Nos. 22-506, 22-535

IN THE

Supreme Court of the United States

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

Petitioners,

v.

NEBRASKA, ET AL.,

Respondents.

DEPARTMENT OF EDUCATION, ET AL.,

Petitioners,

v.

MYRA BROWN, ET AL.,

Respondents.

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

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

This *Amici Curiae* brief is submitted on behalf of the National Education Association ("NEA"), the largest labor union in the United States, which represents three million educators, including pre-K-12 classroom teachers; education support professionals such as paraeducators, transportation workers, and clerical staff; specialized instructional support personnel including counselors, social workers, library media specialists, and speech language pathologists; and higher education faculty.[1]

NEA has long advocated for college affordability, understanding that no one should face the Hobson's choice of forgoing higher education or taking on lifelong, crippling student debt. Likewise, no student should be deterred from pursuing a career as an educator because of the prospects of a low salary and a high student debt balance, just as educators should not be forced to leave the teaching profession because of an inability to pay their student loans. NEA maintains that the federal government, in managing a student debt portfolio topping $1.6 trillion, owed by more than 42 million borrowers, must do all in its power to alleviate the student debt crisis that holds back educators and millions of others.

Educators today are under an unprecedented level of strain because of the pandemic, its attendant economic upheaval, and an increasingly dire staffing shortage affecting over half of American schools. Nearly half of educators have outstanding student

[1] *Amicus* NEA states that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *Amicus* NEA—contributed money that was intended to fund preparing or submitting the brief.

loan debt, owing, on average, $58,700.[2] The financial challenges faced by these educators compared to their peers accelerated during the pandemic, but debt relief now would place many educators on more solid financial footing. This relief, though individual, will have implications across the profession as financially secure educators are less likely to leave the profession.[3] Debt relief is also likely to abate the teacher shortage by improving teacher recruitment among recent graduates, as research shows that each additional $10,000 in student debt reduces the likelihood of choosing a career in public education by almost 6 percentage points.[4]

NEA accordingly has a strong interest in ensuring that the Secretary of Education is permitted to exercise the full breadth of his authority, conferred by Congress in the HEROES Act of 2003, to provide student debt relief as is now necessary to help educators, and tens of millions of other student loan borrowers, recover financially from the COVID-19 pandemic.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should uphold the Student Debt Relief Plan as a valid exercise of the Secretary of Education's authority under the Higher Education Relief Opportunities for Students (HEROES) Act of 2003.

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[2] Melissa Hershcopf, et. al, *Student Loan Debt Among Educators: A National Crisis* 8 (2021), https://www.nea.org/sites/default/files/2021-07/Student%20Loan%20Debt%20among%20Educators.pdf.

[3] *Id.* at 28.

[4] Jesse Rothstein & Cecilia Rouse, *Constrained After College: Student Loans and Early-Career Occupational Choices*, 91 J. PUB. ECON. 149, 158 (2011).

Congress, through the enactment (and re-enactment) of the HEROES Act, authorized the Secretary to issue any waiver or modification deemed necessary to reduce the financial strain of borrowers' federal student loans because of a national emergency.

In upholding the Secretary's authority, this Court should reject the Respondents' effort to expand the major questions doctrine in a manner that would threaten to harm not only the administration of important administrative schemes validly enacted by Congress, but also this Court's standing and legitimacy as a neutral, non-political arbiter of the law. When properly confined to assertions of agency authority that are truly "extraordinary," the major questions doctrine provides no reason to be skeptical of the Secretary's authority to provide targeted debt relief. After all, "unprecedented circumstances provide no grounds for limiting the exercise of authorities the [Secretary] has long been recognized to have." *Biden v. Missouri*, 142 S. Ct. 647, 654 (2022).

The text of the HEROES Act, context in which it was enacted and subsequently broadened, as well as historical usage, support the conclusion that the Plan fits comfortably within the Secretary's authority to provide classwide debt relief in response to the COVID-19 national emergency. The text of the Act makes explicit that the Secretary may waive or modify *any* statutory or regulatory provision governing the student financial assistance programs of Title IV of the Higher Education Act as he deems necessary to ensure that borrowers are not in a worse financial position with respect to their federal student loans because of a national emergency. Congress's enactment of the HEROES Act shortly after September 11, at a time when Congress conferred on a host of executive agencies authority to take action necessary to respond

to and recover from those attacks, is consistent with the text's expansive language. Congress's 2003 amendment of the HEROES Act, providing that the Secretary can act in response to not only terrorist attacks, but a war or other military operation or national emergency, reinforces the breadth of the Secretary's authority. And the Secretary's exercise of that authority in the intervening 20 years to provide classwide debt relief is consistent with the Secretary's exercise of that authority in the Debt Relief Plan.

