Nos. 22-506 & 22-535

In the Supreme Court of the United States

JOSEPH R. BIDEN, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS,

v.

NEBRASKA, ET AL., RESPONDENTS

DEPARTMENT OF EDUCATION, ET AL., PETITIONERS,

v.

MYRA BROWN, ET AL., RESPONDENTS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND EIGHTH CIRCUITS

BRIEF OF THE EMPIRE CENTER AND THE GOVERNMENT JUSTICE CENTER, INC., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether Respondents have Article III standing.

2. Whether the Secretary of Education's student-loan-relief plan exceeds the Secretary's statutory authority, is arbitrary and capricious, or was adopted in a procedurally improper manner.

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INTEREST OF *AMICI CURIAE*[1]

Amicus the Empire Center for Public Policy, Inc., is an independent, non-partisan, not-for-profit thinktank based in Albany, New York. The Empire Center's mission is to make New York a better place in which to live and work by promoting public-policy reforms grounded in free-market principles, personal responsibility, and the ideals of effective and accountable government. *See* Empire Center, *Who We Are*.[2] The Empire Center works to support a growing economy and vibrant private sector throughout New York to create new opportunities for an informed and engaged citizenry in the State that is grounded in strong local communities and civic institutions. *Id.*

Amicus the Government Justice Center, Inc., is an independent, nonprofit legal center that provides pro-bono representation and legal services to protect New Yorkers against improper action by state or local governments. *See* Government Justice Center, *About Us*.[3] The Government Justice Center believes that

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[1] Under Rule 37.6, *Amici* affirms that no counsel for a party authored this brief in whole or in part, and that no party, counsel for a party, or any person other than *Amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this amicus brief.

[2] Available at https://www.empirecenter.org/who-we-are/ (all websites last visited Feb. 1, 2023).

[3] Available at https://www.govjustice.org/about-us/.

government in New York functions best when it is held to the highest standards of transparency and accountability, and that the government should follow the same laws to which private citizens are held. *Id.* To that end, the Government Justice Center works to ensure that New Yorkers receive the transparency and due process to which they are entitled. *Id.*

The Executive Branch's encroachment on the rights of the people and the States through unlawful, unilateral executive action such as the Student Debt Relief Plan, 87 Fed. Reg. 61,512 (Oct. 12, 2022) (to be codified at 34 C.F.R. pts. 674, 682, 685), threatens *Amici*'s core interests. The Plan undermines *Amici*'s significant interests in free-market principles, personal responsibility, and the ideals of effective and accountable government. The Plan is the latest example in an increasing pattern of Executive Branch lawlessness, where Presidents and bureaucrats have unilaterally doled out allegedly "free" benefits to millions of citizens across the country, with no legal basis, premised on the hope that this Court will hold that no party has Article III standing to challenge those actions in federal court. *Amici* submit this brief to encourage this Court to hold the Executive Branch accountable for such lawlessness, since lawlessness and unaccountability at the federal level imposes harm and lawlessness on New Yorkers.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Article III standing arguments that the United States and some of its *amici* raise in this case pose a grave threat to the separation of powers. If this were a typical case involving a challenge to a garden-variety regulation, the Article III standing issue would be easy to resolve because multiple parties here have standing to challenge the Plan, under this Court's caselaw. Missouri's standing is particularly obvious because the Plan inflicts a classic pocketbook injury on Missouri through its arm, the Missouri Higher Education Loan Authority ("MOHELA").

But while Missouri's standing is straightforward, the Article III standing arguments in this case implicate a much larger and deeply troubling trend in the law that this Court should address. The Executive Branch—seemingly frustrated with its failure to garner sufficient congressional support to pursue its major policy proposals through legislation—has increasingly resorted to unlawful, unilateral action to make "major policy decisions" of "economic and political significance" for the entire Nation. *West Virginia v. EPA*, 142 S. Ct. 2587, 2608–09 (2022) (citations omitted). This has become an especially recurring problem for executive orders and agency rules that seek to hand out benefits and funds that Congress neither authorized nor appropriated, as the Executive Branch has calculated that this Court may narrow its view of Article III, such that the

Executive Branch need not worry if these policies are actually lawful. Given this recurring problem, it is critically important that this Court reject any suggestion that it will narrow its Article III standing doctrine in a way that would encourage the Executive Branch's ongoing assault on the rule of law.

This Court has carefully designed its Article III standing jurisprudence to further "the separation-of-powers principles underlying" Article III's "Cases" and "Controversies" requirement. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014). That doctrinal approach has been both understandable and appropriate, given the lack of clear guidance in the text, structure, and original public meaning of Article III. In light of this lack of historical guidance, this Court has properly focused upon crafting an Article III jurisprudence to advance and protect the separation of powers.

One separation-of-powers consideration that this Court should have firmly in mind as it entertains requests to narrow its Article III standing doctrine is the incentives that any such narrowing would create for Executive Branch lawlessness. As Judge Janice Rogers Brown presciently warned in a powerful concurring opinion, a "myopic and constrained notion of standing" only serves to "give[ ] public officials all the wrong incentives" by "insulat[ing]" such aggressive Executive Branch lawlessness from judicial review, ultimately "undermin[ing] democratic accountability." *Arpaio v. Obama*, 797 F.3d 11, 26,

30–31 (D.C. Cir 2015) (Brown, J., concurring). Recent examples of such illegality that "undermine[ ] democratic accountability," *id.*, include the Obama Administration's Deferred Action for Parents of Americans and Lawful Permanent Residents Program ("DAPA"), the Trump Administration's COVID-related unemployment benefits program, and the Biden Administration's Student Loan Debt Relief Plan at issue here. In each of these examples, and more, the Executive unilaterally issued sweeping orders with no lawful basis, on the hope that a limited view of Article III standing would prevent any plaintiff from challenging them in court.

