Nos. 22-506, 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 SENATOR MARSHA BLACKBURN AND 42 OTHER MEMBERS OF THE UNITED STATES SENATE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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February 3, 2023

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are Senator Marsha Blackburn and 42 other members of the United States Senate (listed in the Appendix). As members of the Senate, *amici* have an unquestionable interest in protecting the legislative powers that the Constitution confers upon the Congress of the United States. *See, e.g.*, U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States[.]"). The Constitution entrusts Congress with the powers to raise and spend the Nation's money, *see id.* art. I, § 8, cl. 1, to dispose of and regulate federal property, *see id.* art. IV, § 3, cl. 2, and to prescribe all laws Necessary and Proper for effectuating the legislature's powers, *see id.* art. I, § 8, cl. 18. In the exercise of those powers, Congress enacted Title IV of the Higher Education Act, 20 U.S.C. § 1070 *et seq.*, to help eligible borrowers pay for the costs of higher education. But it also deliberately structured Title IV to minimize the program's burden on taxpayers and the federal fisc. To that end, Congress authorized the forgiveness of federal student loan debt only in specific, narrow circumstances. This is not one of them. *Amici* submit this brief in support of Respondents because the Executive's actions here defy Title IV, threaten to deprive the Nation of nearly half a trillion dollars, and offend the separation of powers enshrined in the Constitution.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution vests "[a]ll legislative Powers" in Congress. U.S. Const. art. I, § 1. And no part of the legislative power was more important to the Framers than the power of the purse. *See, e.g.*, The Federalist No. 58, at 359 (James Madison) (Clinton Rossiter ed., 1961) (recognizing the "power over the purse" as "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people"). The Constitution therefore authorizes Congress to "provide for the common Defence and general Welfare of the United States," U.S. Const. art. I, § 8, cl. 1, and it jealously protects that power by providing, categorically, that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," *id.* art. I, § 9, cl. 7. In much the same way, the Framers vested Congress with the "[p]ower to release or otherwise dispose of the rights and property of the United States." *Royal Indem. Co. v. United States*, 313 U.S. 289, 294 (1941) (citing U.S. Const. art. IV, § 3, cl. 2). There can be no dispute, then, that the powers to spend and forgive the monies owed to the Treasury rest with Congress alone.

Acting pursuant to these powers, Congress passed Title IV of the Higher Education Act in 1965 to assist in making available the benefits of postsecondary education to eligible students in institutions of higher education. *See* 20 U.S.C. § 1070(a). Since then, Congress has amended the laws governing federal

student loans dozens of times.[2] What has emerged is a detailed and carefully crafted legislative scheme, which aims to provide fair and efficient government aid to eligible students, while balancing the competing interests of taxpayers and institutional actors alike.

Each part of the federal student loan program reflects exhaustive compromises and calculated policy judgments that survived the rigors of bicameralism and presentment. *See* U.S. Const. art. I, § 7, cl. 2. Through those duly enacted laws, Congress intended and expected that the borrowers who voluntarily assumed these obligations would repay their student loans under the conditions set forth in Title IV. And where Congress believed that loan forgiveness was warranted, it made that intention expressly clear.

Yet the Biden Administration, through its Cancellation Program, now seeks to discard those deliberate limitations and unilaterally erase roughly

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[2] *See, e.g.*, Pub. L. No. 117-200, 136 Stat. 2219 (2022); Pub. L. No. 116-260, 134 Stat. 1182 (2020); Pub. L. No. 116-136, 134 Stat. 281 (2020); Pub. L. No. 116-91, 133 Stat. 1189 (2019); Pub. L. No. 115-245, 132 Stat. 2981 (2018); Pub. L. No. 113-28, 127 Stat. 506 (2013); Pub. L. No. 112-25, 125 Stat. 240 (2011); Pub. L. No. 111-152, 124 Stat. 1029 (2010); Pub. L. No. 111-39, 123 Stat. 1934 (2009); Pub. L. No. 110-315, 122 Stat. 3078 (2008); Pub. L. No. 110-84, 121 Stat. 784 (2007); Pub. L. No. 109-171, 120 Stat. 4 (2006); Pub. L. No. 108-76, 117 Stat. 904 (2003); Pub. L. No. 105-244, 112 Stat. 1581 (1998); Pub. L. No. 105-33, 111 Stat. 251 (1997); Pub. L. No. 103-66, 107 Stat. 312 (1993); Pub. L. No. 102-325, 106 Stat. 448 (1992); Pub. L. No. 100-369, 102 Stat. 835 (1988); Pub. L. No. 99-498, 100 Stat. 1268 (1986); Pub. L. No. 96-374, 94 Stat. 1367 (1980); Pub. L. No. 96-49, 93 Stat. 351 (1979); Pub. L. No. 95-566, 92 Stat. 2402 (1978); Pub. L. No. 95-43, 91 Stat. 213 (1977); Pub. L. No. 94-482, 90 Stat. 2081 (1976); Pub. L. No. 92-318, 86 Stat. 235 (1972).

half a trillion dollars in debt owed to the United States. The Cancellation Program is a clear arrogation of the legislative power.

Indeed, it is no exaggeration to say that through the Cancellation Program, the Biden Administration has claimed an unprecedented degree of fiscal authority. Had Congress vested the Executive with the raw power and broad discretion it now asserts—to cancel, partially cancel, or not cancel hundreds of billions of dollars in debt—then this Court would surely view this as a case, in Justice Cardozo's words, of "delegation running riot." *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring). And it would surely hold that "Congress ha[d] unconstitutionally divested itself of its legislative responsibilities." *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting); *see NFIB v. OSHA*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring).

