SUPREME COURT
OF THE UNITED STATES

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         IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH R. BIDEN, PRESIDENT            )

OF THE UNITED STATES, ET AL.,         )

            Petitioners,              )

            v.                        ) No. 22-506

NEBRASKA, ET AL.,                     )

            Respondents.              )

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Pages: 1 through 136

Place: Washington, D.C.

Date: February 28, 2023

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10
11              Washington, D.C.
12         Tuesday, February 28, 2023
13
14      The above-entitled matter came on for oral
15   argument before the Supreme Court of the United
16   States at 10:12 a.m.
17
18   APPEARANCES:
19   GEN. ELIZABETH B. PRELOGAR, Solicitor General,
20      Department of Justice, Washington, D.C.; on behalf
21      of the Petitioners.
22   JAMES A. CAMPBELL, Solicitor General, Lincoln,
23      Nebraska; on behalf of the Respondents.
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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (10:12 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear

4   argument first this morning in Case 22-506,

5   Biden versus Nebraska.

6   General Prelogar.

7   ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

8   ON BEHALF OF THE PETITIONERS

9   GENERAL PRELOGAR: Mr. Chief Justice,

10   and may it please the Court:

11   COVID-19 is the most devastating

12   pandemic in our nation's history and it has

13   caused enormous disruption and economic

14   distress. Over the past three years, millions

15   of Americans have struggled to pay rent,

16   utilities, food, and many have been unable to

17   pay their debts.

18   To head off immediate harm for

19   student-loan borrowers, two Secretaries across

20   two administrations invoked the HEROES Act to

21   suspend interest and payment obligations for all

22   Americans with federally held loans. But, if

23   that forbearance ends without further relief,

24   it's undisputed that defaults and delinquencies

25   will surge above pre-pandemic levels.

1   So Secretary Cardona again invoked the

2   HEROES Act to provide a measure of loan

3   forgiveness to ensure that this unprecedented

4   pandemic does not leave borrowers worse off in

5   relation to their student loans.

6   The states ask this Court to deny that

7   vital relief to millions of Americans, but they

8   lack standing to seek that result. They

9   principally assert harm to a separate legal

10 person, MOHELA, that could sue in its own name

11 but has chosen not to do so, and the states'

12 asserted harms to their tax revenues are

13 self-inflicted and indirect. The states' bare

14 disagreement with this policy is not the sort of

15 concrete injury that Article III demands.

16   On the merits, the states say the Act

17 doesn't authorize the Secretary to ever forgive

18 loan principal. But the Secretary's

19 interpretation of this text is not just a

20 plausible reading; it's the best reading.

21 Congress expressly authorized the Secretary to

22 waive or modify any Title IV provision in

23 emergencies to provide financial relief to

24 borrowers. Loan forgiveness is a paradigmatic

25 form of debt relief, and the Secretary acted

1   within the heartland of his authority and in

2   line with the central purpose of the HEROES Act

3   in providing that relief here.

4   To apply the major questions doctrine

5   to override that clear text would deny borrowers

6   critical relief that Congress authorized and the

7   Secretary deemed essential.

8   I welcome the Court's questions.

9   JUSTICE THOMAS: General, is this a

10   waiver, or is it a modification?

11   GENERAL PRELOGAR: It's both a waiver

12   and a modification, Justice Thomas. This

13   appears at JA 261. That was the decision

14   document that the Secretary signed where he

15   said, I hereby issue waivers and modifications

16   of multiple provisions under Title IV of the

17   student loan program. And then that language

18   was repeated in the Federal Register notice that

19   actually implemented that program and

20   constitutes the final agency action that the

21   states are challenging here.

22   JUSTICE THOMAS: Well, could you

23   explain then -- in -- in -- in other provisions,

24   there is express language as to cancellation,

25   and, of course, there isn't here.

1   So would you take a minute to explain

2 how a waiver or modification amounts to a waiver

3 -- to a cancellation?

4   GENERAL PRELOGAR: Of course. So the

5 Secretary identified various provisions in Title

6 IV that govern the terms and conditions of

7 student loans and also govern discharge and

8 cancellation in other circumstances, as your

9 question suggested.

10   And I think the straightforward way to

11 think about how the verbs map onto the

12 Secretary's action is that he waived elements of

13 those provisions that contain eligibility

14 requirements for discharge and cancellation that

15 are inapplicable under this program and then

16 modified the provisions to contain the

17 limitations that he had announced as part and

18 parcel of announcing this loan forgiveness.

19   Now you had suggested that there's no

20 express statement in the HEROES Act to discharge

21 loan principal, an -- and that's true, but the

22 relevant and operative language here is the

23 provision that says the Secretary is empowered

24 to waive or modify any Title IV provision, and

25 so the HEROES Act isn't enumerating any of the

1   various forms of relief that have long been

2   authorized and implemented under this statute.

3   I don't think anything can be read

4   into the fact that there's no express reference

5   to particular forms of relief because Congress

6   was trying to broadly cover the field and ensure

7   that the Secretary had the tools to respond to

8   the national emergency with whatever relief

9   might be necessitated.

10   CHIEF JUSTICE ROBERTS: But, in -- in

11   an opinion we had a few years ago by Justice

12   Scalia, he talked about what the word "modify"

13   means, and it's -- he said modified in our view

14   connotes moderate change. He said it might be

15   good English to say that the French Revolution

16   modified the status of the French nobility, but

17   only because there's a figure of speech called

18   understatement and a literary device known as

19   sarcasm.

20   We're talking about half a trillion

21   dollars and 43 million Americans. How does that

22   fit under the normal understanding of

23   "modifying"?

24   GENERAL PRELOGAR: So, of course, I

25   recognize that in MCI, Justice Scalia's opinion

 1   adopted a narrower understanding of that term,

 2   but I don't read that opinion to set forth a

 3   universal meaning of "modify," no matter the

 4   statutory context.

 5   And, here, of course, we have a

 6   broader phrase, "waive or modify." It's

 7   undisputed and the states aren't contesting that

 8   the ordinary meaning of "waive" means to

 9   eliminate an obligation in its entirety. And I

10   think, if you look at that phrase in the context

11   of the statute, that means that "modify" has to

12   mean making a change up to the point of

13   wholesale elimination.

14   It would be really strange for

15   Congress to say you can eliminate obligations

16   altogether or tweak them just the littlest bit,

17   but you can't do anything in between.

18   CHIEF JUSTICE ROBERTS: Well, but it's

19   "waive" particular regulatory or statutory

20   provisions.

21   GENERAL PRELOGAR: That's right.

22   CHIEF JUSTICE ROBERTS: That to me

23   suggests a much more focused use of the word.

24   GENERAL PRELOGAR: Well, it's "waive

25   or modify" paired with the authority to do that

1   with respect to any Title IV provision. So I

2   think that that is the --

3   CHIEF JUSTICE ROBERTS: It doesn't say

4   waive -- modify or waive loan balances.

5   GENERAL PRELOGAR: That's true, but

6   it's very clear that under the Title IV

7   provisions that are expressly referenced in the

8   statute, things like repayment obligations,

9   cancellation, discharge, are core features of

10   the program and obvious candidates for waiver in

11   a statute, the central purpose of which is to

12   provide debt relief to borrowers.

13   You know, Congress itself has provided

14   for loan discharge in other circumstances in

15   response to borrower hardship. It's included

16   provisions in the Higher Education Act for

17   bankruptcy, for example, or for total disability

18   or school closure, other kinds of hardships.

19   And so it couldn't have surprised

20   Congress one bit that in response to hardship

21   posed by a national emergency, the Secretary

22   might consider similarly providing discharge if

23   that's what it takes to make sure borrowers

24   don't default.

25   CHIEF JUSTICE ROBERTS: You think

 1   because there's a provision to allow waiver when

 2   your school closes, that because of that,

 3   Congress shouldn't have been surprised when half

 4   a trillion dollars is wiped off the books?

 5   GENERAL PRELOGAR: Well, I think it

 6   demonstrates that in a statute that's centrally

 7   focused on providing financial relief, that that

 8   terminology should be given its plain meaning,

 9   and Congress could have anticipated that in a

10   particular situation, you might expect that the

11   way that you need to ameliorate the borrower

12   harm is through loan forgiveness.

13   And, Mr. Chief Justice, maybe I can

14   just use an example drawn from the initial

15   context of promulgation of this statutory

16   relief. It was initially a bill that was

17   limited just to helping service members who were

18   fighting in wars. And think about an example of

19   a service member who goes off to war and you can

20   provide HEROES Act relief to ensure that the

21   service member doesn't have to pay down the loan

22   while the term of service, but if something were

23   to happen that left that service member worse

24   off because of his service, say a -- a

25   disability that doesn't qualify for total

 1 discharge, it makes perfect sense to think that

 2 Congress would have expected that the Secretary

 3 would have authority under this Act to make the

 4 service member whole and to ensure, just as the

 5 plain language suggests, that that service

 6 member isn't going to be left worse off because

 7 of the circumstance that prompted his service in

 8 the first place.

 9   And so there's that first-order

10 question of whether you can ever do any debt

11 discharge. And I think, in that context, it's

12 perfectly sensible to read this language to

13 authorize that.

14   JUSTICE SOTOMAYOR: General, the

15 amount at issue, the Chief mentioned the quarter

16 trillion dollars or the half a trillion dollars.

17 How do you deal with that? Because that seems

18 to favor the argument that this is a major

19 question.

20   GENERAL PRELOGAR: Yes, Justice

21 Sotomayor. So, of course, we acknowledge that

22 this is an economically significant action, but

23 I think that that can't possibly be the sole

24 measure for triggering application of the major

25 questions doctrine.

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 1          In prior cases, the Court has pointed
 2     to economic and political significance, but it's
 3     also reviewed a litany of additional factors
 4     that have demonstrated that based on
 5     common-sense understandings of how Congress is
 6     likely to legislate, the agency is claiming
 7     extravagant regulatory authority that it doesn't
 8     actually have.
 9          And I think, if the Court were to just
10     look at costs alone, it would take the major
11     questions doctrine outside of that extraordinary
12     case because national policies these days
13     frequently do involve more substantial costs or
14     trigger political controversy.
15          Here, we think that there are any
16     number of additional factors that demonstrate
17     that this does not fit the major questions
18     paradigm.  And the first thing I would point to
19     is that this is not an assertion of regulatory
20     authority at all.
21          This is the administration of a
22     benefits program.  And the Court in prior cases
23     had -- has recognized that you -- using common
24     sense interpretations of understanding how
25     Congress would legislate, Congress might pause
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 1   before empowering the executive to engage in

 2   extravagant regulation with the corresponding

 3   cost to individual liberty interests.

 4   But, in the context of a benefits

 5   program, there's not that same reason to

 6   hesitate about what Congress might have intended

 7   because it's perfectly logical for Congress to

 8   broadly empower the executive to provide

 9   benefits, especially in a crisis situation or an

10   emergency like we've seen with COVID-19.

11   JUSTICE ALITO: And General, let's say

12   that nobody in Congress was aware that there is

13   such a thing in our case law called the major

14   questions doctrine. So put that out of their

15   minds.

16   And you simply polled every member of

17   Congress and asked that person whether, in the

18   ordinary sense of the term, they would regard

19   what the government had -- proposes to do with

20   student loans as a major question or something

21   other than a major question.

22   GENERAL PRELOGAR: Well, I certainly

23   acknowledge that in a colloquial sense you could

24   characterize this as a major policy. We're not

25   disputing that point.

1   But, again, I think that that applies

2   to any number of actions that the government

3   might take, and especially in the context of

4   benefits programs, where just based on the size

5   of those programs and the number of individuals

6   affected, the costs can frequently run into the

7   billions of dollars.

8   So I don't --

9   JUSTICE ALITO: Is there any

10   conceptual reason why the major questions

11   doctrine should apply to most regulatory matters

12   but not to the -- not to benefits programs?

13   GENERAL PRELOGAR: The reason we think

14   it shouldn't apply in the same way to benefits

15   programs is because it doesn't involve that

16   corresponding trade-off on individual liberty

17   interests.

18   The Court in some of the prior cases

19   in this area has expressed concern that if the

20   government is claiming an extraordinary power to

21   regulate, that means it can encroach on the

22   lives of individuals, the affairs of businesses,

23   and quite directly impose onerous burdens on

24   them.

25   JUSTICE ALITO: It may have an effect

 1   on important individual rights, but do you think

 2   that the doctrine also or perhaps primarily has

 3   a separation of powers component?

 4   GENERAL PRELOGAR: Yes, of course, I

 5   recognize the Court has grounded it in the

 6   separation of powers, but I think that that cuts

 7   in favor of the distinction that we're trying to

 8   make because, if the Court were to apply major

 9   questions in this benefits context, even in a

10   circumstance where you might think Congress

11   could quite reasonably want to legislate

12   broadly, then it would have the effect of

13   potentially overriding Congress's intent,

14   contrary to the same kind of separation of

15   powers principles the Court has focused on in

16   prior cases.

17   JUSTICE ALITO: Well, I don't

18   understand why it would under -- undermine

19   Congress's intent to a greater extent in that

20   context. But drawing a distinction between

21   benefits programs and other programs seems to

22   presume that when it comes to the administration

23   of benefits programs, a trillion dollars here, a

24   trillion dollars there, it doesn't really make

25   that much difference to Congress. That doesn't

1   seem very sensible.

2   GENERAL PRELOGAR: Of course, I

3   acknowledge that there can be substantial costs

4   associated with benefits programs, but I guess

5   the reason I'm pressing on this distinction is

6   because I'm trying to think through, you know,

7   what is Congress supposed to do when it wants to

8   empower the executive to --

9   JUSTICE ALITO: But, I mean, isn't the

10   question, looking at this program and looking at

11   this question, is this the sort of thing that

12   Congress is likely to address expressly or

13   through a contestable interpretation of some

14   statutory language?

15   GENERAL PRELOGAR: Well, of course, we

16   think Congress did address this expressly here,

17   and Congress directed that in the context of a

18   national emergency, that is the -- the

19   limitation of the HEROES Act, so the Secretary

20   can't invoke this whenever he wants. There has

21   to be that predicate war or military operation

22   or national emergency.

23   In that context, in line with

24   Congress's limitations on who can count as an

25   affected individual by that -- an emergency, in

1   line with the purposes that relief has to serve,

2   Congress said you can waive or modify any Title

3   IV provision in order to get relief to

4   borrowers.

5   And, Justice Alito, I would point to

6   the forbearance policy that's been in place for

7   the prior three years, put into place right at

8   the beginning of the pandemic by then Secretary

9   DeVos. That has been an economically

10   significant program. It's currently costing the

11   federal government more per year than this loan

12   forgiveness plan would cost the government

13   annually.

14   But I would argue that that is right

15   in the heartland of what the HEROES Act aimed to

16   do. It was critical relief that was rushed out

17   at the beginning of this devastating pandemic to

18   ensure that we didn't see spikes in delinquency

19   and default across the nation.

20   JUSTICE ALITO: May I ask you a

21   question about standing? So it's the case,

22   isn't it, that if any party in either of these

23   two cases has standing, then it would be

24   permissible for us to reach the merits of the

25   issue?

1   GENERAL PRELOGAR: Yes. In -- in the

2 states' case, if you conclude that any party has

3 standing, then the Court could go on to the

4 merits. In the case that the Court is going to

5 hear next, we think that there are objections to

6 the procedural claim with respect to the

7 borrowers' objections there.

8   JUSTICE ALITO: Okay. Then let me ask

9 you a question about MOHELA or maybe a question

10 or two. If MOHELA itself had brought this suit,

11 would you contest Article III standing?

12   GENERAL PRELOGAR: No, we would not.

13 So we think that if MOHELA made allegations that

14 the plan was going to have financial effects on

15 it, it could sue in its own name and we would

16 not contest Article III standing.

17   JUSTICE ALITO: All right. So then we

18 would consider the Article III standing of the

19 State of Missouri, right?

20   GENERAL PRELOGAR: That's right.

21   JUSTICE ALITO: And the -- the -- the

22 most -- the -- the part of the Article III test

23 that's most disputed is injury in fact, is that

24 correct?

25   GENERAL PRELOGAR: That's right.

1   We're also contesting causation --

2   JUSTICE ALITO: Right.

3   GENERAL PRELOGAR: -- and

4   redressability here, but I think injury in fact

5   is one of the critical points in dispute with

6   respect to MOHELA and the state's attempt to

7   assert MOHELA's injury.

