Nos. 22-506 and 22-535

In the Supreme Court of the United States

JOSEPH R. BIDEN, 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 Fifth and Eighth Circuits

BRIEF OF LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS—continued

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

Page(s)

Statutes

TABLE OF AUTHORITIES—continued

Page(s)

Regulations

Other Authorities

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

BRIEF OF LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICI CURIAE*[1]

Amici curiae are professors at law schools throughout the United States. *Amici*'s expertise encompasses student-financial-assistance programs under Title IV of the Higher Education Act of 1965, consumer finance, administrative and constitutional law, modes of statutory interpretation, and the development of the major questions doctrine. *Amici* have a strong interest in assisting this Court in resolving questions of law that go to the core of their professional expertise and scholarship, namely, the scope of the Department of Education's authority to provide relief to borrowers and the development of this Court's statutory interpretation methodology, particularly in the context of its precedent concerning the major questions doctrine. *Amici* are:

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[1] Pursuant to Rule 37.6, no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund this brief, and no person other than *amici*, their members, and their counsel contributed money to fund this brief.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should affirm the judgment of the District Court for the Eastern District of Missouri in *Nebraska* and reverse the judgment of the District Court for the Northern District of Texas in *Brown*. The

government's brief identifies many reasons for that conclusion. This brief focuses on one: the government is likely to prevail on the merits.[2] That is because Congress, through the plain language of the relevant statute, delegated precisely the authority exercised here, and the major questions doctrine does not alter that conclusion.

The relevant statutory text is clear as sunlight. The HEROES Act of 2003 authorizes the Secretary of Education to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under [T]itle IV of the [Higher Education] Act [of 1965] as the Secretary deems necessary in connection with a . . . national emergency." 20 U.S.C. § 1098bb(a)(1). That is exactly what the Secretary did here: waive or modify certain provisions of Title IV so that borrowers are not put in a worse financial position because of a national emergency.

The Secretary's action accompanies the Department of Education's plan to resume normal collections on federally held student loans, which have been suspended since the onset of the COVID-19 global health crisis. The Department found that millions of borrowers continue to face personal financial difficulties emanating from the COVID-19 pandemic and its ongoing effects, causing an elevated risk of default and other harmful financial repercussions for lower-income borrowers. The Secretary therefore announced that the Department would pair the resumption of repayments with a one-time, partial relief of repayment

[2] *Amici* also note separately that President Biden does not appear to be a proper party to this action. The debt relief challenged in this case is solely an exercise of the Department of Education's authority under the HEROES Act of 2003, not any action taken by the President.

obligations on federally held student debt for lower-income borrowers. This action was an appropriate and lawful exercise of the Department's authority under the HEROES Act.

In the face of clear statutory text, Respondents and the district court in *Brown* have relied on invented limits on the explicit waiver and modification authority that have no support in the statutory text and are inconsistent with past agency practice across Administrations. And the Eighth Circuit did not identify any statutory basis whatsoever for reversing the district court in *Nebraska*, stating only that the case raises unspecified "substantial" merits questions warranting an injunction. The lower courts' decisions should not stand.

Respondents' and the *Brown* district court's invocation of the major questions doctrine is likewise unavailing. The Secretary has not "'claim[ed] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority,'" *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022) (quoting *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)), exerted an "unprecedented power over American industry," *id.* at 2612 (quoting *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645 (1980)), or regulated a sector of the economy that Congress did not intend it to regulate, *id.* at 2612-13.

The Department took the exact type of action Congress empowered it to take (waiver or modification of provisions of Title IV of the Higher Education Act) in the precise context Congress authorized it to act (national emergencies) for the specific purpose Congress intended (relief of borrowers affected by an emergency). It is not a new assertion of regulatory

authority over the public at all, but rather the adjustment of a federal benefit under an existing program. The Secretary's action is plainly not the exceptional case in which an agency's extraordinary assertion of authority might call for application of a special mode of statutory analysis. And regardless, the statute provides "clear congressional authorization" for the power that the Department has exercised, *id.* at 2609 (quoting *Utility Air*, 573 U.S. at 324).

ARGUMENT

I. The text of the HEROES Act of 2003 authorizes the Secretary's action.

As this Court has repeatedly explained, statutory interpretation begins with the text of a statute, with "plain and unambiguous statutory language" enforced "according to its terms," *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). The HEROES Act of 2003 "plainly authorizes" the Department to issue the limited debt relief here. *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022) (per curiam).

