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.

On Appeal from the United States District Court
for the Eastern District of Missouri, Eastern Division

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

October 24, 2022

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel states that *amicus curiae* New Civil Liberties Alliance is a nonprofit organization under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

/s/John J. Vecchione
John J. Vecchione

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STATEMENT OF INTEREST

The New Civil Liberties Alliance (NCLA) is a nonprofit, non-partisan civil rights organization devoted to defending constitutional freedoms from violations by the administrative state. 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, the right to be tried in front of an impartial and independent judge, 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 administrative 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 representing the Cato Institute in the United States District Court for the District of Kansas in a similar challenge against the same Defendants' invocation of the Higher Education Relief Opportunities for Students Act of 2003 ("HEROES Act"), Pub. L. No. 108-76, 117 Stat. 904, to cancel hundreds of billions of dollars of federally

held student debt. *See Cato Institute v. Dep't of Educ.* Case No. 5:22-cv-4055 (D. Kansas). The Defendants argue that the HEROES Act should be read broadly to grant them license to make virtually any modification or waiver of prior acts of Congress they deem necessary to address the COVID-19 pandemic, including wiping out debt owned to the Treasury. But if construed so broadly, the Act would divest to an executive agency Congress's power to make laws and appropriate funds, in violation of Article I, §§ 1 and 9 of the Constitution. Adherence to the separation-of-powers principles embedded in the Constitution is, in NCLA's view, essential to maintaining our Republic's representative form of government.

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 by Congress. The Framers decided against *any* congressional delegation of power. Their 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.

Defendants' invocation of the HEROES Act to rewrite statutory provisions to cancel hundreds of billions of dollars owed to the Treasury violates both the Vesting and Appropriations Clauses. This scheme, referred to hereinafter as "Mass Debt Cancellation," is quintessentially legislative in character because it amends laws duly passed by Congress. It is also an appropriation because any amount of cancelled debt directly reduces funds that would otherwise flow into the Treasury. The HEROES Act would be unquestionably unconstitutional if it empowered an executive agency—here the Department of Education—to amend 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). Defendants' reliance on an unconstitutional interpretation of the HEROES Act to justify Mass Debt Cancellation guarantees that Plaintiffs will ultimately succeed on the merits of their lawsuit.

Plaintiffs will also suffer concrete and irreparable injuries absent an injunction. In addition to the injuries set forth the in Plaintiffs' Motion for Injunction Pending Appeal, Mass Debt Cancellation further injures Plaintiffs by taking away congressionally enacted incentives under the Public Service Loan Forgiveness ("PSLF") program for student-loan borrowers to find and maintain employment at state agencies. *See* 20 U.S.C. § 1087e(m)(3)(B)(i) (establishing PSLF incentives for workers in "public service" jobs). The loss of such incentives is both concrete for the purposes of Article III

standing and irreparable. The Court should therefore put the unlawful Mass Debt Cancellation scheme on pause while it considers the parties' arguments on the merits.

ARGUMENT

I. DEFENDANTS' INTERPRETATION OF THE HEROES ACT VIOLATES THE CONSTITUTION'S 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 Defendants, Mass Debt Cancellation is authorized by the HEROES Act, which Congress enacted in response to the September 11 terrorist attacks "to support the members of the United States military and provide [student loan] assistance with their transition into and out of active duty and active service." 20 U.S.C. § 1098aa(b). Under the HEROES Act, "[t]he Secretary of Education … may waive or modify any statutory … provision applicable to student financial assistance" that he "deems necessary." *Id.* § 1098bb(a)(1). Whether or not an intelligible principle guides the waiver or modification, *cf.* 20 U.S.C. § 1098bb(a)(2), such waiver or modification of legislation has an unavoidable and quintessential "legislative character," as "confirmed by the character of the Congressional action it supplants"—legislative amendment. *INS v. Chadha*, 462 U.S. 919, 952 (1983).

In *Clinton v. City of New York*, the 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 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[s] become[s] 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 441. 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 the Court in *Clinton* and the authority to "waive or modify any statutory … provision," ostensibly conferred by the HEROES Act. 20 U.S.C. § 1098bb(a)(1).

The *Clinton* Court distinguished *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), where the Court held a foreign-policy statute requiring the President to suspend certain statutory provisions under circumstances specified by Congress was constitutional. The *Clinton* Court emphasized that in *Field*, "Congress itself made the decision to suspend or repeal the particular provisions at issue upon the occurrence of particular events," and "when the President determined that the contingency had arisen, he had a *duty* to suspend" the statute. 524 U.S. at 443, 445 (emphasis added). In other words, the

delegation of the power to suspend a statute was constitutional because there was no room for "the President himself to effect the repeal of laws[] for his own policy reasons." *Id.* at 445. The constitutionality of this delegation was further supported by the fact that "in the foreign affairs arena, the President has a degree of discretion and freedom … which would not be admissible were domestic affairs alone involved." *Id.* (cleaned up).

