Nos. 22-506 & 22-535

IN THE
Supreme Court of the United States

JOSEPH R. BIDEN, JR.,
PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,

v.

STATE OF NEBRASKA, *et al.*,
Respondents.

U.S. DEPARTMENT OF EDUCATION, *et al.*,
Petitioners,

v.

MAYA BROWN, *et al.*,
Respondents.

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

BRIEF OF MICHAEL W. MCCONNELL, WILLIAM P. BARR, JOHN COGAN, MITCH DANIELS, CHRISTOPHER DEMUTH, C. BOYDEN GRAY, JAMES C. MILLER III, JOHN MICHAEL "MICK" MULVANEY, MICHAEL B. MUKASEY, JOHN B. TAYLOR, AND PETER J. WALLISON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are academics and former government officials who possess, collectively, centuries of experience in the constitutional and statutory strictures of U.S. budgetary policy. *Amici* understand Congress's power of the purse has served as an enduring bulwark against the expansion of executive power, and are concerned that recent actions by American Presidents—most recently, President Biden's student loan forgiveness program—erode this crucial element of our constitutional structure.

Michael W. McConnell is the Richard and Frances Mallery Professor of Law, Director of the Constitutional Law Center at Stanford University, and Senior Fellow at the Hoover Institution. He previously served as a judge on the United States Court of Appeals for the Tenth Circuit. From 1981-1983, he served as Assistant General Counsel of the Office of Management and Budget ("OMB"), where he dealt frequently with issues of spending and appropriations. Professor McConnell has published widely in the field of executive power, including *The President Who Would Not Be King: Executive Power under the Constitution* (2020).

William P. Barr is a Distinguished Fellow at Hudson Institute. He served as Attorney General of the United States in 1991-1993 and again in 2019-2020. He was Deputy Attorney General in 1990-1991 and Assistant Attorney General for the Office of Legal Counsel in 1989-1990. He has also worked at the Central Intelligence Agency (1971-1977) and on the White House domestic policy staff (1982-1983). He has

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity aside from *amici* and their counsel funded its preparation or submission.

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John F. Cogan is the Leonard and Shirley Ely Senior Fellow at the Hoover Institution. His government service includes Assistant Secretary for Policy in the U.S. Department of Labor (1981-1983), Associate Director of the OMB from 1983-1985, and Deputy Director of OMB (1988-1989). He has also served on numerous U.S. government commissions. He has written extensively on congressional appropriations, federal entitlement programs, fiscal policy, and the federal budget process. His book, *The High Cost of Good Intentions: A History of Federal Entitlement Programs*, is the 2018 winner of the Hayek Prize.

Mitch Daniels served as Director of the OMB (2001-2003) following an extensive career in business. He was then elected to two terms as Governor of Indiana (2005-2013) and was President of the Purdue University System (2013-2022). Throughout his ten years at Purdue, he froze tuition, reduced charges for room and board, and introduced several major improvements in the terms and transparency of student loans. He is co-chair of the Committee for a Responsible Federal Budget.

Christopher DeMuth is a Distinguished Fellow at Hudson Institute and was President of the American Enterprise Institute for Public Policy Research from 1986 to 2008. He served as Administrator of the Office of Information and Regulatory Affairs ("OIRA") (1981-1984) and Executive Director of the Presidential Task Force on Regulatory Relief (1981-1983), where he dealt regularly with issues of congressional appropriations, appropriation riders, and delegation of regulatory authorities. His publications include *Agency Finance in*

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James C. Miller III served as Director of the OMB (1985-1988), Chairman of the Federal Trade Commission (1985-1988), and Administrator of OIRA and Executive Director of the Presidential Task Force on Regulatory Relief (1981). He has been a fellow of the American Enterprise Institute; the Hoover Institution, Stanford University; and the Center for the Study of Public Choice, George Mason University.

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John Michael ("Mick") Mulvaney served as director of the OMB (2017-2020). He also served as acting director of the Consumer Financial Protection Bureau (2017-2018), White House Chief of Staff (2019-2020), and U.S. Special Envoy for Northern Ireland (2020-2021). Prior to his service in the executive branch, Mr. Mulvaney represented South Carolina's Fifth District in the U.S. House of Representatives

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John B. Taylor is the George P. Shultz Senior Fellow in Economics at the Hoover Institution and the Mary and Robert Raymond Professor of Economics at Stanford University. He chairs the Economic Policy Working Group, co-chairs the Technology, Economics and Governance Working Group, and is director of Stanford's Introductory Economics Center. He served as Senior Economist and later Member of the Council of Economic Advisers and Undersecretary of the Treasury. He received the Hoagland Prize and the Rhodes Prize for excellence in undergraduate teaching. He is a fellow of the American Academy of Arts and Sciences and the Econometric Society and served as Vice President of the American Economic Association and President of the Mont Pelerin Society.

Peter J. Wallison is a senior fellow emeritus at the American Enterprise Institute, where he studies constitutional law and the growth of the administrative state. Mr. Wallison previously served as White House Counsel and General Counsel of the Department of the Treasury under President Ronald Reagan. His most recent book, *Judicial Fortitude: The Last Chance to Rein in the Administrative State* (2018), argues that the judiciary must curb the growth of the administrative state by enforcing constitutional separation of powers.

