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.

DEPARTMENT OF EDUCATION, ET AL., PETITIONERS

v.

MYRA BROWN, ET AL.

ON WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND FIFTH CIRCUITS

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QUESTIONS PRESENTED

1. Whether respondents have Article III standing.

2. Whether the Secretary of Education's student-loan-relief plan exceeds the Secretary's statutory authority, is arbitrary and capricious, or was adopted in a procedurally improper manner.

PARTIES TO THE PROCEEDING

In *Nebraska*, petitioners (defendants-appellees below) are Joseph R. Biden, in his official capacity as President of the United States; Miguel Cardona, in his official capacity as Secretary of Education; and the U.S. Department of Education. Respondents (plaintiffs-appellants below) are the States of Arkansas, Iowa, Kansas, Missouri, Nebraska, and South Carolina.

In *Brown*, petitioners (defendants-appellants below) are the U.S. Department of Education and Miguel Cardona, in his official capacity as Secretary of Education. Respondents (plaintiffs-appellees below) are Myra Brown and Alexander Taylor.

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ON WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND FIFTH CIRCUITS

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

In *Nebraska*, the opinion of the court of appeals (J.A. 160-167) is reported at 52 F.4th 1044. The order of the court of appeals granting an administrative stay (J.A. 158) is unreported. The order of the district court denying an injunction pending appeal (J.A. 157) is unreported. The opinion, memorandum, and order of the district court (J.A. 135-151) is available at 2022 WL 11728905.

In *Brown*, the order of the court of appeals (J.A. 308) is unreported. The order of the district court (J.A. 263-297) is available at 2022 WL 1658525.

JURISDICTION

In *Nebraska*, the district court entered final judgment on October 20, 2022 (J.A. 152). Respondents appealed the same day (J.A. 153). The court of appeals' jurisdiction rests on 28 U.S.C. 1291. On November 18, 2022, petitioners applied to this Court for vacatur of the court of appeals' injunction. On December 1, 2022, the Court treated the application as a petition for a writ of certiorari before judgment and granted the petition (J.A. 168). The Court's jurisdiction rests on 28 U.S.C. 1254(1) and 2101(e).

In *Brown*, the district court entered final judgment on November 10, 2022 (J.A. 298-299). Petitioners appealed the same day (J.A. 300-301). The court of appeals' jurisdiction rests on 28 U.S.C. 1291. On December 2, 2022, petitioners applied to this Court for a stay. On December 12, 2022, the Court treated the application as a petition for a writ of certiorari before judgment and granted the petition (J.A. 309). The Court's jurisdiction rests on 28 U.S.C. 1254(1) and 2101(e).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced at App., *infra*, 1a-8a.

STATEMENT

To protect student-loan borrowers affected by a national emergency from student-debt-related financial harm, Congress provided the Secretary of Education with authority to waive or modify statutory and regulatory provisions governing their student-loan obligations

under specified conditions. In August 2022, the Secretary announced a plan to use that statutory authority to provide targeted debt relief to millions of student-loan borrowers suffering the continuing economic fallout of an unprecedented global pandemic. Respondents are six States with policy objections to debt relief and two borrowers who purport to want broader relief. They filed suit seeking to bar the Secretary from providing any relief to anyone.

A. The HEROES Act

1. The Department of Education administers federal student-aid programs under Title IV of the Higher Education Act of 1965 (Education Act), 20 U.S.C. 1070 *et seq.* Those programs include the William D. Ford Federal Direct Loan Program (Direct Loans), 20 U.S.C. 1087a-1087j, under which the federal government lends money directly to student borrowers, and the Federal Family Education Loan Program (Family Education Loans), 20 U.S.C. 1071 to 1087-4, and Federal Perkins Loan Program (Perkins Loans), 20 U.S.C. 1087aa-1087ii, under which non-federal lenders issue loans to student borrowers on terms set by the federal government. New loans are no longer issued under the latter two programs, but prior loans under them remain outstanding. More than 43 million borrowers have outstanding loans under the three programs, and their debts total roughly $1.63 trillion. Office of Federal Student Aid, U.S. Dep't of Educ., *Federal Student Aid Portfolio*, https://studentaid.gov/data-center/student/portfolio (last visited Jan. 4, 2022).

The Education Act charges the Secretary of Education with "carry[ing] out" federal student-aid programs. 20 U.S.C. 1070(b). The Act grants the Secretary substantial "powers and responsibilities," 20 U.S.C. 1082

(emphasis omitted), including authority to "compromise, waive, or release any right, title, claim, lien, or demand" acquired in the Secretary's performance of his "functions, powers, and duties" in administering the Department's portfolio of loans, 20 U.S.C. 1082(a)(6). In exercising that statutory authority, the Secretary has many times discharged debts owed by student-loan borrowers, including on a class-wide basis and for substantial amounts.[1]

2. On several occasions, Congress has also specifically authorized the Secretary to grant student-loan relief to particular classes of borrowers. In 1991, for example, Congress enacted the Persian Gulf Conflict Higher Education Assistance Act, Pub. L. No. 102-25, Tit. III, Pt. E, § 327(a)(1), 105 Stat. 93. That Act authorized the Secretary to "waive or modify any statutory or regulatory provision applicable to" the student-aid programs under Title IV of the Education Act as necessary to ensure that "the men and women serving on active duty in connection with Operation Desert Storm" were "not placed in a worse position financially in relation to" their student loans "because of such service." *Ibid.*

A decade later, in response to the September 11th terrorist attacks, Congress enacted the Higher Education Relief Opportunities for Students Act of 2001, Pub.

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[1] See, *e.g.*, Press Office, 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://perma.cc/MTW6-XABV; *Secretary DeVos Cancels Student Loans, Resets Pell Eligibility, and Extends Closed School Discharge Period for Students Impacted by Dream Center School Closures* (Nov. 8, 2019), https://perma.cc/FRT6-WAWS; see also Order Granting Final Settlement Approval, *Sweet* v. *Cardona*, No. 19-cv-3674, D. Ct. Doc. 345 (N.D. Cal. Nov. 16, 2022).

L. No. 107-122, 115 Stat. 2386, to "provide the Secretary of Education with specific waiver authority to respond to conditions in the national emergency declared by the President on September 14, 2001," *ibid*. This time, Congress authorized the Secretary to "waive or modify any statutory or regulatory provision applicable to" the student-aid programs under Title IV of the Education Act "as may be necessary to ensure that" borrowers affected by September 11 and later terrorist attacks are not in a worse position in relation to their student loans. § 2(a)(1) and (2), 115 Stat. 2386; see § 5, 115 Stat. 2388.

In 2003, Congress extended and substantially expanded that authority by enacting the statute at issue here, the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act or Act), Pub. L. No. 108-76, § 2, 117 Stat. 904-905 (20 U.S.C. 1098bb). Like its predecessors, the HEROES Act authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" under Title IV of the Education Act. 20 U.S.C. 1098bb(a)(1). But the HEROES Act does not limit debt relief to borrowers affected by terrorist attacks; instead, it authorizes waiver or modification "as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide the waivers or modifications authorized by paragraph (2)." *Ibid*.

Paragraph 2, in turn, authorizes the Secretary "to waive or modify" any Title IV provision "as may be necessary to ensure" that certain objectives are achieved. 20 U.S.C. 1098bb(a)(2). The first objective is that "recipients of student financial assistance under title IV of the [Education] Act who are affected individuals 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). An "affected individual" is defined to include any individual 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" or who "suffered direct economic hardship as a direct result of" a "national emergency." 20 U.S.C. 1098ee(2)(C) and (D). Congress defined "national emergency" as any "national emergency declared by the President of the United States." 20 U.S.C. 1098ee(4); see 50 U.S.C. 1621-1622 (authorizing such declarations).

Several provisions of the HEROES Act underscore Congress's intent to authorize the Secretary to respond quickly and fully to national emergencies. Congress granted the Secretary authority to provide waivers or modifications "[n]otwithstanding any other provision of law, unless enacted with specific reference to [the HEROES Act]." 20 U.S.C. 1098bb(a)(1). The Secretary need not act through notice and comment; instead, he need only publish a notice in the Federal Register setting forth "the waivers or modifications * * * the Secretary deems necessary to achieve the purposes of this section." 20 U.S.C. 1098bb(b)(1). Nor need the Secretary comply with other procedural requirements that would delay relief. 20 U.S.C. 1098bb(d). And Congress specifically provided that "[t]he Secretary is not required to exercise the waiver or modification authority * * * on a case-by-case basis." 20 U.S.C. 1098bb(b)(3).

The HEROES Act was originally set to expire in 2005. § 6, 117 Stat. 908. In 2005, Congress extended it for two years. Act of Sept. 30, 2005, Pub. L. No. 109-78, 119 Stat. 2043. And in 2007, Congress made the Act

permanent. Act of Sept. 30, 2007, Pub. L. No. 110-93, 121 Stat. 999.

3. Since 2003, the Secretary has repeatedly invoked the HEROES Act to provide categorical relief to borrowers affected by emergencies, including by waiving the requirement that borrowers return overpayments of certain grant funds; waiving the requirement that service be uninterrupted to qualify for loan cancellation on the basis of employment in certain occupations; extending the maximum period of forbearance for Perkins loans and eligibility for deferment of Family Education Loans; and requiring the Department to pay the interest that accrues during extended deferments. See 68 Fed. Reg. 69,312-69,318 (Dec. 12, 2003); Office of Legal Counsel, U.S. Dep't of Justice, *Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans*, 2022 WL 3975075, at *4 (Aug. 23, 2022) (OLC Op.); *Notice of Debt Cancellation Legal Memorandum*, 87 Fed. Reg. 52,943, 52,944 (Aug. 30, 2022).

B. HEROES Act Relief During The COVID-19 Pandemic

1. In March 2020, President Trump declared a national emergency in light of the COVID-19 pandemic. Proclamation No. 9994, 3 C.F.R. 56 (2020 comp.). That declaration remains in effect, and the government has declared all 50 States, the District of Columbia, and the territories to be disaster areas. See FEMA, *COVID-19 Disaster Declarations*, https://perma.cc/B7KA-W4KD. COVID-19 has killed more than one million Americans and led to the hospitalization of millions more. Centers for Disease Control and Prevention, *COVID Data Tracker* (Dec. 30, 2022), https://perma.cc/ZH65-9PX3. The pandemic has also profoundly disrupted the Nation's economy and inflicted severe economic harms, including mass layoffs, food insecurity, spikes in inflation,

rising delinquency rates on debt, and projected reductions in lifetime earnings for students who left school during the pandemic. J.A. 234-239, 249-250. These harms have disproportionately affected lower-income households. J.A. 234-239, 245-253.

In response to the pandemic, the government provided substantial relief to borrowers with Department-held loans. In March 2020, then-Secretary of Education Betsy DeVos invoked the HEROES Act to pause repayment obligations and suspend interest accrual on all such loans. 85 Fed. Reg. 79,856, 79,857 (Dec. 11, 2020). Congress directed the Secretary to extend those policies through September 2020. COVID-19 Pandemic Education Relief Act of 2020, Pub. L. No. 116-136, Div. A, Tit. III, Subtit. B, § 3513, 134 Stat. 404. Both the Trump and Biden Administrations then further extended these protections under the HEROES Act. See, *e.g.*, 85 Fed. Reg. at 79,857; J.A. 257-259. As of April 2022, the payment pause was estimated to have cost the federal government $102 billion, or roughly $5 billion per month. U.S. Gov't Accountability Office, *Student Loans: Education Has Increased Federal Cost Estimates of Direct Loans by Billions due to Programmatic and Other Changes* 14 (July 2022).

2. In August 2022, Secretary of Education Miguel Cardona determined that the across-the-board pause on all payments for all borrowers should come to an end. But he also determined that despite the pause and other COVID-19 relief measures, the resumption of repayment obligations would put many lower-income borrowers "at heightened risk of loan delinquency and default" due to the pandemic. J.A. 257. The Secretary therefore invoked the HEROES Act to adopt a two-pronged approach. He announced that he would extend the pause

a final time, through December 31, 2022. J.A. 259. And to ensure that "borrowers are not in a worse position financially due to the pandemic with regard to their ability to repay their loans" when payment obligations resume, the Secretary directed the Department to issue up to $10,000 in student-loan relief to eligible borrowers with a federal adjusted gross income below $125,000 ($250,000 for borrowers filing jointly). J.A. 258-259. Qualifying Pell Grant recipients, who tend to have fewer resources and are at substantially greater risk of default, can receive up to $20,000. J.A. 258.

