SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES JOSEPH R. BIDEN, PRESIDENT) OF THE UNITED STATES, ET AL.,) Petitioners,) v.) No. 22-506 NEBRASKA, ET AL.,) Respondents.)

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1 IN THE SUPREME COURT OF THE UNITED STATES 2 _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ JOSEPH R. BIDEN, PRESIDENT) 3 4 OF THE UNITED STATES, ET AL.,) 5 Petitioners,)) No. 22-506 6 v. 7 NEBRASKA, ET AL.,) 8 Respondents.) 9 - - - - - - - - - - - - - - - - -10 Washington, D.C. 11 12 Tuesday, February 28, 2023 13 14 The above-entitled matter came on for oral argument before the Supreme Court of the United 15 States at 10:12 a.m. 16 17 18 APPEARANCES: 19 GEN. ELIZABETH B. PRELOGAR, Solicitor General, 20 Department of Justice, Washington, D.C.; on behalf 21 of the Petitioners. JAMES A. CAMPBELL, Solicitor General, Lincoln, 22 23 Nebraska; on behalf of the Respondents. 24 25

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1 PROCEEDINGS 2 (10:12 a.m.) 3 CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 22-506, 4 Biden versus Nebraska. 5 6 General Prelogar. 7 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR ON BEHALF OF THE PETITIONERS 8 GENERAL PRELOGAR: Mr. Chief Justice, 9 and may it please the Court: 10 11 COVID-19 is the most devastating 12 pandemic in our nation's history and it has 13 caused enormous disruption and economic 14 distress. Over the past three years, millions 15 of Americans have struggled to pay rent, 16 utilities, food, and many have been unable to 17 pay their debts. 18 To head off immediate harm for 19 student-loan borrowers, two Secretaries across two administrations invoked the HEROES Act to 20 21 suspend interest and payment obligations for all 2.2 Americans with federally held loans. But, if 23 that forbearance ends without further relief, it's undisputed that defaults and delinguencies 24 25 will surge above pre-pandemic levels.

1 So Secretary Cardona again invoked the 2 HEROES Act to provide a measure of loan forgiveness to ensure that this unprecedented 3 pandemic does not leave borrowers worse off in 4 relation to their student loans. 5 The states ask this Court to deny that 6 7 vital relief to millions of Americans, but they lack standing to seek that result. They 8 9 principally assert harm to a separate legal person, MOHELA, that could sue in its own name 10 but has chosen not to do so, and the states' 11 12 asserted harms to their tax revenues are self-inflicted and indirect. The states' bare 13 14 disagreement with this policy is not the sort of 15 concrete injury that Article III demands. 16 On the merits, the states say the Act 17 doesn't authorize the Secretary to ever forgive 18 loan principal. But the Secretary's 19 interpretation of this text is not just a 20 plausible reading; it's the best reading. 21 Congress expressly authorized the Secretary to 2.2 waive or modify any Title IV provision in 23 emergencies to provide financial relief to 24 borrowers. Loan forgiveness is a paradigmatic 25 form of debt relief, and the Secretary acted

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1 within the heartland of his authority and in 2 line with the central purpose of the HEROES Act in providing that relief here. 3 To apply the major questions doctrine 4 to override that clear text would deny borrowers 5 critical relief that Congress authorized and the 6 7 Secretary deemed essential. I welcome the Court's questions. 8 9 JUSTICE THOMAS: General, is this a waiver, or is it a modification? 10 11 GENERAL PRELOGAR: It's both a waiver 12 and a modification, Justice Thomas. This appears at JA 261. That was the decision 13 14 document that the Secretary signed where he 15 said, I hereby issue waivers and modifications 16 of multiple provisions under Title IV of the 17 student loan program. And then that language 18 was repeated in the Federal Register notice that 19 actually implemented that program and 20 constitutes the final agency action that the states are challenging here. 21 2.2 JUSTICE THOMAS: Well, could you 23 explain then -- in -- in other provisions, 24 there is express language as to cancellation, 25 and, of course, there isn't here.

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1 So would you take a minute to explain 2 how a waiver or modification amounts to a waiver 3 -- to a cancellation? GENERAL PRELOGAR: Of course. So the 4 Secretary identified various provisions in Title 5 IV that govern the terms and conditions of 6 7 student loans and also govern discharge and cancellation in other circumstances, as your 8 9 question suggested. 10 And I think the straightforward way to 11 think about how the verbs map onto the 12 Secretary's action is that he waived elements of those provisions that contain eligibility 13 14 requirements for discharge and cancellation that 15 are inapplicable under this program and then 16 modified the provisions to contain the 17 limitations that he had announced as part and 18 parcel of announcing this loan forgiveness. 19 Now you had suggested that there's no 20 express statement in the HEROES Act to discharge loan principal, an -- and that's true, but the 21 2.2 relevant and operative language here is the 23 provision that says the Secretary is empowered 24 to waive or modify any Title IV provision, and 25 so the HEROES Act isn't enumerating any of the

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1 various forms of relief that have long been 2 authorized and implemented under this statute. 3 I don't think anything can be read into the fact that there's no express reference 4 to particular forms of relief because Congress 5 6 was trying to broadly cover the field and ensure 7 that the Secretary had the tools to respond to the national emergency with whatever relief 8 might be necessitated. 9 10 CHIEF JUSTICE ROBERTS: But, in -- in 11 an opinion we had a few years ago by Justice 12 Scalia, he talked about what the word "modify" means, and it's -- he said modified in our view 13 14 connotes moderate change. He said it might be 15 good English to say that the French Revolution 16 modified the status of the French nobility, but 17 only because there's a figure of speech called 18 understatement and a literary device known as 19 sarcasm. 20 We're talking about half a trillion 21 dollars and 43 million Americans. How does that 2.2 fit under the normal understanding of 23 "modifying"? So, of course, I 24 GENERAL PRELOGAR: 25 recognize that in MCI, Justice Scalia's opinion

1 adopted a narrower understanding of that term, 2 but I don't read that opinion to set forth a universal meaning of "modify," no matter the 3 statutory context. 4 And, here, of course, we have a 5 6 broader phrase, "waive or modify." It's 7 undisputed and the states aren't contesting that the ordinary meaning of "waive" means to 8 9 eliminate an obligation in its entirety. And I 10 think, if you look at that phrase in the context 11 of the statute, that means that "modify" has to 12 mean making a change up to the point of 13 wholesale elimination. 14 It would be really strange for 15 Congress to say you can eliminate obligations 16 altogether or tweak them just the littlest bit, 17 but you can't do anything in between. 18 CHIEF JUSTICE ROBERTS: Well, but it's 19 "waive" particular regulatory or statutory 20 provisions. 21 That's right. GENERAL PRELOGAR: 2.2 CHIEF JUSTICE ROBERTS: That to me 23 suggests a much more focused use of the word. GENERAL PRELOGAR: Well, it's "waive 24 25 or modify" paired with the authority to do that

1 with respect to any Title IV provision. So I 2 think that that is the --CHIEF JUSTICE ROBERTS: It doesn't say 3 waive -- modify or waive loan balances. 4 GENERAL PRELOGAR: That's true, but 5 6 it's very clear that under the Title IV 7 provisions that are expressly referenced in the 8 statute, things like repayment obligations, cancellation, discharge, are core features of 9 the program and obvious candidates for waiver in 10 11 a statute, the central purpose of which is to 12 provide debt relief to borrowers. 13 You know, Congress itself has provided for loan discharge in other circumstances in 14 15 response to borrower hardship. It's included 16 provisions in the Higher Education Act for 17 bankruptcy, for example, or for total disability 18 or school closure, other kinds of hardships. 19 And so it couldn't have surprised 20 Congress one bit that in response to hardship 21 posed by a national emergency, the Secretary 2.2 might consider similarly providing discharge if 23 that's what it takes to make sure borrowers 24 don't default. 25 CHIEF JUSTICE ROBERTS: You think

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1 because there's a provision to allow waiver when 2 your school closes, that because of that, Congress shouldn't have been surprised when half 3 a trillion dollars is wiped off the books? 4 GENERAL PRELOGAR: Well, I think it 5 demonstrates that in a statute that's centrally 6 7 focused on providing financial relief, that that terminology should be given its plain meaning, 8 9 and Congress could have anticipated that in a particular situation, you might expect that the 10 11 way that you need to ameliorate the borrower 12 harm is through loan forgiveness. 13 And, Mr. Chief Justice, maybe I can 14 just use an example drawn from the initial 15 context of promulgation of this statutory 16 relief. It was initially a bill that was 17 limited just to helping service members who were 18 fighting in wars. And think about an example of 19 a service member who goes off to war and you can provide HEROES Act relief to ensure that the 20 service member doesn't have to pay down the loan 21 2.2 while the term of service, but if something were 23 to happen that left that service member worse off because of his service, say a -- a 24 25 disability that doesn't qualify for total

1 discharge, it makes perfect sense to think that 2 Congress would have expected that the Secretary 3 would have authority under this Act to make the service member whole and to ensure, just as the 4 plain language suggests, that that service 5 member isn't going to be left worse off because 6 7 of the circumstance that prompted his service in the first place. 8 And so there's that first-order 9 10 question of whether you can ever do any debt discharge. And I think, in that context, it's 11 12 perfectly sensible to read this language to 13 authorize that. 14 JUSTICE SOTOMAYOR: General, the 15 amount at issue, the Chief mentioned the quarter 16 trillion dollars or the half a trillion dollars. 17 How do you deal with that? Because that seems 18 to favor the argument that this is a major 19 question. 20 GENERAL PRELOGAR: Yes, Justice

Sotomayor. So, of course, we acknowledge that this is an economically significant action, but I think that that can't possibly be the sole measure for triggering application of the major questions doctrine.

1 In prior cases, the Court has pointed 2 to economic and political significance, but it's also reviewed a litany of additional factors 3 that have demonstrated that based on 4 common-sense understandings of how Congress is 5 6 likely to legislate, the agency is claiming 7 extravagant regulatory authority that it doesn't 8 actually have. And I think, if the Court were to just 9 look at costs alone, it would take the major 10 11 questions doctrine outside of that extraordinary 12 case because national policies these days frequently do involve more substantial costs or 13 14 trigger political controversy. 15 Here, we think that there are any 16 number of additional factors that demonstrate 17 that this does not fit the major questions 18 paradigm. And the first thing I would point to 19 is that this is not an assertion of regulatory 20 authority at all. 21 This is the administration of a 2.2 benefits program. And the Court in prior cases 23 had -- has recognized that you -- using common sense interpretations of understanding how 24 25 Congress would legislate, Congress might pause

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1 before empowering the executive to engage in 2 extravagant regulation with the corresponding 3 cost to individual liberty interests. But, in the context of a benefits 4 program, there's not that same reason to 5 6 hesitate about what Congress might have intended 7 because it's perfectly logical for Congress to broadly empower the executive to provide 8 9 benefits, especially in a crisis situation or an emergency like we've seen with COVID-19. 10 11 JUSTICE ALITO: And General, let's say 12 that nobody in Congress was aware that there is such a thing in our case law called the major 13 questions doctrine. So put that out of their 14 15 minds. 16 And you simply polled every member of 17 Congress and asked that person whether, in the 18 ordinary sense of the term, they would regard 19 what the government had -- proposes to do with 20 student loans as a major question or something other than a major question. 21 2.2 GENERAL PRELOGAR: Well, I certainly acknowledge that in a colloquial sense you could 23 24 characterize this as a major policy. We're not 25 disputing that point.

1 But, again, I think that that applies 2 to any number of actions that the government might take, and especially in the context of 3 benefits programs, where just based on the size 4 of those programs and the number of individuals 5 affected, the costs can frequently run into the 6 7 billions of dollars. So I don't --8 9 JUSTICE ALITO: Is there any conceptual reason why the major questions 10 11 doctrine should apply to most regulatory matters 12 but not to the -- not to benefits programs? 13 GENERAL PRELOGAR: The reason we think 14 it shouldn't apply in the same way to benefits 15 programs is because it doesn't involve that 16 corresponding trade-off on individual liberty 17 interests. 18 The Court in some of the prior cases in this area has expressed concern that if the 19 20 government is claiming an extraordinary power to regulate, that means it can encroach on the 21 2.2 lives of individuals, the affairs of businesses, 23 and quite directly impose onerous burdens on 24 them. 25 JUSTICE ALITO: It may have an effect

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1 on important individual rights, but do you think 2 that the doctrine also or perhaps primarily has a separation of powers component? 3 GENERAL PRELOGAR: Yes, of course, I 4 recognize the Court has grounded it in the 5 separation of powers, but I think that that cuts 6 7 in favor of the distinction that we're trying to make because, if the Court were to apply major 8 questions in this benefits context, even in a 9 10 circumstance where you might think Congress 11 could quite reasonably want to legislate 12 broadly, then it would have the effect of 13 potentially overriding Congress's intent, 14 contrary to the same kind of separation of 15 powers principles the Court has focused on in 16 prior cases. 17 JUSTICE ALITO: Well, I don't 18 understand why it would under -- undermine 19 Congress's intent to a greater extent in that 20 context. But drawing a distinction between 21 benefits programs and other programs seems to 2.2 presume that when it comes to the administration 23 of benefits programs, a trillion dollars here, a trillion dollars there, it doesn't really make 24 25 that much difference to Congress. That doesn't

1 seem very sensible.