A. The Act authorizes the Secretary of Education to waive or modify the provisions of Title IV waived here.

"[T]he Secretary of Education . . . may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under Title IV of the [Higher Education] Act [of 1965] as the Secretary deems necessary in connection with a . . . national emergency." 20 U.S.C. § 1098bb(a)(1). This is a grant of substantial power. *Compare id.* (authorizing Secretary to "*waive* or modify" provisions of the HEA (emphasis added)), *with MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 227-29 (1994) (rejecting FCC's assertion of authority to

"modify" a requirement that common carriers file tariffs by eliminating it altogether, because the authority to "modify" connotes only "moderate change").

The Secretary's action faithfully implements this authority. As the administrative record shows, all the provisions waived or modified in this case fall within Title IV, and thus within the clear grant of authority in the HEROES Act. *See* 87 Fed. Reg. 61,512 (Oct. 12, 2022) (waiving or modifying various provisions governing loan terms, payment conditions, cancellation, and discharge of Title IV loans at 20 U.S.C. §§ 1087a, 1087e, 1087dd; 34 C.F.R. Part 674, Subpart D; 34 C.F.R. §§ 682.402, 685.212). There is no serious question that, if the other prerequisites for exercising the Secretary's authority are met, the Secretary's waivers and modifications of these provisions were permissible under the text of the statute.

B. The COVID-19 pandemic created a "national emergency" that authorizes the Secretary to waive or modify the provisions at issue here.

The HEROES Act authorizes waivers of Title IV provisions in connection with a "national emergency." 20 U.S.C. § 1098bb(a)(1). The COVID-19 pandemic constitutes such an emergency. In March 2020, President Trump declared that the COVID-19 outbreak was a national emergency that threatened to strain the nation's healthcare systems. 85 Fed. Reg. 15,337 (Mar. 13, 2020). In February 2022, President Biden continued the national emergency, 87 Fed. Reg. 10,289 (Feb. 18, 2022); by then, the United States had documented more than 78 million cases of COVID-19

and more than 934,000 deaths from the disease, and those numbers are still rising.[3]

Despite State Respondents' suggestion that there is no "real connection to a national emergency" that could justify relief for borrowers, and that post-pandemic relief at this time would be an "absurd result[]" of the Department's asserted authority, *Nebraska* Resp. 22-23, recovery from the pandemic disaster is ongoing. Indeed, *amici* note that the State Respondents themselves continue to receive millions of dollars in federal disaster-recovery funding for COVID relief every month and are projected to receive hundreds of millions of dollars in additional COVID-relief funding in 2023.[4] Recovery from the worst pandemic in a century takes time and can still warrant continued post-disaster relief, both to State Respondents and to affected student borrowers. The specter raised by the *Brown* district court that pandemic recovery could be ongoing ten years from now does not change the fact that, today, a state of emergency continues to exist, with disaster-relief efforts actively ongoing, and it is *not* "unclear if COVID-19 is still a 'national emergency' under the Act." J.A. 293.

State Respondents have further argued that the HEROES Act exists to "address[] *temporary* challenges" in a way that "is 'incompatible' with the *permanent* cancellation of principal." *Nebraska* Resp. 25 (emphasis in original). The statute, however, does not draw distinctions between what Respondents

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[3] Edouard Mathieu et al., *Coronavirus (COVID-19) Cases*, Our World in Data, https://bit.ly/3AuMyMQ (last updated Jan. 11, 2023).

[4] FEMA, Disaster Relief Fund: Monthly Report as of November 30, 2022, https://bit.ly/3GRtU5g.

characterize as temporary versus permanent relief. The Act authorizes the Secretary to "waive or modify" student-loan provisions. 20 U.S.C. § 1098bb(a)(1). Congress did not use more limited language, such as the power to "suspend," as it has in some other emergency statutes. *See*, *e.g.*, 43 U.S.C. § 1341(c) (Secretary of the Interior may "suspend operations under any lease" for development of outer Continental Shelf "during a . . . national emergency"); 40 U.S.C. § 3147 (President may "suspend" statutory wage requirements for federal contractors "during a national emergency"); 46 U.S.C. § 8301(d)(1) (Secretary of Homeland Security may "suspend any part" of regulations concerning crew makeup on Coast Guard vessels "during a national emergency").

Moreover, the Secretary has previously used HEROES Act authority to grant permanent financial relief to borrowers. *See infra* Section II.A.1; Pet Br. 7, 41, 51-52. State Respondents concede that the Department has taken actions that "might have the indirect effect of reducing the principal that a borrower will ultimately pay," and respond that these actions were not "aimed at eliminating principal." *Nebraska* Resp. 25-26. But the Secretary's authority does not turn on Respondents' perception of the Department's intent.

