Nos. 25-1236, 25-1413

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

STATE OF NEW YORK; STATE OF CALIFORNIA; STATE OF ILLINOIS; STATE OF RHODE ISLAND; STATE OF NEW JERSEY; COMMONWEALTH OF MASSACHUSETTS; STATE OF ARIZONA; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; DISTRICT OF COLUMBIA; STATE OF HAWAII; STATE OF MAINE; STATE OF MARYLAND; STATE OF MICHIGAN; STATE OF MINNESOTA; STATE OF NEVADA; STATE OF NORTH CAROLINA; STATE OF NEW MEXICO; STATE OF OREGON; STATE OF VERMONT; STATE OF WASHINGTON; STATE OF WISCONSIN, OFFICE OF THE GOVERNOR OF KENTUCKY, ex rel. ANDREW BESHEAR, in their official capacity as Governor of the Commonwealth of Kentucky,

Plaintiffs - Appellees,

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On Appeal from the United States District Court
for the District of Rhode Island

BRIEF OF LAW SCHOLARS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES, INCLUDING AFFIRMANCE OF THE DISTRICT COURT'S PRELIMINARY INJUNCTION AND RELATED RULINGS

Susannah Landes Weaver
ENVOLVE LAW
5100 Wisconsin Ave. NW, Suite 306
Washington, DC 20016
(202) 556-7898

Jonas Monast
Patrick R. Jacobi
Alexandra L. St. Romain
CENTER FOR APPLIED ENVIRONMENTAL LAW AND POLICY
712 H Street NE, Suite 90006
Washington, DC 20002
(703) 405-8950
patrick.jacobi@caelp.org

Counsel for Law Scholars Amici Curiae

v.

DONALD J. TRUMP, in their official capacity as President of the United States; U.S. OFFICE OF MANAGEMENT AND BUDGET; RUSSELL THURLOW VOUGHT, in their official capacity as Director of the U.S. Office of Management and Budget; U.S. DEPARTMENT OF THE TREASURY; SCOTT BESSENT, in their official capacity as Secretary of the Treasury; PATRICIA COLLINS, in their official capacity as Treasurer of the United States; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT F. KENNEDY, JR., in their official capacity as Secretary of the Department of Health and Human Services; U.S. DEPARTMENT OF EDUCATION; LINDA MCMAHON, in their official capacity as Secretary of Education; U.S. FEDERAL EMERGENCY MANAGEMENT AGENCY; CAMERON HAMILTON, in their official capacity as Acting Administrator of the U.S. Federal Emergency Management Agency; U.S. DEPARTMENT OF TRANSPORTATION; SEAN P. DUFFY, in their official capacity as Secretary of Transportation; U.S. DEPARTMENT OF LABOR; LORI CHAVEZ DEREMER, in their official capacity as Secretary of Labor; U.S. DEPARTMENT OF ENERGY; CHRISTOPHER ALLEN WRIGHT, in their official capacity as Secretary of the U.S. Department of Energy; U.S. ENVIRONMENTAL PROTECTION AGENCY; LEE M. ZELDIN, in their official capacity as Administrator of the U.S. Environmental Protection Agency; U.S. DEPARTMENT OF THE INTERIOR; DOUGLAS BURGUM, in their official capacity as Secretary of the Interior; U.S. DEPARTMENT OF HOMELAND SECURITY; KRISTI NOEM, in their official capacity as Secretary of the U.S. Department of Homeland Security; U.S. DEPARTMENT OF JUSTICE; PAMELA J. BONDI, in their official capacity as Attorney General; NATIONAL SCIENCE FOUNDATION; DR. SETHURAMAN PANCHANATHAN, in their official capacity as Director of the National Science Foundation; U.S. DEPARTMENT OF AGRICULTURE; BROOKE ROLLINS, in their official capacity as Secretary of Agriculture; U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT; SCOTT TURNER, in their official capacity as Secretary of Housing and Urban Development; U.S. DEPARTMENT OF STATE; MARCO RUBIO, in their official capacities as Secretary of State and Acting Administrator of the United States Agency for International Development; U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT; U.S. DEPARTMENT OF DEFENSE; PETE HEGSETH, in their official capacity as Secretary of Defense; U.S. DEPARTMENT OF VETERANS AFFAIRS; DOUGLAS COLLINS, in their official capacity as Secretary of Veterans Affairs; U.S. DEPARTMENT OF COMMERCE; HOWARD

(caption continued on next page)