2	GENERAL PRELOGAR: Of course, I
3	acknowledge that there can be substantial costs
4	associated with benefits programs, but I guess
5	the reason I'm pressing on this distinction is
б	because I'm trying to think through, you know,
7	what is Congress supposed to do when it wants to
8	empower the executive to
9	JUSTICE ALITO: But, I mean, isn't the
10	question, looking at this program and looking at
11	this question, is this the sort of thing that
12	Congress is likely to address expressly or
13	through a contestable interpretation of some
14	statutory language?
15	GENERAL PRELOGAR: Well, of course, we
16	think Congress did address this expressly here,
17	and Congress directed that in the context of a
18	national emergency, that is the the
19	limitation of the HEROES Act, so the Secretary
20	can't invoke this whenever he wants. There has
21	to be that predicate war or military operation
22	or national emergency.
23	In that context, in line with
24	Congress's limitations on who can count as an
25	affected individual by that an emergency, in

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1 line with the purposes that relief has to serve, 2 Congress said you can waive or modify any Title 3 IV provision in order to get relief to borrowers. 4 And, Justice Alito, I would point to 5 6 the forbearance policy that's been in place for 7 the prior three years, put into place right at the beginning of the pandemic by then Secretary 8 9 DeVos. That has been an economically 10 significant program. It's currently costing the 11 federal government more per year than this loan 12 forgiveness plan would cost the government 13 annually. But I would argue that that is right 14 15 in the heartland of what the HEROES Act aimed to 16 do. It was critical relief that was rushed out 17 at the beginning of this devastating pandemic to 18 ensure that we didn't see spikes in delinquency 19 and default across the nation. 20 JUSTICE ALITO: May I ask you a 21 question about standing? So it's the case, 22 isn't it, that if any party in either of these 23 two cases has standing, then it would be permissible for us to reach the merits of the 24 25 issue?

1 GENERAL PRELOGAR: Yes. In -- in the 2 states' case, if you conclude that any party has standing, then the Court could go on to the 3 merits. In the case that the Court is going to 4 hear next, we think that there are objections to 5 6 the procedural claim with respect to the 7 borrowers' objections there. JUSTICE ALITO: Okay. Then let me ask 8 9 you a question about MOHELA or maybe a question 10 or two. If MOHELA itself had brought this suit, 11 would you contest Article III standing? 12 GENERAL PRELOGAR: No, we would not. 13 So we think that if MOHELA made allegations that 14 the plan was going to have financial effects on 15 it, it could sue in its own name and we would 16 not contest Article III standing. 17 JUSTICE ALITO: All right. So then we 18 would consider the Article III standing of the 19 State of Missouri, right? GENERAL PRELOGAR: That's right. 20 JUSTICE ALITO: And the -- the -- the 21 22 most -- the -- the part of the Article III test 23 that's most disputed is injury in fact, is that 24 correct? 25 GENERAL PRELOGAR: That's right.

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1	We're also contesting causation
2	JUSTICE ALITO: Right.
3	GENERAL PRELOGAR: and
4	redressability here, but I think injury in fact
5	is one of the critical points in dispute with
6	respect to MOHELA and the state's attempt to
7	assert MOHELA's injury.
8	JUSTICE ALITO: Okay. Injury in fact
9	is a factual question. So I understand a big
10	thrust of your argument to be that Missouri
11	lacks standing because MOHELA is is
12	separately incorporated. But why should that
13	formal distinction govern the determination of
14	injury in fact?
15	GENERAL PRELOGAR: So we think that
16	the injury in fact analysis here has both a
17	factual and a legal component.
18	In the first place, of course, we're
19	making arguments that even if there's a
20	financial injury to MOHELA, the state hasn't
21	carried its its burden to show that that will
22	have downstream effects on the state or that
23	those would be cognizable. And MOHELA hasn't
24	paid money into the relevant state fund for the
25	past 15 years. It said that further payments

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1	were not deemed probable even before this plan
2	was announced.
3	But even putting the the factual
4	discrepancies to the side, there's a fundamental
5	problem as a matter of law with the claim of
6	injury, and I think it arises directly from two
7	sets of blackletter law principles.
8	The first is that the whole point of
9	incorporation is that you're creating a separate
10	legal person with its own rights and interests.
11	And Missouri has derived substantial benefits
12	from structuring MOHELA that way.
13	And the second is the basic Article
14	III principle that a party has to come to court
15	and assert her own rights and interests.
16	JUSTICE ALITO: Right. We I I,
17	you know I
18	GENERAL PRELOGAR: She can't invoke
19	the interests of a third party.
20	JUSTICE ALITO: All of that is
21	certainly true. You think that our that
22	the lack the fact that MOHELA is incorporated
23	is the end of the day? That's enough to destroy
24	to defeat standing?
25	GENERAL PRELOGAR: We think, as a

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1 matter of first principles, yes, that this Court 2 has several times emphasized that when you have a separately incorporated instrumentality like 3 that, the corporate separateness should be 4 5 respected and that that --6 JUSTICE ALITO: Well, what about --7 GENERAL PRELOGAR: -- serves 8 important --9 JUSTICE ALITO: -- Lebron and Amtrak? 10 GENERAL PRELOGAR: So those are 11 doctrines not focused on Article III standing, 12 of course, but instead are testing for other 13 things. 14 In Lebron, that was a state action 15 case, and the Court's reasoning was that you 16 shouldn't be able to parcel out governmental 17 functions to an instrumentality and thereby 18 evade the strictures of the Constitution. 19 JUSTICE ALITO: Well, have we ever 20 decided a case that presents what you see is the 21 issue here or what the parties see as the issue, 2.2 as one of the issues, which is whether, for 23 Article III standing purposes, a -- an entity is 24 part of a state? 25 GENERAL PRELOGAR: No. So the Court

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hasn't addressed this issue in the context of 1 2 Article III. There aren't cases that are directly on point on either side, but I think 3 that we definitely have the better argument of 4 the first principles here based on the 5 6 propositions I mentioned earlier, including 7 those that generally make clear that the Court won't countenance third-party claims seeking to 8 9 invoke rights and interests of individuals or entities that aren't before the Court. 10 11 And I think it would be particularly 12 anomalous to recognize some kind of exception to 13 those principles here for two reasons. 14 JUSTICE ALITO: No, but the question 15 would be whether MOHELA is part of the State of Missouri for present purposes. And where we're 16 17 considering injury in fact, why should the test 18 turn solely or why should the lack of corporate 19 status be a necessary element? Why shouldn't 20 the test be something more like whether the relationship between this entity and the State 21 2.2 of Missouri is such that an injury to MOHELA 23 will necessarily or presumptively be an injury to the state? 24

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

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1	all point to the reasons for setting up MOHELA
2	as a very relevant factor and the degree of
3	state control, the degree of the governor's
4	control over MOHELA as a very important factor?
5	GENERAL PRELOGAR: I don't think that
6	those factors should count as important in the
7	analysis, and to the extent the Court is
8	inclined to broaden out the analysis beyond the
9	principles I've articulated about corporate
10	separateness, I think the most critical fact
11	would be whether there's financial entanglement
12	and whether Missouri has itself decided to blur
13	those lines for purposes of making it
14	responsible for MOHELA's own liabilities.
15	JUSTICE JACKSON: And, in fact, isn't
16	that really, as you say, the most important
17	thing if economic injury is the point?
18	GENERAL PRELOGAR: Yes.
19	JUSTICE JACKSON: I mean, I had
20	understood that the injury that was being
21	asserted here was an economic injury, but if we
22	look at MOHELA and we see that its financial
23	interests are totally disentangled from the
24	state, it stands alone, it's incorporated
25	separately, the state is not liable for anything

1 that happens to MOHELA, I don't know how that 2 could possibly be a -- a -- a reason to say that 3 an injury to MOHELA should count as an injury to 4 the state. 5 GENERAL PRELOGAR: Yes, we agree 6 exactly with that analysis. And it's important 7 to think about the benefits that Missouri has obtained from structuring MOHELA that way. 8 This is not the first lawsuit that 9 10 MOHELA's been involved in. Actually, MOHELA is 11 not involved in this particular suit, but in 12 prior suits, when MOHELA's been sued, the 13 state's been entirely absent because state law makes clear that Missouri cannot be on the hook 14 15 for MOHELA's liabilities. It creates a wall of 16 separation financially between the two entities, 17 and Missouri gets a lot of benefit from that. 18 JUSTICE JACKSON: And so --19 JUSTICE SOTOMAYOR: General --JUSTICE JACKSON: -- if MOHELA is 20 21 being injured as a result of the plan or at 2.2 least if that's the allegation, MOHELA has the 23 ability to defend itself and its interests, 24 correct? 25 GENERAL PRELOGAR: Exactly. It's a

1 separate legal person. It has the right to sue 2 or be sued in its own name. There is nothing 3 that stands in the way of MOHELA asserting these 4 interests if it's experiencing financial harm, 5 and there's no --JUSTICE JACKSON: But wouldn't --6 7 GENERAL PRELOGAR: -- principle that would support allowing Missouri now to interfere 8 with the separation it itself has created --9 10 JUSTICE JACKSON: And so we would --11 would we be breaking --12 GENERAL PRELOGAR: -- just because it 13 doesn't like the policy. 14 JUSTICE JACKSON: -- would we be 15 breaking new ground then if, on this basis, we 16 found standing? 17 GENERAL PRELOGAR: Yes. I'm not aware 18 of any case that would support standing on this 19 basis. 20 JUSTICE ALITO: Well, would we be 21 breaking new ground if we found that there was 22 standing since we've never been presented, as 23 you admitted earlier, with a case that presents 24 precisely the issue that's here? 25 GENERAL PRELOGAR: It's true that it's

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1 a new fact pattern, but I think that the Court 2 would be breaking new ground with respect to the general principles that it's asserted in 3 third-party standing contexts. There, for 4 example, one of the critical facts the Court has 5 6 highlighted is whether there's some impediment 7 that would prevent the party whose rights and interests are implicated from pursuing its own 8 9 claim. There is nothing like that here, and the Court has never recognized a doctrine of 10 11 third-party standing on facts like these. 12 JUSTICE KAGAN: Do you have any 13 understanding about why MOHELA isn't here? 14 GENERAL PRELOGAR: No. The only 15 evidence in the record about MOHELA is that its 16 involvement in this suit has been responding to 17 sunshine law requests. I think it's possible 18 that loan servicers have --19 JUSTICE KAGAN: Sunshine law requests 20 brought by? 21 GENERAL PRELOGAR: Brought by the 2.2 state. So Missouri served sunshine law requests 23 on MOHELA to get information about its financial 24 interests. 25 JUSTICE KAGAN: Because MOHELA was not

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1 giving over information voluntarily? 2 GENERAL PRELOGAR: That's correct. I 3 think it just reinforces the sense that there was separation here between the state and this 4 instrumentality. If I had to speculate, I think 5 that loan servicers, during the course of the 6 7 forbearance policy, have seen some of their servicing fees be reduced in light of that 8 9 policy, and it's possible that they are waiting 10 for forbearance to lift so that they can start 11 collecting those fees again, and that might be a 12 possible reason why they made the judgment that 13 they don't want to stand in the way of this 14 forgiveness policy, because it's a critical 15 component of allowing payments to resume. 16 JUSTICE ALITO: Do you think there 17 might be a dependent relationship between 18 agencies like MOHELA and the federal government 19 since we're speculating about why they're not 20 here? 21 GENERAL PRELOGAR: Certainly, there 2.2 are contractual relationships, yes. JUSTICE SOTOMAYOR: General --23 24 JUSTICE JACKSON: Can I ask you, you 25 -- oh, I'm sorry.

1 JUSTICE SOTOMAYOR: General, there was 2 a Missouri case in 1979, Menorah Medical Center, 3 with an agency much like MOHELA, and, there, the -- the Missouri Supreme Court said that that 4 entity was not the state. States are free to 5 6 organize themselves and structure themselves in 7 any way they want, correct? 8 GENERAL PRELOGAR: Correct, yes. 9 JUSTICE SOTOMAYOR: And it would be 10 odd for us to have a state say we're creating a 11 -- an -- a corporation, we're not going to be 12 responsible for its debts, we're not going to be 13 responsible for any of its contracts, we're not 14 going to be responsible for anything it does 15 financially, and the state itself says this is 16 not the state, it's an independent corporation, 17 and we're going to say instead that it is the 18 state, correct? 19 GENERAL PRELOGAR: Yes. I think that 20 it would be really anomalous to override the separation that Missouri itself created between 21 2.2 it and MOHELA in the context of this case, this 23 case --JUSTICE SOTOMAYOR: Or to override its 24 25 own state supreme court's decision that it is

1 not the state? 2 GENERAL PRELOGAR: Yes, that's 3 correct. JUSTICE BARRETT: General, I'm 4 thinking of, in Arkansas versus Texas, it was 5 significant in that case that Arkansas owned the 6 7 land of the university. So it does seem that Missouri has created this separateness with 8 9 respect to the liabilities of MOHELA. 10 What if -- and I'll ask this to the 11 other side. It's not really clear to me what 12 happens to MOHELA's assets. I mean, what if 13 MOHELA itself dissolves? There are no 14 shareholders. I mean, does your answer change 15 if, even though Missouri is not responsible for 16 the liabilities, it does have an ownership stake 17 in the assets of MOHELA? 18 GENERAL PRELOGAR: I think it's clear 19 under state law, Justice Barrett, that Missouri doesn't have that kind of ownership interest in 20 the assets of MOHELA. And I would point in 21 2.2 particular to Missouri Revised Statute 173.410. 23 This is the provision that makes clear that Missouri cannot take the assets of MOHELA and 24 25 appropriate them. They don't go into the

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general treasury. It makes clear instead that
 those assets are under MOHELA's exclusive
 control.