Some *amici* in this case advocate for an understanding of Article III that would undermine the separation-of-powers principles that are the hallmark of this Court's Article III jurisprudence. These *amici* offer no basis grounded in the text, structure, or original public meaning of Article III for their request that this Court adopt such a narrow view of Article III standing. Rather, they merely gesture vaguely to concerns about judicial overreach, while giving no consideration whatsoever to the separation-of-powers calamity that adopting their unduly narrow view of Article III standing would unleash. If this Court heeds these *amici*'s suggestions and retreats from its obligation to review such Executive Branch lawlessness in actions brought by parties like the plaintiffs here, the result would be a constitutional calamity that subverts our Constitution's separation of powers.

ARGUMENT

I. Missouri Plainly Has Standing To Challenge The Student Debt Relief Plan Under This Court's Article III Caselaw

Under Article III, the federal "judicial power" extends to "Cases" and "Controversies," U.S. Const. art. III, § 2, which this Court interprets to require plaintiffs to demonstrate their "standing" to sue in federal court, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). This Court has held that the "irreducible constitutional minimum of standing," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992), comprises three elements: "(i) that [the plaintiff] suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion*, 141 S. Ct. at 2203. A "pocketbook injury is a prototypical form of injury in fact." *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021).

While Respondents have presented multiple meritorious standing theories in this case, Br. for the *Nebraska* Respondents ("*Nebraska* Resp'ts.Br.") 15–29; Br. for the *Brown* Respondents ("*Brown* Resp'ts.Br.") 22–34, the most obvious basis for this Court to find standing is Missouri's lead argument that the Plan inflicts a "prototypical" pocketbook injury on Missouri through its arm MOHELA. *Collins*, 141 S. Ct. at 1779. Further, since that

pocketbook injury is both directly traceable to the Plan and redressable here, nothing more is needed to demonstrate standing. *TransUnion*, 141 S. Ct. at 2203.

The Student Debt Relief Plan imposes a classic pocketbook injury on Missouri, through its arm MOHELA. *Id.*; *Collins*, 141 S. Ct. at 1779. MOHELA services "Direct Loans" issued by the federal government, with MOHELA's revenue from its loan-servicing operations depending upon the number of student-loan accounts that it services. JA164; JA27–30. So, the more accounts that MOHELA services, the more revenue MOHELA earns for the State. *See* JA164; JA27–30. The Plan threatens to close at least half of the federal "Direct Loans" accounts in MOHELA's portfolio by offering loan cancellation that is higher than the outstanding balance of those loans. *Nebraska* Resp'ts.Br.15–16; JA65–67, 94–101, 108–15, 118–19, 164. That would reduce MOHELA's loan-servicing revenue by millions of dollars, *Nebraska* Resp'ts.Br.16; JA4, 23, which is a textbook "pocketbook injury," *Collins*, 141 S. Ct. at 1779; *see also Nebraska* Resp'ts.Br.15–23. And MOHELA is an arm of Missouri, which means that injury is to Missouri itself. "Government-created and -controlled corporations are part of the [g]overnment itself" when the government "creates [the] corporation by special law," "for the furtherance of governmental objectives," and "retains for itself permanent authority to appoint a majority of the directors." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397, 399 (1995).

Missouri law created MOHELA, *id.* at 397, as "a public instrumentality" that performs "essential public function[s]," Mo. Rev. Stat. § 173.360, within the Missouri Department of Higher Education and Workforce Development, *id.* § 173.445; *see* Pet'rs.Br.17 (describing MOHELA as "a state-created entity in Missouri"). State law defines MOHELA's powers, Mo. Rev. Stat. § 173.385, and state officials appoint its board members with the legislature's advice and consent, *id.* § 173.360; *see also* § 173.007; *Lebron*, 513 U.S. at 397.

Missouri's standing is sufficient for this Court to address the merits of Respondents' challenge to the Plan, since "a legal dispute [ ] qualif[ies] as a genuine case or controversy" if "at least one plaintiff" has standing. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2565 (2019). Further, this Court has the authority to order that the district court "set aside" the Plan in its entirety as "not in accordance with law" at the behest of any plaintiff with standing. 5 U.S.C. § 706(2); *see DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1901, 1916 n.7 (2020); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 n.2 (1990).

II. This Court Should Not Narrow Its Article III Standing Doctrine In A Manner That Undermines The Separation Of Powers

Certain *amici* have urged this Court to take a narrow view of Article III and then hold that no plaintiff here has standing to challenge the Plan. *See*

Br. For Samuel L. Bray And William Baude As *Amici Curiae* In Support Of Pet'rs 3–24 ("Bray & Baude Br."). This Court should reject that suggestion, which would lead to an unnecessary separation-of-powers calamity, with no basis in Article III's text, structure, or original public meaning.

A. This Court Has Developed Its Standing Doctrine To Protect The Separation Of Powers Principles Underlying Article III's Core Structure And Design

Article III empowers the federal courts to decide those "Cases" and Controversies" "that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'" *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 774 (2000) (quoting *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (op. of Frankfurter, J.)); *accord Willing v. Chi. Auditorium Ass'n*, 277 U.S. 274, 290 (1928) (Brandeis, J.) ("English . . . courts"). "[I]n crafting Article III, 'the framers . . . gave merely the *outlines* of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union." *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 274–75 (2008) (alteration in original) (emphasis added) (quoting *Coleman*, 307 U.S. at 460 (op. of Frankfurter, J.)). Using those "outlines" as guides, *Coleman*, 307 U.S. at 460 (op. of Frankfurter, J.), this Court developed its Article III standing doctrine

"[o]ver the years," *Lujan*, 504 U.S. at 560. As discussed immediately below, given that (1) the Founding Era historical record did not contain a specific standing doctrine, (2) this Court sensibly looked to the separation-of-powers principles undergirding Article III's text and design.