SUMMARY OF ARGUMENT

The power of the purse is the central and most important constitutional power reserved exclusively to the legislative branch, enabling it to oversee and control virtually every activity of the federal government. So important is congressional control over spending that the Framers made the point in two different

provisions of the Constitution—the only "double protected" power in the document. Article I, Section 8, Clause 1 gives Congress (not the President) the power to use tax revenues for "the common Defence and general Welfare of the United States," and Article I, Section 9, Clause 7 provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." But these safeguards are for naught if the executive branch can spend money contrary to the manifest intentions of Congress based on improvised, out-of-context interpretations of spending statutes.

In recent decades, Presidents of both parties have increasingly resorted to loose constructions of congressional appropriations laws to justify spending without congressional action—even when Congress has explicitly rejected the very spending in question. This has gotten to the point that the fundamental principle of the congressional power of the purse is in peril.

This case involves a unilateral decision by the President to forgive over $400 billion in student loan debt owed by 43 million borrowers who financed a college education with the benefit of taxpayer-funded loans. This represents one of the largest expenditures in the nation's history, carried out in the face of clear congressional opposition and supported by no accepted principles of statutory interpretation—let alone the "specific[] statement" that is necessary before the executive branch can spend Treasury funds. 31 U.S.C. § 1301(d).

That the expenditure here is in the form of waiving payments owed to the Treasury, instead of affirmatively expending funds, is of no legal significance. Congress has made clear that "modify[ing] outstanding direct loans (or direct loan obligations) or loan guarantees (or loan guarantee commitments) shall constitute

new budget authority." 2 U.S.C. § 661c(d)(1). For that reason, the CBO scored the "cost of debt cancellation [as] the present value of the borrowers' projected repayments of student debt before accounting for the cancellation minus the present value of repayments after doing so." CBO, *Costs of Suspending Student Loan Payments and Cancelling Debt* 2 (Sept. 26, 2022). The CBO further notes that "the costs of payment suspension and of debt cancellation will be recorded by the Office of Management and Budget in the federal budget as an increase in the deficit during the fiscal year in which the terms of the loans are modified." CBO, *supra*, at 2. Forgiving a loan and making a gift or grant are functionally, legally, and economically indistinguishable—and both come under Congress's exclusive spending power.

This case gives the Court an opportunity to uphold the structural disciplines on executive power. If the Court reaches the merits,[2] it should make clear that spending statutes must be interpreted in accordance with Congress's instructions. If this Court turns a blind eye, the executive will have virtually unlimited power to spend. That might befit the Stuart King Charles I, but not a President of the United States.

ARGUMENT

I. The Framers Designed the Power of the Purse as a Check on Tyranny

Drawing from a tumultuous and ultimately bloody chapter of British history, the Framers assigned the "power of the purse"—the power to raise revenue and direct its spending—solely to the legislative branch. In doing so, they armed Congress with "the most complete and effectual weapon with which any

[2] *Amici* take no position on the standing question.

constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." *The Federalist* No. 58 (James Madison).

In the first clause of Article I, Section 8, the Constitution's list of congressional powers, the authority to use tax revenues for "the common Defence and general Welfare" is given to Congress, not to the President. Making doubly sure that this allocation of power could not be mistaken, the Framers added Section 9, Clause 7, which states emphatically that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"—no matter what the sources of funds might be. In other words: Congress alone may appropriate funds, and the President may not spend without specific statutory authorization.

That structural design is "the foundation stone of all separation-of-powers law." Michael W. McConnell, *The President Who Would Not Be King: Executive Power under the Constitution* 100 (2020). By giving Congress—not the executive—that "most far-reaching and effectual of all governmental powers," the Framers ensured that the people's representatives "would act as the first branch of government." Abner J. Mikva, *Congress: The Purse, the Purpose, and the Power*, 21 Ga. L. Rev. 1, 1 (1986). It follows that the courts should "narrowly construe[]" grants of spending authority, as a means of "reinforcing Congress's constitutional power of the purse." Gillian E. Metzger, *Taking Appropriations Seriously*, 121 Colum. L. Rev. 1075, 1161 (2021).

A. The Common Law Evolution of the Power of the Purse

Until the seventeenth century, Parliament lacked the power of the purse. While the Crown needed Parliament's consent to levy taxes, the "ordinary expenses

of state" were long met with revenue from Crown lands, feudal payments, customs duties, personal loans, and the like. McConnell, *supra*, at 101; see also 1 William Blackstone, *Commentaries on the Laws of England* *272-96 (1765) (describing eighteen sources of "ordinary revenue"); Douglass North & Barry Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. Econ. Hist. 803 (1989) (describing fiscal change after the Glorious Revolution). That revenue was "in a very true sense the king's revenue, and parliament had but seldom attempted to give him orders as to what he should do with it." F.W. Maitland, *The Constitutional History of England* 309 (H.A.L. Fisher ed., 1908). "Only in the event of extraordinary expenditures—usually for a war—did the Crown need to go hat in hand" to Parliament seeking an appropriation. McConnell, *supra*, at 101. As a result, "kings could sometimes go for years and even decades without the botheration of a legislative branch." *Id.*

1. The most consequential example of this took place under Charles I, who "began his reign with a series of expensive and unnecessary foreign policy adventures, each of which ended poorly." Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* 47 (2017). Those defeats left the Crown in "desperate need of new funds," but Parliament demanded concessions in return. See Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. Chi. L. Rev. 1083, 1102 (2009). Unwilling to budge, Charles instead dissolved Parliament in 1629 and governed without it until 1640—a period that historians call "Personal Rule" or the "Eleven Years' Tyranny."