Of course, Congress did no such thing. And the question is not even close. To support his Cancellation Program, the Secretary of Education relies on the HEROES Act—an amendment to Title IV passed in the wake of the September 11 terrorist attacks. *See* Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108-76, 117 Stat. 904 (2003) (codified at 20 U.S.C. §§ 1098aa–1098ee). But the relevant provision of that Act permits only modest measures to prevent certain individuals from losing ground on their loans due to hardships induced by a war or national emergency. That is, Congress authorized only those measures "necessary" to ensure that borrowers would "not [be] placed in a *worse*

position financially in relation to" their student loans "because of their status as affected individuals." 20 U.S.C. § 1098bb(a)(2)(A) (emphasis added). The HEROES Act cannot plausibly be read to authorize the forgiveness of loan principal that places borrowers in a *better* position financially than before the emergency, much less to cancel half a trillion dollars in loan principal as the Secretary attempts to do here.

In fact, the Executive appears to have ignored these statutory limits because of politics. For nearly two years, President Biden failed to deliver on a campaign promise to cancel vast amounts of student debt.[3] During that period, President Biden, Speaker Pelosi, and other leaders admitted that the President could not do it alone; rather, Congress needed to pass a law. *See, e.g.*, President Joseph R. Biden, *Remarks by President Biden in a CNN Town Hall with Anderson Cooper* (Feb. 16, 2021), bit.ly/3Qzg9LN ("I don't think I have the authority to do it by signing the pen."); Speaker of the House Nancy Pelosi, *Transcript of Pelosi Weekly Press Conference Today* (July 28, 2021), bit.ly/3QzglL1 ("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."). But by the summer of 2022, the Biden Administration had exhausted its legislative efforts and recognized that Congress would not adopt the President's unbalanced proposal. So, with the midterm elections looming, the Administration gambled that it might wrest the

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[3] *See, e.g.*, Joe Biden (@JoeBiden), Twitter (Mar. 22, 2020, 7:28 PM), bit.ly/3W2DK8z.

legislative power away from Congress and rewrite Title IV for nearly all of the 45 million borrowers with federal student loans.

The Secretary's unilateral action was patently unlawful. The HEROES Act does not provide the sort of "clear authorization required by [this Court's] precedents" for such an enormously expensive and consequential action. *West Virginia v. EPA*, 142 S. Ct. 2587, 2614 (2022). The text does not authorize the cancellation of loan principal. And even if it did, millions of covered borrowers did not suffer any financial hardship at all due to the COVID-19 pandemic. To the contrary, many remained employed while also receiving subsidies from local, state, and federal authorities, including the suspension of the accrual of interest and payment obligations on these very same loans. The idea that outright cancellation is somehow "necessary" to prevent a waning pandemic from causing these 40-million-plus borrowers to be "worse" off on their student loans defies reality.

The Cancellation Program also violates the President's duties under the Take Care Clause. Article II obliges the President to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. That constitutional duty requires the Executive to faithfully collect on obligations owed to the Treasury and prohibits forgiving such obligations except for reasons expressly authorized by Congress. Yet the metes and bounds of the Cancellation Program represent the policies of the Biden Administration, not the policies embodied in any act of Congress. The President is not a king, and he has no power to dispense with the lawful acts of the legislature.

Though the Administration has structured, and even amended, the Cancellation Program in a cynical effort to avoid judicial scrutiny of its arrogation of legislative power, those efforts should not succeed. This Court should "hold unlawful and set aside" the Cancellation Program, 5 U.S.C. § 706(2), and by doing so, protect the federal fisc and reaffirm the constitutional separation of powers.

STATUTORY BACKGROUND

The Cancellation Program upends Congress's detailed and comprehensive scheme for subsidizing higher education. Under Title IV of the Higher Education Act of 1965, Congress has provided for two basic forms of government financial assistance. The first is grants, which do not need to be repaid. *See* 20 U.S.C. §§ 1070a–1070h. The second is loans, which generally must be repaid in full and with interest. *See id.* §§ 1071–1087-4, 1087a–1087ii.[4]

To mitigate Title IV's impact on the Treasury and American taxpayers, Congress has carefully limited the use of grants. For instance, it has provided grants for students who demonstrate exceptional financial need, *see id.* §§ 1070a(b), 1070b-2(c), for students who agree to pursue a career in teaching, *see id.* § 1070g-2(b), and for students whose parents or guardians died in the course of military service in Iraq or Afghanistan after September 11, 2001, *see id.* § 1070h.

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[4] "[I]nterest rates and fees are generally lower for federal student loans than private student loans." Federal Student Aid, *Interest Rates and Fees for Federal Student Loans*, bit.ly/3GCfYuJ (last visited Feb. 2, 2023).

Loans, by contrast, are more widely available. Congress has provided for flexibility in how borrowers repay these loans, in recognition of the financial challenges that many borrowers face. *See, e.g.*, *id.* §§ 1077(a)(2), 1087e(d)–(f), 1087dd(c)(2)–(7), 1098e(b), 1098f, 1098bb(a). But, to prevent loans from effectively becoming grants, Congress has limited the outright discharge of a loan's principal to narrow and detailed sets of circumstances. *See id.* §§ 1078-10, 1087j (loan forgiveness for teachers); *id.* § 1078-11 (loan forgiveness for service in areas of national need); *id.* § 1078-12 (loan repayment for civil legal assistance attorneys); *id.* §§ 1087(a), 1087dd(c)(1)(F) (loan repayment or forgiveness for deceased or disabled borrowers); *id.* § 1087(c) (discharge of loans due to school's closure or false eligibility certification); *id.* § 1087ee (loan forgiveness for certain public service); *id.* § 1098e(b)(7) (discharge of loans following income-based repayment program); *see also* 11 U.S.C. § 523(a)(8) (discharge of federal student loans in bankruptcy authorized only if failure to do so "would impose an undue hardship").