Here, in contrast, not only is higher education financing a domestic matter, but unlike the *Field* suspensions, the Secretary of Education does not have a duty to issue waivers or modifications under conditions specified by Congress. Rather, he "*may* waive or modify any statutory … provision." 20 U.S.C. § 1098bb(a)(1) (emphasis added). While the Secretary may exercise this power only in service of certain statutory objectives, *see id.* § 1098bb(a)(2), the Act grants him unfettered discretion in choosing whether and when to do so. The Secretary also has the unfettered discretion to act "as [he] deems necessary," *id.* § 1098bb(a)(1), meaning he controls which statutory provisions are waived and what "terms and conditions" he replaces them with, *id.* § 1098bb(b)(2). He controls the contents of the statutory amendment with respect to "affected individuals" and may rewrite the law as he sees fit as applied to those individuals. In *Jarkesy v. SEC*, 34 F.4th 446, 461 (5th Cir. 2022), the Fifth Circuit held that Congress's grant of "unfettered discretion" in deciding whether to "bring a securities fraud suit for monetary penalties within the agency [or] in an Article III court" failed the intelligible-principle test and therefore violated the Vesting Clause. The

HEROES Act, as construed and applied by Defendants, confers far greater discretion. Assuming *arguendo* that "affected individuals" exist who satisfy the Act's predicates for receiving relief, the Secretary has unfettered discretion to provide them no relief at all or, according to Defendants, completely cancel their debt. Because the HEROES Act contains no intelligible principle to guide this awesome power, it is unconstitutional. *Id.*

The Secretary's unfettered discretion impermissibly allows "his own policy reasons"—rather than those of Congress—to determine the existence or timing of a waiver or modification. *Clinton*, 524 U.S. at 445. The effects of this discretion are evident here because the Secretary's choice of whether to enact debt cancellation was motivated by non-statutory policy considerations, including the rising cost of education "[s]ince 1980" and the aim of "[a]dvanc[ing] racial equity." Statements & Releases, White House, *FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most* (Aug. 24, 2022) ("This plan offers targeted debt relief as part of a comprehensive effort to address the burden of growing college costs and make the student loan system more manageable for working families."). Such policy reasons also may have informed the Secretary's choice of when to enact debt cancellation: just weeks before a midterm congressional election that will take place after the President declared "the pandemic is over." Rebecca Falconer, *Biden: "The pandemic is over,"* Axios (Sep. 18, 2022).[1]

[1] Available at: https://www.axios.com/2022/09/19/biden-covid-pandemic-over (last visited Oct. 21, 2022).

It is therefore clear that the President and his Secretary's "own policy reasons" for enacting debt cancellation impermissibly directed the Secretary's choice to invoke waiver and modification under § 1098bb. *Clinton*, 423 U.S. at 445. Even if that were not so, the capacious discretion allowed by the HEROES Act (as interpreted by Defendants) would certainly allow the Secretary's own policy considerations to control the timing and manner of a waiver or modification. Either way, the Act contradicts the precedential requirement that "Congress itself ma[k]e the decision" of whether, when, and how to suspend the laws, especially those with direct effects on the Treasury. *Id.*

The HEROES Act's supposed grant of authority upon the Secretary to suspend the 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 of the Constitution, which vests control over such decisions in Congress.

II. DEFENDANTS' INTERPRETATION OF THE HEROES ACT VIOLATES THE CONSTITUTION'S APPROPRIATIONS CLAUSE

In addition to legislative powers, Defendants' interpretation of the HEROES Act to authorize the outright cancellation of debt owed to the Treasury would also impermissibly vest Congress's appropriation powers in the Executive. Any 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 Nos. 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) (citation omitted).

In *Community Financial Services Association of America* v. *CFPB*, --- F.4th ---, 2022 WL 11054082, at *14 (5th Cir. Oct. 19, 2022), the Fifth Circuit held that Congress may not divest its power of the purse to an executive agency. Congress enacted a statute that allows the Consumer Financial Protection Bureau to "requisition[] from the Federal Reserve an amount 'determined by [CFPB's] Director to be reasonably necessary to carry out' the Bureau's functions" and "[t]he Federal Reserve must grant that request so long as it does not exceed 12% of the Federal Reserve's 'total operating expenses.'" *Id.* (quoting 12 U.S.C. § 5491(a)). This self-funding mechanism is an exercise of Congress's power of the purse because "[t]he funds siphoned by the Bureau, in effect, reduce amounts that would otherwise flow to the general fund of the Treasury." *Id.* The Fifth Circuit held the self-funding statute violated the Appropriations Clause because Congress was prevented from exercising any control over how much funds

CFBP siphons from the Treasury. *Id.* at *15 ("So the Bureau's funding is double-insulated on the front end from Congress's appropriations power. And Congress relinquished its jurisdiction to review agency funding on the back end.").

