No. _____

IN THE

Supreme Court of the United States

BROWN COUNTY TAXPAYERS ASSOCIATION,
APPLICANT,

v.

JOSEPH R. BIDEN, JR., ET AL.,
RESPONDENTS.

To the Honorable Amy Coney Barrett, Associate Justice of the Supreme Court and Circuit Justice for the Seventh Circuit

EMERGENCY APPLICATION FOR WRIT OF INJUNCTION PENDING APPEAL

Richard M. Esenberg
Counsel of Record
Daniel P. Lennington
Wisconsin Institute for Law & Liberty
330 E. Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
(414) 727-9455 | rick@will-law.org
Counsel for Applicant

PARTIES

Applicant is the Brown County Taxpayers Association, an unincorporated association organized under the laws of the State of Wisconsin.

Respondents are Joseph R. Biden, Jr., President of the United States, Miguel A. Cardona, Secretary of Education, Richard A. Cordray, Chief Operating Officer of Federal Student Aid, and the United States Department of Education, Office of Federal Student Aid, an agency of the United States.

DIRECTLY RELATED PROCEEDINGS

Brown County Taxpayers Association v. Biden, et al., No. 1:22-cv-1171 (E.D. Wis., Oct. 4, 2022), Verified Complaint, Decision and Order Dismissing Case and Denying Motion for Injunction Pending Appeal, at App. 1—19.

Brown County Taxpayers Association v. Biden, et al., No. 22-2794 (7th Cir., Oct. 11, 2022), Order Denying Emergency Motion for Injunction Pending Appeal, at App. 20.

JURISDICTION

Applicant has a pending appeal in the United States Court of Appeals for the Seventh Circuit, pursuant to 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1651.

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QUESTIONS PRESENTED

1. May a taxpayer sue in federal court to prevent executive officials from unilaterally exercising the Constitution's spending power in violation of "specific constitutional limitations," *Flast v. Cohen,* 392 U.S. 83, 102–3 (1968), or is the taxpayer-standing doctrine announced in *Flast* effectively a dead letter that ought to be overruled?

2. Does the Major Questions Doctrine prevent the President from relying on the HEROES Act, an act designed to support the "men and women of the United States Military," 20 U.S.C. § 1098aa, to create a massive federal program of loan forgiveness for tens of millions of Americans?

To The Honorable Amy Coney Barrett, Associate Justice, Circuit Justice for the Seventh Circuit:

As soon as Sunday, October 23, 2022,[1] the Biden Administration will start automatically cancelling student-loan debts owed by tens of millions of borrowers. The blow to the United States Treasury and taxpayers will be staggering—perhaps costing more than one trillion dollars. If this program goes forward as planned on Sunday, then the President will unilaterally spend *roughly 4% of the nation's Gross Domestic Product*.

There is no legal justification for this presidential usurpation of the constitutional spending power, which is reserved exclusively for Congress. This step, which is certainly a major question under cases such as *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022), is predicated on a law passed under different circumstances to accomplish different purposes for different beneficiaries. The President has transformed a law designed to benefit military personnel and first responders who have been disadvantaged by their response to a discrete national emergency into a warrant to transfer hundreds of billions, or perhaps over a trillion, dollars in debt

[1] Originally, Respondents ("Defendants" below and in other cases) announced October 17, 2022, would be the first possible date of automatic loan forgiveness, *Nebraska v. Biden*, 4:22-cv-01040 (E.D. Mo. Sept. 30, 2022), ECF.14 ("Defendants will not discharge any student loan debt pursuant to the policy challenged in this case before October 17, 2022"). Several days later, Respondents announced a new day of Sunday, October 23, 2022. *Id.* ECF.27:9 ("The Department will not discharge any student loan debt under the debt relief plan prior to October 23, 2022"). As explained below, Respondents have repeatedly moved the goal posts to avoid legal challenges in court. The extraordinary nature of this program and the unusual legal tactics employed by Respondents necessitates a limited use of the taxpayer standing doctrine.

onto taxpayers. But these student-loan borrowers have not been disadvantaged by their service to the country, or for that matter, anything at all. To the contrary, the President contends this authority exists because, in his sole judgment, and notwithstanding that the need to make loan payments has long been suspended, the COVID-19 pandemic may have made repayment more difficult for some (but not all) recipients of his largesse.

The assault on our separation of powers—and upon the principle that the spending power is vested solely in Congress—is extraordinary, and perhaps unprecedented. Applicant therefore requests an emergency writ of injunction under Sup. Ct. Rule 21, 28 U.S.C. § 1651, and 28 U.S.C. § 2101, preventing Respondents from forgiving any loans under the Plan, described below, pending appeal to the Court of Appeals for the Seventh Circuit.