So I think, as a matter of state law 4 here, we don't have anything like the Arkansas 5 6 case that you just referenced. And as well, the 7 flip side of that is the provision of state law that likewise says Missouri is not going to be 8 9 liable for any agreements or obligations or 10 liability of MOHELA so that if MOHELA goes out 11 there in the world and harms someone, the 12 state's not on the hook for the damage. 13 And that's another distinction from 14 the Arkansas case, where, under state law there,

15 it was clear that a suit against the 16 instrumentality was a suit against the state

17 itself.

18 JUSTICE BARRETT: Would you have the 19 same position with respect to federal 20 corporations? Like what about the FDIC or, you 21 know, organizations like that, what if the 2.2 agency didn't want to sue? Could the United 23 States sue to protect the federal government's 24 interests if the corporate identity was separate 25 like here?

1 GENERAL PRELOGAR: No. I think that 2 our principles would apply with respect to our 3 own instrumentalities. We could, of course, sue to protect interests -- distinct rights and 4 interests of the United States. And so 5 6 Respondents have cited some cases, for example, 7 where a -- an instrumentality entered into a contract on behalf of the United States in the 8 9 name of the United States as its agent, and we had a contract right that we could enforce in 10 11 our own name, or there was another case that 12 involved a statutory right in the tax context to 13 offset, and the United States was permitted to 14 sue on that basis because it had its own rights 15 and interests. 16 But we've never done what the states 17 are doing here and, in the absence of any underlying contract right or statutory right or 18 19 trust right, just asserted this all-purpose 20 ability to blur the distinction between the 21 sovereign and instrumentalities when they're 2.2 separately incorporated in this way. 23 JUSTICE BARRETT: Thank you. 24 CHIEF JUSTICE ROBERTS: Thank you --25 thank you, General. I just have a question on

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1 the -- on the major questions doctrine, and I 2 wanted just a little bit background for why -- I want to get your views on how it applies. 3 You're -- you're arguing here that no 4 notice-and-comment proceeding was required 5 before the action taken on the half trillion 6 7 dollars of loans and that because of your view that the President can act unilaterally, that 8 9 there was no role for Congress to play in this 10 either, and at least in this case, given your view of standing, there's no role for us to play 11 12 in this -- in this either. 13 Now we take very seriously the idea of 14 separation of powers and that power should be 15 divided to prevent its abuse, and there are many 16 procedural niceties that have to be followed for 17 the same purpose. 18 The case reminds me of the one we had 19 a few years ago under a different administration 20 where the administration tried acting on its own 21 to cancel the Dreamers program, and we blocked 2.2 that effort. 23 And I just wonder, given the posture 24 of the case and given our historic concern about the separation of powers, you would recognize at 25

1 least that this is a case that presents 2 extraordinarily serious, important issues about the role of Congress and about the role that we 3 should exercise in scrutinizing that, 4 significant enough that the major questions 5 doctrine ought to be considered implicated? 6 7 GENERAL PRELOGAR: Well, Mr. Chief Justice, let me try to respond to the concerns 8 9 about both the role for the judiciary and the 10 role for Congress here. 11 We are not suggesting that there's no 12 role for the judiciary to play. It's that these 13 plaintiffs are not proper plaintiffs in this 14 case. Of course, the Court is bound by Article 15 III, and as I acknowledged to Justice Alito, we 16 think that loan servicers, for example, would 17 have standing to challenge this plan. 18 But the fact that the -- the loan 19 servicers haven't yet challenged to date doesn't provide a basis to overlook those fundamental 20 21 Article III requirements and distort the meaning 2.2 of how this Court has previously articulated 23 standing principles in a circumstance where the states can't otherwise demonstrate their 24 25 standing to sue.

1 With respect to the role for Congress, I think what's clear is, of course, we're 2 3 recognizing that Congress could take additional action if it disapproves this plan. 4 In fact, there were bills introduced to alter the text of 5 6 the HEROES Act to specifically provide that the 7 Secretary can't authorize loan discharge. Those bills didn't pass, but that's one role Congress 8 9 can play. 10 I think, though, that if the Court is 11 focused on trying to ensure that Congress's role 12 in this process is respected, that just argues in favor of reading this text in line with what 13 14 the plain language suggests. You know, these 15 are not words of limitation in the actual 16 assertion of authority here, waive or modify any 17 Title IV provision. 18 The states want this Court to say 19 Congress really only meant waive or modify some of the provisions, not all of them, not the 20 21 central provisions that govern repayment and 2.2 cancellation, when those would have been obvious

23 candidates for waiver or modification in a loan24 discharge program.

25 And if the Court overrides that clear

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HEROES Act language here, I think that it could only thwart Congress's intent in this particular posture of ensuring that you have the tools, the Secretary has the tools he needs to take care of Americans in a -- a national emergency situation.
CHIEF JUSTICE ROBERTS: But whether

8 Congress acted or not was a factor that we 9 considered in the major questions doctrine, and 10 the way we considered it is whether or not the 11 issue that was before the Court is something 12 that had been seriously considered and debated 13 and was a matter of political controversy before 14 Congress.

15 That certainly is the case here,16 right?

17 GENERAL PRELOGAR: That's right. 18 We're not disputing that this is a politically 19 significant action. But, if you're focused --20 CHIEF JUSTICE ROBERTS: Well, not just a politically significant action but one that 21 2.2 has the attention of Congress. The fact that it 23 hasn't acted under the major questions doctrine but has considered the matter we cited as 24 25 support for the notion that maybe it should be

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1 one for Congress. If you're talking about this in the 2 3 abstract, I think most casual observers would say, if you're going to give up that much amount 4 of money, if you're going to affect the 5 6 obligations of that many Americans on a subject 7 that's of great controversy, they would think that's something for Congress to act on. 8 9 And if they haven't acted on it, then 10 maybe that's a good lesson to say for the 11 President or -- or the administrative 12 bureaucracy that maybe that's not something they 13 should undertake on their own. 14 GENERAL PRELOGAR: Well, let me react 15 to that in a couple of different ways, Mr. Chief 16 Justice. 17 First is to emphasize that the 18 unenacted legislation that the states are 19 pointing to here did not mirror the particulars 20 of this plan, so I don't think it would be right to say that Congress has specifically focused on 21 2.2 this plan and disapproved it. 23 And if the Court were to go down that 24 road, I'd point again to the fact that 25 there's -- there's legislative inaction on the

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1 other side of not amending the HEROES Act. 2 But I would think that the Court, as 3 it usually does, would place more focus on enacted legislation. And, here, during the 4 pandemic, Congress enacted a provision of the 5 6 American Rescue Plan that specifically 7 anticipated and sought to facilitate a program of loan discharge by providing that it wouldn't 8 9 be subject to federal taxation from 2021 to 10 2025. 11 So I think that that congressional 12 action actually carries more weight in the 13 analysis. 14 CHIEF JUSTICE ROBERTS: Thank you. 15 Justice Thomas, anything further? 16 JUSTICE THOMAS: Just briefly. 17 There's some discussion in the briefs 18 that going past with this provision or that 19 modification or waiver, that this is, in effect, a cancellation of a debt -- that's really what 20 we're talking about -- and that as a 21 2.2 cancellation of \$400 billion in debt, in effect, 23 this is a grant of \$400 billion, and it runs 24 head long into Congress's appropriations 25 authority, and I'd like to give you some time to

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1 respond to that.

2	GENERAL PRELOGAR: Sure. And and
3	so, first, I want to take on the argument that
4	some amici have made in this case about
5	implicating appropriations authority.
6	Of course, implementing this program
7	doesn't require that any money be drawn from the
8	Treasury, and so I don't think that it strictly
9	raises an appropriations issue, which is why I
10	think the states aren't raising that argument
11	here.
12	And to the extent that the concern is
13	about the Secretary taking action in a way that
14	Congress didn't authorize, it seems to me that
15	it just collapses back into the central
16	interpretive question in this case, which is:
17	Does the HEROES Act authorize the Secretary's
18	action or not?
19	With respect to the concern you raised
20	that the the effect of loan forgiveness here
21	will result in cancellation of a measure of debt
22	for the affected borrowers, of course, that's
23	true, but I don't think that that is materially
24	different from the kind of effects you can see
25	from other types of authority that's long been

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1 exercised under the HEROES Act. 2 You know, take the forbearance policy 3 that I have mentioned. This has been powerful relief for debtors -- I'm sorry, for 4 student-loan borrowers while it's been in place 5 6 with respect to their debt. 7 And it's had, you know, kind of permanent financial effects on the government, 8 over \$150 billion over the course of that 9 forbearance program by the end of it, but it's 10 11 been absolutely critical relief. And it's 12 provided that kind of help to the student-loan 13 borrowers as well who haven't had to make those 14 interest payments or any payments on their loans 15 while it's been in place. 16 And that too can have the kind of 17 consequence of resulting in cancellation of 18 principal. During the period of forbearance, 19 the -- the years that borrowers spent in forbearance count towards loan forgiveness 20 programs, for example. So, at the end of the 21 2.2 day, those borrowers in income-driven repayment or public service loan forgiveness are going to 23 pay less on their loan overall. 24

25 It will be forgiven three years

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1 earlier or without those three years of payments 2 that they weren't obligated to make. But I 3 don't think that in any sense calls into question the legitimacy and authorization behind 4 5 the forbearance policy. JUSTICE THOMAS: Well, I -- I think 6 7 that forbearance fits more comfortably in modify -- waive or modify language. It's you 8 9 simply forbearing on collecting an underlying 10 debt, but you don't cancel the debt. And that's 11 what we're talking about here. 12 And, certainly, there's a cost to that, I understand, but I -- I still think that 13 14 you haven't fully explained why, if you looked 15 at this, you could not -- you would not argue 16 that the Secretary could actually grant four 17 billion -- \$400 billion. 18 GENERAL PRELOGAR: Well, he --19 JUSTICE THOMAS: Do we agree on that? 20 GENERAL PRELOGAR: I'm sorry --21 JUSTICE THOMAS: He could not give 22 grants of --23 GENERAL PRELOGAR: -- outside the context of the HEROES Act? 24 25 JUSTICE THOMAS: Yes.

GENERAL PRELOGAR: 1 That's right. We, 2 of course, are premising the relief here --3 JUSTICE THOMAS: So you would --GENERAL PRELOGAR: -- specifically on 4 the HEROES Act. 5 6 JUSTICE THOMAS: -- you would rely on 7 appropriations from Congress for that, right? GENERAL PRELOGAR: Yes. 8 9 JUSTICE THOMAS: And the argument is that you are, in effect, doing that without 10 11 appropriations from Congress? 12 GENERAL PRELOGAR: Well, Justice Thomas, I don't see how you could distinguish 13 that from any of the other forms of relief under 14 15 the HEROES Act. All of those forms of relief 16 cost the federal government money and often in 17 significant sums. 18 You know, one of the quintessential 19 forms of relief that the government has offered before in periods of extended deferment for 20 21 soldiers fighting abroad is to pay the interest on their loans for them. 2.2 23 And I think you could probably make the same argument of -- of questioning, well, 24 25 does that cost the government money? Is there

1	an appropriations overlay there? Does that
2	transform the nature of the program because it
3	takes a loan with interest and makes it an
4	effectively an interest-free loan?
5	But that's exactly what Congress
6	attend intended under this authority. It's
7	to make those changes to the program in direct
8	response to and in direct proportion to the
9	situation the Secretary confronts that will
10	otherwise leave that borrower worse off.
11	CHIEF JUSTICE ROBERTS: Justice Alito?
12	Justice Sotomayor?
13	JUSTICE SOTOMAYOR: Returning to the
14	standing question, the states basically say
15	we're going to lose money in taxation one way or
16	another.
17	In the Texas case, you argued that we
18	should be looking at the cost benefit, and some
19	of the amici here say that there will be a
20	tremendous benefit to the states from this
21	cancellation because that extra money will
22	result in increased consumer spending and
23	decreased housing insecurity, less defaults on
24	other loans that those borrowers may have, et
25	cetera.

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Do you agree with those amici that the economic benefits outweigh any alleged financial harm in this case?

GENERAL PRELOGAR: As a factual matter, we do not disagree. As a legal matter, we haven't asked the Court to rely on that as a basis for standing because we think that the invocation of these harms to tax revenues are so easily answered under this Court's precedent.

10 And I would point the Court to the 11 Pennsylvania versus New Jersey case. It is on 12 all fours with this one, precisely identical. And so we just think you don't need to go down 13 14 the road of thinking about some of the broader 15 arguments about tax injury in this case because 16 it's so clear that this Court has already 17 rejected the very injury the states are 18 asserting under the Pennsylvania case. 19 JUSTICE SOTOMAYOR: In Pennsylvania, 20 it was a tax credit that was going to be removed, so it's almost identical to this, 21 2.2 correct? 23 GENERAL PRELOGAR: Exactly.

24 Pennsylvania had issued its tax credit before
25 the New Jersey law that they were opposed to and

had extended it to residents when they pay taxes

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2 in other states.
3 And then New Jersey came along and
4 changed its tax code to impose newly a -- a
5 commuter tax that would ultimately deplete
6 Pennsylvania's tax revenues, and the Court said

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7 that's self-inflicted because nothing required 8 Pennsylvania to extend that tax credit, nothing 9 prohibits Pennsylvania from withdrawing it now.

10 And that analysis applies equally here 11 because, of course, there is nothing that 12 requires the states to tie their definition of gross income to the federal tax code. 13 Two of 14 the states here, Arkansas and Missouri, don't do 15 that. And there's nothing that prevents them 16 from changing that if they don't want to honor 17 the -- the forgiveness from taxation that the 18 federal government is now under.