1. As this Court set out to "deduce[ ]" the "requirements" of Article III, it drew only general guidance from the original public meaning of "Cases" and "Controversies" in Article III, *Lexmark*, 572 U.S. at 125, because historical practice provides little specific doctrine. A review of the "long tradition . . . in England," "the American Colonies," *Vt. Agency of Nat. Res.*, 529 U.S. at 774, and the Founding Era shows a nuanced practice of courts adjudicating claims from plaintiffs who would have lacked standing under this Court's current standing doctrine. Having said that, as other scholars have noted, this historical record is mixed and nuanced. *See generally* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 691 (2004).

Beginning with English practice before the Founding Era, the historical record suggests that English courts, at least in some cases, permitted individuals to seek writs like prohibition or quo warranto to secure the public interest, even in the absence of a concrete and distinct injury. The writ of prohibition prevented lower courts from acting on matters for which they had no jurisdiction, and was,

per Lord Coke, available to "stranger[s]." Edward Coke, Second Part of the Institutes of the Laws of England 602 (1797). English legal dictionaries, in turn, defined a "stranger" as someone "not privy, or party to an Act," *see Stranger*, Nomo-Lexikon: A Law-Dictionary (1670), meaning that even an uninjured plaintiff could seek a writ of prohibition. Having said that, some scholars have argued that the record on this was mixed and unclear. *See* Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 Brook. L. Rev. 1001, 1009–20 (1997). Further, at least some authority suggests that writs of quo warranto—used to challenge an individual's authority to hold public office, 3 William Blackstone, Commentaries *263–64—were available at least in some instances to uninjured plaintiffs. Thus, for example, *Rex v. Brown* (1790) East. 29 Geo. 3, B.R (1790), considered an action for quo warranto challenging whether certain councilmen were eligible to hold office given their failure to comply with a law requiring them to receive the Sacrament within twelve months of the election, although the party bringing the action had no particular interest. *Id.* The court explained that, while "it d[id] not appear [t]here that the party making the application has any connection with the corporation," it could nevertheless hear the case because "the ground on which this application is made [was] to enforce a general Act of Parliament, which interests all the corporations in the kingdom; and therefore it is no objection that the party applying is not a member of the corporation." *Id.*

English law before the Founding also permitted private citizens, acting as "common informers," to bring suit in court against public officials via qui tam actions. Qui tam proceedings date back to the "formative stages of English law," at least "[s]ince the thirteenth century," and were originally "not dependent upon statutory authority." Note, *The History and Development of Qui Tam*, 1972 Wash. U. L. Q. 81, 83–85 (1972). Then, "[b]eginning in the fourteenth century, the English Parliament enacted hundreds of qui tam statutes," which statutorily "authoriz[ed] litigation by any person who would sue." Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 Notre Dame L. Rev. 1235, 1254–55 (2018). Parliament relied on qui tam actions "as a means to ensure that its legal directives prevailed in a climate of policy disagreement" and that "a remedy for government lawlessness" existed. *Id.* at 1266–67.[4]

At least some American courts similarly did not typically view the modern notion of injury-in-fact as a prerequisite to judicial intervention. As this Court

[4] This Court has explained that, although qui tam statutes give relators an interest in the outcome of cases, the interest cannot satisfy Article III's injury-in-fact requirement because it is unrelated to the government's injury-in-fact. *Vt. Agency of Nat. Res.*, 529 U.S. at 772–73. Nevertheless, the Court explained that qui tam relators meet Article III's standing requirement under a theory of claim assignment—that they can assert the injury-in-fact suffered by the government. *Id.* at 773–74.

summarized in 1875, there exists "a decided preponderance of American authority in favor of the doctrine, that private persons may move for a *mandamus* to enforce a public duty, not due to the government as such, without the intervention of the government law-officer." *Union Pac. R. Co. v. Hall*, 91 U.S. 343, 355 (1875). Thus, in *State v. Justices of Middlesex County*, 1 N.J.L. 244 (N.J. 1794), the New Jersey Supreme Court allowed citizens without any distinct injury to seek a writ of certiorari challenging the legality of the administration of a local election, explaining that "whatever crime is manifestly against the public good, it comes within the connusance of this court, though it do not directly injure any particular person." *Id.* at 250 (quoting 2 W. Hawkins, A Treatise on the Pleas of the Crown 2 (T. Leach 6th ed. 1788)). The New York state courts, for their part, often emphasized a citizen's right to bring a legal action when a public wrong was committed. *See, e.g.*, *People ex rel. Case v. Collins*, 19 Wend. 56, 56, 65 (N.Y. Sup. Ct. 1837). Further, like in England, certain Colonies and the Founding Era States relied on qui tam actions to reign-in unlawful government conduct, regardless of whether the qui tam plaintiff suffered an actual injury as a result of that conduct. Beck, *supra*, at 1269–305.