Given the impending unconstitutional actions by Respondents, Applicant respectfully requests emergency consideration of this application. Applicant first moved in the district court under Fed. R. App. P. 8, which was denied, *see* App. 15, and then again at the Seventh Circuit, which also denied this emergency request, App. 20.

Applicant is aware that prudential notions of standing are an issue here. In fact, were it not for concerns about just how far this Court's prudential and extra-constitutional limitations on standing extend, a lower court would have enjoined this program weeks ago. Applicant is not insensitive to these concerns. Applicant is aware of the concern that federal courts should not be transformed into forums for the

abstract litigation of questions in which litigants without a concrete stake in the matter press claims that do not discreetly affect them. Courts should not become a forum to do no more than refight legislative battles.

But that is not what's happening here. We are witnessing a gargantuan increase in the national debt accomplished by a complete disregard for limitations on the constitutional spending authority. Applicant and those similarly situated are being asked to assume perhaps over *one trillion dollars* in debt. The issue is not simply that the government has acted unconstitutionally in a way that harms others but not the Applicant itself. To the contrary, because the unlawful step alleged here tramples the constitutional spending power, it harms Applicant's members as taxpayers. That this harm is shared by many (although by no means all) citizens does not defeat standing. There are numerous examples of widely impactful policies whose constitutionality has been adjudicated by the federal courts.

Applicant is aware, moreover, that it is asking this Court to apply a doctrinal framework that, while adopted long ago and still good law, is seldom applied. But all other creative attempts to establish standing have been frustrated by Respondents' unilateral changes in the program. Doctrine exists that would allow this matter to be heard. It simply cannot be the law that a President can hand out a trillion dollars with impunity.

STATEMENT

1. In Title IV of the Higher Education Act of 1965 as amended ("HEA"), Congress charged the Department of Education with "making available the benefits

of postsecondary education" through the provision of federal financial aid. 20 U.S.C. § 1070(a). The main federal financial aid program is called the William D. Ford Federal Direct Loan Program, which allows students to apply for and receive Direct Loans from the federal government to pay for educational expenses, including tuition and living expenses. 20 U.S.C. § 1087*ll*. Title IV also includes other programs, such as the Federal Family Education Loan ("FFEL") Program, which encouraged private banks to make student loans, backed by a federal guarantee, 20 U.S.C. §§ 1071-1087-4, and the Perkins Loan Program, *id*. §§ 1087aa-1087ii, which encouraged colleges and universities to make loans, again backed by a federal guarantee, 20 U.S.C. §§ 1087aa–ii. But neither of these latter two programs still operates. 20 U.S.C. § 1087(a)(1) (no new FFEL loans after July 1, 2010); *id*. § 1087aa(b)(2) (no new Perkins loans after September 30, 2017). Over time, the Department of Education has come to own many formerly private loans, *e.g.*, 20 U.S.C. § 1078(c)(8); 20 U.S.C. § 1080(b); 34 C.F.R. § 682.409, and many borrowers have consolidated private loans into single, federally held Direct Consolidation Loans, 34 C.F.R. § 685.220.

Through these provisions (which have resulted in the federalization of most student financial aid in America), the federal government has amassed an enormous balance sheet. About 43 million borrowers owe over $1.62 trillion in student-loan debt to the U.S. Treasury. App. 5. This is no fiction or accounting gimmick: this is money that the government and the taxpayers who support it can count on. Borrowers are legally obligated to repay these loans to the U.S. Treasury, *e.g.* 34 C.F.R. § 682.102 (providing that "[a] borrower is obligated to repay the full amount" of a loan under

the FFEL Program); *id.* § 685.207 (providing that "[a] borrower is obligated to repay the full amount of a Direct Loan"), and the Department of Education is obligated to collect this debt. *See* 31 U.S.C. § 3711(a)(1); 31 C.F.R. § 901.1. In short, federal student loan debt is a significant asset of the taxpayers of the United States.

In creating these programs, Congress carefully (and generously) provided several specific provisions allowing repayment plans, incentives, deferment, forbearance, and even loan cancellations. *E.g.* 20 U.S.C. § 1087e(m). But Congress has not chosen to vest the President with the unilateral power to cancel whatever loans he wants whenever he wants.

2. Yet President Biden has assumed this power. On August 24, 2022, President Biden announced the "One-Time Student Loan Debt Relief" plan ("Plan"). App.6.[2] Under the Plan, Respondents will cancel up to $20,000 in federal loans to individuals with income below $125,000 (or $250,000 for households). *Id.*[3]

Two mechanisms will trigger this cancellation. First, some borrowers will apply in "early October 2022" to have their loans forgiven. App. 8. This process has

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[2] https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/

[3] https://studentaid.gov/debt-relief-announcement/one-time-cancellation.

already begun to take shape, with the Department preparing the necessary applications. *See* Dep't of Education, *Federal Student Loan Debt Relief Application and Verification Forms Request*, Docket No.: ED-2022-SCC-1026 (Oct. 17, 2022).[4] And as of yesterday, the Administration posted its formal application online.[5] Second, and most importantly for purposes of this application, "around 8 million borrowers" will have their loans forgiven automatically "without applying" as early as Sunday, October 23. *Id.*; *supra,* fn.1.