LUTNICK, in their official capacity as Secretary of Commerce; NATIONAL AERONAUTICS AND SPACE ADMINISTRATION; JANET PETRO, in their official capacity as Acting Administrator of National Aeronautics and Space Administration; CORPORATION FOR NATIONAL AND COMMUNITY SERVICE; JENNIFER BASTRESS TAHMASEBI, in their official capacity as Interim Head of the Corporation for National and Community Service; U.S. SOCIAL SECURITY ADMINISTRATION; LELAND DUDEK, in their official capacity as Acting Commissioner of United States Social Security Administration; U.S. SMALL BUSINESS ADMINISTRATION; KELLY LOEFFLER, in their official capacity as Acting Administrator of U.S. Small Business Administration,

Defendants - Appellants.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, counsel for Law Scholars *Amici Curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

Dated: July 25, 2025

/s/ Patrick R. Jacobi
Patrick R. Jacobi

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INTEREST OF *AMICI CURIAE*[1]

Law Scholars *Amici Curiae* are law professors who teach and write in the fields of constitutional and administrative law. *Amicus* William W. Buzbee is the Edward and Carole Walter Professor of Law at Georgetown University Law Center. *Amicus* Noah Rosenblum is an Associate Professor of Law at New York University School of Law. *Amicus* Jodi Short is the Mary Kay Kane Distinguished Professor of Law at University of California College of Law, San Francisco.

Law Scholars *Amici Curiae* have a strong interest in the sound development of constitutional and administrative law in the federal courts. They submit this brief because of the important separation-of-powers issues implicated by the Trump Administration's recent actions seeking to indefinitely freeze congressionally authorized funding, without congressional approval and based only on purported inconsistency with the Administration's policy preferences. As leading constitutional- and administrative-law scholars, Law Scholars *Amici*

[1] Counsel for Law Scholars *Amici Curiae* certifies that the parties in these consolidated proceedings have been consulted, and that no party opposes the timely filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4), counsel for Law Scholars *Amici Curiae* states that no party or party's counsel authored this brief in whole or in part, and that no other person besides Law Scholars *Amici* or their counsel contributed money intended to fund the preparation or submission of this brief.

Curiae are well-positioned to provide insights that may assist the Court in evaluating the parties' arguments concerning separation-of-power principles.

ARGUMENT

This case requires this Court to determine the proper relationship between Congress and the Executive Branch. The Administration here relies on an unbounded view of presidential power to support its "categorical, indefinite funding freeze" of "congressionally appropriated and obligated funds" based only on the Administration's policy preferences and "without regard to Congress's authority to control spending." A4, A23. In this Court, the Administration argues that its refusal to spend the funds allocated by Congress—which are necessary to continue the existence of the multiple federal agencies—is not justiciable, contending that resolution of this issue of law should be left to the "hurly-burly" of the political process and is "committed to agency discretion by law." Appellants' Br., Doc. 00118290988, at 31, 41–44 (citations omitted).

Appellees' Brief correctly explains why judicial review is warranted here. Although the Executive Branch may, in some instances, exercise discretion over disbursement of congressional appropriations when certain conditions precedent are satisfied, it cannot unilaterally withhold funding appropriated by Congress in duly enacted legislation where, as here, those requirements are not met. *See* Appellees' Br., Doc. 00118315290, at 34–46; *see also generally* Br. of

Constitutional Accountability Center as *Amicus Curiae* in Supp. of Pls.-Appellees and Affirmance, Doc. 00118318234 (summarizing authority on this question). "There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Clinton v. City of New York*, 524 U.S. 417, 438 (1998). For those reasons alone, the Administration's arguments fail.

The Administration's position here reflects its larger attempt to disrupt the judiciary's duty to "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). It seeks to frustrate or even preclude judicial review in cases challenging this President's actions while supercharging review in cases challenging the prior President's actions. But when, as here, the power at issue derives from congressionally enacted statutes rather than a "conclusive and preclusive" authority of the President, *Trump v. United States*, 603 U.S. 593, 607 (2024) (citations omitted), courts must ensure that the Executive Branch complies with those statutes, regardless of the action under review. The Administration cannot simply avoid statutory requirements or judicial review by appeal to the President's supervisory authority to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. This amicus brief explains why this conclusion follows from two emerging bodies of the Supreme Court's separation-of-powers jurisprudence: one focused on presidential removal power and another focused on review of executive-agency actions.

In a series of cases relying on aspects of the "unitary-executive theory" to extend the President's authority to remove certain agency leadership, the Supreme Court has proclaimed the President the most democratically accountable government official and has stressed the practical and legal importance of a "chain of dependence" between the President and leadership in the Executive Branch. It is that "chain of dependence," the Court has explained, that provides political accountability and democratic legitimacy to Executive Branch actions.