Just as the HEROES Act, on its face and in context, furnishes the Secretary with authority to implement the Debt Relief Plan, the major questions doctrine does not call the Secretary's authority into doubt. This Court has applied the major questions doctrine only in in certain "extraordinary cases" where an agency claimed "'an unheralded power' representing a 'transformative expansion in [its] regulatory authority.'" *West Virginia v. EPA*, 142 S. Ct. 2587, 2608–2610 (2022) (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)). The Secretary's Plan does not present such an "extraordinary case," but rather is consistent with the Secretary's prior use of that authority and is of a kind with other statutory powers and policy decisions conferred on the Secretary in management of student financial assistance programs under Title IV. And in any event, the HEROES Act provides a "clear congressional authorization," *id.* at 2609, for the very action taken here: a waiver or modification of statutory provisions to ensure student loan borrowers are not left in a worse position in repaying their federal student loans because of the COVID-19 national emergency.

ARGUMENT

I. This Court Must Restrict Application of the Major Questions Doctrine to Assertions of Agency Power that Are Genuinely "Extraordinary"

This Court has held that, under the major questions doctrine, certain types of agency actions cannot be sustained based on a delegation of authority having a merely "plausible textual basis" in statute; the class of agency actions subject to this doctrine must instead be supported by a "clear congressional authorization" for the power the agency claims. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (citations and quotation marks omitted). This Court has emphasized, however, that this more stringent requirement applies only to a narrow class of cases where the agency's assertion of authority is truly "extraordinary." *Id.*

In this case, Respondents ask this Court to apply the major questions doctrine to invalidate agency action that—while controversial in the currently polarized political environment—is a predictable exercise of the authority granted by a clear delegation of power in a valid Act of Congress. This Court should not indulge Respondents' request to extend the doctrine to apply to circumstances like this. Unless it remains limited to a subset of cases that (unlike this one) involve truly "extraordinary" assertions of agency power, this Court's use of the major questions doctrine threatens to do grave harm, not only to the administration of important administrative schemes validly enacted by Congress, but also to this Court's standing and legitimacy as a neutral, non-political arbiter of the law.

Even when confined to genuinely "extraordinary" cases, the major questions doctrine represents an anomaly. It is a significant departure from this Court's usual conception of the proper institutional role of courts in interpreting and applying laws that are enacted by Congress and administered and enforced by the Executive.[5] In virtually all other matters, this Court employs the well-honed tools of judicial review to apply the relevant statutory language as informed by its surrounding context, *see Abramski v. United States*, 573 U.S. 169, 179 (2014), or defers to an agency's reasonable interpretation of a law it has been charged with administering, *see Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). A new and special requirement that certain agency action be supported by a "clear congressional authorization," *West Virginia,* 142 S. Ct. at 2609, must be carefully circumscribed to ensure consistency and fairness in the law.

Concerns about the role of the major questions doctrine are amplified even further when this Court is asked, as it is here, to lower the bar on what qualifies as "extraordinary" for purposes of applying the doctrine's heightened clear-authorization requirement. Chief among these concerns is that application of the doctrine to defeat agency action because of its perceived "political" or "economic" significance removes important deliberative issues from the hands of the democratically-accountable branches of government and instead arrogates them to

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[5] *See* Daniel Deacon & Leah Litman, *The New Major Questions Doctrine,* 109 VA. L. REV. (forthcoming 2023) (draft at 25–27), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4165724.

the courts.[6] Such judicial improvisation on the interpretation and application of statutory texts "enfeebles the democratic polity."[7] Lawyers who are "emboldened by [a] courts' adventurism" in identifying issue of political or economic significance will "actively encourage more of it."[8] And political actors who are unable to prevail in having their preferences adopted by Congress may nevertheless attempt to essentially amend or repeal Congress's handiwork outside of the legislative process by generating some amount of political controversy around the application of an enacted policy.[9]

Further, special concerns arise when the major questions doctrine is broadly applied to important

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[6] *See* Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J. L. & PUB. POL'Y 463, 503–05 (2021) ("The political nature of the major questions doctrine's veto is perhaps most obviously exhibited by the doctrine's explicit call to consider a question's political significance. And the doctrine's call to additionally consider economic significance does not save the inquiry from being political. To the contrary, the economic inquiry highlights the majorness inquiry's inherently political focus.")(internal quotation marks and citations omitted).

[7] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 4 (2012).

[8] *Id*.

[9] *See* Deacon & Litman, *supra* note 5, draft at 38 (arguing that "the doctrine seems to allow a motivated political party to functionally amend a statute through political opposition rather than through the legislative process, despite the doctrine's claimed focus on returning issues to the legislative process"); *see also* Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217, 218 (2022) (explaining "the Trump Administration construed the major questions doctrine enormously expansively and inconsistently, in ways untethered to the Court's jurisprudence, turning it into little more than an invitation for courts to strike down regulations the Administration did not favor for policy-based reasons").

statutory and administrative schemes that significantly pre-date this relatively new doctrine. After all, this Court has long understood that Congress legislates against the backdrop of then-existing law and judicial interpretations. *See Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018) (concluding that Congress "presumptively was aware of the longstanding judicial interpretation of the phrase and intended for it to retain its established meaning"). It would therefore make little sense for this Court to require clear authorization in legislation enacted *before* Congress even understood that such a requirement would need to be satisfied. This violates the basic principle that courts should endeavor to provide a stable set of interpretive rules so that Congress's words will function predictably and in a way that gives effect to legislators' expected assumptions about how their words will be construed.[10]

All of this points to the need to confine the major questions doctrine to the kinds of "exceptional" cases where the agency action in question is genuinely unheralded and transformative. For the normal run of cases—like the present one—this Court should continue to apply its established modes of statutory interpretation and deference to administrative expertise.