Congress made difficult but deliberate choices regarding when student loans may be forgiven. After all, forgiving loans comes at a price that falls on the public. Congress must offset any loan forgiveness by increasing taxes, raising the national debt, or reducing spending elsewhere. And borrowers voluntarily take out loans to invest in their future. That investment often pays significant dividends, with college graduates earning, on average, over $25,000 more per year compared to those with a high school diploma, while enjoying a 44% lower unemployment rate. *See Education pays, 2021*, U.S.

Bureau of Labor Statistics (May 2022), bit.ly/3GYZJJe. Where difficulties may arise for particular borrowers, Congress accounted for them by devising an income-based repayment program for borrowers experiencing financial hardship. *See* 20 U.S.C. § 1098e(b). It also directed the Secretary, upon the satisfaction of specified conditions, to "repay or cancel any outstanding balance of principal and interest due" on loans held by those who qualify for that program. *Id.* § 1098e(b)(7).

The Secretary here did not invoke any provision that allows for the discharge or cancellation of loans. The HEROES Act permits the Secretary to "waive or modify" provisions related to Title IV assistance as he "deems necessary in connection with a war or other military operation or national emergency"—but only in specific circumstances "authorized by" statute. 20 U.S.C. § 1098bb(a)(1). One such circumstance—and the one at issue here—is where the waiver or modification is "necessary to ensure" that "affected individuals are not placed in a worse position financially in relation to" their loans "because of their status as affected individuals." *Id.* § 1098bb(a)(2)(A). The HEROES Act does not contain any express provision authorizing the discharge or forgiveness of loan principal.

ARGUMENT

I. The Cancellation Program Exceeds The Executive's Statutory Authority.

The statutory question in this case is simple: Does the HEROES Act empower the Secretary to cancel nearly half a trillion dollars in debt owed by millions

of willing borrowers, many of whom suffered no financial hardship from the COVID-19 pandemic? The answer is clearly no.

A. The Major Questions Doctrine Applies.

To start, "[w]here the statute at issue is one that confers authority upon an administrative agency," the interpretive "inquiry must be 'shaped, at least in some measure, by the nature of the question presented'—whether Congress in fact meant to confer the power the agency has asserted." *West Virginia*, 142 S. Ct. at 2607–08 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). To that end, the "major questions doctrine" calls for "skepticism" before accepting extraordinary claims of regulatory authority. *Id.* at 2614.

This Court "presume[s] that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'" *Id.* at 2609 (citation omitted). That presumption rests on the understanding that Congress will "speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2022) (per curiam) (quoting *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). And it simultaneously "operates to protect foundational constitutional guarantees." *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring).

By vesting "[a]ll legislative Powers" in Congress, U.S. Const. art. I, § 1, the Framers believed that "'important subjects must be entirely regulated by the legislature itself,' even if Congress may leave the Executive 'to act under such general provisions to fill

up the details.'" *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (cleaned up) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825) (Marshall, C.J.)). The major questions doctrine safeguards that constitutional division of authority, preventing agencies from seizing "highly consequential power beyond what Congress could reasonably be understood to have granted." *Id.* at 2609 (majority op.).

"[T]his is a major questions case" if there ever was one. *Id.* at 2610. First, the Secretary has indisputably asserted a "power[] of vast economic and political significance." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (quotation marks omitted). The staggering price tag of his action—roughly half a trillion dollars—dwarfs, by an order of magnitude, what has sufficed to trigger the major questions doctrine in the past. *See id.* ($50 billion). And for years, the propriety of student loan forgiveness has "been the subject of an earnest and profound debate across the country." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (quotation marks omitted); *see, e.g.*, Seung Min Kim & Marianna Sotomayor, *Biden signals he's open to canceling student loans*, Washington Post (Apr. 26, 2022, 2:56 PM), bit.ly/3w1V3fp ("The issue of forgiving student loans has long been politically fraught."). Those considerations alone should give the Court pause. *See NFIB*, 142 S. Ct. at 665 (majority op.).

Moreover, the Secretary has "claim[ed] to discover" in the HEROES Act an "unheralded power" to issue a mass cancellation of student loan debt. *Util. Air*, 573 U.S. at 324. Until now, the Department of Education "ha[d] never relied on the HEROES Act" for the

"blanket or mass cancellation, compromise, discharge, or forgiveness of student loan principal balances." Memorandum from Reed D. Rubinstein, Principal Deputy General Counsel, Department of Education, to Betsy DeVos, Secretary of Education at 6 (Jan. 12, 2021), bit.ly/3H602Ca. Nor could it. "Congress never intended the HEROES Act as authority for mass cancellation." *Id.* And the text and context of the Act make that crystal clear. *See infra* Section I.B.

