Nos. 22-506 & 22-535

IN THE

Supreme Court of the United States

JOSEPH R. BIDEN,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,
v.
STATE OF NEBRASKA, ET AL.,
Respondents.

DEPARTMENT OF EDUCATION, ET AL.,
Petitioners,
v.
MYRA BROWN, ET AL.,
Respondents.

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

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICUS CURIAE

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization devoted to defending constitutional freedoms from the administrative state's depredations. [1] The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, and the right to have laws made by the nation's elected lawmakers through constitutionally prescribed channels (*i.e.*, the right to self-government). These selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, the President, federal agencies, and even sometimes the Judiciary, have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although the American People still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

NCLA is keenly interested in this case because it implicates a profoundly troubling assertion of

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[1] No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief. *Amicus curiae* notified all parties in accordance with Rule 37.2.

administrative power and raises critically important issues of constitutional and administrative law. Indeed, NCLA is challenging the same Loan Cancellation Program on behalf of a nonprofit client in a separate case pending in the United States District Court for the District of Kansas. *See Cato Institute v. Dep't of Educ.*, No. 5:22-cv-4055 (D. Kan.).

SUMMARY OF ARGUMENT

Under the Constitution, individuals are to be bound only by laws made with their consent through their elected legislature. Confirming this principle is the separation of powers, under which legislative power is exercised solely by Congress. The Framers' intent found expression in the Constitution's Vesting Clause, which states that "[*a*]*ll* legislative Powers herein granted shall be vested in a Congress of the United States[.]" U.S. Const. art. I, § 1 (emphasis added). The Framers also made clear that the power of the purse must reside solely in the legislature. To this end, the Constitution's Appropriations Clause explicitly provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." *Id.* art. I, § 9.

Petitioners' invocation of the HEROES Act to rewrite statutory provisions and cancel hundreds of billions of dollars owed to the Treasury violates both the Vesting and Appropriations Clauses. Their scheme is quintessentially legislative in character because it amends laws duly passed by Congress. It is also an appropriation because any canceling of debt owed to the Treasury requires an expenditure that

only Congress may approve. The HEROES Act would unquestionably be unconstitutional if it explicitly empowered an executive agency—here Petitioner Department of Education ("Department")—to rewrite statutes and appropriate funds. *See Clinton v. City of New York*, 524 U.S. 417, 440-41 (1998) (holding Line Item Veto Act was unconstitutional because it impermissibly authorized the President to amend appropriations statutes). Yet Petitioners essentially ask this Court to hold that the Act *implicitly* empowered them to do so—fortuitously discovering not merely one elephant but two woolly mammoths in this proverbial mousehole.

Petitioners ask the Court to adopt this woolly interpretation of the HEROES Act because it is the same (erroneous) interpretation they have invoked to pause student-loan payments and interest accrual beyond a congressionally mandated end date for such relief. *See* Pet. Br. at 8, 35. But those extensions similarly rewrote an Act of Congress and spent billions that Congress never appropriated. Petitioners' invocation of the HEROES Act to justify those extensions was also unconstitutional and merely reinforces the conclusion that their reliance on the same Act here cannot pass constitutional muster.

Finally, Respondent States indisputably would suffer concrete injuries because of Petitioners' unlawful conduct. In addition to injuries set forth in Respondents' brief, the Loan Cancellation Program further injures States by undermining the competitive advantages Congress bestowed on them through Public Service Loan Forgiveness ("PSLF"), which

purposefully incentivized student-loan borrowers to find and maintain employment with state government agencies. *See* 20 U.S.C. § 1087e(m)(3)(B)(i) (creating PSLF incentives for workers in "public service" jobs). Loss of that competitive advantage would inflict a concrete injury against States in their capacity as employers needing to recruit and retain college-educated employees. Thus, even if this Court were not convinced by the States' asserted basis for standing, the States' competitive injury would give the Court discretion to exercise subject-matter jurisdiction and strike down Petitioners' unconstitutional attempt to rewrite laws and cancel debt owed to the Treasury.

ARGUMENT

I. STATES HAVE STANDING BECAUSE THE LOAN CANCELLATION PROGRAM INJURES THEM IN THEIR CAPACITY AS PSLF EMPLOYERS

Professors Samuel Bray and William Baude's *amicus curiae* brief urges the Court to reject Respondent States' theories of standing and to deny them "special solicitude" under *Massachusetts v. EPA*, 549 U.S. 497 (2007). Brief of Profs. Bray and Baude as *Amici Curiae*, *Biden v. Nebraska*, Nos. 22-506 & 22-535) (U.S. Jan. 12, 2023). The Court need not revisit its *Massachusetts* precedent because it may exercise subject-matter jurisdiction based on an alternative theory of standing grounded in traditional economic injury. The Loan Cancellation Program injures Respondent States in their capacity as employers by

undermining recruitment, shrinking the PSLF-subsidized labor pool, and increasing labor costs.