The Plan may cost over one trillion dollars. According to the University of Pennsylvania, the debt cancellation will cost approximately $519 billion, but it is possible that "total plan costs could exceed $1 trillion." *See* University of Pennsylvania, *Penn Wharton Budget Model, The Biden Student Loan Forgiveness Plan* (Aug. 26, 2022).[6] In other words, the Plan is a massive new federal spending program on par with the Bipartisan Infrastructure Act, which was touted by the White House as a "once-in-a-generation" and "transformational" federal law.[7] In a different way, the Plan—which will wipe away untold assets off the United States' balance sheets by unchecked presidential fiat—will be transformational to our separation of powers, the rule of law, and the power of the President. Almost anything

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[4] https://public-inspection.federalregister.gov/2022-22495.pdf

[5] https://studentaid.gov/debt-relief/application

[6] https://budgetmodel.wharton.upenn.edu/issues/2022/8/26/biden-student-loan-forgiveness

[7] https://www.whitehouse.gov/bipartisan-infrastructure-law/

can be a national emergency. If a President can do this, then he will have been transformed into an officer who not only executes the law but also makes it.

And if courts can do nothing about it because of prudential concerns about standing, then the President's power will be unchecked and almost absolute. The President will be able to spend any amount of money to benefit favored groups, and because the only harm will be to those who foot the bill, his disregard of our Constitution's careful vesting of the spending power in the Congress and Congress alone will become a dead letter. Although voters might choose to punish such unilateral action, the unconstitutional giveaways will themselves distort the political process. This outcome can't be the law.

3. Respondents offer a single legal authority in support of their plan: the Higher Education Relief Opportunities for Students Act of 2003 (the HEROES Act). *See* Dep't of Education, *Federal Student Aid Programs, Waivers and Modifications of Statutory and Regulatory Provisions*, 87 FR 61512 (Oct. 12, 2022);[8] Dep't of Education, *Notice of Debt Cancellation Legal Memorandum*, 87 FR 52943 (Aug. 30, 2022);[9] U.S. Department of Justice, *Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans* (Aug. 23, 2022).[10]

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[8] https://www.govinfo.gov/content/pkg/FR-2022-10-12/pdf/2022-22205.pdf

[9] https://www.govinfo.gov/content/pkg/FR-2022-08-30/pdf/2022-18731.pdf

[10] https://www.justice.gov/olc/file/1528451/download

The purpose of the HEROES Act, according to Congressional findings, was to support "our nation's defense," "protect the freedom and secure the safety of its citizens," and to support the "men and women of the United States military [who] put their lives on hold, leave their families, jobs, and postsecondary education in order to serve their country and do so with distinction." 20 U.S.C. § 1098aa(b). In the Act, Congress found that "[t]here is no more important cause for this Congress than to support the members of the United States military and provide assistance with their transition into and out of active duty and active service." *Id*. at (b)(6).

Under the HEROES Act, the Secretary of Education may "waive or modify any statutory or regulatory provision applicable" to federal student loan programs "as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide the waivers or modifications authorized by paragraph (2)." 20 U.S.C. § 1098bb(a)(1). Under Paragraph (2), the Secretary's action is justified only if "recipients of student financial assistance under title IV of the Act 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.A. § 1098bb(a)(2). Instead of claiming that the HEROES Act was passed to support the "men and women of the United States military" (as it says in the law), Respondents instead claim that the HEROES Act allows broad student loan forgiveness for anyone "who suffered financial hardship because of COVID-19"—in other words, any Americans the President deems worthy. In the President's view, the HEROES Act

empowers him to forgive the loans of anyone who has been affected by something that can be called an emergency. It does not. And if it did, it would be unconstitutional.

4. The Brown County Taxpayer Association (BCTA) is an association of dues-paying members who pay federal taxes. App. 2. BCTA's mission is to promote individual freedom and citizen responsibility; limited government that is fiscally responsible, transparent, and accountable; and economic policy that expands opportunity for the people of Brown County to prosper and live free, productive lives. App. 2, 3. BCTA and its members advocate in favor of fiscally responsible federal tax policy and are specifically concerned about the rising federal debt and that debt's impact on their future tax liability. *Id.* The Plan will, if implemented, negatively impact BCTA and each of its members, who will pay higher taxes and live in an America that is less prosperous, more fiscally irresponsible, and burdened by a higher federal debt. *Id.* Moreover, another trillion dollars in debt added through the unilateral action of the President would force BTCA to alter its advocacy activities. *Id*. BTCA alleges that Respondents unconstitutionally exercised congressional spending power, and in doing so, exceeded constitutional limitations, specifically the Appropriations Clause and the Major Questions Doctrine. *Id.*