In a separate set of cases, the Supreme Court coined the "major-questions doctrine" to subject executive-agency actions carrying out presidential directives to stringent review, characterizing them as the work of politically unaccountable bureaucrats. The Court grounds these major-questions-doctrine limits in a constitutional imperative to protect the authority vested in a democratically elected Congress. Yet the invalidated actions were duly taken at the direction of the President by his appointed and confirmed agency Secretary or Administrator, through the same "chain of dependence" that is central to the unitary-executive-removal cases.

The Supreme Court has yet to clarify how these two lines of cases interact with one another. This case presents an opportunity for this Court to harmonize them. It cannot be true that the President is the most democratically accountable government actor, connected to executive agency leadership through a chain of

dependence *and* that executive agencies must be subject to particularly stringent review because they are not accountable to the people. This disconnect is particularly acute in the major-questions-doctrine cases where agency actions of vast economic and political significance carried out at the direction of the President have been subjected to heightened judicial scrutiny.

The Trump Administration attempts to exploit the potential tensions between these two doctrines. When seeking to drastically reduce or even eliminate executive agencies through mass reductions in force or funding freezes, the Administration relies upon the unitary-executive-removal line of cases to empower the Executive Branch. *See, e.g.*, Appellants' Br. at 23 (citing *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 203–04 (2020), for the proposition that "the President exercises his executive power by relying on subordinate officers subject to his direction" as part of a broader argument that the President "may properly exercise this authority by instructing agencies generally to pause or terminate federal funding that does not accord with the President's policy

priorities").[2] The Administration even suggests here that Article III courts may not remedy its statutory violations at all. Appellants' Br. at 28–31, 41–44. By contrast, when seeking to repeal the previous Administration's duly promulgated, still-valid regulations with minimal or no regard for statutory requirements, the Trump Administration invokes the major-questions-doctrine cases that constrain Executive Branch authority.[3] Yet there is no principled way to distinguish these cases. This "heads I win, tails you lose" approach to judicial review of executive action threatens to subvert separation-of-powers principles embedded in the Constitution. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635

[2] In a recent Supreme Court filing regarding the dismantling of various agencies via large-scale reductions in force, the Administration expressly relied on some of the unitary-executive-removal cases discussed in this brief. *See* Appl. to Stay the Order Issued by the U.S. District Ct. for the Northern District of California and Req. for an Immediate Administrative Stay at 1–2, 5, 22–25, *Trump v. Am. Fed'n of Gov't Emps., AFL-CIO*, No. 24A1174 (June 2, 2025), https://www.supremecourt.gov/DocketPDF/24/24A1174/362080/20250602120234175_Trump_v_AFGE_Stay_Appl_2.pdf.

[3] *See* Memorandum on Directing the Repeal of Unlawful Regulations, 2025 Daily Comp. Doc. 466 (Apr. 9, 2025). The Administration's guidance for implementing this directive relies on the notion that executive-agency authority must be reviewed stringently. *See* Off. of Mgmt. & Budget, M-25-28, Guidance Implementing the President's Memorandum Directing the Repeal of Unlawful Regulations (May 7, 2025) (stating incorrectly that *West Virginia v. EPA*, 597 U.S. 697 (2022), in which the Supreme Court coined the major-questions doctrine, requires review of statutory authority for previous agency actions under a "clear-statement canon"), https://perma.cc/8PF7-NWK9.

(1952) (Jackson, J., concurring) (observing that "the Constitution diffuses power the better to secure liberty").

Reading these two bodies of cases together leads to two straightforward conclusions. First, a president's ability, as head of the Executive Branch, to direct agency action does not preclude or constrain judicial review of that action for compliance with substantive or procedural statutory requirements. If it did, the presidentially directed policies at issue in the major-questions-doctrine cases would not have been subject to review, much less heightened scrutiny. Second, judicial review of a president's authority in executing statutes should not be supercharged in some cases and neutered in others. Courts should align review of presidential and agency action where the authority being exercised is not within a specifically identified "conclusive and preclusive" constitutional authority of the President, *Trump*, 603 U.S. at 607 (citations omitted), but rather is governed by the statutory delegation of authority from Congress. The cause of action may differ. *Compare* 5 U.S.C. § 706(2) (governing review of agency action), *with Armstrong v. Exceptional Child Ctr.*, 575 U.S. 320, 326–27 (2015) (discussing federal courts' inherent equitable power to grant relief for violations of federal law). In every case, however, courts should "say what the law is," *Marbury*, 5 U.S. at 177, under the "best reading" of the relevant statutes, *Loper Bright Enters. v. Raimondo*, 603

U.S. 369, 395 (2024), and need not place a thumb on the scale for or against executive action based on the political significance of the case.