Congress established the PSLF program in 2007 to encourage individuals who owe outstanding student-loan debt to seek and maintain employment with public-service employers, including state-government agencies. 20 U.S.C. § 1087e(m)(3)(B)(i). The PSLF does this by promising student-loan borrowers that their outstanding loan balances will be completely discharged after 120 monthly payments (10 years) while working at qualifying employers. *Id.*; *see also* 34 C.F.R. § 685.219. Because of PSLF, all else being equal, working for a qualifying employer is more financially advantageous to student-loan borrowers than working at the same pay (or even higher pay) at a nonqualifying employer.

By offering these incentives to student-loan borrowers in the job market, Congress purposefully gave qualifying employers a valuable advantage over nonqualifying employers in competing to recruit and retain college-educated talent. PSLF benefits qualifying employers "by providing significant financial subsidies to the borrowers they hire," thereby "increasing recruitment and lowering labor costs." *ABA v. Dep't of Educ.*, 370 F. Supp. 3d 1, 19 (D.D.C. 2019). So, government action that eliminates or reduces state employers' PSLF benefits inflicts an economic injury that confers standing. *Ibid.*

Here, state governments qualify as employers for PSLF purposes and thus are among the employers that Congress intended to benefit through PSLF

incentives. *See* 20 U.S.C. § 1087e(m)(3)(B)(i). Yet, the Loan Cancellation Program undermines that benefit and would eliminate it entirely in many cases. The magnitude of the PSLF incentive—and therefore the benefit to a state employer—varies based on the amount that would be forgiven under PSLF for each borrower-employee. The more PSLF-forgivable debt the borrower-employee has, the greater the incentive, and importantly the greater the benefit that is passed on to the state employer. *Any* reduction in the borrower-employee's student-loan debt level through the Loan Cancellation Program would reduce the pre-existing PSLF incentive at least a little bit, and thus reduce the competitive benefit to the state employer. The Loan Cancellation Program reduces the amount of debt that could be forgiven under PSLF by $10,000 or $20,000 for each of the affected 40 million borrowers. The competitive benefits that flow to state employers would fall commensurately, placing States in a comparatively less advantageous hiring position.

This effect is easiest to see for the "nearly 20 million borrowers [who] could see their entire remaining balance discharged." [2] Since these borrowers would have no remaining student debt to

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[2] Statements & Releases, White House, FACT SHEET: The Biden-Harris Administration's Plan for Student Debt Relief Could Benefit Tens of Millions of Borrowers in All Fifty States (Sept. 20, 2022), available at: https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/20/fact-sheet-the-biden-harris-administrations-plan-for-student-debt-relief-could-benefit-tens-of-millions-of-borrowers-in-all-fifty-states/ (last visited Feb. 2, 2023).

cancel, the promise of PSLF cancellation becomes worthless to them and thus would no longer provide any incentive for them to take a job with public service employers like the States. And for any such borrowers who currently work for States, PSLF would no longer provide any incentive for them to continue working at state agencies because no pot of PSLF gold would remain at the end of their 10-year rainbow.

The same deferred compensation dynamic exists for the remaining borrowers whose outstanding student debt would be partially cancelled. The promise of debt forgiveness under PSLF becomes less valuable after the Loan Cancellation Program for the simple reason that affected borrowers would have less remaining debt to forgive. Therefore, they would have less incentive to work for PSLF-qualifying employers like the States. State employers would become less competitive in the labor market and their labor costs would rise commensurately because, all else being equal, they would need to increase compensation or benefits offered in an amount sufficient to replace the lost subsidy and associated competitive advantage that Congress had provided them through PSLF.

The Loan Cancellation Program would thereby inflict direct and immediate competitive and financial harm on the States as employers, which satisfies the injury-in-fact requirement for Article III standing. Indeed, this Court "routinely recognizes probable economic injury resulting from [governmental actions] that alter competitive conditions as sufficient to satisfy the [Article III 'injury-in-fact' requirement.]" *Clinton*, 524 U.S. at 433 (quoting 3 K. Davis & R.

Pierce, Administrative Law Treatise 13–14 (3d ed. 1994) (alterations in original)).

While this traditional theory of standing based on economic injury was not raised by the parties below, [3] the Court nonetheless has discretion to ground subject-matter jurisdiction on this alternative basis. In *A.I. Trade Finance, Inc. v. Petra International Banking Corp.*, 62 F.3d 1454, 1458, 1460, 1463 (D.C. Cir. 1995), for example, Judge Ginsburg rejected plaintiff's jurisdiction arguments based on diversity and 28 U.S.C. § 1331 but exercised jurisdiction nonetheless for reasons not previously raised. *Cf. Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (ruling that Amtrak is part of the Government for First Amendment purposes even though the argument was not raised below). Likewise, the Court may exercise subject-matter jurisdiction based on traditional economic injury inflicted upon States in their capacity as employers without resorting to any "special solicitude" owed to States or revisiting precedent related to that fraught concept.

