494-Student-Loans.pdf ("Congressional Budget Office Letter").[2] Such monumental debt cancellation requires clear and direct Congressional authorization, which former House Speaker Nancy Pelosi has acknowledged does not exist: "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 an act of Congress." Press Release, Transcript of Pelosi Weekly Press Conference Today (July 28, 2021), https://pelosi.house.gov/news/press-releases/transcript-of-pelosi-weekly-press-conference-today-111 ("Pelosi Press Conference").

Nonetheless, the Executive Branch claims that it can unilaterally cancel student debt because it has previously paused student loan repayment in response

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[2] In an audit of the Department's financial statements, independent accounting firm KMPG could not obtain adequate evidence to support the Department's estimated cost of the Debt Cancellation Plan. U.S. Dep't. of Educ., *FY 2022 Agency Financial Report* (2022), https://www2.ed.gov/about/reports/annual/2022report/agency-financial-report.pdf.

to the COVID-19 national emergency. But its position fails for multiple reasons. First, explicit Congressional authority for the initial pause was granted by the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. No. 116-136 (Mar. 27, 2020), which did not grant the authority to cancel student debt on a mass basis. Second, to the extent the Executive Branch previously relied on the Higher Education Relief Opportunities for Students Act ("HEROES Act"), 20 U.S.C. §§ 1098aa *et seq.* (2003), to pause repayment, that Act did not grant authority to cancel the debt altogether. 85 Fed. Reg. 79,856 (Dec. 11, 2020). Such a pause only ensured that affected individuals were not placed in a worse position financially; it did not authorize the Executive Branch to cancel $400 billion in student debt and leave borrowers *in a better position* than they would have been in if the COVID-19 pandemic had never occurred. The deferred repayment scheme simply froze borrowers in the same position they were in at the start of the pandemic, so as not to put them in a worse position financially. A cancellation of debt leaves borrowers better off than before, while simultaneously leaving American taxpayers in a worse position.

As part of due diligence in determining whether authority existed for various potential COVID-19 relief measures, the Department under Secretary DeVos investigated whether it had the authority to cancel student loans on a mass basis. The resulting Rubinstein Memo analyzed the existing statutory framework and, for the reasons identified herein, correctly concluded that the Executive Branch did not have the authority to offer blanket cancellation of student loans.

As matter of first principle, the Executive Branch does not have general lawmaking or dispensary authority and cannot legislate a nationwide policy without clear authorization from Congress. DFI and the Secretaries respectfully submit that no such authorization exists for the Debt Cancellation Plan. Congress did not clearly provide the Department with statutory authority in the HEROES Act to cancel student loan debt, as is required when agencies exercise powers of great significance. Congress considered how to address outstanding student debt in the CARES Act and likewise did not authorize the Executive Branch to cancel any debt. Because the Debt Cancellation Plan purports to take action that has not been clearly authorized by Congress, it violates the separation of powers doctrine and is unconstitutional.

The text and history of the HEROES Act demonstrate that the statute authorizes a pause on student loan payments (to maintain the status quo) but does not authorize any cancellation, much less mass cancellation, of student loans.

In accord, none of the Secretaries believes that Congress provided clear authorization to the Executive Branch to ignore the Department's obligations to collect student debt by cancelling it. Because Congress has not appropriated any money from the Treasury to fund the Debt Cancellation Plan, the Executive Branch cannot unconstitutionally use funds from the Treasury to accomplish the program's objectives, which include not only cancelling existing student loan debt but also refunding payments made during the pandemic. Further, the Department is required by law to collect federally held student loans unless specifically instructed otherwise by Congress.

Congress has not instructed otherwise, and thus the Debt Cancellation Plan interferes with the Department's legal obligations to collect debts. Moreover, interpreting the HEROES Act as granting the Executive Branch the authority to enact the Debt Cancellation Plan would negate the entire preexisting, detailed statutory framework to collect student debt—which would be contrary to clear Congressional intent. The HEROES Act does not allow for such a significant delegation of dispensary power to the Executive Branch.

For these reasons, as set forth more fully below, the Debt Cancellation Plan is an unconstitutional overreach by the Executive Branch.

ARGUMENT

I. THE DEBT CANCELLATION PLAN IS UNPRECEDENTED.

The Executive Branch has never instituted student debt cancellation of the magnitude of the Debt Cancellation Plan. In mid-March of 2020, America, and much of the world, largely shut down to combat a once-in-a-century pandemic. The national emergency brought on by the COVID-19 pandemic required immediate and particular relief measures.[3] To ensure that the pandemic did not leave student loan borrowers financially worse off, the Trump Administration and Secretary DeVos announced that borrowers with federally held student loans would have the option to pause their payments, and that interest would be waived, for at least two months. Press Release, U.S. Dep't of Educ., *Delivering on*

[3] President Trump declared the COVID-19 pandemic a national emergency on March 13, 2020. 85 Fed. Reg. 15,337 (Mar. 18, 2020).