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[10] *See* Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1613 (2012) ("Whether or not Congress is always meticulous, if we don't assume that Congress picks its words with care, then Congress won't be able to rely on words to specify what policies it wishes to adopt or, as important, to specify just how far it wishes to take those policies.").

II. The HEROES Act Unambiguously Provides that the Debt Relief Plan is a Valid Exercise of the Secretary's Delegated Authority

To determine whether the HEROES Act authorizes the Secretary to implement the Debt Relief Plan, the starting—and ending—point is the Act's text. It is evident from the text and structure Congress chose that the HEROES Act gives the Secretary broad authority to determine when, and in what manner, to provide relief to federal student loan borrowers in times of national emergency. This conclusion finds additional support, if any is needed, in the historical context in which the Act was passed and its prior use.

A. The text of the Act grants the Secretary broad authority

The breadth of the Secretary's discretion to enact the Student Debt Relief Plan is clear from the HEROES Act's general grant of authority. Congress provided that the Secretary "may waive or modify *any* statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Higher Education] Act" in connection with "a war or other military operation or national emergency…." 20 U.S.C. § 1098bb(a)(1) (emphasis added). This encompasses the Secretary's proposed waiver and modification of Higher Education Act provisions to permit the discharge of up to $20,000 in student loan debt in connection with the COVID-19 national emergency.

The Secretary's authority under the Act is not boundless and is subject to certain limiting principles. First, Congress confines any waivers or modifications to only those recipients of student financial assistance who are "affected" by a national emergency. An "affected individual" has been defined to include

anyone who "resides or is employed in an area that is declared a disaster area … in connection with a national emergency," 20 U.S.C. § 1098ee(2)(C), which is satisfied here by the President's declaration that the COVID-19 pandemic constitutes such an emergency and that the entire United States and its territories are disaster areas pursuant to the emergency. 87 Fed. Reg. 10,289 (Feb. 23, 2022); FEMA, *COVID-19 Disaster Declarations*, https://www.fema.gov/disaster/coronavirus/disaster-declarations.

The Act also limits the Secretary to waiving or modifying Title IV provisions "as may be necessary to ensure that" borrowers "who are affected 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 Congress ensured against a crabbed reading of this provision by explicitly providing that the Secretary could use this authority as he "deems necessary." *Id.* at § 1098bb(a)(1). Given that these provisions are only applicable in times of national emergency, the Act provides that "[t]he Secretary is not required to exercise the waiver or modification authority under this section on a case-by-case basis." *Id.* at § 1098bb(b)(3).

As Petitioner has discussed at length (Pet. Br. 8–11), the Secretary designed the contours of the Plan in line with these statutory curbs, based on a detailed analysis of historical evidence of borrower delinquency and default following national emergencies, current economic conditions, and borrower surveys. J.A. 233–239. From that evidence, the Secretary concluded that borrowers with outstanding loans as of June 30, 2022, with income of $125,000 in 2020 or 2021 (or $250,000 of household income), are at heightened risk of becoming delinquent on their student loan payments

and falling into default. J.A. 232–233, 245–251. The evidence also led the Secretary to conclude that, while eliminating all debt would be the surest way to avert financial loss, providing relief of up to $10,000 (with an additional $10,000 for borrowers who received Pell Grants), will be sufficient to ensure that borrowers will not be worse off. J.A. 240–244. To accomplish those objectives, the Secretary's Plan calls for the modification of various Higher Education Act provisions to authorize a one-time discharge for eligible borrowers. 87 Fed. Reg. 61,512 (Oct. 12, 2022) (modifying 20 U.S.C. § 1087, 1087dd(g); and 34 C.F.R. 674.51–.65, 682.402, 685.212).

Notably absent from the Act's limiting principles is any hint that the Secretary's authority is cabined by the expense that the federal government would incur from a waiver or modification. As this Court long-ago cautioned, where the "unadorned words" of a statutory provision are not "in some way limited by implication… [it] would be dangerous in the extreme to infer that a case for which the words of an instrument expressly provide, shall be exempted from its operation." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Sturges v. Crowninshield*, 4 Wheat. 122, 202 (1819)); *see also id.* at 253–54 ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) ("When the statutory language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.") (internal quotation marks omitted). To do otherwise would, as Justice Brandeis explained nearly a century ago in refusing to supply a term not found in a statute's text,

"transcend[] the judicial function." *Iselin v. United States*, 270 U.S. 245, 250–51 (1926).

B. The breadth of authority assumed here is consistent with the context in which the Act was enacted, amended, and made permanent

The Secretary's authority to issue the Student Debt Plan is further confirmed by the statutory context of the HEROES Act's original passage, as well as by the context of its subsequent amendment and reenactment.