REASONS FOR GRANTING THE APPLICATION

An injunction pending appellate review is warranted when the applicant demonstrates it is "likely to prevail, that denying . . . relief would lead to irreparable injury, and that granting relief would not harm the public interest." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam) (citing *Winter v.*

Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)). The Court also has discretion to issue an injunction "based on all the circumstances of the case," without its order "be[ing] construed as an expression of the Court's views on the merits" of the underlying claim. *Little Sisters of the Poor Home for the Aged v. Sebelius*, 571 U.S. 1171 (2014). A Circuit Justice or the full Court may also grant injunctive relief "[i]f there is a 'significant possibility' that the Court would. . ." grant certiorari ". . . and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted." *Am. Trucking Ass'ns, Inc. v. Gray*, 483 U.S. 1306, 1308 (1987) (Blackmun, J., in chambers) (considering whether there is a "fair prospect" of reversal).

I. Applicant Has Taxpayer Standing

Standing has proved a stumbling block for plaintiffs wishing to challenge the Plan because Respondents, in response to lawsuits, have quickly made changes in a blatant attempt to blunt challenges. For example, after the Pacific Legal Foundation filed a lawsuit on behalf of an employee who would have faced a tax penalty because of the Plan's details, Respondents immediately added an "opt-out" to nullify that plaintiffs' standing. *See Garrison v. U.S. Dep't of Ed.*, 1:22-cv-1895 (S.D. Ind. Sept. 27, 2022) (motion for TRO denied because of Respondents' change to the program, *see* ECF.16). And then after six states filed a lawsuit to challenge the plan based, in part, on the states' operation of loan servicing agencies, Respondents changed the Plan yet again. *See Nebraska v. Biden*, No. 4:22-cv-1040 (E.D. Mo. Sept. 29, 2022); *see* NPR, "In a reversal, Education Dept. is excluding many from student loan relief," (Sept. 30,

2022).[11] Just last week, Respondents even boldly asserted that because of their newest changes, in part, the States do not even have standing to challenge the Plan, even if they run their own loan servicing agencies. *See Nebraska, supra,* ECF.27:10–19. According to Respondents, no one has standing to challenge the Plan.

The argument that a President may unilaterally forgive debt owed to the U.S. Treasury through executive fiat, and that *no one* has standing to challenge him, threatens the very foundations of a constitutional republic. If Respondents are correct, a future President could similarly order the IRS to implement a one trillion dollar tax holiday—a program that would be "lawful" because no one would have standing to challenge it. The President could send checks to everyone (or to carefully selected demographic groups) for any amount to achieve any political end. To recite the possibility is to invoke its implausibility. This simply cannot be the case. The federal judiciary cannot be relegated to a mere bystander observing constitutional infractions of the highest orders. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Applicant brings this taxpayer standing claim under *Flast v. Cohen*, *infra*, which permits taxpayers with legal standing to challenge a President who usurps congressional spending powers and at the same time violates an express

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[11] https://www.npr.org/2022/09/29/1125923528/biden-student-loans-debt-cancellation-ffel-perkins

constitutional prohibition on that spending power. While we understand that *Flast* has been little used such that it is common to suppose that "taxpayer standing" never exists, it has not been overruled and that fact is as important as the infrequency of its use. Applicant acknowledges that the conditions for the application of *Flast* will not often be present. Applying *Flast* to these facts, Applicant believes it meets that test, or at most, argues for a cabined expansion to be used only in the most extraordinary cases, like this one.

A. Federal Taxpayer Standing

In 1923, the United States Supreme Court ruled that a federal taxpayer did not have standing to challenge the Maternity Act of 1921. *Frothingham v. Mellon*, 262 U.S. 447 (1923). Four decades later, in *Flast v. Cohen,* the Court reconsidered taxpayer standing and whether the "Frothingham barrier" should be "lowered." *Flast*, 392 U.S. at 85. The Court found that it should and decided that the *per se* rule on taxpayer standing was not a constitutional rule. *Id.* at 93. The bar, according to the Court, was based on "pure policy considerations." *Id.* For example, "Frothingham was denied standing not because she was a taxpayer but because her tax bill was not large enough." *Id*. The *Frothingham* court also based its decision on concerns that general taxpayer standing would "open the door of federal courts to countless such suits." *Id.* The Court rejected these concerns, noting that some taxpayers have significant federal tax liability and that class action rules have mitigated the concern about "countless similar suits." *Id*. at 94.

The *Flast* Court emphatically rejected the concept that "under no circumstances should standing be conferred on federal taxpayers to challenge a federal taxing or spending program." *Id.* at 98. The Court then announced this two-part rule, which remains the law today. First, "a taxpayer will be a proper party to allege the unconstitutionality *only of exercises of congressional power under the taxing and spending clause of Art. 1, § 8, of the Constitution*." *Id.* at 102 (emphasis supplied). Second, "the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." *Id.* "Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." *Id.* at 102–03.