JUSTICE SOTOMAYOR: Thank you.
CHIEF JUSTICE ROBERTS: Justice Kagan?
JUSTICE KAGAN: General Prelogar, I
want to change the subject a bit. The -- your
friends on the states' side and also the
borrowers in the other case have a number of
statutory arguments. They frame them as

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statutory arguments, saying this wasn't necessary under the terms of the statute, saying that it leaves borrowers better off, not worse off, again, pointing to statutory language saying that, you know, it -- the borrowers it targets aren't worse off because of the pandemic.

Now I'm not sure that I understand 8 9 really those arguments as statutory arguments as 10 much as I understand them as arbitrary and 11 capricious arguments, that, essentially, they 12 are saying that the Secretary just did not say the right things, did not make the right 13 14 findings, did not properly justify what he did 15 here, that there's no sense in which we read 16 this memorandum and we come away thinking, oh, 17 yes, these harms were caused by the pandemic and -- and there's a basis for this action and --18 19 and a -- and a sufficient basis for this action. 20 So I wanted to give you a chance to talk about that. It's -- it's essentially the 21 2.2 tie to the pandemic of the sort of harms that 23 the Secretary said made relief appropriate. 24 GENERAL PRELOGAR: So let me say at 25 the outset that I agree that those kinds of

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arguments, I think, find a much more natural 1 2 home in arbitrary and capricious analysis, and the reason for that is because it's clear that 3 Congress tolerated overbreadth in this statute. 4 It told the Secretary, for example, that he can 5 act on a "class-wide basis." He doesn't need to 6 7 go case by case with respect to each individual borrower who stands to benefit under HEROES Act 8 relief. It said he should take action to 9 ensure, that is, make certain, that borrowers 10 11 aren't left worse off as may be necessary, not 12 as strictly necessary. So, once we're in the world where it's 13

14 clear under the statute that the Secretary isn't 15 violating the HEROES Act by providing relief 16 that's class-wide and may have the effect of 17 offering critical benefits to borrowers who, as 18 it turns out, wouldn't have needed them in the 19 absence of the relief, then I think the question 20 boils down to has the Secretary justified his 21 line-drawing and the scope of relief, and that 2.2 really should function under arbitrary and 23 capricious review.

And, here, I think, with respect to all of the states' arguments, they lack merit

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1 when you look at the Secretary's explanation for 2 why this relief, in his judgment, was necessary. He documented the substantial economic impacts 3 of the COVID pandemic across the entire country 4 that's already necessitated unprecedented levels 5 of aid that we've never seen before, \$5 trillion 6 7 in other pandemic relief efforts, this forbearance policy under the HEROES Act that the 8 9 Department had never put into place before. 10 So he documented those financial 11 effects the pandemic has had on borrowers, and 12 then he explained, using data that he examined, that huge swaths, substantial percentages of 13 14 borrowers were going to be at serious risk of 15 default and delinquency or inability to pay 16 their loans once forbearance ends. 17 And that ultimately justified his 18 decision about how to craft the limits within the program and the scope of relief to offer. 19 And I think that all of the states' arguments 20 about how that wasn't strictly necessary or that 21 2.2 maybe it doesn't have enough of a connection to 23 the pandemic are answered in full by the 24 Secretary's analysis here.

25 JUSTICE KAGAN: Thank you.

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1	CHIEF JUSTICE ROBERTS: Justice
2	Gorsuch?
3	JUSTICE GORSUCH: I I'd like to
4	follow up on Justice Kagan's question, General.
5	Under State Farm, one of the things
б	that the government must normally do is, in its
7	memoranda, explain not just the the benefits
8	of its proposed course of action but also
9	grapple with the costs or negative effects of
10	of a program that it proposes.
11	And your friends on the other side
12	argue that that's another deficiency in the
13	Secretary's memorandum, and I'd like to give you
14	the chance to respond to that.
15	GENERAL PRELOGAR: Yes, of of
16	course. So I want to say at the outset that my
17	friends are mistaken to suggest that the
18	Secretary didn't even consider costs here. The
19	Department extensively modeled the costs
20	associated with this program and submitted those
21	
22	JUSTICE GORSUCH: Oh, I I I
23	GENERAL PRELOGAR: cost estimates
24	to OMB.
25	JUSTICE GORSUCH: I'm I don't

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1 just mean the numbers --

2	GENERAL PRELOGAR: Yeah.
3	JUSTICE GORSUCH: but, generally,
4	the the negative effects to the economy, to
5	other persons, to people who don't have this
6	opportunity for debt relief. There are a
7	variety of factors that, under State Farm,
8	normally the government would have to consider,
9	and and your friends on the other other
10	side argue those are not present in this
11	memorandum.
12	GENERAL PRELOGAR: Well, I think that
13	those were were certainly part and parcel of
14	the Secretary's determination about how to
15	tailor this relief. The Secretary recognized
16	that the central purpose of the HEROES Act was
17	implicated here because there were going to be
18	millions and millions of student-loan borrowers
19	who were at serious risk of default and who were
20	in a worse position because of the pandemic.
21	But then he decided to tailor the plan
22	to look at that those particular risks and
23	decide on the scope of relief to offer those
24	borrowers. And, of course, the costs associated
25	with that are the flip side of providing HEROES

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1 Act relief in any circumstance. 2 There are always going to be the --3 the costs to the government of offering that benefit to borrowers, and it's in line --4 JUSTICE GORSUCH: Again, not -- not 5 6 just the costs to the government. I'm sorry to 7 interrupt. But --GENERAL PRELOGAR: Yeah. 8 9 JUSTICE GORSUCH: -- what I think they 10 argue that is missing is costs to other persons 11 in terms of fairness, for example, people who 12 have paid their loans, people who don't -- have -- have -- have -- have planned their lives 13 14 around not seeking loans and people who are not 15 eligible for loans in the first place and that a 16 half a trillion dollars is being diverted to one 17 group of favored persons over others. 18 I think that's the nature of their 19 argument, in addition to, as you point out, the 20 cost to the fisc. 21 GENERAL PRELOGAR: The --2.2 JUSTICE GORSUCH: And I didn't see 23 anything in the memorandum that dealt with those kinds of questions, and if there is something, 24 25 I'd be appreciative if you could point me to it.

1	GENERAL PRELOGAR: No, there's not,
2	but that's because I think that those kinds of
3	arguments are inconsistent with the statutory
4	scheme that Congress set up here. Congress
5	already made the judgment that in the context of
6	a national emergency, you should be able to
7	provide borrowers with this kind of relief to
8	serve this purpose.
9	And so I think, for for the states
10	to suggest that it's incumbent on the Secretary
11	to say, actually, I'm not going to do that, even
12	though Congress wanted to me to ensure that
13	borrowers won't be left worse off, is is just
14	at war with the whole statutory purpose.
15	JUSTICE GORSUCH: I appreciate that.
16	Congress has given the executive
17	branch a lot of emergency authority, and I I
18	think your argument rests on that. But it also
19	requires generally the President to specify the
20	provisions of law under which he proposes that
21	he or others will act. That's 50 U.S.C. 1631, I
22	think, my notes are right.
23	And I'm just wondering, did that
24	happen here?
25	GENERAL PRELOGAR: Yes, it did. So

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the COVID-19 emergency, the specific provisions 1 2 that he invoked were part of the Social Security 3 Act and HHS's authority to target the spread of disease. I can't give you the exact citation 4 here, but that determination was made. 5 JUSTICE GORSUCH: Did -- did he 6 7 indicate anything under the HEROES Act or the Department of Education that's acting in this 8 9 case? 10 GENERAL PRELOGAR: No, but I think 11 that it's clear that the HEROES Act is linked to 12 the declaration of the national emergency, not 13 the other way around. 14 JUSTICE GORSUCH: Okay. And then, 15 finally, on standing, in -- in the New York 16 census case, the majority of this Court held 17 that the failure to count an individual, 18 potential failure to count an individual, 19 undercount the census, would have potential effects to the State of New York in the terms --20 in terms of the benefits it might later receive. 21 2.2 That kind of knock-on effect was sufficient to 23 constitute standing in that case. 24 And I'd just like to get your thoughts 25 on how you'd have us distinguish that.

1 GENERAL PRELOGAR: Sure. So, in that 2 case, of course, the Court was looking at a census count that was going to plug in directly 3 to the amount of federal funding that the state 4 would receive. And I think that, you know, in 5 6 the kind of terminology that we've been using 7 and thinking about this issue with, that was a direct effect, that, effectively, the action 8 9 would, by virtue of determining federal funding for the state in that way, operate directly on 10 11 the state or -- or at least determine its rights 12 and interests. 13 And, here, there's not the same kind 14 of direct effect. Of course, as I've already 15 mentioned to Justice Sotomayor, we think that 16 this is a self-inflicted injury to begin with, 17 so the Court doesn't need to get into those issues. But, even if it does, here, the kind of 18 19 downstream effects on tax revenues bring this case within Florida versus Mellon as the closest 20 21 analogue and not Department of Commerce. 2.2 JUSTICE GORSUCH: Thank you. 23 CHIEF JUSTICE ROBERTS: Justice 24 Kavanauqh? 25 JUSTICE KAVANAUGH: I'd like to pick

1 up on the Chief Justice's and Justice Thomas's questions on statutory text and then our precedent.

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I think you said earlier what was 4 Congress in 2003 supposed to do in terms of 5 advance authorization. But, of course, they 6 7 could have in 2003 referred to loan cancellation and loan forgiveness, and those are not in the 8 9 statutory text.

10 So then that leaves us with a 11 situation that I think we've seen before, an old 12 statute with a general language, Congress 13 specifically considering the present issue 14 repeatedly but not, as you acknowledge, passing 15 legislation that would authorize the specific 16 act -- and then, in the wake of Congress not 17 authorizing the action, the executive, 18 nonetheless, doing a massive new program. 19 And that seems problematic under --20 going back to the Benzene case, the Brown & 21 Williamson, UARG. You know the line of cases. 2.2 So why does this case not fit into 23 that formula that we've seen before in prior 24 cases? 25 GENERAL PRELOGAR: So there was a lot

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1 packed in there, and I want to be careful and 2 try to respond to each of the considerations you raise because I think, actually, down the line, 3 this case is a far cry from those prior 4 situations the Court has confronted. 5 You mentioned the idea of taking an 6 7 old statute with, you know, general language or cryptic language and pressing it into service. 8 I don't think that that is a fair 9 10 characterization of this use of the HEROES Act. 11 The whole point of this statute, its central 12 mission and function, is to ensure that in the face of a national emergency that is causing 13 14 financial harm to borrowers, the Secretary can 15 do something. He can alter the student loan 16 program to ensure that they're not worse off. 17 So there's not the same mismatch here 18 of taking an old statute and dusting it off and 19 deploying it in a context where Congress could never have imagined it would be used before. 20 21 Instead, this is a perfect fit with the problem 2.2 that the Secretary confronted. 23 You also suggested that there would 24 have been a clearer way for Congress to 25 formulate this language, that there's no express

reference here. But I think that that doesn't carry a lot of significance in this context because, of course, Congress didn't enumerate any of the possible forms of relief under the HEROES Act. It says that the Secretary can consider waiving or modifying all Title IV provisions.

And, certainly, if there was an 8 9 enumerated list, you might be able to draw inferences from that, but, here, I think the 10 11 opposite inference applies, that Congress wanted 12 to cover the waterfront and ensure in advance that the Secretary had the tools depending on 13 whatever situation he confronted to make sure 14 15 that student-loan borrowers weren't going to be 16 left worse off.

You mentioned the congressional inaction. And I think that it -- it's true that I acknowledge that that demonstrates that this is a politically significant issue. We have -we have never contested that point. But there again, as I mentioned to the Chief Justice, we have inaction on both sides.

24 Congress has not amended the HEROES25 Act and instead enacted the provision of the

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1 American Rescue Plan that anticipated this --2 this program in particular and facilitated it by ensuring that those discharges would not be 3 subject to federal taxation. 4 And then the other thing I would add, 5 6 you did -- you did not put this in, but if 7 you'll indulge me --JUSTICE KAVANAUGH: Yeah. 8 GENERAL PRELOGAR: -- this is not a 9 situation where the Secretary is acting outside 10 11 the heartland of his authority. In some of the 12 cases that you've mentioned, you have, you know, concerns that the -- the agency is acting 13 outside the core of its domain, the CDC 14 15 inserting itself in the landlord/tenant 16 relationship, for example. 17 But that's not what we have here. 18 This is the student loan program. That falls 19 within the wheelhouse of the Secretary of 20 Education. He exercises comprehensive authority These are federal loans 21 over that program. 2.2 between the federal government and student-loan borrowers. So this is a situation where the 23 24 Secretary is really acting within the core of 25 his expertise and his authority.

1 JUSTICE KAVANAUGH: Something else you 2 said earlier was that we shouldn't necessarily 3 apply that line of precedent in this situation because this is not a regulatory program but a 4 -- but a benefits program. 5 But I want to push back a little bit 6 7 on that and get your response, which is, in something like this, there are going to be 8 winners and losers, and that raises similar 9 concerns about individual rights, individual 10 11 liberty that are present arguably in regulatory 12 programs as well. 13 And why, therefore, wouldn't the same 14 line of precedents that we've applied in the 15 regulatory context apply also in the benefits 16 context to consider whether we need specific 17 express congressional authorization? GENERAL PRELOGAR: Well, I think that 18 19 at the very least, to the extent that there are those considerations that you referenced, 20 21 they're not direct in the same way that 2.2 expansive regulatory authority is. You know, when you've got a government 23 program that is -- as -- as the Court has said 24 25 before, constitutes extravagant regulatory

authority, that I -- takes an identifiable group
 of individuals or entities and directly imposes
 burdens or costs on them.

And I think there is a distinction with the benefit context when it comes to how Congress is likely to legislate and its general comfort level with broadly empowering the executive to provide benefits to Americans, especially in the context of an emergency situation.