In the immediate aftermath of the September 11 terrorist attacks, Congress passed sweeping legislation authorizing the Executive Branch to protect against future attacks and take steps to recover from this generation-defining tragedy.[11] Congress quickly passed the Authorization for Use of Military Force (AUMF) Joint Resolution, providing expansive authority for the President "to use all necessary and appropriate force" against all those who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons…." Pub. L. No. 107-40, § 2, 115 Stat 224 (2001). Shortly thereafter, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, which vastly expanded the authority of law enforcement agencies, including the Departments of Justice, Defense, Treasury, and State, to respond to

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[11] Madeleine Carlisle, *How 9/11 Radically Expanded the Power of the U.S. Government*, TIME (Sep. 11, 2021) ("One of the most significant—and lasting—changes was a massive expansion of executive power that transformed entire portions of America's legal landscape.").

the September 11 attacks. Pub. L. No. 107-56, 115 Stat 272 (2001).

Just as those measures sought to protect against future attacks, Congress took action to help Americans recover from the financial upheaval that followed from September 11. For instance, Congress quickly appropriated $20 billion to the State of New York and granted flexibility to federal agencies responsible for administering disaster relief to do so quickly.[12]

In December 2001 Congress unanimously passed the HEROES Act of 2001 to enable the Secretary of Education to provide financial relief to federal student loan borrowers. Pub. L. No. 107-122, 115 Stat. 2386 (2002). In its initial form, the HEROES Act authorized the Secretary to issue waivers and modifications deemed necessary in connection with the September 11 attacks for the following two years. *Id*. at § 2(a)(1), 115 Stat. 2386. Two years later, Congress not only extended the HEROES Act through 2005, but broadened the Secretary's authority to its present form, allowing the Secretary to act in response to *any* "war or other military operation or national emergency." HEROES Act of 2003, Pub. L. No. 108-76, § 6, 117 Stat. 908 (20 U.S.C. § 1098bb(a)(1)). Congress extended the Act again in 2005. Act of Sept. 30, 2005, Pub. L. No. 109-78, § 1, 119 Stat. 2043. Congress subsequently removed the sunset provision altogether in 2007, thereby making permanent the Secretary's waiver and modification authority. Act of Sept. 30, 2007, Pub. L. No. 110-93, § 2, 121 Stat. 999.

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[12] Subcomm. on Mgmt., Integration & Oversight of the House Comm. on Homeland Sec., *An Examination Of Federal 9/11 Assistance To New York: Lessons Learned In Preventing Waste, Fraud, Abuse And Lax Management* 3 (Aug. 2006), https://www.govinfo.gov/content/pkg/CPRT-109HPRT20452/html/CPRT-109HPRT20452.htm.

Several conclusions can be drawn from Congress's subsequent enactments. First, expanding the Secretary's authority is a recognition that the same flexibility to avoid financial loss following September 11 is also necessary following other national emergencies. Second, the sunset provision that may have provided a "spoonful of sugar" effect for legislators wary of conferring expansive emergency powers to the Executive Branch,[13] proved unnecessary as the Act's value came into focus in intervening years.[14]

While Respondents and their supporters claim that the Secretary's authority is somehow circumscribed, the text and history of the HEROES Act demonstrate that Congress understood broad authority was warranted. *See Marinello v. United States*, 138 S. Ct. 1101, 1117 (2018) (Thomas, J. dissenting) ("Whether or not we agree with Congress' judgment, we must leave the ultimate '[r]esolution of the pros and cons of whether a statute should sweep broadly or narrowly ... for Congress.'") (quoting *United States v. Rodgers*, 466 U.S. 475, 484 (1984)). And there is no reason to believe Congress was unaware that the Secretary's future exercise of the Act's authority could come at great expense. In 2007, the same year

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[13] Chris Mooney, *A Short History of Sunsets*, LEGAL AFFAIRS (Jan. 2004) ("Under the Bush Administration, sunsetting has been reduced to a spoonful of sugar that helps controversial legislation go down."), https://www.legalaffairs.org/issues/January-February-2004/story_mooney_janfeb04.msp.

[14] John E. Finn, *Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation*, 48 COLUM. J. TRANSNAT'L L. 442, 447 (2010) (explaining that sunset provisions can be understood as "providing the legislature with periodic opportunities to revisit questions with the additional information or experience necessary to adjust or to recalibrate public policy").

Congress made permanent the Secretary's HEROES Act authority, the federal government's student loan portfolio consisted of $516 billion in loans owed by 28.3 million borrowers, an amount that would continue to increase at rapid pace.[15] Moreover, while the Debt Relief Plan involves significant sums of money in the aggregate, that alone does not warrant a different level of scrutiny or skepticism, as discussed *infra*, Section III, for "the Court's task is to discern and apply the law's plain meaning as faithfully as [it] can, not 'to assess the consequences of each approach and adopt the one that produces the least mischief.'" *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1542 (2021) (quoting *Lewis v. Chicago*, 560 U.S. 205, 217 (2010)). Accordingly, to the extent that an inference can (or should) be drawn about whether Congress was aware of the potential expense of modifying "any statutory or regulatory provision," it should be drawn in the Secretary's favor. 20 U.S.C. § 1098bb(a)(1).