But that freedom came at a cost to the King. No Parliament meant no new tax revenue, and by the Stuart

Era "the king's ordinary revenues were no longer even remotely sufficient to cover the normal costs of royal governance." Chafetz, *Congress's Constitution*, *supra*, at 47. So Charles and his ministers set out to raise money, beginning where monarchs usually did: increasing rents and selling Crown lands. Pauline Gregg, *King Charles I*, at 227-28 (1984). And when those ordinary coffers ran bare, Charles got more creative, redrawing the borders of royal forests and fining those who now found themselves trespassers. *Id.* at 225.

Even more inventive was Charles's invocation and manipulative reinterpretation of ancient statutes. The most notorious was his resuscitation of the 1307 *Statutum de Militibus,* putting the statute to a use utterly unrelated to its original purpose of compelling military service by the king's knights, and converting it to a means of collecting revenue without going to Parliament. See 2 William Blackstone, *Commentaries*, *supra*, at *69; H.H. Leonard, *Distraint of Knighthood: The Last Phase, 1625-41*, 63 History 23, 23 (1978); Gregg, *supra*, at 228. Within five years, the Crown had extorted more than £170,000 through knighthood fines—the "largest single source of extraordinary revenue apart from the sale of crown lands." Leonard, *supra*, at 35. With this money in hand, Charles was able to avoid calling a Parliament for a decade.

That infuriated Parliament. When Charles finally reconvened Parliament, lawmakers denounced the king for raising funds "upon pretext of an ancient custom." F.M. Nichols, *On Feudal and Obligatory Knighthood*, 39 Archaeologia 189, 243 (1863). In the end, the stratagem proved a "staging post" on the road to war and Charles's beheading in 1649. Leonard, *supra*, at 36; see also B.W. Quintrell, *Oliver Cromwell and*

Distraint of Knighthood, 57 Bull. of the Inst. of Hist. Rsch. 224, 230 (1984).

2. After the Civil War and the Glorious Revolution, Parliament gradually wrested the power of the purse from the Crown.

That shift began with revenue. To "ensure that monarchs would no longer feel free to rule without Parliament," lawmakers "took away almost all of the remnants of the Crown's ordinary revenue," leaving William and Mary dependent on "annual appropriations." Chafetz, *Congress's Constitution, supra*, at 51. Then, the 1689 Bill of Rights outlawed "levying Money for and to the Use of the Crowne … for other time and in other manner than the same was granted by Parlyament." 1 W. & M., sess. 2, c. 2, § 1, cl. 4; *id.* § 2, cl. 4 (1689). Finally, in 1702, Parliament "prohibited the Crown from alienating crown property" beyond the monarch's lifetime—"end[ing] the practice of borrowing on royal credit." McConnell, *supra*, at 102. As a result, the king "had to come, cap in hand, to the House of Commons," which "more often than not … drove a hard bargain." G.M. Trevelyan, *The English Revolution, 1688-1689*, at 96 (1965).

From there, it was "but a small step" to Parliamentary control over spending. *Id.* 100. After the Glorious Revolution, "it became common practice … for Parliament to specifically appropriate the funds that it raised for the Crown." Chafetz, *Congress's Constitution, supra*, at 51. And with the new system came new oversight: a budget, audits, and "severe punishments" for royal officials who disregarded Parliament's appropriation. *Id.* at 51-52. By 1782, when "the king lost his prerogative to determine how the [domestic budget] would be spent," the purse strings were fully in Parliament's grasp. McConnell, *supra*, at 102. "From that

point forward, the Crown could not spend without appropriation by Parliament." *Id.*

B. Congress's Exclusive Power of the Purse

With this history fresh in mind, the Framers "entrenched each of these settlements in the Constitution." McConnell, *supra*, at 102. Evoking the English Bill of Rights and the restrictions on alienating Crown property, the first two clauses of Article I, Section 8 give Congress alone the power to tax and borrow. And mirroring Parliament's control of spending, the Appropriations Clause provides that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Together, these clauses give Congress control of not only "how much revenue to raise and how, but what to spend it on, and under what conditions." McConnell, *supra*, at 103.

That structural choice is "the foundation stone of all separation-of-powers law." McConnell, *supra*, at 100. As experience under Charles I had shown, the executive who could raise money by himself could also govern by himself. And the executive with "unbounded power" to spend could "apply all its monied resources at his pleasure." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1342 (1833); see *The Federalist* No. 30 (Alexander Hamilton) (calling money the "vital principle of the body politic"). And the flip side was also true, as Madison observed in Federalist 58. With the "powerful instrument" of the purse, Parliament had "gradually enlarg[ed] the sphere of its activity and importance," allowing it to "obtain[] a redress of every grievance" and "carry[] into effect every just and salutary measure." *The Federalist* No. 58 (James Madison). In short: the power to set national policy comes with the power of the purse. See McConnell, *supra*, at 100-01.

These "structural details" are "not simply matters of etiquette or architecture." *Sissel* v. *U.S. Dep't of Health & Hum. Servs.*, 799 F.3d 1035, 1052 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of reh'g en banc). Instead, their "ultimate purpose" is "to protect the liberty and security of the governed." *Metro. Wash. Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). To that end, the Constitution guarantees that "the legislative department alone has access to the pockets of the people." *The Federalist* No. 48 (James Madison).