I. The Unitary-Executive Cases Recognize the Need for and Reality of Presidential Control Over Agency Leadership and Function, but They Do Not Authorize the President to Direct Agencies to Violate Statutes.

Since 2010, the Supreme Court has issued a series of opinions that bolster the President's control over agency leadership and function. Specifically, these cases rely on aspects of the unitary-executive theory, under which "the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'" *Seila L.*, 591 U.S. at 203 (quoting U.S. Const. art. II, § 1, cl. 1; *id.* § 3)). These cases recognize the President as "the most democratic and politically accountable official in Government" and require a "chain of dependence" between the President and the agencies that Congress charges with executing myriad laws. *Seila L.*, 591 U.S. at 224 (citations omitted); *see also, e.g.*, *id.* at 204 ("[T]he Constitution gives the President 'the authority to remove those who assist him in carrying out his duties.' . . . 'Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.'" (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513–14 (2010))). But none of these cases, nor *Trump v. United States*, suggests that the President may act outside the bounds of congressionally delegated authority as set out in statutes. *See In re Aiken Cnty.*,

725 F.3d 255, 259 (D.C. Cir. 2013) (Kavanaugh, J.) ("[T]he Executive must abide by statutory mandates and prohibitions. Those basic constitutional principles apply to the President and subordinate executive agencies.").

The modern line of cases reflecting this unitary-executive vision began in 2010 in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477. There, the Supreme Court concluded that the two-layer statutory scheme protecting the tenure of Public Company Accounting Oversight Board members unduly restricted the President's power to remove them. *Id.* at 483–84. The Court elaborated on the need for presidential control over agency function: "The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the executive's control, and thus from that of the people." *Id.* at 499. The President needs command of government officials—described as a "chain of dependence"—because he is the conduit by which the people control the agency. *Id.* at 498. *Free Enterprise Fund* "shifted the grounds of judicial review" of removal power from "a small set of formalistic limits" to "a probing theoretical question"—whether "the design of the agency undercut the connection between the people, the president, and the bureaucracy putatively necessary to maintain a democratic state?" Noah A.

Rosenblum & Roderick M. Hills, Jr., *Presidential Administration after* Arthrex, 75 Duke L.J. (forthcoming 2026) (manuscript at 31).[4]

The Court further delineated the scope of the President's removal power over agency leadership in the ensuing years. In *Seila Law,* the Court struck down statutory removal protections for the Director of the Consumer Financial Protection Bureau ("CFPB"), an agency considered to be otherwise "independent" from executive control, because the Director must be held accountable to "the most democratic and politically accountable official in Government," the President. 591 U.S. at 224–25. In *Collins v. Yellen*, the Court deemed unlawful the statute limiting the President to for-cause removal of the Federal Housing Finance Agency's single Director because agency heads must "serve the people effectively and in accordance with the policies that the people presumably elected the president to promote." 594 U.S. 220, 226–28, 252 (2021) (citations omitted).

In *United States v. Arthrex, Inc.*, the Court addressed not the President's authority to remove agency heads at will, but rather the degree of presidential control over substantive agency decision-making that Article II demands. 594 U.S. 1 (2021). The Court held unlawful the structure of the Patent and Trial Appeal Board ("PTAB"), which had authority to make final, binding decisions to

[4] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5122594.

invalidate previously issued patents in proceedings brought by private parties, because "the President can neither oversee the PTAB himself nor 'attribute the Board's failings to those whom he *can* oversee.'" *Id.* at 8–9, 17 (quoting *Free Enter. Fund*, 561 U.S. at 496). To remedy the constitutional violation, the Court ordered that the presidentially appointed Director of the Patent and Trademark Office exercise review of the PTAB's decisions. *Id.* at 26 (plurality), 44 (Breyer, J., dissenting but joining remedy).

All these cases embrace the unitary-executive theory and conclude that a "chain of dependence" from agency leadership to the President ensures agencies' democratic accountability. Yet in none of these cases did the Supreme Court question, much less invalidate, the statutes that govern Executive Branch behavior in a host of ways that leave intact the chain of dependence from the President to agency leadership. *See, e.g.*, *Seila Law*, 591 U.S. at 235 ("The provisions of the Dodd-Frank Act bearing on the CFPB's structure and duties remain fully operative without the offending tenure restriction."); *Free Enter. Fund*, 561 U.S. at 509 ("The Sarbanes-Oxley Act remains 'fully operative as a law' with these tenure restrictions excised." (citations omitted)). Accordingly, executive-agency "officers are duty-bound to give effect to the policies embodied in the President's direction" but only "to the extent allowed by the law." *Bldg. & Constr. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 32 (D.C. Cir. 2002) (citation omitted). And it remains the

case that "the President's power [under Article II, § 3] to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Id.* (quoting *Youngstown*, 343 U.S. at 587) (alteration in *Allbaugh*). Presidents therefore can select and oversee executive-agency leadership but cannot unilaterally ignore or rewrite statutes, including appropriations.