C. The Secretary's Plan is consistent with other pandemic-related invocations of the Act

Finally, having shown that the Secretary's plan is in accord with the Act's text and context in which it was enacted, amended, and made permanent, it is worth briefly reviewing how the Secretary's exercise of authority here is similar to, and consistent with, prior exercises of that authority during the pandemic.

On March 20, 2020, days after President Trump declared that the COVID-19 pandemic constitutes a national emergency, 85 Fed. Reg. 15,337 (Mar. 13,

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[15] Nat'l Student Loan Data Sys., *Federal Student Aid Portfolio Summary*, https://studentaid.gov/sites/default/files/fsawg/datacenter/library/PortfolioSummary.xls.

2020), then-Secretary of Education Betsy DeVos invoked her HEROES Act authority to modify a number of statutory and regulatory provisions in order to provide relief to *all* federal student loan borrowers. 85 Fed. Reg. 79,856 (Dec. 11, 2020). She ordered the Department to place federal loans into administrative forbearance automatically and reduce the interest rate on those loans to 0%.[16] She also ordered loan servicers to suspend the seizure of wages, tax refunds, Social Security payments, and federal benefits from borrowers with defaulted student loans, and to refund amounts garnished after March 13.[17]

Notably, the Secretary did not limit the class of borrowers who would receive relief, through means-testing or otherwise, or consider whether there were any borrowers who were not at risk of being left in a worse position relative to their student loans because of the pandemic. Rather, she "deem[ed] necessary" relief for *all* borrowers.

Congress stepped in temporarily to furnish student debt relief as part of the $2.2 trillion Coronavirus Aid, Relief, and Economic Security (CARES) Act, which included temporarily codifying many provisions of Secretary's DeVos's student loan relief, through September 30, 2020. Pub. L. No. 116-136, § 3513, 134 Stat. 4, 404 (2020). As that expiration

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[16] U.S. Dep't of Educ., *Secretary DeVos Extends Student Loan Forbearance Period Through January 31, 2021, in Response to COVID-19 National Emergency* (Dec. 4, 2020), https://content.govdelivery.com/accounts/USED/bulletins/2afbc4b.

[17] Elissa Nadworny, *Education Dep't Will Stop Collections on Student Borrowers in Default*, NPR (Mar. 25, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/03/25/821383576/education-dept-will-stop-collecting-on-student-borrowers-in-default.

date approached, President Trump issued a Memorandum extolling the benefit of this student debt relief implemented by his Administration: "This relief has helped many students and parents retain financial stability. And many other Americans have continued to routinely pay down their student loan balances, to more quickly eliminate their loans in the long run. During this time, borrowers have been able to determine the best path forward for themselves." 85 Fed. Reg. 157 (Aug. 8, 2020). Understanding the continued toll of the pandemic, President Trump directed Secretary DeVos to continue the payment pause and interest rate reduction until December 30, 2020. *Id.*

In December 2020, Secretary DeVos extended this debt relief through January 31, 2021.[18] While asserting that "Congress, not the Executive Branch, is in charge of student loan policy," she explained that "[t]he coronavirus pandemic has presented challenges for many students and borrowers, and this temporary pause in payments will help those who have been impacted."[19] Following the change in the Administration, Secretary Miguel Cardona extended this relief several more times, most recently until 60 days after the Department is permitted to implement its Debt Relief Plan or this litigation is resolved.[20]

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[18] U.S. Dep't of Educ., *Secretary DeVos Extends Student Loan Forbearance Period Through January 31, 2021, in Response to COVID-19 National Emergency* (Dec. 4, 2020), https://content.govdelivery.com/accounts/USED/bulletins/2afbc4b.

[19] *Id.*

[20] U.S. Dep't of Educ., *Biden-Harris Administration Continues Fight for Student Debt Relief for Millions of Borrowers, Extends Student Loan Repayment Pause* (Nov. 22, 2022), https://www.ed.gov/news/press-releases/biden-harris-

(*continued . . .*)

The cost of these measures, including the payment pause, interest rate reduction, and other COVID-related student debt relief (but not the Plan under consideration here), is substantial. The federal government has determined that, as of April 2002, these debt relief measures had cost the federal government $102 billion or roughly $5 billion each month.[21] While the scope of this relief is certainly expansive, it is the natural result of waiving statutory and regulatory provisions that govern a student debt portfolio that had ballooned to more than $1.5 trillion owed by more than 42 million borrowers at the outset of the pandemic.[22]

Fortunately, in the wake of September 11, Congress foresaw a need for flexible and widespread student debt relief, which is precisely what the Secretary seeks to accomplish in response to another generation-defining tragedy—the COVID pandemic—through the Debt Relief Plan. The Respondents' attempt to challenge that authority is nothing more than a policy disagreement cloaked in legal argument,

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administration-continues-fight-student-debt-relief-millions-borrowers-extends-student-loan-repayment-pause.

