

No. 22-3179

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

STATE OF NEBRASKA, STATE OF MISSOURI, STATE OF
ARKANSAS, STATE OF IOWA, STATE OF KANSAS, and STATE
OF SOUTH CAROLINA,

Plaintiffs-Appellants,

v.

JOSEPH R. BIDEN, Jr., in his official capacity as the President of the
United States of America; MIGUEL CARDONA, in his official
capacity as Secretary, United States Department of Education; and
UNITED STATES DEPARTMENT OF EDUCATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri, Eastern Division
(No. 22-cv-01040, Hon. Henry Edward Autrey)

**BRIEF OF AMICUS CURIAE
AMERICANS FOR PROSPERITY FOUNDATION
IN SUPPORT OF PLAINTIFFS–APPELLANTS’ MOTION FOR
INJUNCTION PENDING APPEAL**

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The *amicus curiae* Americans for Prosperity Foundation is a nonprofit corporation. It has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

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University of Pennsylvania Wharton School of Business,
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<https://budgetmodel.wharton.upenn.edu/issues/2022/8/26/biden-student-loan-forgiveness>13

U.S. Dept. of Ed., About ED, <https://www2.ed.gov/about/landing.jhtml>21

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INTEREST OF *AMICUS CURIAE*¹

Amicus curiae Americans for Prosperity Foundation (“AFPF”) is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas include the separation of powers and constitutionally limited government, as well as bringing the administrative state in line with the U.S. Constitution. As part of this mission, AFPF appears as *amicus curiae* before state and federal courts.

AFPF has a particular interest in this case because of the critical separation of powers issues that underlie it, which present a familiar question: which branch of government is responsible for making law and how? It is not this Court’s role to set public policy. Nor is it the job of unelected federal bureaucrats or the Executive acting alone. Instead, the Constitution tasks the democratically elected, politically accountable branches—Congress and the President—with resolving important policy questions through the deliberately arduous processes of bicameralism and presentment.

¹This brief is accompanied by a motion for leave to file. Pursuant to FRAP 29(a)(4)(E), *amicus curiae* states that no counsel for a party other than AFPF authored this brief in whole or in part, and no counsel or party other than AFPF made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The wisdom and fairness of granting blanket student loan cancellation to tens of millions of borrowers at a cost of hundreds of billions of dollars is not before the Court. Instead, this case is about who the Constitution empowers to make that decision—one of vast political and economic importance—and by what process. At the federal level, the answer is Congress, through duly enacted legislation, subject to constitutional constraints on federal power.

Our system of government relies on the consent of the governed, memorialized in the Constitution. Our Constitution exclusively tasks the People’s elected representatives with answering major policy questions through duly enacted legislation that survives bicameralism and presentment, a deliberately difficult process designed to ensure such laws reflect broad political consensus.

Toward this end, the Constitution flatly prohibits Congress from delegating legislative power to other entities: “*All* legislative Powers herein granted shall be vested in a Congress of the United States[.]” U.S. Const. Art. I, § 1 (emphasis added). “The Constitution did not create a President in the King’s image but envisioned an executive regularly checked and balanced by other authorities.” *United States v. Zubaydah*, 142 S. Ct. 959, 992 (2022) (Gorsuch, J., dissenting). And *a fortiori* unelected people are not allowed to make law in this country through administrative edict, as the Department sought to do here. For “the Constitution does not authorize

agencies to use pen-and-phone regulations as substitutes for laws passed by the people’s representatives.” *West Virginia v. EPA*, 142 S. Ct. 2587, 2626 (2022) (Gorsuch, J., concurring).

The Department’s sweeping assertion of power to unilaterally rewrite the Higher Education Act (“HEA”), 20 U.S.C. 1001 et seq.—based on the President’s dubious claim of a “national emergency”—flies in the face of these basic principles. It is not only unconstitutional but profoundly antidemocratic.

At a minimum, this Court should put the unlawful student loan cancelation on hold and carefully consider the parties’ arguments on the merits.