The supporting analysis on which the Secretary relied explained that additional relief beyond the payment pause is necessary to ensure that affected borrowers are not "in a worse position financially as a result of the COVID-19 pandemic." J.A. 232. The Department analyzed historical data about borrowers who transitioned back to repayment after periods of forbearance, including after other emergencies, and concluded that such borrowers are typically at "elevated risk of delinquency and default." J.A. 234. Indeed, default rates increase twentyfold after the period of non-payment ends, and affected Pell Grant recipients experience even "larger increases in default." J.A. 234-235. That data suggests that a pause on payments alone is not necessarily sufficient to alleviate the economic effects of a disaster on the affected borrowers' ability to repay their loans.

The Department also reviewed data specific to the COVID-19 pandemic and its effects on borrowers, including borrower surveys, loan data, economic studies, and credit analyses conducted by the Consumer Financial Protection Bureau and Federal Reserve Banks. That data revealed rising delinquency rates on non-student-loan debt and commercially held student-loan

debt (which was not covered by the pause); high percentages of borrowers who anticipate difficulty making loan payments; and acute inflationary pressures on household budgets for "basic necessities, including energy, food, and shelter costs." J.A. 235-239, 245, 249-251. And the Department emphasized the substantial penalties imposed on borrowers who are delinquent or default on student-loan payments, including exposure to involuntary collection methods; lost access to affordable or flexible repayment options; and 50-to-90-point drops in credit scores that make insurance, rent, and other financial products more expensive and limit employment opportunities. J.A. 239.

The Department explained that the proposed relief was targeted to ameliorate these harms. J.A. 240-255. As to the income eligibility threshold, the relevant economic data established that borrowers with incomes under $125,000, especially Pell Grant recipients, are at "particular risk of being in a worse financial position because of the pandemic" and are far likelier to experience financial hardship in repaying their loans when payments resume. J.A. 243, 245-253. Among other things, such borrowers were disproportionately likely to become unemployed and experience material hardship due to the pandemic, including food insecurity and difficulty making utility, rent, and mortgage payments. J.A. 237, 248-253.

As to the amount of debt to be discharged, the Department concluded that "it should discharge an amount of debt necessary to significantly decrease the rates of delinquency and default." J.A. 242. After considering borrower loan balances and the effectiveness of various monthly payment reductions in reducing delinquency rates, the Department determined that

$10,000 in relief (and $20,000 for Pell Grant recipients) would "mitigate the risk that delinquency and default rates will rise above pre-pandemic levels." J.A. 242-244.

On September 27, 2022, the Secretary implemented that debt relief by waiving and modifying certain Title IV statutory and regulatory provisions setting forth circumstances in which federal student-loan obligations can be cancelled or discharged. See J.A. 261-262 (citing 20 U.S.C. 1087, 1087a, 1087e, 1087dd(g); 34 C.F.R. 682.402, 685.212); 87 Fed. Reg. 61,512 (Oct. 12, 2022).

C. Proceedings Below In *Nebraska*

1. The States of Arkansas, Iowa, Kansas, Missouri, Nebraska, and South Carolina filed suit in the U.S. District Court for the Eastern District of Missouri, claiming that the plan exceeds the Secretary's statutory authority and is arbitrary and capricious. J.A. 1-44.

The district court dismissed the States' suit for lack of Article III standing. J.A. 135-151. The court rejected the argument that the plan would deprive Iowa, Kansas, Nebraska, and South Carolina of tax revenue. J.A. 150. Those States argued that, because they had "chosen to adopt [the federal] definition of taxable income in their own tax codes," and because the federal definition in turn excludes certain discharges of student loans from 2021 to 2025, the Secretary's plan would reduce the taxes that the States would otherwise collect from borrowers in those years. *Ibid.* The court rejected that argument as a self-inflicted harm, noting that the plan does not affect the States' "sovereign power to set [their] own tax policy" and that the States remain "free to propose and pass tax revenue plans as they see fit." *Ibid.*

The district court additionally rejected the argument that the plan would cause financial harm to Arkansas

and Nebraska. J.A. 146-149. Those States argued that, because the Secretary's plan applies to Direct Loans but not Family Education Loans, it creates an "incentive" for borrowers to "consolidate" (*i.e.*, convert) their Family Education Loans into Direct Loans. J.A. 146; see 34 C.F.R. 685.220 (authorizing consolidation). The States asserted that such consolidation would harm the Arkansas Student Loan Authority, a state entity that receives administrative fees for servicing Family Education Loans, and the Nebraska Investment Council, a state entity that has invested in securities backed by Family Education Loans. J.A. 147-149. The court rejected that argument, observing that the Department had announced that "borrowers with federal student loans not held by the Department cannot obtain the one-time student debt relief by consolidating those loans into Direct Loans." J.A. 146. The court explained that there was accordingly no "ongoing incentive to consolidate." J.A. 147.

The court also rejected Missouri's argument that it has standing because the Missouri Higher Education Loan Authority (MOHELA), a state-created nonprofit corporation that services federal student loans, would suffer financial harms because of the plan. J.A. 142-146. The court explained that MOHELA is a distinct legal person from the State of Missouri; that it traditionally has not been considered an "arm of the State"; that it has the capacity to "sue and be sued in its own name"; that it "retains financial independence" from the State; and that the State has no legal obligation to pay MOHELA's debts. J.A. 145; see J.A. 144-146. The court accordingly concluded that Missouri lacks standing to sue based on alleged harms to MOHELA. J.A. 146.

2. The States appealed, and the Eighth Circuit issued a nationwide injunction pending appeal. J.A. 160-167. The court concluded that Missouri likely has standing (and did "not address the standing of the other States"). J.A. 164-165. The court reasoned that MOHELA, as a loan servicer, "obtains revenue from the accounts it services," but that "the total revenue MOHELA recovers will decrease if a substantial portion of its accounts are no longer active under the Secretary's plan." J.A. 164. The court concluded that, since MOHELA has "financial obligations to the State treasury," the plan's "financial impact on MOHELA" could lead to "financial harm to the State." *Ibid.*

On the merits, the Eighth Circuit did not conclude that the States' suit is likely to succeed; instead, its one-sentence analysis stated only that the "merits of the appeal before this court involve substantial questions of law which remain to be resolved." J.A. 165 (citation omitted). The court also stated that the "equities strongly favor an injunction." *Ibid.* The court issued a universal injunction pending appeal prohibiting the Department from applying the plan to discharge any debt for any borrower in any State. J.A. 165-167.

D. Proceedings Below In *Brown*

1. Myra Brown and Alexander Taylor are individuals with outstanding student loans. J.A. 269. Brown is ineligible for relief under the plan because her loans are held by commercial entities rather than the Department. *Ibid.* Taylor is eligible for $10,000 rather than $20,000 in relief because he did not receive a Pell Grant. *Ibid.*

Brown and Taylor sued the Department and the Secretary in the U.S. District Court for the Northern District of Texas. J.A. 169-187. Their complaint asserted

a single claim: that the Department improperly promulgated the plan without notice-and-comment rulemaking and without engaging in the Education Act's negotiated-rulemaking process. J.A. 184-186.

2. The district court granted summary judgment in favor of Brown and Taylor. J.A. 263-297. The court first concluded that they have Article III standing to raise their procedural challenge because they claim that the lack of notice and comment deprived them of the opportunity to urge the Secretary to expand the plan's eligibility criteria to provide greater debt relief. J.A. 276-282.

Turning to the merits, the district court rejected Brown and Taylor's claim that the plan is procedurally defective. J.A. 285-287. The court observed that the HEROES Act expressly provides that the Secretary need not act through notice and comment; instead, he need only publish a notice in the Federal Register setting forth "the waivers or modifications * * * the Secretary deems necessary to achieve the purposes of this section." J.A. 286 (quoting 20 U.S.C. 1098bb(b)(1)). The court rejected Brown and Taylor's assertion that they could establish that the plan falls outside the notice-and-comment exemption by showing that it exceeds the Secretary's statutory authority. J.A. 287.

Although Brown and Taylor had raised only a procedural claim, and although the district court had analyzed their standing only as to that claim, the court went on to hold that the plan is substantively unlawful. J.A. 287-294. The court stated that, "because the [plan] is an agency action of vast economic and political significance, the major-questions doctrine applies." J.A. 291. The court then concluded that the HEROES Act did not authorize the plan with sufficient clarity to satisfy that

doctrine. J.A. 291-294. The court declared the plan unlawful and vacated it nationwide. J.A. 294-296.

3. The government appealed. J.A. 300-301. The Fifth Circuit denied a stay pending appeal in an unreasoned, per curiam order. J.A. 308.

E. The Secretary's Extension Of The Payment Pause

On November 22, 2022, in response to the orders in these cases preventing implementation of the plan, the Secretary extended the payment pause and suspension of interest accrual. Press Release, U.S. Dep't of Education, https://perma.cc/6T7Y-2YK9. The Department explained that the Secretary's "[t]argeted student debt relief" plan was designed to "address[] the financial harms of the pandemic" and to "help[] borrowers at highest risk of delinquencies or default once payments resume." *Ibid.* But "[e]fforts to block student debt relief in the courts have caused tremendous financial uncertainty for millions of borrowers who cannot set their family budgets or even plan for the holidays without a clear picture of their student debt obligations." *Ibid.* The extension will "alleviate uncertainty for borrowers" and "the continuing economic effects of the unprecedented COVID-19 pandemic" while this Court "review[s] the lower-court orders." *Ibid.* Payment obligations will resume "60 days after the Department is permitted to implement the program or the litigation is resolved," but no later than 60 days after June 30, 2023. *Ibid.*

SUMMARY OF ARGUMENT

The lower courts' orders have erroneously deprived the Secretary of his statutory authority to provide targeted student-loan debt relief to borrowers affected by national emergencies, leaving millions of economically

vulnerable borrowers in limbo. For nearly three years, the Secretary and his predecessors have responded to an unprecedented global pandemic by adopting and extending an unprecedented across-the-board pause in payment obligations for all borrowers. The Secretary determined, and respondents have not seriously disputed, that ending that pause without providing some additional relief for lower-income borrowers would cause delinquency and default rates to spike above pre-pandemic levels. This Court should not compel that damaging and destabilizing result: Respondents do not have Article III standing, and the Secretary's plan is lawful in any event.

I. To establish Article III standing, a plaintiff must show that she has suffered an injury in fact that is fairly traceable to the defendant's challenged conduct and likely to be redressed by judicial relief. Neither the States nor Brown and Taylor can satisfy those fundamental requirements.

A. The States have raised four theories of standing, all of which the district court in *Nebraska* correctly rejected.

First, four States argue that the plan will diminish their tax revenues because some student loans that would have been discharged in the future will instead be discharged under the plan and because federal law (which the States have chosen to incorporate) does not treat discharges that occur between 2021 and 2025 as taxable income. That argument is flawed for several independent reasons: The States' alleged harm is self-inflicted; a federal policy's incidental effects on a State's tax revenues are not judicially cognizable injuries in any event; and the incidental injury the States posit rests on a chain of speculation.

Second, three States argue that, because the plan provides relief for Direct Loans but not for Family Education Loans, it has encouraged borrowers to consolidate their Family Education Loans (which state entities hold or in which they have invested) into Direct Loans. But the plan does not encourage consolidation because the Department has announced that "borrowers with federal student loans not held by [the Department] cannot obtain one-time debt relief by consolidating those loans into Direct Loans." J.A. 215 (emphasis omitted). And even if the plan did encourage consolidation, the States would still lack standing. An injury suffices for Article III standing only if it is fairly traceable to the challenged action of the defendant, rather than to the independent action of a third party. Any harms resulting from consolidation are fairly traceable, not to the plan, but to borrowers' independent decisions to consolidate.

Third, the Eighth Circuit adopted a theory of standing focused on MOHELA, a state-created entity in Missouri. The Eighth Circuit reasoned that MOHELA has contracted with the Department to service student loans; that MOHELA will stop receiving servicing fees for loans that are discharged under the plan; and that this loss of revenue could in turn impair MOHELA's ability to fulfill its state-law obligation to contribute a specified amount of money to the state treasury. But the States have never alleged that the plan will cause MOHELA to default on its obligations to the State. And it is pure speculation that, if the plan causes a reduction in MOHELA's revenues, MOHELA will respond by defaulting on its obligations rather than, say, cutting its other expenditures. In any event, the Eighth Circuit cited no authority for the proposition that, if A causes

financial harm to B, and B owes money to C, C has standing to sue A.