After laying out the two conditions for taxpayer standing, *Flast* considered them together, explaining that the plaintiffs suffered a particular injury for standing purposes when, in violation of the Establishment Clause and by means of "the taxing and spending power," their property is transferred through the Government's Treasury to a religious entity. *Id.* at 105–106. "The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power." *Id.* at 106. *Flast* thus "understood the 'injury' alleged in Establishment Clause challenges to federal spending to be the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion alleged by a plaintiff." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 348 (2006)

(quoting *Flast*, 392 U.S. at 106). "Such an injury," *Flast* continued, is unlike "generalized grievances about the conduct of government" and so is "appropriate for judicial redress." 392 U.S. at 106. Of particular note, *Flast* found support for taxpayer standing in the "history of the Establishment Clause," especially contemporary founding documents. *Id.* at 103–104.

Admittedly, since *Flast*, many taxpayers have failed to meet its requirements. In 2007, a plurality of the Court found that the Freedom from Religion Foundation did not have standing to challenge the President's "faith-based initiatives." The opinion considered it dispositive that the money used for the initiatives was not from "specifically appropriat[ed] money. Instead, their activities are funded through general Executive Branch appropriations." *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 595, 604–5 (2007); *see also Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011).

It may not be clear that the facts of *Flast* met its doctrine. One might argue that the limit imposed by the Establishment Clause is upon general governmental conduct and is not itself a direct prescription of how money may be spent. But, respectfully, Applicant asserts both that *Flast*'s two-part test remains good law and that no Supreme Court decision has slammed the door on application of that test outside of the Establishment Clause context. Certainly, the Court's formulation of its doctrine and rationale—that our constitutional separation of powers allows taxpayers to insist that money be spent only in the way the Constitution directs—does not so limit its application. While Court has yet to apply *Flast* as Applicant urges here, there

are few—if any cases—where a President has so blatantly ignored constitutional process in an amount and with a magnitude that certainly qualifies as a major question under *West Virginia v. EPA*. Applicant contends that applying the *Flast* test (or at least a cabined extension of *Flast*) to the facts supports standing here. If not, the Court should make clear its position and overrule *Flast*; otherwise, *Flast* will remain a zombie precedent lurking in the shadows and unnecessarily draining resources away from future litigants and this Court.

B. Applicant's Taxpayer Standing

A logical, cabined application of *Flast* (or, if one prefers, extension of *Flast*), based on its two-part test, is warranted here:

1. Applicant challenges the exercise of "congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution." *Flast,* 392 U.S. at 102. Specifically, Applicant alleges that Respondents, as Executive Branch officials, have usurped congressional powers under that provision and created a program that obligates federal taxes and erases federal assets (in the form of debt) without any authority. App. 3, 9, 10. Only Congress may tax, spend, pay debts, and forgive debts. *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013) (congressional power to spend includes "the authority to impose" terms on their use).

Put succinctly and with apologies to Justice Robert Jackson, if there is a fixed star in our constitutional constellation, it is that the spending power is granted to Congress and not the President. Applicant has the legitimate expectation that its members' taxes will be spent according to lawful appropriations under the

Constitution, not through executive fiat. As the Court said in *Flast,* "a taxpayer will be a proper party to allege the unconstitutionality of *exercises of congressional power*." 392 U.S. at 102 (emphasis added). Here, Respondents are unconstitutionally exercising that congressional power. App. 9.

This Court may be concerned that *Flast*'s language is limited to an exercise of power "by Congress." *Flast,* 392 U.S. at 104. If *Flast* were so limited, and Congress passed a law forgiving student loans only to Christian students, then a taxpayer would have taxpayer standing. But if the President did the same thing, then there would be no taxpayer standing. Under *Flast*, and the other cases like *Bowen v. Kendrick*, 487 U.S. 589 (1988), a taxpayer has standing in both cases because *Flast*'s concern was the unlawful exercise of the spending power (not *who* exercised the power), which is precisely the issue here.

Even such a formulaic distinction would not defeat standing here. In *Bowen v. Kendrick*, taxpayers challenged the implementation of the Adolescent Family Life Act, which allowed executive officials to issue grants to address premarital adolescent sexual relations and pregnancy. The government opposed taxpayer standing, claiming that the taxpayer opposition to the grants under AFLA was "really a challenge to executive action, not to an exercise of congressional authority under the Taxing and Spending Clause." *Id.* at 619. This Court rejected that argument: "We do not think, however, that appellees' claim that AFLA funds are being used improperly by individual grantees is any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and

been administered by the Secretary." *Id*. The Court explained that in *Flast* itself and three subsequent cases, taxpayers had standing to challenge executive officials who were using "Congress' taxing and spending powers." *Id*. at 620 (collecting cases). On this score, the only relevant difference between *Bowen, Flast*, and the other cited cases is that here, executive officials are *unlawfully* and *unconstitutionally* exercising Congressional spending power. This is an *additional* constitutional violation. Applicant submits that this fact weighs heavily in favor of finding taxpayer standing as it implicates broad separation of powers issues not present in cases arising solely under the Establishment Clause.

