Nos. 22-506 & 22-535

IN THE
Supreme Court of the United States

JOSEPH R. BIDEN, JR.,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,
v.
STATE OF NEBRASKA, ET AL.,
Respondents.

DEPARTMENT OF EDUCATION, ET AL.,
Petitioners,
v.
MYRA BROWN, ET AL.,
Respondents.

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

BRIEF OF FORMER REPRESENTATIVE GEORGE MILLER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

During his forty-year career representing California's seventh and eleventh congressional districts, Representative George Miller frequently engaged with issues of higher education policy. Indeed, he was one of the chief architects of the HEROES Act of 2003, the legislation that authorized the targeted debt relief plan at issue in this case. He was a co-sponsor of the bill that became the HEROES Act of 2003, H.R. 1412, 108th Cong., as well as related legislation in 2001, *see* H.R. 3086, 107th Cong.; in 2005, *see* H.R. 2132, 109th Cong.; and in 2007, H.R. 3625, 110th Cong. As a former member and chairman of the House Education and Labor Committee, he also has extensive expertise concerning the U.S. Department of Education and its role in managing the federal government's portfolio of student loans. Accordingly, he has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

To facilitate the "democratization of college opportunities in the United States," Congress has long provided for federal involvement in the student loan market. Lawrence E. Gladieux, U.S. Dep't of Educ., *Federal Student Aid Policy: A History and Assessment* 43 (Oct. 1995). Indeed, in 1958, Congress created the first

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[1] Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or his counsel made a monetary contribution to its preparation or submission.

federally funded, low-interest loans for college students, convinced that the "security of the Nation requires the fullest development of the mental resources and technical skills of its young men and women." National Defense Education Act of 1958, Pub. L. No. 85-864, § 101, 72 Stat. 1580, 1581. Since then, lawmakers have expanded educational access by providing guarantees for private loans, *see* Higher Education Act, Pub. L. No. 89-329, 79 Stat. 1219 (1965), and authorizing direct loans to student borrowers from the government, *see* Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448, 569; *see generally* Pet'r Br. 3-4 (describing variety of loan programs encompassed under Title IV of the Higher Education Act).

These programs embody an "explicit federal commitment to equalizing college opportunities for needy students," Gladieux, *supra*, at 44, and aim to improve higher education options through the mechanism of student choice, *see* Elizabeth Popp Berman & Abby Stivers, "Student Loans as a Pressure on U.S. Higher Education," *in The University Under Pressure* 129, 129-31 (Elizabeth Popp Berman & Catherine Paradeise eds., 2016) (noting that "policymakers are also interested in encouraging competition for funding among colleges in the hopes of improving their performance").

In all of these laws, Congress enlisted federal agencies to administer the federal government's expansive student loan program. As relevant here, the Higher Education Act ("HEA") authorizes the Secretary of Education to regulate student loan programs to "assist in making available the benefits of postsecondary education to eligible students" through the

provision of federal financial aid. 20 U.S.C. § 1070(a). It gives the Secretary the specific authority to "compromise, waive, or release any right, title, claim, lien, or demand" acquired in the Secretary's performance of his vested "functions, powers, and duties" to administer federal student loans, *id.* § 1082(a), and it generally authorizes the Secretary to "prescribe such regulations as may be necessary to carry out the purposes of this part," *id.* § 1082(a)(1).

In 2003, Congress passed the HEROES Act of 2003. Pub. L. No. 108-76, 117 Stat. 904. Like the HEA, that Act contains a waiver provision. It provides that the Secretary of Education "may waive or modify any statutory or regulatory provision" that applies to student loan programs, as he "deems necessary in connection with a . . . national emergency." 20 U.S.C. § 1098bb(a)(1). The HEROES Act specifically permits the Secretary to use this authority "as may be necessary to ensure that" federal student-aid recipients who are affected by national emergencies "are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." *Id.* § 1098bb(a)(2).

In March 2020, former President Trump declared the COVID-19 pandemic to be a "national emergency." *See* 85 Fed. Reg. 15,337 (Mar. 18, 2020); *see also* 87 Fed. Reg. 10,289 (Feb. 23, 2022) (continuing this designation). Since then, education secretaries serving under both President Trump and President Biden have invoked the HEROES Act in response to the COVID-19 pandemic. For example, they used this authority to pause students' repayment obligations and suspend interest accrual on Department-held student

loans. *See* 85 Fed. Reg. 79,856, 79,857 (Dec. 11, 2020); 86 Fed. Reg. 5,008 (Jan. 19, 2021).