Equally troubling, the Secretary here claims authority "to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself." *West Virginia*, 142 S. Ct. at 2610. Both before and after the pandemic, numerous bills proposing similar, broad cancellation of student loans were introduced.[5] But none managed to pass through the "single, finely wrought and exhaustively considered, procedure" that our Constitution demands. *INS v. Chadha*, 462 U.S. 919, 951 (1983). That Congress "has considered and rejected bills authorizing something akin" to the Cancellation

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[5] *See, e.g.*, H.R. 6708, 117th Cong. (2022); H.R. 4797, 117th Cong. (2021); H.R. 2034, 117th Cong. (2021); H.R. 8514, 116th Cong. (2020); H.R. 6800, 116th Cong. § 150117(h) (2020); H.R. 6363, 116th Cong. (2020); S. 2235, 116th Cong. (2019); H.R. 3887, 116th Cong. (2019); H.R. 3448, 116th Cong. (2019). Dozens of other bills proposed more targeted loan forgiveness than the Secretary's indiscriminate program here. *See* Nat'l Ass'n of Student Fin. Aid Admins., *Legislative Tracker: Loans & Repayment*, NASFAA, bit.ly/3H4OKhH (last visited Feb. 2, 2023) (collecting bills from 117th Congress); Nat'l Ass'n of Student Fin. Aid Admins., *Legislative Tracker Archive: Loans & Repayment*, NASFAA, bit.ly/3iBBvf1 (last visited Feb. 2, 2023) (collecting pre-117th Congress bills).

Program shows that the Secretary has "attempt[ed] to work around the legislative process to resolve for [himself] a question of great political significance." *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (cleaned up) (citations omitted); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952) (recognizing that the seizure power "was not only unauthorized by congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes"). Indeed, when coupled with the President's campaign promise, and the conspicuous pre-election timing, that conclusion is inescapable.

The Secretary suggests that the major questions doctrine should not apply to cases involving government benefits. *See* Pet. Br. at 48–49. But such cases can pose the same "particular and recurring problem" that the doctrine aims to address: "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." *West Virginia*, 142 S. Ct. at 2609 (majority op.). This case proves the point. And, if anything, Congress's exclusive power to spend and forgive the monies owed to the government should make this Court even more reluctant to believe that it broadly delegated that core legislative power here.

Despite the Secretary's blinkered belief that forgiving roughly half a trillion dollars will not significantly affect the lives of others, *see* Pet. Br. at 49, that belief is simply untrue. Other Americans will have to pick up the tab, to the tune of over $2,500 per

taxpayer.[6] And the problems do not stop there. As former Treasury Secretary Lawrence Summers has explained, the Administration's massive handout will only exacerbate inflation, "consume[] resources that could be better used helping those who did not, for whatever reason, have the chance to attend college," and incentivize schools to "rais[e] tuitions" in the long run for others.[7]

In short, "there is every reason to 'hesitate before concluding that Congress' meant to confer on [the Secretary] the authority [he] claims" under the HEROES Act. *West Virginia*, 142 S. Ct. at 2610 (citation omitted). Whether to cancel almost half a trillion dollars in debt for 40-million-plus borrowers is a monumental decision that affects every American. And "[t]he basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself." *Id.* at 2613. Therefore, the major questions doctrine applies.

B. Congress Did Not Authorize The Secretary's Cancellation Program, Let Alone In Clear Terms.

Because this is a major questions case, the Secretary "must point to 'clear congressional authorization' for the power [he] claims." *West*

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[6] Lorie Konish, *Student loan forgiveness could result in a $2,500 burden per taxpayer, research finds*, CNBC (Sep. 2, 2022, 4:15 PM), bit.ly/3GKiYFr.

[7] Eric Boehm, *Biden's Student Debt Relief Plan Will Worsen Inflation*, Reason (Aug. 24, 2022, 2:00 PM), bit.ly/3kf9WZi (quoting former Secretary Summers).

Virginia, 142 S. Ct. at 2609 (quoting *Util. Air*, 573 U.S. at 324). He cannot.

The HEROES Act permits the Secretary to "waive or modify" certain student-loan-related provisions as he "deems necessary in connection with a war or other military operation or national emergency." 20 U.S.C. § 1098bb(a)(1). Yet before he may do so, such waivers or modifications must also be "authorized by" one of the provisions contained in paragraph (a)(2). *Id.* As relevant here, then, the Secretary's actions must "be necessary to ensure" that "affected individuals are not placed in a worse position financially in relation to" their loans "because of their status as affected individuals." *Id.* § 1098bb(a)(2)(A).

1. The Cancellation Program violates the plain text of the HEROES Act.

The Cancellation Program cannot be squared with the text of the HEROES Act for at least three reasons.

First, the Secretary's action is plainly unnecessary to ensure that recipients "are not place[d] in a *worse* position financially in relation to th[eir] financial assistance." *Id.* (emphasis added). After all, the permanent discharge of principal places borrowers in a *better* financial position in relation to their loans. And the Secretary's previous actions show that cancellation is by no means "necessary"—*i.e.*, needed or required—to prevent borrowers from falling behind their pre-pandemic loan positions. *Id.*; *see* Merriam-Webster's Collegiate Dictionary 828 (11th ed. 2003) (defining "necessary" to mean "absolutely needed" or "required" (capitalization altered)); American Heritage College Dictionary 911 (3d ed. 1997)

("Needed to achieve a certain result or effect; requisite.").[8]