In any event, Respondents have not cited any authority for the proposition that emergencies cannot be met with relief that has permanent effects, nor could they. Indeed, this Court recently held that the COVID-19 emergency justified the imposition of vaccination requirements on workers in healthcare facilities, *Biden v. Missouri*, 142 S. Ct. 647 (2022), a permanent measure that "cannot be undone at the end of the workday," *NFIB*, 142 S. Ct. at 665 (citation omitted).

Although the explicit statutory text provides a full response here, it is also the case that Respondents' apparent intuition that emergencies justify only temporary relief would be a curious and unheard-of constraint on disaster recovery efforts; after all, the federal government regularly provides one-time financial assistance to victims seeking to recover after a disaster, such as funds for housing and home repair, energy subsidies, or funeral expenses.[5]

C. Lower-income student borrowers are "affected individuals."

The HEROES Act treats as "affected individuals" anyone who "resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency." 20 U.S.C. § 1098ee(2). All 50 States, all U.S. territories, and the District of Columbia have been individually designated as disaster areas in connection with the COVID-19 pandemic, at the request of each State's governor. *See*, *e.g.*, *President Donald J. Trump Approves Missouri Disaster Declaration,* White House Statements & Releases (Mar. 26, 2020), https://bit.ly/3EHvbL9; *see also COVID-19 Disaster Declarations,* FEMA, https://bit.ly/3gh1uXZ (last updated Aug. 20, 2021). Therefore, under the plain language of the statute, any student borrower who lives or works in one of the States, including the Respondent States, "resides or is employed in . . . a disaster area" and qualifies as an "affected individual" under the Act. 20 U.S.C. § 1098ee(2)(C). Nothing more is necessary under the statute for nearly all beneficiaries.

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[5] *See Assistance for Housing and Other Needs*, FEMA, https://bit.ly/3tTPoqE (last updated Oct. 13, 2022).

The HEROES Act also includes an alternate definition of "affected individual": those who have "suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary," *id.* § 1098ee(2)(D). The Department's grant of relief to borrowers living overseas (and therefore not covered by section 2(C)) rests on this authority. *See* Pet. Br. 35. Notably, subsections (2)(C) and (2)(D) are *alternative* definitions of "affected individual." *Cf., e.g.*, *Horne v. Flores*, 557 U.S. 433, 454 (2009) ("Use of the disjunctive 'or' makes it clear that each of the provision's three grounds for relief is independently sufficient."). Only subsection 2(D) requires a finding that a national emergency impose direct economic hardship on affected individuals; the Secretary's waiver authority for those living in disaster areas (i.e., those not living abroad) does not contain such a limitation. Congress could have limited the Secretary's waiver authority in disaster areas only to those directly affected, but it chose not to. This choice "requires respect, not disregard." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2072 (2018).

As to both subsection 2(C) and (2)(D), the HEROES Act explicitly relieves the Secretary of any requirement that he "exercise the waiver or modification authority . . . on a case-by-case basis." 20 U.S.C. § 1098bb(b)(3). Rather than requiring individual-by-individual judgments about hardship for millions of borrowers, Congress permitted the Secretary to make reasonable determinations about classes of borrowers when tailoring relief, empowering the Secretary to act with the scale and speed necessary to address national emergencies. *See also id.* § 1098bb(a)(2)(B) (authorizing Secretary to ensure that "administrative

requirements placed on affected individuals . . . are minimized, . . . to ease the burden" on student borrowers).

D. The Secretary reasonably concluded that debt relief is "necessary to ensure that" borrowers are not "placed in a worse position financially" due to the national emergency.

As the Secretary explained, the effects of a national emergency on individuals' financial positions relative to their loans can include increased likelihood of default, inability to afford repayment without depleting funds for necessities and savings, and a reduction in borrowers' future abilities to obtain credit or employment. *See* J.A. 233-39. The HEROES Act authorizes the Secretary to consider these harmful effects and waive repayment provisions as he "deems necessary" to ensure that a national emergency does not place borrowers "in a worse position financially" than they would have been in otherwise. 20 U.S.C. § 1098bb(a)(1), (a)(2)(A).