8   JUSTICE ALITO: Okay. Injury in fact

9   is a factual question. So I understand a big

10   thrust of your argument to be that Missouri

11   lacks standing because MOHELA is -- is

12   separately incorporated. But why should that

13   formal distinction govern the determination of

14   injury in fact?

15   GENERAL PRELOGAR: So we think that

16   the injury in fact analysis here has both a

17   factual and a legal component.

18   In the first place, of course, we're

19   making arguments that even if there's a

20   financial injury to MOHELA, the state hasn't

21   carried its -- its burden to show that that will

22   have downstream effects on the state or that

23   those would be cognizable. And MOHELA hasn't

24   paid money into the relevant state fund for the

25   past 15 years. It said that further payments

1   were not deemed probable even before this plan

2   was announced.

3   But even putting the -- the factual

4   discrepancies to the side, there's a fundamental

5   problem as a matter of law with the claim of

6   injury, and I think it arises directly from two

7   sets of blackletter law principles.

8   The first is that the whole point of

9   incorporation is that you're creating a separate

10   legal person with its own rights and interests.

11   And Missouri has derived substantial benefits

12   from structuring MOHELA that way.

13   And the second is the basic Article

14   III principle that a party has to come to court

15   and assert her own rights and interests.

16   JUSTICE ALITO: Right. We -- I -- I,

17   you know -- I --

18   GENERAL PRELOGAR: She can't invoke

19   the interests of a third party.

20   JUSTICE ALITO: All of that is

21   certainly true. You think that our -- that

22   the lack -- the fact that MOHELA is incorporated

23   is the end of the day? That's enough to destroy

24   -- to defeat standing?

25   GENERAL PRELOGAR: We think, as a

1   matter of first principles, yes, that this Court

2   has several times emphasized that when you have

3   a separately incorporated instrumentality like

4   that, the corporate separateness should be

5   respected and that that --

6   JUSTICE ALITO: Well, what about --

7   GENERAL PRELOGAR: -- serves

8   important --

9   JUSTICE ALITO: -- Lebron and Amtrak?

10   GENERAL PRELOGAR: So those are

11   doctrines not focused on Article III standing,

12   of course, but instead are testing for other

13   things.

14   In Lebron, that was a state action

15   case, and the Court's reasoning was that you

16   shouldn't be able to parcel out governmental

17   functions to an instrumentality and thereby

18   evade the strictures of the Constitution.

19   JUSTICE ALITO: Well, have we ever

20   decided a case that presents what you see is the

21   issue here or what the parties see as the issue,

22   as one of the issues, which is whether, for

23   Article III standing purposes, a -- an entity is

24   part of a state?

25   GENERAL PRELOGAR: No. So the Court

1   hasn't addressed this issue in the context of

2   Article III. There aren't cases that are

3   directly on point on either side, but I think

4   that we definitely have the better argument of

5   the first principles here based on the

6   propositions I mentioned earlier, including

7   those that generally make clear that the Court

8   won't countenance third-party claims seeking to

9   invoke rights and interests of individuals or

10   entities that aren't before the Court.

11   And I think it would be particularly

12   anomalous to recognize some kind of exception to

13   those principles here for two reasons.

14   JUSTICE ALITO: No, but the question

15   would be whether MOHELA is part of the State of

16   Missouri for present purposes. And where we're

17   considering injury in fact, why should the test

18   turn solely or why should the lack of corporate

19   status be a necessary element? Why shouldn't

20   the test be something more like whether the

21   relationship between this entity and the State

22   of Missouri is such that an injury to MOHELA

23   will necessarily or presumptively be an injury

24   to the state?

25   And if that's the case, doesn't that

 1   all point to the reasons for setting up MOHELA

 2   as a very relevant factor and the degree of

 3   state control, the degree of the governor's

 4   control over MOHELA as a very important factor?

 5   GENERAL PRELOGAR: I don't think that

 6   those factors should count as important in the

 7   analysis, and to the extent the Court is

 8   inclined to broaden out the analysis beyond the

 9   principles I've articulated about corporate

10   separateness, I think the most critical fact

11   would be whether there's financial entanglement

12   and whether Missouri has itself decided to blur

13   those lines for purposes of making it

14   responsible for MOHELA's own liabilities.

15   JUSTICE JACKSON: And, in fact, isn't

16   that really, as you say, the most important

17   thing if economic injury is the point?

18   GENERAL PRELOGAR: Yes.

19   JUSTICE JACKSON: I mean, I had

20   understood that the injury that was being

21   asserted here was an economic injury, but if we

22   look at MOHELA and we see that its financial

23   interests are totally disentangled from the

24   state, it stands alone, it's incorporated

25   separately, the state is not liable for anything

1   that happens to MOHELA, I don't know how that

2   could possibly be a -- a -- a reason to say that

3   an injury to MOHELA should count as an injury to

4   the state.

5   GENERAL PRELOGAR: Yes, we agree

6   exactly with that analysis. And it's important

7   to think about the benefits that Missouri has

8   obtained from structuring MOHELA that way.

9   This is not the first lawsuit that

10   MOHELA's been involved in. Actually, MOHELA is

11   not involved in this particular suit, but in

12   prior suits, when MOHELA's been sued, the

13   state's been entirely absent because state law

14   makes clear that Missouri cannot be on the hook

15   for MOHELA's liabilities. It creates a wall of

16   separation financially between the two entities,

17   and Missouri gets a lot of benefit from that.

18   JUSTICE JACKSON: And so --

19   JUSTICE SOTOMAYOR: General --

20   JUSTICE JACKSON: -- if MOHELA is

21   being injured as a result of the plan or at

22   least if that's the allegation, MOHELA has the

23   ability to defend itself and its interests,

24   correct?

25   GENERAL PRELOGAR: Exactly. It's a

1   separate legal person. It has the right to sue

2   or be sued in its own name. There is nothing

3   that stands in the way of MOHELA asserting these

4   interests if it's experiencing financial harm,

5   and there's no --

6   JUSTICE JACKSON: But wouldn't --

7   GENERAL PRELOGAR: -- principle that

8   would support allowing Missouri now to interfere

9   with the separation it itself has created --

10   JUSTICE JACKSON: And so we would --

11   would we be breaking --

12   GENERAL PRELOGAR: -- just because it

13   doesn't like the policy.

14   JUSTICE JACKSON: -- would we be

15   breaking new ground then if, on this basis, we

16   found standing?

17   GENERAL PRELOGAR: Yes. I'm not aware

18   of any case that would support standing on this

19   basis.

20   JUSTICE ALITO: Well, would we be

21   breaking new ground if we found that there was

22   standing since we've never been presented, as

23   you admitted earlier, with a case that presents

24   precisely the issue that's here?

25   GENERAL PRELOGAR: It's true that it's

1   a new fact pattern, but I think that the Court

2   would be breaking new ground with respect to the

3   general principles that it's asserted in

4   third-party standing contexts. There, for

5   example, one of the critical facts the Court has

6   highlighted is whether there's some impediment

7   that would prevent the party whose rights and

8   interests are implicated from pursuing its own

9   claim. There is nothing like that here, and the

10   Court has never recognized a doctrine of

11   third-party standing on facts like these.

12   JUSTICE KAGAN: Do you have any

13   understanding about why MOHELA isn't here?

14   GENERAL PRELOGAR: No. The only

15   evidence in the record about MOHELA is that its

16   involvement in this suit has been responding to

17   sunshine law requests. I think it's possible

18   that loan servicers have --

19   JUSTICE KAGAN: Sunshine law requests

20   brought by?

21   GENERAL PRELOGAR: Brought by the

22   state. So Missouri served sunshine law requests

23   on MOHELA to get information about its financial

24   interests.

25   JUSTICE KAGAN: Because MOHELA was not

1   giving over information voluntarily?

2   GENERAL PRELOGAR: That's correct. I

3   think it just reinforces the sense that there

4   was separation here between the state and this

5   instrumentality. If I had to speculate, I think

6   that loan servicers, during the course of the

7   forbearance policy, have seen some of their

8   servicing fees be reduced in light of that

9   policy, and it's possible that they are waiting

10   for forbearance to lift so that they can start

11   collecting those fees again, and that might be a

12   possible reason why they made the judgment that

13   they don't want to stand in the way of this

14   forgiveness policy, because it's a critical

15   component of allowing payments to resume.

16   JUSTICE ALITO: Do you think there

17   might be a dependent relationship between

18   agencies like MOHELA and the federal government

19   since we're speculating about why they're not

20   here?

21   GENERAL PRELOGAR: Certainly, there

22   are contractual relationships, yes.

23   JUSTICE SOTOMAYOR: General --

24   JUSTICE JACKSON: Can I ask you, you

25   -- oh, I'm sorry.

1   JUSTICE SOTOMAYOR: General, there was

2   a Missouri case in 1979, Menorah Medical Center,

3   with an agency much like MOHELA, and, there, the

4   -- the Missouri Supreme Court said that that

5   entity was not the state. States are free to

6   organize themselves and structure themselves in

7   any way they want, correct?

8   GENERAL PRELOGAR: Correct, yes.

9   JUSTICE SOTOMAYOR: And it would be

10   odd for us to have a state say we're creating a

11   -- an -- a corporation, we're not going to be

12   responsible for its debts, we're not going to be

13   responsible for any of its contracts, we're not

14   going to be responsible for anything it does

15   financially, and the state itself says this is

16   not the state, it's an independent corporation,

17   and we're going to say instead that it is the

18   state, correct?

19   GENERAL PRELOGAR: Yes. I think that

20   it would be really anomalous to override the

21   separation that Missouri itself created between

22   it and MOHELA in the context of this case, this

23   case --

24   JUSTICE SOTOMAYOR: Or to override its

25   own state supreme court's decision that it is

1   not the state?

2   GENERAL PRELOGAR: Yes, that's

3   correct.

4   JUSTICE BARRETT: General, I'm

5   thinking of, in Arkansas versus Texas, it was

6   significant in that case that Arkansas owned the

7   land of the university. So it does seem that

8   Missouri has created this separateness with

9   respect to the liabilities of MOHELA.

10   What if -- and I'll ask this to the

11   other side. It's not really clear to me what

12   happens to MOHELA's assets. I mean, what if

13   MOHELA itself dissolves? There are no

14   shareholders. I mean, does your answer change

15   if, even though Missouri is not responsible for

16   the liabilities, it does have an ownership stake

17   in the assets of MOHELA?

18   GENERAL PRELOGAR: I think it's clear

19   under state law, Justice Barrett, that Missouri

20   doesn't have that kind of ownership interest in

21   the assets of MOHELA. And I would point in

22   particular to Missouri Revised Statute 173.410.

23   This is the provision that makes clear that

24   Missouri cannot take the assets of MOHELA and

25   appropriate them. They don't go into the

 1   general treasury. It makes clear instead that

 2   those assets are under MOHELA's exclusive

 3   control.

 4   So I think, as a matter of state law

 5   here, we don't have anything like the Arkansas

 6   case that you just referenced. And as well, the

 7   flip side of that is the provision of state law

 8   that likewise says Missouri is not going to be

 9   liable for any agreements or obligations or

10   liability of MOHELA so that if MOHELA goes out

11   there in the world and harms someone, the

12   state's not on the hook for the damage.

13   And that's another distinction from

14   the Arkansas case, where, under state law there,

15   it was clear that a suit against the

16   instrumentality was a suit against the state

17   itself.

18   JUSTICE BARRETT: Would you have the

19   same position with respect to federal

20   corporations? Like what about the FDIC or, you

21   know, organizations like that, what if the

22   agency didn't want to sue? Could the United

23   States sue to protect the federal government's

24   interests if the corporate identity was separate

25   like here?

1   GENERAL PRELOGAR: No. I think that

2 our principles would apply with respect to our

3 own instrumentalities. We could, of course, sue

4 to protect interests -- distinct rights and

5 interests of the United States. And so

6 Respondents have cited some cases, for example,

7 where a -- an instrumentality entered into a

8 contract on behalf of the United States in the

9 name of the United States as its agent, and we

10 had a contract right that we could enforce in

11 our own name, or there was another case that

12 involved a statutory right in the tax context to

13 offset, and the United States was permitted to

14 sue on that basis because it had its own rights

15 and interests.

16   But we've never done what the states

17 are doing here and, in the absence of any

18 underlying contract right or statutory right or

19 trust right, just asserted this all-purpose

20 ability to blur the distinction between the

21 sovereign and instrumentalities when they're

22 separately incorporated in this way.

23   JUSTICE BARRETT: Thank you.

24   CHIEF JUSTICE ROBERTS: Thank you --

25 thank you, General. I just have a question on

1   the -- on the major questions doctrine, and I

2   wanted just a little bit background for why -- I

3   want to get your views on how it applies.

4   You're -- you're arguing here that no

5   notice-and-comment proceeding was required

6   before the action taken on the half trillion

7   dollars of loans and that because of your view

8   that the President can act unilaterally, that

9   there was no role for Congress to play in this

10   either, and at least in this case, given your

11   view of standing, there's no role for us to play

12   in this -- in this either.

13   Now we take very seriously the idea of

14   separation of powers and that power should be

15   divided to prevent its abuse, and there are many

16   procedural niceties that have to be followed for

17   the same purpose.

18   The case reminds me of the one we had

19   a few years ago under a different administration

20   where the administration tried acting on its own

21   to cancel the Dreamers program, and we blocked

22   that effort.

23   And I just wonder, given the posture

24   of the case and given our historic concern about

25   the separation of powers, you would recognize at

 1   least that this is a case that presents

 2   extraordinarily serious, important issues about

 3   the role of Congress and about the role that we

 4   should exercise in scrutinizing that,

 5   significant enough that the major questions

 6   doctrine ought to be considered implicated?

 7   GENERAL PRELOGAR: Well, Mr. Chief

 8   Justice, let me try to respond to the concerns

 9   about both the role for the judiciary and the

10   role for Congress here.

11   We are not suggesting that there's no

12   role for the judiciary to play. It's that these

13   plaintiffs are not proper plaintiffs in this

14   case. Of course, the Court is bound by Article

15   III, and as I acknowledged to Justice Alito, we

16   think that loan servicers, for example, would

17   have standing to challenge this plan.

18   But the fact that the -- the loan

19   servicers haven't yet challenged to date doesn't

20   provide a basis to overlook those fundamental

21   Article III requirements and distort the meaning

22   of how this Court has previously articulated

23   standing principles in a circumstance where the

24   states can't otherwise demonstrate their

25   standing to sue.

1   With respect to the role for Congress,

2   I think what's clear is, of course, we're

3   recognizing that Congress could take additional

4   action if it disapproves this plan. In fact,

5   there were bills introduced to alter the text of

6   the HEROES Act to specifically provide that the

7   Secretary can't authorize loan discharge. Those

8   bills didn't pass, but that's one role Congress

9   can play.

10   I think, though, that if the Court is

11   focused on trying to ensure that Congress's role

12   in this process is respected, that just argues

13   in favor of reading this text in line with what

14   the plain language suggests. You know, these

15   are not words of limitation in the actual

16   assertion of authority here, waive or modify any

17   Title IV provision.

18   The states want this Court to say

19   Congress really only meant waive or modify some

20   of the provisions, not all of them, not the

21   central provisions that govern repayment and

22   cancellation, when those would have been obvious

23   candidates for waiver or modification in a loan

24   discharge program.

25   And if the Court overrides that clear

 1   HEROES Act language here, I think that it could

 2   only thwart Congress's intent in this particular

 3   posture of ensuring that you have the tools, the

 4   Secretary has the tools he needs to take care of

 5   Americans in a -- a national emergency

 6   situation.

 7   CHIEF JUSTICE ROBERTS: But whether

 8   Congress acted or not was a factor that we

 9   considered in the major questions doctrine, and

10   the way we considered it is whether or not the

11   issue that was before the Court is something

12   that had been seriously considered and debated

13   and was a matter of political controversy before

14   Congress.

15   That certainly is the case here,

16   right?

17   GENERAL PRELOGAR: That's right.

18   We're not disputing that this is a politically

19   significant action. But, if you're focused --

20   CHIEF JUSTICE ROBERTS: Well, not just

21   a politically significant action but one that

22   has the attention of Congress. The fact that it

23   hasn't acted under the major questions doctrine

24   but has considered the matter we cited as

25   support for the notion that maybe it should be

1   one for Congress.

2   If you're talking about this in the

3   abstract, I think most casual observers would

4   say, if you're going to give up that much amount

5   of money, if you're going to affect the

6   obligations of that many Americans on a subject

7   that's of great controversy, they would think

8   that's something for Congress to act on.