But even if you didn't think that that benefits and regulation distinction should carry the day and be a bright-line rule, at the very least, I think it should factor into the analysis when applying interpretive principles here and in looking at what Congress is -- is doing.

18 And as I mentioned before and -- and would love to finish here, you know, think about 19 20 what Congress is supposed to do. There you are, 21 Congress in 2003, thinking we can't predict the 2.2 future, we don't know exactly what national 23 emergencies will happen, but we -- what we want 24 to ensure is that we are empowering the federal 25 government to take care of student-loan

borrowers and not leave them at substantial risk
 of being worse off with their ability to repay
 their loans.

And the language that Congress enacted
here is a perfect fit to accomplish that goal.
And it's hard to see what Congress could have
done differently.

8 JUSTICE KAVANAUGH: Last question. 9 Broadening it out and thinking about, you 10 mentioned emergencies, the history of this Court 11 with respect to executive assertions of 12 emergencies.

13 Some of the biggest mistakes in the 14 Court's history were deferring to assertions of 15 executive emergency power. Some of the finest 16 moments in the Court's history were pushing back 17 against presidential assertions of emergency 18 power. And that's continued not just in the 19 Korean War but post-9/11 in some of the cases 20 there.

21 So, given that history, there's a 22 concern, I suppose, that I feel at least about 23 how to handle an emergency assertion. You know, 24 some of the amicus briefs, one of them from a 25 professor says this is a case study in abuse of

executive emergency powers. I'm not saying I
 agree with that. I'm just saying that's the
 assertion.

And I want to get your assessment -this is a big-picture question, so I'll give you a little time -- of how we should think about our role in assertion of presidential emergency power given the Court's history.

GENERAL PRELOGAR: Well, I think, 9 in -- in light of that history in all of the 10 11 contexts that you identified, it's aware the 12 distinction between regulation and benefits really makes a difference. And it actually 13 14 tracks some of the concerns that have been 15 raised about standing and the Chief Justice's 16 questions about who could actually sue on this 17 plan and what role there is for the judiciary.

18 To the extent that there is a limited 19 category of people who have the actual kind of cognizable Article III harm that would permit 20 standing in a case like this one, I think that 21 2.2 just shows that that's because, when the 23 government is administering a benefits program, there are fewer reasons to be concerned that it 24 25 is going to have the kind of profound burdens

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1 or -- or regulatory effects that might prompt a 2 note of caution in other contexts involving exercises of emergency powers. 3 Instead, I think that the 4 considerations all line up on the other side 5 6 when you think about an emergency situation. Ιt 7 is logical for Congress, in -- in confronting that possibility, to think we want to make sure 8 9 that without delay the executive branch can take care of Americans and can get them essential 10 11 benefits. 12 It did so here with language that has many other limitations, so we are not claiming 13 14 just limitless authority for the federal 15 government to do what it wants in an emergency. 16 The HEROES Act limits the 17 circumstances that can trigger the authority. It says who you can help. It says how you can 18 19 help them. And it enumerates the purposes that the aid has to serve. 20 21 So, in all of those ways, Congress can find that authority. But, in a circumstance 2.2 23 like this one, where the Secretary has made the findings that without this critical relief for 24 25 debtors we are going to have a wave of default

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1 across the country with all of the negative 2 consequences that has for borrowers, I think it is precisely the type of context where the 3 executive should be able to implement those 4 5 emergency powers. 6 JUSTICE KAVANAUGH: Thank you very 7 much. CHIEF JUSTICE ROBERTS: Justice 8 9 Barrett? 10 JUSTICE BARRETT: General, my first 11 question is clarifying because I think I may 12 have misunderstood. You said at the start of your argument that the Secretary both waived and 13 modified. 14 15 I had understood that the Secretary 16 only relied on the modification in the Federal 17 Register at the relevant cites at 87 Federal 18 Register 61512 and 61514. 19 Is it in those same -- did I just miss 20 in there, did he also specifically say waive? 21 GENERAL PRELOGAR: So I -- I 2.2 understand where your confusion comes from --23 JUSTICE BARRETT: Yes. 24 GENERAL PRELOGAR: -- because, at 25 times in the Federal Register, he spoke of

1 modifications and then, if you read down in the 2 next paragraph, he said these waivers will. So 3 I think he was treating these as both waivers and modifications. 4 And the relevant decision memo 5 specifically says, I hereby issue waivers and 6 7 modifications of the relevant provisions of Title IV. That's at the cite I gave earlier at 8 JA 261. So I would look at that as well to 9 10 understand what the Secretary was doing. 11 JUSTICE BARRETT: Okay. And to be 12 clear, and I think maybe some of the confusion is waivers. I quess, when I saw that in the 13 14 language, I thought he was talking -- using 15 waiver as a synonym for cancellation there with 16 respect to the underlying debt, the waiver of 17 the obligation to pay back the principal. 18 And just to be clear, waiver in the 19 statute refers to waiving the statutory and regulatory provisions, not waiving the 20 21 obligation to repay? 2.2 GENERAL PRELOGAR: That's correct. So 23 the -- if you kind of trace through the specific 24 provisions that he invoked, they are statutory 25 and regulatory provisions and they establish the

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1 terms of the student loan program and then also 2 deal with discharge and cancellation authority. 3 And he said that he was issuing waivers and modifications of -- of all of those 4 provisions, and I think the right way to 5 6 conceptualize this is that he was waiving the 7 elements of the discharge and cancellation provisions that are inapplicable in this program 8 9 that would limit eligibility to other contexts 10 and then modifying the provisions to bring it in 11 line with this program and the -- and the 12 student-loan borrowers who are eligible for 13 relief. 14 JUSTICE BARRETT: So kind of like, if 15 you think of it as red penciling, both deleting 16 and then adding back in, waiving and then 17 putting his own requirements in? 18 GENERAL PRELOGAR: That's right. And 19 the states have suggested there was something 20 improper about adding the requirements in, but 21 the HEROES Act directs him to do this. That 2.2 subsection (b)(2) specifically says he has to 23 publish the terms and conditions for the loan 24 program that are going to apply in lieu of the 25 waived and modified provision.

1 So there's nothing improper about the 2 Secretary delineating how those waivers and 3 modifications were going to operate. JUSTICE BARRETT: Okay. Next question 4 is also a clarification because I want to be 5 6 sure I understand your position on Lebron and 7 the overlap potentially between when we're 8 thinking about are you acting as an arm of the 9 government for purposes of say, like in the 10 Amtrak sense, are you bound by the First 11 Amendment, and are -- is MOHELA part of the 12 government of Missouri for purposes of standing. So could MOHELA, say, deny loans to 13 14 people on the basis of their race or their 15 religion? Would the First Amendment bind 16 MOHELA? 17 GENERAL PRELOGAR: I think that MOHELA 18 likely would qualify as a state actor under the 19 Lebron test, but I don't think that the Lebron 20 test should in any way be controlling for 21 Article III standing purposes. JUSTICE BARRETT: Well, why would that 2.2 23 be? How can they be part of the government for purposes of the state action doctrine but then 24 25 not for purposes of standing? Either they are

1 or they are not part of the government of 2 Missouri, right? 3 GENERAL PRELOGAR: So we're certainly not disputing that they could be, that they're a 4 public instrumentality, that they have 5 governmental functions, and that's the kind of 6 7 inquiry the Court would engage in to determine whether they're brought within the state action 8 doctrine. 9 10 But one way to think about this is 11 that the Court, in trying to kind of analyze 12 who's a state actor, has made clear that it would be inappropriate for a state to be able to 13 14 separately incorporate an instrumentality, for 15 example, and that way evade the strictures of 16 the Constitution. There's kind of a good 17 equitable reason to ensure that states can't 18 thereby unbind themselves from the Bill of 19 Rights with respect to fundamental rights of 20 citizens. 21 Here, I think all of the equitable 2.2 considerations line up in precisely the opposite direction. We have a situation here where 23 Missouri has benefited from the corporate 24 25 separateness. It's ensured that it's not going

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1 to be responsible for MOHELA's debts. And to 2 now allow it to come in and blur that line and say, actually, you should just treat it and this 3 separate corporation as one and the same would 4 actually produce the kind of inequity that the 5 6 state action doctrine is guarding against. 7 JUSTICE BARRETT: So two different buckets, three if you throw in sovereign 8 9 immunity too? You would say one test is for purposes of state action, another test for 10 11 purposes of sovereign immunity, and another test 12 for purposes of standing? 13 GENERAL PRELOGAR: That's right. And 14 for sovereign immunity, I just want to be clear 15 that we don't think MOHELA actually qualifies as 16 an arm of the state for sovereign immunity 17 purposes because, there, one of the critical 18 factors is whether a lawsuit against the 19 instrumentality can get at the state treasury. 20 And, here, the financial separation makes clear 21 that there is a strict wall and that Missouri's 2.2 not going to be responsible for MOHELA's debts. 23 Lower courts have gone both directions on this, but we think that under this Court's 24 25 precedent, MOHELA wouldn't qualify as an arm of

the state. Even if it did, though, yes, we
 think that there is a different inquiry under
 Article III.

JUSTICE BARRETT: Right. Okay. And now I just want to return to Justice Kagan's questions about whether we think about these as statutory arguments or arbitrary and capricious arguments, some of these arguments about are you leaving them worse off or better off.

10 Specifically, I want to focus on the causation.

11 It seems to me that the government's 12 position must be that the HEROES Act permits but-for causation and it doesn't require 13 14 proximate cause because the Secretary's memo 15 also refers to things like Russia's invasion of 16 Ukraine and, you know, inflation and other 17 things that would -- well, I mean, the invasion 18 of Ukraine has nothing to do with COVID, but the 19 other things that would have a more attenuated 20 relationship to COVID.

So is that your position, it would be
a but-for?
GENERAL PRELOGAR: Yes, that is our

24 position. We think that it should be but-for 25 causation. And the states were challenging that

below. They haven't actually revived those arguments here, and I don't understand them to be -- to be urging a different standard, or at least they haven't made that a central aspect of their arguments in the Court.

JUSTICE BARRETT: But would that bear 6 7 on the question of whether this is a statutory interpretation question or not, whether this is 8 9 within the Secretary's authority? I mean, below the government took the position too that even 10 11 in 10 years from now it could forgive loans 12 based on COVID if effects were lingering, right? GENERAL PRELOGAR: No. The district 13 14 court completely misunderstood that colloquy at 15 oral argument. What government counsel said in 16 that oral argument is, if the national emergency 17 is ongoing, if we are still in 10 years in the 18 midst of a raging COVID pandemic and it's 19 producing all of those same harms, he said it would be hard to fathom. And, of course, we 20 know that we are actually as a nation now 21 2.2 working to recover from the pandemic. But, in 23 the counterfactual world, as he understood the 24 hypothetical, he said the HEROES Act authority 25 would continue to apply.

1	We are not suggesting that you could
2	have that kind of temporal attenuation from a
3	national emergency and say that, you know,
4	ending today and going forward 10 years from
5	now, you could point back to COVID and in this
6	time period as a basis for HEROES Act relief.
7	But, of course, we don't have anything
8	like that. The Secretary acted now in the midst
9	of the pandemic and in in recognition that
10	it's time for the forbearance policy to end, but
11	that is going to leave huge numbers of borrowers
12	unable to pay their loans.
13	JUSTICE BARRETT: That's very helpful.
14	Thank you.
15	CHIEF JUSTICE ROBERTS: Justice
16	Jackson?
17	JUSTICE JACKSON: Yes. I have two
18	questions, one concrete and one big picture.
19	The concrete question comes from a
20	a statement that you make in your reply brief
21	about MOHELA standing to earn offsetting fees.
22	Can you spell out what those off by and by
23	that, I mean offsetting fees from the discharges
24	so that we aren't even really sure, you know,
25	what the net loss would be.