Respondents have argued that, because relief in this instance takes the form of a reduction in principal owed by qualifying borrowers, the Secretary's action puts these borrowers in a better position than they were in prior to the pandemic, rather than ensuring that they are not placed in a worse position because of the pandemic. *See Nebraska* Resp. 24-25. The administrative record, however, supports the Department's conclusion that the pandemic emergency caused substantial deterioration in lower-income borrowers' financial positions, with these borrowers substantially more likely to have trouble making payments in 2022 than in 2019. J.A. 233-39. As such, it does not follow that a one-time, limited reduction in principal owed

must put borrowers in a better position than they were in before the pandemic. The Department further found that borrowers whose loan obligations would be eliminated by the Secretary's action were disproportionately likely to be low income and at high risk of default; and for remaining borrowers, the economic effects of loan forgiveness on their monthly payments would be roughly equivalent to the payment pause that has persisted throughout the pandemic. J.A. 242-44.

The Secretary reasonably concluded that his action was necessary and appropriate to offset the harms of the pandemic emergency. Respondents may disagree with this conclusion, but their disagreement does not render the Secretary's contrary decision arbitrary, *see, e.g., FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021) (actions are not arbitrary and capricious as long as "agency has acted within a zone of reasonableness," at which point judicial review does not permit a court to "substitute its own policy judgment for that of the agency"), much less contrary to the statute, as Respondents have argued.

Respondents' second guessing of the Secretary's judgment here is particularly meritless given Congress's decision to vest the Secretary with broad authority to "deem [relief] necessary" to avoid borrowers being in a worse position relative to their loans than they would have been absent the pandemic. 20 U.S.C. § 1098bb(a)(1), (a)(2)(A). The statute thus anticipated a discretionary determination. *See*, *e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018) (statute authorizing President to "suspend the entry of all aliens or any class of aliens . . . for such period as he shall deem necessary" or subject to "any restrictions he may deem to be appropriate" constituted a "comprehensive

delegation" that authorized the suspension of entry of nationals from several countries); *Webster v. Doe*, 486 U.S. 592, 600 (1988) (statute allowing termination of CIA employees when the Director "'shall deem [] necessary' . . . exudes deference to the Director"); *see also, e.g.*, *Texas v. EPA*, 983 F.3d 826, 836-37 (5th Cir. 2020) (statutory text giving EPA Administrator "discretion to make changes whenever it 'deems necessary'" gave "the agency discretion to determine when changes are necessary, not merely authority to make changes when it has no other option").

II. The major questions doctrine does not bar the Secretary's action.

A. The Secretary's action does not trigger the doctrine.

In *West Virginia*, this Court explained that in rare, "'extraordinary cases,'" "the 'history and the breadth of the authority that [an agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." 142 S. Ct. at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000)). Those exceptional cases—in which an agency "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority"—are subject to the major questions doctrine. *Id.* at 2610 (quoting *Utility Air*, 573 U.S. at 324).

The challenged waivers and modifications bear none of the hallmarks of unheralded, transformative agency action. The Secretary's action is entirely consistent with the Department's prior assertions of its HEROES Act authority, its traditional mission and

expertise, and the structure of the Act. Indeed, as the government points out, it does not even involve an assertion of regulatory authority over the public at all—merely a change in the provision of government benefits under an existing statutory scheme. Pet. Br. 48-49. Respondents' arguments to the contrary ignore the history and text of the Act and the Department's oversight of the federal student-loan program as a whole.[6]

Nor does the Secretary's action trigger the major questions doctrine merely because it appears to involve a large amount of money and has been the subject of recent congressional proposals, as Respondents have pressed and the *Brown* district court held, *see*

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[6] The cases that the Court has treated as "extraordinary" show what types of agency actions are unheralded and transformative in the relevant sense. For example, *Brown & Williamson* involved the FDA's attempt to regulate and ban tobacco products, which it had disclaimed authority over for more than 70 years and which Congress had separately regulated in exacting detail. 529 U.S. at 127, 137. *Utility Air* concerned the EPA's regulation of "millions of small sources, such as hotel and office buildings, that had never before been subject to such [EPA] requirements," 142 S. Ct. at 2608. *Alabama Association of Realtors v. HHS* involved the CDC's assertion of authority to regulate landlords' eviction practices nationwide. 141 S. Ct. 2485 (2021) (per curiam). *Gonzales v. Oregon* dealt with the Attorney General's attempt to rescind state-issued medical licenses. 546 U.S. 243 (2006). *NFIB v. OSHA* considered the occupational-health agency's ability to require vaccinations and weekly testing *outside* of the workplace. 142 S. Ct. at 665. And in *West Virginia* itself, the EPA attempted to convert an authority that had always been understood to "ensur[e] the efficient pollution performance of [an] individual regulated source" into one that allowed it to "forc[e]" one segment of the power industry to "cease making power altogether." 142 S. Ct. at 2612. In each case, an agency regulated far beyond the subjects Congress expected it to regulate.