This Court too, in its early history, at times heard actions brought by plaintiffs who lacked a distinct and particularized injury. For example, in *Union Pacific*, 91 U.S. 343, the Court considered "whether a writ of *mandamus* to compel the performance of a public duty

may be issued at the instance of a private relator." *Id.* at 354. The plaintiffs there were two Iowa merchants who sought to compel Union Pacific to maintain a bridge that the men used in their businesses. Relying on a general mandamus statute, they asked a federal court to order the company "to operate its road as required by law." *Id.* at 343–44. Despite recognizing that these plaintiffs had alleged no "special injury" to themselves and had "no interest other than such as belonged to others," *id.* at 354, this Court nevertheless affirmed the issuance of the writ of mandamus, *id.* at 355–56. And in *Crampton v. Zabriskie*, 101 U.S. 601 (1879), this Court heard a citizen suit brought by municipal taxpayers, stating that "it would seem eminently proper for courts of equity to interfere upon the application of the taxpayers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property-holders." *Id.* at 609; *see also Hawke v. Smith*, 253 U.S. 221, 224–25 (1920) (hearing a citizen taxpayer suit on the merits); *Cochran v. La. State Bd. of Educ.*, 281 U.S. 370, 373–75 (1930) (same); *Everson v. Bd. of Educ.*, 330 U.S. 1, 3–4 (1947) (same).

2. Given this historical record, this Court has sensibly built its Article III caselaw "[o]ver the years," *Lujan*, 504 U.S. at 560, with the goal of furthering "the separation-of-powers principles underlying" Article III's core design, *Lexmark*, 572 U.S. at 125, thereby insuring that the judiciary does not "pass[ ] the limits assigned to it" under the Constitution,

James Madison, *The Federalist*, No.48, or disrupt "the balance of the Constitution," Alexander Hamilton, *The Federalist*, No.71. This Court thus recognized that "implicit policies embodied in Article III, and not history alone," would inform this Court's standing doctrine. *Flast v. Cohen*, 392 U.S. 83, 95–96 (1968). For example, *Allen v. Wright*, 468 U.S. 737 (1984), explained that "the law of Art. III standing" and the "doctrines that have grown up to elaborate" Article III's case-or-controversy requirement are both "built on a single basic idea": "the idea of separation of powers," *id.* at 750–52 (citations omitted). *Lujan* grounded the requirement of Article III standing in "the Constitution's central mechanism of [the] separation of powers," 504 U.S. at 559, relying on *The Federalist* and the "common understanding" of "[t]he Judicial Power" at the Founding for only thematic support, *id.* at 559–61 (alteration in original); *accord Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) ("Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy.").

This Court's more recent Article III standing decisions follow the same general approach, relying on Founding Era sources as only general support for an Article-III-standing requirement, while citing this Court's caselaw for the particular, constitutive elements of its standing doctrine. *See TransUnion*, 141 S. Ct. at 2203–04; *Spokeo*, 578 U.S. at 337–42 ("The [standing] doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood.").

The course of the development of this Court's Article III standing jurisprudence—primarily implementing the Constitution's separation-of-powers principles—is both understandable and appropriate. The text and structure of Article III do not themselves impose "a rigorous and explicit theory" of standing. *Allen*, 468 U.S. at 750 (quoting *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178–79 (D.C. Cir. 1982) (Bork, J., concurring)). Further, as noted above, the Framers provided only "outlines" of the meaning of a "Case[ ]" or "Controvers[y]" in Article III itself, *Coleman*, 307 U.S. at 460 (op. of Frankfurter, J.), and the "historical antecedents of the case-and-controversy doctrine" are "uncertain," *Flast*, 392 U.S. at 95–96; *accord* 2 *Records of the Federal Convention of 1787*, at 430 (M. Farrand ed., 1911) (explaining Madison's view that Article III limited the courts to "cases of a Judiciary Nature").[5]

Relatedly, the terms "Case" and "Controversy" are "not [themselves] susceptible of precise definition," *Allen*, 468 U.S. at 750–51—nor is it "linguistically inevitable" that any standing requirements flow from these terms, Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 882 (1983). So, where this Court found specific guidance from Article III's text or history lacking, this

[5] Available at https://oll.libertyfund.org/title/farrand-the-records-of-the-federal-convention-of-1787-vol-2.

Court appropriately constructed "a *constitutionally based* doctrine" of standing that would "*implement* the Framers' concept of . . . [the] 'role of the courts in a democratic society.'" John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1220 (1993) (emphases added) (quoting *Allen*, 468 U.S. at 750); *accord* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182–84 (1989); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 Fordham L. Rev. 453, 469–72 (2013). And where the Court could discern a "long tradition . . . in England and the American Colonies" that demonstrated that a given dispute was a recognized "Case[ ]" or "Controvers[y]," the Court relied on that historical evidence to "confirm[ ]" its understanding of Article III standing. *Vt. Agency of Nat. Res.*, 529 U.S. at 774; *see also Sprint Commc'ns*, 554 U.S. at 274–75 (finding "[a] clear historical answer" to Article III standing question).

B. In Expounding Its Article III Standing Caselaw, This Court Should Take Into Account The Incentive That Narrowing That Caselaw Would Create For Executive Branch Lawlessness

Given that this Court's Article III standing doctrine rests primarily on the separation-of-powers principle woven into the Constitution's text and structure, *supra* Part II.A, this Court has the responsibility to develop its Article III standing caselaw in a manner that protects the separation of

powers. That is, this Court should continue to develop its Article III standing jurisprudence in a way that "maintain[s] the balance of the Constitution," Hamilton, *The Federalist* No.71—including, when necessary, by ensuring that the Judicial Branch may "effectually restrain[ ]" the Executive "from passing the limits assigned to it" by the Constitution, Madison, *The Federalist* No.48.

One important consideration that this Court should take into account in developing its Article III caselaw in the present case is whether that caselaw will encourage the Executive Branch to issue unilateral executive orders deciding "major policy decisions" of "economic and political significance" for the entire Nation, *West Virginia*, 142 S. Ct. at 2608–09 (citations omitted), without any grounding in a law passed by Congress or in the Executive's own constitutional powers. As recent experience teaches, the Executive Branch frequently issues those sweeping orders to provide unlawful benefits to classes of individuals, while relying on a narrow view of Article III standing that would insulate the orders from federal court review. Three recent examples, one from each of the past three Administrations, demonstrate the type of misconduct this Court should be aware of as it develops its Article III caselaw.