ARGUMENT

I. The Department Must Respect the Separation of Powers.

The Department is a creature of statute, which possesses only those powers Congress chooses to confer upon it. *See La. Pub. Serv. Com v. Fed. Commc’n’s Comm’n*, 476 U.S. 355, 374 (1986). After all, “[a]gencies have only those powers given to them by Congress, and ‘enabling legislation’ is generally not an ‘open book to which the agency [may] add pages and change the plot line.’” *West Virginia v. EPA*, 142 S. Ct. at 2609 (quoting E. Gellhorn & P. Verkuil, *Controlling Chevron-Based Delegations*, 20 *Cardozo L. Rev.* 989, 1011 (1999)). Accordingly, the Department bears the affirmative burden to establish statutory authorization for its actions. *West Virginia v. EPA*, 142 S. Ct. at 2609 (“We presume that ‘Congress

intends to make major policy decisions itself, not leave those decisions to agencies.” (quoting *United States Telecom Assn. v. FCC*, 855 F. 3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)); *La. Pub. Serv. Com.*, 476 U.S. at 374. And “[r]egardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.” *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (cleaned up). Congress need not expressly negate an agency’s claimed powers; “[w]ere courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with . . . the Constitution[.]” *Ry. Labor Executives’ Assn’s v. Nat’l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc).

As the Supreme Court reaffirmed earlier this year, under the major questions doctrine, “cases in which the ‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.” *West Virginia v. EPA*, 142 S. Ct. at 2608 (quoting *Brown & Williamson*, 529 U.S. at 159–60). In those cases, “both separation of powers principles and a practical understanding of legislative intent make [courts] ‘reluctant to read into ambiguous statutory text’ the delegation claimed to be lurking there. . . . [S]omething

more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to ‘clear congressional authorization’ for the power it claims.” *Id.* at 2609 (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

The major questions doctrine “refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.” *West Virginia v. EPA*, 142 S. Ct. at 2609. “If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress.” *Nat’l Fed’n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring). “Like many parallel clear-statement rules in our law, this one operates to protect foundational constitutional guarantees.” *West Virginia v. EPA*, 142 S. Ct. at 2616 (Gorsuch, J., concurring). Specifically, it “protect[s] the Constitution’s separation of powers.” *Id.* (Gorsuch, J., concurring). It does this by “guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power.” *NFIB v. OSHA*, 142 S. Ct. at 669 (2022) (Gorsuch, J., concurring). This doctrine “is vital because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable

‘ministers.’” *West Virginia v. EPA*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (citation omitted). Application of these principles to the Department’s mass student loan cancellation confirms that it is plainly *ultra vires*.

II. The Department Has Usurped Congress’s Exclusive Legislative Power.

A. The Major Questions Threshold Inquiry.

Whether an agency action implicates the major questions doctrine is a threshold inquiry. *See, e.g., id.* at 2607–10; *see id.* at 2620 n.8 (Gorsuch, J., concurring) (“[O]ur precedents have usually applied the doctrine as a clear-statement rule, and the Court today confirms that is the proper way to apply it.”); *see also id.* at 2691 n.9 (Gorsuch, J., concurring) (noting “antecedent question whether the agency’s challenged action implicates a major question.”).

As Justice Gorsuch observed, Supreme Court “cases supply a good deal of guidance about when an agency action involves a major question for which clear congressional authority is required.” *Id.* at 2620 (Gorsuch, J., concurring). As particularly relevant here, the “Court has indicated that the doctrine applies when an agency claims the power to resolve a matter of great ‘political significance’ or end an ‘earnest and profound debate across the country.’” *Id.* (Gorsuch, J., concurring) (quoting *NFIB v. OSHA*, 142 S. Ct. at 665 (internal quotation marks omitted); *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006)). It “has [also] said that an agency must point to clear congressional authorization when it seeks to regulate a significant

portion of the American economy or require billions of dollars in spending by private persons or entities.” *Id.* at 2621 (Gorsuch, J., concurring) (cleaned up).