This reading of the unitary-executive-removal cases comports with the Supreme Court's more recent articulation of executive power in *Trump v. United States,* 603 U.S. 593 (2024). Where the President cannot rely on "his exclusive constitutional power" to take an action and must derive his authority from a statute, *id.* at 607–09, all links in the chain of Executive Branch dependence (the President included) must abide by the terms of the statutory delegation, *see Trump v. Am. Fed. of Gov't Emps.*, No. 24A1174, 2025 U.S. LEXIS 2667, at *17 (July 8, 2025) (Jackson, J., dissenting) ("While the President no doubt has the authority to manage the Executive Branch, our system does not allow the President to rewrite laws on his own under the guise of that authority."). In other words, "the President may not decline to follow a statutory mandate or prohibition simply because of policy objections." *Aiken Cnty.*, 725 F.3d at 259.

II. The Major-Questions-Doctrine Cases Have Constrained Executive Authority Even Where the President Has Exerted Significant Control Over Agencies.

While the Supreme Court was developing its unitary-executive-removal precedents, it was also developing another body of cases constraining exercises of executive-agency discretion by invoking Congress's constitutional primacy to address politically and economically significant issues through the legislative process. To date, the Court's major-questions-doctrine cases have largely invalidated challenged actions as beyond the bounds of the discretionary authority delegated to executive agencies. *See generally, e.g.*, *Biden v. Nebraska*, 600 U.S. 477 (2023) (invalidating the Secretary of Education's loan-forgiveness program); *West Virginia v. EPA*, 597 U.S. 697 (2022) (striking down the Environmental Protection Agency's ("EPA") Clean Power Plan). This was so even though the President had directed the agencies to adopt each of the policies in question. Although the major-questions doctrine is not at issue in this case, these cases demonstrate that the Executive Branch may not act contrary to or exceed its statutorily delegated authority, even when the President directs executive agency action through the chain of dependence, and that the courts must police the Executive Branch's compliance with statutory law.

As set out in 2022, the major-questions doctrine may apply in "extraordinary cases . . . in which the history and the breadth of the authority that the agency has

asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer" the authority for the challenged regulation, absent "clear congressional authorization." *West Virginia*, 597 U.S. at 721, 723 (citations omitted) (cleaned up). Scholars have boiled down the *West Virginia* majority's test for when the doctrine applies to roughly three factors: whether the assertion of agency authority is unheralded, transformative, and of vast economic and political significance. *See generally, e.g.*, Natasha Brunstein & Donald L. R. Goodson, *Unheralded and Transformative: The Test for Major Questions After* West Virginia, 47 Wm. & Mary Env't L. & Pol'y Rev. 47 (2022). Where the Court determines that those factors are met, it requires a heightened showing of statutory clarity before it can conclude that Congress delegated sufficient authority for the challenged action. *Id.*

The constraints the Supreme Court has placed on agencies are particularly pronounced in precisely the cases where the President is most likely to direct agency decision-making: those of vast political and economic significance. Yet those cases are largely silent about the President's role. Instead, members of the Court have, for example, faulted agencies for "laying claim to extravagant statutory power over the national economy," *Util. Air Regul. Grp. v. EPA*, 573 U.S.

302, 324 (2014),[5] and seeking "to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment," *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 595 U.S. 109, 125 (2022) (Gorsuch, J., joined by Thomas, J., and Alito, J., concurring). Justices have even invoked separation-of-powers principles to frame the major-questions doctrine as a means to protect the Constitution's vesting of all legislative power in Congress against "a regime administered by a ruling class of largely unaccountable 'ministers.'" *West Virginia*, 597 U.S. at 737 (Gorsuch, J., joined by Alito, J., concurring) (citations omitted).