President Trump's Promise, Secretary DeVos Suspends Federal Student Loan Payments, Waives Interest During National Emergency (Mar. 20, 2020), https://tinyurl.com/yf9wa5v3.

A week later, President Trump signed the CARES Act, which directly authorized a freeze of borrowers' repayment obligations to preserve the status quo. Pub. L. No. 116-136 (Mar. 27, 2020). Section 3513 of the CARES Act specifically directed the Secretary to: (1) suspend all payments due, and (2) cease interest accrual on federally held student loans. *Id.* Notably, Congress left no ambiguity in the CARES Act that it did not authorize the mass cancellation of student debt in response to the COVID-19 pandemic. Secretary DeVos later cited the HEROES Act as *additional* legal authority in support of temporarily pausing student loan payments and waiving interest in response to the COVID-19 pandemic. 85 Fed. Reg. 79,856 (Dec. 11, 2020).

Put differently, Congress could have authorized the Executive Branch to cancel student debt on a mass basis in response to the COVID-19 pandemic in the CARES Act but deliberately did not. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1849 (2017) ("That silence is also relevant and telling here, where Congress has had nearly 16 years to extend 'the kind of remedies [sought by] respondents,' but has not done so.") (citation omitted). While the CARES Act unequivocally directed the Secretary to defer loan payments and eliminate interest for a period of time, it contained no

authorization for the Executive Branch to offer *mass* student loan debt cancellation.[4]

Prior to announcement of the Debt Cancellation Plan, it was widely understood and acknowledged that student loan debt cancellation would require an act of Congress. Though concerns about the rising costs of higher education and the amount of outstanding student loan debt have been part of the public discourse for decades (and long before COVID-19), the idea that the Executive Branch could unilaterally cancel student loan debt on a mass basis without Congressional authority was not seriously entertained. During the COVID-19 pandemic, former Speaker of the House Nancy Pelosi, a proponent of student loan debt relief, acknowledged, "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 an act of Congress." Pelosi Press Conference. President Biden even publicly doubted his own authority to cancel large amounts of student loan debt, stating, "I don't think I have the authority to do it[.]" The White House, *Remarks by President Biden in a CNN Town Hall with Anderson Cooper* (Feb. 17, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/17/remarks-by-president-biden-in-a-cnn-town-hall-with-anderson-cooper/. These statements are consistent with DFI's and the

[4] Section 3508(c) of the CARES Act did provide for loan cancellation but only in a very specific circumstance—where a student withdrew from an institution because of a "qualifying emergency," and even then, only permitted cancellation of the portion of the loan associated with the payment period during which the student withdrew. Pub. L. No. 116-136, § 3508(c), 134 Stat. 281 (Mar. 27, 2020). Thus, Congress specifically declined to authorize any larger scale debt cancellation in the CARES Act.

Secretaries' understanding that the Executive Branch lacks the unilateral authority to cancel student debt on a mass basis.

Nothing changed before August 24, 2022, when President Biden announced his Debt Cancellation Plan—there were no new acts of Congress, no new laws, and no new court decisions. The unprecedented nature of the Debt Cancellation Plan explains why the Biden Administration now stretches to point to the deferral of student loan payments during the COVID-19 pandemic as precedent in support of its action. Petitioners' Brief at 51. But such an analogy is inapposite because the laws that permitted such COVID-19 relief measures do not permit the cancellation of student debt. Pausing student loan payments is drastically different from cancelling student loan debt; those distinct actions have rather different outcomes, and only one—the pause—was authorized by Congress.

While the HEROES Act may be read to allow for payment deferral in certain limited circumstances, nothing in the Act can be read to allow for the Debt Cancellation Plan. This is because cancellation of student debt plainly conflicts with the language and the animating purposes of the HEROES Act. Relief under the HEROES Act exists so that "recipients of student financial assistance under title IV of the [HEA] 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). A temporary pause on payments during a period of unforeseeable global turmoil was a proportionate response that ensured borrowers were not placed in a worse position financially concerning

their federally held student loans. Borrowers would have the same obligations at the end of the emergency as they had at the beginning and were not placed in a better position financially in relation to their student loans because of the economic effects of the COVID-19 pandemic. This type of relief was broadly consistent with 20 U.S.C. § 1098bb(a)(2)(A) of the HEROES Act. The Debt Cancellation Plan, including the refund of payments made during the pandemic,[5] on the other hand, is of an entirely different nature and scope because it *cancels* $400 billion in debt and leaves borrowers *better off* and taxpayers worse off; borrowers will owe tens of thousands of dollars less at the end of the COVID-19 emergency than at the beginning. As further discussed in Section II of this brief, such an outcome is inconsistent with the history and text of the HEROES Act.