On August 24, 2022, Secretary of Education Miguel Cardona announced the Department of Education's Student Debt Relief Plan, which paired a final extension of the longstanding payment pause with targeted debt cancellation in order "[t]o address the financial harms of the pandemic by smoothing the transition back to repayment and helping borrowers at highest risk of delinquencies or default once payments resume." U.S. Dep't of Educ., Press Release, "Biden-Harris Administration Announces Final Student Loan Pause Extension Through December 31 and Targeted Debt Cancellation to Smooth Transition to Repayment" (Aug. 24, 2022); *see id.* (explaining that the "targeted relief . . . will help ensure borrowers are not placed in a worse position financially because of the pandemic"). As the federal government explains in detail, the plan targets the unique financial risks posed by the expiration of the pandemic-related pause of interest accrual and repayment obligations, in combination with the current economic conditions facing borrowers. *See* Pet'r Br. 9-11, 57-59; J.A. 238 (Memo from James Kvaal, Undersec'y of Educ., describing the "significant pressures" created by pandemic-related inflation and the expiration of the payment pause).

The state respondents argue, and the court in *Brown* held, that that the Secretary "lacks clear congressional authorization" for the program." J.A. 293; States' Resp. to Appl. 26, *Nebraska v. Biden*, No. 22-506 (arguing that the plan "exceeds the Secretary's authority" under the HEROES Act). But this argument is at odds with the text and history of the Act. The law's plain text authorizes the Secretary to "waive or

modify" student loan provisions in response to certain conditions, clearly permitting the Secretary to reduce students' debt burdens by way of waiver or modification of the laws requiring repayment. Indeed, this is how the Department of Education and the courts have understood the Secretary's waiver authority for decades. *See, e.g.*, 53 Fed. Reg. 33,427 (Aug. 30, 1988) (interpreting HEA provision permitting "waiver" of student loan provisions to permit the Secretary to "suspend or terminate collection of a debt, in *any amount*" (emphasis added)). Furthermore, by allowing waivers or modifications that the Secretary "deems necessary" in response to a national emergency, 20 U.S.C. § 1098bb(a)(1), and authorizing "actions" that "may be necessary to ensure" that certain goals are met, *id.* at § 1098bb(a)(2), Congress gave the Secretary broad discretion to determine when such waivers or modifications might be necessary.

The history of the HEROES Act confirms what its plain text makes clear. As *amicus* knows from his involvement in the drafting of the Act, Congress modeled the HEROES Act of 2003 on a 2001 law that gave the Secretary substantial authority to protect borrowers who were affected by the September 11 terrorist attacks. While the HEROES Act was originally set to expire in 2005, Congress then extended the Secretary's authority for two years, s*ee* Pub. L. No. 109-78, 119 Stat. 2043 (2005), and in 2007 made the Act permanent, *see* Pub. L. No. 110-93, 121 Stat. 999 (2007). At each of these junctures, Congress gave the Secretary of Education broad discretion and "flexibility" to protect student loan recipients from military emergencies, national disasters, and any "unforeseen issues that may arise." H. Rep. 122, 108th Cong., at 8 (2003).

Secretaries across administrations have used that authority on several occasions, both before and during the COVID-19 pandemic. Thus, far from cabining the Secretary to "relatively narrow[]" action, States' Resp. to Appl. 29, *Nebraska v. Biden*, No. 22-506, the Act confers significant authority on the Secretary to ease the burdens on borrowers who have been affected by unexpected national emergencies. And that is exactly what the Secretary has done here.

ARGUMENT

I. The Text of the HEROES Act Makes Clear That the Secretary Has Broad Authority to Respond to National Emergencies.

The HEROES Act gives the Secretary of Education the authority to "waive or modify any statutory or regulatory provision" regarding federal student-loan programs "as the Secretary deems necessary in connection with a . . . national emergency." 20 U.S.C. § 1098bb(a)(1). The Secretary is authorized to exercise this authority "as may be necessary to ensure" that federal student-aid recipients who are affected by national emergencies "are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." *Id.* § 1098bb(a)(2). The Secretary "is not required to exercise the waiver or modification authority" under the HEROES Act "on a case-by-case basis." *Id.* § 1098bb(b)(3).

A. The text of the HEROES Act authorizes the Secretary of Education to reduce or eliminate a borrower's debt obligation.

In *Brown*, the court below concluded that the plan lacked statutory authorization because the HEROES

Act does not "mention loan forgiveness," and " allows the Secretary only to 'waive or modify' provisions of [T]itle IV," rather than to "provide for loan forgiveness." J.A. 291. But the statute did not need to mention "loan forgiveness"—just as there was no need for it to mention 'payment pause' or 'suspension of interest accrual' to authorize earlier forms of pandemic relief—because it gives the Secretary the broad authority to "waive" or "modify" "statutory or regulatory provision[s] applicable to the student financial assistance programs under title IV" of the HEA, *id.* § 1096bb(a); *id.* § 1098aa(c) ("References in this part to 'the Act' are references to the Higher Education Act of 1965."), and thus plainly authorizes the reduction or elimination of borrowers' debt.