II. PETITIONERS' INTERPRETATION OF THE HEROES ACT VIOLATES ARTICLE I OF THE CONSTITUTION

Petitioners contend that the HEROES Act authorizes the Secretary of Education to "waive or

[3] The *amicus* brief NCLA filed in the Eighth Circuit in support of the States' motion for an injunction pending appeal did raise this standing argument. Brief of NCLA as *Amicus Curiae* at 11-13, *Nebraska v. Biden*, No. 22-3179 (8th Cir. Oct. 24, 2022).

modify *any* statutory … provision applicable to student financial assistance" that "the Secretary *'deems'* necessary" to benefit all individuals whom "he reasonably 'determined'" were affected by the COVID-19 pandemic. Pet. Br. at 35-36 (emphases in original) (quoting 20 U.S.C. § 1098bb(a)(1)). This boundless discretion purportedly includes rewriting statutes to wipe out a half-trillion dollars in debt owed to the Treasury by over 40 million borrowers. The Court should reject that interpretation as trampling on the Constitution's prohibition against executive agencies exercising Congress' exclusive powers to enact laws and appropriate funds.

A. Petitioners' HEROES Act Interpretation Violates the Vesting Clause

Article I, § 1, of the Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States." Congress may not "abdicate or … transfer to others the essential legislative functions with which it is thus vested." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935).

According to Petitioners, the HEROES Act authorizes the Secretary to "waive or modify *any* statutory or regulatory provision" governing federal student loan programs. Pet. Br. at 36 (quoting 20 U.S.C. § 1098bb(a)(1)). This claim is fundamentally different from delegation of authority to suspend a statutory requirement on a *case-by-case basis*, such as the Attorney General's authority to suspend deportation of an individual alien at issue in *INS v.*

Chadha, 462 U.S. 919, 923 (1983), or the Food and Drug Administration's authority to suspend provisions of the Public Health Act to authorize specific dugs for emergency use, *see* 21 U.S.C. § 360bbb-3. Even if executive agencies are permitted to suspend the law as specifically directed by Congress, *but see* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 78 (2014) ("The U.S. Constitution thus precluded any executive dispensing or suspending power, including any delegation of such powers to the executive"), that does not authorize them to invent wholesale exemptions. Nor can they simply rewrite the law.

Petitioners assert authority to rewrite statutes in their entirety for tens of millions of borrowers at a time without any individualized assessment. Petitioners' HEROES Act Notice, 87 Fed. Reg. 61,512, 61,514 (Oct. 12, 2022), announced the Secretary was revising statutes (originally authorizing discharge of debt for borrowers who are disabled, 20 U.S.C. § 1087(a); who filed for bankruptcy, *id.* § 1087(b); or whose schools closed or failed to follow certain requirements, *id.* §§ 1087(c), 1087dd(g)) in order to cancel debt instead for a massive and unrelated category of borrowers he prefers. Such sweeping rewriting of legislation has an unavoidable and quintessential "legislative character," as "confirmed by the character of the Congressional action it supplants"—legislative amendment. *Chadha*, 462 U.S. at 952. Put another way, cancelling debt that borrowers are legally obligated to repay amounts to executive dispensation, *i.e.*, "power to act outside the law to relieve persons from a law that applied to

them[.]" Hamburger, *supra* at 77. English Kings' exercise of dispensing power ended with James II, who was removed from power for abusing it. *Id.* at 67-68. American colonists never tolerated such power in the executive. *Id.* at 73-74.

In *Clinton*, this Court rejected the President's authority under the Line-Item Veto Act to "cancel" certain types of statutory provisions that have been signed into law. 524 U.S. at 436. Because the effect of line-item cancellation was to "prevent[] the item 'from having legal force or effect,'" the Court reasoned that its "legal and practical effect" was to "amend[] … Acts of Congress" "after the bill becomes law." *Id.* at 437–39. It was of no moment that the cancellations did not formally "effect a 'repeal'" and that cancelled items continued to occupy space in the U.S. Code. What mattered was that "the President made [the cancelled statutory provisions] entirely inoperative as to appellees." *Id.* at 440–41. The Court made clear that such changes to a statute must "accord with a single, finely wrought and exhaustively considered, procedure," namely bicameralism and presentment. *Id.* at 439–40. There is no difference between the cancellation of the budgetary provision rejected by this Court in *Clinton* and the authority to "waive or modify any statutory … provision," ostensibly conferred by Petitioners' flawed reading of the HEROES Act. 20 U.S.C. § 1098bb(a)(1).

The *Clinton* Court found it unnecessary to consider whether an "intelligible principle" guided the Line-Item Veto's unconstitutional delegation. 524 U.S. at 448. That is because delegating the power to

cancel a prior Act of Congress outside of bicameralism-and-presentment procedures is unconstitutional, regardless of whether the delegation includes an intelligible principle. *Ibid.* As such, the existence of objectives at 20 U.S.C. § 1098bb(a)(2) governing the Secretary's asserted authority to cancel statutory provisions cannot save Petitioners' interpretation of the HEROES Act from being unconstitutional.