Finally, the States have asserted that the alleged financial harms to MOHELA are harms to the State of Missouri, and that Missouri may accordingly sue based on MOHELA's loss of servicing fees. But Missouri cannot establish standing based on harms to MOHELA, which it has established as a separate corporation.

B. Brown and Taylor, too, lack standing to challenge the plan as substantively unlawful. The district court in *Brown* held that they have standing because the plan provides no debt relief to borrowers such as Brown and only $10,000 rather than $20,000 in debt relief to borrowers such as Taylor. But a judgment that the plan is substantively unlawful would in no sense redress those asserted injuries. It would not grant Brown and Taylor the additional debt relief they say they desire; rather, it would mean that nobody gets any debt relief at all.

Nor do Brown and Taylor have standing to challenge the plan on procedural grounds. They argue that, although the HEROES Act exempts certain actions from notice-and-comment and negotiated-rulemaking procedures, that exemption does not apply here because the plan exceeds the Secretary's substantive authority under the HEROES Act. But a judgment based on that theory would not redress Brown and Taylor's injuries. Instead, because the ostensibly procedural judgment would be premised on the plan's substantive unlawfulness, it would mean that no one—including Brown and Taylor—could receive any debt-cancellation relief under the HEROES Act at all.

II. On the merits, the Secretary's plan is authorized by the HEROES Act, reasonably explained, and procedurally proper.

A. The plain language of the HEROES Act authorizes the plan. The operative text empowers the Secretary to respond to a "national emergency" by "waiv[ing] or modify[ing] any statutory or regulatory provision" governing the federal student loan programs in order to "ensure" that affected student-loan borrowers are not "placed in a worse position financially" in relation to their loans because of the emergency. 20 U.S.C. 1098bb(a)(1) and (2). Here, the Secretary responded to the devastating economic consequences of the COVID-19 pandemic by granting targeted relief to borrowers at higher risk of delinquency and default due to the pandemic—specifically, by waiving and modifying certain provisions governing student-loan cancellation and discharge. That relief falls squarely within the Secretary's express statutory authority.

Respondents' various attempts to reconcile their contrary position with the Act's unambiguous text fall short. Their arguments rest on manufactured limits nowhere to be found in the Act; revisionist accounts of the Act's purpose and history flatly contradicted by the Act itself; strained readings of other provisions in other statutes; and mischaracterizations of the plan and the analysis on which it is based. Nothing in the text, purpose, or history of the Act undermines the most natural reading of its operative provisions, and the Secretary's plan readily satisfies the Act's requirements.

Respondents' resort to the major questions doctrine fares no better. That doctrine does not justify overriding ordinary principles of statutory construction whenever an agency action can be described as consequential; rather, this Court has applied the doctrine only in "extraordinary cases" characterized by what the Court has concluded is a gross mismatch between an agency's

assertion of regulatory authority and the history and context of the supposed congressional authorization. *West Virginia* v. *EPA,* 142 S. Ct. 2587, 2608-2609 (2022) (citation omitted). This case does not share the key features of those extraordinary cases. The Secretary's plan concerns the administration of a federal benefit program and involves no assertion of regulatory authority at all; the statutory authorization to provide debt relief is central to the HEROES Act, direct, and concrete; and the asserted authority to discharge debt is neither a surprising form of borrower relief nor beyond the Department's ordinary domain. Even if the major questions doctrine applied, moreover, it would not justify invalidating the plan: The Act's plain text supplies the clear authorization that the doctrine requires.

B. The Secretary's plan is both reasonable and reasonably explained. In defining the key aspects of the plan, the Secretary examined the available economic and historical data and tailored the relief to the relevant statutory objective: ensuring that borrowers affected by the pandemic would not be in a worse position financially with regard to their student-loan obligations. Respondents offer no sound basis to second-guess the Secretary's considered evaluation of the evidence or his predictive judgment about the type and degree of relief required to ensure that borrowers are not placed in a worse financial position because of the pandemic.

C. The Secretary's plan is also procedurally proper. The HEROES Act expressly exempts the Secretary from complying with the notice-and-comment requirements in the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, when issuing waivers and modifications under the Act. The Education Act's negotiated-rulemaking procedures are likewise inapplicable to such

waivers and modifications. Contrary to respondents' contentions, neither procedural exemption depends on the substantive validity of the Secretary's plan. In any event, because the HEROES Act does authorize the plan, the Secretary's undisputed compliance with the Act's procedural requirements answers respondents' challenge in full.

ARGUMENT

I. RESPONDENTS LACK ARTICLE III STANDING

Article III empowers the federal courts to decide only "Cases" and "Controversies." U.S. Const. Art. III, § 2, Cl. 1. An Article III case or controversy exists only if the plaintiff has standing, a requirement that "ensures that [the] federal courts decide only 'the rights of individuals'" and "exercise 'their proper function in a limited and separated government.'" *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2203 (2021) (citations omitted). In our system, "[f]ederal courts do not possess a roving commission to publicly opine on every legal question" and "do not exercise general legal oversight of the Legislative and Executive Branches." *Ibid.*

The "irreducible constitutional minimum of standing" has "three elements." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Ibid.* (citations and internal quotation marks omitted). Second, the injury must be "fairly traceable to the challenged action of the defendant." *Id.* at 560-561 (brackets, citation, and ellipsis omitted). "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (citation omitted). "The party in-

voking federal jurisdiction bears the burden of establishing these elements." *Ibid.* Respondents have failed to do so here.

A. The States Lack Standing

The States have raised four theories of standing. The district court in *Nebraska* correctly rejected each of them. J.A. 142-151.

1. Four States—Iowa, Kansas, Nebraska, and South Carolina—assert that the plan will diminish their tax revenues. J.A. 150. They contend that some student loans that would have been discharged in the future will instead be discharged under the plan. *Ibid.* That hypothesized shift in timing matters, they say, because the Internal Revenue Code normally treats "discharge of indebtedness" as a form of "gross income," 26 U.S.C. 61(a)(11)-(12), but a temporary provision excludes discharges of student loans from 2021 to 2025, see 26 U.S.C. 108(f)(5). J.A. 150. The States argue that, because they have chosen to incorporate the Code's definition of "gross income" into their own laws, a change in the timing of discharges will diminish their revenues. *Ibid.* That roundabout theory is incorrect for multiple independent reasons.

First, the States' alleged harm results from their own choice to tie their tax laws to the Internal Revenue Code. This Court's decision in *Pennsylvania* v. *New Jersey*, 426 U.S. 660 (1976) (per curiam), forecloses a State's effort to claim standing on such a self-generated basis. There, Pennsylvania sought to establish standing to challenge a New Jersey tax by arguing that, because Pennsylvania provided a credit for taxes paid to other States, a tax increase in New Jersey could lead to a loss of tax revenue in Pennsylvania. *Id.* at 664-665. The Court rejected that theory, explaining that nothing re-

quired Pennsylvania to extend the credit, that any harm to Pennsylvania was thus "self-inflicted," and that "[n]o State can be heard to complain about damage inflicted by its own hand." *Id.* at 664.

Any harm to the States' treasuries here is likewise self-inflicted. The States have no obligation to track the federal definition of gross income; indeed, two of the six States that have brought this suit (Arkansas and Missouri) evidently do not do so. The other States remain free to depart from that definition and to treat student-loan discharges from 2021 to 2025 as taxable income for purposes of state income taxes. If they choose not to do so, any resulting reduction in their tax revenues is fairly traceable not to the Secretary's plan, but instead to their own choices about how to structure their tax laws. And the States "cannot manufacture standing merely by inflicting harm on themselves." *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 416 (2013).

Second, even apart from the self-inflicted nature of the States' asserted harm, this Court's decision in *Florida* v. *Mellon*, 273 U.S. 12 (1927), establishes that a federal policy's incidental effects on state tax revenues are not judicially cognizable injuries. There, Florida sought to establish standing to challenge a federal inheritance tax by arguing that the tax would prompt the "withdrawal of property" from the State, diminishing its tax base. *Id.* at 18. The Court rejected that argument, explaining that Florida was required to show a "direct injury" and that any harm caused by the federal tax was, "at most, only remote and indirect." *Ibid.* (emphasis omitted). That analysis equally applies here: Just as Florida could not establish standing by claiming that state tax revenues would decline because of a federal policy, the States here cannot do so either.

Respondents' contrary view has startling implications. Virtually all federal actions—from prosecuting crime to imposing taxes to managing property—have some incidental effects on state finances. If such incidental effects suffice for standing, every State would have standing to challenge almost any federal policy. That would flout Article III's case-or-controversy requirement and convert the federal courts into "an open forum for the resolution of political or ideological disputes." *United States* v. *Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring); see *Pennsylvania* v. *Kleppe*, 533 F.2d 668, 672 (D.C. Cir.) ("[T]he unavoidable economic repercussions of virtually all federal policies * * * suggest to us that impairment of state tax revenues should not, in general, be recognized as sufficient injury in fact to support state standing."), cert. denied, 429 U.S. 977 (1976).

Third, the States' theory of reduced tax revenues is unduly speculative. "Standing is not 'an ingenious academic exercise in the conceivable'"; rather, a plaintiff must show that its asserted injury is "'*certainly* impending.'" *Defenders of Wildlife*, 504 U.S. at 564 n.2, 566 (citations omitted). The asserted loss of tax revenues after 2025 is neither certain nor impending. Instead, it depends on the assumption that if borrowers did not receive discharges under the plan, they would receive discharges for other reasons; that those discharges would not occur until 2026 or later; and that neither state nor federal law would change in the meantime. The States' theory thus depends on a "speculative chain of possibilities," which does not suffice to establish standing. *Clapper*, 568 U.S. at 410.

2. Three States—Arkansas, Missouri, and Nebraska—assert a second theory of standing. J.A. 146 & n.4.

Those States argue that, because the plan provides relief for Direct Loans but not for Family Education Loans, it has encouraged borrowers to consolidate (*i.e.*, convert) their Family Education Loans into Direct Loans. The States maintain that such consolidation causes them financial harm because state entities hold or have invested in Family Education Loans. J.A. 146.

The most obvious problem with the States' incentive-to-consolidate theory is that the plan does not create an incentive to consolidate. Under a decision the Department made before the States sued and announced and made effective the day they sued, "borrowers with federal student loans not held by [the Department] cannot obtain one-time debt relief by consolidating those loans into Direct Loans." J.A. 215 (emphasis omitted). Because consolidation does not make borrowers eligible for relief under the plan, the plan does not encourage borrowers to consolidate their loans.

Even if the plan still somehow encouraged consolidation, the States would lack standing. An injury suffices for Article III standing only if it is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Defenders of Wildlife*, 504 U.S. at 560 (brackets, citation, and ellipses omitted). That principle "does not exclude injury produced by [the] determinative or coercive effect [of the defendant's conduct] upon the action of someone else." *Bennett* v. *Spear*, 520 U.S. 154, 169 (1997). But it does mean that, in general, a plaintiff cannot establish standing simply by showing that the defendant's conduct creates an incentive for third parties to act in a particular way. For example, in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), this Court held that a group of

indigent plaintiffs lacked standing to challenge a revenue ruling concerning the availability of a federal tax benefit that allegedly "'encouraged' hospitals to deny services to indigents." *Id.* at 42. The Court found it "purely speculative" that any denial of service would result from the government's "'encouragement'" rather than from "decisions made by the hospitals without regard to the tax implications." *Id.* at 43.

The States' incentive-to-consolidate theory defies those principles. The States do not allege that the plan "coerc[ed]" borrowers to consolidate their loans. *Bennett*, 520 U.S. at 169. They instead allege only that the plan created an "incentive" for borrowers to do so. J.A. 146. But a borrower deciding whether to consolidate loans must weigh the benefits of consolidation (such as lower monthly payments, the switch from a variable interest rate to a fixed interest rate, and potential eligibility for COVID-19 forbearance) and the costs (such as a longer repayment period and the loss of discounts associated with the existing loans). See, *e.g.*, Federal Student Aid, U.S. Dep't of Educ., *What are the benefits and downsides of loan consolidation?*; Federal Student Aid, U.S. Dep't of Educ., *COVID-19 Loan Payment Pause and 0% Interest*. It is purely speculative whether any loan consolidations that may occur will result from the plan's "'encouragement'" or instead from "decisions made by the [borrowers] without regard to the [plan]." *Simon*, 426 U.S. at 43. Any financial harms that flow from consolidation would thus be fairly traceable to the borrowers' independent decisions to consolidate, not to the plan.