Nebraska Resp. 27-28; *Brown* Resp. 18-19; J.A. 288-89. But even if the Court were to adopt such a mode of analysis, the Secretary's action still would not trigger the doctrine.

1. The Secretary's action is not unheralded.

Respondents portray the Secretary's action here as unprecedented in two ways: the scope of affected individuals is broad, and the waiver of a payment obligation provides permanent relief. *See Nebraska* Resp. 28-29; *Brown* Resp. 18-19. But neither is in any way new. The history and breadth of the Department's prior uses of its HEROES Act authority show that the challenged waivers and modifications align with its longstanding, uncontroversial understanding of that authority. Far from a novel, unheralded assertion of authority, the Secretary's action here is consistent with the scope and effect of prior waivers and modifications. *Compare, e.g.*, *NFIB*, 142 S. Ct. at 666 (striking down OSHA vaccine mandate where "OSHA, in its half century of existence, ha[d] never before adopted a broad public health regulation" of that kind), *with Biden v. Missouri*, 142 S. Ct. at 653 (upholding HHS vaccine mandate where "the Secretary routinely imposes conditions of participation" on healthcare workers and "has always justified" such requirements by reference to the statutory provisions in question).

As an initial matter, this is not the first time that the Department has drawn on its HEROES Act authority to relieve a broad, nationwide class of borrowers from repayment and other obligations in response to the COVID-19 pandemic, nor the first Administration to do so. Beginning in March 2020, Secretary DeVos temporarily eliminated the accrual of interest and suspended payment on all federally held student

loans, and she paused collection actions and wage garnishment to recoup delinquent loans. *See* 85 Fed. Reg. 79,856 (Dec. 11, 2020). That relief was made available to all federal borrowers across the United States, all of whom the Secretary determined—as a categorical matter—were affected by the COVID-19 pandemic. *See id.* at 79,857. The incoming Biden Administration extended these waivers. *See Pausing Federal Student Loan Payments*, White House Statements & Releases (Jan. 20, 2021), https://bit.ly/3UmyWKZ; *see also* Press Release, U.S. Dep't of Educ., Department of Education Announces Expansion of COVID-19 Emergency Flexibilities to Additional Federal Student Loans in Default (Mar. 30, 2021), https://bit.ly/3UjVb48. The waivers remain in effect today and are currently set to expire later this year. *See* Press Release, U.S. Dep't of Educ., Biden-Harris Administration Continues Fight for Student Debt Relief for Millions of Borrowers (Nov. 22, 2022), https://bit.ly/3ZujYFW.

The class of beneficiaries covered by the action challenged here is no larger than that covered by previous, uncontroversial actions—indeed, *less* expansive, given that the Secretary's action imposes an income threshold that was absent from the ongoing nationwide payment pause. Further, there is nothing novel about providing relief to all borrowers who reside in a disaster area; indeed, that has been the case since the passage of the HEROES Act. *See, e.g.*, 68 Fed. Reg. 69,312 (Dec. 12, 2003) (providing waivers and modifications to all federal borrowers residing or employed in a disaster area).

Beyond that, the substance of the challenged action is not markedly different from previous exercises of authority under the Act. The Department has in the

past permanently waived payments and otherwise made it easier for borrowers to discharge debts. For example, soon after the passage of the Act, the Department waived the requirement that borrowers return unearned grant funds, which they are ordinarily obligated to do under the Higher Education Act, when they withdraw from an institution because they reside in a disaster area or have suffered economic hardship because of a national emergency. *See id.* at 69,314. Likewise, under the Department's ongoing pause on loan payments and elimination of interest accrual, borrowers who have continued to pay their principal during the moratorium will have lower monthly interest payments when the pause is lifted. These and other waivers and modifications amount to permanent reductions in borrowers' repayment obligations of the type that Respondents argue falls outside the bounds of permissible emergency relief, *see Nebraska* Resp. 29.[7]

Thus, unlike the CDC's novel use of a decades-old statute to regulate evictions, *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489, or EPA's sector-threatening

[7] The Department has also relied on the HEROES Act to waive the requirement that borrowers in employment-based loan-forgiveness programs perform their qualifying work without interruption, for those whose employment was interrupted as the result of their residing or being employed in a disaster area. *See* 68 Fed. Reg. at 69,316. And in the first set of waivers that the Department issued in connection with the COVID-19 pandemic, the Department made it easier for borrowers with certain types of federal loans to assert defenses to repayment, by applying a more forgiving standard to their asserted defenses. *See* 85 Fed. Reg. at 79,862. These waivers that make it easier for borrowers to have their loans forgiven inevitably reduce the amount of principal that many borrowers repay, therefore conferring what Respondents would characterize as a "permanent" benefit to borrowers.

restrictions on coal-power production, *West Virginia*, 142 S. Ct. at 2610-11, the Department's determination is comparable in key respects to its prior, uncontroversial exercise of its authority under the HEROES Act.