To the Framers, the power of the purse was a "bulwark" against tyranny. *U.S. Dep't of Navy* v. *FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.); see Montesquieu, *The Spirit of the Laws* bk. XI, ch. VI (1748) ("Were the executive power to determine the raising of public money … liberty would be at an end."). In fact, the "separation of purse and sword" became "the Federalists' strongest rejoinder to Anti-Federalist fears of a tyrannical president." Chafetz, *Congress's Constitution*, *supra*, at 57; see Alexis de Tocqueville, *Democracy in America* 114 (Harvey Mansfield & Delba Winthrop eds. & trans., 2002) ("[T]he struggle between the president and the legislature can only be unequal, since the latter, if it perseveres in its designs, can always master the resistance opposed to it …."). So when Patrick Henry warned that a President of "ambition, and abilities" could "easily become king," Madison responded that the "purse is in the hands of the representatives of the people" who "have the appropriation of all moneys." 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 58-59, 393 (Jonathan Elliot 2d ed., 1891).

In short, the founding generation saw Congress's power of the purse as a "salutary check, not only upon the extravagance, and profusion, in which the

executive department might otherwise indulge itself … but also against any misappropriation, which a rapacious, ambitious, or otherwise unfaithful executive might be disposed to make." St. George Tucker, *View of the Constitution of the United States* 298 (1803) (Clyde N. Wilson ed. 1999); see Story, *supra*, § 1342 ("[The] power to control, and direct appropriations, constitutes a most useful and salutary check … upon corrupt influence and public peculation.").

II. Executive Encroachment on the Power of the Purse Threatens Constitutional Order

A. Presidents Have Repeatedly Usurped Congress's Spending Authority

While the President does not have the ability to liquidate Crown lands or fine absent knights, the American Executive has shown no less creativity in pressing the limits of its spending authority than did its monarchical forbears.

1. Presidents and Congresses have been tussling over the scope of appropriations and the timing of expenditures since the beginning of the Republic. *E.g.*, Louis Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 Law & Contemp. Probs. 135 (1972). President Jefferson famously agreed to purchase the Louisiana Territory from France for $15 million even though Congress had appropriated only $2 million for the purchase of New Orleans and the Floridas. Fisher, *supra*, at 165 & n.149. But Jefferson did not attempt to make the expenditure until after Congress appropriated the rest of the money, a few weeks after it ratified the treaty. *Id.*

On the other side of the coin, Presidents have refused to expend funds that Congress directed to be spent. This practice of impoundment traces back to 1803, when President Jefferson reported to Congress

that "[t]he sum of $50K appropriated by Congress for providing gun boats remains unexpended" due to his determination that intervening developments "rendered an immediate execution of that law unnecessary." Thomas Jefferson, *Third Annual Message* (Oct. 17, 1803). Jefferson's approach to impoundment, which would prevail through at least the presidency of Franklin Delano Roosevelt, was characterized by "an attitude of economy and efficiency" with the salutary goal of "not spending on a program no longer needed." Gerald A. Figurski, *Presidential Impoundment of Funds: A Constitutional Crisis*, 7 Akron L. Rev. 107, 108-09 (1973).[3]

This practice became controversial in 1973 when President Nixon "changed the unwritten rules of the impoundment battle." Wm. Bradford Middlekauff, *Twisting the President's Arm: The Impoundment Control Act as a Tool for Enforcing the Principle of Appropriation Expenditure*, 100 Yale L.J. 209, 212 (1990). During a press conference, President Nixon declared he "w[ould] not spend money if the Congress overspends" or implement "programs that will raise the taxes and put a bigger burden on the already overburdened American taxpayer. See Richard Nixon, *The President's News Conference* (Jan. 31, 1973). Following through on this promise, President Nixon "slashed billions of dollars in domestic areas such as federal housing, highway safety, and environmental protection." Bale, *supra*, at 618; see OMB, Report Under Federal Impoundment and Information Act, 38 Fed. Reg. 19,582, 19,584 (July 13, 1973) (reporting the President

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[3] Not every use of impoundment during this period was as public minded. *See*, *e.g.*, Christian I. Bale, *Checking the Purse: The President's Limited Impoundment Power*, 70 Duke L.J. 607, 616 (2020) ("President Buchanan impounded funds appropriated for Illinois post offices to punish the representatives of the state.").

was impounding $7.7 billion appropriated to more than twenty different agencies and components).

Over 160 district courts held various acts of impoundment illegal, and this Court did the same in *Train* v. *City of New York*, 420 U.S. 35 (1975), where President Nixon had partially impounded funds specifically appropriated over his veto. These cases were decided on grounds of statutory construction, but had a clear constitutional dimension—as does the executive action at issue in this case and the antecedent actions discussed below.

2. In recent years, Presidents of both political parties have employed far-fetched interpretations of statutory texts to spend money on controversial projects that Congress had never authorized—and, in many instances, had specifically rejected. President Biden's student loan forgiveness program is the latest and most dramatic instance of what is, in practical effect, a claim to unilateral executive spending power.