Even if the intelligible-principle test were applied, Petitioners' interpretation would fail it. That test requires delegations of the power to make law to be guided by objective and judicially administrable standards. *Yakus v. United States*, 321 U.S. 414, 426 (1944) (delegation would be unconstitutional if "it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed"); *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (delegation must allow "the courts to test" whether agency is following Congress' legislative guidance). While the HEROES Act requires the Secretary to pursue objectives listed in § 1098bb(a)(2), the Act provides no administrable standard to guide the Secretary's discretion over when to exercise his "waive or modify" powers during a national emergency. Nothing requires the Secretary to exercise his HEROES Act powers when a national emergency is declared. And when he decides in his apparently unreviewable discretion to act, he need not follow any objective, judicially administrable standard. Indeed, that is the thrust of Petitioners' argument—they insist the Act authorizes any statutory modification that "the Secretary '*deems*' necessary rather than

[what] actually '*is necessary*'" based on whatever facts he "reasonably 'determined.'" Pet. Br. at 35-36 (emphasis in original). In other words, the Secretary apparently thinks his power to rewrite law is limited only by his own imagination.

The decision in *International Union v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991), is instructive. There, the D.C. Circuit held that an agency's authority to impose whatever workplace safety rules it deemed "necessary or appropriate" would fail the intelligible-principle test if, "once significant risk is found," the agency were allowed to take any position between "requir[ing] precautions that take the industry to the verge of economic ruin" and "do[ing] nothing at all." *Id.* at 1317. Petitioners claim even broader discretion: they claim power, due to the pandemic, to outright cancel hundreds of billions of dollars owed to the Treasury by 40 million borrowers or to do nothing at all (or to do anything in between). At least in *International Union*, the agency first had to use objective metrics to identify a "significant risk" in the workplace before regulating. *Id.* 1317. In contrast, the triggering conditions for Petitioners' purportedly boundless discretion to rewrite laws under the HEROES Act are themselves controlled by Petitioners. The President may declare a "national emergency" and define its scope,[4] while the Secretary may "reasonably 'determine[]'" who are "affected individuals." Pet. Br. at 35. Petitioners not only claim power to rewrite an Act of Congress but insist on self-

[4] Petitioners identify no limit as to what may qualify as a national emergency other than a presidential declaration.

judging standards regarding when and how they exercise that power. Under such circumstances, the statutory objectives in § 1098bb(a)(2) fail to provide any intelligible principle because "it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus*, 321 U.S. at 426.

At the same time, it is easy to see how the Loan Cancellation Program thwarts Congress' will in enacting the *PSLF program*. *See supra* Argument I. The power to eviscerate a later-enacted 2007 debt-relief program is an elephant that Congress would not have hidden in the HEROES Act's "waiver or modification" mousehole. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). That is, precisely because Congress carefully crafted the PSLF, this Court should be loath to interpret a vague provision of the prior HEROES Act in a novel way that would alter fundamental aspects of Congress' own handiwork in devising the PSLF statutory scheme. *See United States v. Hernandez-Garcia*, 44 F.4th 1157, 1164 (9th Cir. 2022) ("[T]the later and more specific statute usually controls if two statutes conflict." (cleaned up)), *cert. denied*, 143 S. Ct. 508 (2022).

Interpreting the HEROES Act to empower the Secretary to waive statutory provisions concerning debt owed to the Treasury, to "modify" them with his own "terms and conditions," 20 U.S.C. § 1098bb(a)(1), (b)(2), and to do so when and how "[he] deems necessary," *id.* § 1098bb(a)(1), violates Article I, § 1, which vests control over such decisions in Congress.

B. Petitioners' HEROES Act Interpretation Violates the Appropriations Clause

Petitioners' interpretation of the HEROES Act to authorize mass cancellation of debt owed to the Treasury would also impermissibly vest Congress' appropriation powers in the Executive. [5] Such cancellation amounts to an appropriation that violates Article I, § 9 of the Constitution, which provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." This clause reflects the Framers' decision to "carefully separate[] the 'purse' from the 'sword' by assigning to Congress and Congress alone the power of the purse." *Texas Educ. Agency v. U.S. Dep't of Educ.*, 992 F.3d 350, 362 (5th Cir. 2021) (quoting The Federalist Nos. 78 (Alexander Hamilton)); *see also* The Federalist No. 48 (James Madison) ("[T]he legislative department alone has access to the pockets of the people.").

By requiring that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress," the Appropriations Clause "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents." *OPM v. Richmond*, 496 U.S. 414, 428 (1990). Such "reservation of

[5] NCLA agrees with the Atlantic Legal Foundation's excellent explanation for why the Loan Cancellation Program violates the Appropriations Clause. *See* Brief of the Atlantic Legal Foundation as *Amicus Curiae*, *Biden v. Nebraska*, Nos. 22-506 & 22-535 (U.S. Jan. 12, 2023).

congressional control over funds in the Treasury," *id.* at 425, "is at the foundation of our constitutional order," Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1344 (1988).