B. The Department’s Mass Student Debt Cancellation Triggers the Major Questions Doctrine.

Here, everything about the Department’s mass student debt forgiveness program implicates the major questions doctrine, as demonstrated by “the amount of money involved for regulated and affected parties, the overall impact on the economy, the number of people affected, and the degree of congressional and public attention to the issue.”² *See United States Telecomms. Ass’n*, 855 F.3d at 422–23 (Kavanaugh, J., dissenting from denial of rehearing en banc) (listing generally relevant factors to major question inquiry).

1. The Department Attempted to Decide Matters of Great Political Importance.

To begin with, student loan debt—and what, if anything, to do about it—is an issue of great political significance and the subject of a robust national debate.³ *See, e.g.,* Michael Stratford and Eugene Daniels, *How Biden Finally Got to ‘Yes’ on Canceling Student Debt*, Politico (Aug. 25, 2022) (reporting “[s]tudent loans were

² Federal Defendants agree that “this is a case of economic and political significance.” Dkt. No. 27 at 31.

³ *Cf. Tiger Lily, LLC v. HUD*, 5 F.4th 666, 675 (6th Cir. 2021) (Thapar, J., concurring) (“As is often true, there are two sides to today’s story. . . . While landlords and tenants likely disagree on much, there is one thing both deserve: for their problems to be resolved by their elected representatives.”).

regularly in the top five issues in the correspondence that the White House received from Americans each week”⁴; *see also* David Lerman, *Cardona Defends Student Loan Plan as One-Time Covid-19 Remedy: Education Secretary’s Appearance is Part of Push to Sell Democratic Policies Ahead of Midterms*, Roll Call (Sept. 7, 2022).⁵ Indeed, according to Brookings, “[t]wo thirds [of voters] say that student loan debt is a serious problem[.] . . . The two most recent polls . . . put support” for the President’s mass debt cancellation “among registered voters at 51 percent and 52 percent[.]” William Galston, *Do Americans Support President Biden’s Student Loan Plan?*, Brookings (Sept. 6, 2022).⁶

Student loan debt is plainly of great interest to Congress. *See* Letter from 94 Members of Congress to Speaker Pelosi, 1 (Aug. 26, 2022) (explaining the President’s “student loan giveaway is unconstitutional and illegal”)⁷; Sen. Chuck Grassley & Sen. Rob Portman, *Biden’s Student Loan Debt Transfer Is An Abuse of Executive Power*, Washington Examiner (Sept. 8, 2022).⁸ Tellingly, “Congress has

⁴ <https://www.politico.com/news/2022/08/25/biden-canceling-student-debt-00053826>

⁵ <https://rollcall.com/2022/09/07/cardona-defends-student-loan-plan-as-one-time-covid-19-remedy/>

⁶ <https://www.brookings.edu/blog/fixgov/2022/09/06/do-americans-support-president-bidens-student-loan-plan/>

⁷ <https://www.politico.com/f/?id=00000183-19c4-de9f-a9eb-f9f772e10000>

⁸ <https://www.washingtonexaminer.com/restoring-america/fairness-justice/bidens-student-loan-debt-transfer-is-an-abuse-of-executive-power>

considered and rejected bills authorizing something akin to the agency’s proposed course of action.” *West Virginia v. EPA*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (cleaned up); *see, e.g.*, Student Loan Debt Relief Act of 2019, S. 2235 (116th Cong.); Student Loan Relief Act, H.R. 8514 (116th Cong.); Frontline Healthcare Worker Student Loan Assistance Act, H.R. 8393 (116th Cong.); Student Loan Debt Relief Act of 2019, H.R. 3887 (116th Cong.). Indeed, Congress is currently considering legislation relating to student loan forgiveness.⁹ *See, e.g.*, Income-Driven Student Loan Forgiveness Act, H.R. 2034 (117th Cong.); Second Chance at Public Service Loan Forgiveness Act, S. 4581 (117th Cong.); Strengthening and Improving Public Service Loan Forgiveness Act of 2022, H.R. 8330 (117th Cong.); Debt Cancellation Accountability Act of 2022, S. 4483 (117th Cong.); Student Loan Accountability Act, H.R. 8102 (117th Cong.); Student Loan Accountability Act, S. 4253 (117th Cong.); Fairness for Responsible Borrowers Act, H.R. 8496 (117th Cong.).