As an initial matter, the provisions requiring individuals to repay student loans are "statutory or regulatory provision[s] applicable to the student financial assistance programs under title IV." *Id.* § 1098bb(a)(1); *see, e.g.*, *id.* § 1087dd(c) (requiring loan agreements to "provide[] for repayment of the principal amount of the loan"); 34 C.F.R. § 685.207(a)(1) ("[a] borrower is obligated to repay the full amount of a Direct Loan"); *id.* § 682.102(a) ("[a] borrower is obligated to repay the full amount" of a loan under the FFEL Program); *id.* § 682.209 ("Repayment of a loan.").

By permitting the Secretary to "waive" these provisions, the Act permits the Secretary to "give up," "relinquish," or "refrain from . . . enforcing" them. *Waive*, Merriam-Websters' Dictionary 1406 (11th ed. 2003); *Waive*, American Heritage Dictionary 914 (4th ed. 2001) ("give up (a claim or right) voluntarily"). "Waive" is often used to refer to a decision to decline to seek payment of an amount owed. *See Brooklyn Sav.*

Bank v. O'Neil, 324 U.S. 697, 704 (1945) (understanding a damages waiver as a "bar[to] subsequent action to recover" those damages); *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 80 (D.C. Cir. 2014) (understanding "waive" as "promising not to penalize"); Internal Revenue Manual § 20.1.3.2.7 (2010) ("Waivers are sometimes granted . . . to provide relief from estimated tax penalties" and to allow the IRS to "cancel an estimated tax penalty.").

And by authorizing the Secretary to "modify" these provisions, the Act allows him to change them so that the amount of a student debtor's loan obligation is reduced. American Heritage Dictionary 545 (4th ed. 2001) (defining "modify" as "change," "make . . . less extreme, severe, or strong"); *Modify*, Merriam-Websters' Dictionary 1406 (11th ed. 2003) ("to make less extreme"). To be sure, this Court has observed that the term "modify" sometimes connotes only limited or incremental changes, *see MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.,* 512 U.S. 218, 225 (1994); *see also* 46 Op. O.L.C. 1, 10 (Aug. 23, 2022), but that is only when surrounding context suggests that connotation. In *MCI*, this Court held that the FCC's authority to "modify" tariff filing requirements did not "contemplate" a rule that would exempt most of the regulated market from filing at all. 512 U.S. at 228. But the Court in *MCI* did not look at the definition of "modify" alone. Rather, it found "further indication" from the context in which the word was used—the fact that the section authorizing modification contained a "sole exception" prohibiting the modification of a notice period. *Id.* The disjuncture between the FCC's broad reading of the modification authority and the very specific exception led this Court to interpret narrowly the word "modify."

Id. at 229 ("Is it conceivable that the statute is indifferent to the Commission's power to [make broad modifications] and yet strains out the gnat of extending the waiting period for tariff revision beyond 120 days?").

By contrast, in the HEROES Act the term "modify" appears as part of the phrase "waive or modify." 20 U.S.C. § 1098bb(a)(1). There are no "exceptions" to the modification authority. In fact, the authority exists "[n]otwithstanding any other provision of law," *id.*, and alongside the companion authority to "waive" provisions, *see Beecham v. United States*, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well.").

Furthermore, the word "modify" can, in some circumstances, refer to "substantial" changes up to and including the elimination of certain obligations in their entirety. For example, the power to "modify" a term of imprisonment under 18 U.S.C. § 3582(c)(2) gives courts "the power to 'reduce' an otherwise final sentence" by any degree, *Dillon v. United States*, 560 U.S. 817, 825-26 (2010) (any reduction authorized so long as it aligns with § 3582(c)(2)'s reference to Sentencing Commission guidance); *Concepcion v. United States*, 142 S. Ct. 2389, 2398 (2022) (the "broad discretion" of federal courts at sentencing "carries forward to later proceedings that may modify an original sentence"). And in federal budgeting, the authority to "modify" a loan authorizes "changes [to] the estimated cost of an outstanding direct loan" and can include "forgiveness." Off. Mgmt. & Budget, OMB Circular No. A-11, Preparation, Submission, and Execution of the Budget § 185.3(s); *see id.* ("Modifications produce a one-time change in the subsidy cost of outstanding direct loans

(or direct loan obligations)." (emphasis omitted)). Even when interpreting the Communications Act in *MCI*, this Court noted that the FCC's modification authority could be used to "defer filing or perhaps *even waive it altogether* in limited circumstances." 512 U.S. at 234 (emphasis added).