DAPA. In 2014, the Obama Administration announced its Deferred Action for Parents of Americans and Lawful Permanent Residents Program ("DAPA"), which purported to grant via

unilateral executive order "lawful presence" status to undocumented immigrants who had children who were either American citizens or lawful residents. *See* Memorandum from Jeh Johnson, Sec'y, Dep't of Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship and Immigration Servs., *et al.*, at 3–4 (Nov. 20, 2014).[6] Then, by granting these individuals this "lawful presence" status, DAPA also purported to make these individuals eligible for significant public benefits, including work permits. *Id.*

The Obama Administration knew—or, at minimum, strongly suspected—that it lacked the lawful authority to make such "major policy decisions" of vast "economic and political significance" through an executive order. *See West Virginia*, 142 S. Ct. at 2608–09 (citations omitted). Prior to issuing DAPA, President Obama had explained to the public that he could not "just bypass Congress and change [immigration] law [himself]," since "that's not how a democracy works." President Barack Obama, Remarks by the President on Comprehensive Immigration Reform in El Paso, Texas (May 10, 2011).[7] "I am president, I am not king," President Obama explained, "I can't do these things just by

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[6] Available at https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

[7] Available at https://obamawhitehouse.archives.gov/the-press-office/2011/05/10/remarks-president-comprehensive-immigration-reform-el-paso-texas.

myself." Michael Muskal, *'I am not king': Obama Tells Latino Voters He Can't Conjure Immigration Reform Alone*, LA Times (Oct. 25, 2010).[8]

But the Obama Administration issued DAPA anyway in November 2014 and then—once DAPA was challenged by 22 States, 4 governors, and a state Attorney General, Pet. for Writ of Certiorari at II, *United States v. Texas*, No.15-674 (Nov. 20, 2015)—argued that the federal courts could not review the lawfulness of this significant program because the challengers lacked standing. So, in the Fifth Circuit, "[t]he government claim[ed] the [challengers] lack[ed] standing to challenge DAPA" since, among other arguments, any costs DAPA inflicted on the States would be "offset" in other respects. *Texas v. United States*, 809 F.3d 134, 150, 155 (5th Cir. 2015). After the Fifth Circuit rejected the Administration's standing arguments, *id.* at 162, the Administration continued to argue before this Court that the challengers "lack[ed] Article III standing" to challenge DAPA's lawfulness, Br. of the United States at 18–33, *United States v. Texas*, No.15-674 (Mar. 1, 2016). This Court never addressed this Article III standing argument—and, indeed, never reviewed whether the Administration had authority to unilaterally issue DAPA—since this Court affirmed

[8] Available at https://www.latimes.com/archives/la-xpm-2010-oct-25-la-pn-obama-immigration-reform-20101026-story.html.

the Fifth Circuit's judgment by an equally divided court in a per curiam order. *See United States v. Texas*, 579 U.S. 547 (2016) (per curiam).

COVID-Related Unemployment Benefits. In 2020, the Trump Administration unilaterally extended through executive order various pandemic-related benefits to affected individuals, including authorizing $400 a week in unemployment benefits, provided that $100 of those benefits come from state coffers. *See* Administration of Donald J. Trump, Memorandum on Authorizing the Other Needs Assistance Program for Major Disaster Declarations Related to Coronavirus Disease 2019 (Aug. 8, 2020).[9] The Trump Administration took that unilateral action after its negotiations with Congress to extend the pandemic-related unemployment benefits previously authorized by Congress via statute failed. *See* Nolan D. McCaskill, *Criticism and Constitutional Issues Greet Trump's Executive Orders*, Politico (Aug. 9, 2020).[10]

The Trump Administration knew—or at least strongly suspected—that it had no authority to impose this "major policy decision[ ]" of vast "economic and political significance" via executive fiat. *West Virginia*, 142 S. Ct. at 2608–09 (citations

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[9] Available at https://www.govinfo.gov/content/pkg/DCPD-202000593/pdf/DCPD-202000593.pdf.

[10] Available at https://www.politico.com/news/2020/08/09/trump-executive-orders-unemployment-evictions-392794.

omitted). The Constitution vests Congress, not the Executive, with the spending power, U.S. Const. art. I, § 8, cl.1. Yet, after President Trump's "first choice" to implement this expanded unemployment-benefits program failed—"go[ing] up" to Congress and attempting to "negotiate a fair deal," Nolan D. McCaskill, *supra* (quoting Treasury Secretary Steve Mnuchin)—he had "had it" and decided to just issue his own "bills," Maggie Haberman, Emily Cochran & Jim Tankersley, *Sidestepping Congress, Trump Signs Executive Measures for Pandemic Relief*, N.Y. Times (Aug. 8, 2020) (quoting President Trump).[11]

While this expanded unemployment-benefits program from the Trump administration drew no legal challenges of which *Amici* are aware, had such a lawsuit been filed, there is little question that a claimed lack of Article III standing would have been the lead—and, perhaps, the only—defense for this plainly unlawful, deeply significant action.