II. THE EXECUTIVE BRANCH LACKS THE LEGAL AUTHORITY TO ENACT THE DEBT CANCELLATION PLAN.

In January 2021, the Department's OGC considered whether the Secretary of Education had the requisite statutory authority, under the HEA or the HEROES Act, to provide mass cancellation of student loan principal balances and conclusively found the answer to be no. *See* Rubinstein Memo.

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[5] Federal Student Aid, *One-time Federal Student Loan Debt Relief*, (last accessed Jan. 19, 2023), https://studentaid.gov/manage-loans/forgiveness-cancellation/debt-relief-info ("If you made voluntary payments during the payment pause and your current loan balance is below the amount of debt relief you'll receive . . . we'll automatically refund the amount you paid during the payment pause (only up to the remaining amount of your eligible debt relief).").

Notably, one day before the Debt Cancellation Plan was announced, the Biden Administration's OGC revisited this same issue—this time, concluding that the Secretary of Education *did* have the authority under the HEROES Act to cancel student debt on a mass basis. Lisa Brown, *The Secretary's Legal Authority for Debt Cancellation* (Aug. 23, 2022), https://www2.ed.gov/policy/gen/leg/foia/secretarys-legal-authority-for-debt-cancellation.pdf. But this conveniently timed disavowal of the Rubinstein Memo reflects nothing more than political pressure resulting in a change of policy.

The Rubinstein Memo's conclusion was correct and consistent with DFI's and the Secretaries' longstanding understanding of the Executive Branch's power.

A. The Executive Branch Does Not Have General Dispensary and Lawmaking Authority, and the Debt Cancellation Plan Violates the Separation of Powers Doctrine.

In drafting the Constitution, the "Framers 'built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment . . . of one branch at the expense of the other.'" *Clinton v. Jones*, 520 U.S. 681, 699 (1997). It is a foundational principle of our government that Congress has been delegated dispensary and lawmaking authority. U.S. Const. Art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States[.]").

> 'In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea

> that he is to be a lawmaker . . . . [T]he Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States[.]"

Buckley v. Valeo, 424 U.S. 1, 123 (1976).

Moreover, the Constitution provides "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]" U.S. Const. art. I, § 9, Cl. 7. This Clause is intended "to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good, and not according to the individual favor of Government agents or the individual pleas of litigants." *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 428 (1990). The Appropriations Clause creates "a most useful and salutary check upon profusion and extravagance" that could result if the President were given power over the nation's purse to be wielded "at his pleasure." *Id.* at 427. Appropriations "shall be applied only to the objects for which the appropriations were made except as otherwise provided by law" and must be expressly stated, not inferred or implied. 31 U.S.C. §§ 1301(a), 1301(d); *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

In simple terms, Congress controls the power of the purse. Agencies such as the Department "possess only the authority that Congress has provided." *Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661, 665 (2022). Congress, not the Executive Branch, passes laws that spend the American people's money. In other words, if Congress intends to make an

appropriation, it must do so by passing a clearly worded law. Likewise, a statute should not be construed as authorizing the expenditure of public funds just because the statute does not prohibit such an expenditure. *MacCollom*, 426 U.S. at 321 ("The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.").

The Debt Cancellation Plan is a textbook illustration of why our Founders included the Appropriations Clause in the Constitution. President Biden seeks the cancellation of billions in student debt owed to the American people for the benefit of a distinct sub-population of borrowers. Whatever the wisdom or folly of such a policy, it is the constitutional role of Congress to authorize such an immense expenditure through the passage of a clear and direct law. *Richmond*, 496 U.S. at 428. The Executive Branch's attempt to usurp such Congressional authority has "no . . . support in any part of the constitution[,] and . . . would be clothing the President with a power entirely to control the legislation of congress, and paralyze the administration of justice." *Kendall v. United States*, 37 U.S. 524, 613 (1838).

In sum, sanctioning the Debt Cancellation Plan absent a specific grant of Congressional authority would permit a significant encroachment on Congress' legislative and dispensary powers in violation of the separation of powers doctrine and the Constitution. *Buckley*, 424 U.S. at 123 ("This Court has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it.").

Accordingly, the Constitution's Appropriations Clause prohibits any appropriations from the Treasury to fund the Debt Cancellation Plan.

B. Congress Did Not Clearly Appropriate Any Funds for the Department to Carry Out the Debt Cancellation Plan.

Because Congress did not express a clear intent to delegate authority for the Executive Branch to enact a national policy of the Debt Cancellation Plan's magnitude, under the HEROES Act or otherwise, the attempt should be carefully scrutinized and rejected.