This focus on "unaccountable bureaucrats" obscures a key feature of the agency policies invalidated as major questions: the role that a succession of presidents played in directing and shaping the challenged agency policies. *See* Jodi L. Short & Jed H. Shugerman, *Major Questions About Presidentialism: Untangling the "Chain of Dependence" Across Administrative Law*, 65 B.C. L. Rev. 511, 533–74 (2024) (rigorously detailing how, with the exception of some dissenting opinions, the Justices have largely ignored the President's role in directing the regulations challenged in what are now considered major-questions-

[5] When the Court first denominated the major-questions doctrine in *West Virginia*, the majority and concurring opinions identified various cases, including *Utility Air Regulatory Group*, as progenitors of the doctrine. *See* 597 U.S. at 721–25, 740–45.

doctrine cases over the past twenty-five years).[6] This history of presidential direction serves as a vital reminder that, however broad the President's directive authority might be, it cannot salvage Executive Branch actions that exceed statutorily delegated authority. For example, the *West Virginia* Court invalidated the Clean Power Plan despite President Obama's express direction and active support in EPA's development of that regulation. *See, e.g.*, Remarks at Georgetown University, 2013 Daily Comp. Pres. Doc. 452 (June 25, 2013) ("I'm *directing* the Environmental Protection Agency to put an end to the limitless dumping of carbon pollution from our power plants and complete new pollution standards for both new and existing power plants." (emphasis added)); Remarks by the President in Announcing the Clean Power Plan, 2015 Daily Comp. Pres. 546 (Aug. 3, 2015) (emphasizing his role in initiating the policy and his support for the final result). Where the Court addressed President Obama's involvement, it used his remarks not to demonstrate the importance of the President's chain of dependence in carrying out the Clean Power Plan but rather as evidence that the

[6] Justice Kavanaugh's recent concurrence in *FCC v. Consumers' Research* lends support to Professors Short and Shugerman's argument: "Critiques of broad congressional delegations sometimes focus on officials described as 'unaccountable bureaucrats.' But that label does not squarely fit delegations to *executive* agencies. In those circumstances, the President and his subordinate executive officials maintain control over the executive actions undertaken pursuant to a delegation." 145 S. Ct. 2482, __, 222 L. Ed. 2d 800, 841 (2025).

agency had acted outside of the authority that Congress delegated. *See West Virginia*, 597 U.S. at 745 (concluding that Congress's failure to pass legislation similar to the Clean Power Plan "frustrated the Executive Branch and led it to attempt its own regulatory solution" and quoting President Obama as stating "'if Congress won't act soon . . . I will'" (citations omitted)).

Similarly, in *Biden v. Nebraska*, the Court invalidated President Biden's plan for the Secretary of Education to forgive federal student debt despite the President's direction of the plan. Specifically, President Biden undertook well-publicized efforts to campaign on enacting the loan forgiveness policy, direct the Secretary of Education to pause federal student loan repayments on his first day in office, champion the policy throughout its development, and embrace it as part of his re-election campaign. *See* Short & Shugerman, *supra*, 65 B.C. L. Rev. at 535–39 (citations omitted). While the Court briefly recognized that *the President* had directed extension of debt waivers during the COVID-19 emergency and later declared the emergency over, the Court cited this as evidence that the Secretary of Education lacked the requisite emergency authority to promulgate the debt forgiveness plan. *Nebraska*, 600 U.S. at 487. More puzzling, despite the President's close connection to the policy, the Court described the loan forgiveness program as allowing the Secretary of Education—the *agency head*—to "enjoy virtually unlimited power to rewrite the Education Act," "unilaterally define every

aspect of federal student financial aid," and "unilaterally alter large sections of the American economy." *Id.* at 502, 507.

The upshot is that presidential direction of and involvement in policies that violate the major-questions doctrine did not save them from invalidation when the Court found that the policies fell outside statutorily delegated authority. Indeed, in subjecting these actions to heightened review, the Court did not account for the democratic accountability of the President so central to its unitary-executive-removal cases. Thus, the Court's major-questions-doctrine cases reinforce that the President's role in directing agency policy is not a license for the President *or* the agency to undertake actions outside of statutorily delegated authority, including actions that violate a statutory mandate or prohibition.

III. This Court Should Uphold the District Court's Injunction and Recognize Congress's Central Role in Empowering and Constraining the President and His Subordinates Alike.

It is critical that courts provide clarity for all three branches of government by harmonizing these two lines of cases. This Court can resolve the separation-of-powers question presented here, as well as align these two doctrines, in a straightforward manner: By reinforcing that, when the Executive Branch is exercising power conveyed by Congress in a statute, the *entire* Executive Branch must act within the bounds of—and consistent with—its constitutional and statutorily delegated authority. This is true whether the actor is the President or an

agency official and regardless of whether the action relates to congressionally conferred spending, regulatory, or other authority. It follows from this approach that the Executive Branch has no power to unilaterally withhold funding appropriated by Congress in duly enacted legislation based solely on the Administration's policy preferences, effectively paralyzing each agency's ability to carry out statutory charges. Statutes brought various agencies into being and mandate that they continue fulfilling their missions through the expenditure of congressionally appropriated funds. *See* Appellees' Br. at 34–46 (explaining how the Administration violated the requirements of appropriations statutes).