3. The Eighth Circuit adopted a theory of standing focused on MOHELA, a state-created entity in Missouri that has contracted with the Department of Edu-

cation to service student loans. J.A. 162. The States have alleged that MOHELA receives an administrative fee for each loan it services and that MOHELA will stop receiving such fees for loans that are discharged under the plan. The Eighth Circuit reasoned that Missouri has standing because Missouri law requires MOHELA to contribute a specified amount to a fund in the state treasury, and "the financial impact on MOHELA due to the Secretary's debt discharge" may impair MOHELA's ability to fulfill that obligation. J.A. 164. But the States have not alleged that the plan's effect on MOHELA will cause it to default on its obligation to Missouri. And even if they had made such an allegation, the Eighth Circuit still would have erred in accepting it as a basis for Article III standing.

The Eighth Circuit cited no authority for the proposition that, if A causes financial harm to B, and B owes money to C, C has standing to sue A. That theory of standing is irreconcilable with the principle that a plaintiff must "assert [its] own legal rights and interests, and cannot rest [its] claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). Taken to its logical conclusion, the Eighth Circuit's theory would mean that banks could sue anyone who causes financial harm to their borrowers, credit-card companies could sue anyone who causes financial harm to their customers, and governments could sue anyone who causes financial harm to their taxpayers.

The Eighth Circuit's analysis also conflicts with this Court's "usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper*, 568 U.S. at 414. It is pure speculation that, if the plan causes financial harm to MO-

HELA, MOHELA will default on its obligation to pay a fixed sum to the state treasury. The plan may not cause a significant drop in MOHELA's revenue at all. Alternatively, MOHELA may make enough money that it can fulfill its financial obligations to the State despite any loss of revenue. Guesswork about how the plan will affect MOHELA and how MOHELA will react to those effects does not suffice to establish Article III standing.

4. Fourth, the States have also advanced a different theory of standing based on MOHELA: They assert that the relationship between MOHELA and Missouri means that financial injuries to MOHELA are injuries to the State—and thus that MOHELA's alleged loss of servicing fees as a result of the plan constitutes an Article III injury to the State itself. J.A. 145-146.

The States' theory is foreclosed by two familiar legal principles, taken together. First, a plaintiff has standing only if it has a "personal stake" in the outcome of the litigation. *TransUnion*, 141 S. Ct. at 2203 (citation omitted). That is, a plaintiff may sue only to vindicate its "own legal rights and interests"; it may not rest its claim to judicial relief on "the legal rights and interests of third parties." *Warth*, 422 U.S. at 499. Second, "separately incorporated organizations are separate legal units with distinct legal rights and obligations." *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2087 (2020). Indeed, "[s]eparate legal personality has been described as 'an almost indispensable aspect of the public corporation.'" *First Nat'l City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 625 (1983) (*Bancec)* (citation omitted).

Missouri has established MOHELA as a corporation with a separate legal personality. Missouri law declares MOHELA to be a "body corporate." Mo. Rev. Stat.

§ 173.360 (2022). MOHELA, like any other corporation, has "perpetual succession" and the right to "sue and be sued" in its own name. *Id.* § 173.385(1) and (3). Its assets shall not "be considered to be part of the revenue of the state," *id.* § 173.425, and the State "shall not be liable" for its debts, *id.* § 173.410. In short, Missouri and MOHELA are legally separate entities. Missouri thus cannot establish its own standing by asserting that the plan injures MOHELA.

The States' contrary arguments (*Nebraska* Resp. 13-16) conflict with the bedrock principle of corporate separateness. The States emphasize that Missouri law describes MOHELA as a "public instrumentality" that performs "essential public functions." *Id.* at 14 (brackets and citation omitted). But a corporation's status as a public instrumentality does not detract from its legal separateness. "[G]overnment instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Bancec*, 462 U.S. at 626-627; see *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 475 (2003). "Freely ignoring the separate status of government instrumentalities would result in substantial uncertainty" over the instrumentality's and the sovereign's legal rights and obligations. *Bancec*, 462 U.S. at 626.

The States also argue (*Nebraska* Resp. 15) that Missouri and MOHELA have a "close" relationship, but the States overstate the closeness of those ties. As the district court observed, Missouri has established MOHELA as a "self-sustaining," "financially independent" corporation with "express financial separation" from the State. J.A. 145. And MOHELA has stated that it was "not involved with the decision of the Missouri Attorney General's Office" to bring this suit. 22-3179 C.A.

Docket Entry (8th Cir. Nov. 1, 2022). Indeed, MOHELA has stated that its only communications with the Office regarding student debt relief have involved the Office's "sunshine law requests" to MOHELA seeking documents for use in this litigation. *Ibid.*

More fundamentally, it makes no difference whether MOHELA has close ties to the State. A corporation's status as a separate legal person does not depend on the closeness of its relationship to its creator. "After all, incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 163 (2001). For example, the law generally treats a corporation and its sole owner as distinct persons, regardless of the closeness of the link between the two. See *ibid.*

There is no reason to treat a corporation created by Missouri any differently. Missouri chose to structure MOHELA as a separate corporation that can sue and be sued in its own name. Mo. Rev. Stat. § 173.385(3) (2022). The States identify no prior case in which Missouri purported to sue on MOHELA's behalf. Having chosen to establish MOHELA as a separate legal entity and reaped the benefits of that choice, Missouri may not now maintain that the State and MOHELA are one and the same merely because it believes that MOHELA has standing to challenge a policy the State opposes.[2]

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[2] In addition to their other theories, the States have asserted (*Nebraska* Resp. 21-22) that the plan's alleged effect on MOHELA will harm Missouri's "quasi-sovereign state interest" by diminishing its residents' educational opportunities. But it is well-established that "[a] State does not have standing as parens patriae to bring an ac-

B. Brown And Taylor Lack Standing

Brown and Taylor, too, lack standing to challenge the plan. The district court in *Brown* held that they have standing because the plan provides them less debt relief than they claim to desire and they allege that they were improperly deprived of the opportunity to urge the Secretary to provide greater relief. J.A. 277-282. The court emphasized that Brown is ineligible for any relief under the plan because her debt is held by a commercial lender, while Taylor is eligible for $10,000 rather than $20,000 because he did not receive a Pell Grant. J.A. 279-280. But that theory is insufficient to establish standing to press either the substantive claim on which the court granted relief or the distinct procedural claim that Brown and Taylor have actually asserted.

Brown and Taylor plainly lack standing to raise the substantive claim on which the district court granted relief. Indeed, they have never seriously argued otherwise. To establish Article III standing, plaintiffs must do more than show injury; they must also show that "the injury would likely be redressed" by their requested relief. *TransUnion*, 141 S. Ct. at 2203. And because "standing is not dispensed in gross," plaintiffs must make that showing "for each claim that they press and for each form of relief they seek." *Id.* at 2208. The relief the district court granted—a declaration that the plan is substantively unlawful and an order vacating it—would not redress the injuries asserted here. That judgment leaves Brown's financial position unchanged; she would still receive no loan forgiveness. And it would leave Taylor worse off than before; he would receive

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tion against the Federal Government." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 610 n.16 (1982) (emphasis omitted).

neither the $10,000 the plan provides nor the $20,000 he purports to seek, but instead nothing at all.

Brown and Taylor also lack standing to raise the procedural claim they presented below. In concluding otherwise, the district court reasoned that the ordinary redressability requirement is "relaxed when a plaintiff asserts a deprivation of a procedural right"—here, an asserted right to have the Secretary follow notice-and-comment and negotiated-rulemaking procedures, which would enable Brown and Taylor to "advocate for the expansion of the [plan's] eligibility criteria." J.A. 276, 279-280. The court concluded that, in that circumstance, the plaintiff need only show that "'there is some possibility that the requested relief will cause the injury-causing party to reconsider the decision that allegedly harmed the litigant.'" J.A. 281 (citation and emphasis omitted). But private respondents' claim fails that test.

Brown and Taylor contend that, even though the HEROES Act exempts waivers and modifications from notice-and-comment and negotiated-rulemaking procedures, those exemptions do not apply here because the plan exceeds the Secretary's substantive authority under the HEROES Act. Under that theory, the Secretary would lack authority to provide loan forgiveness to any borrower—Brown and Taylor included. A judgment based on that theory thus could not prompt the Secretary to reconsider the decisions that allegedly harmed private respondents—*i.e.*, the decision not to extend HEROES Act relief to borrowers such as Brown and to extend only $10,000 rather than $20,000 to borrowers such as Taylor. Instead, because the ostensibly procedural judgment would be premised on the plan's substantive unlawfulness, it would mean that no one could receive debt-cancellation relief under the HE-

ROES Act at all, now or in the future following a notice-and-comment period. That result would in no way redress Brown's injury and would cost Taylor $10,000. Cf. *Carney* v. *Adams*, 141 S. Ct. 493, 501-502 (2020) (holding that a plaintiff lacked standing because "the context of th[e] particular record" suggested simply "a desire to vindicate his view of the law" and "not an actual desire" to have his asserted individual injury remedied).

* * * * *

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon*, 426 U.S. at 37; see *TransUnion*, 141 S. Ct. at 2203. Yet respondents' theories make that fundamental principle seem like a lawyer's game. The States assert standing based on injuries that are highly speculative, that they have inflicted upon themselves, or that fall upon a third party that is a stranger to this litigation. And private respondents purport to assert that the plan injures them because it provides too little debt relief, but seek a remedy that would result in no debt relief at all. This Court should reject those convoluted theories and hold that none of the respondents has established Article III standing to challenge the plan.

II. THE SECRETARY'S PLAN IS LAWFUL

On the merits, respondents challenge the Secretary's plan as exceeding his statutory authority, arbitrary and capricious, and procedurally improper. Each contention is wrong. The plan falls squarely within the plain text of the HEROES Act; indeed, a central purpose of the statute is to authorize the Secretary to grant student-loan-related relief to at-risk borrowers because

of a national emergency—precisely what the Secretary did here. The plan rests on the Secretary's examination of the relevant economic data and his predictive judgment based on the Department's long experience with borrowers transitioning back into repayment after periods of forbearance, which illustrates that forbearance alone is not necessarily sufficient to alleviate the continuing economic effects of an emergency. And it is undisputed that the Secretary complied with the procedural requirements of the HEROES Act.

A. The HEROES Act Authorizes The Plan

The Secretary's plan is authorized by the plain text of the HEROES Act. Respondents' contrary arguments are unpersuasive, and their invocation of the major questions doctrine provides no sound reason to depart from the most natural reading of the statutory text.

1. The plain text of the HEROES Act authorizes the plan

a. The HEROES Act provides that, "[n]otwithstanding any other provision of law," the Secretary may (i) respond to a "national emergency" by (ii) providing relief to student-loan recipients who are "affected individuals" (iii) to the extent "the Secretary deems necessary" to "ensure" that those individuals are not "placed in a worse position financially" in relation to their loans because of the emergency. 20 U.S.C. 1098bb(a)(1) and (2). The Act further specifies (iv) that the relief may consist of "waiv[ing] or modify[ing] any statutory or regulatory provision" governing the federal student loan programs. 20 U.S.C. 1098bb(a)(1). The Secretary's plan satisfies each of those elements.

First, the COVID-19 pandemic is a "national emergency declared by the President of the United States."

20 U.S.C. 1098ee(4); see 87 Fed. Reg. 10,289, 10,289 (Feb. 23, 2022). Both the Trump and Biden Administrations previously invoked the HEROES Act to categorically suspend payment obligations and interest accrual on all Department-held loans in light of the pandemic. See p. 8, *supra*. No respondent has argued that those actions were unlawful.

Second, borrowers eligible for relief under the plan are "affected individuals." 20 U.S.C. 1098bb(a)(2)(A). The vast majority qualify based on where they "reside[]" or are "employed," 20 U.S.C. 1098ee(2)(C): The 50 States, the District of Columbia, and all five permanently populated United States territories have been designated as COVID-19 disaster areas. See p. 7, *supra*. And because the pandemic has inflicted profound global economic harms, with particularly severe effects on lower-income borrowers, the Secretary reasonably "determined" that the small fraction of eligible borrowers living and working abroad qualify because they have suffered "direct economic hardship" due to the pandemic. 20 U.S.C. 1098ee(2)(D). Again, the payment pauses adopted by both the Trump and Biden Administrations rested on the same understanding of "affected individual."