Courts "expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *OSHA*, 142 S. Ct. at 665. Courts necessarily exercise skepticism and caution when an agency claims to possess power which would give it broad authority to regulate "a fundamental sector of the economy" and, in these cases, consistently require a "clear statement" that Congress indeed intended to delegate such broad power to that agency. *West Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022). This caution is warranted where, as here, an agency claims to possess power "representing a 'transformative expansion in [its] regulatory authority.'" *Id.* at 2610; *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) ("[T]he sheer scope of the CDC's claimed authority . . . would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'").

The Biden Administration's attempt to cancel hundreds of billions of dollars in federally held student loans unquestionably holds "vast economic and political significance." *Id.*; *King v. Burwell*, 576 U.S.

473, 485 (2015) (finding "reason to hesitate before concluding that Congress has intended such an implicit delegation" where the IRS sought to spend "billions of dollars" in tax credits on federal exchanges and ultimately determining that Congress did not intend such a delegation). The Debt Cancellation Plan would automatically offer debt cancellation to "[n]early 8 million borrowers[.]" Federal Student Aid, *The Biden-Harris Administration's Student Debt Relief Plan Explained*, (last accessed Jan. 15, 2023), https://studentaid.gov/debt-relief-announcement. The Department stated that the Debt Cancellation Plan will cost a staggering "$30 billion a year over the next decade." U.S. Dep't of Educ., *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://www.ed.gov/news/press-releases/us-department-education-estimate-biden-harris-student-debt-relief-cost-average-30-billion-annually-over-next-decade. In total, the Debt Cancellation Plan is projected to cost approximately $400 billion. Congressional Budget Office Letter.[6] Thus, "[t]here can be little doubt that [the Debt Cancellation Plan] qualifies as an exercise of . . . authority" of vast economic and political significance. *OSHA*, 142 S. Ct. at 665.

Congress' consideration and subsequent failure to adopt a similar legislative scheme "may be a sign that an agency is attempting to 'work around' the

[6] Other models project that the Debt Cancellation Plan will cost between $469 and $519 billion. Penn Wharton Univ. of Pa. Budget Model, *The Biden Student Loan Forgiveness Plan: Budgetary Costs and Distributional Impact* (Aug. 26, 2022), https://budgetmodel.wharton.upenn.edu.

legislative process to resolve for itself a question of great political significance" and can also trigger the requirement for a clear statement of Congressional intent. *West Virginia*, 142 S. Ct. at 2621 (J. Gorsuch, concurring) (rejecting the EPA's attempt to adopt a broad regulatory scheme to cap carbon emissions where "Congress has debated the matter frequently" and "conspicuously and repeatedly declined" to address the issue).

Here, Congress has considered the issue of federal student loan debt cancellation several times and has declined to enact legislation to that effect. In 2019, some legislators attempted to pass a bill which would "discharge the qualified loan amount" up to $50,000, with the limitation that the amount discharged "shall be reduced . . . by $1 for each $3 . . . by which the taxpayer's adjusted gross income exceeds $100,000" or $200,000 for taxes filed jointly. S. 2235, 116th Cong. § 101 (2019). In 2020, some legislators introduced a bill which would "cancel or repay" the balance due on Federal student loans "of an economically distressed borrower" up to $10,000. H.R. 6800, 116th Cong. § 150117 (2020). More recently, in 2021, legislators attempted to pass a bill which would "forgive the outstanding balance" on federal student loans for borrowers whose income "does not exceed $100,000" or $200,000 when filing taxes jointly. H.R. 2034, 117th Cong. § 2 (2021). ***All of these bills failed to pass***. Legislators would not have attempted to pass these bills authorizing student loan debt cancellation, two of which were attempted during the COVID-19 national emergency declaration, if Congress already had authorized such cancellation two decades earlier via the HEROES Act.

"Given these circumstances, [Supreme Court] precedent counsels skepticism toward [the Department's] claim that [the HEROES Act] empowers" the President to authorize cancellation of federal student loans. *West Virginia*, 142 S. Ct. at 2614. "To overcome that skepticism, the Government must . . . point to 'clear congressional authorization' to regulate in that manner." *Id.* The Biden Administration is unable to do so because clear Congressional authorization to cancel $400 billion of student debt in response to the COVID-19 pandemic does not exist within the HEROES Act. This dooms the Debt Cancellation Plan.

In *OSHA*, the Court found that there was no statutory authority for the agency's COVID-19 vaccine mandates where Congress itself declined to adopt a vaccine mandate. *OSHA*, 142 S. Ct. at 666 ("In fact, the most noteworthy action concerning the vaccine mandate by either House of Congress has been a majority vote of the Senate disapproving the regulation[.]"). Here, similarly, Congress has repeatedly declined to authorize mass student loan cancellation, even in response to the COVID-19 national emergency.