Reaching this conclusion would reinforce bedrock separation-of-powers and administrative-law principles. Congress may delegate discretionary authority directly to the President in a statute. *See, e.g.*, *Dalton v. Specter*, 511 U.S. 462, 473–76 (1994) (discussing the scope of authority statutorily delegated to the President). Or Congress may delegate discretion to an Executive Branch agency. *See Loper Bright*, 603 U.S. at 394 ("In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion."). There are good reasons to treat these delegations the same in this context. *See Consumers' Research*, 222 L. Ed. 2d at 835 n.1 (Kavanaugh, J., concurring) ("[D]elegations to executive officers and agencies, in my view, are not analytically distinct for present purposes from delegations to the President because

the President controls, supervises, and directs those executive officers and agencies. Delegation to executive officers and agencies are thus *de facto* delegations to the President." (citing *Myers v. United States*, 272 U.S. 52, 163–64 (1926))).[7] In each instance, a statute prescribes the limits of the delegated authority. And, in each instance, courts must hold the relevant actor in the Executive Branch to those limits.

Indeed, *Loper Bright* expressly requires that courts police these boundaries for agencies. "[T]o stay out of discretionary policymaking left to the political branches, judges need only fulfill their obligations under the [Administrative Procedure Act ("APA")] to independently identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA." 603 U.S. at 404. *Dalton* does not suggest a different result when discretionary authority is exercised or directed by the President. The *Dalton* Court declined to consider whether the

[7] Although Justice Kavanaugh's concurrence confirms that presidential and executive-agency delegations should be reviewed uniformly and acknowledges that "the President is elected by and accountable to all the American people," *Consumers' Research*, 222 L. Ed. 2d at 841, his concurrence does not address the implications of those conclusions for judicial review of presidentially directed agency actions. Specifically, Justice Kavanaugh does not reconcile the two lines of cases discussed in Parts I and II, *supra*, or explain why certain agency actions carrying out significant policy goals of a democratically elected president should be subject to heightened review.

President had abused his congressionally delegated discretion only because *the statute* placed no limit on that discretion. 511 U.S. at 476–77, *see also id.* at 473 ("We may assume for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA." (citing *Dames & Moore v. Regan*, 453 U.S. 654, 667 (1981)). *Dalton* has been distinguished on the same or similar ground multiple times. *E.g.*, *Am. Forest Res. Council v. United States*, 77 F.4th 787, 797 (D.C. Cir. 2023), *cert. denied*, 144 S. Ct. 1110 (2024); *Chamber of Com. v. Reich*, 74 F.3d 1322, 1331–32 (D.C. Cir. 1996). Further, the Supreme Court recently construed the Reorganization Act of 1949 to have "barred *the President* from seizing on a reorganization plan to unilaterally confer new powers on an agency" because only Congress could confer such authority. *Kennedy v. Braidwood Mgmt.*, 145 S. Ct. 2427, __, 222 L. Ed. 2d 867, 904 (2025) (citations omitted).

It would therefore be "untenable to conclude that there are no judicially enforceable limitations on presidential actions, besides actions that run afoul of the Constitution or which contravene direct statutory prohibitions, so long as the President *claims* that he is acting . . . in the pursuit of governmental savings." *Chamber of Com.*, 74 F.3d at 1332. Otherwise, the President could "bypass scores of statutory limitations on governmental authority." *Id.* Such an approach would also undermine the "purpose of the nondelegation doctrine," which "is to enforce

limits on the 'degree of policy judgment that can be left to those executing or applying the law.'" *Consumers' Research*, 222 L. Ed. 2d at 823 (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