In short, the HEROES Act permits the reduction or elimination of a student borrower's debt burden by allowing the Secretary to "relinquish," *Waive*, Merriam-Websters' Dictionary 1406 (11th ed. 2003), or "make less extreme," American Heritage Dictionary 545 (4th ed. 2001), the provisions that require repayment of student loans. This understanding of "waive" and "modify" is consistent with the way that agencies have interpreted these terms in similar statutory provisions. For example, the HEA has long authorized the Secretary to "modify," 20 U.S.C. § 1082(a)(4), or "compromise, waive, or release" any "right, title, claim, lien, or demand" acquired in the Secretary's performance of the "functions, powers, and duties" to administer federal student loans, *id.* § 1082(a)(6) (regarding FFELP loans); *see also* 20 U.S.C. § 1087hh(1), (2) (Perkins Loans); *id.* § 1087e(a) (making Direct Loans subject to "the same terms, conditions, and benefits as [FFELP]"). Regulations interpreting these provisions have permitted the agency to "terminate collection of a debt *in any amount*." 34 C.F.R. § 30.70(e)(1) (effective July 1, 2017) (emphasis added); 53 Fed. Reg. 33,427 (Aug. 30, 1988) (codified at former 34 C.F.R. § 30.70(h)) ("Notwithstanding [the Department's other settlement authorities] the Secretary may compromise a debt, or suspend or terminate collection of a debt, in *any amount* if the debt arises under [the FFELP or Perkins Loan Program]." (emphasis added)). In some

cases, the Department has used its modification authority to eliminate a student's debt obligations entirely. *See* Decl. of Cristin Bullman 5, *Carr v. DeVos*, No. 19-cv-6597 (S.D.N.Y. Oct. 3, 2019), Dkt. No. 15-1 (noting that one plaintiff's "loans were modified by the Secretary pursuant to 20 U.S.C. § 1082(a)(4), resulting in balances of $0.00"); Gov't Opp. Mot. Inj. Pending Appeal 27, *Nebraska v. Biden*, No. 22-3179 (8th Cir. Nov. 14, 2022) (citing cancellation actions for students of closed schools).

Courts have also permitted the Department of Education and its predecessor, the Office of Education, to use the "waiver" authority to "decline to enforce" rights against a student, so long as the declination is "in the larger interests of the student loan program." *United States v. Griffin*, 707 F.2d 1477, 1482 (D.C. Cir. 1983); Stipulation of Dismissal, *Carr*, No. 19-cv-6597 (S.D.N.Y. Oct. 7, 2019), Dkt. No. 16. And courts have also held that the Secretary's decision to exercise this waiver authority "is committed to [her] absolute discretion." *Weingarten v. Devos*, 468 F. Supp. 3d 322, 338 (D.D.C. 2020) (citing *Balt. Gas & Elec. Co. v. F.E.R.C.*, 252 F.3d 456, 459 (D.C. Cir. 2001)).

B. The statute's plain text also authorizes the Secretary to reduce student loan balances in response to the COVID-19 pandemic.

The HEROES Act gives the Secretary the discretion to waive loan provisions as he or she "deems necessary in connection with a . . . national emergency." 20 U.S.C. § 1098bb(a)(1). The Secretary is authorized to exercise this authority "as may be necessary to ensure" that federal student-aid recipients who are affected by such emergencies "are not placed in a worse position

financially in relation to that financial assistance because of their status as affected individuals." *Id.* § 1098bb(a)(2).

This text plainly grants the Secretary broad discretion to determine what relief is appropriate for student borrowers affected by a national emergency. The phrase "deems necessary" "fairly exudes deference" to the Secretary, *Webster v. Doe*, 486 U.S. 592, 600 (1988), and confers "legitimate discretionary power," *City of New York v. FCC*, 486 U.S. 57, 67 (1988) (interpreting the phrase "may be necessary" in 47 U.S.C. § 303(r)); *North Dakota ex rel. Bd. of Univ. & School Lands v. Yeutter*, 914 F.2d 1031, 1035 (8th Cir. 1990) (statute permitting waiver "if the Secretary determines" that certain conditions are met "fairly exudes deference" to the Secretary).