This is unsurprising given that no statute authorizes the Executive to cancel student debt *en masse*. Until recently, this fact was uncontroversial. Even the Speaker of the House, who supports student loan cancelation, acknowledged as

⁹ For that matter, on October 11, 2022, the President signed into law the Joint Consolidation Loan Separation Act, S. 1098 (117th Cong.). *See* The White House, Bills Signed: H.R. 91, H.R. 92, H.R. 2142, H.R. 3508, H.R. 3539, H.R. 5809, H.R. 7698, S. 1098 (Oct. 11, 2022), <https://www.whitehouse.gov/briefing-room/legislation/2022/10/11/bills-signed-h-r-91-h-r-92-h-r-2142-h-r-3508-h-r-3539-h-r-5809-h-r-7698-s-1098/>

much: “People think that the President of the United States has the power for debt forgiveness. He does not. . . . [H]e does not have that power. That has to be an act of Congress.” Press Release, Transcript of Pelosi Weekly Press Conference Today (July 28, 2021), <https://www.speaker.gov/newsroom/72821-2>. The President also “entered the presidency deeply skeptical of the idea of writing off large chunks of student loan debt. He questioned publicly whether he had the authority to do it[.]”¹⁰ Accordingly, the President asked Congress to pass legislation forgiving \$10,000 in student debt for all borrowers.¹¹

It was only after Congress declined to pass the legislation he wanted that the President changed his tune, specifically directing the Department to unilaterally pursue mass student loan cancellation. *See* Fact Sheet: President Biden Announces Student Loan Relief for Borrowers Who Need It Most (Aug. 24, 2022). “The President’s intervention only underscores the enormous significance of” these issues. *United States Telecomms. Ass’n*, 855 F.3d at 424 (Kavanaugh, J., dissenting from denial of rehearing en banc); *see West Virginia v. EPA*, 142 S. Ct. at 2622

¹⁰ Michael Stratford and Eugene Daniels, *How Biden Finally Got to ‘Yes’ on Canceling Student Debt*, Politico (Aug. 25, 2022), <https://www.politico.com/news/2022/08/25/biden-canceling-student-debt-00053826>

¹¹ *See* Annie Nova, *Biden Will Call on Congress to Forgive \$10,000 in Student Debt for All Borrowers*, CNBC (Jan. 8, 2021), <https://www.cnbc.com/2021/01/08/student-loan-forgiveness-could-be-more-likely-but-challenges-remain-.html>

(Gorsuch, J., concurring). This holds particularly true given the curious timing of the President’s actions: the cusp of the midterm elections, an occasion for candidates to seek public support for their preferred policy solutions in advance of the next Congress. This further shows that the President is (again) “attempting to work [a]round the legislative process to resolve for itself a question of great political significance,” another telltale sign of a major question. *West Virginia v. EPA*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (cleaned up); *see, e.g., NFIB v. OSHA*, 142 S. Ct. 661 (2022) (rejecting unlawful OSHA vaccine mandate); *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (per curiam) (rejecting unlawful CDC eviction moratorium).