One of the first modern instances of this phenomenon was a President standing up an entire new federal agency and only later seeking Congress's assent. In 1961, less than two months after taking office, President Kennedy established the Peace Corps by Executive Order. Exec. Order No. 10,924, 26 Fed. Reg. 1789 (Mar. 1, 1961). Congress, though, had never passed any legislation on the subject, and would not appropriate funds to support the Peace Corps for seven more months. See Act of Sept. 30, 1961, Pub. L. No. 87-329, tit. V, 75 Stat 717, 721. To fund the agency in the interim, President Kennedy diverted more than $1 million in contingency funds allocated under the Mutual Security Act. Fisher, *supra*, at 138.

More recent Presidents have read into congressional enactments the power to implement policies that,

unlike the Peace Corps, were clearly going nowhere at the opposite end of Pennsylvania Avenue. To take just the three most recent former Presidents as examples:

President Bush, in the waning months of his presidency, urged Congress to pass a $14 billion bailout package for American automakers. When that legislation failed, President Bush candidly determined "the only way to avoid a collapse of the U.S. auto industry is for the executive branch to step in." Remarks on the American Auto Industry, 44 Weekly Comp. Pres. Doc. 1568, 1569 (Dec. 19, 2008). He thus "announc[ed] that the Federal Government will grant loans to auto companies under conditions similar to those Congress considered." *Id.* To fund this bank-shot bailout, the administration used dollars Congress had appropriated to prop up "financial institution[s]" through the Troubled Asset Relief Program ("TARP"). 12 U.S.C. § 5211. TARP, though, limited eligible "financial institutions" to "any institution, including, but not limited to, any bank, savings association, credit union, security broker or dealer, or insurance company." 12 U.S.C. § 5202(5).

To evade this stricture, the Administration interpreted the term "financial institution" to include "holding companies engaged in the manufacturing of automotive vehicles and the provision of credit and financing in connection with the manufacturing and purchase of such vehicles" because "they are 'institution[s].'" Henry M. Paulson, Jr., *Determination*, Dep't of the Treasury (Dec. 19, 2008). In other words, the administration determined car manufacturers were "financial institutions" for purposes of TARP because the term was "not limited" to the listed types of institutions (and, of course, the manufacture and sale of cars does involve financing—as does virtually every other large sector of the economy).

President Obama followed a similar playbook after Congress specifically refused to appropriate funding for a provision of the Affordable Care Act authorizing reimbursement of certain costs to health insurers participating in the Affordable Care Act exchanges. See 42 U.S.C. § 18071.[4] Despite the lack of any appropriation, and notwithstanding Congress's vote against such an appropriation, Treasury began to make advance section 1402 payments to insurers. *United States House of Representatives* v. *Burwell*, 185 F. Supp. 3d 165, 174 (D.D.C. 2016), *vacated in part sub nom. United States House of Representatives* v. *Azar*, 2018 WL 8576647 (D.D.C. May 18, 2018).

Contradicting its initial request of section 1402 funds, the administration claimed that it was permitted to make these payments under the permanent appropriation in 31 U.S.C. § 1324. Yet that permanent appropriation was limited to "refunding internal revenue collections," such as the section 1401 individual tax credit for insurance premiums. *Id.* § 1324(a). The House successfully sued to halt the unauthorized spending, with the district court holding the expenditure unlawful and unconstitutional. *House of Representatives*, 185 F. Supp. at 174-79 ("A law may be construed to make an appropriation out of the Treasury … only if the law specifically states that an appropriation is made ….''). By that time, some $7 billion of unappropriated money had been taken from the Treasury, never to be returned.

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[4] President Obama took this action after Congress rejected a number of his administration's proposals, in response to which the President pledged to use his "pen" and "[]phone" to "take executive actions where Congress won't." Barack Obama, *Remarks by the President and First Lady at the College Opportunity Summit* (Jan. 16, 2014).

President Trump also determined to spend money that Congress had not appropriated. In July and August 2020, Congress debated whether to extend the enhanced unemployment benefits provided by the CARES Act. Unable to agree on an amount—Democrats wanted a $600 enhancement; Republicans proposed $200—Congress deadlocked. See Jake Sherman & John Bresnahan, *White House Eyes Executive Orders to Upend Virus Negotiations*, Politico (Aug. 4, 2020). Yet the administration went ahead with a $400 enhancement by diverting funds appropriated to the Federal Emergency Management Administration's Disaster Relief Fund into a new Assistance Program for Lost Wages. See Donald J. Trump, *Memorandum on Authorizing the Other Needs Assistance Program for Major Disaster Declarations Related to Coronavirus Disease 2019* (Aug. 8, 2020).

The administration justified this spending under the Stafford Act, which authorizes federal Disaster Relief Fund assistance "to meet disaster-related medical, dental, child care, and funeral expenses" or "to address personal property, transportation, and other necessary expenses or serious needs resulting from the major disaster." 42 U.S.C. § 5174(e). But the Act does not authorize federal assistance to cover lost *income*. And while a separate provision does authorize the President to provide unemployment assistance, it restricts such assistance to weeks where the individual is not entitled to any other form of employment compensation. See *id.* § 5177. Like his predecessors, President Trump here "attempt[ed] to legislate through executive fiat." Erwin Chemerinsky, *Trump Just Made Another Huge and Illegal Power Grab. Be Very Alarmed.* L.A. Times (Aug. 10, 2020).