Congress cannot—through the HEROES Act or any other law—delegate its power of the purse to an executive agency. *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 51 F.4th 616, 638-39 (5th Cir. 2022), *petition for cert. filed*, Nos. 22-448, 22-663 (U.S. Nov. 14, 2022). In *CFPB*, the Fifth Circuit struck down a statute that allowed the Consumer Financial Protection Bureau ("CFPB") to fund itself by siphoning "amounts that would otherwise flow to the general fund of the Treasury." *Id.* at 638. This statutory self-funding mechanism violated "[t]he Appropriations Clause's 'straightforward and explicit command' [of] ensur[ing] Congress's *exclusive* power over the federal purse," *id.* at 637 (quoting *Richmond*, 496 U.S. at 428), because it delegated to an agency the power to appropriate funds without congressional approval, *id.* at 639.

Defendants' interpretation of the HEROES Act as authorizing the Loan Cancellation Program likewise would allow an agency to usurp the power of the purse from congressional control. The easiest place to see this arrogation of power is Petitioners' plan to "automatically refund the amount [certain eligible borrowers] paid during the payment pause."[6]

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[6] Off. of Fed. Student Aid, U.S. Dep't of Educ., *One-Time Student Loan Debt Relief*, available at: https://studentaid.gov/manage-loans/forgiveness-cancellation/debt-relief-info#refunds (explaining how borrowers can obtain a refund of prior payments into the Treasury).

Any such refunds would require "funds from the Federal Treasury" and thus are prohibited "without specific authorization from Congress." *Affordable Bio Feedstock, Inc. v. United States*, 42 F.4th 1288, 1292 (11th Cir. 2022); *see also Richmond*, 496 U.S. at 424.

Congress' power of the purse is not limited to control over cash but also includes other monetary assets such as debt instruments held by the United States. *See Putnam v. Comm'r*, 352 U.S. 82, 89 (1956) (a "debt is an asset of full value in the creditor's hands"). Indeed, any distinction between cash and debt instruments for the purposes of the Appropriations Clause is illusory because money in the early Republic consisted of privately issued debt instrument such as banknotes.[7] Moreover, Congress' exclusive power of the purse would be a nullity if executive agencies could simply issue debt to pay for their programs, or conversely cancel debt owed to the

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[7] *See* Susan Hoffman, Politics and Banking: Ideas, Public Policy, and the Creation of Financial Institutions 75-76 (2001); Bruce Champ, *Private Money in our Past, Present, and Future*, U.S. Fed. Rsrv. Bank of Cleveland (Jan. 1, 2007) ("In the 1800s, for example, much of the country's paper currency consisted of notes issued by private banks."); Lawrence White, *How U.S. Government Paper Currency Began, and How Private Banknotes Ended*, Cato Inst. (May 20, 2021) ("Private commercial banks issued banknotes in the United States from 1781 up to 1935, with only occasional governmental and semi-governmental issues.").

Treasury.[8]

In short, even if Congress has authorized a particular activity, and even if money is available in the Treasury to fund it, that money may be spent only if Congress specifically authorizes the expenditure. *See, e.g.*, *Richmond*, 496 U.S. at 424; *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1851). Thus, even if the HEROES Act delegated power to carry out a massive debt-relief program—a highly contestable proposition—Petitioners may exercise that power only if Congress provides specific appropriation, which it has not done here. For example, the statutory authority for the President to forgive debt owed to the United States by foreign countries clearly states that "[t]he aggregate amount of principal and interest waived under this section may not exceed the amount approved for such purpose in an Act appropriating funds[.]" 7 U.S.C. § 1736e(c). So, even in foreign affairs, where the President generally has maximal flexibility, his ability to cancel foreign debt is strictly governed by specific congressional appropriations.

More recently and in the domestic context, Congress delegated authority to the Secretary of Agriculture in section 22006 of the Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 22006,

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[8] This is not to say that the Executive is without discretion to enforce debt that is legally owed to the Treasury. But such discretion must be exercised on a case-by-case basis and in accordance with Congress' direction in 31 U.S.C. § 3711 (providing that an agency "shall try to collect a claim of the United States" and setting standards for when an agency may compromise, suspend, or end a collection action).

136 Stat. 1818, to provide debt relief to distressed borrowers of federal farm loans. Congress appropriated a specific amount to pay for this debt-relief program: "there is appropriated to the Secretary for fiscal year 2022 … $3,100,000 … for the cost of loans or loan modifications … with respect to distressed borrowers of direct or guaranteed loans administrated by the Farm Service Agency[.]" *Id.* § 22006, 136 Stat. at 2021. If a specific appropriation is needed to fund "loan modifications" of farm loans, one would think a specific appropriation would likewise be needed to fund the modification, much less cancellation, of student loans.