2. The Mass Student Debt Cancellation Has Vast Economic Significance.

In addition, mass student debt cancellation is plainly of vast economic significance. To put this in perspective, OLC itself found that “[a]s of the end of the second quarter of 2022, about 43.0 million borrowers had loans under the three federal student loan programs, and their debts collectively amounted to approximately \$1.62 trillion.” Christopher H. Schroeder, Asst. Attorney General, U.S. Dept. of Justice, Office of Legal Counsel, *Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans*, Mem. Op. for the General Counsel, Dept. of Education, 46 Op. O.L.C. ___, Slip Op. at 2 (Aug. 23, 2022) (“OLC Memo”) (citation omitted); *accord* Letter from Phillip Swagel, Director,

Congressional Budget Office, to Congress, 3 (Sept. 26, 2022) (“CBO Letter”), <https://www.cbo.gov/system/files/2022-09/58494-Student-Loans.pdf>; *see also* FACT SHEET: The Biden-Harris Administration’s Plan for Student Debt Relief Could Benefit Tens of Millions of Borrowers in All Fifty States, White House (Sept. 20, 2022) (“The Biden-Harris Administration expects that over 40 million borrowers are eligible for its student debt relief plan, and nearly 20 million borrowers could see their entire remaining balance discharged.”).

In terms of cost, “CBO estimates that the cost of student loans will increase by about an additional \$400 billion in present value as a result of the action[.]” CBO Letter at 1.¹² According to the National Taxpayers Union Foundation, this could cost, on average, \$2,000 per taxpayer.¹³ The Committee for a Responsible Federal Budget previously estimated that all of the Department’s debt changes “will cost between \$440 billion and \$600 billion over the next ten years[.]”¹⁴ And a Wharton analysis

¹² The University of Pennsylvania Wharton School of Business “estimate[d] that a one-time maximum debt forgiveness of \$10,000 per borrower will cost around \$300 billion for borrowers with incomes less than \$125,000.” *Forgiving Student Loans: Budgetary Costs and Distributional Impact* (August 23, 2022), <https://budgetmodel.wharton.upenn.edu/issues/2022/8/23/forgiving-student-loans>.

¹³ NTUF, *Cost of Student Debt Cancellation Could Average \$2,000 Per Taxpayer* (Aug. 23, 2022), <https://www.ntu.org/foundation/detail/cost-of-student-debt-cancellation-could-average-2000-per-taxpayer>

¹⁴ CRFB, *New Student Debt Changes Will Cost Half a Trillion Dollars* (Aug. 24, 2022), <https://www.crfb.org/blogs/new-student-debt-changes-will-cost-half-trillion-dollars>. The CBO’s “estimate does not include the cost of the

found that “depending on future details of the actual IDR program and concomitant behavioral changes, the IDR program could add another \$450 billion or more, thereby raising total plan costs to over \$1 trillion.”¹⁵

C. The Department’s Blanket Loan Forgiveness Scheme Fails the Major Questions Doctrine’s Clear Statement Requirement.

Against this backdrop, the Executive’s “claim to extravagant statutory power over the national economy” should be greeted skeptically. *Util. Air Regulatory Grp.*, 573 U.S. at 324. And where, as here, the major questions doctrine applies, “a colorable textual basis” is not enough to justify the agency’s assertion of power. *See West Virginia v. EPA*, 142 S. Ct. at 2609. Instead, “[a]t this point, the question becomes what qualifies as a clear congressional statement authorizing an agency’s action.” *Id.* at 2622 (Gorsuch, J., concurring). “*First*, courts must look to the legislative provisions on which the agency seeks to rely ‘with a view to their place in the overall statutory scheme.’” *Id.* (Gorsuch, J., concurring) (quoting *Brown & Williamson*, 529 U.S. at 133). “*Second*, courts may examine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address.”

Administration’s income driven repayment (IDR) policy[.]” CRFB, *Debt Cancellation is Too Costly, CBO Confirms* (Sept. 26, 2022), <https://www.crfb.org/press-releases/debt-cancellation-too-costly-cbo-confirms>

¹⁵ *The Biden Student Loan Forgiveness Plan: Budgetary Costs and Distributional Impact* (Aug. 26, 2022), <https://budgetmodel.wharton.upenn.edu/issues/2022/8/26/biden-student-loan-forgiveness>

Id. at 2623 (Gorsuch, J., concurring). “*Third*, courts may examine the agency’s past interpretations of the relevant statute.” *Id.* (Gorsuch, J., concurring). “*Fourth*, skepticism may be merited when there is a mismatch between an agency’s challenged action and its congressionally assigned mission and expertise.” *Id.* (Gorsuch, J., concurring). The Department’s mass student loan cancellation independently fails all four of these tests.