Shortly after COVID-19 struck, then-Secretary Betsy DeVos invoked the HEROES Act for the far-more modest action of suspending loan payments and freezing the accrual of interest during the economic dislocation caused by government-mandated shutdowns. *See* Federal Student Aid Programs, 85 Fed. Reg. 79,856, 79,862 (Dec. 11, 2020) (describing March 20, 2020 action). One week later, Congress ratified the Secretary's action through September 2020 to protect borrowers and preserve the status quo. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 3513(a)–(b), 134 Stat. 281, 404 (2020). After that term expired, the Secretary

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[8] "Necessary's dictionary definitions reflect the word's ordinary meaning." *Vorchheimer v. Philadelphian Owners Ass'n*, 903 F.3d 100, 106 (3d Cir. 2018) (Bibas, J.). When Congress wants to "loosen the degree of necessity" to confer more discretion, it ordinarily "uses the phrase 'reasonably necessary,'" or another modifier to that effect. *Id.* at 106–07 (citing *Ayestas v. Davis*, 138 S. Ct. 1080, 1093 (2018)). In fact, that is what it did elsewhere in Title IV, including in the HEROES Act itself. *See, e.g.*, 20 U.S.C. § 1087e(e)(1) ("reasonably necessary"); *id.* § 1087dd(k) ("as the Secretary *determines* necessary" (emphasis added)); *id.* § 1098bb(a)(1) ("as the Secretary *deems* necessary" (emphasis added)). Section 1098bb(a)(2) does not employ similar loosening language. And contrary to the Secretary's contention, its use of the word "may" does not "exude[] deference." *See* Pet. Br. at 36–37 (citation omitted). After all, the provision deals with unforeseen, transient events like war or national emergency. Read in that context, "'may' signals not a low probability of necessity, but rather the conditional mood." *Vorchheimer*, 903 F.3d at 106. The temporary "condition" created by the emergency, "when met, makes the accommodation necessary, as in the phrase 'as the case may be.'" *Id.*

renewed the suspension of payments and accrual of interest. *See* 85 Fed. Reg. at 79,857. And that freeze has continued unabated, despite the economy having fully reopened.

Whether or not the Secretary's two-year freeze is consistent with the HEROES Act in its own right, the substantial relief already granted confirms the Cancellation Program's lack of necessity. Since the start of the pandemic, borrowers have had the benefit of years of protection from the need to make payments and the accrual of interest. And those lesser measures were more than capable of preventing borrowers from falling behind on their student loans on account of the national emergency. Thus, the Secretary's drastic step of permanently discharging principal is plainly not "necessary" to achieve that same, modest statutory goal. 20 U.S.C. § 1098bb(a)(2). The Secretary has simply granted an unlawful windfall to millions of borrowers across the country by administrative fiat.

Second, even if the HEROES Act permitted loan forgiveness, the Cancellation Program is insufficiently tailored to the ends prescribed by Congress. The Secretary argues that the "vast majority" of borrowers swept up in his Program qualify as "affected individuals," because they "'reside[]' or are 'employed'" in places "designated as COVID-19 disaster areas." Pet. Br. at 35 (alteration in original) (quoting 20 U.S.C. § 1098ee(2)(C)). But that is not enough. The basic statutory question is still whether, absent the Secretary's action, those individuals would be worse off "*because of their status* as affected individuals." 20 U.S.C. § 1098bb(a)(2)(A) (emphasis added). Nobody suggests that all—or even many—of the 40-million-

plus borrowers eligible for cancellation are worse off on their loans simply because they lived and worked somewhere in the United States during the COVID-19 pandemic. And certainly not to the degree that cancellation is "necessary."

The evidence shows that the overwhelming majority of borrowers have not suffered any financial hardship because of the pandemic. Nor will they in the future. Our economy has long since reopened, and the President claims it is even "stronger than before the pandemic." President Joseph R. Biden, *Remarks by President Biden on the December 2021 Jobs Report* (Jan. 7, 2022), bit.ly/3kjMj1C. At the same time, college graduates disproportionately work in sectors whose employees' incomes were—and continue to be—undisturbed by COVID-19. *See* Center on Budget and Policy Priorities, *Chart Book: Tracking the Recovery From the Pandemic Recession*, CBPP (Jan. 27, 2023), bit.ly/3kbNUXj ("[J]ob losses among adults with a bachelor's degree or above were just 6.4 percent at their *worst* in April 2020. As a group, these highly educated adults had recovered all job losses as of July 2021, and in December 2022 their employment was 5.4 percent above February 2020."). For these reasons, the Secretary does not argue that a large number of the 40-million-plus eligible borrowers—or even any of those that live or work in the United States—"suffered direct economic hardship as a direct result of" the pandemic. 20 U.S.C. § 1098ee(2)(D); *see* Pet. Br. at 35 (invoking § 1098ee(2)(D) only for that "small fraction of eligible borrowers" who "liv[e] and work[] abroad").