Third, the plan serves an express statutory objective. The Secretary "deem[ed]" relief "necessary to ensure" that a subset of affected individuals—namely, those with lower incomes—"are not placed in a worse position" in relation to their student-loan obligations "because of their status as affected individuals," *i.e.*, because of the effects of the COVID-19 pandemic. 20 U.S.C. 1098bb(a)(1) and (2). That determination was supported by analysis and evidence showing that, because of the pandemic, such borrowers are at particu-

larly high risk of delinquency and default once payment obligations restart. See pp. 9-10, *supra*.

Fourth, the Act authorizes the type of relief that the Secretary granted. The Act allows the Secretary to "waive or modify *any* statutory or regulatory provision applicable to the student financial assistance programs under title IV." 20 U.S.C. 1098bb(a)(1) (emphasis added). The provisions governing student-loan repayment obligations, cancellation, and discharge are unquestionably "statutory or regulatory provision[s] applicable to the student financial assistance programs under title IV." *Ibid.*; see, *e.g.*, 20 U.S.C. 1087 (2018 & Supp. I 2019), 1087dd(g); 34 C.F.R. 682.402, 685.212. The HEROES Act thus authorized the Secretary to "waive or modify" those provisions to reduce the scope of vulnerable borrowers' payment obligations in order to ensure that they are not worse off in relation to their student-loan obligations because of the pandemic. 20 U.S.C. 1098bb(a)(1); J.A. 257-259.

b. Other provisions of the HEROES Act underscore the breadth of the authority Congress conferred on the Secretary to determine eligibility criteria and define the scope of relief to be afforded. The Act specifically authorizes the Secretary to issue relief to classes of borrowers rather than on a "case-by-case basis." 20 U.S.C. 1098bb(b)(3). Congress likewise expressly contemplated the Secretary's exercise of substantial discretion in fashioning appropriate relief, authorizing the Secretary not once but twice to issue those waivers and modifications he "deems necessary" to "achieve the purposes of this section." 20 U.S.C. 1098bb(a)(1) and (b)(1). By authorizing relief that the Secretary "*deems*" necessary rather than relief that actually "*is* necessary," Congress adopted a standard that "fairly exudes defer-

ence." *Webster* v. *Doe*, 486 U.S. 592, 600 (1988) (citation omitted). Congress underscored the point in Section 1098bb(a)(2), authorizing the Secretary to waive or modify any such provision "as *may* be necessary" to "ensure" that the Act's objectives are met. 20 U.S.C. 1098bb(a)(2) (emphasis added). And Congress made clear that the Secretary's authority to grant debt relief applies "[n]otwithstanding any other provision of law, unless enacted with specific reference to [the HEROES Act]," 20 U.S.C. 1098bb(a)(1)—thus setting a default of expansive remedial authority that can be displaced only through express reference.

2. Respondents' attempt to exclude discharge as a form of HEROES Act relief contradicts the Act's text

In challenging the Secretary's statutory authority to adopt the plan, respondents principally contend that the HEROES Act categorically precludes discharge of loan principal as a form of relief. See *Nebraska* Resp. 24-26; *Brown* Resp. 21-22. That purported limit contradicts the Act's unambiguous text, and respondents' various attempts to justify it are unpersuasive.

a. The Act specifically authorizes the Secretary to "waive or modify *any* statutory or regulatory provision applicable to the student financial assistance programs" under Title IV of the Education Act, 20 U.S.C. 1098bb(a)(1) (emphasis added). Nothing in the Act limits the Title IV provisions that the Secretary can waive or modify; to the contrary, "the word 'any' has an expansive meaning." *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (citation omitted). Respondents do not dispute that the referenced provisions include those governing student-loan cancellation and discharge, which are the provisions the Secretary waived and modified here. See J.A. 261-262 (citing 20 U.S.C. 1087, 1087a,

1087e, 1087dd(g); 34 C.F.R. 682.402, 685.212); 87 Fed. Reg. at 61,512. And respondents cannot show that those provisions are implicitly excluded; to the contrary, Congress underscored that the HEROES Act authorizes the Secretary to displace the ordinary operation of those provisions by specifying that the Act applies "[n]otwithstanding any other provision of law, unless enacted with specific reference to [the Act]." 20 U.S.C. 1098bb(a)(1).

Respondents make little effort to square their contrary position with the Act's text. Brown and Taylor briefly assert that "waive" and "modify" are "'modest words'" that cannot authorize debt relief. *Brown* Resp. 21 (citation omitted). But to waive is "[t]o abandon, renounce, or surrender (a claim, privilege, right, etc.)" or "to give up (a right or claim) voluntarily," *Black's Law Dictionary* 1894 (11th ed. 2019); to modify is "[t]o make somewhat different" or "to reduce in degree or extent," *id.* at 1203. The Act thus unambiguously authorizes the Secretary to eliminate or reduce the requirements imposed by any Title IV student-aid provision—including those that establish loan repayment obligations and discharge eligibility. To be sure, the Secretary can only exercise that authority when all predicates for relief under the HEROES Act are satisfied, and those limitations ensure that any relief is tailored to the economic consequences of a particular emergency. See pp. 34-37, *supra*; pp. 50-51, *infra*. But there is no reason to think that Congress, by empowering the Secretary to "waive or modify" any Title IV student-aid provision, intended to limit the Secretary to modest changes when such changes would not suffice to ameliorate borrower hardship due to the emergency. "By introducing a limitation not found in the statute, respondents ask [this Court] to

alter, rather than to interpret, the [Act]." *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2381 (2020). But courts have no authority to "impos[e] limits on an agency's discretion that are not supported by the text." *Ibid.*

b. Lacking textual support, respondents invoke other statutory provisions and the Act's purpose and legislative history. Those arguments are unpersuasive on their own terms, and none justifies a departure from the Act's unambiguous text.

First, Brown and Taylor emphasize that the Education Act explicitly authorizes the Department to discharge student-loan debt in certain circumstances and assert that "[t]he Court should not 'read [debt cancellation] into' the HEROES Act 'when it is clear that Congress knew how to [authorize it] when it wanted to.'" *Brown* Resp. 22 (citation omitted; brackets in original). But such specific statutory references to loan cancellation authorize *only* cancellation; by contrast, when Congress says "any," it authorizes any appropriate form of relief, which naturally includes debt cancellation in the context of a provision designed to provide student-loan-related relief as warranted by circumstances like a national emergency.

Moreover, the HEROES Act does not list *any* of the specific forms of relief the Secretary has long issued under the Act to ensure that borrowers affected by a national emergency are not left worse off—including extending forbearance, suspending interest accrual, and altering the requirements for loan deferrals. See pp. 7-8, *supra*. The Act instead ensures that the Secretary can respond quickly and effectively to the particular emergency at hand by authorizing the Secretary to waive or modify "any" Title IV provision applicable to

the federal student-aid programs, where the circumstances so warrant. Indeed, as with cancellation, various provisions of the Education Act specifically authorize many of the forms of relief the Secretary has long granted under the HEROES Act. See, *e.g.*, 20 U.S.C. 1077(a)(2)(C) (deferment); 20 U.S.C. 1078(b)(1)(M) (same); 20 U.S.C. 1087e(f) (same); 20 U.S.C. 1087e(*o*) (suspension of interest accrual); 20 U.S.C. 1087dd(e) (forbearance). If respondents were correct that Congress's express authorization of a form of relief in other circumstances implicitly precludes the Secretary from granting that relief under the HEROES Act, the Act would be a virtual dead letter.

Respondents' effort to read Congress's express authorization of discharge in other circumstances as an implied limit on the HEROES Act also contradicts Congress's direction that the Secretary's authority under the Act applies "[n]otwithstanding any other provision of law, unless enacted with specific reference to [the Act]." 20 U.S.C. 1098bb(a)(1). "[T]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Cisneros* v. *Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993). The provisions authorizing debt relief in other circumstances—which were not enacted with specific reference to the HEROES Act—thus cannot be construed to limit the Secretary's authority under the Act.

Second, the States assert (*Nebraska* Resp. 25) that the Act's "focus on addressing *temporary* challenges like a 'military operation or a national emergency' " is inconsistent with "the *permanent* cancellation of principal." But nothing about the nature of events that can trigger the Act suggests a limitation on the *type of relief*

that might be necessary to respond to those conditions. Rather, the Act contemplates that the Secretary will authorize relief in proportion to the scale and scope of the emergency; the more devastating and lingering the emergency, the more significant the relief "necessary to ensure" that borrowers are not worse off as a result. 20 U.S.C. 1098bb(a)(2)(A). And even in response to less-severe disruptions, the Secretary has long invoked the HEROES Act to provide permanent relief such as waiving the requirement that borrowers return certain overpayments or modifying the criteria for loan cancellation. OLC Op., 2022 WL 3975075, at *4; 87 Fed. Reg. at 52,944.

Finally, relying on statements made by individual legislators, respondents assert that in enacting the HEROES Act Congress "thought it was doing little more than relieving active-duty military from 'making student loan payments for a period of time while they are away.'" *Brown* Resp. 18-19 (citation omitted); see *Nebraska* Resp. 30-31. But again, that argument flatly contradicts the statutory text. In two predecessor statutes, Congress had focused narrowly on providing relief to soldiers serving in the Gulf War and people affected by terrorist attacks. See pp. 4-5, *supra*. In the HEROES Act, in contrast, Congress deliberately granted the Secretary broader authority: Rather than limit relief to those "serving on active duty in connection with Operation Desert Storm," § 372(a)(1), 105 Stat. 93, or those affected by September 11th or subsequent terrorist attacks, 115 Stat. 2386, Congress authorized the Secretary to grant relief in response to any "national emergency." 20 U.S.C. 1098bb(a)(1). And the Act defines "affected individuals" to include not only individuals "serving on active duty" or "performing qualifying

National Guard duty," but also 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" or who "suffered direct economic hardship" due to that emergency. 20 U.S.C. 1098ee(2)(A)-(D); see pp. 5-6, *supra*. The Secretary has thus long issued relief under the Act to large groups of civilians, including in response to COVID-19. See pp. 7-8, *supra*.

3. Respondents' remaining statutory arguments lack merit

Respondents also argue that even if the HEROES Act generally authorizes discharge of principal as a form of relief, the particulars of the Secretary's plan do not comply with the Act's requirements. All those arguments are unpersuasive, and many of them rest on misunderstandings of the plan and its supporting analysis.

For instance, respondents assert (*Nebraska* Resp. 26; *Brown* Resp. 22-23) that the Secretary failed to limit the plan to those who "reside[d] or [were] employed in an area that is declared a disaster area." 20 U.S.C. 1098ee(2)(C). But the entire country has been declared a disaster area, so the vast majority of borrowers do qualify based on where they work and reside. See p. 35, *supra*. And the Secretary could reasonably "determine[]"—as both the Trump and Biden Administrations previously did—that the small fraction of eligible borrowers who live and work abroad qualify because they have suffered "direct economic hardship" due to a global pandemic. 20 U.S.C. 1098ee(2)(D); see p. 35, *supra*.

Respondents also assert that because interest accrual and payment obligations have been paused during

the pandemic, the plan would place borrowers in a "better position" rather than ensuring that they are not placed in a "'worse position financially in relation to [their] financial assistance.'" *Nebraska* Resp. 22, 24 (capitalization, citation, and emphasis omitted; brackets in original); see *Brown* Resp. 21. But the evidence before the Secretary showed that without relief, lower-income borrowers were likely to experience increased default and delinquency rates *beyond* pre-pandemic levels once repayments resume. See J.A. 234-239, 245, 249-251; pp. 9-10, *supra*. And the evidence further showed that reducing the principal owed by such borrowers by the proposed amounts, and reducing their monthly payments accordingly, would ameliorate the "risk that delinquency and default rates will rise *above pre-pandemic levels*." J.A. 242 (emphasis added); see J.A. 242-244. Respondents do not seriously dispute those determinations.