2. The Secretary's action does not transform the Department's regulatory authority.

Similarly, the challenged action does not work a "'radical or fundamental change' to a statutory scheme," *West Virginia*, 142 S. Ct. at 2609-10 (quoting *MCI*, 512 U.S. at 229), nor one that would effect a "transformative expansion in [its] regulatory authority," *id.* (quoting *Utility Air*, 573 U.S. at 324). Indeed, the Secretary's action is not an assertion of regulatory authority over the public at all, but rather an exercise of authority to provide relief under a benefits program. *See* Pet. Br. 48-49.

Beyond that, the Department is not asserting jurisdiction over matters not previously within its purview or trying to regulate topics Congress never assigned to it; it is acting at the core of its statutory authority. The Secretary's HEROES Act waiver and modification authority falls squarely within the responsibilities Congress has vested in the Secretary. For example, in tasking the Department of Education with carrying out the purposes of the federal student loan programs, Congress already authorized the Secretary to modify "any . . . provision of any note evidencing a loan" made under Title IV and to "compromise, waive, or release any right, title, claim, lien, or demand," among other powers. 20 U.S.C. § 1087hh(1)-(2). Given that Congress expressly authorized the Secretary to modify, compromise, or release federal student-loan debt, the Department's use of its HEROES Act authority to do exactly that hardly represents a "transformative expansion" or "radical or

fundamental change" in its power. *West Virginia*, 142 S. Ct. at 2609-10 (quoting *MCI*, 512 U.S. at 229, and *Utility Air*, 573 U.S. at 324).

For that reason, this is not a case in which the agency "'has no comparative expertise' in making certain policy judgments," such that "'Congress presumably would not' task it with doing so." *Id.* at 2613 (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019)). There is no "mismatch between [the] agency's challenged action and its congressionally assigned mission and expertise," *id.* at 2623 (Gorsuch, J., concurring), unlike the CDC intervening in landlord-tenant relations, *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489, OSHA requiring actions outside the workplace, *NFIB*, 142 S. Ct. at 665, or the Attorney General making medical judgments, *Gonzales*, 546 U.S. at 265-66. The Department's regulation of federal student loans is squarely within its expertise. *See supra* Section II.A.1.

Nor is the Department attempting to exploit an "ancillary provision" of a statute, one "designed to function as a gap filler." *West Virginia*, 142 S. Ct. at 2610; *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress "does not . . . hide elephants in mouseholes."). The HEROES Act's waiver and modification authority is not some "previously little-used backwater" of a broader statute, *West Virginia*, 142 S. Ct. at 2613; it is the heart of a statute designed to give the Secretary "specific waiver authority to respond to . . . [a] national emergency." Act of Aug. 18, 2003, Pub. L. No. 108-76, 117 Stat. 904 (Aug. 18, 2003). In fact, § 1098bb is the *only* provision in the tightly drawn HEROES Act that gives effect to the law's central purpose; the Act does not contain back channels through which undelegated stores of agency

authority might be sneaking. *See generally* 20 U.S.C. §§ 1098aa-1098ee.

Ignoring this evidence, State Respondents suggest that the Secretary has claimed transformative authority because the one-time, limited relief measure on the heels of a once-in-a-century global pandemic raises the specter of broader debt cancellation. *See Nebraska* Resp. 29-30. Far from it. The hypothetical unlimited debt cancellation that Respondents invoke simply would not hold up in the face of the limits on agency waiver and modification authority that the HEROES Act imposes—limits that the Department's action respects and reinforces. Waiver of debt is permissible under the statute only when done "in connection with a war or other military operation or national emergency" and only in satisfaction of one of five enumerated objectives. 20 U.S.C. § 1098bb(a)(1)-(2). The Secretary's action does not open the floodgates to unlimited debt cancellation.