Failure by Congress to act does not permit the Executive Branch to act without authority out of sheer frustration. "It seems that fact has frustrated the Executive Branch and led it to attempt its own regulatory solution[.]" *West Virginia*, 142 S. Ct. at 2622 (J. Gorsuch, concurring). But the President's frustration "does not permit agencies to act unlawfully[,] even in pursuit of desirable ends . . . . It is up to Congress, not the [Department], to decide whether the public interest merits further action here." *HHS*, 141 S. Ct. at 2490. Without "a clear

statement . . . that Congress intended to delegate authority" of this magnitude, the Biden Administration cannot, acting through the Department, exercise the authority it claims to, but does not, possess. *West Virginia*, 142 S. Ct. at 2605.

C. By its Own Terms the HEROES Act Does Not Grant the Executive Branch Authority to Cancel $400 Billion in Student Debt.

The history and text of the HEROES Act demonstrate why the statute does not sanction the Debt Cancellation Plan. The HEROES Act was not passed to revolutionize the HEA statutory scheme or to grant the Executive Branch the power to unilaterally cancel student debt. Congress' intent was much narrower.

Congress enacted the HEROES Act in response to the September 11 terrorist attacks, the Afghanistan War, and the start of the Iraq War. Congress passed the HEROES Act to aid Americans impacted by 9/11, as well as those who put their civilian lives on hold while serving in the Armed Forces of the United States. Pub. L. 107-122, 115 Stat. 2386 (Jan. 15, 2002); Pub. L. 108-76, 117 Stat. 904 (Aug. 18, 2003). Within the HEROES Act itself, each Congressional finding in support of the Act refers to the importance of military service generally and of supporting the American men and women who put their lives—including their educations—on hold to serve our country. 20 U.S.C. § 1098aa(b). After initially extending the HEROES Act, Congress made it permanent in 2007. Pub. L. 109-78, 119 Stat. 2043 (Sept. 30, 2005); Pub. L. 110-93, 121 Stat. 999 (Sept. 30, 2007).

The purpose behind the HEROES Act clarifies why the plain language of the Act may, in certain narrow circumstances, allow for the pause of student loan payments and interest but not for the cancellation of student loan debt. The HEROES Act provides that, "in connection with a war or other military operation or national emergency" the Secretary of Education "may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [HEA,]" but only as necessary to ensure that certain limited and clearly defined aims are achieved. 20 U.S.C. § 1098bb. If a proposed waiver or modification does not achieve one of the clearly defined aims, it is not an "[a]ction[] authorized" by the HEROES Act. 20 U.S.C. § 1098bb(a)(2).

Therefore, the HEROES Act only allows waivers or modifications aimed at ensuring that "recipients of student financial assistance under title IV of the [HEA] 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). Tellingly, in the twenty years that the HEROES Act has been in effect, no party has proposed the cancellation of student loan debt incurred by all military veterans under 20 U.S.C. § 1098bb(a)(2). Put differently, the HEROES Act allows for a freeze of the loan payment status of an individual's loans *if* the individual's ability to pay is negatively affected by certain extraordinary events. For example, it would allow the Department to *pause* payments and interest on a soldier's student loan because that soldier was occupied fighting the Taliban in Afghanistan. Reading the HEROES Act through the prism articulated by this Court in *West Virginia* forecloses any colorable

argument that the same provisions of the HEROES Act could be used to *cancel* billions of dollars of debt held by white collar workers who spent the COVID-19 pandemic working remotely.

Other provisions of the HEROES Act confirm this reading. For instance, a permissible aim under the Act is to ensure that "administrative requirements placed on affected individuals who are recipients of student financial assistance are *minimized*, to the extent possible *without impairing the integrity of the student financial assistance programs*, to ease the burden on such students and avoid inadvertent, technical violations or defaults[.]" 20 U.S.C. § 1098bb(a)(2)(B) (emphasized added). This permissible aim is notable in at least three respects.

First, it makes clear that the type of waivers and modifications authorized by the HEROES Act are those that would help to *minimize* "administrative requirements" and to assist affected individuals (such as deployed soldiers) "avoid inadvertent technical violations or defaults[.]" *Id.* For example, the HEROES Act would apply to help minimize the risk of a soldier missing a student loan payment because they were fighting the Taliban in Afghanistan. But the Act only aims to "minimize" such requirements, not to eliminate (or cancel) them. If cancellation were indeed permitted, there would be no need to mention the narrow goal of avoiding technical violations or defaults—surely, more ink would have been spilled spelling out the terms and conditions of such a momentous scheme.