In *Webster*, this Court emphasized the importance of the word "deem" in a statute granting the Director of the Central Intelligence Agency the authority to terminate an employee "whenever he shall deem such termination necessary or advisable in the interests of the United States." *Webster*, 486 U.S. at 615. "[I]t should be noted," the Court explained, that the statute "allows termination of an Agency employee whenever the Director 'shall deem such termination necessary or advisable in the interests of the United States' . . . not simply when the dismissal *is* necessary or advisable to those interests." *Id.* at 600. Congress's use of the word "deem" underscored that the termination decision was committed to the Director's discretion. *Id.*; *see id.* at 615-16 (Scalia, J., dissenting) (noting that it was "compellingly obvious" that the statutory text committed "individual employee discharges to the Director's discretion," but disagreeing with the conclusion that the

Director's decision was reviewable for constitutional defect); *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 561 (1976) (interpreting a statute authorizing the President to "take such action, and for such time, as he deems necessary" in a particular circumstance to "clearly . . . grant him a measure of discretion"). Like the statute at issue in *Webster*, the HEROES Act "exudes deference" to the Secretary to determine when a waiver or modification of loan-related provisions is appropriate.

To be sure, § 1098bb(a)(2) guides the Secretary's discretion by specifying the circumstances in which certain relief is appropriate, but even this guidance confers "broad authority" on the Secretary. *Mourning v. Fam. Publ'ns Serv., Inc.*, 411 U.S. 356, 365 (1973). This subsection provides that the Secretary may waive or modify student loan conditions "as may be necessary to ensure" that borrowers who are affected by national emergencies "are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals," 20 U.S.C. § 1098bb(a)(2)(A), and that administrative requirements placed on these borrowers are "minimized . . . to the extent possible without impairing the integrity of the student financial assistance programs, to ease the burden on such students and avoid inadvertent, technical violations or defaults," *id.* § 1098bb(a)(2)(B).

By authorizing actions that "may be necessary to ensure" that certain goals are met, *id.* § 1098bb(a), Congress empowered the Secretary to take actions necessary to "make sure" or "make certain" those goals are satisfied. *Ensure,* Merriam-Websters' Dictionary 416 (11th ed. 2003). In other words, this language merely guides—rather than eliminates—the

Secretary's discretion. Indeed, when interpreting similar language in a statute's general rulemaking provision, this Court explained that provisions allowing agencies to "make . . . such rules and regulations as may be necessary to carry out the provisions of this Act," *Mourning*, 411 U.S. at 369 (1973) (citing 42 U.S.C. § 1408), require a "reasonabl[e]" relationship between the provisions of the Act and an agency's regulation, *id.* (citing *Thorpe v. Hous. Auth. of Durham*, 393 U.S. 268, 280-81 (1969)); *see also Merck & Co. v. U.S. Dep't of Health & Hum. Servs.*, 962 F.3d 531, 537-38 (D.C. Cir. 2020) (when a statute authorized regulations "necessary to carry out the administration of" the Medicare and Medicaid programs, it authorized regulations with an "actual and discernible nexus" to the "conduct or management" of those programs). As the federal government explains in detail, the plan at issue here bears a "reasonable" relationship and a "discernible nexus" to the goals articulated in § 1098bb(a)(2). *See* Pet'r Br. 56-59 (explaining that the Secretary's plan is "reasonable and reasonably explained"); J.A. 232-55 (describing "Rationale for Pandemic-Connected Loan Discharge Program").

Finally, other contextual cues confirm the breadth of the Secretary's discretion. First, the Act exempts any waiver or modification decision from many procedural requirements, including notice-and-comment rulemaking under the Administrative Procedure Act. 20 U.S.C. § 1098bb(b)(1), (d). Second, the Act specifically provides that the Secretary "is not required to exercise the waiver or modification authority . . . on a case-by-case basis." *Id.* § 1098bb(b)(3). Third, the Act specifies that the Secretary can use the waiver and modification authority "[n]otwithstanding any other

provision of law, unless enacted with specific reference to this section." *Id.* § 1098bb(a)(1). By freeing the Secretary from the constraints of procedural obligations and individualized decision-making, Congress made clear its plan to vest the Secretary with broad discretion to take any actions that he deems necessary to ensure that student borrowers are not negatively affected by national emergencies.

C. In *Brown*, the court below concluded that the plan was not authorized by the HEROES Act because, in its view, "it is unclear if COVID-19 is still a 'national emergency' under the Act." J.A. 292-93 (noting that "[t]he COVID-19 pandemic was declared a national emergency almost three years ago and declared weeks before the Program by the President as 'over'" (citing 60 Minutes (@60Minutes), TWITTER (Sept. 18, 2022, 7:09 PM), https://tinyurl.com/2s35maau). This conclusion is at odds with the plain text of the governing statute, which defines exactly when and how "national emergencies" can be terminated.