3. The economic and political significance of the Secretary's action do not trigger the doctrine.

As explained above, the hallmark of a major-questions case is an agency's assertion of unheralded, transformative power to regulate the public. *See supra* Section II.A.1-2. Respondents' and the *Brown* district court's conception of "economic and political significance" as an isolated test or sufficient indicia of "majorness" does not accord with this Court's major-questions precedents, as described above. *See supra* n.6 (cataloguing major-questions cases); *see generally* Natasha Brunstein & Donald L. R. Goodson, *Unheralded and Transformative: The Test for Major Questions After* West Virginia, 47 Wm. & Mary Env't L. & Pol'y Rev., at 20-21 (forthcoming 2023) (explaining that

several of the Court's cases establishing the doctrine do not analyze economic and political significance in determining whether questions presented by agency action are "major"). But even if the Court were to accept Respondents' conception of economic and political significance, which it should not, the major questions doctrine still would not govern the Department's action.

a. This Court should resist Respondents' desire to evaluate economic significance in a vacuum. The Department's action may concern a large amount of money—approximately $13.3 billion per year, by one early analysis[8]—but this figure must be viewed in the context of the federal student-loan program as a whole, comprising 43 million borrowers with loans totaling approximately $1.6 trillion.[9]

Given the overall size of the student-loan program, Department actions managing this portfolio regularly involve large sums. For example, the Department cancelled an estimated $6.8 billion in federal student debt under the Public Service Loan Forgiveness program and an additional $7.8 billion for borrowers with disabilities from January 2021 to April 2022—a total of $14.6 billion in debt cancellation.[10] Likewise, the Department regularly discharges billions of dollars of federal student loans held by hundreds of thousands of borrowers who have attended

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[8] *See* Letter from Phillip L. Swagel, Director, Cong. Budget Office, to Members of Congress (Sept. 26, 2022), https://bit.ly/3U71fwE.

[9] *Id.* at 3.

[10] *See* Press Release, U.S. Dep't of Educ., Department of Education Announces Actions to Fix Longstanding Failures in the Student Loan Programs (Apr. 19, 2022), https://bit.ly/3DDF9wr.

educational institutions that the Department later determined misrepresented their credentials and accreditation or otherwise misled students about the value of the education provided.[11] For example, over the course of three months this year, the Department discharged more than $11 billion in federal loans held by borrowers who attended just three institutions.[12]

When managing a $1.6 trillion loan portfolio, virtually *every* action that the Department takes to relieve borrowers might trigger the major questions doctrine if courts looked only to the bottom-line amount.[13] That would work a massive expansion in the major questions doctrine—a rule reserved for

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[11] *See* U.S. Dep't of Educ., Office of Fed. Student Aid, Borrower Defense Findings, https://bit.ly/3DhundS (last visited Jan. 11, 2023) (cataloguing Department's discharges of debt against institutions).

[12] *See* Press Release, U.S. Dep't of Educ., Education Department Approves $1.5 Billion in Debt Relief for 79,000 Borrowers Who Attended Westwood College (Aug. 30, 2022), https://bit.ly/3DB7svE; Press Release, U.S. Dep't of Educ., Education Department Approves $3.9 Billion Group Discharge for 208,000 Borrowers Who Attended ITT Technical Institute (Aug. 16, 2022), https://bit.ly/3NasrbQ; Press Release, U.S. Dep't of Educ., Education Department Approves $5.8 Billion Group Discharge to Cancel All Remaining Loans for 560,000 Borrowers Who Attended Corinthian (June 1, 2022), https://bit.ly/3DhLvjA.

[13] And it's not just the Department of Education's regular activity that would be disrupted by so freewheeling a standard. Many agencies have promulgated multi-billion-dollar regulations without raising major-questions hackles. *See, e.g.*, 85 Fed. Reg. 61,505 (Sept. 29, 2020) (Department of Defense rule regarding unclassified information with estimated costs of $6.5 billion annually); 85 Fed. Reg. 72,158 (Nov. 12, 2020) (multi-agency regulation regarding health-insurance disclosures with estimated annual costs up to $10 billion).

"extraordinary" circumstances, *West Virginia*, 142 S. Ct. at 2608.