Respondents further contend (*Nebraska* Resp. 26; *Brown* Resp. 22) that the Department failed to show that the plan was "necessary" to prevent delinquency and default for each borrower eligible for relief. Congress, however, authorized the Secretary to issue relief "as may be necessary to *ensure*" that affected individuals are not worse off with respect to their student loans. 20 U.S.C. 1098bb(a)(2) (emphasis added); see *Webster's Third New International Dictionary of the English Language* 756 (2002) ("ensure" means "to make sure, certain, or safe"). And again, the Act makes clear that "[t]he Secretary is not required to exercise the waiver or modification authority * * * on a case-by-case basis." 20 U.S.C. 1098bb(b)(3). By authorizing the Secretary to act on a class-wide basis as may be necessary to make "sure" or "certain" that borrowers are not placed in a

worse position financially, Congress authorized and encouraged the Secretary to err on the side of over-inclusion—a sensible approach in a statute addressing relief from national emergencies. See *Weinberger* v. *Salfi*, 422 U.S. 749, 777 (1975) (Congress may conclude "that the expense and other difficulties of individual[ized] determinations justif[y] the inherent imprecision of a prophylactic rule.").

Previous invocations of the HEROES Act have likewise afforded relief on a class-wide basis. See OLC Op., 2022 WL 3975075, at *4-*5. Most obviously, each invocation of the Act to pause payment obligations and interest accrual during the pandemic—which respondents do not challenge—provided relief for *all* borrowers with federally held student loans. See, *e.g.*, 85 Fed. Reg. at 79,857; 87 Fed. Reg. at 61,512-65,514. Here, by contrast, the Secretary limited eligibility for relief to the subset of affected borrowers most likely to be in a "worse position financially in relation to" their student loans because of the pandemic. 20 U.S.C. 1098bb(a)(2)(A). No more is required.

Relatedly, respondents argue (*Nebraska* Resp. 26; *Brown* Resp. 22) that the plan's income thresholds are insufficiently tailored to identify those borrowers who will be at heightened risk of delinquency and default due to the pandemic. But again, Congress specifically authorized the Secretary to respond quickly and fully to an emergency by acting on a class-wide basis, and it encouraged him to err on the side of over- rather than under-inclusion. Here, moreover, the plan directly corresponds to the Department's supporting analysis, which examined the relevant data and determined that $125,000 is the individual income threshold at which repayment capability is likely to substantially change, and

that a $10,000 discharge ($20,000 for qualifying Pell Grant recipients) will mitigate the risk that vulnerable borrowers will be worse off in relation to their student loans as a result of the pandemic. See pp. 10-11, *supra*.

Finally, the States assert (*Nebraska* Resp. 23) that the Act requires "more than" a "but-for" connection between the proposed relief and the national emergency. But the Act authorizes the Secretary to ensure that borrowers are not worse off in relation to their student loans "because of" an emergency. 20 U.S.C. 1098bb(a)(2)(A). The term "because of" is most "often associated with but-for causation." *Comcast Corp.* v. *National Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1016 (2020); see *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 350 (2013) (collecting cases). And the States' assertion that the Act instead demands "direct causation" (*Nebraska* Resp. 23) cannot be reconciled with the Act's definition of the "affected individuals" eligible for relief. Congress defined an "affected individual" to include not just those who have "suffered direct economic hardship as a direct result" of the triggering emergency, but also three other categories, including anyone who "resides or is employed in an area that is declared a disaster area." 20 U.S.C. 1098ee(2)(C) and (D). If "direct causation" were required, those other provisions would be superfluous because the affected individuals in those categories who would be eligible for relief would necessarily fall within the separate "direct economic hardship" provision.

In any event, the plan satisfies any potentially applicable standard of causation. The evidence before the Secretary included substantial data showing that the pandemic has caused severe economic harms, including layoffs, inflationary spikes, rising delinquency rates,

and projected reductions in lifetime earnings for students who left school in 2020 and 2021—and that those material hardships have disproportionately affected lower-income households. J.A. 234-239, 245-253. The evidence further showed that, without the proposed relief, those borrowers would likely experience default and delinquency rates beyond pre-pandemic levels. See J.A. 234-239, 242-245, 249-251. The plan thus directly targets those borrowers facing "a worse position financially" "because of" the pandemic, 20 U.S.C. 1098bb(a)(1) and (2).

4. The major questions doctrine provides no reason to depart from the statutory text

The district court in *Brown*—the only court that addressed the merits of the Secretary's plan—did not deny that the plan is authorized by the natural reading of the HEROES Act. But the court nonetheless believed that the major questions doctrine compelled a contrary result. J.A. 287-294. Respondents have likewise relied heavily on the major questions doctrine. But that doctrine does not apply here and, even if it did, it would not support respondents' claims.

a. The *Brown* district court believed that the major questions doctrine applies because the plan is an agency action of great "economic and political significance." J.A. 291. But this Court has never treated the major questions doctrine as a license for courts to override statutory text simply because they regard an agency's action as economically or politically consequential. Many agency actions can be characterized as costly or politically salient, but the Court has not applied the major questions doctrine as a matter of course. To the contrary, this Court regularly decides challenges to executive actions of major economic and political significance

under the usual rules of statutory interpretation without imposing heightened-specificity requirements. See, *e.g.*, *Biden* v. *Missouri*, 142 S. Ct. 647, 652 (2022) (per curiam); *Collins* v. *Yellen*, 141 S. Ct. 1761, 1776 (2021); *Little Sisters of the Poor*, 140 S. Ct. at 2380-2381; *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2571-2572 (2019); *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2408 (2018).

In particular, the cost of a government program alone provides no basis to depart from plain statutory meaning. For example, although the scope of the Medicare program inevitably means that policies adopted by the Secretary of Health and Human Services may involve many billions of dollars, this Court has never treated that as a reason to demand specific authorization in a Medicare case. See, *e.g.*, *Becerra* v. *Empire Health Found.*, 142 S. Ct. 2354 (2022); *American Hosp. Ass'n* v. *Becerra*, 142 S. Ct. 1896 (2022); see generally *Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1808 (2019). The same is true for various agency actions implicating billions of dollars in costs to the energy, utility, and telecommunications industries. See, *e.g.*, *EPA* v. *EME Homer City Generation, L.P.*, 572 U.S. 489 (2014); *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967 (2005); *New York* v. *FERC*, 535 U.S. 1 (2002). The district court thus erred in presuming that the mere fact that an action could be called "economically and politically significant" suffices to demand clearer-than-ordinary congressional authorization.

Rather, the major questions doctrine applies when an agency claims an "[e]xtraordinary grant[] of regulatory authority" based on "'modest words,' 'vague terms,' or 'subtle devices,'" and the "'history and the

breadth'" of that asserted power provide "'reason to hesitate before concluding that Congress'" meant to confer such authority. *West Virginia* v. *EPA,* 142 S. Ct. 2587, 2608-2609 (2022) (brackets and citations omitted). The Court has thus applied the doctrine only in a handful of "extraordinary cases" that presented a marked incongruity between an agency's claimed authority and the history and context of the statutory provision that purportedly conferred it. *Id.* at 2609. This case lacks the hallmarks of those extraordinary cases.

Most fundamentally, this case does not involve any assertion of "regulatory authority," but rather the exercise of authority over a government benefit program to provide additional relief to beneficiaries. Every case in which this Court has invoked the major questions doctrine to invalidate an agency action involved an agency asserting the power to regulate, and not simply the provision of government benefits. See, *e.g.*, *West Virginia*, 142 S. Ct. at 2608 (EPA's authority to regulate power plants with emissions standards based on restructuring the Nation's mix of electricity generation); *NFIB* v. *OSHA*, 142 S. Ct. 661, 666 (2022) (per curiam) (OSHA's authority to adopt "a broad public health regulation" requiring vaccination or other COVID-19 precautions in the workplace); *Alabama Ass'n of Realtors* v. *HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (CDC's authority to regulate "the landlord-tenant relationship" by issuing a nationwide eviction moratorium); *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 324 (2014) (EPA's power to assert permitting authority over millions of small sources); *Gonzales* v. *Oregon*, 546 U.S. 243, 266-268 (2006) (Attorney General's authority to ban drugs used in physician-assisted suicide); *Whitman* v. *American Trucking Assn's*, 531 U.S. 457, 465-468

(2001) (EPA's authority to consider implementation costs in setting national ambient air quality standards); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-161 (2000) (FDA's authority to regulate tobacco products).

The Court's focus on whether a case involves an "[e]xtraordinary grant[] of regulatory authority" makes good sense: the major questions doctrine rests on "separation of powers principles and a practical understanding of legislative intent," both of which inform the way one would expect Congress to legislate if it intended to grant an agency "'extravagant statutory power over the national economy.'" *West Virginia*, 142 S. Ct. at 2609 (citation omitted). It is, in other words, tailored to assertions of "expansive regulatory authority over some major social or economic activity." *United States Telecom Ass'n* v. *FCC*, 855 F.3d 381, 421 (D.C. Cir. 2017) (per curiam) (Kavanaugh, J., dissenting from the denial of rehearing en banc); see also *West Virginia*, 142 S. Ct. at 2618 (Gorsuch, J., concurring) ("The framers believed that the power to make new laws regulating private conduct was a grave one that could, if not properly checked, pose a serious threat to individual liberty."). The provision of government benefits, in contrast, poses no similar risk of "significant encroachment into the lives" of individuals and the affairs of entities. *NFIB*, 142 S. Ct. at 665. Broad grants of authority to provide such benefits accordingly do not provide the same "reason to hesitate" when interpreting a statute. *West Virginia*, 142 S. Ct. at 2608. Neither the district court nor respondents have offered any sound basis for extending the major questions doctrine to this distinct context, where the agency is not claiming power to impose regulation on private parties in the first place.

b. Even setting aside that fundamental distinction, this case lacks the other key features this Court has emphasized in invoking the major questions doctrine. Most obviously, this is not a case where the agency relied on statutory language that is "vague," "cryptic," "ancillary," or "modest." *West Virginia,* 142 S. Ct. at 2608-2610 (citation omitted). To the contrary, the relevant grant of authority at issue here is direct, concrete, and central to the HEROES Act, which authorizes the Secretary to provide student-loan-related relief to affected borrowers in enumerated circumstances, including national emergencies. See pp. 34-37, *supra*.

Relatedly, the asserted power is neither "'transformative'" nor "sweeping." *West Virginia*, 142 S. Ct. at 2608, 2610 (citation omitted). Although the HEROES Act gives the Secretary powerful tools to address the situations encompassed by the Act, it applies only in a limited set of circumstances (including a "national emergency," 20 U.S.C. 1098bb(a)(1)); authorizes relief only for a defined class of individuals and entities, *e.g.*, 20 U.S.C. 1098ee(2) (defining "affected individual"); to accomplish limited objectives (such as "ensur[ing]" that affected individuals are not "placed in a worse position financially" in relation to their loans, 20 U.S.C. 1098bb(a)(2)(A)); through specific measures related only to student loans (waiving or modifying applicable student-loan requirements, 20 U.S.C. 1098bb(a)(1)). In keeping with those limits, the Secretary waived and modified certain terms of a federal benefit program to ensure that vulnerable student-loan borrowers would not be worse off in relation to their student loans due to the pandemic. This case is thus far afield from cases like *West Virginia*, where the Court found that the agency action at issue would have required a complete

reorganization of American energy infrastructure, 142 S. Ct. at 2604, or *Alabama Association of Realtors*, where the Court could perceive "no limit" on the types of "measures [the agency's] interpretation would place outside the CDC's reach," from "mandat[ing] free grocery delivery to the homes of the sick or vulnerable" to "[o]rder[ing] telecommunications companies to provide free high-speed Internet service to facilitate remote work," 141 S. Ct. at 2489.

This is also not a case in which the agency lacks "'comparative expertise' in making [the relevant] policy judgments," *West Virginia*, 142 S. Ct. at 2613 (citation omitted), or has asserted authority that falls outside its "particular domain," *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489. Rather, the Department of Education, the agency responsible for administering federal student loans, has taken actions that apply only within the scope of the federal student-loan program—and, indeed, only to loans held by the Department itself.

Nor has the Secretary relied on a "long-extant statute" to claim "unheralded power." *Utility Air*, 573 U.S. at 324. Since the HEROES Act's enactment in 2003, the Department has repeatedly invoked it to provide class-wide relief to affected borrowers, see p. 7, *supra*, and since March 2020, both the Trump and Biden Administrations have invoked the Act to afford relief to all borrowers, see p. 8, *supra*. Those previous invocations of the Act had permanent and substantial economic effects. Most significantly, the previous COVID-19 relief measures, including the suspension of loan payments and interest accrual, are estimated to have cost the federal government $102 billion. See U.S. Gov't Accountability Office, *Student Loans: Education Has Increased*

Federal Cost Estimates of Direct Loans by Billions due to Programmatic and Other Changes 14 (July 2022).