The HEROES Act defines "national emergency" to be "a national emergency declared by the President of the United States." *See* 20 U.S.C. § 1098ee(4). When Congress passed the HEROES Act, the National Emergencies Act of 1976 provided a framework for "[a]ny provisions of law conferring powers and authorities to be exercised during a national emergency." *See* 50 U.S.C. §§ 1601 *et seq.*; *id.* § 1621(b); *Hall v. United States*, 566 U.S. 506, 516 (2012) (noting that this Court generally "assume[s] that Congress is aware of existing law when it passes legislation" (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990)). In 2003, the National Emergencies Act authorized the President to declare a national emergency and required that "such

proclamation shall immediately be transmitted to the Congress and published in the Federal Register." 50 U.S.C. § 1621(a). The Act also specified that national emergencies would terminate by concurrent resolution of Congress, *id.* § 1622(a)(1), by proclamation from the President, *id.* § 1622(a)(2), or "automatic[ally]" after one year unless the President published a notice of continuation, *id.* § 1622(d). The National Emergencies Act does not contemplate any additional methods of declaration or termination of a national emergency. *Id.* § 1621(b) ("Any provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective . . . *only* in accordance with this chapter." (emphasis added)).

The COVID-19 pandemic is a "national emergency" under the National Emergencies Act and, accordingly, the HEROES Act. President Trump initially declared a national emergency concerning the COVID-19 pandemic on March 13, 2020. *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, 85 Fed. Reg. 15,337 (Mar. 18, 2020). President Biden has twice published notices continuing this declaration. *See Notice on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic*, 87 Fed. Reg. 10,289 (Feb. 23, 2022); *Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic*, 86 Fed. Reg. 11,599 (Feb. 26, 2021). Neither the President nor Congress has terminated the national emergency and thus a "national emergency" continues to exist within the meaning of the HEROES Act.

D. Finally, as *amicus* well knows from his participation in the drafting of the HEROES Act, the states'

contention that the loan-forgiveness plan "exceeds the Secretary's authority" is completely without merit. States' Resp. to Appl. 26, *Nebraska v. Biden*, No. 22-506; J.A. 291-94.

In fact, the Secretary's plan is exactly the type of initiative that the Act authorizes. By using broad terms, the HEROES Act gives the Secretary the authority to make the type of "major policy decision[]," *id.* at 17, at issue here—an appropriate exercise of the authority that Congress has delegated to the agency charged with facilitating the administration of student loans. *See supra* 2-3; *see also Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (considering whether an agency action was within the agency's "particular domain"); *West Virginia v. EPA*, 142 S. Ct. 2587, 2612-13 (2022) ("When an agency has no comparative expertise in making certain policy judgments, we have said, Congress presumably would not task it with doing so." (quotation marks omitted)).

It may be that Congress does not "hide elephants in mouseholes," *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001), but here the statute places the elephant in plain sight. Because the statute clearly authorizes the Secretary to take broad action, it authorizes policy decisions—even allegedly "major" ones, States' Resp. to Appl. 27-28, *Nebraska v. Biden*, No. 22-506; J.A. 288 (concluding that the major-questions doctrine applies)—like the debt relief plan. And as the next Section explains, the history of the HEROES Act only confirms that the statute authorizes just the type of broad relief envisioned by the Secretary's targeted debt relief plan.

II. The History of the HEROES Act Confirms that It Authorizes Action as Broad as Its Text Indicates.

The HEROES Act's history further confirms the breadth of the Secretary's authority to waive and modify student loan provisions in response to national emergencies.

A. In the HEROES Act of 2003, Congress provided the Secretary with the flexibility to adopt a wide variety of responses to unforeseen circumstances.

A few months after the September 11 terrorist attacks, Congress passed the HEROES Act of 2001, "provid[ing] the Secretary of Education with specific waiver authority to respond to conditions in the national emergency declared by the President on September 14, 2001," or "subsequent national emergencies declared by the President by reason of terrorist attacks." Pub. L. No. 107-122, 115 Stat. 2386, 2388 (2002). It authorized the Secretary to "waive or modify any statutory or regulatory provision applicable to" student loan programs "as may be necessary to ensure that" individuals affected by the terrorist attacks—which included those who "suffered direct economic hardship as a direct result," *id.* at 2386, 2388—were "not placed in a worse position financially in relation to those loans" because they were affected by the attacks, *id.* at 2386.

When debating this bill, members of Congress emphasized the flexibility it provided to the Secretary of Education. *Amicus* Representative Miller, for example, noted that the Act gave the Secretary the power to "adjust the laws governing student aid programs, if necessary, in response to the September 11 attacks."