Second, this aim specifically states that permissible waivers and modifications directed at minimizing administrative requirements are only authorized, "to the extent possible without impairing

the integrity of the student financial assistance programs[.]" *Id.* Whereas a temporary pause on payments and interest does not impair the integrity of the federal student financial assistance programs, the cancellation of hundreds of billions of student debt certainly does.

Third, the reference to "defaults" in Section 1098bb(a)(2)(B) provides a strong textual basis for concluding Congress intended the underlying loans to be repaid, even after the exercise of HEROES Act authority.

Likewise, in another permissible aim, the HEROES Act specifically provides that affected individuals who withdraw from school may not be required to return or repay overpayments made prior to the student's withdrawal. 20 U.S.C. § 1098bb(a)(2)(D) (cross-referencing 20 U.S.C. § 1091b(b)(2)). But the conditions for acting pursuant to this provision are circumscribed: the institution engaging in such limited discharges of overpayments must document (1) "the student's status as an affected individual in the student's file," and (2) "the amount of any overpayment discharged[.]" 20 U.S.C. § 1098bb(a)(2)(D). Spelling out such specific requirements for permissible discharges of overpayments undermines any argument that a broad cancellation of the underlying debt is permitted by the statute. If cancellation of student loans were permissible under the HEROES Act, there would be no need to express that the limited discharge of overpayments is allowed under carefully monitored circumstances. The Executive Branch's reading of the HEROES Act makes other parts of the HEROES Act redundant and superfluous. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)

(the statute must be construed "as a symmetrical and coherent regulatory scheme," and the interpreter must endeavor to "fit, if possible, all parts into an harmonious whole[.]" (citation omitted)).

Finally, although the HEROES Act allows the Secretary to "waive or modify" provisions of the HEA, and only in furtherance of the clearly defined authorized aims, the Debt Cancellation Plan far exceeds the scope of a "waiver" or "modification." Instead, the Debt Cancellation Plan creates an entirely new program with no connection to the HEA provisions that the Executive Branch purports to modify or waive.

The term "waive" requires a connection to a specific provision that is being waived and does not authorize the Executive Branch to craft an entirely new program from whole cloth. Rather than waiving (or even modifying) specific provisions in the HEA, the Debt Cancellation Plan attempts to write an entirely new program, involving debt cancellation for millions of borrowers, into the statutory scheme. *Brown v. U.S. Dep't of Educ.*, No. 4:22-cv-0908-P, 2022 U.S. Dist. LEXIS 205875, at *31 (N.D. Tex. Nov. 10, 2022) ("[T]he HEROES Act does not mention loan forgiveness . . . . The Act allows the Secretary only to 'waive or modify' provisions of title IV. The Secretary then uses that provision to rewrite title IV portions to provide for loan forgiveness."). This is not permitted under the text of the HEROES Act. *Id.* at *31-32 ("'[E]nabling legislation' like the HEROES Act is not an 'open book to which the agency may add pages and change the plot line.'").

Likewise, the term "modify" does not authorize the Executive to make major changes to the repayment provisions of loans made pursuant to Title IV. To the

contrary, "modify" means "to change moderately or in minor fashion." *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225 (1994); *see also* Modify, Black's Law Dictionary (11th ed. 2019) ("modify" means "[t]o make somewhat different; to make small changes"). It does not mean to eliminate, extinguish, forgive, or cancel.

In conclusion, these provisions foreclose the broad reading of the HEROES Act proposed by the Executive Branch and illuminate why there is no historical precedent for the Executive Branch's irresponsibly broad interpretation of the Act. The Court should give weight to this lack of historical precedent, as it has in recent, similar cases. "[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *West Virginia*, 142 S. Ct. at 2610 (finding that Congress did not grant the EPA the authority to adopt its own regulation scheme to cap carbon emissions); *OSHA*, 142 S. Ct at 666 ("It is telling that OSHA . . . has never before adopted a broad public health regulation of this kind . . . . 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.").

D. The Debt Cancellation Plan Also Violates Congressional Instructions that Require the Department to Collect Federally Held Student Loans and Wrongfully Negates an Existing Statutory and Regulatory Scheme.

Absent clear direction from Congress, the Federal Claims Collection Act obligates Executive agencies such as the Department to "try to collect a claim of the United States Government for money . . . arising out of the activities of, or referred to, the agency[.]" 31 U.S.C. § 3711(a)(1). The Department must "aggressively collect all debts" arising out of its activities, e.g., issuing federally held student loans. 31 C.F.R. § 901.1(a). The law is also clear that the Department has only been delegated limited authority to compromise claims of the Government. *See* 31 U.S.C. § 3711(a)(2)–(3) (discussing when an agency may compromise a claim of the Government); 31 C.F.R. § 902.2 (same); 31 C.F.R. § 902.3 (explaining that agencies may compromise a Government claim "if the agency's enforcement policy in terms of deterrence and securing compliance . . . will be adequately served"); 31 C.F.R. § 902.4(b) (where borrowers are jointly and severally liable, "[a]gencies should ensure that a compromise agreement with one debtor does not release the agency's claim against the remaining debtors").