1 Can you spell out a little bit more 2 about those? 3 GENERAL PRELOGAR: Yes. So, under the Department's contracts with MOHELA, MOHELA 4 receives fees for discharging accounts. And we 5 6 were making the point that, here, Missouri 7 hasn't come forward with any allegations that MOHELA will actually, sum total, suffer 8 9 financial injury under this plan. 10 And this is all just in service of 11 making the -- the broader point that any 12 financial effects downstream on the state here 13 are attenuated and speculative. 14 JUSTICE JACKSON: So we don't know 15 really what the ultimate loss would be to 16 MOHELA, even if we believed that MOHELA is part 17 of the state? 18 GENERAL PRELOGAR: That's right. The 19 states haven't offered any evidence in that regard to substantiate their assertion of 20 21 standing. 2.2 JUSTICE JACKSON: All right. And --23 and I also have a big picture question about 24 standing. You've been arguing that standing 25 here would be a reach if we were to, for

1 example, find that, you know, MOHELA somehow --2 losses to it count for the purposes of the state 3 based on established standing principles. And what I've been mulling and 4 wondering is whether the same concerns about the 5 political significance of this case that the 6 7 Chief pointed to could be a reason for us to hold the line in terms of thinking about our 8 9 standing doctrine and whether or not we should expand it in this area. 10 11 I understood that the standing bar 12 really, you know, as applied in a case like 13 this, would allow the political branches to hash 14 this out without interference, you know, from a 15 torrent of lawsuits brought by states and 16 entities and individuals who don't have a real 17 personal stake in the outcome. And, in some 18 ways, it's not unlike a case we heard last week 19 where people were very concerned about, you 20 know, lawsuits against tech companies and how 21 they might hobble these companies if we allowed 2.2 them to go forward. 23 And I quess I have that same worry about the operation of the federal government 24 25 and -- and its ability to govern. If we look at

1 our standing doctrine in cases like this and we 2 find that, you know, even the most minor state interest, a dormant fund that hasn't been, you 3 know, funded or used by the state in 15 years, 4 if that can be the basis for standing, I -- I 5 6 guess I'm concerned that we're going to have a 7 problem in terms of -- of -- of the federal 8 government's ability to operate. 9 So my question is: Is this a 10 legitimate concern and should we think -- be 11 thinking in cases like this about that type of 12 concern as we ponder whether to expand our standing doctrines? 13 14 GENERAL PRELOGAR: T think it is a 15 legitimate concern. The Court has never 16 suggested before that it should alter ordinary 17 Article III principles and allow plaintiffs to 18 sue based on concerns about the significance of the action. 19 20 And, in fact, the Court has said again and again that the fact that no one might have 21 2.2 standing to sue about an action doesn't mean 23 that you should alter Article III and allow a 24 suit to proceed, because the judiciary doesn't 25 sit as a roving commission to rule on the

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1 legality of either Congress's enactments or the executive's implementation of those enactments. 2 3 But I think it would be particularly anomalous in this case to accept any of the 4 states' attenuated theories of standing because 5 there isn't even a situation where there's no 6 7 other identifiable plaintiff or possibility to have the -- the courts weigh in on these issues. 8 The problem here is that the states 9 aren't the proper plaintiff to bring this suit. 10 11 JUSTICE JACKSON: Thank you. 12 CHIEF JUSTICE ROBERTS: Thank you, 13 General. 14 General Campbell. 15 ORAL ARGUMENT OF JAMES A. CAMPBELL 16 ON BEHALF OF THE RESPONDENTS 17 MR. CAMPBELL: Mr. Chief Justice, and 18 may it please the Court: 19 The Secretary is attempting to bypass 20 Congress on one of today's most debated policy 21 questions, student loan forgiveness. After many 2.2 failed legislative efforts, the Secretary seeks 23 to write off nearly a half trillion dollars in loans for over 40 million borrowers. No statute 24 25 authorizes this sweeping action.

1 On standing, Missouri has the right to 2 vindicate the harms to MOHELA. MOHELA is a state-created and state-controlled public 3 instrumentality that performs the essential 4 public function of providing financial aid to 5 Missouri students. 6 7 The Secretary's program threatens to cut MOHELA's operating revenue by 40 percent. 8 9 That will directly undermine MOHELA's ability to further its critical public purposes, and the 10 11 state has standing to assert those harms. 12 On the merits, this is a major questions case. A nearly half trillion dollar 13 14 debt cancellation program is undoubtedly a 15 matter of vast economic and political 16 significance. It is also unprecedented. Never 17 before has the HEROES Act been used to forgive a 18 single loan. 19 In addition, the Secretary here 20 asserts a breathtaking power, to do anything that he thinks might reduce the risk of 21 2.2 borrowers defaulting, even years after a 23 national emergency arises. He needs clear congressional authorization for such power, but 24 25 he doesn't have it here because the HEROES Act

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1 does not authorize this program. 2 The Act permits the Secretary to waive or modify existing provisions because of a 3 national emergency. It does not permit him to 4 rewrite existing provisions to create a new 5 6 program that covers 95 percent of borrowers and 7 applies to them regardless of how the pandemic affected them. 8 9 This Court should declare this program unlawful, and I welcome the Court's questions. 10 11 JUSTICE THOMAS: General, I think, at 12 the beginning, you should comment some on the relationship between MOHELA and the State of 13 14 Missouri, primarily, the -- as you've heard, the 15 effect of this forgiveness program on MOHELA 16 and, by extension, on the State of Missouri for 17 the -- at least to establish standing. 18 MR. CAMPBELL: Sure, Justice Thomas. 19 To start with the effect on MOHELA, so MOHELA approximately -- as of last fiscal year, 20 21 77 percent of its operating revenue came from 2.2 servicing direct loans. 23 The Secretary tells us that nearly half of all loans -- all borrowers' loans will 24 25 be discharged under this program. So it stands

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1 to reason that about half of MOHELA's operating revenue from direct loans will be cut, and, 2 overall, that amounts to about 40 percent of its 3 operating revenue. 4 Now Justice Jackson asked the question 5 about whether there are offsetting fees. It --6 7 it -- it's very hard to believe, and the government doesn't offer any details in its 8 9 reply brief, that a one-time payment of fees for 10 discharging loans will offset the ongoing fee 11 that MOHELA earns from servicing those loans. 12 So --13 JUSTICE JACKSON: But isn't that your 14 burden? I mean, I -- I understood the 15 government to say that you are bringing this 16 lawsuit and you have to establish standing. 17 And so, to the extent we're trying to 18 assess whether or not MOHELA is actually going 19 to be injured, I -- I don't think you can answer 20 but the government hasn't said something about 21 the fees. 2.2 MR. CAMPBELL: Well, the -- my point 23 in bringing that up, Justice Jackson, is that 24 the government hasn't -- hasn't said anything 25 about the fees in responding to what we've

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1 already substantiated through the documents 2 we've put in. 3 We have put in documents indicating that this will amount to approximately a 4 40 percent loss of operating revenue for MOHELA. 5 6 And, in response, the government referenced 7 potential offsetting costs, which they don't quantify, and they don't show that that would 8 9 significantly reduce the injury that we're 10 anticipating. Now --11 JUSTICE KAGAN: MOHELA isn't here, 12 General Crawford, is that correct? 13 MR. CAMPBELL: MOHELA is not here, but 14 15 JUSTICE KAGAN: It has the ability --16 MR. CAMPBELL: -- its interests are 17 here. 18 JUSTICE KAGAN: -- to sue and be sued. 19 It's been set set up as an independent corporate 20 entity with the ability to bring suits on its 21 own. Usually, we don't allow one person to step 2.2 into another's shoes and say I think that that 23 person suffered a harm, even if the harm is very great. We -- we -- we leave it to the 24 25 person, him or her or itself, to make that

1 judgment. 2 Now, here, the state has derived very 3 substantial benefits from setting up MOHELA as an independent body with financial distance from 4 the state and sue and be sued authority. So why 5 isn't MOHELA responsible for deciding whether to 6 7 bring this suit? MR. CAMPBELL: We don't deny that 8 MOHELA has -- could file a suit like that, but 9 the state's interest is directly implicated 10 11 here, so it is allowed to assert the interests 12 it has in MOHELA directly. JUSTICE KAGAN: Well, I quess -- I 13 14 mean, there are third parties all the time who 15 have an interest in, gosh, I -- I wish that 16 party over there would bring a suit because I 17 have some relationship with that third party and 18 I would like it very much if that third party 19 represented its own interests better in my view. But we don't do that. We -- we -- we 20 -- we don't allow that kind of interference with 21 2.2 the decision of the entity involved to decide 23 whether the harm is of the kind that -- that 24 they want to sue for. 25 MR. CAMPBELL: Well, the government is

1 different. This Court has recognized that in 2 cases like Cherry Cotton Mills and Erickson, 3 where it's allowed the federal government to assert the interests of federally created 4 5 corporations. JUSTICE KAGAN: I -- I -- I believe 6 7 that in those cases the federal government had an independent interest. So the federal 8 9 government was not saying, oh, we just have an 10 entitlement to stand in the shoes of the -- the 11 federal corporation. 12 MR. CAMPBELL: Two -- two responses. 13 The first response is I don't think that's the 14 best reading, certainly, of Cherry Cotton Mills. 15 Cherry Cotton Mills, the Court discussed a 16 number of facts and then at the end said the 17 reason why the government can assert the federal 18 corporation's interest is because it is 19 performing purely governmental purposes. 20 That's exactly what's happening here. 21 The State of Missouri has declared that 2.2 everything MOHELA does is the performance of an 23 essential public function. So that's the first 24 response. 25 The second response is, even if the

1 state does need an interest, the state has an interest here. I'd identify at least three. 2 The first interest is that the state 3 created MOHELA to provide financial aid for 4 Missouri students and that's what it does. 5 The second interest is in the Lewis and Clark 6 7 Discovery Fund. And the third interest is in the regular contributions that MOHELA makes to 8 9 the state's scholarship programs. 10 Now there was some discussion early --11 earlier about the Lewis and Clark Fund and some 12 suggestion that it's a dormant fund that no longer exists. I -- I think it's clear -- I --13 I think we need to clarify what exactly is the 14 15 status. 16 So, yes, it's true that there hasn't 17 been a contribution in the last 15 years, but 18 that's because the state has negotiated with 19 MOHELA for MOHELA, in lieu of making the Lewis and Clark contributions, to contribute over \$65 20 21 million directly to the state's scholarship 2.2 program. And in exchange for those agreements, the -- the state has allowed the Lewis and Clark 23 deadline to be extended. 24 25 So, at this point, the question is:

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1 What's going to happen at the next deadline? 2 The next deadline is coming up next year. And 3 if -- the question before this Court is whether cutting MOHELA's operating revenue by 40 percent 4 will increase the risk that it either won't make 5 the next contribution to the Lewis and Clark 6 7 Fund or it won't make the next payment to the scholarship fund in lieu of the Lewis and Clark 8 9 Fund. 10 JUSTICE BARRETT: That's --11 JUSTICE SOTOMAYOR: That seems --12 JUSTICE BARRETT: -- what's most 13 important to you now is the Lewis and Clark 14 Fund? 15 MR. CAMPBELL: No, it's not, Your 16 Honor. What's most important to us is that the 17 state can speak directly for MOHELA, but I was 18 responding to the question about the interest 19 that --20 JUSTICE BARRETT: I quess I understood 21 the interests to be, if MOHELA was really 22 Missouri, the loss of the servicing fees. Am I 23 misunderstanding that? 24 MR. CAMPBELL: No, you're not --25 JUSTICE BARRETT: You have two

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1 different arguments, right? 2 MR. CAMPBELL: That's correct. 3 JUSTICE BARRETT: You have that argument and then you have this argument about 4 5 the Lewis and Clark Fund. 6 MR. CAMPBELL: That -- that's correct. 7 My first response to Justice Kagan, I was trying to focus on the first theory, and then the 8 9 second response, where I got into the Lewis and 10 Clark Fund, I was responding under the second 11 theory. 12 JUSTICE BARRETT: All right. So let's 13 JUSTICE SOTOMAYOR: On the first 14 15 theory, it's hard to imagine how the State of 16 Missouri can claim an injury, putting the Lewis 17 and Clark and the scholarship issues aside, when 18 it's not responsible for the debts of MOHELA, 19 it's not responsible for the contracts it enters 20 into, it doesn't own the assets of that 21 corporation. 2.2 There is on paper no financial 23 obligation by the state or loss to the state by 24 anything MOHELA does or anything it gets. 25 I'm -- I'm putting aside Lewis and Clark. It's

1 hard -- it's just very hard for me to say that 2 there is an interest sufficient for the state to speak on behalf of an entity who has the right 3 to sue or be sued. 4 MR. CAMPBELL: When this Court in 5 6 Lebron and when the Missouri Supreme Court in 7 Casualty Reciprocal Exchange consider whether an 8 entity is a part of the government, it looks at a far more --9 10 JUSTICE SOTOMAYOR: But those are --11 MR. CAMPBELL: -- broad analysis. 12 JUSTICE SOTOMAYOR: -- different -those are different issues. 13 Standing has to do 14 with injury. It doesn't have to do with are you 15 evading the Constitution, are you trying to 16 delegate public functions. Those are all -- are 17 you immune because you are acting in a way that 18 only a state can. Those are very, very 19 different questions. This is the question of standing, 20 21 which relies on injury in fact. How can you 2.2 have -- I'm putting Lewis and Clark aside -- how 23 can you have injury in fact if you have immunize -- you, the state, have immunized 24 25 yourself from any liability or any injury that

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1 MOHELA can experience? 2 MR. CAMPBELL: Because the state 3 speaks for MOHELA. The state represents 4 MOHELA's interests. JUSTICE SOTOMAYOR: Well, it -- it 5 6 decided to give this entity the right to sue and 7 be sued. So it -- it chose to say I'm not 8 injured in fact. Speaking is not the same as 9 injury. 10 MR. CAMPBELL: Your -- Your Honor, the 11 -- the federally created corporations in Cherry 12 Cotton Mills and Erickson also had the right to sue and be sued, but that didn't stop the 13 14 federal government from asserting their 15 interests. 16 In addition, if we're focusing just on 17 the right to sue or be sued, the Secretary has 18 the right to sue or be sued. That doesn't 19 disable the Department of Justice for -- from 20 speaking for their interests. 21 JUSTICE SOTOMAYOR: Now let's go back to Lewis and Clark a moment. The arrangement 2.2 23 that MOHELA and the state engaged in predated 24 the pandemic, correct? It started in 2009, 25 2010?