2. Applicant also alleges that "the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power." *Flast*, 392 U.S. at 102–03. The Constitution specifically limits presidential powers to only those authorized by Congress or the Constitution. The President's "power, if any, to issue [an] order must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). "Agencies have only those powers given to them by Congress." *West Virginia*, 142 S. Ct. at 2609. When "taxing and spending power" is exercised, it must be in conformity with the rest of Article I, specifically the Appropriations Clause, which prevents the Executive Branch from obligating the Government to pay money without statutory authority. *See* U.S. Const. art. 1, § 9, cl. 7. "Congress's control over federal expenditures is absolute." *U.S. Dep't of Navy v. Fed. Lab. Rels. Auth.*, 665 F.3d 1339, 1348 (D.C. Cir. 2012).

In 2012, then-Judge Kavanaugh wrote that the Appropriations Clause is a "bulwark of the Constitution's separation of powers among the three branches of the National Government." *Id.* at 1347. "If not for the Appropriations Clause, the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure." *Id.* (citation omitted); *accord Reeside v. Walker*, 52 U.S. 272, 291 (1851).

Here, Respondents are doing just that. They are exercising "unbounded power" by obligating the federal treasury, and in fact removing assets from the federal treasury, without legal authority. This violates the specific limitations imposed by the separation of powers, and more specifically, the Appropriations Clause.

Moreover, when Respondents point to a vague statute like the HEROES Act, and then claim congressional authorization, the Major Questions Doctrine is implicated. As explained below, "extraordinary" claims of executive power must be based on "clear congressional authorization." *West Virginia*, 142 S. Ct. at 2609. By not basing their new spending program on "clear congressional authorization," Respondents are exceeding a "specific constitutional limitation." *Flast*, 392 U.S. at 103.

As *Flast* explained, the "specific constitutional limitation" test is informed by the "specific evils" by "those who drafted" the relevant constitutional restriction "and fought for its adoption." *Id.* at 103. It is hard to overstate the importance of the constitutional design restricting the President from exercising a unilateral power over the purse, which has been in place since the founding. *E.g.,* Federalist, No. 78

(Hamilton) (Congress "commands the purse"); Federalist, No. 58 (Madison) ("The power over the purse may [be] the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people."). By invoking the Appropriations Clause, Applicant alleges a specific limitation on the congressional spending power, like the limitation imposed by the Establishment Clause.

* * *

Applicant contends that such arguments fit logically within the *Flast* test.

If this Court finds that they do not, then Applicant contends that the *Flast* test ought to be expanded to encompass Respondents' massive and unprecedented usurpation of Congressional spending power. The problem is not simply as it was in *Flast:* what the money was spent on (even though the expenditure at issue there was then considered to be unconstitutional). It is that the way in which the money has come to be spent, that is, by unilateral executive decree. That violation is made more clear (and grave) by its transgression of the Major Questions Doctrine. Far from allowing taxpayers free rein to litigate the legality of all and sundry government spending, what Applicant asks here is recognition of the self-evident point that major spending programs ought to be constitutionally enacted and that judicial enforcement of that requirement does not derogate from separation of powers principles. It enforces them.

This targeted expansion of taxpayer standing should be precise and limited to situations where, as here, federal officials exercised the spending power of Congress

in violation of specific constitutional provisions. That is particularly so where the spending power has been flouted in such a manner that other procedural protections employed by Congress, such as the Administration Procedures Act, have been evaded or entirely disregarded. As argued *supra*, not only have Respondents violated the separation of powers and specific constitutional prohibitions, but Respondents have also violated Congressionally mandated procedural safeguards, namely, the notice-and-comment mandates of the APA. These procedures exist "to ensure that unelected administrators, who are not directly accountable to the populace, are forced to justify their quasi-legislative rulemaking before an informed and skeptical public." *New Jersey v. HHS*, 670 F.2d 1262, 1281 (3d Cir. 1981). By requiring notice and comment, the APA "ensure[s] that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas." *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979). By imposing these safeguards upon the executive branch, Congress imposed a procedure check on "the dangers of arbitrariness and irrationality in the formulation of rules." *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027-28 (D.C. Cir. 1978). But Respondents ignored those checks, and created a new, massive federal spending program in violation of the Appropriations Clause and the Major Questions Doctrine. Had Respondents even minimally complied with the APA, Applicant would have at least had notice and the opportunity to comment on such a plan. And this harm should be considered as part of the overall calculus of taxpayer standing. "The violation of a procedural right granted by statute can be sufficient in

some circumstances to constitute injury in fact." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 342 (2016). "A plaintiff in such a case need not allege any additional harm beyond the one Congress has identified." *Id*. (collecting cases).