147 Cong. Rec. H10892 (Dec. 19, 2001). Another member explained that these adjustments would allow the Secretary to "reduce the effects of . . . upheaval" for students and their families. 147 Cong. Rec. H7132 (Oct. 23, 2001) (Rep. McKeon). Representative Boehner added that the bill "addresses the issue arising from what has occurred," but "also allows the Secretary to address needs arising from incidents that may occur in the future," 147 Cong. Rec. H7133 (Oct. 23, 2001), gesturing toward the Secretary's authority to respond to future terrorism-related emergencies, *see* 115 Stat. 2388.

Furthermore, lawmakers recognized that the Secretary might take broad action in exercise of his authority under the HEROES Act of 2001. They explained, for example, that the law enabled the Secretary to "relax repayment obligations," and "reduce or delay monthly student loan payments." *See* 147 Cong. Rec. H7133 (Oct. 23, 2001) (Rep. Boehner). And in response to the contention that the law authorized "too much compensation," one lawmaker observed that this was "a ridiculous discussion," because Congress did "not have the capacity to give too much." 147 Cong. Rec. H7134 (Oct. 23, 2001) (Rep. Owens).

Shortly before the expiration of the 2001 Act, Congress passed the HEROES Act of 2003, which expanded the Secretary's authority. Specifically, the HEROES Act of 2003 broadened the definition of "affected individuals" to include student debtors affected by any presidentially declared national emergency, rather than only those relating to terrorism. *See* 117 Stat. 905-06 (2003).

When passing the HEROES Act of 2003, lawmakers continued to emphasize the breadth of discretion that it gave the Secretary. A House Report described an amendment containing the HEROES Act as "[p]rovid[ing] the Secretary with the authority to implement waivers deemed necessary and not yet contemplated." H. Rep. 122, 108th Cong. (2003), at 9; *id.* at 8 (adding that the law "[g]rants the Secretary of Education specific waiver authority within Title IV of the Higher Education Act to provide relief to those affected by . . . any unforeseen issues that may arise"). Members also made clear that the law would allow the Secretary "to act quickly should a situation arise that has not been considered," 149 Cong. Rec. H2525 (Apr. 1, 2003) (Rep. McKeon), and would provide the flexibility to "address events now unforeseen," *id.* at H2527 (Rep. Holt); 149 Cong. Rec. H4586 (May 22, 2003) (Rep. Kildee) (urging the Secretary to "use[] the authority we grant him," including to pause the accrual of interest on servicemembers' loans).

This "flexibility" was also central to Congress's plan when it reauthorized the HEROES Act in 2005, *see* 151 Cong. Rec. H8111 (Sept. 20, 2005) (Rep. Kline), and made its provisions permanent in 2007, *see* 153 Cong. Rec. H10789 (Sept. 25, 2007) (Rep. Sestak) ("Without prompt passage of H.R. 3625, the Secretary's authority to provide this flexibility will expire at the end of this week."). Indeed, in making the Act permanent, Congress stated its "sense" that the Act authorized broad action in unforeseen "situations." 121 Stat. 999. In addition to military emergencies, lawmakers explained that this flexibility would help the Secretary respond to "unforeseen national emergencies," including Hurricane Katrina, 153 Cong. Rec.

H10789 (Sept. 25, 2007) (Rep. Kline); *id.* (Rep. Sestak) (referencing "national emergencies and natural disasters").

B. In *Brown*, the court below asserted that the Education Department has used a novel, "unheralded power" to enact its loan forgiveness program. J.A. 293 (citing *West Virginia*, 142 S. Ct. at 2625). This is incorrect: from the very beginning, the HEROES Act of 2003 has been used by the Secretary of Education to assist borrowers affected by national emergencies.

The Department of Education published its first notice of waivers and modifications pursuant to the Act in December 2003. 68 Fed. Reg. 69,312 (Dec. 12, 2003). While a small subset of these waivers and modifications applied only to those on military duty, most applied more broadly. *Id.* at 69,313-18. For example, the Secretary waived certain requirements for affected individuals, including those who "reside or are employed in a disaster area," to make it easier for them to qualify for loan cancellation programs. *Id.* at 69,314-17.

After Congress made the Act permanent in 2007, reiterating that the statute addresses situations faced by "active duty military personnel *and other affected individuals,*" 121 Stat. 999 (emphasis added), the Education Department continued to address the needs of these individuals. On several occasions, most recently in 2017, it extended and renewed nearly all of its 2003 HEROES Act waivers and modifications without major changes. *See* 46 Op. O.L.C. 1, 5-6 (Aug. 23, 2022).