Student Debt Relief Plan. The Biden Administration's Student Debt Relief Plan is the most recent example of this species of lawlessness, relying upon a belief that this Court will adopt a narrow view of Article III standing. During his presidential campaign, then-candidate Biden had promised to "provide targeted debt relief" if elected President. *See*

[11] Available at https://www.nytimes.com/2020/08/08/us/politics/trump-stimulus-bill-coronavirus.html

JA117–18. But after winning the election, he was unable to persuade Congress to enshrine this promise into law. *See Nebraska* Resp'ts.Br.48. So President Biden issued an executive order directing the Department of Education to cancel massive amounts of student-loan debt. 87 Fed. Reg. at 61,512; Federal Student Aid, *The Biden-Harris Administration's Student Debt Relief Plan Explained*.[12] This Plan is estimated to cancel about $430 billion of the $1.6 trillion in student-loan debt held by approximately 43 million borrowers. Letter from Phillip L. Swagel, Dir., CBO, to Members of Cong. at 3 (Sept. 26, 2022).[13] That obviously makes the Plan a "major policy decision[ ]" of "economic and political significance," unilaterally imposed by the Executive on the Nation. *West Virginia*, 142 S. Ct. at 2608–09 (citations omitted).

The Biden Administration knew—or at least strongly suspected—that the Plan is unlawful. After all, the HEROES Act permits only what is "necessary to ensure" that borrowers "are not placed in a worse position financially in relation to [their] financial assistance" due to a national emergency. 20 U.S.C. § 1098bb(a)(2)(A). Yet here, the Plan puts a vast number of borrowers in a *better* financial position by discharging student-loan principal on a massive

[12] Available at https://studentaid.gov/debt-relief-announcement.

[13] Available at https://tinyurl.com/2p95x8kk.

scale. Further, the Department of Education's own general counsel had concluded that anything like the Plan would be illegal, given that it purported to authorize "mass cancellation . . . of student loan principal balances." Memorandum from Reed Rubinstein, Principal Deputy Gen. Couns., to Betsy DeVos, Sec'y of Educ., Re: Student Loan Principal Balance Cancellation, Compromise, Discharge, and Forgiveness Authority at 6 (Jan. 12, 2021).[14] And President Biden himself was "deeply skeptical of the idea" that he had the "authority" to unilaterally cancel debt via executive order upon entering the presidency. Michael Stratford & Eugene Daniels, *How Biden Finally Got to "Yes" on Canceling Student Debt*, Politico (Aug. 25, 2022).[15] That is why the Administration has relied so heavily upon Article III standing in litigating every case challenging the Plan. *See, e.g.*, *Cato Inst. v. U.S. Dep't of Educ.*, 5:22-cv-04055, Dkt.29 (D. Kan. Nov. 7, 2022); *Garrison v. U.S. Dep't of Educ.*, No. 1:22-cv-01895-RLY-TAB, 2022 WL 16509532, at *5 (S.D. Ind. Oct. 21, 2022); *Brown Cnty. Taxpayers Ass'n v. Biden*, No. 22-C-1171, 2022 WL 5242626, at *3 (E.D. Wis. Oct. 6, 2022).

Tellingly, the Administration has repeatedly amended the Plan, on an *ad hoc* basis, whenever any

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[14] Available at https://perma.cc/D94K-A7AV (permalink supplied by *Nevada* Respondents).

[15] Available at https://perma.cc/H7X4-5URZ (permalink supplied by *Nevada* Respondents).

serious challenger arose, in an attempt to eliminate the challenger's Article III standing. *Accord* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065, 1089 (2018) ("The political branches can announce a new federal policy at the eleventh hour, when it is difficult for most of the affected individuals to quickly file suit."). For example, in response to a lawsuit from borrowers who would have had to pay state income taxes on any cancelled debt, the Department of Education announced that it had amended the Plan to allow borrowers who were automatically eligible for relief to "opt out of debt relief for any reason—including . . . concern[ ] about a potential state tax liability." U.S. Dep't. of Educ., *One-Time Federal Student Loan Debt Relief*;[16] *see also* Rachel Mackey & Brayden Cohen, *White House Makes Changes to Student Debt Relief Plan in Anticipation of Legal Challenges* (Oct. 7, 2022).[17] And when private debt holders challenged the Plan, claiming they suffered an injury because the Plan allowed borrowers with privately held loans to consolidate them with federal loans and thus obtain loan forgiveness, the Administration again amended the Plan to try to foreclose that harm. *See* Mackey & Cohen, *supra*; *see*

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[16] Available at https://studentaid.gov/manage-loans/forgiveness-cancellation/debt-relief-info.

[17] Available at https://www.naco.org/blog/white-house-makes-changes-student-debt-relief-plan-anticipation-legal-challenges.

also Michael Stratford, *Biden Administration Scales Back Student Debt Relief for Millions amid Legal Concerns*, Politico (Sept. 29, 2022)[18]; Cory Turner, *In a Reversal, the Education Dept. Is Excluding Many from Student Loan Relief*, NPR (Sept. 30, 2022).[19]

3. This pattern of Executive Branch lawlessness should caution this Court against narrowing its Article III standing doctrine in a way that encourages such misconduct. As explained above, this Court has repeatedly recognized that it designed that doctrine to preserve the separation-of-powers principle, *Lexmark*, 572 U.S. at 125; *Flast*, 392 U.S. at 95–96; *Allen*, 468 U.S. at 750, and the Constitution more broadly, *Allen*, 468 U.S. at 750; *Buckley v. Valeo*, 424 U.S. 1, 124 (1976); *Lujan*, 504 U.S. at 559–60. Yet, the Executive Branch carrying out unilateral executive actions like President Obama's DAPA, President Trump's COVID-related unemployment benefits program, and President Biden's Plan here, threatens that vital principle, as such programs fly in the face of Congress' constitutional lawmaking and appropriations authority. U.S. Const. art. I, § 1; *id.* § 9, cl.7. Indeed, under the Constitution's original design, Congress under Article I "predominates" over

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[18] Available at https://www.politico.com/news/2022/09/29/biden-administration-scales-back-student-debt-relief-for-millions-amid-legal-concerns-00059522.