II. Applicant is Likely to Succeed on its Claims that the Plan Exceeds Respondents' Constitutional and Statutory Authority

A. The Plan Violates the Constitutional Separation of Powers

The President's "power, if any, to issue [an] order must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co.*, 343 U.S. at 585. And an "agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). When the executive acts, it mostly points to "clear congressional authorization." *West Virginia*, 142 S. Ct at 2609.

Respondents do not claim that the President has any constitutional power to wipe a thirteen-figure sum from the balance sheets. That power belongs to Congress. *See, e.g., Agency for Int'l Dev.,* 570 U.S. at 213. Instead, Respondents point to a 9/11-era law, the HEROES Act (the "Act"). *See Notice of Debt Cancellation Legal Memorandum*, 87 Fed. Reg. 52,943 (Aug. 30, 2022). That law, however, grants no clear authorization for Respondents to implement a nationwide debt cancellation plan.

1. The Major-Questions Doctrine Applies

The major-questions doctrine applies to the Plan. In *West Virginia v. EPA*, the Supreme Court explained that it "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." 142 S. Ct.

at 2605 (citation omitted). In such cases, "modest words, vague terms, or subtle devices" cannot confer upon the Executive Branch the power to make "a radical or fundamental change" to a statutory scheme. *Id*. at 2609 (citations omitted). The Court presumes that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Id*. (citation omitted). In short, in "certain extraordinary cases," executive officials "must point to clear congressional authorization for the power [they] claim[ ]." *Id*. at 2634.

Several factors support the application of this principle to the Plan. Respondents claim the authority to resolve a matter of great "economic and political significance." *Id*. at 2608 (citation omitted). And Respondents are attempting to create a program that Congress has "conspicuously and repeatedly declined to enact itself." *Id*. at 2610; *see, e.g.,* S. 2235, 116th Cong. (2019); H.R. 2034, 117th Cong. (2021) (failed attempts to forgive student loans). Through the Plan, Respondents are also exercising "unheralded power." *id*. at 2610 (citation omitted); *see also NFIB v. OSHA*, 142 S. Ct. 661, 666 (2022) ("It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind"); *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism.")

A new government spending program, resting solely upon authority granted to the Secretary of Education to do what he "deems necessary" during a "national

emergency," 20 U.S.C. § 1098bb(a)(1)–(2)(A), is precisely the type of policy closely scrutinized by the Supreme Court under the Major Questions Doctrine. *See generally West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (collecting cases applying the Major Questions doctrine).

2. Respondents Cannot Point to any Clear Congressional Authorization for this Debt Forgiveness

Because the Major Questions Doctrine applies, Respondents must identify "clear congressional authorization." *Util. Air Reg. Grp.*, 573 U.S. at 324. In reviewing Respondents' alleged authority, courts should employ "skepticism." *West Virginia*, 142 S. Ct. at 2614.

The purpose of the Act is to support "our nation's defense," "protect the freedom and secure the safety of its citizens," and to support the "men and women of the United States military [who] put their lives on hold, leave their families, jobs, and postsecondary education in order to serve their country and do so with distinction." 20 U.S.C. § 1098aa(b).

Under the Act, the Secretary of Education may "waive or modify any statutory or regulatory provision applicable" to federal student loan programs "as the Secretary deems necessary in connection with a war or other military operation or national emergency" 20 U.S.C. § 1098bb(a)(1). Under the Act, the Secretary's action is justified only if "recipients of student financial assistance under title IV of the Act 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).

Instead of claiming that the Act was passed to support the "men and women of the United States military" (as the law says), Respondents claim that the Act allows broad student loan forgiveness for anyone "who suffered financial hardship because of COVID-19," whether they served in the military or not—in other words, any Americans the President deems worthy. *See Notice of Debt Cancellation Legal Memorandum*, 87 Fed. Reg. 52943 (Aug. 30, 2022). It does not.

First, the student loan cancellation is not "necessary in connection with a … national emergency." 20 U.S.C. §1098bb(a)(1). Respondents did not announce this program until nearly two-and-a-half years after the pandemic began and a few weeks after the President declared that "[t]he pandemic is over." *See* David Cohen and Adam Cancryn, "Biden on '60 Minutes': 'The Pandemic is over,'" (Politico, Sept. 18, 2022).[12] Even the White House's own press release on the plan did not invoke a "national emergency," but merely mentioned in passing that the plan will "provide more breathing room to America's working families as they continue to recover from the strains associated with the COVID-19 pandemic."[13] A policy to "provide more breathing room" to Americans "as they continue to recover" from a respiratory virus hardly sounds like a "war or other military operation or national emergency" denoted in the Act.