Moreover, the "cost" in question is not the type of cost considered in previous cases, which involved "'billions of dollars in spending' by private persons or entities," *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (quoting *King v. Burwell*, 576 U.S. 473, 485 (2015)), resulting from an exercise of "unprecedented power over American industry," *id.* at 2612 (quoting *Indus. Union Dep't*, 448 U.S. at 645); *see also, e.g.*, *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (considering the "financial burden on landlords" resulting from CDC's eviction moratorium). Respondents here point instead to the cost imputed to the federal government by a reduction in projected income generated by a federal program. The absence of any costs to private parties is, on its own, sufficient to end the major-questions inquiry.[14]

Indeed, in describing the injury that supposedly gives rise to this case, Respondents don't allege that the action will trigger billions of dollars in costs to private parties, nor could they. They merely contend that the debt-relief measure will cost Missouri's state-affiliated loan servicer money in lost account fees and that states may lose some unspecified amount in tax

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[14] Relatedly, because the Department's action pertains only to *federally* held student loans, it raises none of the federalism concerns that sometimes animate the Court's major-questions analysis. *See, e.g.*, *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (CDC's national eviction moratorium "intrudes into an area that is the particular domain of state law: the landlord-tenant relationship"); *Gonzales*, 546 U.S. at 274 ("[T]he background principles of our federal system . . . belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power.").

revenue. *See Nebraska* Resp. 13-14, 18-19. These tenuous allegations of marginal economic harm are a far cry from the effects one would expect were the Department exercising an "extravagant statutory power over the national economy," *West Virginia*, 142 S. Ct. at 2609 (quoting *Utility Air*, 573 U.S. at 324).

b. The mere existence of political disagreement with the Secretary's decision does not satisfy any "political significance" requirement. The major questions doctrine is not so malleable that a determined litigant can stoke a controversy to change the applicable standard of review.

Aside from their own disagreement, all that Respondents point to as evidence of political significance is that Congress has failed to enact debt-relief measures over the last three years. *See Nebraska* Resp. 28; *Brown* Resp. 20-21. But two of the three proposals that they have cited are much broader in scope than the Department's action here. *See, e.g.*, H.R. 2034, 117th Cong. (2021) (bill introduced in House that would cancel all student debt for all borrowers with adjusted gross incomes up to $100,000); S. 2235, 116th Cong. (2019) (bill introduced in Senate proposing cancellation of up to $50,000 for all borrowers regardless of income). And the third was *one* provision of a $3 trillion stimulus bill. *See* H.R. 6800, 116th Cong. § 150117(h) (2020).

Far more than this "simple inaction by Congress" is required to provide meaningful evidence of intent. *See Brown & Williamson*, 529 U.S. at 155 (drawing on 35-year history of specific congressional action at odds with agency's assertion of authority); *West Virginia*, 142 S. Ct. at 2610 (Congress's "conspicuously and repeatedly declin[ing] to enact" particular regulatory scheme was evidence of congressional intent); *see also*

Johnson v. Transp. Agency, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting) ("[O]ne must ignore rudimentary principles of political science to draw any conclusions regarding [congressional] intent from the *failure* to enact legislation."); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1747 (2020) (post-enactment failed legislation is a "particularly dangerous basis on which to rest an interpretation of an existing law").

And in this case, countervailing evidence points in the opposite direction: the American Rescue Plan of 2021 anticipated further student-debt relief by making any discharge of federal student loans through 2025 tax-exempt. *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (Mar. 11, 2021).

B. The Secretary's action is justified by clear congressional authorization.

The Secretary's action does not implicate the major questions doctrine, and no further inquiry is necessary. But even if the challenged action did raise a major statutory question, it is supported by clear congressional authorization, for "the [underlying provision] plainly authorizes the Secretary's" action. *NFIB*, 142 S. Ct. at 665.

For the reasons already explained, *see supra* Section I, the plain text of the HEROES Act authorizes the Department's action here. The text of the Act explicitly authorizes the Department to modify or waive federally held student-debt requirements in connection with a national emergency to ensure that affected borrowers are not placed in a worse position financially. *See* 20 U.S.C. §§ 1098bb(a)(1)-(2), 1098ee(2)(D). The Act permits the Secretary to modify or waive *any* provision that applies to the three student-loan programs that the federal government administers under

the Higher Education Act. *See* 20 U.S.C. §§ 1087a-1087j. This broad grant of authority naturally encompasses the ability to waive or modify the statutory and regulatory provisions that obligate borrowers to repay their loans and specify the consequences of failure to repay. *See* 20 U.S.C. §§ 1080, 1087e, 1087dd; 34 C.F.R. §§ 682.102, 682.402, 685.207, 685.212-218. And because the Secretary's action here fits squarely within the text and purpose of the statute, the Court need not strain to determine whether a statutory term designed for one context can be the basis for regulation in another. *See, e.g.*, *West Virginia*, 142 S. Ct. at 2614-15 (finding ambiguity in the term "system," which, when "shorn of all context . . . is an empty vessel").

CONCLUSION

The Court should affirm the judgment of the district court in *Nebraska* and reverse the judgment of the district court in *Brown*.

Respectfully submitted.

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