9   And if they haven't acted on it, then

10   maybe that's a good lesson to say for the

11   President or -- or the administrative

12   bureaucracy that maybe that's not something they

13   should undertake on their own.

14   GENERAL PRELOGAR: Well, let me react

15   to that in a couple of different ways, Mr. Chief

16   Justice.

17   First is to emphasize that the

18   unenacted legislation that the states are

19   pointing to here did not mirror the particulars

20   of this plan, so I don't think it would be right

21   to say that Congress has specifically focused on

22   this plan and disapproved it.

23   And if the Court were to go down that

24   road, I'd point again to the fact that

25   there's -- there's legislative inaction on the

1   other side of not amending the HEROES Act.

2   But I would think that the Court, as

3   it usually does, would place more focus on

4   enacted legislation. And, here, during the

5   pandemic, Congress enacted a provision of the

6   American Rescue Plan that specifically

7   anticipated and sought to facilitate a program

8   of loan discharge by providing that it wouldn't

9   be subject to federal taxation from 2021 to

10   2025.

11   So I think that that congressional

12   action actually carries more weight in the

13   analysis.

14   CHIEF JUSTICE ROBERTS: Thank you.

15   Justice Thomas, anything further?

16   JUSTICE THOMAS: Just briefly.

17   There's some discussion in the briefs

18   that going past with this provision or that

19   modification or waiver, that this is, in effect,

20   a cancellation of a debt -- that's really what

21   we're talking about -- and that as a

22   cancellation of $400 billion in debt, in effect,

23   this is a grant of $400 billion, and it runs

24   head long into Congress's appropriations

25   authority, and I'd like to give you some time to

 1   respond to that.

 2   GENERAL PRELOGAR: Sure. And -- and

 3   so, first, I want to take on the argument that

 4   some amici have made in this case about

 5   implicating appropriations authority.

 6   Of course, implementing this program

 7   doesn't require that any money be drawn from the

 8   Treasury, and so I don't think that it strictly

 9   raises an appropriations issue, which is why I

10   think the states aren't raising that argument

11   here.

12   And to the extent that the concern is

13   about the Secretary taking action in a way that

14   Congress didn't authorize, it seems to me that

15   it just collapses back into the central

16   interpretive question in this case, which is:

17   Does the HEROES Act authorize the Secretary's

18   action or not?

19   With respect to the concern you raised

20   that the -- the effect of loan forgiveness here

21   will result in cancellation of a measure of debt

22   for the affected borrowers, of course, that's

23   true, but I don't think that that is materially

24   different from the kind of effects you can see

25   from other types of authority that's long been

 1   exercised under the HEROES Act.

 2   You know, take the forbearance policy

 3   that I have mentioned. This has been powerful

 4   relief for debtors -- I'm sorry, for

 5   student-loan borrowers while it's been in place

 6   with respect to their debt.

 7   And it's had, you know, kind of

 8   permanent financial effects on the government,

 9   over $150 billion over the course of that

10   forbearance program by the end of it, but it's

11   been absolutely critical relief. And it's

12   provided that kind of help to the student-loan

13   borrowers as well who haven't had to make those

14   interest payments or any payments on their loans

15   while it's been in place.

16   And that too can have the kind of

17   consequence of resulting in cancellation of

18   principal. During the period of forbearance,

19   the -- the years that borrowers spent in

20   forbearance count towards loan forgiveness

21   programs, for example. So, at the end of the

22   day, those borrowers in income-driven repayment

23   or public service loan forgiveness are going to

24   pay less on their loan overall.

25   It will be forgiven three years

 1   earlier or without those three years of payments

 2   that they weren't obligated to make. But I

 3   don't think that in any sense calls into

 4   question the legitimacy and authorization behind

 5   the forbearance policy.

 6   JUSTICE THOMAS: Well, I -- I think

 7   that forbearance fits more comfortably in

 8   modify -- waive or modify language. It's you

 9   simply forbearing on collecting an underlying

10   debt, but you don't cancel the debt. And that's

11   what we're talking about here.

12   And, certainly, there's a cost to

13   that, I understand, but I -- I still think that

14   you haven't fully explained why, if you looked

15   at this, you could not -- you would not argue

16   that the Secretary could actually grant four

17   billion -- $400 billion.

18   GENERAL PRELOGAR: Well, he --

19   JUSTICE THOMAS: Do we agree on that?

20   GENERAL PRELOGAR: I'm sorry --

21   JUSTICE THOMAS: He could not give

22   grants of --

23   GENERAL PRELOGAR: -- outside the

24   context of the HEROES Act?

25   JUSTICE THOMAS: Yes.

1   GENERAL PRELOGAR: That's right. We,

2   of course, are premising the relief here --

3   JUSTICE THOMAS: So you would --

4   GENERAL PRELOGAR: -- specifically on

5   the HEROES Act.

6   JUSTICE THOMAS: -- you would rely on

7   appropriations from Congress for that, right?

8   GENERAL PRELOGAR: Yes.

9   JUSTICE THOMAS: And the argument is

10   that you are, in effect, doing that without

11   appropriations from Congress?

12   GENERAL PRELOGAR: Well, Justice

13   Thomas, I don't see how you could distinguish

14   that from any of the other forms of relief under

15   the HEROES Act. All of those forms of relief

16   cost the federal government money and often in

17   significant sums.

18   You know, one of the quintessential

19   forms of relief that the government has offered

20   before in periods of extended deferment for

21   soldiers fighting abroad is to pay the interest

22   on their loans for them.

23   And I think you could probably make

24   the same argument of -- of questioning, well,

25   does that cost the government money? Is there

1   an appropriations overlay there? Does that

2   transform the nature of the program because it

3   takes a loan with interest and makes it an --

4   effectively an interest-free loan?

5   But that's exactly what Congress

6   attend -- intended under this authority. It's

7   to make those changes to the program in direct

8   response to and in direct proportion to the

9   situation the Secretary confronts that will

10   otherwise leave that borrower worse off.

11   CHIEF JUSTICE ROBERTS: Justice Alito?

12   Justice Sotomayor?

13   JUSTICE SOTOMAYOR: Returning to the

14   standing question, the states basically say

15   we're going to lose money in taxation one way or

16   another.

17   In the Texas case, you argued that we

18   should be looking at the cost benefit, and some

19   of the amici here say that there will be a

20   tremendous benefit to the states from this

21   cancellation because that extra money will

22   result in increased consumer spending and

23   decreased housing insecurity, less defaults on

24   other loans that those borrowers may have, et

25   cetera.

 1   Do you agree with those amici that the

 2   economic benefits outweigh any alleged financial

 3   harm in this case?

 4   GENERAL PRELOGAR: As a factual

 5   matter, we do not disagree. As a legal matter,

 6   we haven't asked the Court to rely on that as a

 7   basis for standing because we think that the

 8   invocation of these harms to tax revenues are so

 9   easily answered under this Court's precedent.

10   And I would point the Court to the

11   Pennsylvania versus New Jersey case. It is on

12   all fours with this one, precisely identical.

13   And so we just think you don't need to go down

14   the road of thinking about some of the broader

15   arguments about tax injury in this case because

16   it's so clear that this Court has already

17   rejected the very injury the states are

18   asserting under the Pennsylvania case.

19   JUSTICE SOTOMAYOR: In Pennsylvania,

20   it was a tax credit that was going to be

21   removed, so it's almost identical to this,

22   correct?

23   GENERAL PRELOGAR: Exactly.

24   Pennsylvania had issued its tax credit before

25   the New Jersey law that they were opposed to and

1   had extended it to residents when they pay taxes

2   in other states.

3   And then New Jersey came along and

4   changed its tax code to impose newly a -- a

5   commuter tax that would ultimately deplete

6   Pennsylvania's tax revenues, and the Court said

7   that's self-inflicted because nothing required

8   Pennsylvania to extend that tax credit, nothing

9   prohibits Pennsylvania from withdrawing it now.

10   And that analysis applies equally here

11   because, of course, there is nothing that

12   requires the states to tie their definition of

13   gross income to the federal tax code. Two of

14   the states here, Arkansas and Missouri, don't do

15   that. And there's nothing that prevents them

16   from changing that if they don't want to honor

17   the -- the forgiveness from taxation that the

18   federal government is now under.

19   JUSTICE SOTOMAYOR: Thank you.

20   CHIEF JUSTICE ROBERTS: Justice Kagan?

21   JUSTICE KAGAN: General Prelogar, I

22   want to change the subject a bit. The -- your

23   friends on the states' side and also the

24   borrowers in the other case have a number of

25   statutory arguments. They frame them as

1   statutory arguments, saying this wasn't

2   necessary under the terms of the statute, saying

3   that it leaves borrowers better off, not worse

4   off, again, pointing to statutory language

5   saying that, you know, it -- the borrowers it

6   targets aren't worse off because of the

7   pandemic.

8   Now I'm not sure that I understand

9   really those arguments as statutory arguments as

10   much as I understand them as arbitrary and

11   capricious arguments, that, essentially, they

12   are saying that the Secretary just did not say

13   the right things, did not make the right

14   findings, did not properly justify what he did

15   here, that there's no sense in which we read

16   this memorandum and we come away thinking, oh,

17   yes, these harms were caused by the pandemic and

18   -- and there's a basis for this action and --

19   and a -- and a sufficient basis for this action.

20   So I wanted to give you a chance to

21   talk about that. It's -- it's essentially the

22   tie to the pandemic of the sort of harms that

23   the Secretary said made relief appropriate.

24   GENERAL PRELOGAR: So let me say at

25   the outset that I agree that those kinds of

 1   arguments, I think, find a much more natural

 2   home in arbitrary and capricious analysis, and

 3   the reason for that is because it's clear that

 4   Congress tolerated overbreadth in this statute.

 5   It told the Secretary, for example, that he can

 6   act on a "class-wide basis." He doesn't need to

 7   go case by case with respect to each individual

 8   borrower who stands to benefit under HEROES Act

 9   relief. It said he should take action to

10   ensure, that is, make certain, that borrowers

11   aren't left worse off as may be necessary, not

12   as strictly necessary.

13   So, once we're in the world where it's

14   clear under the statute that the Secretary isn't

15   violating the HEROES Act by providing relief

16   that's class-wide and may have the effect of

17   offering critical benefits to borrowers who, as

18   it turns out, wouldn't have needed them in the

19   absence of the relief, then I think the question

20   boils down to has the Secretary justified his

21   line-drawing and the scope of relief, and that

22   really should function under arbitrary and

23   capricious review.

24   And, here, I think, with respect to

25   all of the states' arguments, they lack merit

        1   when you look at the Secretary's explanation for

        2   why this relief, in his judgment, was necessary.

        3   He documented the substantial economic impacts

        4   of the COVID pandemic across the entire country

        5   that's already necessitated unprecedented levels

        6   of aid that we've never seen before, $5 trillion

        7   in other pandemic relief efforts, this

        8   forbearance policy under the HEROES Act that the

        9   Department had never put into place before.

       10   So he documented those financial

       11   effects the pandemic has had on borrowers, and

       12   then he explained, using data that he examined,

       13   that huge swaths, substantial percentages of

       14   borrowers were going to be at serious risk of

       15   default and delinquency or inability to pay

       16   their loans once forbearance ends.

       17   And that ultimately justified his

       18   decision about how to craft the limits within

       19   the program and the scope of relief to offer.

       20   And I think that all of the states' arguments

       21   about how that wasn't strictly necessary or that

       22   maybe it doesn't have enough of a connection to

       23   the pandemic are answered in full by the

       24   Secretary's analysis here.

       25   JUSTICE KAGAN: Thank you.

1   CHIEF JUSTICE ROBERTS: Justice

2   Gorsuch?

3   JUSTICE GORSUCH: I -- I'd like to

4   follow up on Justice Kagan's question, General.

5   Under State Farm, one of the things

6   that the government must normally do is, in its

7   memoranda, explain not just the -- the benefits

8   of its proposed course of action but also

9   grapple with the costs or negative effects of --

10   of a program that it proposes.

11   And your friends on the other side

12   argue that that's another deficiency in the

13   Secretary's memorandum, and I'd like to give you

14   the chance to respond to that.

15   GENERAL PRELOGAR: Yes, of -- of

16   course. So I want to say at the outset that my

17   friends are mistaken to suggest that the

18   Secretary didn't even consider costs here. The

19   Department extensively modeled the costs

20   associated with this program and submitted those

21   --

22   JUSTICE GORSUCH: Oh, I -- I -- I --

23   GENERAL PRELOGAR: -- cost estimates

24   to OMB.

25   JUSTICE GORSUCH: -- I'm -- I don't

       1   just mean the numbers --

       2   GENERAL PRELOGAR: Yeah.

       3   JUSTICE GORSUCH: -- but, generally,

       4   the -- the negative effects to the economy, to

       5   other persons, to people who don't have this

       6   opportunity for debt relief. There are a

       7   variety of factors that, under State Farm,

       8   normally the government would have to consider,

       9   and -- and your friends on the other -- other

      10   side argue those are not present in this

      11   memorandum.

      12   GENERAL PRELOGAR: Well, I think that

      13   those were -- were certainly part and parcel of

      14   the Secretary's determination about how to

      15   tailor this relief. The Secretary recognized

      16   that the central purpose of the HEROES Act was

      17   implicated here because there were going to be

      18   millions and millions of student-loan borrowers

      19   who were at serious risk of default and who were

      20   in a worse position because of the pandemic.

      21   But then he decided to tailor the plan

      22   to look at that -- those particular risks and

      23   decide on the scope of relief to offer those

      24   borrowers. And, of course, the costs associated

      25   with that are the flip side of providing HEROES

 1   Act relief in any circumstance.

 2   There are always going to be the --

 3   the costs to the government of offering that

 4   benefit to borrowers, and it's in line --

 5   JUSTICE GORSUCH: Again, not -- not

 6   just the costs to the government. I'm sorry to

 7   interrupt. But --

 8   GENERAL PRELOGAR: Yeah.

 9   JUSTICE GORSUCH: -- what I think they

10   argue that is missing is costs to other persons

11   in terms of fairness, for example, people who

12   have paid their loans, people who don't -- have

13   -- have -- have -- have planned their lives

14   around not seeking loans and people who are not

15   eligible for loans in the first place and that a

16   half a trillion dollars is being diverted to one

17   group of favored persons over others.

18   I think that's the nature of their

19   argument, in addition to, as you point out, the

20   cost to the fisc.

21   GENERAL PRELOGAR: The --

22   JUSTICE GORSUCH: And I didn't see

23   anything in the memorandum that dealt with those

24   kinds of questions, and if there is something,

25   I'd be appreciative if you could point me to it.

1   GENERAL PRELOGAR: No, there's not,

2   but that's because I think that those kinds of

3   arguments are inconsistent with the statutory

4   scheme that Congress set up here. Congress

5   already made the judgment that in the context of

6   a national emergency, you should be able to

7   provide borrowers with this kind of relief to

8   serve this purpose.

9   And so I think, for -- for the states

10   to suggest that it's incumbent on the Secretary

11   to say, actually, I'm not going to do that, even

12   though Congress wanted to -- me to ensure that

13   borrowers won't be left worse off, is -- is just

14   at war with the whole statutory purpose.

15   JUSTICE GORSUCH: I appreciate that.

16   Congress has given the executive

17   branch a lot of emergency authority, and I -- I

18   think your argument rests on that. But it also

19   requires generally the President to specify the

20   provisions of law under which he proposes that

21   he or others will act. That's 50 U.S.C. 1631, I

22   think, my notes are right.

23   And I'm just wondering, did that

24   happen here?

25   GENERAL PRELOGAR: Yes, it did. So

 1   the COVID-19 emergency, the specific provisions

 2   that he invoked were part of the Social Security

 3   Act and HHS's authority to target the spread of

 4   disease. I can't give you the exact citation

 5   here, but that determination was made.

 6   JUSTICE GORSUCH: Did -- did he

 7   indicate anything under the HEROES Act or the

 8   Department of Education that's acting in this

 9   case?

10   GENERAL PRELOGAR: No, but I think

11   that it's clear that the HEROES Act is linked to

12   the declaration of the national emergency, not

13   the other way around.

14   JUSTICE GORSUCH: Okay. And then,

15   finally, on standing, in -- in the New York

16   census case, the majority of this Court held

17   that the failure to count an individual,

18   potential failure to count an individual,

19   undercount the census, would have potential

20   effects to the State of New York in the terms --

21   in terms of the benefits it might later receive.