The Secretary instead argues that he may ignore this evidence, because he does not need to make

waivers on a "case-by-case basis." Pet. Br. at 36 (quoting 20 U.S.C. § 1098bb(b)(3)). But that language does not allow him to expand the statutorily defined category of individuals for whom a waiver is permitted. The Secretary still must meaningfully tailor his waivers to those who would be worse off "because of their status as affected individuals." 20 U.S.C. § 1098bb(a)(2)(A). He has not even tried to do that here. The Secretary's decisions to arbitrarily cap the relief available and to set income thresholds for the Cancellation Program may reflect his view of good policy. But they do not involve any real tailoring as to who has been financially harmed by the COVID-19 pandemic.[9]

Third, the Cancellation Program is not "necessary in connection with a . . . national emergency." 20 U.S.C. § 1098bb(a)(1). The Secretary relied upon the

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[9] It is also telling that, in contrast with usual practice, the OLC opinion upon which the Secretary relied does not actually analyze the legality of the Cancellation Program itself. *See* Memorandum from David J. Barron, Acting Assistant Attorney General, to Attorneys of the Office, *Best Practices for OLC Legal Advice and Written Opinions* at 2 (July 16, 2010), bit.ly/3DtLPNe. It instead addresses general interpretive questions, and then opines that a debt cancellation program "could," theoretically, "be structured as a permissible invocation of the [HEROES] Act." Office of Legal Counsel, U.S. Dep't of Justice, *Use of the Heroes Act of 2003 to Cancel the Principal Amounts of Student Loans*, 2022 WL 3975075, at *13 (Aug. 23, 2022). The opinion expresses no view on how $430 billion in categorical loan forgiveness could truly meet the requirements of the statute. That the Biden Administration does not appear to have asked OLC to review the legality of its actual Cancellation Program speaks volumes, particularly where the President himself had voiced serious doubts over the legal power to cancel student loan debt.

purported ongoing emergency posed by COVID-19. But the President had publicly declared weeks before that "[t]he pandemic is over." Kate Sullivan et al., *Biden: 'The pandemic is over,'* CNN (Sep. 18, 2022, 9:39 PM), bit.ly/3iEJLee. Before this Court, too, the Administration has proclaimed that COVID-19 no longer justifies pandemic-era measures that hamper its immigration priorities, stating, ironically, that it is constrained to follow the will of Congress. *See* Federal Respondents' Opposition to Application for a Stay Pending Certiorari at 2–3, *Arizona v. Mayorkas*, No. 22A544 (U.S. Dec. 20, 2022) ("[T]he solution to th[e] immigration problem cannot be to extend indefinitely a public-health measure that all now acknowledge has outlived its public-health justification. Instead, it is to rely on the immigration laws Congress has prescribed[.]").

The White House's public messaging further demonstrates that it never viewed its indiscriminate Cancellation Program as "necessary in connection with" a national emergency. Instead, the Administration's selective invocation of the waning pandemic was patently pretextual. In its press announcement, the White House emphasized the President's campaign promise and the economic problems associated with rising tuition costs. *See* J.A. 117–31. But remarkably, the White House never mentioned the supposedly "devastating economic consequences" of COVID-19. Pet. Br. at 19. Not once. This Court "cannot ignore the disconnect between the decision made and the explanation given." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019). If rising tuition costs are a major problem, then Congress must fix it. "But the current [tuition] crisis

is not a COVID crisis." *Arizona v. Mayorkas*, 143 S. Ct. 478, 479 (2022) (Gorsuch, J., joined by Jackson, J., dissenting). It does not support the Secretary's Cancellation Program.

2. Statutory context confirms that the Cancellation Program is unlawful.

In the end, the text of the HEROES Act is thrice fatal to the Cancellation Program's legality. And the major questions doctrine layers "extra icing on [that] cake already frosted." *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021) (citation omitted). But lest any doubt remain, context further cements the conclusion that Congress has not "plainly authorize[d] the Secretary's" action. *NFIB*, 142 S. Ct. at 665.

Take, for example, Title IV's broader scheme. When Congress wanted to authorize the forgiveness of student loan debt, it did so explicitly. *See, e.g.*, 20 U.S.C. §§ 1078-10, 1087(a), 1098e(b)(7). That Congress did not similarly do so here suggests that it never meant for the HEROES Act to permit the cancellation of principal. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018) ("Courts are required to give effect to Congress' express inclusions and exclusions, not disregard them."). And its choice of language—authorizing measures only to prevent individuals from becoming "worse" off "in relation to" their loans—confirms that.

Similarly, throughout Title IV, Congress repeatedly instructed the Secretary that he "shall" forgive particular amounts of debt for certain borrowers upon the satisfaction of defined conditions. *See, e.g.*, 20 U.S.C. §§ 1078-10(b)–(c), 1078-11(a)(1),

1078-12(c), 1087(a)(1), 1087(c)(1), 1087(d), 1087e(m)(1), 1087j(b), 1087dd(g)(1), 1087ee(a)–(b), 1098e(b)(7). In doing so, Congress chose not to leave the critical cancellation choice to the Secretary's discretion; it wanted to make that decision itself. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018) ("The word 'shall' generally imposes a nondiscretionary duty."). The idea that Congress sought to depart from that practice here, through the "modest words" contained in the HEROES Act, is simply implausible. *West Virginia*, 142 S. Ct. at 2609 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

"The history of the" HEROES Act also "provides important context for the issue in this case." *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 581 U.S. 258, 263 (2017). At bottom, Congress enacted the law in the wake of the September 11 attacks "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). That explicit "focus[] on one problem" is another "warning sign" that the Secretary "is acting without clear congressional authority" in his attempt "to solve a new and different problem" allegedly caused by a pandemic—particularly because, as explained above, the pandemic was never the true basis for the Cancellation Program. *West Virginia*, 142 S. Ct. at 2623 (Gorsuch, J., concurring). It was mere pretext to further a political end.