[21] U.S. Gov't Accountability Off., *Student Loans: Education Has Increased Federal Cost Estimates of Direct Loans by Billions due to Programmatic and Other Changes* 14 (July 2022); *see also* Travis Hornsby, *The Cost of the Student Loan Pause Now Exceeds the Cost of Student Loan Cancellation*, STUDENT LOAN PLANNER (Dec. 19, 2022), https://www.studentloanplanner.com/cost-student-loan-pause/ (explaining cost is potentially far higher than government estimate, which does not account for the fact that payments not made due to pause will nevertheless count towards other loan forgiveness programs and therefore will never be paid).

[22] Nat'l Student Loan Data Sys., *supra* note 15.

which is better directed at the politically accountable branches of government.

III. The Major Questions Doctrine Does Not Bar the Secretary's Plan

Faced with the reality that the Debt Relief Plan fits neatly within the Secretary's HEROES Act authority, Respondents look to the "major questions doctrine" to invite this Court to evaluate the Secretary's authority from that exceedingly limited exception to this Court's usual jurisprudence. But the Plan represents a straightforward exercise of authority vested (and revested) by Congress, rather than the type of metamorphic change that this Court has flagged may raise a "major question."

In *West Virginia v. EPA*, this Court articulated a two-pronged test for identifying when it is confronted with a truly "extraordinary" assertion of an agency's regulatory authority. 142 S. Ct. 2587, 2608 (2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). Moving forward, a court must ask whether the agency claimed to discover "'an unheralded power' representing a 'transformative expansion in [its] regulatory authority.'" *Id.* at 2610 (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)). This advancement in the major questions doctrinal evolution "eschews an amorphous multi-factor test of economic and political significance" present in earlier cases.[23]

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[23] Natasha Brunstein & Donald Goodson, *Unheralded and Transformative: The Test for Major Questions After West Virginia*, 47 WM. & MARY ENV'T L. & POL'Y REV. (forthcoming 2023) (draft at 23), https://ssrn.com/abstract=4300622; *see also id.* (theorizing that the *West Virginia* test reduces the "know it when you see it" aspect of the doctrine) (quoting *U.S. Telecom Ass'n v. FCC*, 855

(*continued . . .*)

The lower court's decision in *Brown* distorts this "crystallization of the long-developing major-questions doctrine" by announcing that "the major-questions doctrine applies if an agency claims the power to make decisions of vast 'economic and political significance.'" J.A. 288. Reducing the major questions doctrine to the "economic and political significance" of the action taken fails to account for "'the nature of the question presented'—whether Congress in fact meant to confer the power the agency has asserted." *West Virginia*, 142 S. Ct. at 2608 (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159). This cannot be accomplished by the simple artifice of repeating the projected cost of the program over and over, as did the district court judge in *Brown*, J.A. 263, 284, 289, 291, 296, and the Respondent did in opposing Petitioner's application before this Court to stay the lower court's judgment, Resp. to App. To Stay the Judgment 1, 6, 9, 18, 20, 25, 28.

A. The Secretary's Plan is not unheralded

In analyzing whether the Secretary's Plan represents the exercise of "unheralded power," *West Virginia* teaches that it is necessary to determine "the extent of power conveyed by general statutory language" by review of the agency's "established practice." 142 S. Ct. at 2610 (quoting *FTC v. Bunte Bros., Inc.,* 312 U.S. 349, 352 (1941)). Here, the Secretary's Plan goes no "further than what the Secretary has done in the past" under the HEROES Act, *Biden v. Missouri*, 142 S. Ct. 647, 653 (2022), albeit it on a somewhat different scale.

F.3d 381, 481 (D.C. Cir. 2017) (per curiam) (Kavanaugh, J. dissenting from denial of rehearing en banc)).

The Secretary has historically used its HEROES Act authority to grant relief to borrowers in federally declared disaster areas nationwide. Since its enactment, the Secretary has maintained a standing authority to provide relief to *all* borrowers that reside or work in *any* federally declared disaster area in connection with a national emergency when the need arises. 82 Fed. Reg. 48,195 (Oct. 12, 2017) (describing history of standing order and extending it through 2022). Although there have been mercifully few long-term national emergencies warranting the exercise of the Secretary's authority since it was expanded in 2003, as discussed above, see pp. 16, *supra*, the Secretary's Debt Relief Plan is not only consistent with, but in important respects more limited than, prior exercises of HEROES Act authority.

In 2017, for instance, the Secretary placed a "large influx of borrowers … into mandatory administrative forbearance" in response to several natural disasters, including Hurricanes Harvey, Irma, and Maria and the California wildfires.[24] The Secretary did so without regard to the recipients' income or other financial circumstances. Likewise, at the outset of the pandemic the Secretary placed *all* loans into forbearance, including those that came into repayment in the years that followed, and reduced interest to 0% *automatically*, without as much as a request from the borrower, and without any determination of which affected individuals were at risk of being left worse off financially. By contrast, in his Debt Relief Plan under review here, the Secretary modified statutory and

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[24] U.S. Dep't of Educ., *Federal Student Aid Posts New Reports to FSA Data Center* (Aug. 7, 2019), https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2019-08-07/federal-student-aid-posts-new-reports-fsa-data-center#.

regulatory provisions only to the extent he deemed necessary to ensure affected individuals were not left worse off financially. 87 Fed. Reg. 61,512 (Oct. 12, 2022).