1. The HEROES Act’s Place in the Overall Statutory Scheme.

Congress does not “typically use oblique or elliptical language to empower an agency to make a ‘radical or fundamental change’ to a statutory scheme.” *West Virginia v. EPA*, 142 S. Ct. at 2609 (quoting *MCI Tele. Corp. v. American Telephone & Telegraph Co.*, 512 U. S. 218, 229 (1994)). If Congress wanted to grant the Department unfettered (and unconstitutional) legislative power to mass cancel student debt, it would have clearly said so. *See Util. Air Regulatory Grp.*, 134 S. Ct. at 2444. It did not, instead saying the opposite.

The student loan statutory structure Congress has enacted makes clear that Congress generally expects borrowers to pay back their federally funded loans. For example, as a general matter, student loans are not dischargeable in bankruptcy. *See* 11 U.S.C. § 523(a)(8). And when Congress has wanted to authorize student loan relief, it has done so explicitly through targeted statutes narrowly authorizing relief to discreet subsets of borrowers under limited circumstances. *See, e.g.*, 20 U.S.C.

§§ 1087 (repayment by the Secretary of loans of bankrupt, deceased, or disabled borrowers; treatment of borrowers attending schools that fail to provide a refund, attending closed schools, or falsely certified as eligible to borrow), 1087e(f) (deferment), 1087e(h) (borrower defenses), 1087e(m)(2) (loan cancellation amount), 1098cc (tuition refunds or credits for members of Armed Forces). *See generally* Congressional Research Service, *Federal Student Loan Forgiveness and Loan Repayment Programs* (Nov. 20, 2018) (discussing statutorily authorized programs). None of those provisions apply here.

Recognizing this, the Department bases its new-claimed power to cancel broad swaths of student loans on an obscure, “rarely invoked statutory provision,” *cf. West Virginia v. EPA*, 142 S. Ct. at 2624 (Gorsuch, J., concurring), of the Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108-76, 117 Stat. 904 (2003) (codified at 20 U.S.C. §§ 1098aa–1098ee) (“HEROES Act of 2003” or “HEROES Act”). *See* 87 Fed. Reg. 61,512, 61,514 (Oct. 12, 2022) (relying on 20 U.S.C. § 1098bb(a)(1) to justify mass debt cancellation). The provision authorizes the Secretary to “waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under Title IV of the Act 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).”¹⁶ 20 U.S.C. § 1098bb(a)(1) (emphasis added). As relevant here, the Secretary is authorized to do this “as may be necessary to ensure that—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[.]*”¹⁷ 20 U.S.C. § 1098bb(a)(2)(A) (emphasis added).

Nothing in that provision purports to authorize, let alone clearly authorize, the Department to unilaterally reimagine student loan law to cancel hundreds of billions of dollars of debt, even if the President declares an “emergency.” *See Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005) (plurality) (suggesting “broad or general language” insufficient to find clear statement); *see also West Virginia v. EPA*, 142 S. Ct. at 2609 (“Extraordinary grants of regulatory authority are rarely accomplished through ‘modest words,’ ‘vague terms,’ or ‘subtle device[s].’” (quoting *Whitman v. Am. Trucking Ass’ns., Inc.*, 531 U.S. 457, 468 (2001))). As the

¹⁶ “To ‘modify’ means ‘to change moderately.’” *Terry v. United States*, 141 S. Ct. 1858, 1863 (2021) (quoting *MCI Telecomms. Corp.*, 512 U.S. at 225).