Finally, while the text of the statute is clear and should be conclusive, "[t]he legislative history (for those who consider it) confirms" that Congress meant

only to suspend obligations on student loans during temporary military service or national emergencies—not to forgive them altogether. *Sturgeon v. Frost*, 139 S. Ct. 1066, 1085 (2019). Members of Congress wanted to protect borrowers from experiencing "further financial difficulty generated when they are called to serve." 149 Cong. Rec. H2522, H2524 (daily ed. Apr. 1, 2003) (statement of sponsor Rep. Kline). And to do that, they wanted to enable our troops' "loan payments [to be] *deferred* until the[ir] return." *Id.* (statement of cosponsor Rep. Isakson) (emphasis added); *see also id.* ("[T]he Secretary will have the opportunity to forbear a loan as our servicemen and servicewomen are activated, [and] this will allow them not to pay on their student loans for the time that they are active." (statement of Rep. Ryan)); *id.* at H2524–25 ("What we want to do here is to make it clear to the Secretary that . . . he can, in fact, defer these payments." (statement of cosponsor Rep. Boehner)).

That is why Congress chose the language that it did—to allow those whose lives were suddenly disrupted from becoming "worse" off "in relation to" their loans "because of their status as affected individuals." 20 U.S.C. § 1098bb(a)(2)(A). But the bill went no further, and that is why it passed with near unanimous support after little debate.[10] Had the uncontroversial bill delegated to the Secretary the extraordinary power now claimed, surely that would not have been the case.

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[10] The lone House dissenter clarified two days later that he too "meant to vote 'yea' on [the] rollcall vote" for the bill. 149 Cong. Rec. E663, E663 (Apr. 3, 2003) (statement of Rep. Miller).

* * *

In sum, the Secretary's reading of the HEROES Act is "not only unprecedented; it also effect[s] a fundamental revision of the statute, changing it from one sort of scheme" (preventing "affected individuals" from becoming "worse" off due to emergency-induced hardship) "into an entirely different kind" (conferring windfalls upon nearly all borrowers across the Nation). *West Virginia*, 142 S. Ct. at 2612 (cleaned up) (citation omitted). "It strains credulity to believe that this statute grants the [Secretary] the sweeping authority that [he] asserts." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2486. That authority remains with Congress.

II. The Cancellation Program Violates The Take Care Clause.

In addition, the Cancellation Program flagrantly disregards the Executive's appropriate role under our constitutional separation of powers. Rather than collect the money owed to the Treasury as the law requires, *see* 31 U.S.C. § 3711(a)(1) (requiring agency heads to "try to collect a claim . . . for money . . . arising out of the activities of" their duties), the Executive has gone to the opposite extreme by outright cancelling it. The Executive's Cancellation Program therefore embodies a policy that "is so extreme as to amount to an abdication of its statutory responsibilities." *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985). Worse yet, the Administration's action violates the letter and spirit of the Constitution, because the Take Care Clause imposes a duty on the Executive to faithfully execute the law—not unilaterally nullify it. The cancellation of nearly half a trillion dollars of debt in contravention of the

applicable statutory scheme is the very opposite of faithful execution.

A. The Take Care Clause Imposes An Affirmative Obligation On The Executive To Faithfully Execute The Law.

Article II of the Constitution vests "[t]he executive Power" in the "President of the United States of America," U.S. Const. art. II, § 1, cl. 1, and directs that the President "shall take Care that the Laws be faithfully executed," *id.* art. II, § 3. The Take Care Clause expresses a constitutional imperative: It imposes on the President a duty to faithfully carry out the laws that Congress has enacted and constitutes an important limitation on the independent discretion of the Executive. No other constitutional provision mandates that any branch execute a power in such a specific manner. And certainly, no other requires a different branch to do so "faithfully." *See* 1 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) (unpaginated) (defining "faithfully" to mean "[w]ith strict adherence to duty and allegiance" or "[w]ithout failure of performance; honestly; exactly").

In that way, the Take Care Clause elevates the considered policy judgments of Congress over those of the President. Under our Constitution, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown Sheet & Tube Co.*, 343 U.S. at 587. Rather, the President's enumerated role when it comes to legislation is simply "the recommending of laws he thinks wise and the vetoing of laws he thinks bad." *Id.*

The Executive, of course, enjoys some discretion with respect to the execution of federal law. *See Heckler*, 470 U.S. at 831. But that discretion depends upon the policies inherent to enforcing the acts of Congress and does not confer upon the Executive the discretion to adopt the policies that he would have preferred Congress to have adopted. In other words, executive "discretion encompasses the discretion not to *enforce* a law against private parties; it does not encompass the discretion not to *follow* a law imposing a mandate or prohibition on the Executive Branch." *In re Aiken Cnty.*, 725 F.3d 255, 266 (D.C. Cir. 2013) (opinion of Kavanaugh, J.). As a result, the duty to faithfully execute the laws bars the Executive from pursuing policies at variance with those adopted by Congress. *See Heckler*, 470 U.S. at 833 (recognizing that the Executive may not "disregard legislative direction in the statutory scheme").

A contrary conclusion would "vest[] in the President a dispensing power." *Kendall v. U.S. ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838). Yet the Take Care Clause repudiates the Executive's ability to dispense with lawful acts of Congress. As this Court has recognized, to "contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the [C]onstitution, and entirely inadmissible." *Id.*; *see also The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C. 55, 57 (1980) ("The history of th[e] dispute [over the Stuart kings' 'dispensing power'] was well known to the Framers of the Constitution, and it is clear that they intended to

deny our President any discretionary power of the sort that the Stuarts claimed.").

B. The Cancellation Program Fails To Take Care That The Law Is Faithfully Executed As It Far Exceeds The Executive's Settlement Power.