22   That kind of knock-on effect was sufficient to

23   constitute standing in that case.

24   And I'd just like to get your thoughts

25   on how you'd have us distinguish that.

1   GENERAL PRELOGAR: Sure. So, in that

2   case, of course, the Court was looking at a

3   census count that was going to plug in directly

4   to the amount of federal funding that the state

5   would receive. And I think that, you know, in

6   the kind of terminology that we've been using

7   and thinking about this issue with, that was a

8   direct effect, that, effectively, the action

9   would, by virtue of determining federal funding

10   for the state in that way, operate directly on

11   the state or -- or at least determine its rights

12   and interests.

13   And, here, there's not the same kind

14   of direct effect. Of course, as I've already

15   mentioned to Justice Sotomayor, we think that

16   this is a self-inflicted injury to begin with,

17   so the Court doesn't need to get into those

18   issues. But, even if it does, here, the kind of

19   downstream effects on tax revenues bring this

20   case within Florida versus Mellon as the closest

21   analogue and not Department of Commerce.

22   JUSTICE GORSUCH: Thank you.

23   CHIEF JUSTICE ROBERTS: Justice

24   Kavanaugh?

25   JUSTICE KAVANAUGH: I'd like to pick

 1   up on the Chief Justice's and Justice Thomas's

 2   questions on statutory text and then our

 3   precedent.

 4   I think you said earlier what was

 5   Congress in 2003 supposed to do in terms of

 6   advance authorization. But, of course, they

 7   could have in 2003 referred to loan cancellation

 8   and loan forgiveness, and those are not in the

 9   statutory text.

10   So then that leaves us with a

11   situation that I think we've seen before, an old

12   statute with a general language, Congress

13   specifically considering the present issue

14   repeatedly but not, as you acknowledge, passing

15   legislation that would authorize the specific

16   act -- and then, in the wake of Congress not

17   authorizing the action, the executive,

18   nonetheless, doing a massive new program.

19   And that seems problematic under --

20   going back to the Benzene case, the Brown &

21   Williamson, UARG. You know the line of cases.

22   So why does this case not fit into

23   that formula that we've seen before in prior

24   cases?

25   GENERAL PRELOGAR: So there was a lot

 1   packed in there, and I want to be careful and

 2   try to respond to each of the considerations you

 3   raise because I think, actually, down the line,

 4   this case is a far cry from those prior

 5   situations the Court has confronted.

 6   You mentioned the idea of taking an

 7   old statute with, you know, general language or

 8   cryptic language and pressing it into service.

 9   I don't think that that is a fair

10   characterization of this use of the HEROES Act.

11   The whole point of this statute, its central

12   mission and function, is to ensure that in the

13   face of a national emergency that is causing

14   financial harm to borrowers, the Secretary can

15   do something. He can alter the student loan

16   program to ensure that they're not worse off.

17   So there's not the same mismatch here

18   of taking an old statute and dusting it off and

19   deploying it in a context where Congress could

20   never have imagined it would be used before.

21   Instead, this is a perfect fit with the problem

22   that the Secretary confronted.

23   You also suggested that there would

24   have been a clearer way for Congress to

25   formulate this language, that there's no express

 1   reference here. But I think that that doesn't

 2   carry a lot of significance in this context

 3   because, of course, Congress didn't enumerate

 4   any of the possible forms of relief under the

 5   HEROES Act. It says that the Secretary can

 6   consider waiving or modifying all Title IV

 7   provisions.

 8   And, certainly, if there was an

 9   enumerated list, you might be able to draw

10   inferences from that, but, here, I think the

11   opposite inference applies, that Congress wanted

12   to cover the waterfront and ensure in advance

13   that the Secretary had the tools depending on

14   whatever situation he confronted to make sure

15   that student-loan borrowers weren't going to be

16   left worse off.

17   You mentioned the congressional

18   inaction. And I think that it -- it's true that

19   I acknowledge that that demonstrates that this

20   is a politically significant issue. We have --

21   we have never contested that point. But there

22   again, as I mentioned to the Chief Justice, we

23   have inaction on both sides.

24   Congress has not amended the HEROES

25   Act and instead enacted the provision of the

1   American Rescue Plan that anticipated this --

2   this program in particular and facilitated it by

3   ensuring that those discharges would not be

4   subject to federal taxation.

5   And then the other thing I would add,

6   you did -- you did not put this in, but if

7   you'll indulge me --

8   JUSTICE KAVANAUGH: Yeah.

9   GENERAL PRELOGAR: -- this is not a

10   situation where the Secretary is acting outside

11   the heartland of his authority. In some of the

12   cases that you've mentioned, you have, you know,

13   concerns that the -- the agency is acting

14   outside the core of its domain, the CDC

15   inserting itself in the landlord/tenant

16   relationship, for example.

17   But that's not what we have here.

18   This is the student loan program. That falls

19   within the wheelhouse of the Secretary of

20   Education. He exercises comprehensive authority

21   over that program. These are federal loans

22   between the federal government and student-loan

23   borrowers. So this is a situation where the

24   Secretary is really acting within the core of

25   his expertise and his authority.

 1   JUSTICE KAVANAUGH: Something else you

 2   said earlier was that we shouldn't necessarily

 3   apply that line of precedent in this situation

 4   because this is not a regulatory program but a

 5   -- but a benefits program.

 6   But I want to push back a little bit

 7   on that and get your response, which is, in

 8   something like this, there are going to be

 9   winners and losers, and that raises similar

10   concerns about individual rights, individual

11   liberty that are present arguably in regulatory

12   programs as well.

13   And why, therefore, wouldn't the same

14   line of precedents that we've applied in the

15   regulatory context apply also in the benefits

16   context to consider whether we need specific

17   express congressional authorization?

18   GENERAL PRELOGAR: Well, I think that

19   at the very least, to the extent that there are

20   those considerations that you referenced,

21   they're not direct in the same way that

22   expansive regulatory authority is.

23   You know, when you've got a government

24   program that is -- as -- as the Court has said

25   before, constitutes extravagant regulatory

 1 authority, that I -- takes an identifiable group

 2 of individuals or entities and directly imposes

 3 burdens or costs on them.

 4   And I think there is a distinction

 5 with the benefit context when it comes to how

 6 Congress is likely to legislate and its general

 7 comfort level with broadly empowering the

 8 executive to provide benefits to Americans,

 9 especially in the context of an emergency

10 situation.

11   But even if you didn't think that that

12 benefits and regulation distinction should carry

13 the day and be a bright-line rule, at the very

14 least, I think it should factor into the

15 analysis when applying interpretive principles

16 here and in looking at what Congress is -- is

17 doing.

18   And as I mentioned before and -- and

19 would love to finish here, you know, think about

20 what Congress is supposed to do. There you are,

21 Congress in 2003, thinking we can't predict the

22 future, we don't know exactly what national

23 emergencies will happen, but we -- what we want

24 to ensure is that we are empowering the federal

25 government to take care of student-loan

         1   borrowers and not leave them at substantial risk

         2   of being worse off with their ability to repay

         3   their loans.

         4   And the language that Congress enacted

         5   here is a perfect fit to accomplish that goal.

         6   And it's hard to see what Congress could have

         7   done differently.

         8   JUSTICE KAVANAUGH: Last question.

         9   Broadening it out and thinking about, you

        10   mentioned emergencies, the history of this Court

        11   with respect to executive assertions of

        12   emergencies.

        13   Some of the biggest mistakes in the

        14   Court's history were deferring to assertions of

        15   executive emergency power. Some of the finest

        16   moments in the Court's history were pushing back

        17   against presidential assertions of emergency

        18   power. And that's continued not just in the

        19   Korean War but post-9/11 in some of the cases

        20   there.

        21   So, given that history, there's a

        22   concern, I suppose, that I feel at least about

        23   how to handle an emergency assertion. You know,

        24   some of the amicus briefs, one of them from a

        25   professor says this is a case study in abuse of

 1   executive emergency powers. I'm not saying I

 2   agree with that. I'm just saying that's the

 3   assertion.

 4   And I want to get your assessment --

 5   this is a big-picture question, so I'll give you

 6   a little time -- of how we should think about

 7   our role in assertion of presidential emergency

 8   power given the Court's history.

 9   GENERAL PRELOGAR: Well, I think,

10   in -- in light of that history in all of the

11   contexts that you identified, it's aware the

12   distinction between regulation and benefits

13   really makes a difference. And it actually

14   tracks some of the concerns that have been

15   raised about standing and the Chief Justice's

16   questions about who could actually sue on this

17   plan and what role there is for the judiciary.

18   To the extent that there is a limited

19   category of people who have the actual kind of

20   cognizable Article III harm that would permit

21   standing in a case like this one, I think that

22   just shows that that's because, when the

23   government is administering a benefits program,

24   there are fewer reasons to be concerned that it

25   is going to have the kind of profound burdens

 1   or -- or regulatory effects that might prompt a

 2   note of caution in other contexts involving

 3   exercises of emergency powers.

 4   Instead, I think that the

 5   considerations all line up on the other side

 6   when you think about an emergency situation. It

 7   is logical for Congress, in -- in confronting

 8   that possibility, to think we want to make sure

 9   that without delay the executive branch can take

10   care of Americans and can get them essential

11   benefits.

12   It did so here with language that has

13   many other limitations, so we are not claiming

14   just limitless authority for the federal

15   government to do what it wants in an emergency.

16   The HEROES Act limits the

17   circumstances that can trigger the authority.

18   It says who you can help. It says how you can

19   help them. And it enumerates the purposes that

20   the aid has to serve.

21   So, in all of those ways, Congress can

22   find that authority. But, in a circumstance

23   like this one, where the Secretary has made the

24   findings that without this critical relief for

25   debtors we are going to have a wave of default

1   across the country with all of the negative

2   consequences that has for borrowers, I think it

3   is precisely the type of context where the

4   executive should be able to implement those

5   emergency powers.

6   JUSTICE KAVANAUGH: Thank you very

7   much.

8   CHIEF JUSTICE ROBERTS: Justice

9   Barrett?

10   JUSTICE BARRETT: General, my first

11   question is clarifying because I think I may

12   have misunderstood. You said at the start of

13   your argument that the Secretary both waived and

14   modified.

15   I had understood that the Secretary

16   only relied on the modification in the Federal

17   Register at the relevant cites at 87 Federal

18   Register 61512 and 61514.

19   Is it in those same -- did I just miss

20   in there, did he also specifically say waive?

21   GENERAL PRELOGAR: So I -- I

22   understand where your confusion comes from --

23   JUSTICE BARRETT: Yes.

24   GENERAL PRELOGAR: -- because, at

25   times in the Federal Register, he spoke of

1 modifications and then, if you read down in the

2 next paragraph, he said these waivers will. So

3 I think he was treating these as both waivers

4 and modifications.

5   And the relevant decision memo

6 specifically says, I hereby issue waivers and

7 modifications of the relevant provisions of

8 Title IV. That's at the cite I gave earlier at

9 JA 261. So I would look at that as well to

10 understand what the Secretary was doing.

11   JUSTICE BARRETT: Okay. And to be

12 clear, and I think maybe some of the confusion

13 is waivers. I guess, when I saw that in the

14 language, I thought he was talking -- using

15 waiver as a synonym for cancellation there with

16 respect to the underlying debt, the waiver of

17 the obligation to pay back the principal.

18   And just to be clear, waiver in the

19 statute refers to waiving the statutory and

20 regulatory provisions, not waiving the

21 obligation to repay?

22   GENERAL PRELOGAR: That's correct. So

23 the -- if you kind of trace through the specific

24 provisions that he invoked, they are statutory

25 and regulatory provisions and they establish the

1 terms of the student loan program and then also

2 deal with discharge and cancellation authority.

3   And he said that he was issuing

4 waivers and modifications of -- of all of those

5 provisions, and I think the right way to

6 conceptualize this is that he was waiving the

7 elements of the discharge and cancellation

8 provisions that are inapplicable in this program

9 that would limit eligibility to other contexts

10 and then modifying the provisions to bring it in

11 line with this program and the -- and the

12 student-loan borrowers who are eligible for

13 relief.

14   JUSTICE BARRETT: So kind of like, if

15 you think of it as red penciling, both deleting

16 and then adding back in, waiving and then

17 putting his own requirements in?

18   GENERAL PRELOGAR: That's right. And

19 the states have suggested there was something

20 improper about adding the requirements in, but

21 the HEROES Act directs him to do this. That

22 subsection (b)(2) specifically says he has to

23 publish the terms and conditions for the loan

24 program that are going to apply in lieu of the

25 waived and modified provision.

 1   So there's nothing improper about the

 2 Secretary delineating how those waivers and

 3 modifications were going to operate.

 4   JUSTICE BARRETT: Okay. Next question

 5 is also a clarification because I want to be

 6 sure I understand your position on Lebron and

 7 the overlap potentially between when we're

 8 thinking about are you acting as an arm of the

 9 government for purposes of say, like in the

10 Amtrak sense, are you bound by the First

11 Amendment, and are -- is MOHELA part of the

12 government of Missouri for purposes of standing.

13   So could MOHELA, say, deny loans to

14 people on the basis of their race or their

15 religion? Would the First Amendment bind

16 MOHELA?

17   GENERAL PRELOGAR: I think that MOHELA

18 likely would qualify as a state actor under the

19 Lebron test, but I don't think that the Lebron

20 test should in any way be controlling for

21 Article III standing purposes.

22   JUSTICE BARRETT: Well, why would that

23 be? How can they be part of the government for

24 purposes of the state action doctrine but then

25 not for purposes of standing? Either they are

 1   or they are not part of the government of

 2   Missouri, right?

 3   GENERAL PRELOGAR: So we're certainly

 4   not disputing that they could be, that they're a

 5   public instrumentality, that they have

 6   governmental functions, and that's the kind of

 7   inquiry the Court would engage in to determine

 8   whether they're brought within the state action

 9   doctrine.

10   But one way to think about this is

11   that the Court, in trying to kind of analyze

12   who's a state actor, has made clear that it

13   would be inappropriate for a state to be able to

14   separately incorporate an instrumentality, for

15   example, and that way evade the strictures of

16   the Constitution. There's kind of a good

17   equitable reason to ensure that states can't

18   thereby unbind themselves from the Bill of

19   Rights with respect to fundamental rights of

20   citizens.

21   Here, I think all of the equitable

22   considerations line up in precisely the opposite

23   direction. We have a situation here where

24   Missouri has benefited from the corporate

25   separateness. It's ensured that it's not going

 1   to be responsible for MOHELA's debts. And to

 2   now allow it to come in and blur that line and

 3   say, actually, you should just treat it and this

 4   separate corporation as one and the same would

 5   actually produce the kind of inequity that the

 6   state action doctrine is guarding against.

 7   JUSTICE BARRETT: So two different

 8   buckets, three if you throw in sovereign

 9   immunity too? You would say one test is for

10   purposes of state action, another test for

11   purposes of sovereign immunity, and another test

12   for purposes of standing?

13   GENERAL PRELOGAR: That's right. And

14   for sovereign immunity, I just want to be clear

15   that we don't think MOHELA actually qualifies as

16   an arm of the state for sovereign immunity

17   purposes because, there, one of the critical

18   factors is whether a lawsuit against the

19   instrumentality can get at the state treasury.

20   And, here, the financial separation makes clear

21   that there is a strict wall and that Missouri's

22   not going to be responsible for MOHELA's debts.

23   Lower courts have gone both directions

24   on this, but we think that under this Court's

25   precedent, MOHELA wouldn't qualify as an arm of

1   the state. Even if it did, though, yes, we

2   think that there is a different inquiry under

3   Article III.

4   JUSTICE BARRETT: Right. Okay. And

5   now I just want to return to Justice Kagan's

6   questions about whether we think about these as

7   statutory arguments or arbitrary and capricious

8   arguments, some of these arguments about are you

9   leaving them worse off or better off.

10   Specifically, I want to focus on the causation.

11   It seems to me that the government's

12   position must be that the HEROES Act permits

13   but-for causation and it doesn't require

14   proximate cause because the Secretary's memo

15   also refers to things like Russia's invasion of

16   Ukraine and, you know, inflation and other

17   things that would -- well, I mean, the invasion

18   of Ukraine has nothing to do with COVID, but the

19   other things that would have a more attenuated

20   relationship to COVID.

21   So is that your position, it would be

22   a but-for?

23   GENERAL PRELOGAR: Yes, that is our

24   position. We think that it should be but-for

25   causation. And the states were challenging that

1   below. They haven't actually revived those

2   arguments here, and I don't understand them to

3   be -- to be urging a different standard, or at

4   least they haven't made that a central aspect of

5   their arguments in the Court.