¹⁷ As relevant here, “[t]he term ‘affected individual’ means an individual who . . . 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)(D) (emphasis added); *see also* CRFB, *Student Debt Cancellation is Not Financially Justified* (Oct. 11, 2022), <https://www.crfb.org/blogs/student-debt-cancellation-not-financially-justified>

Congressional Research Service has explained: “The HEROES Act lacks express reference to ‘cancellation,’ ‘discharge,’ ‘forgiveness,’ or similar terms that Congress has used in portions of statutes, such as the Public Service Loan Forgiveness program, that allow or require ED to ‘cancel’ student loan balances.” Congressional Research Service, *Statutory Basis for Biden Administration Student Loan Forgiveness*, 4 (Sept. 13, 2022).

Indeed, simple “common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude,” *Brown & Williamson*, 529 U.S. at 133, as blanket student loan forgiveness suggests Congress did not do so here. Congress could not have intended to grant unfettered power to erase hundreds of billions of dollars in student debt for millions of borrowers, a topic of intense debate with immense economic consequences, to the Department “in so cryptic a fashion.” *Id.* at 160.

2. Age and Focus of the Act in Relation to Mass Debt Cancellation.

“Of course, sometimes old statutes may be written in ways that apply to new and previously unanticipated situations. But an agency’s attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign that it is acting without clear congressional authority.” *West Virginia v. EPA*, 142 S. Ct. at 2623 (Gorsuch, J., concurring) (citation omitted). So too here.

The HEROES Act of 2003 was passed in the wake of the 9/11 terrorist attacks for the benefit of servicemembers in circumstances involving military mobilizations. The Act’s findings make plain its focus: protecting servicemembers.¹⁸ *See* 20 U.S.C. § 1098aa(b). As the Act recognized: “The men and women of the United States military put their lives on hold, leave their families, jobs, and postsecondary education in order to serve their country and do so with distinction.” *Id.* § 1098aa(b)(5); *see also id.* § 1098aa(b)(6) (“There 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.”).

Unsurprisingly, given this context, only a single member of the House voted against it, and it passed the Senate without amendment by unanimous consent. *See* Congressional Research Service, *Statutory Basis for Biden Administration Student Loan Forgiveness*, 4 (Sept. 13, 2022). There was no suggestion this bill would authorize the President and Secretary to reimagine this country’s student loan system and mass-cancel student loan debt for all borrowers making less than an arbitrary threshold amount of money.

¹⁸ As OLC has explained: “The precursor of the HEROES Act of 2003 was the Higher Education Relief Opportunities for Students Act of 2001. Enacted a few months after the terrorist attacks of September 11, that statute was intended to ‘provide the Secretary of Education with specific waiver authority to respond to conditions in the national emergency declared by the President on September 14, 2001.’” OLC Memo, Slip Op. 3 (quoting Pub. L. No. 107-122, 115 Stat. 2386, 2386 (2002)).

3. The Department’s Past Interpretations of the HEROES Act.

The Department’s prior interpretations of the HEROES Act further underscore the extent of its overreach. As the Supreme Court explained in *West Virginia v. EPA*, “as Justice Frankfurter has noted, ‘just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.’” 142 S. Ct. at 2610 (quoting *FTC v. Bunte Brothers, Inc.*, 312 U. S. 349, 352 (1941)). That resonates here.

Until now, the Department has never suggested the HEROES Act grants the Secretary plenary power to reimagine student loan law whenever the President deigns to declare an emergency,¹⁹ arrogating to itself not only Congress’s exclusive legislative power, *see* U.S. Const. Art. I, § 1, but also Congress’s power of the purse,²⁰ U.S. Const. Art. I, § 9, cl. 7. Instead, the Department more modestly used its HEROES Act waiver-and-modification authority to tweak the margins of loan

¹⁹ It bears reminding that “[i]f human nature and history teach anything, it is that civil liberties face grave risks when governments proclaim indefinite states of emergency.” *Doe v. Mills*, 142 S. Ct. 17, 21 (2021) (Gorsuch, J., dissenting from denial of application for injunctive relief).