The Department of Justice has long acknowledged that the Take Care obligation fully applies to the protection of the federal fisc and includes an obligation to faithfully collect on the financial obligations owed to the United States. *See The Attorney General's Role as Chief Litigator for the United States*, 6 Op. O.L.C. 47, 60 (1982). If anything, it applies with extra force in this context, where Congress possesses exclusive authority to control the federal purse strings. *See, e.g.*, *U.S. Dep't of Navy v. Fed. Lab. Rels. Auth.*, 665 F.3d 1339, 1346–47 (D.C. Cir. 2012) (Kavanaugh, J.); *Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc.*, 33 F.4th 218, 225–32 (5th Cir. 2022) (Jones, J., concurring).

Congress has authorized the Executive in some instances to settle outstanding debts owed to the Treasury pursuant to its settlement power. *See, e.g.*, *United States v. S. Pac. Co.*, 259 U.S. 214, 235–36 (1922); 31 U.S.C. § 3711(a)(2). But where Congress has conferred on the Executive the authority to compromise or forgive monies owed to the Nation, the Executive must do so based on the policies ingrained in enforcement discretion and the underlying federal statutes. *See Angelus Milling Co. v. Comm'r*, 325 U.S. 293, 296 (1945) ("Insofar as Congress has made explicit statutory requirements, they must be observed and are beyond the dispensing power of

[Executive] officials."). Accordingly, the Executive breaches the Take Care obligation when it forgives monies owed to the United States beyond the scope permitted by statute.

In an analogous setting, OLC has advised that the Attorney General's power to settle litigation—which involves forgiving a debt potentially owed to the United States—must abide by the policies adopted by Congress. "The settlement power is sweeping, but the Attorney General must still exercise her discretion in conformity with her obligation to enforce the Acts of Congress." *Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion*, 23 Op. O.L.C. 126, 135 (1999) (quotation marks omitted). Thus, "the considerations and terms that inform and structure a settlement must be traceable . . . to a discernible source of statutory authority." *Id.* at 137; *see also The Attorney General's Role as Chief Litigator for the United States*, 6 Op. O.L.C. at 60 (recognizing that the Attorney General's settlement authority is limited by express statutory limitations and by "the duty imposed on the President by Article II, § 3 of the Constitution to 'take Care that the Laws be faithfully executed'"). Although the Attorney General may settle outstanding debts based on the kinds of considerations that typically govern the settlements of cases—such as enforcement resources, litigation risk, and the ability to collect—"[o]ther types of considerations that concern more particular policy aims . . . generally must be rooted in the purposes of the statutes." 23 Op. O.L.C. at 138.

These same considerations apply with full force to the Cancellation Program. Here, Congress has

specifically charged the Secretary of Education with the obligation to "try to collect a claim . . . for money . . . arising out of the activities of" his duties. 31 U.S.C. § 3711(a)(1). The Secretary's general authority to "compromise, waive, or release" student loan obligations is not an unbounded license to reformulate federal policy and rewrite Title IV, 20 U.S.C. § 1082(a)(6), but one that may only be exercised consistent with the statutory program, *see* 3 U.S. Gen. Accounting Office, Office of the General Counsel, *Principles of Federal Appropriations Law* 14-75 (3d ed. 2008) ("[W]ithout a clear statutory basis, an agency has no authority to forgive indebtedness or to waive recovery."). When Congress has authorized the Secretary to forgive student loans, it has done so expressly by identifying specific groups of borrowers eligible for loan cancellation. *See supra* Section I.B.2. And Department regulations similarly restrict the Secretary's compromise authority to certain limited circumstances. *See* 34 C.F.R. § 30.70(a); *see also* 31 C.F.R. § 902.2(a). Indeed, the Secretary recently conceded that historically, the Department has employed its settlement authority "on an individualized, case-by-case basis." Joint Resp. to Court Order at 2, *Sweet v. Cardona*, No. 3:19-cv-03674-WHA (N.D. Cal. Nov. 9, 2022).

Simply put, Congress has not vested the Secretary with the plenary authority to forgive student debt that is otherwise collectible and owed to the Treasury, because of a "presidential policy," much less a secretarial policy, that has not been endorsed by Congress. But that is precisely the authority that the Executive claims here. The Cancellation Program "does not direct that a congressional policy be executed

in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed" by the Executive. *Youngstown Sheet & Tube Co.*, 343 U.S. at 588. As a result, the Executive has failed in its constitutional duty to faithfully execute the law, exploiting the end of a pandemic to adopt policies at odds with those of the People's representatives in Congress. The Cancellation Program is contrary to law and the Constitution, and reflects an unprecedented executive aggrandizement of the fiscal powers vested exclusively in Congress. Where the President has failed in his duty to faithfully execute the law, it is the province and duty of the Court to remind him of that obligation.

CONCLUSION

Amici respectfully urge this Court to hold unlawful and set aside the Secretary's Cancellation Program. The district court's judgment in *Brown* (No. 22-535) should be affirmed, and the district court's judgment in *Nebraska* (No. 22-506) should be reversed.

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APPENDIX

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Senator John Boozman
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Senator Bill Cassidy
Senator John Cornyn
Senator Tom Cotton
Senator Kevin Cramer
Senator Mike Crapo
Senator Ted Cruz
Senator Steve Daines
Senator Joni Ernst
Senator Deb Fischer
Senator Lindsey Graham
Senator Chuck Grassley
Senator Bill Hagerty
Senator Josh Hawley
Senator John Hoeven
Senator Cindy Hyde-Smith
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