That across-the-board pause and the Secretary's more targeted debt-relief plan affect many more borrowers—and thus involve significantly higher costs—than the Secretary's pre-pandemic actions. But that reflects the pandemic's unparalleled scope, not any established understanding about the limits of the Secretary's authority. It is only natural that the Secretary's response to an unprecedented pandemic went "further than what the Secretary has done in the past" in response to less severe and less widespread exigencies. *Missouri*, 142 S. Ct. at 653.

The *Brown* district court suggested that "Congress's extensive consideration of various bills seeking to forgive student loans and failure to pass such bills" justified applying the major questions doctrine. J.A. 290. But each bill the court cited meaningfully differed from the relief the Secretary authorized.[3] The far more relevant congressional action is a measure included in pandemic-relief legislation enacted in 2021. At that time, when the possibility of forgiveness under the HEROES Act was already being publicly debated, Congress anticipated and facilitated the possibility of such relief by adopting a "Special Rule for Discharges in 2021 Through 2025" that makes student-loan discharges during that period tax-free. See American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9675(a), 135 Stat. 185-186 (capitalization altered); see also Sen. Menendez, Press Release, *Menen-*

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[3] See, *e.g.*, H.R. 2034, 117th Cong., 1st Sess. (2021) (proposing discharge of entire loan balances); H.R. 6800, 116th Cong., 2d Sess. § 150117(h) (2020) (omnibus $3 trillion relief package that included many other controversial provisions); S. 2235, 116th Cong., 1st Sess. (2019) (proposing discharge of up to $50,000 before the pandemic).

dez, 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). That enacted legislation—far from indicating any disapproval of loan forgiveness under the HEROES Act—instead shows that Congress foresaw and provided for precisely the sort of relief the Secretary granted. See *Brown & Williamson*, 529 U.S. at 155 (emphasizing, in finding that a case presented a major question, that the Court was "not rely[ing] on Congress' failure to act—its consideration and rejection of bills that would have given the FDA this authority," but rather on the fact that "Congress has enacted several statutes" that created a "regulatory scheme * * * incompatible with FDA's jurisdiction").

c. Even if the major questions doctrine applied, it would not justify invalidating the plan. The central interpretive question in the case is whether the HEROES Act authorizes the Secretary to grant loan forgiveness. On that score, the Act's unambiguous text provides the "clear congressional authorization" that the major questions doctrine demands. *West Virginia*, 142 S. Ct. at 2609 (citation omitted). And the doctrine provides no support for respondents' various secondary arguments quibbling with the Secretary's application of the Act's other requirements in defining the details of the plan.

First, as explained above, see pp. 34-37, *supra*, the Act's key provision, on its face, authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education] Act" the Secretary deems necessary to respond to a "national emergency," "[n]otwithstanding any other provision of law," 20 U.S.C. 1098bb(a)(1). The terms governing loan re-

payment and discharge are among the most basic statutory and regulatory provisions governing the federal student-loan programs; Congress's express grant of authority to the Secretary to waive and modify "any" such Title IV provision cannot plausibly be read to exclude such obvious candidates for debt relief without saying anything of the sort. The plan thus "fits neatly within the language of the statute," *Missouri*, 142 S. Ct. at 652; indeed, a central purpose of the HEROES Act is to authorize the Secretary to grant student-loan debt relief to mitigate economic harms borrowers face from national emergencies.

Nor is discharge of principal a type of debt relief that "'Congress could not have intended to delegate.'" *West Virginia*, 142 S. Ct. at 2608 (citation omitted). In various circumstances, Congress has specifically recognized that loan forgiveness can be an appropriate response to hardships experienced by borrowers. See, *e.g.*, 20 U.S.C. 1087(a) (authorizing discharge of Family Education Loans due to total disability or death); 20 U.S.C. 1087dd(c)(1)(F)(ii) (same for Perkins Loans); 20 U.S.C. 1087(c) (authorizing discharge of Family Education Loans due to school closure); 20 U.S.C. 1087dd(g) (same for Perkins loans); 20 U.S.C. 1087(c) (authorizing discharge of Family Education Loans due to school's false eligibility certification); 20 U.S.C. 1087e(h) (authorizing the Secretary to establish borrower defenses to repayment); see also 20 U.S.C. 1087a(b)(2) (applying same terms to Direct Loans). And Congress has elsewhere granted the Secretary the substantial "power[]" to "compromise, waive, or release any right, title, claim, lien, or demand" acquired in administering the Department's portfolio of loans, 20 U.S.C. 1082(a)(6)—authority the Secretary has many times exercised to discharge

debts owed by student borrowers, including on a class-wide basis and for substantial amounts. See p. 4, *supra*; see *West Virginia*, 142 S. Ct. at 2613 (emphasizing that Congress "ha[d] not conferred a like authority upon EPA anywhere else in the Clean Air Act"). In short, "there is nothing surprising" about the Secretary providing for discharge—a quintessential form of debt relief Congress clearly could have contemplated—upon finding that relief necessary to ensure that borrowers are not left worse off as a result of the unprecedented global pandemic. *West Virginia*, 142 S. Ct. at 2613.

Statutory context fortifies that conclusion. The determination whether the HEROES Act clearly confers authority for the plan "must be 'shaped, at least in some measure, by the nature of the question presented,'" *West Virginia*, 142 S. Ct. at 2608 (citation omitted)—here, whether Congress would likely authorize the Secretary to provide the benefit of discharge to student-loan borrowers when warranted by a national emergency. A central purpose of the HEROES Act is to empower the Secretary to respond quickly and fully to such emergencies to ensure borrowers are not left worse off in relation to their student-loan debt. And because the Act involves only the provision of government benefits—and not any authority to impose regulation—the claimed power to discharge debt risks no countervailing intrusion on individual liberty. Under these circumstances, declining to give full effect to the statutory language authorizing the Secretary to "waive or modify *any* statutory or regulatory provision" governing the federal student loan programs by excluding discharge as a permissible form of debt relief would not implement Congress's intent, but instead override it. 20 U.S.C. 1098bb(a)(1) (emphasis added).

Second, the major questions doctrine provides no support for respondents' challenges to particular features of the plan, including the Secretary's determinations about which borrowers should be eligible for relief and the amount of relief necessary to achieve the HEROES Act's purpose. Those subsidiary issues—such as whether $10,000 is an appropriate amount of relief, whether the plan's income-eligibility thresholds are justified, or whether Pell Grant recipients warrant additional consideration—are not the sort of fundamental questions of agency authority to which the doctrine applies. Instead, they are questions about the application of the Act to the particular factual circumstances presented by a specific emergency. The major questions doctrine provides no basis for imposing a clear-statement requirement for such subsidiary applications of an agency's statutory authority. And imposing such a requirement here would directly contradict Congress's decision to vest the Secretary with broad authority to provide class-wide relief as he "deems necessary" to achieve the Act's objectives. 20 U.S.C. 1098bb(a)(1).

In any event, the Secretary's plan directly targets those borrowers facing "a worse position financially" in relation to their student loans "because of" a national emergency, 20 U.S.C. 1098bb(a)(2)(A)—here, the COVID-19 pandemic. The evidence before the Secretary showed that borrowers with individual incomes below $125,000 were most likely to have experienced job loss, non-student-loan debt delinquency, and other material hardships as a result of the pandemic, and thus faced the highest risk of delinquency and default when student-loan repayment obligations resume. See J.A. 235-236, 245-251; p. 10, *supra*. And the evidence further

showed that reducing the principal owed by such borrowers by the proposed amounts, and reducing their monthly payments accordingly, would ameliorate the "risk that delinquency and default rates will rise above pre-pandemic levels." J.A. 242; see J.A. 239-243; pp. 10-11, *supra*.

Contrary to the *Brown* district court's suggestion, therefore, the Secretary has not asserted the power to "use the HEROES Act to forgive student-loan debt" "in ten years * * * because of the COVID-19 pandemic." J.A. 293. Rather, the plan reflects the Secretary's determination that a one-time discharge of a limited measure of debt for a subset of affected borrowers is necessary when loan-repayment obligations resume to ensure that those borrowers are not placed in a worse position as they and the country work to recover from the immediate and devastating effects of COVID-19. Other emergencies may be different in kind, scope, or scale, and may call for different relief—but always subject to the terms of the HEROES Act, which limit (1) the circumstances in which the Secretary can act; (2) the class of individuals eligible for relief; (3) the objectives any relief must aim to accomplish; and (4) the measures the Secretary may implement. See pp. 50-51, *supra*.

B. The Plan Is Reasonable And Reasonably Explained

The States—but not Brown and Taylor—maintain that the Secretary's plan is arbitrary and capricious. No court has accepted that argument, and it is without merit.

1. The Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, authorizes a court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). "The scope of review under the 'arbitrary

and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Although "the available data" often "do not settle a regulatory issue," *id.* at 52, "[t]he APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies," *FCC* v. *Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021). In assessing agency action, "[a] court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC* v. *Electric Power Supply Ass'n*, 577 U.S. 260, 292 (2016). Instead, to satisfy judicial scrutiny, an agency need only "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (citation omitted). The Secretary's action readily satisfies that deferential standard because it is both "reasonable and reasonably explained." *Prometheus*, 141 S. Ct. at 1158.

The Secretary reviewed the Department's "[p]ast experience with student loan borrowers transitioning back into repayment" after emergency-related forbearance; borrower surveys, economic studies, and credit analyses examining "current economic conditions facing borrowers" as a result of the pandemic; and evidence about the "substantial negative penalties" imposed on borrowers "who go delinquent or default on their student loans." J.A. 233-239 (capitalization altered; emphasis omitted); pp. 9-10, *supra*. The Secretary also considered whether "pandemic-connected loan discharge will reduce * * * delinquency and default rates"; the availability of "other options to reduce monthly pay-

ments"; the "amount of debt to discharge" to "mitigate the risk that delinquency and default rates will rise above pre-pandemic levels"; and "borrower income threshold[s]" to confine relief to those borrowers "mo[st] likely to experience delinquency and default." J.A. 240, 242, 245 (capitalization altered; emphasis omitted); see J.A. 240-255; pp. 10-11, *supra*.

The Secretary found that, when loan-repayment obligations resume, many lower-income borrowers "will be at heightened risk of loan delinquency and default" due to the pandemic's continuing economic effects. J.A. 257. The Secretary further determined that "[a]dditional steps are needed to * * * ensure that borrowers are not in a worse position financially due to the pandemic with regard to their ability to repay their loans." J.A. 257-258. Accordingly, the Secretary reasonably determined—as part and parcel of the decision to end forbearance and restart repayments—that eligible borrowers with federal adjusted gross incomes below $125,000 ($250,000 for joint filers) should be afforded up to $10,000 in student-loan debt relief, and that Pell Grant recipients can receive up to $20,000. J.A. 258-259.

2. The States have argued (*Nebraska* Resp. 32-35) that the Secretary failed to consider alternatives, overlooked reliance interests, failed to justify key aspects of the plan, and offered pretextual justifications. Those criticisms lack merit.

An agency need not consider "every alternative device and thought conceivable by the mind of man." *DHS* v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020) (citation omitted). And here, the Secretary did consider the availability of reasonable alternatives. The supporting analysis considered whether discharge was necessary "even though borrowers have other options

to reduce monthly payments, like income-driven repayment (IDR) plans." J.A. 241. The analysis determined that "[l]oan discharges" would reduce "delinquency and default risks" beyond what could be accomplished through "efforts to increase enrollment in IDR." *Ibid*. The Secretary likewise considered continuing the across-the-board pause on interest accrual and payment obligations for all borrowers. His decision to continue that pause until December 31, 2022, but resume payments after that date, J.A. 257-259, reflected his determination that the Department's objectives would be best served by resuming payments rather than indefinitely continuing forbearance—so long as lower-income borrowers could receive relief to address the difficulties they would face, *ibid.*

Nor did the Secretary ignore cognizable reliance interests in issuing relief to certain federal borrowers. The States have no cognizable interest in this action, see pp. 22-30, *supra*, let alone "'serious'" or "significant reliance interests." *Encino Motorcars, LLC* v. *Navarro*, 579 U.S. 211, 222 (2016) (citation omitted). This case bears no resemblance to *Regents*, where the Court found that the agency had ignored the interests of DACA recipients themselves in *rescinding* a program they had relied upon to "embark[] on careers," "purchase[] homes, and even marr[y] and ha[ve] children." 140 S. Ct. at 1914.