B. Spending Statutes Must Be Strictly Construed to Safeguard Separation of Powers

As the foregoing examples demonstrate, willfully loose interpretations of spending statutes are threatening to become standard practice, radically undermining Congress's power of the purse. Regardless of party, policy, or purpose, modern Presidents have sought to circumvent Congress's appropriations power by hanging plainly unauthorized executive policies on the slenderest of statutory reeds—and future presidents will continue to do so absent clear guidance from this Court.

This is plainly not the manner in which our constitutional order is designed to function. The Constitution vests the President with "[t]he executive Power," U.S. Const. art. II, § 1, but the executive power does not comprise the power to direct spending. The President can request and propose, he can bargain and cajole, he can even demand and threaten, but he may not *spend* absent congressional authorization. See Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1351 (1988). Yet recent standoffs between Congress and the President have increasingly ended not with the President acknowledging his constitutional limits, but rather with the President circumventing the Appropriations Clause under the guise of statutory interpretation.

This Court has never countenanced presidential creativity in implementing spending laws of the sort witnessed in recent years. As this Court has made clear, "the best way of determining whether Congress intended" to empower the President to spend the public fisc "is to examine the nature and scope of the authority granted by Congress." *La. Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 374 (1986). If Congress did not

intend to authorize an appropriation, the executive "may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." *Fed. Maritim Comm'n* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973). Allowing the executive to "expand its power in the face of congressional limitation … would be to grant to the [President] power to override Congress." *La. Pub. Serv. Comm'n*, 476 U.S. at 374-75. So long as the "the controversy involves taxing, spending, borrowing, impositions on liberty or property, going to war, suspension of habeas corpus, or any other delegated powers, congressional authorization is a necessary precondition." McConnell, *supra*, at 281. And such authorization, to protect against usurpations of authority, must be construed narrowly.

This Court has adopted clear statement rules in other contexts to shore up important structural principles of constitutional law. See, *e.g.*, *Gregory* v. *Ashcroft*, 501 U.S. 452, 459-60 (1991) (federalism canon); *Dellmuth* v. *Muth*, 491 U.S. 223, 228 (1989) (state sovereign immunity); *Johnson* v. *United States*, 529 U.S. 694, 701 (2000) (nonretroactivity); *Morrison* v. *Nat'l Australian Bank Ltd.*, 561 U.S. 247, 255 (2010) (extraterritoriality). The Court should similarly "narrowly construe" grants of spending authority, as a means of "reinforcing Congress's constitutional power of the purse." Metzger, *supra*, at 1161. Indeed, in this context no inference is necessary because Congress itself has enacted a clear-statement rule: "A law may be construed to make an appropriation out of the Treasury … only if the law *specifically states* that an appropriation is made …." 31 U.S.C. § 1301(d) (emphasis added).

And that makes sense. The appropriations context demands stricter interpretive rules precisely because looser rules govern the interpretation of delegated regulatory authority. Put another way, the purse strings

are frequently Congress's last line of defense against executive overreach. Every year, Congress intervenes in agency rulemaking by using appropriations riders that prohibit action on certain subjects, mandate consideration of particular proposals, or set conditions for action. See generally Curtis W. Copeland, Cong. Rsch. Serv., RL34354, *Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions* (updated Aug. 5, 2008). The mere threat of funding cuts allows Congress to shape regulators' decisions. In fact, it stands to reason that Congress has delegated broad regulatory powers only because it expected it could always use its funding powers to direct and restrain regulators. See Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 Duke L.J. 456, 462-63, 472-73 (tracing use of riders to the beginning of the modern administrative state). If the President could use far-fetched interpretations to circumvent Congress's power of the purse, that last line of defense would be breached.

Further, and apart from violating separation of powers, what the President has done here deprives the government of revenue Congress had assumed would be collected, adding more than $400 billion to the deficit for FY 2023. It would be no different if the president, claiming that the economy needed a boost or that the tax code needed to be more competitive globally, directed the IRS not to collect the full amount of taxes—either from all Americans or from some favored constituency. See, *e.g.*, Jim Tankersley, *Trump Won't Order a Capital Gains Tax Cut, for Now*, N.Y. Times (Sept. 11, 2019). This would nullify or compromise a law Congress had passed. If the President's action in this case is approved by this Court, it will create a precedent with no conceivable boundaries.

III. Congress Did Not Authorize the Student Loan Forgiveness Program

A. President Biden's student loan forgiveness program is one of the largest single expenditures in American history. The program would unilaterally forgive nearly a half trillion dollars on loans held by 43 million borrowers. If passed through Congress, the program would represent an epochal change in the nation's domestic spending programs.

But it was not passed through Congress, though not for lack of effort. The President ran on a platform of forgiving a significant amount of federal debt, see, *e.g.*, Joe Biden, *Joe Biden Outlines New Steps to Ease Economic Burden on Working People*, Medium (Apr. 9, 2020), and in the 117th Congress alone, members of the House and Senate introduced over eighty bills on the topic of student loan repayment and forgiveness. See Nat'l Ass'n of Student Fin. Aid Adm'rs, *Legislative Tracker: Loan & Repayments* (Jan. 5, 2023). This included various proposals to forgive student debt for all borrowers. See, *e.g.*, H.R. 6708, 117th Cong. (2022) (requiring the discharge of $25,000 in debt per borrower); H.R. 4797, 117th Cong. (2022) ($50,000). But the only one of these proposals enacted was an uncontroversial bill permitting two borrowers who had previously consolidated their loans to sever the consolidation. Pub. L. No. 117-200, 136 Stat. 2219 (2022).