Yet, nothing in the HEROES Act (or elsewhere) appropriates funds to pay for the cancellation of principal and interest owed on federal student loans. The Omnibus Budget Reconciliation Act of 1993 authorized long-term funding of direct federal loans, but only for two purposes: "(1) to make loans to all eligible students (and the eligible parents of such students) in attendance at participating institutions of higher education selected by the Secretary, to enable such students to pursue their courses of study at such institutions … ; and (2) for purchasing loans[.]" 20 U.S.C. § 1087a(a). This explicit language cannot be interpreted to authorize the cancellation of federal student loans. *See* 31 U.S.C. § 1301(d) ("A law may be construed to make an appropriation out of the Treasury … only if the law specifically states that an appropriation is made[.]").

Congress never appropriated a single dime to pay for cancellation of student debt (nor to refund debt

payments) under the HEROES Act. Petitioners nonetheless insist the Act authorizes the Secretary to refund or cancel whatever amount of student debt he "deems necessary"—here an astounding half trillion dollars. The Court should reject this audacious and unprecedented interpretation as an unconstitutional delegation of "Congress's *exclusive* power over the federal purse." *CFPB*, 51 F.4th at 637.

III. PETITIONERS' EXTENSION OF THE PAYMENT-AND-INTEREST PAUSE REINFORCES THE ILLEGALITY OF THEIR RELIANCE ON THE HEROES ACT IN THIS CASE

Petitioners characterize the Loan Cancellation Program as part of an ongoing student loan debt-relief program, which has included a succession of pauses on monthly payment obligations and interest accruals that began in March 2020 and continues to this day. Pet. Br. at 8, 15. They claim that, because both the Trump and Biden Administrations asserted authority under the HEROES Act for some of those successive pauses (although not all), this bipartisan course of conduct vindicates their claim that the Loan Cancellation Program is likewise authorized. *E.g.*, *id.* at 35 ("No respondent has argued that those actions were unlawful."). But those pauses on monthly payments and interest accrual were unlawful. So, this argument is predicated on an erroneous presumption.

Petitioners inaccurately assert that the HEROES Act was invoked to justify the pauses from their start in March 2020. *See* Pet. Br. at 8. In truth,

Congress enacted the initial six-month pause and legislated a fixed expiration date of September 2020. The Department did *not* invoke the HEROES Act when it first administratively extended Congress' expiration date to December 2020; it was not until December 2020, shortly after the Department again extended the expiration date to January 31, 2021, that the Department first cited the HEROES Act as an *ex post* justification for extending the pause beyond Congress' September 2020 deadline, essentially enacting a new pause through administrative fiat. In doing so, the Department claimed the Act authorized it to rewrite Congress' deadline and to unilaterally pay for the pause—including lost interest—with unappropriated funds, thus contravening the Vesting and Appropriations Clauses.

A. Petitioners Misrepresent the HEROES Act's Role in the Payment-and-Interest Pause

Petitioners falsely assert that "[i]n March 2020, then-Secretary of Education Betsy DeVos *invoked the HEROES Act* to pause repayment obligations and suspend interest accrual on all [federal student] loans." Pet. Br. at 8 (emphasis added). In truth, Secretary DeVos's March 20, 2020 press release announcing the pause did *not* cite the HEROES Act nor any other statutory authority.[9] Nor did she

[9] Press Release, Dep't of Educ., (Mar. 20, 2020), available at: https://content.govdelivery.com/accounts/USED/bulletins/2823e37.

publish a notice of the pause decision in the Federal Register, which Petitioners acknowledge is necessary for an invocation of the HEROES Act. Pet. Br. at 62 ("All the HEROES Act requires 'is that the Secretary publish the modifications' in the Federal Register."). Secretary DeVos's announcement was soon overtaken by events when, a week later, Congress enacted section 3513 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020), which directed that "[t]he Secretary shall suspend all payments due for loans … held by the Department of Education … through September 30, 2020," and that "interest shall not accrue on [such] a loan … for the period of the suspension." Thus, section 3513 of the CARES Act was the authority for the pause in March 2020—not the HEROES Act—despite what Petitioners claim.

Nor was the HEROES Act invoked when President Trump first extended the pause beyond section 3513's September 30, 2020 expiration date. On August 8, 2020, President Trump issued a memorandum directing the Department of Education to extend the pause until December 31, 2020. 85 Fed. Reg. 49,585 (Aug. 13, 2020). The memorandum did *not* cite the HEROES Act and instead relied on "economic hardship deferments described in section 455(f)(2)(D) of the Higher Education Act of 1965, as amended, 20 U.S.C. 1087e(f)(2)(D)." *Ibid.* That provision, however, authorizes deferment only for borrowers who "in accordance with regulations prescribed under section 1085(o)[,] … ha[ve] experience[d] or will experience an economic hardship." 20 U.S.C. § 1087e(f)(2)(D). Regulations under § 1085(o), in turn,

narrowly define "economic hardship" as when a borrower receives means-tested public assistance; works a full-time job with an income that does not exceed the greater of the federal minimum wage or 150 percent of the poverty line; or serves in the Peace Corps. *See* 34 C.F.R. §§ 682.210(s)(6) (FFEL Program), 685.204(g) (Direct Loan Program). Most student-loan borrowers obviously do not qualify for "economic hardship" under the Department's own regulations.