The States' contention (*Nebraska* Resp. 34) that the Department did not justify "key aspects" of the plan likewise fails. The supporting analysis explains at length how the Department arrived at the $125,000 income threshold, including by examining data showing that "[t]here is a break in repayment capacity at around $125,000" and that "borrowers with incomes between

$100,000 and $124,000 have rates of payment inconsistency * * * nearly double what they are for those with incomes between $125,000 and $149,000." J.A. 245-246; see J.A. 235-237, 246-248. Given that the COVID-19 disaster spanned both 2020 and 2021, it was reasonable to consider borrowers' incomes from both years. J.A. 262. And the Secretary reasonably set the deadline to apply for relief to reflect the fact, emphasized in the Department's analysis, that lower-income borrowers often do not immediately apply for available relief. J.A. 241-242. The Secretary has "'wide discretion' in making [such] line-drawing decisions," *National Shooting Sports Found., Inc.* v. *Jones*, 716 F.3d 200, 214 (D.C. Cir. 2013) (citation omitted), particularly where the authorizing statute expressly contemplates such discretion, see pp. 36-37, *supra*.

Finally, the States' assertion (*Nebraska* Resp. 33-34) that the Secretary's decision was pretextual is based on legally irrelevant political statements that cast no doubt on the Secretary's stated explanation. A "court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities." *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2573 (2019). The statements on which respondents rely reflect, at most, the sort of policy and political considerations that "routinely" inform policymaking. *Ibid.* They do not come close to the "strong showing of bad faith or improper behavior" necessary before this Court looks behind an agency's stated rationale. *Id.* at 2574 (citation omitted); see *Biden* v. *Texas*, 142 S. Ct. 2528, 2546-2547 (2022).

C. The Secretary's Action Was Procedurally Proper

Finally, Brown and Taylor—but not the States—argue that the Secretary's plan was procedurally defective. Indeed, that is the only claim Brown and Taylor asserted in their complaint: a single count that the Secretary "fail[ed] to follow proper rulemaking procedures" under the APA, 5 U.S.C. 701 *et seq*. Compl. 13 (capitalization and emphasis omitted); see D. Ct. Doc. 4, at 20 (Oct. 10, 2022) (brief in support of preliminary injunction raising only one merits argument: "The Department violated the APA by adopting the [plan] without following the proper rulemaking procedures.") (emphasis omitted); pp. 13-14, *supra*.

The district court correctly rejected that claim. The Secretary adopted the plan under the HEROES Act, which expressly exempts the Secretary from complying with "section 553 of title 5"—*i.e.*, the APA's notice-and-comment requirement—when issuing waivers and modifications under the Act. See 20 U.S.C. 1098bb(b)(1). All the HEROES Act requires "is that the Secretary publish the modifications" in the Federal Register. J.A. 287. Brown and Taylor do not dispute that the Secretary has done that here. See *ibid*. The Secretary therefore satisfied the applicable procedural requirements.

Brown and Taylor have nonetheless asserted (*Brown* Resp. 14-16) that the plan falls outside the HEROES Act's express exemption from notice-and-comment procedures because it exceeds the Secretary's substantive authority. But as the district court recognized, the notice-and-comment exemption does not depend on whether, as a substantive matter, the HEROES Act actually authorizes the Secretary's action. J.A. 287. The statute provides: "Notwithstanding [the APA's notice-and-comment provisions], the Secretary shall, by notice

in the Federal Register, publish the waivers or modifications of statutory and regulatory provisions the Secretary deems necessary to achieve the purposes of this section." 20 U.S.C. 1098bb(b)(1). That text makes clear that the procedural exemption depends only on the Secretary's determination that the HEROES Act applies and that waivers or modifications are necessary—not on the substantive merits of the Secretary's plan.

In addition to their arguments based on the APA's notice-and-comment requirement, Brown and Taylor have invoked Section 1098bb(d) of the HEROES Act. Section 1098bb(d) specifies that a provision requiring the Secretary to proceed by negotiated rulemaking in certain circumstances "shall not apply to the waivers and modifications authorized or required" by the HEROES Act. 20 U.S.C. 1098bb(d). But that direction cannot plausibly be read to condition the procedural exception on the substantive validity of the Secretary's action. To the contrary, the referenced provision for negotiated rulemaking imposes requirements only on "proposed regulations" issued for public comment. 20 U.S.C. 1098a(b)(1) and (2). By its terms, that provision has no application where, as here, the Act provides an express exemption from notice-and-comment procedures and the Secretary need not issue "proposed regulations" at all. *Ibid.*

More broadly, Brown and Taylor's theory would subvert the distinction between procedural and substantive challenges. Many statutes authorizing agency actions include specific procedural provisions that govern actions taken pursuant to that statute. See, *e.g.*, 21 U.S.C. 360eee-2(e); 42 U.S.C. 7410; Department of Homeland Security Appropriations Act, Pub. L. No. 109-90, Tit. V, § 540, 119 Stat. 2088 (49 U.S.C. 114 note). If litigants

could characterize a claim that the action was not "actually" authorized by the statute, *Brown* Resp. 15 (emphasis omitted), as a *procedural* challenge—based on the agency's use of the procedures associated with the asserted statutory basis for its action—many substantive challenges could be reconceptualized as procedural claims, providing a ready end-run around the "normal standards for redressability and immediacy." *Defenders of Wildlife*, 504 U.S. at 572 n.7. Respondents cite no decision by any court endorsing—or even entertaining—such an end-run.

In any event, the HEROES Act does authorize the student-loan-relief plan: As explained above, the Secretary's actions fall comfortably within the plain text of the Act. See pp. 34-57, *supra*. Accordingly, the Secretary's undisputed compliance with the procedural requirements of the HEROES Act refutes Brown and Taylor's challenge, even on its own terms.

CONCLUSION

The judgment of the district court in *Nebraska* should be affirmed. The judgment of the district court in *Brown* should be reversed.

Respectfully submitted.

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1. 20 U.S.C. 1082(a) provides:

Legal powers and responsibilities

(a) General powers

In the performance of, and with respect to, the functions, powers, and duties, vested in him by this part, the Secretary may–

(1) prescribe such regulations as may be necessary to carry out the purposes of this part, including regulations applicable to third party servicers (including regulations concerning financial responsibility standards for, and the assessment of liabilities for program violations against, such servicers) to establish minimum standards with respect to sound management and accountability of programs under this part, except that in no case shall damages be assessed against the United States for the actions or inactions of such servicers;

(2) sue and be sued in any court of record of a State having general jurisdiction or in any district court of the United States, and such district courts shall have jurisdiction of civil actions arising under this part without regard to the amount in controversy, and action instituted under this subsection by or against the Secretary shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in that office; but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Secretary or property under the Secretary's control and nothing herein shall be construed to except litigation arising out of activities under this part from

the application of sections 509, 517, 547, and 2679 of title 28;

(3) include in any contract for Federal loan insurance such terms, conditions, and covenants relating to repayment of principal and payment of interest, relating to the Secretary's obligations and rights to those of eligible lenders, and borrowers in case of default, and relating to such other matters as the Secretary determines to be necessary to assure that the purposes of this part will be achieved; and any term, condition, and covenant made pursuant to this paragraph or pursuant to any other provision of this part may be modified by the Secretary, after notice and opportunity for a hearing, if the Secretary finds that the modification is necessary to protect the United States from the risk of unreasonable loss;

(4) subject to the specific limitations in this part, consent to modification, with respect to rate of interest, time of payment of any installment of principal and interest or any portion thereof, or any other provision of any note or other instrument evidencing a loan which has been insured by the Secretary under this part;

(5) enforce, pay, or compromise, any claim on, or arising because of, any such insurance or any guaranty agreement under section 1078(c) of this title; and

(6) enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption.

2. 20 U.S.C. 1098bb provides:

Waiver authority for response to military contingencies and national emergencies

(a) Waivers and modifications

(1) In general

Notwithstanding any other provision of law, unless enacted with specific reference to this section, the Secretary of Education (referred to in this part as the "Secretary") may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the Act [20 U.S.C. 1070 et seq.] as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide the waivers or modifications authorized by paragraph (2).

(2) Actions authorized

The Secretary is authorized to waive or modify any provision described in paragraph (1) as may be necessary to ensure that—

(A) recipients of student financial assistance under title IV of the Act who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals;

(B) administrative requirements placed on affected individuals who are recipients of student financial assistance are minimized, to the extent possible without impairing the integrity of the student financial assistance programs, to ease the burden on such students and avoid inadvertent, technical violations or defaults;

(C) the calculation of "annual adjusted family income" and "available income", as used in the determination of need for student financial assistance under title IV of the Act for any such affected individual (and the determination of such need for his or her spouse and dependents, if applicable), may be modified to mean the sums received in the first calendar year of the award year for which such determination is made, in order to reflect more accurately the financial condition of such affected individual and his or her family;

(D) the calculation under section 484B(b)(2) of the Act (20 U.S.C. 1091b(b)(2)) of the amount a student is required to return in the case of an affected individual may be modified so that no overpayment will be required to be returned or repaid if the institution has documented (i) the student's status as an affected individual in the student's file, and (ii) the amount of any overpayment discharged; and

(E) institutions of higher education, eligible lenders, guaranty agencies, and other entities participating in the student assistance programs under title IV of the Act that are located in areas that are declared disaster areas by any Federal, State or local official in connection with a national emergency, or whose operations are significantly affected by such a disaster, may be granted temporary relief from requirements that are rendered infeasible or unreasonable by a national emergency, including due diligence requirements and reporting deadlines.

(b) Notice of waivers or modifications

(1) In general

Notwithstanding section 1232 of this title and section 553 of title 5, the Secretary shall, by notice in the Federal Register, publish the waivers or modifications of statutory and regulatory provisions the Secretary deems necessary to achieve the purposes of this section.

(2) Terms and conditions

The notice under paragraph (1) shall include the terms and conditions to be applied in lieu of such statutory and regulatory provisions.

(3) Case-by-case basis

The Secretary is not required to exercise the waiver or modification authority under this section on a case-by-case basis.

(c) Impact report

The Secretary shall, not later than 15 months after first exercising any authority to issue a waiver or modification under subsection (a), report to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor and Pensions of the Senate on the impact of any waivers or modifications issued pursuant to subsection (a) on affected individuals and the programs under title IV of the Act [20 U.S.C. 1070 et seq.], and the basis for such determination, and include in such report the Secretary's recommendations for changes to the statutory or regulatory provisions that were the subject of such waiver or modification.

(d) No delay in waivers and modifications

Sections 482(c) and 492 of the Higher Education Act of 1965 (20 U.S.C. 1089(c), 1098a) shall not apply to the waivers and modifications authorized or required by this part.

3. 20 U.S.C. 1098ee provides:

Definitions

In this part:

(1) Active duty

The term "active duty" has the meaning given such term in section 101(d)(1) of title 10, except that such term does not include active duty for training or attendance at a service school.

(2) Affected individual

The term "affected individual" means an individual who—

(A) is serving on active duty during a war or other military operation or national emergency;

(B) is performing qualifying National Guard duty during a war or other military operation or national emergency;

(C) 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; or

(D) suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary.

(3) Military operation

The term "military operation" means a contingency operation as such term is defined in section 101(a)(13) of title 10.

(4) National emergency

The term "national emergency" means a national emergency declared by the President of the United States.

(5) Serving on active duty

The term "serving on active duty during a war or other military operation or national emergency" shall include service by an individual who is—

(A) a Reserve of an Armed Force ordered to active duty under section 12301(a), 12301(g), 12302, 12304, or 12306 of title 10 or any retired member of an Armed Force ordered to active duty under section 688 of such title, for service in connection with a war or other military operation or national emergency, regardless of the location at which such active duty service is performed; and

(B) any other member of an Armed Force on active duty in connection with such war, operation, or emergency or subsequent actions or conditions who has been assigned to a duty station at a location other than the location at which such member is normally assigned.

(6) Qualifying National Guard duty

The term "qualifying National Guard duty during a war or other military operation or national emergency" means service as a member of the National Guard on

full-time National Guard duty (as defined in section 101(d)(5) of title 10) under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under section 502(f) of title 32, in connection with a war, another military operation, or a national emergency declared by the President and supported by Federal funds.