The Secretary has also historically utilized waivers and modifications that have had the effect of reducing borrowers' total repayment obligation. For example, the Department has waived the statutory obligation to repay Title IV grant funds for borrowers who withdrew from school in a disaster area and waived borrowers' obligation to pay interest accrued on subsidized Stafford Loans while their enrollment was interrupted by a national emergency. 68 Fed. Reg. 69,312 (Dec. 12, 2003). Both of these waivers effectively reduced borrowers' total repayment obligation.

The Secretary's modifications in the Plan under review is consistent with these prior exercises of authority. And in contrast to the automatic forbearance and interest rate reduction afforded to all borrowers throughout the COVID-19 pandemic, and the broad relief afforded to all borrowers in hurricane-stricken disaster areas, in the Plan the Secretary affords relief to a narrower class of borrowers based on careful deliberation of who is at risk and how much relief is necessary to reduce that risk. *See* pp. 10–11, *supra*. This does not come close to the sweeping expansions of regulatory jurisdiction that this Court has previously considered unheralded in its decisions leading to *West Virginia*. *See, e.g.*, *Utility Air*, 573 U.S. at 328 (concluding that EPA's application of PSD and Title V programs to "small sources that Congress did not expect" which increased regulated entities from "15,000 to about 6.1 million" was "unheralded"); *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) ("Since that

provision's enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium.").

B. The Secretary's Plan is not a "transformative expansion" of the Department's regulatory authority

Precedent dictates that an "extraordinary" case must also present a "transformative expansion in [the agency's] regulatory authority." *West Virginia*, 142 S. Ct. at 2612 (quoting *Utility Air*, 573 U.S. at 234). Such expansions typically come before this Court in one of two forms: a claim to power that the statutory scheme was "not designed to grant," *Utility Air*, 573 U.S. at 324, or an assertion of jurisdiction by an agency with "no expertise in crafting…policy of [the] sort," *King v. Burwell*, 576 U.S. 473. 486 (2015). The Secretary's Plan does not expand the Department's regulatory authority in either sense.

First, even prior to the HEROES Act, Congress had already entrusted the Secretary with the broad authority to alter borrowers' debt obligations in several provisions throughout the Higher Education Act. The statutory and regulatory provisions modified by the Secretary's Plan already provide for discharge of a borrower's liability on their federal student loans, including interest and fees, in a number of instances. *See* 87 Fed. Reg. 61,512 (Oct. 12, 2022) (modifying 20 U.S.C. § 1087, 1087dd(g); and 34 C.F.R. §§ 674.51–.65, 682.402, 685.212). Separately, Congress explicitly granted the Secretary the power to modify as well as "compromise, waive, or release" federal student loan debt "in carrying out the provisions" of the student loan program created by the Higher Education Act. 20 U.S.C. § 1087hh(1)–(2). Furthermore, the Secretary is authorized to "repay or cancel any outstanding balance of principal and interest due" by a borrower

who fulfills the requirements of certain forgiveness plans set forth in the Higher Education Act. *See* 20 U.S.C. § 1098e (income-based repayment); 20 U.S.C. § 1087e(m) (repayment plan for public service employees). Thus, the Higher Education Act was "designed to grant" the kind of power that the Secretary intends to exercise here, the power to permanently reduce the amount owed by a borrower. *Utility Air*, 573 U.S. at 324.

Furthermore, the Plan does not effect a "'fundamental revision of the statute, changing it from [one sort of] scheme of ... regulation' into an entirely different kind." *West Virginia*, 142 S. Ct. at 2612 (quoting *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994)). The Department is not "eliminat[ing] a crucial provision of the statute" for all borrowers for the foreseeable future. *MCI*, 512 U.S. at 231. For the approximately 23 million borrowers that will see their loan balances reduced but not eliminated, J.A. 243, repayment on the remaining balance will proceed under the exact statutory terms it did before. The same is true for all borrowers with loans disbursed after June 30, 2022, who will not receive relief under the Secretary's Plan. In other words, while this action may alter the scope of the federal student aid portfolio in the short-term, it does not change the Department's role in managing and overseeing outstanding federal student debt for the future.

Second, the Secretary is not making a "very different kind of policy judgment" than Congress anticipated in enacting the HEROES Act, *West Virginia*, 142 S. Ct. at 2612, nor is the Secretary deploying "technical and policy expertise *not* traditionally needed" for the management of federal student loans, *id.* The Secretary drew the Plan's eligibility parameters based on the Department of

Education's determination that lower-income borrowers are at high risk of default when the waiver provisions expire and repayment resumes. J.A. 233–234. This is precisely the sort of policy judgment that Congress empowered the Secretary to make as he "deems necessary" when it enacted the HEROES Act. 20 U.S.C. § 1098bb(a)(1). Moreover, the Secretary exercises the very same technical and policy expertise in carrying out the income-based repayment program established by section 493C of the Higher Education Act, where the Secretary is authorized to determine borrower's monthly repayment amounts by virtue of their financial position and potential for financial hardship in making payments. *Id*. at § 1098e.