The Department nonetheless followed President Trump's unlawful instructions. On August 21, 2020, the Department announced in a press release that the payment-and-interest pause would be extended past the congressionally enacted deadline until December 31, 2020.[10] The press release also did *not* identify the HEROES Act as statutory authority and instead said the Department was "[a]cting on President Donald J. Trump's Presidential Memorandum signed August 8, 2020,"[11] which cited "economic hardship" under 20 U.S.C. § 1087e(f)(2)(D). The Department's press release, however, extended the pause for all student-loan borrowers regardless of their individual economic well-being. The August 21, 2020 press release was not accompanied by a Federal Register notice, which Petitioners (as previously

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[10] Press Release, Dep't of Educ., (Aug. 21, 2020), available at: https://content.govdelivery.com/accounts/USED/bulletins/29b4634 (last visited Feb. 3, 2023).

[11] *Id.*

noted) concede is required to invoke the HEROES Act. Pet. Br. at 62.

Four months later, on December 4, 2020, the Department extended the pause again to January 31, 2021, through a press release[12] and published an accompanying notice in the Federal Register. 85 Fed. Reg. 79,856 (Dec. 11, 2020). The Department for the first time invoked the HEROES Act, asserting that:

> On August 8, 2020, the President issued a memorandum directing the Secretary to continue to waive interest and payments on such loans until December 31, 2020. Therefore, in accordance with the prior announcement, the Secretary is using her authority under the HEROES Act to modify the terms of the benefits provided under section 3513 of the CARES Act such that they will continue to be provided to borrowers until December 31, 2020.

Id. at 79,863.

The Department, however, could not have relied on the HEROES Act "in accordance with the prior announcement" because that prior announcement did not invoke the HEROES Act. Apparently recognizing that its August 2020

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[12] Press Release, Dep't of Educ., (Dec. 4, 2020), available at: https://content.govdelivery.com/accounts/USED/bulletins/2afbc4b (last visited Feb. 3, 2023).

justification for extending the payment-and-interest pause based on "economic hardship" was infirm, the Department asserted reliance on the HEROES Act.

To its credit, the Department acknowledged this misstep in a January 19, 2021 correction in the Federal Register, which revised the December 11, 2020 notice to say that President Trump's August 8, 2020 memorandum, not the HEROES Act, was the basis for extending the pause from Congress' September 30, 2020 end date to Dec. 31, 2020. 86 Fed. Reg. 5,008 (Jan. 19, 2021) (correcting 85 Fed Reg. 79,863). The January 19, 2021 correction further confirmed that the Secretary first invoked her authority under the HEROES Act on December 4, 2020, to extend the pause from December 31, 2020 to January 31, 2021. *Ibid.* Petitioners' Brief to this Court, however, omits this crucial correction and instead cites only the original and uncorrected December 11, 2020 Federal Register publication to backdate their supposed invocation of the HEROES Act. Pet. Br. at 8 (citing 85 Fed. Reg. 79,856,79,857 (Dec. 11, 2020)). Petitioners thus double down on what the Department long ago conceded was false, claiming now that "since March 2020, both the Trump and Biden Administrations have invoked the [HEROES] Act to afford relief to all borrowers." Pet. Br. at 51.

Petitioners' claim that the HEROES Act has been the basis for student-debt relief programs—including the pause on payments and interest accrual—since the beginning of the pandemic is false. In fact, the Department used other excuses to justify bumping the congressionally enacted September 2020

payment-and-interest pause deadline, and it did not rely on its HEROES Act justification until December 2020. But just as the HEROES Act does not authorize the Loan Cancellation Program, it likewise did not and cannot authorize extending the payment-and-interest pause by administrative fiat beyond the September 2020 end date Congress mandated.

B. Extensions of the Payment-and-Interest Pause also Trample the Vesting and Appropriations Clauses

When the Biden Administration came to power in January 2021, it continued the Department's policy of extending the payment-and-interest pause, first to September 30, 2021, then January 31, 2022, then May 1, 2022, then August 31, 2022, and then December 31, 2022. 87 Fed. Reg. at 61,513-14 (listing extensions). These Biden-era extensions were all accomplished through press releases without accompanying publications in the Federal Register. The Department most recently extended the pause in a November 22, 2022 press release to "'60 days after the Department is permitted to implement the program or [this Supreme Court] litigation is resolved,' but no later than 60 days after June 30, 2023." Pet. Br. at 15 (citing Nov. 22, 2022 Press Release). Each Biden-era extension has relied on the Department's belated December 2020 position that the HEROES Act authorizes the Secretary "to modify the [end date] of the benefits provided under section 3513 of the CARES Act such that they will continue" to a new date set by the Secretary. 85 Fed. Reg. at 79,863.