Additionally, Secretaries of Education in the Trump and Biden administrations have used their HEROES Act authority to issue broad waivers and

modifications in response to the COVID-19 pandemic. After President Trump declared a national emergency in March 2020, Secretary Betsy DeVos used her HEROES Act authority to set the interest rates of federal student loans to zero and allow all borrowers to suspend payments without penalty for "at least two months." U.S. Dep't of Educ., Press Release, "Delivering on President Trump's Promise, Secretary DeVos Suspends Federal Student Loan Payments, Waives Interest During National Emergency" (Mar. 20, 2020); *see also* 85 Fed. Reg. 79,856, 79,857 (Dec. 11, 2020); U.S. Dep't of Educ., Press Release, "Secretary DeVos Extends Student Loan Forbearance Period Through January 31, 2021, in Response to COVID-19 National Emergency" (Dec. 4, 2020). The broad interest-free payment pause was repeatedly extended by Education Secretaries DeVos and Miguel Cardona pursuant to their HEROES Act authority. *See* 85 Fed. Reg. 79,856, 79,856-57 (Dec. 11, 2020); 86 Fed. Reg. 5,008, 5,008 (Jan. 19, 2021); 87 Fed. Reg. 61,512, 61,513-14 (Oct. 12, 2022).

While the states object to the plan on the ground that it provides relief for "every borrower in the world," no matter how they were financially affected by the pandemic, States' Resp. to Appl. 26, *Nebraska v. Biden*, No. 22-506, the interest-free payment pauses enacted by Secretaries Devos and Cardona swept even more broadly. Unlike the targeted debt relief plan, which applies only to borrowers in certain income brackets, the payment pauses applied to "all borrowers with federally held student loans." March 2020 Press Release, *supra*, at 1 (quoting Secretary DeVos's statement that "everyone should be focused on staying safe and healthy, not worrying about their student loan

balance growing"). Notably, the states have acknowledged that DeVos's action was permissible under the HEROES Act. *See State of Nebraska, et al., v. Joseph R. Biden Jr., et al.*, U.S. District Court for the Eastern District of Missouri, YouTube (Oct. 11, 2022), 39:40-41:30, https://www.youtube.com/watch?v=iA8wm41bk2Q.

Rather than disapproving of any of these initiatives, Congress indicated awareness and even encouragement. Soon after Secretary DeVos's initial invocation of the HEROES Act in response to COVID-19, Congress enacted the CARES Act, which effectively ratified and extended this action. Specifically, the CARES Act directed the Secretary to "suspend all payments due for loans . . . through September 30, 2020" and provided that "interest shall not accrue" during that payment pause. Pub. L. No. 116-136, § 3513, 134 Stat. 281, 404-05 (2020). And in March 2021, Congress enacted COVID relief legislation that eliminated a policy barrier to debt forgiveness under the HEROES Act. The American Rescue Plan included a provision that exempted student debt discharges in 2021 through 2025 from federal taxable income, clearing the way for the Secretary to forgive student debt without triggering a costly federal tax bill for recipients that could, at least in the short term, leave them worse-off as a result of the relief. Pub. L. No. 117-2, § 9675, 135 Stat. 4, 185-86 (2021). An author of the provision, Senator Robert Menendez, explained that he was "hopeful this will pave the way for President Biden to provide real debt relief so many student borrowers need." Senator Robert Menendez, Press Release, "Menendez, Warren Bill to Make Student Loan Relief Tax-Free Passes as

Part of COVID Relief Package, Clearing Hurdle for Broad Loan Forgiveness" (Mar. 6, 2021).

* * *

In summary, the HEROES Act provides that the Secretary may "waive or modify" student loan conditions "as he deems necessary in connection with a . . . national emergency" to ensure that affected borrowers "are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." 20 U.S.C. § 1098bb(a)(2)(A). In this case, the Secretary determined that "many borrowers will be at heightened risk of loan delinquency and default" when transitioning into repayment after the expiration of the payment pause, and that forgiving a limited amount of student debt for certain borrowers would ensure that they were "not placed in a worse position financially by the COVID-19 national emergency as they restart payments." J.A. 228-29 (Memo from James Kvaal, Undersec'y of Educ.).

The Secretary's action is a "reasonabl[e]" exercise of the broad authority to waive or modify student loan conditions that he enjoys under the plain text of the HEROES Act, *Mourning*, 411 U.S. at 369, and it also aligns with Congress's plan in passing that statute. The targeted debt forgiveness program "provide[s] relief" in response to the "unforeseen issues" presented by this unprecedented multi-year emergency. H. Rep. 122, 108th Cong. (2003), at 2. Indeed, the breadth of the debt relief plan reflects the breadth of the economic hardship created by the pandemic and the sobering fact that the Department of Education "has never had to address [a] . . . problem of this scale and scope before." *Missouri v. Biden*, 142 S. Ct. 647, 653 (2022).

CONCLUSION

For the foregoing reasons, if the Court reaches the merits, it should hold that there is statutory authority for the Student Debt Relief Plan.

Respectfully submitted,

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