In the midst this campaign and legislative activity, few seriously thought the President could forgive student debt with the stroke of a pen. Then-House Speaker Nancy Pelosi, for example, Shermanesquely declared in July 2021:

> People think that the President of the United States has the power for debt forgiveness. He

> does not. He can postpone, he can delay, but he does not have that power.

Adam S. Minsky, *Pelosi: President Biden Does Not Have Power To Cancel Student Loan Debt—What It Means For Borrowers*, Forbes (July 28, 2021). It was not until it became clear that legislative support was lacking—and that even many supporters preferred not to take a vote on such a controversial measure—that the President discovered the authority to go it alone.

Even those who supported unilateral debt relief at this time did not find support for this position in the HEROES Act. Instead, advocates relied on a provision of the Higher Education Act authorizing the Secretary of Education to "compromise, waive, or release any right, title, claim, lien, or demand." 20 U.S.C. § 1082(a)(6); see Sen. Elizabeth Warren, *Press Release, Warren, Schumer, Pressley, Colleagues: President Biden Can and Should Use Executive Action to Cancel up to $50,000 in Federal Student Loan Debt Immediately* (Feb. 4, 2021). The much-discussed flaws in that theory need not be described here, because the Administration abandoned it without putting it into effect.

Eventually, the Administration hit upon a theory that almost no one had predicted: use of the HEROES Act, a 2003 statute passed in the wake of 9/11 "to support the members of the United States military and provide assistance with their transition into and out of active duty and active service," 20 U.S.C. § 1098aa(b)(6). The Act authorizes the Secretary of Education to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs … as the Secretary deems necessary in connection with a war or other military operation or national emergency." *Id.* § 1098bb(a)(1). Relief under the Act is limited to "affected individual[s]," defined as a member of the armed forces or National Guard, a

person who resides in a disaster area, or a person who "suffered direct economic hardship as a direct result of a war or other military operation or national emergency." *Id.* § 1098ee(2).

The Administration reasoned that the COVID-19 pandemic is an "emergency" within the meaning of the HEROES Act, 87 Fed. Reg. 61,512, 61,512-13 (Oct. 12, 2022) (citing 20 U.S.C. § 1098bb(a)), and that former students with unpaid student loans are "affected individuals," on account of suffering "direct economic hardship" as a "direct result" of the COVID emergency. See *The Biden-Harris Administration's Student Debt Relief Plan Explained*, Federal Student Aid (last visited Jan. 20, 2023).

B. There are multiple reasons why ordinary principles of interpretation of spending laws do not support the Administration's interpretation.

At the outset, it is not even clear that the COVID-19 emergency is the type of "emergency" contemplated by the HEROES Act. In construing the term "national emergency," the canon of *ejusdem generis* counsels that the general term "national emergency" should be construed in light of the specific terms that precede it—namely, war, military operation, or disaster, all of which place a disproportionate burden on a subset of individuals. 20 U.S.C. § 1098ee(2); see *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588 (1980). The mere fact the statute includes the term "national emergency" does not necessarily mean that emergencies fundamentally different in kind than those specifically listed are covered—no one, for example, argues that emergencies declared to impose trade sanctions would justify forgiving the student loans of tens of millions of Americans.

But even accepting that COVID-19 is an emergency for purposes of the HEROES Act, it now remains an "emergency" in name only—and soon, not even that. In a televised interview less than a month after implementing the program, President Biden declared the pandemic "over." Scott Pelley, *President Joe Biden: The 2022 60 Minutes Interview* (Sept. 18, 2022). A few months later, the Administration determined that COVID-19 was no longer an emergency sufficient to support restrictions on illegal migration. See *Arizona* v. *Mayorkas*, 143 S. Ct. 478 (2022). This on-again-off-again logic is untenable. The pandemic either is a continuing national emergency or it is not. And just this week, the White House confirmed that it is not, announcing it would end the public health emergency effective May 11, 2023. See Sharon LaFraniere & Noah Weiland, *U.S. Plans to End Public Health Emergency for Covid in May*, N.Y. Times (Jan. 30, 2023).

It is also hard to see how 43 million student borrowers can be described as "affected individuals" under the terms of the HEROES Act. Congress defined the term as including members of the armed forces or National Guard, persons who reside in a disaster area, or persons who "suffered direct economic hardship as a direct result of a war or other military operation or national emergency." 20 U.S.C. § 1098ee(2). The beneficiaries of the program outnumber the entire population of the nation's armed forces by more than 30:1. See Council on Foreign Relations, *Demographics of the U.S. Military* (updated July 13, 2020).[5]

Again, the principle of *ejusdem generis* suggests the catch-all language about those suffering economic

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[5] Indeed, due to tuition-free service academies and the G.I. Bill, military members and veterans are perhaps the class *least* likely to benefit from the program.

hardship as a result of a national emergency should be limited to those similar to the fighting forces called to service in the wake of 9/11, who faced, in addition to everything else, the prospect of no longer being in a position to repay loans while away from their ordinary employment. Same for those who lose their home or place of business in a natural disaster. The focus of the HEROES Act was to provide relief to individuals impacted by the sacrifices that military service requires, such as abrupt, unexpected deployments. See, *e.g.*, 149 Cong. Reg. H2522, H2526 (daily ed. Apr. 1, 2003) (referencing numerous times the goal of benefiting servicemembers). Congress was concerned that people called unexpectedly to military service would be taken away from their ordinary jobs and might be unable to pay their student loans. The emergency thus was "directly" responsible for their anticipated inability to pay their student loans.