While Respondents and others have attempted to make much of bills introduced in Congress to grant student debt relief, that has no bearing on whether the Secretary's Plan constitutes a "transformative expansion" of the Secretary's authority. The bills referenced by the lower court in *Brown*, J.A. 265, were not an "unsuccessful attempt [by the Secretary] to secure from Congress an express grant of [the challenged] authority" under the HEROES Act. *Bunte Bros.*, 312 U.S. at 352. These bills were of a different nature and a different scope than the Secretary's Plan for they were untethered to the COVID-19 national emergency.[25] But even if these bills would have accomplished similar debt-relief goals, the fact that they were not passed does not suggest that the

[25] *See* Student Debt Relief Act of 2019, S. 2235, 116th Cong. (2019) (providing various forms of relief, including discharge of up to $50,000 of student debt based on income, refinancing loans at lower interest rate, and making student loans dischargeable in bankruptcy proceedings); Income-Driven Student Loan Forgiveness Act, H.R. 2034, 117th Cong. (2021) (forgiving up to $100,000).

Secretary's Plan constitutes a transformative expansion of the Secretary's authority under existing law. "[S]peculation about why a later Congress declined to adopt new legislation offers a particularly dangerous basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1747 (2020) (internal quotation marks omitted); *see also Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote.").

Moreover, if anything is to be gleaned from unenacted bills, it must be pointed out that numerous bills were also introduced to *prohibit* broad student debt relief.[26] One such bill sought to amend the HEROES Act to provide that "the President or the Secretary of Education may not cancel the outstanding balances, or a portion of the balances, on covered loans due to the COVID–19 national emergency or any other national emergency." Stop Reckless Student Loan Actions Act of 2022, H.R. 7656, 117th Cong. (2022). Under Respondents' logic, this bill could be read as establishing that the Secretary has the authority that this bill sought to revoke.

Rather than look to this unenacted legislation in an effort to divine congressional intent, one can instead find additional support for the Secretary's broad debt cancellation authority in the American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9675, 135

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[26] *See*, *e.g.*, Debt Cancellation Accountability Act, S. 4483, 117th Cong. (2022) (barring class-based student loan forgiveness); Student Loan Accountability Act, H.R. 8102, 117th Cong. (2022) (prohibiting Executive Branch agencies from cancelling or forgiving student loans).

Stat. 185-186 (2021) (26 U.S.C. §108(f)(5)). Enacted to provide far-reaching pandemic-related economic relief, the Act provides that student loans "discharge[d] (in whole or part)" are not subject to taxation through 2025. *Id.* The broad exemption is in contrast to other tax exemptions that are limited to discharges made pursuant to specific programs enumerated in the Higher Education Act. *See* 26 U.S.C. § 108(f)(1) (permanently exempting employment-related discharges such as Public Service Loan Forgiveness and Teacher Loan Forgiveness); *see also* Act of Dec. 22, 2017, Pub. L. No. 115-97, § 11031, 131 Stat. 2054, 2081 (2017), *amended by* Pub. L. No. 117-2, § 9675 (exempting discharges for Total and Permanent Disability from 2018 through 2025). The breadth of this provision indicates Congress's anticipation that the Executive branch would implement broad student debt relief. *See* Sen. 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) ("The student loan tax relief legislation paves the way for President Biden to cancel at least $50,000 in federal student loan debt."). This concurrent call for broad student debt relief "provides important context to Congress's enactment" of this tax exemption. *See Brown & Williamson*, 529 U.S. at 157 (emphasizing that "when Congress created a distinct regulatory scheme addressing the subject of tobacco and health, it understood that the FDA is without jurisdiction to regulate tobacco products and ratified that position.").

C. The Secretary's Plan is justified by clear congressional authorization

Even if the Secretary's Plan did present the kind an "extraordinary" exercise of agency authority covered by the major questions doctrine, it is

nevertheless valid because it is supported by "clear congressional authorization." *West Virginia*, 142 S. Ct. at 2614. As already explained, *see supra* Sec. II, the Plan is authorized by the plain text of the HEROES Act as further demonstrated by the historical context in which it was enacted and its use during prior emergencies. The Secretary's Plan modifies the statute and regulatory provisions providing for the discharge of borrower liability on their federal student loans for borrowers residing in a disaster area declared in connection with the COVID-19 national emergency, which the Secretary "deem[ed] necessary," after studied review, to reduce the likelihood of delinquency and default on student loans. In stark contrast to the regulatory action at issue in *West Virginia*, there are no "definitional possibilities" at play, 142 S. Ct. at 2614, nor does the Secretary seek to "exploit some gap, ambiguity, or doubtful expression" in the statute, *id.* at 2620 (Gorsuch, J. concurring). Accordingly, even if the Plan raises a "major question," it is a valid exercise of the Secretary's HEROES Act authority.

CONCLUSION

The judgments of the courts of appeals should be reversed and remanded with instructions to enter judgment in favor of Petitioners.

Respectfully submitted,

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