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[12] https://www.politico.com/news/2022/09/18/joe-biden-pandemic-60-minutes-00057423

[13] https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/

Second, the student loan cancellation plan is not "necessary to ensure that recipients of student financial assistance … 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). To give meaning to each word in the text, the provision should be interpreted as a backstop to prevent a decline in the person's position vis-à-vis the loan at issue. Under this interpretation, the Act could help a service member deployed abroad and unable to send in their monthly payment. But the same rationale does not apply to the Plan, which puts Respondents' chosen class in a financially *better* position without any showing that the individuals were in a "worse place financially" with their loan repayments. There is no requirement that a beneficiary's ability to repay his or her loan has been impeded by COVID: no need to demonstrate that he or she missed work due to COVID, lost or was laid off from his or her job, or otherwise suffered a financial hardship. Indeed, it would be impossible to make such a claim because no one has been obligated to make payments on the loans since the national emergency on which Respondents rely began. For two years, Respondents have suspended "repayment of and interest accrual on all Federal loans held by the Department." 87 Fed. Reg. 41,878, 41,884 (July 13, 2022). "No one with federally held loans has had to pay a single dollar in

loan payments."[14] The Plan is not "necessary" to ensure borrowers are not in a "worse position" as required by the Act.

Third, the plan is not limited to "affected individuals." 20 U.S.C. § 1098bb(a)(2)(A). The Act defines "affected individuals," in relevant part, as people who (1) "reside[] or [are] employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency" or (2) "suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary." 20 U.S.C. § 1098ee(2)(C)–(D). But Respondents have not restricted debt cancellation borrowers who have suffered "direct economic hardship as a direct result" of the pandemic. The loan forgiveness applies to everyone that meets the income qualifications, whether they suffered hardship or not.

B. The Plan Violates the Administrative Procedures Act

The Administrative Procedure Act embodies a "basic presumption of judicial review," *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), and instructs reviewing courts to set aside agency action that is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B). For all the reasons stated above, Respondents have exceeded their constitutional powers and their Plan violates constitutional rights. Moreover, as a "statement of general or particular applicability

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[14] https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/

and future effect designed to implement . . . policy," the Plan meets the requirements of a rule and must be submitted to notice and comment. *See* 5 U.S.C. § 553. It was not. Respondents rely again on the HEROES Act, which provides an exemption. *See* 20 U.S.C. § 1098bb(b)(1)–(2). But as Respondents would be the first to admit, if the HEROES Act does not provide the broad, unbounded, and apparently limitless powers as argued by Respondents, then that Act provides no exemption here and the APA's notice-and-comment mandate is therefore transgressed.

III. Applicant Will Be Irreparably Harmed Absent an Injunction

Constitutional violations generally constitute proof of an irreparable harm. Wright & Miller, *Grounds for Granting or Denying a Preliminary Injunction—Irreparable Harm*, 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.") (collecting cases). Here, an injunction would prevent a constitutional violation. Absent one, Respondents will deplete the federal treasury by a staggering amount. Once action is taken, a court cannot turn back the clock. As the lower court noted in a similar case, "[o]nce a loan is forgiven, it cannot easily be undone." *Faust v. Vilsack,* 519 F.Supp.3d 470, 477–78 (E.D. Wis. 2021) (enjoining federal defendants from forgiving loans based on race).

Moreover, irreparable harm is "harm that cannot be repaired and for which money compensation is inadequate." *Orr v. Shicker*, 953 F.3d 490, 502 (7th Cir. 2020) (citation omitted). Damages are not available in this case because of sovereign immunity: "Federal constitutional claims for damages are cognizable only under

Bivens." *Loumiet v. United States*, 828 F.3d 935, 945 (D.C. Cir. 2016). Since monetary relief is not available here, the harm is irreparable.

IV. The Public Interest and Balance of Harms Weigh Heavily in Favor of an Injunction

The final two factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). The "public interest would be served" by an injunction preventing a constitutional violation. *Preston v. Thompson*, 589 F.2d 300, 303, n.3. And the "government suffers no harm from an injunction that merely ends unconstitutional practices and/or ensures that constitutional standards are implemented." *Doe v. Kelly*, 878 F.3d 710, 718 (9th Cir. 2017).

CONCLUSION

Applicant requests that this Court issue an injunction pending appeal enjoining Respondents from implementing the Plan, and if the Seventh Circuit affirms the district court's order, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court.

Respectfully submitted,

WISCONSIN INSTITUTE FOR
LAW & LIBERTY, INC.

Richard M. Esenberg
Counsel of Record
Daniel P. Lennington
330 E. Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
Telephone: (414) 727-9455
Facsimile: (414) 727-6385
Rick@will-law.org
Dan@will-law.org
Counsel for Applicant

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