The Department thus claims power to literally rewrite the CARES Act. Congress enacted the payment-and-interest pause in section 3515 of the CARES Act and set a clear and specific end date of September 30, 2020. Instead of allowing Congress to debate whether to extend that date based on economic circumstances, the Department simply blue-penciled Congress' September 2020 deadline and replaced it with an open-ended deadline to be determined at the Department's whim. Nearly three years later, the six-month payment-and-interest pause Congress enacted continues indefinitely, with section 3515 repeatedly rewritten to its latest iteration that the pause will last until "'60 days after the Department is permitted to implement the [challenged loan-cancellation] program or the litigation is resolved,' but no later than 60 days after June 30, 2023." Pet. Br. at 15 (quoting Nov. 22, 2022 Press Release). There is no way Congress intended its fixed end date to be repeatedly extended for years and then ultimately reset by reference to the outcome of litigation over a different program that did not exist when Congress enacted the pause. And, according to Petitioners' interpretation, nothing short of the Secretary's imagination stops them from rewriting the end date again should this Court rule against them.

The Court need not resort to the intelligible-principle test to conclude that rewriting a congressionally enacted, fixed end date for a debt-relief program with an agency's open-ended preferred end date is an act of pure legislation. That is perhaps Petitioners' point. If the HEROES Act allows Petitioners to rewrite key provisions of the CARES

Act—such as when a debt-relief program must end—then there truly is no limit to Petitioners' ability to usurp Congress' legislative power. Why stop at extending a mandatory end date? Petitioners could simply rewrite statutes as the Secretary "deems necessary" to cancel debt outright. Pet. Br. at 53 (quoting 20 U.S.C. § 1098bb(a)(1)). That is precisely what they hope to do here. The Constitution, however, clearly forbids such lawmaking by executive agencies. *See supra* Argument II.A. The fact that no lawsuits have yet challenged the payment-and-interest pause does not, as Petitioners contend, support the legality of the Loan Cancellation Program. *See* Pet. Br. at 35. Rather, the absence of such legal challenges illustrates what happens if you give a mouse a cookie.

The Court has been down this road already under a different provision of the CARES Act. *See Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021). Congress enacted through the CARES Act a 120-day nationwide eviction moratorium for federally subsidized properties. *Id.* at 2486. When that term expired in July 2020, the Centers for Disease Control and Prevention ("CDC") invoked an irrelevant provision of the Public Health Services Act to repeatedly extend (and expand) the moratorium, first to December 2020, then to March 2021, then to June 2021, and then July 2021. *Id.* at 2487. When CDC extended the moratorium in August 2021 in defiance of Justice Kavanaugh's warning that only Congress can extend the moratorium, *id.* at 2488, the Court declared the administrative extensions unlawful, *id.* at 2490 ("If a federally imposed eviction moratorium is to continue, Congress must specifically authorize

it."). CARES Act deadline extensions by administrative fiat are no more lawful in the nationwide student loan payment and interest accrual context than they were in the nationwide eviction moratorium context.

Petitioners' reliance on the HEROES Act to repeatedly extend the payment-and-interest pause is even more unlawful than the eviction-moratorium extensions because it also violates the Appropriations Clause. Congress enacted detailed provisions governing the accrual of interest on student loans. *See* 20 U.S.C. § 1087e(b). Halting the accrual of interest on a debt instrument held by the United States is no different that cancelling an amount of debt equal to the interest that would have accrued. Hence, pausing interest on debt owed to the Treasury is no less an exercise of Congress' power of the purse than the cancellation of such debt. *See supra* Argument II.B.

Congress' decision to pause the accrual of interest on all federal student-loan debt from March to September 2020 was an exercise of its exclusive power of the purse, and it was done via bicameralism and presentment. Congress appropriated an amount equal to the foregone interest, and not a penny more. Every additional month of the pause beyond September 2020 has constituted an unlawful cancellation of debt equal to the interest that otherwise would have accrued and become a debt due to the Treasury. Petitioners concede the cost of the lost interest to the Treasury is approximately $5 billion per month, and the Trump and Biden Administrations together have thus expended well over $100 billion in

unappropriated funds by failing to collect this interest. Pet. Br. at 8 (citing U.S. Gov't Accountability Office, *Student Loans: Education Has Increased Federal Cost Estimates of Direct Loans by Billions due to Programmatic and Other Changes* 14 (July 2022)). Both Administrations' reliance on the HEROES Act to extend the payment-and-interest pause is misplaced because that Act cannot divest Congress' Appropriations Clause powers.

Petitioners' assertion that their interpretation of the HEROES Act mirrors their reliance on it to justify extending the payment-and-interest pause falls flat. Far from propping up their Loan Cancellation Program, it proves its unlawfulness because the extension of the payment-and-interest pause was itself unlawful after September 2020.

CONCLUSION

For the foregoing reasons, the Court should exercise subject-matter jurisdiction in this case and reject Petitioners' unconstitutional interpretation of the HEROES Act.

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