6   JUSTICE BARRETT: But would that bear

7   on the question of whether this is a statutory

8   interpretation question or not, whether this is

9   within the Secretary's authority? I mean, below

10   the government took the position too that even

11   in 10 years from now it could forgive loans

12   based on COVID if effects were lingering, right?

13   GENERAL PRELOGAR: No. The district

14   court completely misunderstood that colloquy at

15   oral argument. What government counsel said in

16   that oral argument is, if the national emergency

17   is ongoing, if we are still in 10 years in the

18   midst of a raging COVID pandemic and it's

19   producing all of those same harms, he said it

20   would be hard to fathom. And, of course, we

21   know that we are actually as a nation now

22   working to recover from the pandemic. But, in

23   the counterfactual world, as he understood the

24   hypothetical, he said the HEROES Act authority

25   would continue to apply.

 1   We are not suggesting that you could

 2   have that kind of temporal attenuation from a

 3   national emergency and say that, you know,

 4   ending today and going forward 10 years from

 5   now, you could point back to COVID and in this

 6   time period as a basis for HEROES Act relief.

 7   But, of course, we don't have anything

 8   like that. The Secretary acted now in the midst

 9   of the pandemic and in -- in recognition that

10   it's time for the forbearance policy to end, but

11   that is going to leave huge numbers of borrowers

12   unable to pay their loans.

13   JUSTICE BARRETT: That's very helpful.

14   Thank you.

15   CHIEF JUSTICE ROBERTS: Justice

16   Jackson?

17   JUSTICE JACKSON: Yes. I have two

18   questions, one concrete and one big picture.

19   The concrete question comes from a --

20   a statement that you make in your reply brief

21   about MOHELA standing to earn offsetting fees.

22   Can you spell out what those off -- by -- and by

23   that, I mean offsetting fees from the discharges

24   so that we aren't even really sure, you know,

25   what the net loss would be.

 1   Can you spell out a little bit more

 2   about those?

 3   GENERAL PRELOGAR: Yes. So, under the

 4   Department's contracts with MOHELA, MOHELA

 5   receives fees for discharging accounts. And we

 6   were making the point that, here, Missouri

 7   hasn't come forward with any allegations that

 8   MOHELA will actually, sum total, suffer

 9   financial injury under this plan.

10   And this is all just in service of

11   making the -- the broader point that any

12   financial effects downstream on the state here

13   are attenuated and speculative.

14   JUSTICE JACKSON: So we don't know

15   really what the ultimate loss would be to

16   MOHELA, even if we believed that MOHELA is part

17   of the state?

18   GENERAL PRELOGAR: That's right. The

19   states haven't offered any evidence in that

20   regard to substantiate their assertion of

21   standing.

22   JUSTICE JACKSON: All right. And --

23   and I also have a big picture question about

24   standing. You've been arguing that standing

25   here would be a reach if we were to, for

 1 example, find that, you know, MOHELA somehow --

 2 losses to it count for the purposes of the state

 3 based on established standing principles.

 4   And what I've been mulling and

 5 wondering is whether the same concerns about the

 6 political significance of this case that the

 7 Chief pointed to could be a reason for us to

 8 hold the line in terms of thinking about our

 9 standing doctrine and whether or not we should

10 expand it in this area.

11   I understood that the standing bar

12 really, you know, as applied in a case like

13 this, would allow the political branches to hash

14 this out without interference, you know, from a

15 torrent of lawsuits brought by states and

16 entities and individuals who don't have a real

17 personal stake in the outcome. And, in some

18 ways, it's not unlike a case we heard last week

19 where people were very concerned about, you

20 know, lawsuits against tech companies and how

21 they might hobble these companies if we allowed

22 them to go forward.

23   And I guess I have that same worry

24 about the operation of the federal government

25 and -- and its ability to govern. If we look at

 1 our standing doctrine in cases like this and we

 2 find that, you know, even the most minor state

 3 interest, a dormant fund that hasn't been, you

 4 know, funded or used by the state in 15 years,

 5 if that can be the basis for standing, I -- I

 6 guess I'm concerned that we're going to have a

 7 problem in terms of -- of -- of the federal

 8 government's ability to operate.

 9   So my question is: Is this a

10 legitimate concern and should we think -- be

11 thinking in cases like this about that type of

12 concern as we ponder whether to expand our

13 standing doctrines?

14   GENERAL PRELOGAR: I think it is a

15 legitimate concern. The Court has never

16 suggested before that it should alter ordinary

17 Article III principles and allow plaintiffs to

18 sue based on concerns about the significance of

19 the action.

20   And, in fact, the Court has said again

21 and again that the fact that no one might have

22 standing to sue about an action doesn't mean

23 that you should alter Article III and allow a

24 suit to proceed, because the judiciary doesn't

25 sit as a roving commission to rule on the

 1   legality of either Congress's enactments or the

 2   executive's implementation of those enactments.

 3   But I think it would be particularly

 4   anomalous in this case to accept any of the

 5   states' attenuated theories of standing because

 6   there isn't even a situation where there's no

 7   other identifiable plaintiff or possibility to

 8   have the -- the courts weigh in on these issues.

 9   The problem here is that the states

10   aren't the proper plaintiff to bring this suit.

11   JUSTICE JACKSON: Thank you.

12   CHIEF JUSTICE ROBERTS: Thank you,

13   General.

14   General Campbell.

15   ORAL ARGUMENT OF JAMES A. CAMPBELL

16   ON BEHALF OF THE RESPONDENTS

17   MR. CAMPBELL: Mr. Chief Justice, and

18   may it please the Court:

19   The Secretary is attempting to bypass

20   Congress on one of today's most debated policy

21   questions, student loan forgiveness. After many

22   failed legislative efforts, the Secretary seeks

23   to write off nearly a half trillion dollars in

24   loans for over 40 million borrowers. No statute

25   authorizes this sweeping action.

 1   On standing, Missouri has the right to

 2   vindicate the harms to MOHELA. MOHELA is a

 3   state-created and state-controlled public

 4   instrumentality that performs the essential

 5   public function of providing financial aid to

 6   Missouri students.

 7   The Secretary's program threatens to

 8   cut MOHELA's operating revenue by 40 percent.

 9   That will directly undermine MOHELA's ability to

10   further its critical public purposes, and the

11   state has standing to assert those harms.

12   On the merits, this is a major

13   questions case. A nearly half trillion dollar

14   debt cancellation program is undoubtedly a

15   matter of vast economic and political

16   significance. It is also unprecedented. Never

17   before has the HEROES Act been used to forgive a

18   single loan.

19   In addition, the Secretary here

20   asserts a breathtaking power, to do anything

21   that he thinks might reduce the risk of

22   borrowers defaulting, even years after a

23   national emergency arises. He needs clear

24   congressional authorization for such power, but

25   he doesn't have it here because the HEROES Act

1   does not authorize this program.

2   The Act permits the Secretary to waive

3   or modify existing provisions because of a

4   national emergency. It does not permit him to

5   rewrite existing provisions to create a new

6   program that covers 95 percent of borrowers and

7   applies to them regardless of how the pandemic

8   affected them.

9   This Court should declare this program

10   unlawful, and I welcome the Court's questions.

11   JUSTICE THOMAS: General, I think, at

12   the beginning, you should comment some on the

13   relationship between MOHELA and the State of

14   Missouri, primarily, the -- as you've heard, the

15   effect of this forgiveness program on MOHELA

16   and, by extension, on the State of Missouri for

17   the -- at least to establish standing.

18   MR. CAMPBELL: Sure, Justice Thomas.

19   To start with the effect on MOHELA, so MOHELA

20   approximately -- as of last fiscal year,

21   77 percent of its operating revenue came from

22   servicing direct loans.

23   The Secretary tells us that nearly

24   half of all loans -- all borrowers' loans will

25   be discharged under this program. So it stands

1   to reason that about half of MOHELA's operating

2   revenue from direct loans will be cut, and,

3   overall, that amounts to about 40 percent of its

4   operating revenue.

5   Now Justice Jackson asked the question

6   about whether there are offsetting fees. It --

7   it -- it's very hard to believe, and the

8   government doesn't offer any details in its

9   reply brief, that a one-time payment of fees for

10   discharging loans will offset the ongoing fee

11   that MOHELA earns from servicing those loans.

12   So --

13   JUSTICE JACKSON: But isn't that your

14   burden? I mean, I -- I understood the

15   government to say that you are bringing this

16   lawsuit and you have to establish standing.

17   And so, to the extent we're trying to

18   assess whether or not MOHELA is actually going

19   to be injured, I -- I don't think you can answer

20   but the government hasn't said something about

21   the fees.

22   MR. CAMPBELL: Well, the -- my point

23   in bringing that up, Justice Jackson, is that

24   the government hasn't -- hasn't said anything

25   about the fees in responding to what we've

1   already substantiated through the documents

2   we've put in.

3   We have put in documents indicating

4   that this will amount to approximately a

5   40 percent loss of operating revenue for MOHELA.

6   And, in response, the government referenced

7   potential offsetting costs, which they don't

8   quantify, and they don't show that that would

9   significantly reduce the injury that we're

10   anticipating. Now --

11   JUSTICE KAGAN: MOHELA isn't here,

12   General Crawford, is that correct?

13   MR. CAMPBELL: MOHELA is not here, but

14   --

15   JUSTICE KAGAN: It has the ability --

16   MR. CAMPBELL: -- its interests are

17   here.

18   JUSTICE KAGAN: -- to sue and be sued.

19   It's been set set up as an independent corporate

20   entity with the ability to bring suits on its

21   own. Usually, we don't allow one person to step

22   into another's shoes and say I think that that

23   person suffered a harm, even if the harm is very

24   great. We -- we -- we -- we leave it to the

25   person, him or her or itself, to make that

 1   judgment.

 2   Now, here, the state has derived very

 3   substantial benefits from setting up MOHELA as

 4   an independent body with financial distance from

 5   the state and sue and be sued authority. So why

 6   isn't MOHELA responsible for deciding whether to

 7   bring this suit?

 8   MR. CAMPBELL: We don't deny that

 9   MOHELA has -- could file a suit like that, but

10   the state's interest is directly implicated

11   here, so it is allowed to assert the interests

12   it has in MOHELA directly.

13   JUSTICE KAGAN: Well, I guess -- I

14   mean, there are third parties all the time who

15   have an interest in, gosh, I -- I wish that

16   party over there would bring a suit because I

17   have some relationship with that third party and

18   I would like it very much if that third party

19   represented its own interests better in my view.

20   But we don't do that. We -- we -- we

21   -- we don't allow that kind of interference with

22   the decision of the entity involved to decide

23   whether the harm is of the kind that -- that

24   they want to sue for.

25   MR. CAMPBELL: Well, the government is

 1   different. This Court has recognized that in

 2   cases like Cherry Cotton Mills and Erickson,

 3   where it's allowed the federal government to

 4   assert the interests of federally created

 5   corporations.

 6   JUSTICE KAGAN: I -- I -- I believe

 7   that in those cases the federal government had

 8   an independent interest. So the federal

 9   government was not saying, oh, we just have an

10   entitlement to stand in the shoes of the -- the

11   federal corporation.

12   MR. CAMPBELL: Two -- two responses.

13   The first response is I don't think that's the

14   best reading, certainly, of Cherry Cotton Mills.

15   Cherry Cotton Mills, the Court discussed a

16   number of facts and then at the end said the

17   reason why the government can assert the federal

18   corporation's interest is because it is

19   performing purely governmental purposes.

20   That's exactly what's happening here.

21   The State of Missouri has declared that

22   everything MOHELA does is the performance of an

23   essential public function. So that's the first

24   response.

25   The second response is, even if the

 1 state does need an interest, the state has an

 2 interest here. I'd identify at least three.

 3   The first interest is that the state

 4 created MOHELA to provide financial aid for

 5 Missouri students and that's what it does. The

 6 second interest is in the Lewis and Clark

 7 Discovery Fund. And the third interest is in

 8 the regular contributions that MOHELA makes to

 9 the state's scholarship programs.

10   Now there was some discussion early --

11 earlier about the Lewis and Clark Fund and some

12 suggestion that it's a dormant fund that no

13 longer exists. I -- I think it's clear -- I --

14 I think we need to clarify what exactly is the

15 status.

16   So, yes, it's true that there hasn't

17 been a contribution in the last 15 years, but

18 that's because the state has negotiated with

19 MOHELA for MOHELA, in lieu of making the Lewis

20 and Clark contributions, to contribute over $65

21 million directly to the state's scholarship

22 program. And in exchange for those agreements,

23 the -- the state has allowed the Lewis and Clark

24 deadline to be extended.

25   So, at this point, the question is:

1   What's going to happen at the next deadline?

2   The next deadline is coming up next year. And

3   if -- the question before this Court is whether

4   cutting MOHELA's operating revenue by 40 percent

5   will increase the risk that it either won't make

6   the next contribution to the Lewis and Clark

7   Fund or it won't make the next payment to the

8   scholarship fund in lieu of the Lewis and Clark

9   Fund.

10   JUSTICE BARRETT: That's --

11   JUSTICE SOTOMAYOR: That seems --

12   JUSTICE BARRETT: -- what's most

13   important to you now is the Lewis and Clark

14   Fund?

15   MR. CAMPBELL: No, it's not, Your

16   Honor. What's most important to us is that the

17   state can speak directly for MOHELA, but I was

18   responding to the question about the interest

19   that --

20   JUSTICE BARRETT: I guess I understood

21   the interests to be, if MOHELA was really

22   Missouri, the loss of the servicing fees. Am I

23   misunderstanding that?

24   MR. CAMPBELL: No, you're not --

25   JUSTICE BARRETT: You have two

1 different arguments, right?

2   MR. CAMPBELL: That's correct.

3   JUSTICE BARRETT: You have that

4 argument and then you have this argument about

5 the Lewis and Clark Fund.

6   MR. CAMPBELL: That -- that's correct.

7 My first response to Justice Kagan, I was trying

8 to focus on the first theory, and then the

9 second response, where I got into the Lewis and

10 Clark Fund, I was responding under the second

11 theory.

12   JUSTICE BARRETT: All right. So let's

13 --

14   JUSTICE SOTOMAYOR: On the first

15 theory, it's hard to imagine how the State of

16 Missouri can claim an injury, putting the Lewis

17 and Clark and the scholarship issues aside, when

18 it's not responsible for the debts of MOHELA,

19 it's not responsible for the contracts it enters

20 into, it doesn't own the assets of that

21 corporation.

22   There is on paper no financial

23 obligation by the state or loss to the state by

24 anything MOHELA does or anything it gets.

25 I'm -- I'm putting aside Lewis and Clark. It's

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 1    hard -- it's just very hard for me to say that

 2    there is an interest sufficient for the state to

 3    speak on behalf of an entity who has the right

 4    to sue or be sued.

 5              MR. CAMPBELL:  When this Court in

 6    Lebron and when the Missouri Supreme Court in

 7    Casualty Reciprocal Exchange consider whether an

 8    entity is a part of the government, it looks at

 9    a far more --

10              JUSTICE SOTOMAYOR:  But those are --

11              MR. CAMPBELL:  -- broad analysis.

12              JUSTICE SOTOMAYOR:  -- different --

13    those are different issues.  Standing has to do

14    with injury.  It doesn't have to do with are you

15    evading the Constitution, are you trying to

16    delegate public functions.  Those are all -- are

17    you immune because you are acting in a way that

18    only a state can.  Those are very, very

19    different questions.

20              This is the question of standing,

21    which relies on injury in fact.  How can you

22    have -- I'm putting Lewis and Clark aside -- how

23    can you have injury in fact if you have

24    immunize -- you, the state, have immunized

25    yourself from any liability or any injury that
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 1   MOHELA can experience?

 2   MR. CAMPBELL: Because the state

 3   speaks for MOHELA. The state represents

 4   MOHELA's interests.

 5   JUSTICE SOTOMAYOR: Well, it -- it

 6   decided to give this entity the right to sue and

 7   be sued. So it -- it chose to say I'm not

 8   injured in fact. Speaking is not the same as

 9   injury.

10   MR. CAMPBELL: Your -- Your Honor, the

11   -- the federally created corporations in Cherry

12   Cotton Mills and Erickson also had the right to

13   sue and be sued, but that didn't stop the

14   federal government from asserting their

15   interests.