Congress has passed laws establish a detailed statutory and regulatory scheme proscribing the Department's responsibility to collect student loan debt and to limit its authority to compromise such debt absent specific circumstances. The specificity of the statutory and regulatory scheme created by the HEA demonstrates Congress' intent to create a carefully

tailored system and to provide detailed, limited authority to the Department with respect to student loan debt cancellation—authority much narrower than what the Executive Branch seeks with the Debt Cancellation Plan. "Insofar as Congress has made explicit statutory requirements, they must be observed and are beyond the dispensing power of Treasury officials." *Angelus Milling Co. v. Comm'r*, 325 U.S. 293, 296 (1945). The Department must faithfully fulfill its clearly defined statutory obligation to aggressively collect all debts. The Executive Branch does not have the authority to avoid the law in favor of its own desired scheme. *Richmond*, 496 U.S. at 435 (J. White, concurring) ("The Executive Branch does not have the dispensing power on its own . . . and should not be granted such a power by judicial authorization." (citation omitted)).

Specifically, Congress has set forth explicit requirements that loans be made available to eligible borrowers with the very clear intention that they be repaid. *See* 20 U.S.C. § 1077(a)(2)(B) ("[A] loan by an eligible lender shall be insurable by the Secretary . . . if . . . [it is] evidenced by a note or other written agreement which . . . provides for repayment . . . of the principal amount of the loan in installments over a period of not less than 5 years . . . nor more than 10 years[.]"); 20 U.S.C. § 1083(a)(1) ("Each eligible lender . . . shall provide thorough and accurate loan information . . . to the borrower . . . . [including] a statement prominently and clearly displayed and in bold print that the borrower is receiving a loan that must be repaid[.]"); *see also* 20 U.S.C. §§ 1078, 1078–3, 1078–6, 1078–7, 1080, 1080(a), 1082, 1087e, 1087–1, 1087gg, 1091b, 1092b, 1092c, 1094,1095a, 1098e. In accord, the Department has adopted regulations that require repayment of its loans. *See* 30 C.F.R.

§ 685.207(a)(1) ("A borrower is obligated to repay the full amount of a Direct Loan, including the principal balance, fees, any collection costs . . . and any interest . . . unless the borrower is relieved of the obligation to repay as provided in this part.").[7]

Notably, Congress has not allowed for the mass cancellation of student loan debt anywhere in this carefully crafted statutory scheme. Rather, in the few instances where Congress did elect to offer loan cancellation to borrowers, it did so *directly* with respect to specifically tailored groups of borrowers and with *detailed* instructions. *See* 20 U.S.C. §§ 1078–10(b) ("The Secretary shall carry out a program . . . of assuming the obligation to repay a qualified loan amount for a loan . . . [for a borrower who] has been employed as a full-time teacher for 5 consecutive complete school years . . . . The Secretary shall repay not more than $5,000 in the aggregate of the [outstanding] loan obligation[.]"); 1078–10(c)(3) (authorizing "[a]dditional amounts for teachers in mathematics, science, or special education"); 1078–11(a) (describing that the Secretary shall forgive the qualified loan amount for borrowers who are "employed full-time in an area of national need" as defined under (b)); 1078–12 (allowing forgiveness for those employed as civil legal assistance attorneys not to exceed "$6,000 for any borrower in any calendar year" or "an aggregate total of $40,000"); 1082(a)(6) ("the Secretary may . . . enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand . . . including any equity or any right of

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[7] *See also* U.S. DEP'T. OF EDUC., OBM NO. 1845-0007, MASTER PROMISSORY NOTE (2022) (requiring borrowers to acknowledge that they must repay all loans received).

redemption")[8]; 1087ee (providing for the "[c]ancellation of percentage of debt based on years of qualifying service" for borrowers who work in certain public service industries); 1098(d) (cancellations and deferments for eligible disabled veterans); 20 U.S.C. § 1087e(h) (establishing "Borrower defenses" and instructing the Secretary to "specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan[.]"). Tellingly, the Executive Branch does not rely on any of these statutes as a basis to authorize the Debt Cancellation Program and thus implicitly acknowledges that the grants of authority in these statutes are not an express authorization by Congress for its Debt Cancellation Program.