But it is not necessary to fall back on canons of interpretation. The language used by Congress is clear. Only persons suffering "direct" economic hardship as a "direct result of war or other military operation or national emergency" qualify for the extraordinary relief provided by the statute. There is no evidence in the administrative record that all, or even most, of the 43 million former students whose loans were forgiven suffered any "direct" economic hardship as a "direct" result of the COVID pandemic.

Moreover, the purpose of the Secretary's waiver authority under the HEROES Act was not to confer a benefit on a class of individuals, but rather to ensure only that "affected individuals" were 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). That was true of military personnel whose deployment took them away

from their jobs and disaster victims forced from their homes. That is not true of student borrowers, whose loan forgiveness makes them significantly better off.

Most of the beneficiaries of the program have a college degree, and virtually all have at least some college education. The majority of college-educated individuals are in the same (or better) position than they were prior to the pandemic. See Monthly Labor Review, *Covid-19, Educational Attainment, and the Impact on American Workers*, U.S. Bureau of Labor Statistics (Sept. 2020) (explaining that unemployment rate rose the least for those with a college education during pandemic); Career Outlook, *Education Pays, 2020*, U.S. Bureau of Labor Statistics (June 2021) (explaining that college educated workers suffered less unemployment compared to others during COVID-19 pandemic). Further, these borrowers have already received 34 months (and counting) of student loan forbearance, an accommodation that presumably offset any harm those borrowers experienced during the height of COVID-19. So even if the HEROES Act did authorize such a sweeping interpretation, the program would violate the statute simply because the Department of Education failed to make the necessary causal showing under section 1098bb(a)(2)(A).

Finally, that the President had to reach for a two-decades-old law is especially telling. The COVID-19 pandemic resulted in an unprecedented flurry of legislation and appropriations. Between 2020 and 2022, Congress passed nine different COVID-19 relief bills, which totaled approximately $5 trillion in spending. Alicia Parlapiano et al., *Where $5 Trillion in Pandemic Stimulus Money Went*, N.Y. Times (Mar. 11, 2022). One of these bills, the CARES Act, even suspended federal student loan payments. *Federal Student Loan Debt Relief in the Context of Covid-19*, Cong. Rsch.

Serv., R46314 (updated Oct. 12, 2022). Yet none of these statutes authorized new loan forgiveness, directed the President to use the HEROES Act to forgive loans, or appropriated funds for the forgiveness of student loans. Student loan forgiveness was the dog that didn't bark.

C. The President's actions in this case portend a constitutional order where the President's ability to spend is effectively unchecked. The President relied on one emergency (COVID) to unlock one new authority (loan forgiveness). But there are currently 42 extant emergencies, the oldest in effect since 1979. See Brennan Center, *Declared National Emergencies Under the National Emergencies Act* (updated Dec. 12, 2022). Each of these emergencies allows the President to access 123 statutory emergency powers through various emergency declarations without any need for Congressional approval; another 13 emergency powers become active if Congress declares a state of emergency. Brennan Center, *A Guide to Emergency Powers and Their Use* PDF p. 3 (updated June 9, 2022). Ninety-six of the emergency powers require nothing more than the President's signature on an emergency declaration. *Id.*

Using the same authority and rationale, the President could wipe out the loans of all members of the armed forces and their families because the nation is at war, notwithstanding the various statutory caps on military educational benefits. Or the President could unilaterally declare an emergency—a border emergency or a climate emergency, for example—as a pretext for unilaterally granting financial relief to some politically important constituency.

Student loans are also not the only form of financial assistance backed by the federal government. In 2021, a total of $5 trillion in federal direct and guaranteed loans were outstanding. See OMB, *Analysis*

Perspectives: Fiscal Year 2023, at 270 tbl. 19-1. Only about a quarter of those loans ($1.3 trillion) were student loans. *Id.* If the President can bail out one category of loans to make good on a campaign promise, there is no reason why a future President could not similarly bail out farmers, small businesses, veterans, homeowners, or the beneficiaries of some other federal loan program. All he would have to do is find a sufficiently broad or vague statutory grant to justify the bailout. See, *e.g.*, 12 U.S.C. § 1150 (authorizing the Secretary of Agriculture to "compromise, adjust, or cancel indebtedness arising from loans and payments made or credit extended to farmers").

And this does not even take into account how the President might find new spending authority even in the absence of a declared emergency. As the above analysis demonstrates, modern Presidents have increasingly invoked expansive interpretations of appropriations statutes where the only emergency is political.

This case thus demonstrates why it is essential that spending statutes be strictly construed. Under the program, the Administration is granting hundreds of billions of dollars in debt relief to tens of millions of individuals who were never intended to be beneficiaries, under circumstances never intended to support student loan relief—all in furtherance of a policy Congress declined to enact. If the Court affirms the Administration's creative statutory interpretation and expansive assertion of authority, it would herald virtually unlimited executive spending authority.

CONCLUSION

This Court should reverse the judgment of the district court in *Nebraska* and affirm the judgment of the district court in *Brown*.

Respectfully submitted,

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