16   In addition, if we're focusing just on

17   the right to sue or be sued, the Secretary has

18   the right to sue or be sued. That doesn't

19   disable the Department of Justice for -- from

20   speaking for their interests.

21   JUSTICE SOTOMAYOR: Now let's go back

22   to Lewis and Clark a moment. The arrangement

23   that MOHELA and the state engaged in predated

24   the pandemic, correct? It started in 2009,

25   2010?

1   MR. CAMPBELL: The -- the Lewis and

2   Clark Fund started --

3   JUSTICE SOTOMAYOR: Yes. The --

4   MR. CAMPBELL: -- in --

5   JUSTICE SOTOMAYOR: -- suspension of

6   MOHELA's contributions to it, correct?

7   MR. CAMPBELL: Started in 2008.

8   JUSTICE SOTOMAYOR: Isn't it a series

9   of speculations that in 2004, absent this

10   program, that the state won't continue that

11   arrangement it currently has and continue to

12   defer obligations?

13   MOHELA said that it -- MOHELA has

14   already said publicly that it doesn't think that

15   contributions to the Lewis and Clark Fund are

16   within its wheelbarrow obligations. That was

17   one of the reasons this arrangement has been

18   made, correct?

19   MR. CAMPBELL: Well, MOHELA recognizes

20   that it still owes $105 million to the Lewis and

21   Clark Fund.

22   JUSTICE SOTOMAYOR: Well, it's -- in

23   fact, I understand it's not writing it off as an

24   obligation anymore.

25   MR. CAMPBELL: But it still --

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1         JUSTICE SOTOMAYOR:  It doesn't carry

2    it on its books anymore.

3         MR. CAMPBELL:  Your Honor, if you look

4    at page 20 through 21 of the financial statement

5    we cite in our brief, MOHELA acknowledges that

6    it still owes $105 million to that fund.

7         And the point that I was making

8    earlier is that the fund -- contributions to the

9    fund and contributions to the scholarship

10   program are different sides of the same coin.

11   The state has been constantly -- throughout the

12   entire time from 2007 until now, has been

13   constantly receiving payments from MOHELA, and

14   those payments have taken the form sometime of

15   Lewis and Clark, but more -- more often

16   recently, it has taken the form of a scholarship

17   contribution.

18        JUSTICE JACKSON:  Have you expressed

19   any plans to actually use the fund to pursue

20   projects in the foreseeable future, and, if so,

21   what projects?

22        MR. CAMPBELL:  At this point, the

23   projects have been put on pause.

24        JUSTICE JACKSON:  I see.  So we're

25   talking about a fund that hasn't been
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1 contributed into because the state has waived

2 the obligation to do so for at least a temporary

3 period of time, and then, even if the funds were

4 to go into this particular fund, you don't have

5 a set of plans that you are planning to pursue

6 with them?

7 MR. CAMPBELL: But all that requires

8 is the legislature and the governor to move

9 forward once the money -- once the fund has been

10 funded.

11 JUSTICE JACKSON: Yes. No, I

12 understand, but we're trying to figure out the

13 degree to which the state is injured by the

14 money not being there. And so, on the one hand,

15 you know, I hear Justice Sotomayor exploring

16 with you the fact that the state has allowed the

17 money not to be there in the recent past by

18 saying don't worry, you don't have to put it in

19 there, MOHELA. So that seems to be a sort of

20 strike against the state now saying we're so

21 injured because the money isn't there.

22 And then we have on top of that your

23 representation here that the state isn't even

24 actively seeking or interested in the money

25 insofar as it's decided that it's going to

 1   engage in some sort of project that we need the

 2   money for.

 3   So I'm just wondering about the

 4   speculative, attenuated nature of the harm that

 5   you're alleging on the basis of there not being

 6   -- or -- or -- of the risk that we won't have

 7   extra money put into this fund.

 8   MR. CAMPBELL: Your Honor, I -- I

 9   disagree with -- with what you said, that the

10   state has waived the obligation under the fund.

11   What the state has done is it's engaged in a

12   quid pro quo discussion with MOHELA, and it has

13   said that in exchange for $65 million in

14   payments to the scholarship fund, it has allowed

15   the -- the timeline to be extended. That's not

16   a waiver.

17   JUSTICE JACKSON: Yes, I apologize.

18   I'm just saying the state has not pressed MOHELA

19   to put money into the fund, right?

20   MR. CAMPBELL: Because it -- correct,

21   but because it has been receiving money in

22   another fund all along.

23   JUSTICE JACKSON: I -- I appreciate

24   that, but I guess I'm just still trying to

25   understand how you can look at that fund as the

1   basis for the injury that you're claiming with

2   respect to this particular plan.

3   MR. CAMPBELL: Your Honor, because the

4   next due date for the fund is the -- a year from

5   now.

6   JUSTICE JACKSON: And you can't extend

7   it?

8   MR. CAMPBELL: It can be extended, but

9   that would be in exchange for them giving

10 another contribution to a scholarship fund,

11 which is further showing that there are further

12 financial contributions coming.

13   JUSTICE JACKSON: And there -- the --

14 the plan is not totally ridding them of any

15 opportunity to make money, so they do have some

16 other income, yes?

17   MR. CAMPBELL: MOHELA?

18   JUSTICE JACKSON: Yes.

19   MR. CAMPBELL: Whether MOHELA has

20 other --

21   JUSTICE JACKSON: Yes.

22   MR. CAMPBELL: Yes, MOHELA has other

23 --

24   JUSTICE JACKSON: All right. So we

25 could believe that the income that MOHELA gets

1   from its other sources of revenue could be used

2   to pay off in a year the -- the -- the amount

3   that the state says it requires in order to put

4   off the obligation yet again, right?

5   MR. CAMPBELL: I -- I don't -- I don't

6   think -- well, here -- here's the key point in

7   response: What MOHELA says in the letter that

8   the government filed as supplemental authority

9   with the Eighth Circuit is that they take all

10   available funds beyond their expenses and

11   reasonable reserves and they devote them to

12   student financial aid in Missouri.

13   So, if their operating revenues are

14   cut by 40 percent, we know what they do with the

15   money at the top, the excess money. They give

16   it to students attending school in Missouri.

17   So, if their operating revenues go down, that's

18   the first thing that's going to go.

19   JUSTICE BARRETT: General, I'd like to

20   put aside the Lewis and Clark Fund for a minute,

21   and I want to return to the direct injury

22   argument, the MOHELA is an arm of the state

23   argument.

24   Justice Sotomayor was pointing out

25   statutorily MOHELA has the right to sue and be

 1   sued, the state doesn't have responsibility for

 2   its liabilities, and the state has disclaimed

 3   any -- any claim to the assets.

 4   Is that correct?

 5   MR. CAMPBELL: I would disagree with

 6   the last point. I don't think --

 7   JUSTICE BARRETT: Okay.

 8   MR. CAMPBELL: -- the state has

 9   disclaimed any interest in the assets.

10   JUSTICE BARRETT: So explain to me why

11   --

12   MR. CAMPBELL: I --

13   JUSTICE BARRETT: -- because, on the

14   one hand, you have -- you know, in -- in

15   Missouri Statute 173.420, you have -- the last

16   sentence says that nothing in these sections

17   "shall be construed to deprive the state and its

18   governmental subdivisions of their respective

19   powers over assets of the authority." But then,

20   in the next section, 425, it says, "[n]o asset

21   of the authority shall be considered to be part

22   of the revenue of the state."

23   So which is it? I mean, because it

24   would be hard to see how a win for the state

25   would benefit MOHELA or a win for MOHELA would

        1   benefit the state if the assets are completely

        2   separate. You don't get any money out of it,

        3   putting aside Lewis and Clark because I'm not

        4   really interested in that.

        5   MR. CAMPBELL: So, Your Honor, to --

        6   to go to the second provision you read, 425, it

        7   says, "[n]o asset of the authority shall be

        8   considered to be part of the revenue of the

        9   state" within the meaning of a specific state

       10   constitutional provision.

       11   So I would then say --

       12   JUSTICE BARRETT: Okay.

       13   MR. CAMPBELL: -- that's only for a

       14   limited purpose. The prior provision that you

       15   read, where the state has preserved its

       16   authority over MOHELA's assets, shows that any

       17   residual interest in MOHELA's assets belongs to

       18   the state.

       19   So we cited the Reciprocal Casualty

       20   Exchange case in our brief that shows that the

       21   legislature could abolish an entity like MOHELA,

       22   and if it did, the money would come back to the

       23   state. So the state does have the ultimate

       24   interest in the property of MOHELA.

       25   JUSTICE BARRETT: If the state wanted

1   money from MOHELA right now, if the state just

2   wanted to pull assets out, say, because the

3   state was going to make a decision to fund the

4   Lewis and Clark Fund, does the state have the

5   authority to do that?

6   MR. CAMPBELL: Acting through the

7   legislature, it does.

8   JUSTICE BARRETT: Okay.

9   MR. CAMPBELL: Act -- acting -- and --

10   and I think the Lewis and Clark Fund is actually

11   a great example of that. So the Lewis and Clark

12   Fund wasn't created until 26 years after MOHELA

13   began its operations, and at that point, the

14   legislature came in and said, MOHELA, you have

15   to start giving this source of funding to the

16   state. So the legislature can come in at any

17   time and -- and request money.

18   JUSTICE BARRETT: Do you want to

19   address why MOHELA's not here?

20   MR. CAMPBELL: MOHELA is not here

21   because the state's asserting its interests.

22   MOHELA doesn't need to be here because the state

23   has the authority to speak for them. And that

24   brings me to --

25   JUSTICE BARRETT: Why didn't the state

 1   just make MOHELA come then? If -- if MOHELA is

 2   really an arm of the state and all of this would

 3   be a lot easier -- I mean, the Solicitor General

 4   conceded that if MOHELA was here, MOHELA would

 5   have standing. If MOHELA is an arm of the

 6   state, why didn't you just strong-arm MOHELA and

 7   say you've got to pursue this suit?

 8   MR. CAMPBELL: Your Honor, that's a

 9   question of state politics, but we believe as a

10   matter of law that the state has the authority

11   to assert its interests. Under the factors in

12   Lebron, under the factors that the state --

13   Missouri State Supreme Court recognized in

14   Casualty Reciprocal Exchange, if it's a

15   state-created and state-controlled entity that

16   performs government functions, the state can

17   speak for it regardless --

18   JUSTICE KAGAN: Just -- just along the

19   same lines, I mean, it's true that you couldn't

20   even get documents from MOHELA without file --

21   filing the state equivalent of a FOIA request.

22   MR. CAMPBELL: Your -- Your Honor,

23   that was the -- the mechanism by which we went

24   about acquiring the documents, but that just

25   further --

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 1              JUSTICE KAGAN:  Well, that was the

 2   mechanism.  I think that if MOHELA was willing

 3   to hand you over the documents, you wouldn't

 4   have filed a state FOIA request.

 5              MR. CAMPBELL:  Your Honor, I think

 6   that further shows that MOHELA is a state

 7   entity.  They're subject to public records laws.

 8   They're subject to open meeting laws.  They are

 9   a entity of the State of Missouri.

10              JUSTICE JACKSON:  And when you say

11   acting through the legislature in response to

12   Justice Barrett, do you mean that sort of the --

13   the structure of MOHELA would have to be

14   revisited through the legislature?  In other

15   words, you've now set it up -- we have a law in

16   Missouri that structures this corporation in a

17   certain way, and it is separate.

18              So, when you say acting through the

19   legislature, do you mean that there would have

20   to be some kind of amendment to the way in which

21   MOHELA is and operates in order to allow for you

22   to reach its assets?

23              MR. CAMPBELL:  I -- I think it would

24   have to be an act of the legislature.  Whether

25   it took the form of amending the existing
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 1    statutes or whether it was a new statute, it
 2    would have to be an act of the legislature.
 3              JUSTICE GORSUCH:  Counsel, on -- on
 4    the merits, if I could direct you to the
 5    Solicitor General's argument suggesting the
 6    major questions doctrine does not apply because
 7    this is a benefits program, despite our -- our
 8    holding in King versus Burwell, and -- and
 9    arguing that it doesn't implicate the
10    Appropriations Clause authority of Congress.
11              Can you address that argument, please?
12              MR. CAMPBELL:  Yes, Your Honor.  The
13    whole point of the major questions doctrine is
14    to preserve the separation of powers, and it
15    rests on the presumption that Congress intends
16    to address major questions for itself.
17              JUSTICE GORSUCH:  I understand that.
18    But this is a more specific question with
19    respect to benefits programs --
20              MR. CAMPBELL:  Right.
21              JUSTICE GORSUCH:  -- and the
22    relationship between it and the Appropriations
23    Clause and King versus Burwell.
24              MR. CAMPBELL:  Your Honor, the reason
25    why I referenced the underlying doctrine and why
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 1   it exists is that those same reasons apply in

 2   this benefits context no less than they do in a

 3   different regulatory context. The separation of

 4   powers is implicated here because we're dealing

 5   with a congressionally created program.

 6   In addition, if anything, I would say

 7   that there are more reasons to apply the major

 8   questions doctrine here, because what the agency

 9   is effectively doing is exercising the power of

10   the purse by going into the federal balance

11   sheet and crossing off nearly a half trillion

12   dollars in loans payable to the government.

13   That is a quintessentially legislative

14   function. So that's even more reason why the

15   major questions doctrine should apply.

16   JUSTICE KAVANAUGH: Isn't the -- well,

17   do --

18   JUSTICE SOTOMAYOR: I was just going

19   to ask, that's the whole purpose of the HEROES

20   Act. The whole purpose of the HEROES Act is to

21   say in -- either for veterans or -- not for

22   veterans, for people who are in military service

23   or in a national emergency, we give you the

24   authority to impose debt on us.

25   The forbearance of payment is -- is it

1   5 billion a month or something like that? It's

2   an outrageous sum. And yet that isn't -- no one

3   is disputing that the Secretary -- that the

4   Secretary has that power. It's not the amount

5   of money. The question is: What's Congress's

6   intent?

7   And we know from the HEA Act that

8   Congress recognized that there would be

9   cancellation of debt for schools that close at

10   least. Why would you think that Congress didn't

11   intend under the HEROES Act to permit

12   cancellations of debt if a national emergency

13   required it?

14   MR. CAMPBELL: Because what Congress

15   said in the HEROES Act is that the Secretary has

16   the power to "waive or modify" existing

17   provisions. It did not give the Secretary the

18   power to rewrite --

19   JUSTICE SOTOMAYOR: But all of those

20   -- a waiver --

21   JUSTICE KAGAN: Well, yes, it did.

22   Sorry. May I?

23   JUSTICE SOTOMAYOR: Go ahead. Yes.

24   JUSTICE KAGAN: General Campbell, I

25   mean, it -- it says, "waive or modify any

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 1    statutory or regulatory provision applicable to

 2    the student financial assistance programs, and

 3    then it says the Secretary can add terms and

 4    conditions to be applied in lieu of such

 5    statutory and regulatory provisions."

 6              So it's really quite clear here, it's

 7    like you can waive or modify the old ones, and

 8    then you can add new ones in lieu of the old

 9    ones.  So, you know, Congress could not have

10    made this much more clear.

11              I mean, Congress didn't say exactly

12    the circumstances in which it wanted the

13    Secretary to use this authority.  Of course not.

14    This is -- this is a -- a bill about, like, what

15    happens when you have an emergency.

16              So what Congress said is what happens

17    when you have an emergency is the Secretary has

18    the power to take care of emergencies, and it

19    has that power by way of waiving or modifying

20    any provision and adding others in lieu of them.

21              MR. CAMPBELL:  A couple responses.

22              The adding "in lieu of" language, that

23    has to be understood to mean adding along the

24    lines of a modification.  It can't be adding

25    just anything the Secretary wants.  It has to be
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 1   read in context with the terms --

 2   JUSTICE KAGAN: Or a waiver.

 3   MR. CAMPBELL: -- waive or modify.

 4   JUSTICE KAGAN: Or a -- and, you know,

 5   it's not just modify, it's waived. So it's

 6   modify even if we take a kind of MCI-type

 7   reading of modify, all -- you know, through more

 8   major changes, all the way up to waive, and then

 9   you can say what terms and conditions should be

10   applied in lieu of those provisions.

11   Congress doesn't get much clearer than

12   that. We -- we deal with congressional statutes

13   every day that are really confusing. This one

14   is not.

15   MR. CAMPBELL: Your Honor, I -- I

16   disagree that what we're dealing with here is a

17   waiver or modification. Three points on waiver.