Instead, the Department points solely to the HEROES Act; however, if the HEROES Act were to be interpreted as granting a general administrative dispensing power to enact a new national policy of student debt relief across the board, the specific provisions carefully considered and enacted in the HEA would be rendered effectively moot. This surely was not Congress' intent. "Congress typically [does not] use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme." *West Virginia*, 142 S. Ct. at 2609. Instead, when reading various laws, relevant statutes must be construed "as a symmetrical and coherent

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[8] Section 1082(a)(6) does not authorize *mass* cancellation. Indeed, the Department's OGC has previously determined that "[Section 1082(a)(6)] is best construed as a limited authorization for the Secretary to provide cancellation, compromise, discharge, or forgiveness only on a case-by-case basis and then only under those circumstances specified by Congress." Rubinstein Memo at 4.

regulatory scheme," that "fit, if possible, all parts into an harmonious whole[.]" *FDA*, 529 U.S. at 133 (citation omitted). In accord, "[i]t is a commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). This cannon of statutory interpretation is especially relevant where, as here, "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *Id*.

This is another reason why the Department would need to show clear and specific Congressional instruction to avoid or negate these statutory and regulatory requirements. As discussed, no such clear and direct instruction exists. The CARES Act authorized the Executive Branch only to defer collection of student loan payments and suspend related interest. Congress specifically declined to instruct the Executive Branch to cancel student debt in any amount, much less $400 billion.

Considering this, the Executive Branch cannot circumvent Congress by relying on a broadly phrased statutory provision to enact the Debt Cancellation Plan. Congress "does not . . . hide elephants in mouseholes." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006). "Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'" *West Virginia*, 142 S. Ct. at 2609. The Executive Branch is bound to follow the instructions of Congress and to implement the laws faithfully.

The HEROES Act was not intended to eliminate the specific provisions of the HEA in favor of an entirely new and sweeping national policy for student debt cancellation based on the declaration of a

"national emergency," which the current President has conceded no longer exists. Kate Sullivan *et al.*, *Biden: 'The Pandemic is Over,'* CNN (Sept. 18, 2022), https://www.cnn.com/2022/09/18/politics/biden-pandemic-60-minutes/index.html (President Biden announced that "[t]he pandemic is over" on a 60 Minutes appearance);[9] *see Morales v. TWA*, 504 U.S. 374, 384-85 (1992) (the FAA's broad savings clause could not supersede a more specific ERISA counterpart because "it is a commonplace of statutory construction that the specific governs the general," and "Congress [did not] intend[] to undermine this carefully drawn statute through a general saving clause").

This Court has rejected similar attempts. For instance, in *Addison v. Holly Hill Fruit Products, Inc.*, the Court determined that a federal agency administrator did not have authority under the statute to interpret a specific provision broadly, resulting in a policy change, where the statute itself created a carefully crafted statutory and regulatory scheme which addressed exemptions in detail and did not "give broad discretion for administrative relief." 322 U.S. 607, 616 (1944). "Congress did not prescribe or proscribe generally . . . . [Rather, the statute] was here formulated [by Congress] with exceptions, catalogued with particularity and not left within the

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[9] On January 30, 2023, President Biden told Congress that he will extend the national and public health emergencies until May 11, 2023, when they will expire. Zeke Miller *et al.*, *President Biden to End COVID-19 Emergencies on May 11*, AP News (Jan. 30, 2023) https://apnews.com/article/biden-united-states-government-district-of-columbia-covid-public-health-2a80b547f6d55706a6986debc343b9fe.

broad dispensing power of the Administrator." *Id.* at 616-17.

In sum, Congress established a national policy for federal financial aid for higher education, complete with "exemptions in detail and with particularity." *Id.* at 617. Congress did not delegate through the HEROES Act a broad dispensing power to the Department or the President to carry out this national policy. Thus, "[t]he details with which the exemptions in [the HEA] have been made preclude their enlargement by implication." *Id.* at 618; *see Zuber v. Allen*, 396 U.S. 168, 185 (1969) ("It is clear that Congress was not conferring untrammeled discretion on the Secretary and authorizing him to proceed in a vacuum."). Interpreting the provision of the HEROES Act as a general grant of authority to cancel student loan debt would undermine the specific provisions of the HEA's statutory scheme entirely: "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *West Virginia*, 142 S. Ct. at 2613.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully submit that the judgment of the district court in *Brown* should be affirmed, and the judgment of the district court in *Nebraska* should be reversed.

Respectfully submitted,

JOSEPH H. HUNT
ALSTON & BIRD LLP
950 F Street, NW
Washington, DC 20004
(202) 239-3278
jody.hunt@alston.com

TERANCE A. GONSALVES
ALSTON & BIRD LLP
One Atlantic Center
1201 W. Peachtree Street
Atlanta, GA 30309
(404) 881-7000
terance.gonsalves@alston.com

ALEXANDER AKERMAN
Counsel of Record
ALSTON & BIRD LLP
333 S. Hope Street
16th Floor
Los Angeles, CA 90071
(213) 576-1000
alex.akerman@alston.com

Counsel for Amici Curiae

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