1 MR. CAMPBELL: The -- the Lewis and 2 Clark Fund started --3 JUSTICE SOTOMAYOR: Yes. The --MR. CAMPBELL: -- in --4 JUSTICE SOTOMAYOR: -- suspension of 5 MOHELA's contributions to it, correct? 6 7 MR. CAMPBELL: Started in 2008. JUSTICE SOTOMAYOR: Isn't it a series 8 of speculations that in 2004, absent this 9 program, that the state won't continue that 10 11 arrangement it currently has and continue to 12 defer obligations? 13 MOHELA said that it -- MOHELA has 14 already said publicly that it doesn't think that 15 contributions to the Lewis and Clark Fund are 16 within its wheelbarrow obligations. That was 17 one of the reasons this arrangement has been 18 made, correct? 19 MR. CAMPBELL: Well, MOHELA recognizes that it still owes \$105 million to the Lewis and 20 21 Clark Fund. JUSTICE SOTOMAYOR: Well, it's -- in 2.2 23 fact, I understand it's not writing it off as an 24 obligation anymore. 25 MR. CAMPBELL: But it still --

1	JUSTICE SOTOMAYOR: It doesn't carry
2	it on its books anymore.
3	MR. CAMPBELL: Your Honor, if you look
4	at page 20 through 21 of the financial statement
5	we cite in our brief, MOHELA acknowledges that
6	it still owes \$105 million to that fund.
7	And the point that I was making
8	earlier is that the fund contributions to the
9	fund and contributions to the scholarship
10	program are different sides of the same coin.
11	The state has been constantly throughout the
12	entire time from 2007 until now, has been
13	constantly receiving payments from MOHELA, and
14	those payments have taken the form sometime of
15	Lewis and Clark, but more more often
16	recently, it has taken the form of a scholarship
17	contribution.
18	JUSTICE JACKSON: Have you expressed
19	any plans to actually use the fund to pursue
20	projects in the foreseeable future, and, if so,
21	what projects?
22	MR. CAMPBELL: At this point, the
23	projects have been put on pause.
24	JUSTICE JACKSON: I see. So we're
25	talking about a fund that hasn't been

contributed into because the state has waived the obligation to do so for at least a temporary period of time, and then, even if the funds were to go into this particular fund, you don't have a set of plans that you are planning to pursue with them?

7 MR. CAMPBELL: But all that requires 8 is the legislature and the governor to move 9 forward once the money -- once the fund has been 10 funded.

11 JUSTICE JACKSON: Yes. No, I 12 understand, but we're trying to figure out the 13 degree to which the state is injured by the 14 money not being there. And so, on the one hand, 15 you know, I hear Justice Sotomayor exploring 16 with you the fact that the state has allowed the 17 money not to be there in the recent past by 18 saying don't worry, you don't have to put it in 19 there, MOHELA. So that seems to be a sort of 20 strike against the state now saying we're so injured because the money isn't there. 21 2.2 And then we have on top of that your

23 representation here that the state isn't even 24 actively seeking or interested in the money 25 insofar as it's decided that it's going to

1	engage in some sort of project that we need the
2	money for.
3	So I'm just wondering about the
4	speculative, attenuated nature of the harm that
5	you're alleging on the basis of there not being
6	or or of the risk that we won't have
7	extra money put into this fund.
8	MR. CAMPBELL: Your Honor, I I
9	disagree with with what you said, that the
10	state has waived the obligation under the fund.
11	What the state has done is it's engaged in a
12	quid pro quo discussion with MOHELA, and it has
13	said that in exchange for \$65 million in
14	payments to the scholarship fund, it has allowed
15	the the timeline to be extended. That's not
16	a waiver.
17	JUSTICE JACKSON: Yes, I apologize.
18	I'm just saying the state has not pressed MOHELA
19	to put money into the fund, right?
20	MR. CAMPBELL: Because it correct,
21	but because it has been receiving money in
22	another fund all along.
23	JUSTICE JACKSON: I I appreciate
24	that, but I guess I'm just still trying to
25	understand how you can look at that fund as the

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1 basis for the injury that you're claiming with 2 respect to this particular plan. 3 MR. CAMPBELL: Your Honor, because the 4 next due date for the fund is the -- a year from 5 now. 6 JUSTICE JACKSON: And you can't extend 7 it? MR. CAMPBELL: It can be extended, but 8 9 that would be in exchange for them giving another contribution to a scholarship fund, 10 11 which is further showing that there are further 12 financial contributions coming. 13 JUSTICE JACKSON: And there -- the --14 the plan is not totally ridding them of any 15 opportunity to make money, so they do have some 16 other income, yes? 17 MR. CAMPBELL: MOHELA? 18 JUSTICE JACKSON: Yes. 19 MR. CAMPBELL: Whether MOHELA has 20 other --21 JUSTICE JACKSON: Yes. 2.2 MR. CAMPBELL: Yes, MOHELA has other 23 _ _ 24 JUSTICE JACKSON: All right. So we 25 could believe that the income that MOHELA gets

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1 from its other sources of revenue could be used 2 to pay off in a year the -- the -- the amount 3 that the state says it requires in order to put off the obligation yet again, right? 4 MR. CAMPBELL: I -- I don't -- I don't 5 think -- well, here -- here's the key point in 6 7 response: What MOHELA says in the letter that the government filed as supplemental authority 8 9 with the Eighth Circuit is that they take all 10 available funds beyond their expenses and 11 reasonable reserves and they devote them to 12 student financial aid in Missouri. 13 So, if their operating revenues are 14 cut by 40 percent, we know what they do with the 15 money at the top, the excess money. They give 16 it to students attending school in Missouri. 17 So, if their operating revenues go down, that's 18 the first thing that's going to go. JUSTICE BARRETT: General, I'd like to 19 20 put aside the Lewis and Clark Fund for a minute, 21 and I want to return to the direct injury 2.2 argument, the MOHELA is an arm of the state 23 argument. 24 Justice Sotomayor was pointing out 25 statutorily MOHELA has the right to sue and be

1 sued, the state doesn't have responsibility for 2 its liabilities, and the state has disclaimed 3 any -- any claim to the assets. 4 Is that correct? MR. CAMPBELL: I would disagree with 5 6 the last point. I don't think --7 JUSTICE BARRETT: Okay. MR. CAMPBELL: -- the state has 8 9 disclaimed any interest in the assets. 10 JUSTICE BARRETT: So explain to me why 11 _ _ 12 MR. CAMPBELL: I --JUSTICE BARRETT: -- because, on the 13 14 one hand, you have -- you know, in -- in 15 Missouri Statute 173.420, you have -- the last 16 sentence says that nothing in these sections 17 "shall be construed to deprive the state and its governmental subdivisions of their respective 18 19 powers over assets of the authority." But then, in the next section, 425, it says, "[n]o asset 20 21 of the authority shall be considered to be part of the revenue of the state." 2.2 23 So which is it? I mean, because it would be hard to see how a win for the state 24 25 would benefit MOHELA or a win for MOHELA would

benefit the state if the assets are completely 1 2 separate. You don't get any money out of it, 3 putting aside Lewis and Clark because I'm not really interested in that. 4 MR. CAMPBELL: So, Your Honor, to --5 6 to go to the second provision you read, 425, it 7 says, "[n]o asset of the authority shall be considered to be part of the revenue of the 8 9 state" within the meaning of a specific state constitutional provision. 10 11 So I would then say --12 JUSTICE BARRETT: Okay. 13 MR. CAMPBELL: -- that's only for a 14 limited purpose. The prior provision that you 15 read, where the state has preserved its 16 authority over MOHELA's assets, shows that any 17 residual interest in MOHELA's assets belongs to 18 the state. 19 So we cited the Reciprocal Casualty Exchange case in our brief that shows that the 20 21 legislature could abolish an entity like MOHELA, 2.2 and if it did, the money would come back to the 23 state. So the state does have the ultimate 24 interest in the property of MOHELA. 25 JUSTICE BARRETT: If the state wanted

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1 money from MOHELA right now, if the state just 2 wanted to pull assets out, say, because the 3 state was going to make a decision to fund the Lewis and Clark Fund, does the state have the 4 authority to do that? 5 6 MR. CAMPBELL: Acting through the 7 legislature, it does. 8 JUSTICE BARRETT: Okay. 9 MR. CAMPBELL: Act -- acting -- and -and I think the Lewis and Clark Fund is actually 10 a great example of that. So the Lewis and Clark 11 12 Fund wasn't created until 26 years after MOHELA began its operations, and at that point, the 13 14 legislature came in and said, MOHELA, you have 15 to start giving this source of funding to the 16 state. So the legislature can come in at any 17 time and -- and request money. 18 JUSTICE BARRETT: Do you want to 19 address why MOHELA's not here? 20 MR. CAMPBELL: MOHELA is not here because the state's asserting its interests. 21 2.2 MOHELA doesn't need to be here because the state 23 has the authority to speak for them. And that 24 brings me to --25 JUSTICE BARRETT: Why didn't the state

1 just make MOHELA come then? If -- if MOHELA is 2 really an arm of the state and all of this would 3 be a lot easier -- I mean, the Solicitor General conceded that if MOHELA was here, MOHELA would 4 have standing. If MOHELA is an arm of the 5 6 state, why didn't you just strong-arm MOHELA and 7 say you've got to pursue this suit? 8 MR. CAMPBELL: Your Honor, that's a 9 question of state politics, but we believe as a matter of law that the state has the authority 10 11 to assert its interests. Under the factors in 12 Lebron, under the factors that the state --13 Missouri State Supreme Court recognized in 14 Casualty Reciprocal Exchange, if it's a 15 state-created and state-controlled entity that 16 performs government functions, the state can 17 speak for it regardless --18 JUSTICE KAGAN: Just -- just along the 19 same lines, I mean, it's true that you couldn't 20 even get documents from MOHELA without file --21 filing the state equivalent of a FOIA request. 2.2 MR. CAMPBELL: Your -- Your Honor, 23 that was the -- the mechanism by which we went 24 about acquiring the documents, but that just

25 further --

1 JUSTICE KAGAN: Well, that was the 2 mechanism. I think that if MOHELA was willing 3 to hand you over the documents, you wouldn't have filed a state FOIA request. 4 MR. CAMPBELL: Your Honor, I think 5 6 that further shows that MOHELA is a state 7 entity. They're subject to public records laws. They're subject to open meeting laws. They are 8 a entity of the State of Missouri. 9 10 JUSTICE JACKSON: And when you say 11 acting through the legislature in response to 12 Justice Barrett, do you mean that sort of the --13 the structure of MOHELA would have to be 14 revisited through the legislature? In other 15 words, you've now set it up -- we have a law in 16 Missouri that structures this corporation in a 17 certain way, and it is separate. 18 So, when you say acting through the 19 legislature, do you mean that there would have to be some kind of amendment to the way in which 20 21 MOHELA is and operates in order to allow for you 2.2 to reach its assets? MR. CAMPBELL: I -- I think it would 23 have to be an act of the legislature. Whether 24 25 it took the form of amending the existing

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

1 it exists is that those same reasons apply in 2 this benefits context no less than they do in a different regulatory context. The separation of 3 powers is implicated here because we're dealing 4 with a congressionally created program. 5 6 In addition, if anything, I would say 7 that there are more reasons to apply the major questions doctrine here, because what the agency 8 9 is effectively doing is exercising the power of 10 the purse by going into the federal balance 11 sheet and crossing off nearly a half trillion 12 dollars in loans payable to the government. 13 That is a quintessentially legislative 14 function. So that's even more reason why the major questions doctrine should apply. 15 JUSTICE KAVANAUGH: Isn't the -- well, 16 17 do --18 JUSTICE SOTOMAYOR: I was just going 19 to ask, that's the whole purpose of the HEROES Act. The whole purpose of the HEROES Act is to 20 21 say in -- either for veterans or -- not for 2.2 veterans, for people who are in military service or in a national emergency, we give you the 23 24 authority to impose debt on us. 25 The forbearance of payment is -- is it

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1 5 billion a month or something like that? It's 2 an outrageous sum. And yet that isn't -- no one 3 is disputing that the Secretary -- that the Secretary has that power. It's not the amount 4 5 of money. The question is: What's Congress's 6 intent? 7 And we know from the HEA Act that Congress recognized that there would be 8 cancellation of debt for schools that close at 9 10 least. Why would you think that Congress didn't 11 intend under the HEROES Act to permit 12 cancellations of debt if a national emergency 13 required it? 14 MR. CAMPBELL: Because what Congress 15 said in the HEROES Act is that the Secretary has 16 the power to "waive or modify" existing 17 provisions. It did not give the Secretary the 18 power to rewrite --19 JUSTICE SOTOMAYOR: But all of those 20 -- a waiver --21 JUSTICE KAGAN: Well, yes, it did. 2.2 Sorry. May I? JUSTICE SOTOMAYOR: Go ahead. 23 Yes. 24 JUSTICE KAGAN: General Campbell, I 25 mean, it -- it says, "waive or modify any

1 statutory or regulatory provision applicable to 2 the student financial assistance programs, and then it says the Secretary can add terms and 3 conditions to be applied in lieu of such 4 statutory and regulatory provisions." 5 6 So it's really quite clear here, it's 7 like you can waive or modify the old ones, and then you can add new ones in lieu of the old 8 9 ones. So, you know, Congress could not have made this much more clear. 10 11 I mean, Congress didn't say exactly 12 the circumstances in which it wanted the Secretary to use this authority. Of course not. 13 14 This is -- this is a -- a bill about, like, what 15 happens when you have an emergency. 16 So what Congress said is what happens 17 when you have an emergency is the Secretary has the power to take care of emergencies, and it 18 19 has that power by way of waiving or modifying 20 any provision and adding others in lieu of them. 21 MR. CAMPBELL: A couple responses. 2.2 The adding "in lieu of" language, that 23 has to be understood to mean adding along the lines of a modification. It can't be adding 24 25 just anything the Secretary wants. It has to be

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1 read in context with the terms --2 JUSTICE KAGAN: Or a waiver. 3 MR. CAMPBELL: -- waive or modify. JUSTICE KAGAN: Or a -- and, you know, 4 it's not just modify, it's waived. So it's 5 6 modify even if we take a kind of MCI-type 7 reading of modify, all -- you know, through more major changes, all the way up to waive, and then 8 9 you can say what terms and conditions should be 10 applied in lieu of those provisions. 11 Congress doesn't get much clearer than 12 that. We -- we deal with congressional statutes every day that are really confusing. This one 13 14 is not. 15 MR. CAMPBELL: Your Honor, I -- I 16 disagree that what we're dealing with here is a 17 waiver or modification. Three points on waiver. 18 In terms of when -- when we look at 19 the -- the publication in the -- in the Federal 20 Register, it says the Secretary modifies the following provisions. So the Secretary didn't 21 2.2 even purport to waive the loan discharge 23 provisions that were cited. 24 Second point, that makes sense because 25 the Secretary wasn't actually excusing

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1 compliance with any of the existing 2 requirements. The Secretary was ignoring all of 3 those requirements and creating brand-new ones to -- to put in place a brand-new program. 4 And the third point is, again, we know 5 that there was no waiver here because affected 6 7 individuals can continue to access all those 8 existing loan discharge programs. 9 If somebody qualifies for the public 10 loan service program, they're able to access it 11 right now. So there was no waiver here. All we 12 have is an attempt to modify, but this goes far beyond a modification because it -- it is the 13 14 creation of a brand-new program that goes far 15 beyond what Congress intended. 16 In fact, if Congress --17 JUSTICE KAGAN: Do you think that 18 there is an ability to modify provisions 19 respecting discharge? So, you know, is there 20 any ability? Because there are these -- these particular discharge provisions, right, and it 21 2.2 has to do with death and with when your school 23 closes and so forth. 24 So suppose the Secretary says, that's 25 not enough, I want to do some more.