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

the Executive under Article II. *See* James Madison, *The Federalist*, No.51. Yet, this recent pattern of Executive Branch lawlessness disrupts that balance, impermissibly supplanting Article I with Article II. *Compare* Alexander Hamilton, *The Federalist*, No.71. If this Court were to narrow its Article III standing doctrine so that more such unlawful actions would evade judicial review, that would pose a grave threat to the Constitution's separation-of-powers principle, in a complete contradiction of this Court's carefully crafted Article III standing project.

As Judge Janice Rogers Brown presciently warned in a powerful concurrence less than a decade ago, the consequences of an "obsession with a myopic and constrained notion of standing" would only encourage such Executive Branch lawlessness. *Arpaio*, 797 F.3d at 26 (Brown, J., concurring). In a concurring opinion agreeing that the Sheriff of Maricopa County, Arizona, lacked standing to challenge the Obama Administration's DAPA and related Deferred Action for Childhood Arrivals ("DACA") programs, Judge Brown warned against "standing doctrines" that "immunize government officials from challenges to allegedly *ultra vires* conduct," especially when the injury inflicted by such Executive Branch lawlessness is not "[f]ocused . . . against particular persons," but rather "widespread" and diffuse. *Id.* at 29–30. Any such approach would "give[ ] public officials all the wrong incentives": if an Executive wishes to "insulate" its unlawful, unilateral action from federal-court review, it must "'[n]ever

steal anything small,'" since "the larger the injury, and the more widespread the effects, the harder it becomes to show standing." *Id.* at 30–31. In other words, a standing doctrine that is blind to the incentives that doctrine creates for the Executive Branch to act unlawfully encourages disrespect for the rule of law, "undermines democratic accountability," and destroys the core separation-of-powers principles that that this Court designed its Article III standing doctrine to safeguard and advance. *See id.*

C. The Approach That Certain *Amici* Urge Would Lead To A Separation-Of-Powers Calamity With No Justification In Article III's Text, Structure, Or Original Public Meaning

Despite the grave separation-of-powers consequences that would result from this Court narrowing its Article III standing caselaw in the realm of challenging Executive Branch actions that impact millions of people, certain *amici* in this case argue this Court should adopt an Article III doctrine that does not permit plaintiffs to challenge such actions in many instances. The amicus brief submitted by *amici* Professors Samuel Bray and William Baude presents such an approach, arguing that Article III prohibits all of the Respondents from challenging the Student Debt Relief Plan here and, more generally, that this Court should take a

skeptical view of robust notions of Article III standing. *See* Bray & Baude Br.3–24.

These *amici*'s Article III standing argument, with all respect, finds no support in the Constitution's text, structure, or original public meaning. Under the proposed approach, Article III only confers standing on the "proper party to a given lawsuit," Bray & Baude Br.4 (citations omitted), viewed narrowly and vaguely defined as the party who is "most affected by the challenged action," Bray & Baude Br.2—"relatively speaking," Bray & Baude Br.5. Again, this crabbed conception of standing finds no grounding in the text, structure, or original public meaning of "Cases" or "Controversies" in Article III. *See generally* Bray & Baude Br.4–17. So while these *amici* argue that the history of Article III requires "the proper party to bring suit," they cite no Founding Era basis for that proposal. Bray & Baude Br.4–9. Instead, they rely only on law review articles for this argument, Bray & Baude Br.4–5—but these articles admit that their view of history does not compel any specific theory of Article III doctrine. Indeed, their lead article forthrightly admits: "We do not claim that history compels acceptance of the modern Supreme Court's vision of standing, or that the constitutional nature of standing doctrine was crystal clear from the moment of the Founding on. The subsistence of qui tam actions alone might be enough to refute any such suggestion." Woolhandler & Nelson, *supra*, at 691. This article only modestly (and correctly) claims that "history does not *defeat* standing doctrine," *id.*, and

certainly provides no historical account that would require or even suggest anything like the standing doctrine that these *amici* urge this Court to adopt.

Given that the narrow "proper party" theory of standing has no grounding in Article III's original public meaning, it is best understood as resting on "the separation-of-powers principles undying" Article III, *Lexmark*, 572 U.S. at 125; but judged on those grounds, this argument has nothing to say for it. The argument both fails to advance the separation-of-powers principle of judicial restraint that it claims to be built to forward, and would cause a separation-of-powers calamity by encouraging the Executive Branch to violate the separation of powers.

In terms of advancing the principles of judicial restraint that appear to be these *amici*'s core concern, Bray & Baude Br.1–3, the proposed "proper parties" theory is also hopelessly vague and impossible to administer. Since the "proper party" is "relative[ ]," Bray & Baude Br.5, courts would often be unable to know in a given case whether some unknown, unnamed potential plaintiff exists who would be better suited to bring a claim than the plaintiff presently before it. Further, potential plaintiffs may have interests in a case that are of similar character, yet differing strengths—such as two potential plaintiffs with property interests threatened by the same conduct of a defendant, with one interest much larger than the other—yet the "proper party" inquiry suggests that only one of those potential plaintiffs

could invoke the power of the court. And potential plaintiffs in a given case may have interests that are incommensurate, especially in cases challenging federal action: a State may assert a sovereignty interest, an individual may assert a liberty interest, and a business may assert a pocketbook interest. Nothing in the "proper party" theory indicates how courts could possibly weigh those interests so as to identify the "proper party." These scholars' narrow view finds no support in Article III's original public meaning and would lead to an unnecessary separation-of-powers calamity.