Defendants' interpretation of the HEROES Act as authorizing the cancellation of debt likewise would allow an executive agency to wield the power of the purse without Congressional control. To start, any cancellation of debt owed to the Treasury is indisputably an exercise of appropriations power because, like the CFBP's requisitions, it "reduce amounts that would otherwise flow to the general fund of the Treasury." *Id.* at *14. Congress also has neither direct nor indirect control over this appropriations power because debt may be cancelled as "the Secretary deems necessary." 20 U.S.C. § 1098bb(a)(1). The need for a "national emergency" is no limitation because, according to Defendants, a qualifying national emergency exists whenever the President declares one. *See Federal Student Aid Programs*, 87 Fed. Reg. 61,512, 61,513 (Oct. 12, 2022) (justifying cancellation because "the President declared a national emergency concerning the COVID-19 pandemic"). Defendants' interpretation of the HEROES Act to authorize the Secretary to cancel debt owed to the Treasury therefore would violate "[t]he Appropriations Clause's 'straightforward and explicit command' ensur[ing] Congress's *exclusive* power over the federal purse." *CFPB*, 2022 WL 11054082, at *13 (quoting *Richmond*, 496 U.S. at 428).

III. MASS DEBT CANCELLATION INFLICTS ADDITIONAL CONCRETE AND IRREPARABLE INJURY

Plaintiffs' brief identifies several concrete injuries sufficient for Article III standing that Mass Debt Cancellation inflicts and explains why such injuries are irreparable. Appellants' Br. at 8-15, 25. Even if the Court disagrees with Plaintiffs, an injunction pending appeal is still appropriate because the Cancellation scheme inflicts additional concrete and irreparable injuries on Plaintiffs by taking away PSLF incentives that Congress enacted to help state governments recruit and retain college-educated workers. The Court is permitted to consider these PSLF injuries as an alternative basis for subject-matter jurisdiction. *See A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp.*, 62 F.3d 1454, 1458, 1460, 1463 (D.C. Cir. 1995) (rejecting plaintiff's subject-matter jurisdiction arguments based on diversity and 28 U.S.C. § 1331 but holding that the district court nonetheless had jurisdiction for reasons plaintiff never raised).

Congress established the PSLF program 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 they make 120 monthly payments (10 years) while working at qualifying public-service 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 the estimated 40 million student-loan borrowers than working for the same pay (or even higher pay) at a nonqualifying employer.

Put another way, 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 effectively subsidizes a portion of a qualifying employer's compensation costs for each employee with outstanding student-loan debt. As state governments, Plaintiffs are qualifying employers for purposes of PSLF and thus are among the employers that Congress benefited through PSLF incentives. *See* 20 U.S.C. § 1087e(m)(3)(B)(i). Yet, Mass Debt Cancellation undermines that benefit and would eliminate it entirely in many cases. With the wave of an administrative wand, Defendants would vaporize most or all of the outstanding student debt owed by the vast majority of current and prospective PSLF participants, thereby removing PSLF's financial incentives designed to induce borrowers to seek and stay in jobs with state governments. In equal measure, the scheme would raise Plaintiffs' effective compensation costs because, all other things being equal, Plaintiffs would need to raise the compensation they offer and pay to employee-borrowers in an amount sufficient to replace the effective subsidy Congress provided through PSLF.

Mass Debt Cancellation, if allowed to go forward, would thereby inflict direct and immediate competitive and financial harm on Plaintiffs, which satisfies the injury-in-fact requirement for Article III standing. Indeed, the Supreme 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 (1998) (quoting 3 K. Davis & R. Pierce, Administrative Law Treatise 13–14 (3d ed. 1994) (alterations in original)).

The competitive and financial injury is directly traceable to Defendants' actions because "but for [their] unlawful conduct, [Plaintiffs'] alleged injury would not have occurred." *Comcast Corp. v. Nat'l Assoc. of African American-Owned Media*, 140 S. Ct. 1009, 1014 (2020). And a favorable decision by this Court halting Mass Debt Cancellation would redress the injury. Plaintiffs therefore satisfy the injury-in-fact, traceability, and redressability elements of Article III standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

The competitive and financial injury that Plaintiffs would suffer because of the loss of PSLF incentives is irreparable because there is no way for Plaintiffs to recover money damages against Defendants who are immune from suit. *Chamber of Com. of U.S. v. Edmondson*, 594 F.3d 742, 770–71 (10th Cir. 2010) ("Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury."). Moreover, once Defendants cancel hundreds of billions of dollars in student debt, the toothpaste cannot be put back in the tube, and therefore belated injunctive relief from this or another court cannot replace the lost PSLF incentives. The

competitive injuries would start becoming permanent as soon as cancellations begin to occur and can only be fully prevented by an injunction pending appeal now.

CONCLUSION

For these reasons, the Court should grant Plaintiffs' Motion for Injunction Pending Appeal.

Respectfully submitted,

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October 24, 2022

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2022, an electronic copy of the foregoing brief *amicus curiae* was filed with the Clerk of Court for the United States Court of Appeals for the Eight Circuit using the CM/ECF filing system and that service upon counsel for the parties will be accomplished using the CM/ECF system.

/s/John J. Vecchione
John J. Vecchione

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,224 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in 14-point Garamond, a proportionally spaced typeface.

/s/John J. Vecchione
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