18   In terms of when -- when we look at

19   the -- the publication in the -- in the Federal

20   Register, it says the Secretary modifies the

21   following provisions. So the Secretary didn't

22   even purport to waive the loan discharge

23   provisions that were cited.

24   Second point, that makes sense because

25   the Secretary wasn't actually excusing

1   compliance with any of the existing

2   requirements. The Secretary was ignoring all of

3   those requirements and creating brand-new ones

4   to -- to put in place a brand-new program.

5   And the third point is, again, we know

6   that there was no waiver here because affected

7   individuals can continue to access all those

8   existing loan discharge programs.

9   If somebody qualifies for the public

10   loan service program, they're able to access it

11   right now. So there was no waiver here. All we

12   have is an attempt to modify, but this goes far

13   beyond a modification because it -- it is the

14   creation of a brand-new program that goes far

15   beyond what Congress intended.

16   In fact, if Congress --

17   JUSTICE KAGAN: Do you think that

18   there is an ability to modify provisions

19   respecting discharge? So, you know, is there

20   any ability? Because there are these -- these

21   particular discharge provisions, right, and it

22   has to do with death and with when your school

23   closes and so forth.

24   So suppose the Secretary says, that's

25   not enough, I want to do some more.

1   MR. CAMPBELL: Your -- Your Honor, I

2   think there's a good example where the

3   Secretary's done it in the past that was

4   acceptable. So, in 2003, the Secretary used the

5   power under the HEROES Act to modify the -- an

6   existing requirement to access student loan and

7   it was under one of those profession-based

8   programs where, if you work for a teacher for a

9   certain amount of years, you can get into the

10   program.

11   JUSTICE KAGAN: So let me give you an

12   example. Suppose, like, there's an earthquake.

13   We'll use an earthquake instead of a pandemic.

14   And the Secretary says this isn't enough, people

15   are -- are really being hurt by this. So we

16   have a provision about the borrower dying. The

17   Secretary says, I'm also going to allow

18   dischargers where the primary earner in the

19   borrower's household dies.

20   Could the Secretary do that?

21   MR. CAMPBELL: Your Honor, I don't

22   believe so because it doesn't sound like a

23   modification of an existing program. It sounds

24   like the creation of a brand-new program.

25   JUSTICE KAGAN: Really, just from the

1   borrower dying, the Secretary is allowed to do

2   that, but -- but the Secretary in -- in -- in --

3   in the face of this massive earthquake is not

4   allowed to say, you know, or not just the

5   borrower but the -- the -- the primary earner in

6   the borrower's family?

7   MR. CAMPBELL: Your Honor, the

8   question would come down to whether that is a

9   modification. It sounds to me like it might go

10   too far because it's creating a new program.

11   But even if that was --

12   JUSTICE KAGAN: I mean, this is very

13   broad language, go -- go modify or waive any

14   statutory or regulatory provision and come up

15   with new ones, and you're not even going to

16   allow me that?

17   MR. CAMPBELL: Your Honor, I was going

18   to say, even if that would be sufficient here,

19   it's nothing like this program. This is a

20   program that includes 95 percent of borrowers

21   regardless of how they were affected by the

22   pandemic. So we --

23   JUSTICE KAGAN: Could the Secretary

24   say, well, there was this terrible earthquake

25   and lots of people's houses were destroyed, and

 1   so I'm going to discharge the loans of people

 2   whose houses were destroyed in this terrible

 3   earthquake?

 4   MR. CAMPBELL: Your Honor, it sounds

 5   to me like creating a new program. I don't

 6   think that that would be okay under the HEROES

 7   Act. Now what I would say --

 8   JUSTICE KAGAN: See, I -- I -- I -- I

 9   guess, you know, this is an emergency provision.

10   There's an emergency. It's an earthquake. You

11   don't think Congress wanted to give -- and --

12   and not just wanted. It's not what Congress

13   thought. It's what Congress said, to give the

14   Secretary power to say, oh, my gosh, people have

15   had their homes wiped out, we're going to

16   discharge their student loans.

17   MR. CAMPBELL: Your -- Your Honor,

18   when it comes to taking that ultimate step to

19   discharging loans, Congress wanted to preserve

20   that for itself. And I think we note -- we --

21   Congress acts in pandemics --

22   JUSTICE KAGAN: Where do you see that

23   in this statute? I mean, the -- the provision

24   of the statute says any statutory or regulatory

25   provision applicable to the student loan program

 1   you can waive, you can add another, to deal with

 2   an emergency.

 3   This isn't a massive delegation to the

 4   Secretary of Education. It's -- it's designed

 5   to deal with emergency conditions. You have a

 6   lot of power in emergencies. When those

 7   people's homes are destroyed, you have the power

 8   to -- to discharge their loans.

 9   MR. CAMPBELL: But Congress still has

 10   a voice in emergencies, and we see that through

 11   the CARES Act here.

 12   JUSTICE KAGAN: Congress used its

 13   voice. Congress used its voice in enacting this

 14   piece of legislation. All this business about

 15   executive power, I mean, we worry about

 16   executive power when Congress hasn't authorized

 17   the use of executive power.

 18   Here, Congress has authorized the use

 19   of executive power in an emergency situation.

 20   We're in that sphere, you know, in those --

 21   all -- all those zones, we're in that sphere

 22   where the executive is acting with congressional

 23   authorization.

 24   MR. CAMPBELL: Your Honor, I disagree

 25   that this is congressional authorization because

 1   it's not a modification. It goes way beyond

 2   that. It creates a brand-new program, and

 3   that's not what the HEROES Act allowed.

 4   If the HEROES Act did allow the

 5   wholesale rewriting of statutes whenever an

 6   emergency arose, then that would create an

 7   issue -- constitutional issue under Clinton

 8   versus City of New York, and it essentially

 9   would be allowing the executive branch to go in

10   and rewrite statutes after the fact, and the

11   executive branch doesn't have that power.

12   CHIEF JUSTICE ROBERTS: Thank you,

13   counsel.

14   Just pick up on the discussion that

15   we've been having, the breadth of the statute at

16   issue here.

17   How does it compare to the breadth of

18   the statutes that were at issue in our major

19   questions doctrine, where we indicated enough

20   even though the breadth of some of those

21   provisions would by their terms literally cover

22   the authority that the agency exercised, that

23   given the nature of the authority and its

24   consequences, that was not clear enough?

25   MR. CAMPBELL: Your Honor, I think

1   it -- it fits within those cases. And I would

2   point the Court specifically to Alabama

3   Association of Realtors. In that case, the

4   statute authorized the relevant federal official

5   to engage in actions that he thought in his

6   judgment were necessary or in his judgment may

7   be necessary.

8   Yet this Court looked at that language

9   and said that it was not broad enough to -- to

10   authorize the -- the action at issue there, the

11   CDC eviction moratorium, and it did so because

12   of the major questions doctrine.

13   CHIEF JUSTICE ROBERTS: Justice

14   Thomas?

15   Justice Alito?

16   Justice Sotomayor?

17   JUSTICE SOTOMAYOR: This is

18   substantially different because the Secretary is

19   authorized to cancel loans under HEA. So this

20   is not an action as a moratorium on eviction

21   which had never occurred previously or wasn't

22   within the wheelhouse of the agency. At least

23   that's what the Court said. I had -- I had a

24   difference of opinion.

25   Putting that aside, this is not an

 1   action that could come as a surprise because it

 2   is expressly permitted under the HEA Act, and

 3   nothing in the HEROES Act says that the

 4   Secretary can't do something that's in the

 5   normal course of his business in circumstances

 6   that justify it, like a school closing or like a

 7   school engaged in fraud.

 8   Those are exceptions that clearly are

 9   permitted under the HEA to cancel a debt. So

10   why would I have a view that Congress didn't

11   understand that, in a proper emergency, debt

12   cancellation would be right?

13   MR. CAMPBELL: I would go back to my

14   prior -- prior answer, which is there is a

15   difference between modifying an existing loan

16   forgiveness program in light of the national

17   emergency, which is appropriate -- and an

18   example of that is to take the existing loan

19   discharge program for teachers, and there has to

20   be consecutive service, and to say if the reason

21   why that teacher would fall out of the

22   consecutive service requirement is because of

23   the national emergency, it's okay to waive that

24   requirement or to modify that requirement.

25   JUSTICE SOTOMAYOR: That's changing

 1   the program. I -- I mean, it -- it's semantics.

 2   Clearly, a waiver is an extinguishment. Whether

 3   you're -- whether you're rewriting it to say a

 4   national emergency will pause your service

 5   years, statute says you have to serve

 6   consecutively, and the Secretary is saying you

 7   don't have to, you're rewriting the statute.

 8   You just want to say this is a bigger rewrite

 9   than I like. But it's not rewriting the

10   statute. It's just saying this obligation is

11   terminated.

12   MR. CAMPBELL: Your Honor --

13   JUSTICE SOTOMAYOR: This obligation to

14   serve continuously is terminated for this period

15   of time.

16   MR. CAMPBELL: It's a bigger rewrite

17   than the words "waive or modify" allow.

18   JUSTICE SOTOMAYOR: That -- that

19   really has us, as the third branch of

20   government, changing Congress's words because we

21   don't think we like what's happening.

22   MR. CAMPBELL: Your Honor, I would --

23   JUSTICE SOTOMAYOR: There's 50 million

24   students who are -- will benefit from this who

25   today will struggle. Many of them don't have

1   assets sufficient to bail them out after the

2   pandemic. They don't have friends or families

3   or others who can help them make these payments.

4   The evidence is clear that many of them will

5   have to default. Their financial situation will

6   be even worse because, once you default, the

7   hardship on you is exponentially greater. You

8   can't get credit. You're going to pay higher

9   prices for things. They are going to continue

10   to suffer from this pandemic in a way that the

11   general population doesn't.

12   And what you're saying is now we're

13   going to give judges the right to decide how

14   much aid to give them. Instead of the person

15   with the expertise and the experience, the

16   Secretary of Education, who's been dealing with

17   educational issues and the problems surrounding

18   student loans, we're going to take it upon

19   ourselves, instead of leaving that decision in

20   the hands of the person who has experience with

21   these questions.

22   MR. CAMPBELL: Your Honor, there are

23   additional statutory clues showing that Congress

24   didn't intend the creation of new loan discharge

25   programs. I'd point the Court to subsection

1   (a)(2)(D). That -- there, Congress specifically

2   identified one limited instance where the

3   Secretary could excuse the return of funds owed

4   to the government. That was grant overpayments.

5   JUSTICE SOTOMAYOR: Counsel --

6   MR. CAMPBELL: By identifying --

7   JUSTICE SOTOMAYOR: -- that was an

8   emergency, or that was a situation that was sui

9   generis. That's what emergencies are.

10   MR. CAMPBELL: Your -- Your Honor, I

11   think --

12   JUSTICE SOTOMAYOR: Sui generis

13   situations that the Secretary can address in a

14   particular situation.

15   MR. CAMPBELL: Your Honor, I think, by

16   identifying that specific example, Congress was

17   sending a message that it did not want the other

18   provisions to be used to create new loan

19   discharge programs.

20   CHIEF JUSTICE ROBERTS: Justice Kagan?

21   Justice Gorsuch?

22   JUSTICE GORSUCH: I had understood the

23   Office of Legal Counsel's memorandum to suggest

24   that the Secretary, under the statute, had

25   authority to put student borrowers in -- in the

1   same condition that they were in prior to the

2   emergency and that the nature of your argument

3   is that that -- that test is not met.

4   Do you agree with the OLC's position

5   and understanding of the statute? And -- and --

6   and do -- and how do you -- how do you argue

7   that it's exceeded that authority?

8   MR. CAMPBELL: Your Honor, I disagree

9   with most everything in the OLC opinion, but I

10   agree with that part of the OLC opinion. I

11   think it's right that that's what the phrase "no

12   worse position" means. It means Congress was

13   telling the -- the Secretary he had the

14   authority to keep borrowers near the status quo.

15   But what we have here is a program

16   that, for 20 million borrowers, is going to

17   leave them without a single outstanding loan.

18   That goes well beyond putting them back in the

19   status quo ante.

20   And for the other approximately 20

21   million borrowers that stand to benefit from

22   this, their average debt is going to go from

23      $29,000 to $13,000, again, far beyond returning

24   to the status quo ante.

25   JUSTICE GORSUCH: And I understand the

1   Secretary has considerable expertise when it

2   comes to educational affairs, but with -- in

3   terms of macroeconomic policy, do we normally

4   assume that every -- every Secretary, cabinet

5   member, as learned as they are, has that kind of

6   knowledge?

7   MR. CAMPBELL: No, we don't. When

8   we're dealing with a nearly half trillion dollar

9   loan cancellation program, this is squarely in

10   the ken of Congress. Congress has the power and

11   expertise to weigh the balancing, competing

12   fiscal implications, particularly at that scale.

13   So this is something that's outside the

14   Secretary's expertise.

15   CHIEF JUSTICE ROBERTS: Justice

16   Kavanaugh?

17   JUSTICE KAVANAUGH: I think, when

18   we're talking about emergency powers, that

19   certainly focuses the inquiry, but that doesn't

20   mean that the executive can't take action. And

21   it all then turns on the -- I think, the

22   language of the statute at issue and the kind of

23   action taken.

24   And I think you have a good argument

25   on "modify," but what do you do with the word

 1 "waive"? That is an extremely broad word. In

 2 2003, Congress was very aware of potential

 3 emergency actions in the wake of September 11th

 4 and war, possible terrorist attacks, and yet it

 5 puts that extremely broad word, "waive," into

 6 the statute.

 7   Why not just read that as written?

 8   MR. CAMPBELL: Your Honor, I -- I

 9 believe we are reading it as written. "Waive"

10 means to excuse compliance with an existing

11 obligation. And what the Secretary is

12 purporting to do here is to change existing loan

13 discharge program. The Secretary is not waiving

14 anything in those provisions. And so we think,

15 as I explained earlier, that the word "waiver"

16 simply doesn't apply here.

17   Now, to the extent the Court looks at

18 the term "waiver" and finds that that's cause to

19 read the phrase "waive or modify" a little more

20 broadly, it still doesn't reach this program,

21 because the Secretary is not dealing with any of

22 these existing provisions that he purports to

23 cite. He's not changing anything within them.

24 He's frankly ignoring what's there and creating

25 a brand-new program, and that's not within the

 1   language of this statute.

 2   JUSTICE KAVANAUGH: You don't think

 3   that fits within "waiver"?

 4   MR. CAMPBELL: I -- I don't believe it

 5   does, no. A waiver is to take something away,

 6   and the Secretary is not taking anything away

 7   from the cited loan discharge provisions.

 8   JUSTICE KAVANAUGH: And then, on the

 9   body of precedent we've developed within the

10   pandemic on emergency powers and -- and major

11   executive actions, we have the eviction

12   moratorium case, we have the national OSHA

13   mandate case, but, on the other hand, we have

14   the healthcare mandate case, and I think the

15   distinction -- one of the distinctions drawn

16   there was that was more in the -- in the

17   wheelhouse of the agency in question.

18   And I think the Solicitor General has

19   argued, and I'll just get your response, on this

20   is right in the wheelhouse -- and Justice

21   Sotomayor was just saying this -- right in the

22   wheelhouse of what the Secretary of Education

23   would normally be expected to do, unlike CDC

24   doing an eviction moratorium.

25   I know you've addressed this a little

 1   bit, but just to get your response on that.

 2   MR. CAMPBELL: Your Honor, I don't

 3   think it's in the wheelhouse because it's

 4   creating a brand-new program. The only entity

 5   that has created new loan discharge programs is

 6   Congress. There's a number of them in the

 7   Higher Education Act. But the Secretary has

 8   never before created a brand-new loan

 9   cancellation program, particularly under the

10   HEROES Act.

11   As I mentioned at the outset, the

12   HEROES Act has never even been used to forgive a

13   single loan in the past. That's telling because

14   one of the things the Court looks at in its

15   major questions jurisprudence is if it's

16   unprecedented. And we certainly have an

17   unprecedented use of the statute here.

18   JUSTICE KAVANAUGH: Thank you.

19   CHIEF JUSTICE ROBERTS: Justice

20   Barrett?

21   JUSTICE BARRETT: Two questions, one

22   on merits, one on standing. First, on the

23   merits, do you agree that this Administration

24   and the prior administration had authorization

25   under the HEROES Act to pause loan -- loan

 1   repayment obligations?

 2   MR. CAMPBELL: Your Honor, it's a --

 3   we're not challenging it in this case.