²⁰ The Act unhelpfully defines “‘national emergency’ [to] mean[] a national emergency declared by the President of the United States.” 20 U.S.C. § 1098ee(4).

cancellation programs authorized by other statutes.²¹ “[T]here is no original, longstanding, and consistent interpretation meriting judicial respect.” *West Virginia v. EPA*, 142 S. Ct. at 2624 (Gorsuch, J., concurring). Nor did the Department claim blanket loan cancellation powers during the COVID-19 pandemic, even as it found in the HEROES Act the power to pause payments. As the Congressional Research Service recently explained: “Categorical cancellation appears poised to substantially reshape ED’s federal student loan portfolio. The action reflects a use of ED’s HEROES Act authority that is unlike past invocations. For the first time, ED plans to use this authority to directly and permanently discharge a portion of borrowers’ student loan debt.” Congressional Research Service, *Statutory Basis for Biden Administration Student Loan Forgiveness*, 1 (Sept. 13, 2022).

4. Mismatch Between the Mass Student Debt Cancellation and the Department of Education’s Congressionally Assigned Mission.

Bolstering the conclusion that the Department is seeking to arrogate to itself Congress’s legislative power is the mismatch between the Department’s actual mission and the apparent goals of the mass student debt cancellation. The Department has no expertise in fiscal policy. Nor does the Department have

²¹ See, e.g., 68 Fed. Reg. 69,312, 69,316–17 (Dec. 12, 2003) (“For borrowers who are affected individuals in this category, the Secretary is waiving the requirements that apply to the various loan cancellations that such periods of service be uninterrupted and/or consecutive, if the reason for the interruption is related to the borrower’s status as an affected individual.”); 77 Fed. Reg. 59,311, 59,316 (Sept. 27, 2012) (similar); 82 Fed. Reg. 45,465, 45,470 (Sept. 29, 2017) (similar).

authority to handle appropriations—a task the Constitution exclusively reserves to Congress. U.S. Const. Art. I, § 9, cl. 7; *see also* *Cnty. Fin. Servs. Ass’n of Am. v. Consumer Fin. Prot. Bureau*, No. 21-50826, 2022 U.S. App. LEXIS 29060, at *33 (5th Cir. Oct. 19, 2022) (“The Framers . . . believed that vesting Congress with control over fiscal matters was the best means of ensuring transparency and accountability to the people.” (citing Federalist No. 48 (Madison))). Instead, its “mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.”²² The Department’s mass student loan cancellation has nothing to do with that.

Just as the CDC lacked the power to reimagine landlord-tenant law, *see Ala. Ass’n of Realtors*, 141 S. Ct. at 2489 (per curiam); OSHA lacked the power to mandate vaccinations, *see NFIB v. OSHA*, 142 S. Ct. at 665 (“The Act empowers the Secretary to set workplace safety standards, not broad public health measures.”); and the IRS lacked power to make national health policy, *King v. Burwell*, 576 U.S. 473, 486 (2015), the Department lacks the power to reach into policymaking outside the scope of its mission.

CONCLUSION

For these reasons, this Court should grant Plaintiff States’ Motion for Injunction Pending Appeal.

²² U.S. Dept. of Ed., About ED, <https://www2.ed.gov/about/landing.jhtml>

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of FRAP 29(a)(5) and FRAP 32(a)(7)(B) because it contains 4,962 words. This brief also complies with the typeface and type-style requirements of FRAP 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Times New Roman 14-point font.

/s/ Michael Pepson
Michael Pepson

Dated: October 21, 2022

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2022, I electronically filed the above Brief of Amicus Curiae Americans for Prosperity Foundation in Support of Plaintiffs-Appellants' Motion for Injunction Pending Appeal with the Clerk of the Court by using the appellate CM/ECF system. I further certify that service will be accomplished by the appellate CM/ECF system.

/s/ Michael Pepson
Michael Pepson

Dated: October 21, 2022