Further, it is unclear how these *amici*'s narrow conception of Article III standing would advance judicial restraint principles in any way. *Amici* apparently believe that if Missouri only amended its laws to make MOHELA even closer to the State of Missouri than it already is, that would then allow the federal courts to address the issues presented in this case. *See* Bray & Baude Br.6–9. Put another way, in *amici*'s view, simple amendments to Missouri state law would allow this Court to address the very same arguments, argued in the very same way and by the very same attorneys as are currently before the Court. Given that, any suggestion that an even closer relationship between Missouri and MOHELA would somehow resolve whatever separation-of-powers concerns that *amici* see here is, frankly, silly.

Viewed in that light, *amici*'s narrow theory of Article III standing would only advance the

separation of powers if it were paired with *amici*'s equally wrongheaded view of the federal courts' equitable authority to vacate agency rules and executive orders nationwide.[20] Putting these two theories together, these *amici* would severely limit the universe of "proper parties" that can challenge an unlawful executive action that impacts millions of people, and then confine that artificially limited number of proper plaintiffs to obtaining relief as to only themselves against the unlawful executive program. Indeed, under *amici*'s view, even if one State did somehow have standing to challenge an unlawful executive program, relief would be limited *to that State only*, creating a patchwork of federal law across the States, rather than a uniform rule of law

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[20] Whatever the merits of the arguments against district courts issuing nationwide injunctions as a general matter, *see Knick v. Township of Scott*, 139 S. Ct. 2162, 2180 (2019) (Thomas, J., concurring), those arguments have no merit whatsoever to challenges to rules or orders issued by the Executive Branch, given the robust historical record of courts broadly blocking such rules and orders even before the APA, *see, e.g.*, *United States v. Balt. & Ohio R.R. Co.*, 293 U.S. 454 (1935); *Assigned Car Cases*, 274 U.S. 564 (1927); *Houston v. St. Louis Ind. Packing Co.*, 249 U.S. 479 (1919); *see* Mila Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121, 1142–54 (2020), and the APA's plain language requiring courts to "set aside" an agency action that is, *inter alia*, "not in accordance with law," 5 U.S.C. § 706(2)(A). This Court has already explored these nationwide-vacatur issues in the recently argued *United States v Texas*, No. 22-58 (argued Nov. 29, 2022), and that issue would be more properly resolved in that case.

for the whole Union. In all, *amici*'s approach to Article III here appears to be perfectly engineered to allow unilateral executive action that confers lawless benefits on millions of individuals to stand either in whole or in very overwhelming part, for as long as a President wishes them to stand.

On the other end of the separation-of-powers balance, adopting *amici*'s narrow approach to Article III standing would have disastrous consequences for the separation of powers for no discernible reason. As discussed above, *supra* Part II.B, artificially narrow views of Article III standing create "all the wrong incentives" and completely "undermine[ ] democratic accountability," by encouraging Executives to issue extreme, lawless executive orders creating "large[ ]" injuries and "widespread [ ] effects" so as to be "insulate[d]" from judicial review. *Arpaio*, 797 F.3d at 30–31 (Brown, J., concurring).

The constitutional tools that these *amici* gesture towards to counteract this concern, *see* Bray & Baude Br.5, do not provide any meaningful check on the perverse incentives that their approach to Article III standing would create. Congress' power under the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7, cannot restrain this species of Executive Branch lawlessness under this view of Article III standing given that, as this case demonstrates, this illegality is often carried out by the President spending money that Congress never authorized under the Appropriations Clause to begin with. Indeed, even if

Congress could get together the votes to revoke specifically a President's unlawful executive order and then override the inevitable Presidential veto—which is a burden far higher than the one the Constitution actually imposes upon Congress under the Appropriations Clause—the President could ignore that law and keep the program going, and no plaintiff would have standing to challenge that serial lawlessness in federal court under these *amici*'s standing theory. The Impeachment Power is similarly ill-suited, *id.* § 3, cl.6, including because it is unclear whether issuing an illegal order is a "high crime[ ] or misdemeanor[ ]," *see* Nikolas Bowie, *High Crimes Without Law*, 132 Harv. L. Rev. F. 59, 70 (2018), and because such impeachment for a single executive order or rule would appear to be wholly disproportionate. Finally, the prospect of presidential elections does not solve the issue. U.S. Const. art. II, § 1. The People elect members of Congress, *id.*, art. I, § 2–3, to exercise the power of the purse, *id.*, art. I, § 9, cl. 7, and the lawmaking power, *id.*, art. I, § 1, and it subverts that system to require voters both to elect Congressmen *and* to defeat the reelection of a President in order to oppose successfully plans like the Student Debt Relief Plan. In any event, a second-term President need not worry about reelection. *See supra* pp.19–22 (Obama Administration announcing DAPA in President Obama's second term).

At bottom, these *amici*'s fundamental error involves confusing the symptoms for the disease. These *amici* bemoan the rise of litigation brought by

State or other parties challenging unilateral executive actions as driven by new and "extreme" theories of Article III standing. Bray & Baude Br.11. But the actual catalyst for this trend is the ever-increasing Executive Branch lawlessness itself, which is based—at least in part—on a hope that this Court will adopt a narrow view of Article III like *amici* urge, and thus create a law-free zone for Executive Branch unilateralism. *See* Part II.B. So, while *amici* bemoan state-led lawsuits, Bray & Baude Br.9–11, lawsuits like this one and the challenge to DAPA, *Texas*, 809 F.3d 134, have been *essential* to safeguarding the separation of powers that this Court designed its Article III caselaw to protect.

CONCLUSION

This Court should hold that plaintiffs have Article III standing and that the Plan is unlawful.

Respectfully submitted,

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February 2023