Consistent with these principles, the President acts at the "lowest ebb" of his constitutional authority and power when he acts contrary to the will of Congress. *See Youngstown*, 343 U.S. at 638 (Jackson, J., concurring); *see also United States v. Texas*, 599 U.S. 670, 731 (2023) (Alito, J., dissenting) ("Our Constitution gives the President important powers, and the precise extent of some of them has long been the subject of contention, but it has been widely accepted that the President's power reaches its lowest ebb when he contravenes the express will of Congress, for what is at stake is the equilibrium established by our constitutional system." (citations omitted) (cleaned up)). Thus, it is the courts' role to determine what statutory limits Congress placed on the authority delegated to the Executive Branch and to invalidate Executive Branch actions when they are outside of those bounds. *See Consumers' Research*, 222 L. Ed. 2d at 840 (Kavanaugh, J., concurring) ("The President generally must act within the confines set by Congress when he implements legislation. So the President's actions when implementing legislation *are* constrained—namely, by the scope of Congress's authorization and by any restrictions set forth in that statutory text." (citing *Loper Bright*, 603 U.S. at 394–96, 404)); *INS v. Chadha*, 462 U.S. 919, 953–54 n.16 (1983) (concluding that

executive action undertaken pursuant to "legislatively delegated authority" "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review").

Accordingly, Article II does not allow the President (or an agency) to unilaterally override Congress's choices. Otherwise, Congress would be a secondary branch with a mere advisory role. *Cf. Youngstown*, 343 U.S. at 587 ("[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."). To the contrary, the Take Care Clause is an *affirmative* command that requires good-faith execution of duly enacted laws, not a license to ignore the will of Congress. *See, e.g.*, Andrew Kent, Ethan J. Leib, & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111, 2118 (2019). The Executive Branch thus violates the Take Care Clause where it undermines statutes enacted by Congress and signed into law. *See Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 612–13 (1838) (rejecting the argument that, by charging the President with faithful execution of the laws, the Take Care Clause "implies a power to forbid their execution"); *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 551 (D.C. Cir. 1999) (concluding that "the President is without authority to set aside congressional legislation by executive order"). Notably, here, the statutes at issue are an exercise of Congress's

power to appropriate funds, the very first among Congress's enumerated authorities. U.S. Const. art. I, § 8, cl. 1.

Finally, aligning judicial-review principles of the scope of congressionally delegated authority for presidential and executive-agency actions will support effective governance within the constitutional design. Consistent with the Court's approach in *Loper Bright*, there would seldom be need for courts to put a thumb on the scale for or against agency action by considering non-statutory factors, such as relative economic and political significance or whether a democratically elected president attempts to direct a policy outcome that is novel yet consistent with campaign promises. *See, e.g.*, *Kovac v. Wray*, 109 F.4th 331, 335, 342 (5th Cir. 2024) (admonishing a district court for considering the major-questions doctrine before undertaking *Loper Bright*'s best-reading requirement and concluding that major-questions-doctrine analysis was unnecessary). This approach will allow the President to pursue policy goals by directing executive-agency priorities even where the resulting agency actions may have vast political and economic significance, so long as the Executive Branch acts within the bounds of Congress's delegated authority. Most important, it would ensure that the President does not act beyond the authority provided by Congress and thereby protect the promise of ordered liberty enshrined in the Constitution.

CONCLUSION

For the reasons stated above and in the Appellees' Brief, this Court should uphold the U.S. District Court for the District of Rhode Island's preliminary injunction, as well as that court's related decisions granting Plaintiffs-Appellees' motion regarding enforcement of the preliminary injunction and denial of Defendants-Appellants' motion for reconsideration of the enforcement order. This Court should further conclude that when the Executive Branch is exercising power conveyed by Congress in a statute, the entire Executive Branch must act within the bounds of—and consistent with—that delegated authority.

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Respectfully submitted,

/s/ Patrick R. Jacobi

Susannah Landes Weaver
ENVOLVE LAW
5100 Wisconsin Ave. NW, Suite 306
Washington, DC 20016
(202) 556-7898

Jonas Monast
Patrick R. Jacobi
Alexandra L. St. Romain
CENTER FOR APPLIED ENVIRONMENTAL LAW AND POLICY
712 H Street NE, Suite 90006
Washington, DC 20002
(703) 405-8950
patrick.jacobi@caelp.org

Counsel for Law Scholars Amici Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitations set forth in Fed. R. App. P. 29(a)(5) because this brief contains 5586 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), and which is less than one-half the length set for a party's principle brief in Fed. R. App. 32(a)((7)(B)(i). The foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: July 25, 2025

/s/ Patrick R. Jacobi
Patrick R. Jacobi

CERTIFICATE OF SERVICE

I hereby certify that, on this 25th day of July, 2025, I caused the foregoing Brief of Law Scholars *Amici Curiae* in Support of Plaintiffs-Appellees, including Affirmance of the District Court's Preliminary Injunction and Related Rulings, to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the Court's CM/ECF system, which constitutes service on all parties and parties' counsel who are registered ECF filers.

/s/ Patrick R. Jacobi
Patrick R. Jacobi