 4   JUSTICE BARRETT: I know, but --

 5   MR. CAMPBELL: I think it's a --

 6   JUSTICE BARRETT: -- the question is,

 7   do you think it's within it? This kind of goes

 8   to the --

 9   MR. CAMPBELL: Sure.

10   JUSTICE BARRETT: -- scope of "waive

11   or modify," right?

12   MR. CAMPBELL: Yes. I -- I think that

13   the -- so if I can go through the timeline to

14   explain, so the first seven days, on March 20th,

15   2020, Secretary DeVos waived but didn't indicate

16   what legal authority she was using. I have no

17   way to assess that because I just don't know

18   what -- what authority she was using.

19   Then Congress came in seven days later

20   and enacted the CARES Act. The CARES Act put a

21   payment pause in place for six months. At the

22   end of that six-month period, Secretary DeVos

23   extended it for three months.

24   I think, arguably, that was a

25   legitimate use of the HEROES Act because taking

 1   a congressionally created six-month program and

 2   extending it for three months seems like it

 3   might be a modification.

 4   But now that we're two years down the

 5   road, we're beyond a modification. And not only

 6   that, the connection to the national emergency

 7   has become even more tenuous.

 8   JUSTICE BARRETT: So your argument is

 9   that even assuming that Secretary DeVos

10   initially had the authority to -- and you're --

11   and you're kind of just whiffing on the question

12   about before the CARES Act was passed, right?

13   But you're talking about after the

14   CARES Act was passed, she arguably had authority

15   under the HEROES Act to extend the pause but

16   that at some point as that time dragged on post

17   the CARES Act, when the new administration came

18   in, then it exceeded the authority to waive or

19   modify?

20   MR. CAMPBELL: Your Honor, it could

21   have been the -- Secretary DeVos had two

22   extensions. It could have been her second

23   extension. I don't think it hinges on who the

24   administration was.

25   At some point, I think it goes beyond

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 1    a modification and the connection to the

 2    national emergency became too tenuous to

 3    maintain it.

 4              JUSTICE BARRETT:  So it's not that a

 5    pause is different in your mind than canceling

 6    the obligation to repay the principle.  It's

 7    that -- or -- or I guess it's a combination of

 8    the distinction between a pause and a

 9    cancellation and then the temporal --

10              MR. CAMPBELL:  Correct.

11              JUSTICE BARRETT:  -- reach?

12              MR. CAMPBELL:  Correct, because I do

13    think there are significant distinctions between

14    a pause and cancellation.  I'll give you a few.

15              The first is a pause maintains the

16    status quo.  Cancellation puts people in a -- in

17    a far better -- this cancellation puts people in

18    a far better position.

19              A pause keeps indebtedness from

20    rising, versus cancellation erases indebtedness.

21    In addition, as I mentioned before, the

22    connection to the national emergency, when you

23    put a pause in place, when the nation is still

24    dealing with lockdown conditions, that is a -- a

25    -- a there's a pretty close connection between
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1   that and a national emergency.

2   When two-and-a-half years down the

3   road the Secretary, having much time to

4   contemplate this -- this -- the situation, comes

5   in and creates a debt forgiveness program for

6   95 percent of borrowers, the connection to the

7   -- to the national emergency is too tenuous.

8   JUSTICE BARRETT: Okay. I -- I

9   understand.

10   Second question is on standing. Could

11   Missouri file suit to vindicate the interests of

12   the City of St. Louis?

13   MR. CAMPBELL: No, Your Honor,

14   because, when we look at the factors that we've

15   cited for why MOHELA is a state-created and

16   state-controlled entity, the leadership of the

17   City of Missouri is not selected by the governor

18   or by the state. They're selected at the local

19   level.

20   JUSTICE BARRETT: Thank you.

21   CHIEF JUSTICE ROBERTS: Justice

22   Jackson?

23   JUSTICE JACKSON: So can I just

24   understand your view on waiver or modification

25   with respect to sort of the initial applications

1   of this authority?

2   You know, we're sort of in a certain

3   species of it now, but I had understood from the

4   SG and from the briefs that originally we're

5   talking about wartime, and -- and so I'm just

6   trying to understand, are you saying that those

7   were not legitimate waivers or modifications

8   under this kind of power?

9   MR. CAMPBELL: Your Honor, we don't

10   question any of the uses of the HEROES Act prior

11   to 2020. So --

12   JUSTICE JACKSON: Right. But I -- I

13   --

14   MR. CAMPBELL: -- I don't know if I'm

15   understanding the question.

16   JUSTICE JACKSON: -- what -- what

17   is -- what is your view -- again, I'm just

18   trying to clarify your exchange with -- with

19   Justice Kavanaugh on what "waiver" means. So

20   are you saying that the Secretary would have had

21   to change something about the regulations but

22   not about their application with respect to the

23   obligations that they require of people?

24   MR. CAMPBELL: Your -- Your Honor, if

25   I can try to illustrate it with an example, I

1   think this might get to it.

2   There is an existing loan discharge

3   program for permanent disability that requires

4   an individual to expect to be permanently

5   disabled for at least 60 months.

6   If the Secretary came in and said,

7   because of the national emergency, if someone

8   was affected because of that, they can reduce

9   that 60-month requirement down to, say, 36

10   months, that to me is a modification of an

11   existing program. That would be an example.

12   In terms of waiver, waiver is when the

13   Secretary goes in and would take out an

14   entire -- one of the existing requirements. And

15   that's not what the Secretary is doing here.

16   That --

17   JUSTICE JACKSON: I understand.

18   But -- but -- but you're -- I guess my question

19   is, do you dispute that under the prior

20   circumstances people owed a certain amount, and

21   what the Secretary did was modified the amount

22   that they would owe as a result of this loan?

23   MR. CAMPBELL: Your -- Your Honor, I

24   think that's exactly what he was trying to do.

25   And I think that highlights why there's a

 1   problem here. Let me point --

 2   JUSTICE JACKSON: Okay.

 3   MR. CAMPBELL: -- the Court

 4   specifically to the statute that we cite on

 5   pages 46 through 47 of our brief. Congress

 6   knows how to authorize the Secretary to waive or

 7   modify an amount owed. We cite provisions in

 8   the Higher Education Act that specifically say

 9   the Secretary shall waive the amount owed.

10   Here, the Secretary wasn't given that

11   language. If the Secretary instead was given

12   the power to waive or modify provisions, and so

13   that's why the analysis here have --

14   JUSTICE JACKSON: But why doesn't it

15   all -- why doesn't it all reduce to the same

16   thing? And this is where I go back to the sort

17   of original application.

18   I mean, so, fine, we have wartime

19   people who are away and you say you have no

20   problem with the Secretary modifying the

21   regulations insofar as it would help them, but

22   doesn't it reduce to just them not having to pay

23   as much? I don't understand why there's really

24   a distinction --

25   MR. CAMPBELL: Well --

 1   JUSTICE JACKSON: -- between waiving

 2   the -- the regulations in the way that you're

 3   reading this and waiving the amount a person

 4   owes under a regulation that relates to a loan.

 5   MR. CAMPBELL: Your Honor, there's

 6   never been a past use of the HEROES Act that

 7   would eliminate the amount that someone owes.

 8   So I don't think there's a prior comparator to

 9   look to.

10   JUSTICE JACKSON: Okay. Let me just

11   ask you one final question on my big-picture

12   concern.

13   So I was listening carefully to your

14   opening statement, and you started by indicating

15   that this is one of today's most debated policy

16   questions, and you ended by saying that we, the

17   courts, should essentially answer it by

18   invalidating this program.

19   And what concerns me is that to the

20   extent you're talking about separation of powers

21   and major questions, the judiciary is part of

22   the same constitutional separation of powers

23   dynamic that compels us to think about questions

24   like the major questions doctrine.

25   And I feel like we really do have to

 1   be concerned about jumping into the political

 2   fray, unless we are prompted to do so by a

 3   lawsuit that is brought by someone who has an

 4   actual interest. So this is why I'm sort of

 5   pressing really hard on the standing point.

 6   And so do -- do you dispute that the

 7   ordinary standing rule would be that a plaintiff

 8   cannot establish standing by asserting the

 9   interests of an independent actor or by saying

10   that an independent actor not before the Court

11   will respond to the defendant's actions in a

12   certain way?

13   I mean, isn't the ordinary rule one

14   that really doesn't cover you and what you're

15   asking for in a way is an extension of our

16   standing principles to allow for the state to

17   proceed with this action?

18   MR. CAMPBELL: Your Honor, I don't

19   believe so. I think what we're asking for is

20   the same treatment that the federal government

21   got in Cherry Cotton Mills and Erickson.

22   We're asking for the ability to assert

23   the interests of the public corporation that the

24   State of Missouri created, that it controls and

25   that it charged with performing nothing but

 1   essential government functions.

 2   JUSTICE JACKSON: All right. So we'll

 3   go back and look at that case, and if we find

 4   that the federal government had some sort of a

 5   separate interest that it was asserting, do you

 6   lose? I mean, is that your only case that is

 7   going to make it be the case that we can find

 8   standing for you?

 9   MR. CAMPBELL: No, Your Honor. I

10   think that those cases are certainly helpful. I

11   would direct the Court, if the Court wants to

12   look under either federal law to see what it

13   takes to be a part of the government, I would

14   direct the Court to Lebron and Department of

15   Transportation that we cite.

16   If the Court wants to look --

17   JUSTICE JACKSON: So you reject the

18   distinction that the -- that the SG pointed to

19   with respect to what those cases were about?

20   Those were not standing cases. We have

21   different doctrines that apply when we're

22   looking at different issues.

23   And the issue of whether or not you

24   are injured by, you know, an injury to another

25   entity, an independent corporation, seems to me

 1   to be a separate thing.

 2   So do you have a case that would help

 3   us to understand whether an entity like MOHELA

 4   that has totally been isolated through state law

 5   from liability, that can sue for itself, et

 6   cetera, do you have a case where we've said that

 7   same kind of entity you can sue as a state in --

 8   because you're injured for standing purposes?

 9   MR. CAMPBELL: Your Honor, I think the

10   closest cases we have are the ones I referenced

11   before, Cherry Cotton Mills and Erickson.

12   But I will say that part of the

13   inquiry has to look to state law to see if

14   Missouri is charged with speaking -- has the

15   ability to speak on behalf of MOHELA.

16   And on that front, I would point the

17   Court to two things. One is Missouri Statute

18   27.06 -- .060, which gives the attorney general

19   the right to determine whether to litigate in

20   the name of the state to protect any interest of

21   the state. And because MOHELA is a --

22   JUSTICE JACKSON: But, of course,

23   that's the question here, right?

24   MR. CAMPBELL: -- but because MOHELA

25   --

1   JUSTICE JACKSON: Yeah.

2   MR. CAMPBELL: -- is a part of the

3   state --

4   JUSTICE JACKSON: I see.

5   MR. CAMPBELL: -- and the second point

6   that I would direct the Court to is the Casualty

7   Reciprocal Exchange case. That's the case that

8   specifically identified what it means to be a

9   public corporation under Missouri state law.

10   And it identifies the same factors

11   that Lebron looked to. It's whether it was

12   created by the government, controlled by the

13   government, and whether it's performing

14   essential public purposes.

15   JUSTICE JACKSON: Thank you.

16   MR. CAMPBELL: Thank you.

17   CHIEF JUSTICE ROBERTS: Thank you,

18   counsel.

19   Rebuttal, General?

20   REBUTTAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

21   ON BEHALF OF THE PETITIONERS

22   GENERAL PRELOGAR: Thank you, Mr.

23   Chief Justice.

24   I'll pick up with standing and focus

25   on the MOHELA-related arguments.

1   Justice Barrett, you asked about the

2   provision of state law 173.420. This is a

3   provision that refers generally to Missouri

4   reserving rights over the assets of MOHELA.

5   I think, if you look at that in

6   context, it clearly functions as a savings

7   clause. It's making clear that notwithstanding

8   all of the other provisions we've pointed to,

9   like 173.425, .4210 -- 410, these are the

10   provisions that create the strict financial

11   separation, that Missouri is reserving its

12   rights under other sources of law, like eminent

13   domain or search and seizure, and it's not

14   actually limiting its ability to obtain assets

15   in that way.

16   I understand my friend to have

17   conceded that actually Missouri would have to

18   change its law and change the structure of

19   MOHELA if it wanted to have any direct access to

20   MOHELA's assets. And that makes sense because

21   these other provisions that I just pointed you

22   to are very clear that there is absolute

23   financial separation between the state and

24   MOHELA.

25   You asked as well about control over

 1   MOHELA, which my friend has emphasized several

 2   times. That's actually one of the relevant

 3   questions under the arm-of-the-state doctrine,

 4   whether you could direct the authority in any

 5   way. I'd point to Justice Kavanaugh's decision

 6   in the D.C. Circuit in the Puerto Rico Ports

 7   Authority case. There, it was significant that

 8   you could direct the -- the authority to sue.

 9   And, here, that's obviously lacking, and the

10   state hasn't attempted to do that.

11   My friend several times brought up the

12   Cherry Cotton Mill and Erickson cases. In

13   Cherry Cotton Mill, there was an express

14   statutory right of the United States to tax

15   offsets, and the Court was interpreting that

16   statutory language and determined that the

17   United States had its own interest in the

18   statutory right and further emphasized that with

19   respect to that particular public corporation --

20   and I'm reading from the language of the Court's

21   opinion -- that for the public corporation, "its

22   profits, if any, go to the Government; its

23   losses the Government must bear."

24   There wasn't the financial separation

25   in that case that exists here, and there was a

 1   distinct statutory right on behalf of the United

 2   States.

 3   Erickson is even further afield. It

 4   wasn't a case about standing at all. And there,

 5   the United States had a contract right that the

 6   instrumentality had entered into as an agent of

 7   the federal government. The instrumentality was

 8   itself a plaintiff in that case, and there was

 9   no Article III issue in the case.

10   Finally, I'll focus on the

11   contributions to the Lewis and Clark Discovery

12   Fund. This is the secondary argument as it

13   relates to MOHELA. There are huge factual

14   deficiencies in trying to premise standing on

15   that basis. As we've explained, they haven't

16   been able to bring forward allegations that

17   would substantiate the asserted financial

18   impacts on MOHELA and certainly haven't

19   established that that will be the likely cause

20   of any default to a fund that hasn't been paid

21   for the last 15 years.

22   But there's also a more fundamental

23   legal problem with their theory. It has no

24   logical stopping point. There's nothing, for

25   example, that would prevent anyone who's owed a

 1   debt to say that suddenly they can have standing

 2   to challenge a regulation that doesn't affect

 3   them in any way because it might affect the

 4   debtor, who then will be unable to make good on

 5   that -- on that liability. And there is no

 6   precedent in this Court's Article III doctrine

 7   to support that kind of broad expansion of

 8   Article III standing here.

 9   Turning to the merits, I want to pick

10   up on the colloquies that my friend was having

11   about the meaning of the term "waive or modify."

12   And if I understand the gloss that he's putting

13   on that language, I don't think that there would

14   be any room to grant any kind of HEROES Act

15   relief whatsoever.

16   He says that there was no waiver or

17   modification here, but there was. The Secretary

18   took the provisions that deal with discharge and

19   cancellation and he waived the existing

20   eligibility requirements and modified those

21   provisions to add an additional basis for

22   relief.

23   This is how Secretaries across

24   administrations have implemented the HEROES Act.

25   For example, with deferment, the Secretary, in

1   prior uses of the HEROES Act, took the

2   provisions that exist for deferment and waived

3   the existing eligibility requirements and then

4   granted additional deferment in line with the

5   national emergency.

6   That fits with the plain language of

7   the statute, and to suggest that that

8   automatically creates a brand-new program would

9   leave very little room for the HEROES Act to

10   operate at all.

11   My friend is getting it exactly

12   backwards. The fact that there are already

13   statutory provisions for things like deferment

14   and forbearance and discharge demonstrates that

15   Congress could foresee that all of those are

16   ways that you grant financial relief to

17   student-loan borrowers.

18   And in the context of a statute like

19   this one that is centrally focused on ensuring

20   that the Secretary can act in unforeseen

21   circumstances outside the existing scope of

22   those provisions, Congress directed that the

23   Secretary has the authority to "waive or modify"

24   in order to expand eligibility for those forms

25   of relief.

1   So we'd ask the Court to reject the

2   states' arguments here.

3   CHIEF JUSTICE ROBERTS: Thank you,

4   counsel.   The case is submitted.

5   (Whereupon, at 12:15 p.m., the case

6   was submitted.)

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