1 MR. CAMPBELL: Your -- Your Honor, I 2 think there's a good example where the Secretary's done it in the past that was 3 acceptable. So, in 2003, the Secretary used the 4 power under the HEROES Act to modify the -- an 5 6 existing requirement to access student loan and 7 it was under one of those profession-based programs where, if you work for a teacher for a 8 9 certain amount of years, you can get into the 10 program. 11 JUSTICE KAGAN: So let me give you an 12 example. Suppose, like, there's an earthquake. We'll use an earthquake instead of a pandemic. 13 14 And the Secretary says this isn't enough, people 15 are -- are really being hurt by this. So we have a provision about the borrower dying. The 16 17 Secretary says, I'm also going to allow 18 dischargers where the primary earner in the 19 borrower's household dies. 20 Could the Secretary do that? 21 MR. CAMPBELL: Your Honor, I don't 2.2 believe so because it doesn't sound like a 23 modification of an existing program. It sounds like the creation of a brand-new program. 24 25 JUSTICE KAGAN: Really, just from the

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1 borrower dying, the Secretary is allowed to do 2 that, but -- but the Secretary in -- in -- in --3 in the face of this massive earthquake is not allowed to say, you know, or not just the 4 borrower but the -- the -- the primary earner in 5 6 the borrower's family? 7 MR. CAMPBELL: Your Honor, the question would come down to whether that is a 8 9 modification. It sounds to me like it might go 10 too far because it's creating a new program. 11 But even if that was --12 JUSTICE KAGAN: I mean, this is very 13 broad language, go -- go modify or waive any 14 statutory or regulatory provision and come up 15 with new ones, and you're not even going to 16 allow me that? 17 MR. CAMPBELL: Your Honor, I was going 18 to say, even if that would be sufficient here, 19 it's nothing like this program. This is a program that includes 95 percent of borrowers 20 21 regardless of how they were affected by the 22 pandemic. So we --23 JUSTICE KAGAN: Could the Secretary 24 say, well, there was this terrible earthquake 25 and lots of people's houses were destroyed, and

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1 so I'm going to discharge the loans of people 2 whose houses were destroyed in this terrible 3 earthquake? MR. CAMPBELL: Your Honor, it sounds 4 5 to me like creating a new program. I don't 6 think that that would be okay under the HEROES 7 Act. Now what I would say --JUSTICE KAGAN: See, I -- I -- I -- I 8 9 guess, you know, this is an emergency provision. 10 There's an emergency. It's an earthquake. You 11 don't think Congress wanted to give -- and --12 and not just wanted. It's not what Congress 13 thought. It's what Congress said, to give the 14 Secretary power to say, oh, my gosh, people have 15 had their homes wiped out, we're going to 16 discharge their student loans. 17 MR. CAMPBELL: Your -- Your Honor, 18 when it comes to taking that ultimate step to 19 discharging loans, Congress wanted to preserve that for itself. And I think we note -- we --20 21 Congress acts in pandemics --2.2 JUSTICE KAGAN: Where do you see that 23 in this statute? I mean, the -- the provision 24 of the statute says any statutory or regulatory 25 provision applicable to the student loan program

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1 you can waive, you can add another, to deal with 2 an emergency. This isn't a massive delegation to the 3 Secretary of Education. It's -- it's designed 4 to deal with emergency conditions. You have a 5 6 lot of power in emergencies. When those 7 people's homes are destroyed, you have the power to -- to discharge their loans. 8 MR. CAMPBELL: But Congress still has 9 a voice in emergencies, and we see that through 10 11 the CARES Act here. 12 JUSTICE KAGAN: Congress used its 13 voice. Congress used its voice in enacting this 14 piece of legislation. All this business about 15 executive power, I mean, we worry about 16 executive power when Congress hasn't authorized 17 the use of executive power. 18 Here, Congress has authorized the use 19 of executive power in an emergency situation. We're in that sphere, you know, in those --20 all -- all those zones, we're in that sphere 21 2.2 where the executive is acting with congressional authorization. 23 MR. CAMPBELL: Your Honor, I disagree 24 25 that this is congressional authorization because

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1	it's not a modification. It goes way beyond
2	that. It creates a brand-new program, and
3	that's not what the HEROES Act allowed.
4	If the HEROES Act did allow the
5	wholesale rewriting of statutes whenever an
б	emergency arose, then that would create an
7	issue constitutional issue under Clinton
8	versus City of New York, and it essentially
9	would be allowing the executive branch to go in
10	and rewrite statutes after the fact, and the
11	executive branch doesn't have that power.
12	CHIEF JUSTICE ROBERTS: Thank you,
13	counsel.
14	Just pick up on the discussion that
15	we've been having, the breadth of the statute at
16	issue here.
17	How does it compare to the breadth of
18	the statutes that were at issue in our major
19	questions doctrine, where we indicated enough
20	even though the breadth of some of those
21	provisions would by their terms literally cover
22	the authority that the agency exercised, that
23	given the nature of the authority and its
24	consequences, that was not clear enough?
25	MR. CAMPBELL: Your Honor, I think

1 it -- it fits within those cases. And I would 2 point the Court specifically to Alabama 3 Association of Realtors. In that case, the statute authorized the relevant federal official 4 to engage in actions that he thought in his 5 6 judgment were necessary or in his judgment may 7 be necessary. Yet this Court looked at that language 8 9 and said that it was not broad enough to -- to authorize the -- the action at issue there, the 10 CDC eviction moratorium, and it did so because 11 12 of the major questions doctrine. 13 CHIEF JUSTICE ROBERTS: Justice 14 Thomas? 15 Justice Alito? 16 Justice Sotomayor? 17 JUSTICE SOTOMAYOR: This is 18 substantially different because the Secretary is 19 authorized to cancel loans under HEA. So this is not an action as a moratorium on eviction 20 which had never occurred previously or wasn't 21 2.2 within the wheelhouse of the agency. At least 23 that's what the Court said. I had -- I had a difference of opinion. 24 25 Putting that aside, this is not an

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1 action that could come as a surprise because it 2 is expressly permitted under the HEA Act, and nothing in the HEROES Act says that the 3 Secretary can't do something that's in the 4 normal course of his business in circumstances 5 that justify it, like a school closing or like a 6 7 school engaged in fraud. Those are exceptions that clearly are 8 permitted under the HEA to cancel a debt. So 9 why would I have a view that Congress didn't 10 11 understand that, in a proper emergency, debt 12 cancellation would be right? 13 MR. CAMPBELL: I would go back to my 14 prior -- prior answer, which is there is a 15 difference between modifying an existing loan 16 forgiveness program in light of the national 17 emergency, which is appropriate -- and an 18 example of that is to take the existing loan 19 discharge program for teachers, and there has to be consecutive service, and to say if the reason 20 why that teacher would fall out of the 21 2.2 consecutive service requirement is because of

23 the national emergency, it's okay to waive that 24 requirement or to modify that requirement.

25 JUSTICE SOTOMAYOR: That's changing

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1 the program. I -- I mean, it -- it's semantics. 2 Clearly, a waiver is an extinguishment. Whether 3 you're -- whether you're rewriting it to say a national emergency will pause your service 4 years, statute says you have to serve 5 6 consecutively, and the Secretary is saying you 7 don't have to, you're rewriting the statute. You just want to say this is a bigger rewrite 8 than I like. But it's not rewriting the 9 statute. It's just saying this obligation is 10 11 terminated. 12 MR. CAMPBELL: Your Honor --13 JUSTICE SOTOMAYOR: This obligation to 14 serve continuously is terminated for this period 15 of time. 16 MR. CAMPBELL: It's a bigger rewrite 17 than the words "waive or modify" allow. 18 JUSTICE SOTOMAYOR: That -- that 19 really has us, as the third branch of 20 government, changing Congress's words because we 21 don't think we like what's happening. MR. CAMPBELL: Your Honor, I would --2.2 23 JUSTICE SOTOMAYOR: There's 50 million students who are -- will benefit from this who 24 today will struggle. Many of them don't have 25

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assets sufficient to bail them out after the 1 pandemic. They don't have friends or families 2 or others who can help them make these payments. 3 The evidence is clear that many of them will 4 have to default. Their financial situation will 5 6 be even worse because, once you default, the 7 hardship on you is exponentially greater. You can't get credit. You're going to pay higher 8 prices for things. They are going to continue 9 to suffer from this pandemic in a way that the 10 11 general population doesn't.

12 And what you're saying is now we're 13 going to give judges the right to decide how 14 much aid to give them. Instead of the person 15 with the expertise and the experience, the 16 Secretary of Education, who's been dealing with 17 educational issues and the problems surrounding 18 student loans, we're going to take it upon 19 ourselves, instead of leaving that decision in 20 the hands of the person who has experience with these questions. 21

22 MR. CAMPBELL: Your Honor, there are 23 additional statutory clues showing that Congress 24 didn't intend the creation of new loan discharge 25 programs. I'd point the Court to subsection

1 (a)(2)(D). That -- there, Congress specifically 2 identified one limited instance where the 3 Secretary could excuse the return of funds owed to the government. That was grant overpayments. 4 5 JUSTICE SOTOMAYOR: Counsel --MR. CAMPBELL: By identifying --6 7 JUSTICE SOTOMAYOR: -- that was an emergency, or that was a situation that was sui 8 9 generis. That's what emergencies are. 10 MR. CAMPBELL: Your -- Your Honor, I 11 think --12 JUSTICE SOTOMAYOR: Sui generis 13 situations that the Secretary can address in a 14 particular situation. 15 MR. CAMPBELL: Your Honor, I think, by 16 identifying that specific example, Congress was 17 sending a message that it did not want the other 18 provisions to be used to create new loan 19 discharge programs. 20 CHIEF JUSTICE ROBERTS: Justice Kagan? 21 Justice Gorsuch? 2.2 JUSTICE GORSUCH: I had understood the 23 Office of Legal Counsel's memorandum to suggest that the Secretary, under the statute, had 24 25 authority to put student borrowers in -- in the

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1 same condition that they were in prior to the 2 emergency and that the nature of your argument 3 is that that -- that test is not met. Do you agree with the OLC's position 4 and understanding of the statute? And -- and --5 6 and do -- and how do you -- how do you argue 7 that it's exceeded that authority? MR. CAMPBELL: Your Honor, I disagree 8 9 with most everything in the OLC opinion, but I 10 agree with that part of the OLC opinion. I 11 think it's right that that's what the phrase "no 12 worse position" means. It means Congress was 13 telling the -- the Secretary he had the 14 authority to keep borrowers near the status quo. 15 But what we have here is a program 16 that, for 20 million borrowers, is going to 17 leave them without a single outstanding loan. 18 That goes well beyond putting them back in the 19 status quo ante. 20 And for the other approximately 20 million borrowers that stand to benefit from 21 2.2 this, their average debt is going to go from 23 \$29,000 to \$13,000, again, far beyond returning 24 to the status quo ante. 25 JUSTICE GORSUCH: And I understand the

1 Secretary has considerable expertise when it 2 comes to educational affairs, but with -- in terms of macroeconomic policy, do we normally 3 assume that every -- every Secretary, cabinet 4 member, as learned as they are, has that kind of 5 6 knowledge? 7 MR. CAMPBELL: No, we don't. When we're dealing with a nearly half trillion dollar 8 9 loan cancellation program, this is squarely in 10 the ken of Congress. Congress has the power and

11 expertise to weigh the balancing, competing
12 fiscal implications, particularly at that scale.
13 So this is something that's outside the
14 Secretary's expertise.

15 CHIEF JUSTICE ROBERTS: Justice
16 Kavanaugh?

JUSTICE KAVANAUGH: I think, when we're talking about emergency powers, that certainly focuses the inquiry, but that doesn't mean that the executive can't take action. And it all then turns on the -- I think, the language of the statute at issue and the kind of action taken.

And I think you have a good argument on "modify," but what do you do with the word

"waive"? That is an extremely broad word. In 2003, Congress was very aware of potential emergency actions in the wake of September 11th and war, possible terrorist attacks, and yet it puts that extremely broad word, "waive," into the statute.

7 Why not just read that as written? MR. CAMPBELL: Your Honor, I -- I 8 believe we are reading it as written. "Waive" 9 10 means to excuse compliance with an existing 11 obligation. And what the Secretary is 12 purporting to do here is to change existing loan 13 discharge program. The Secretary is not waiving 14 anything in those provisions. And so we think, 15 as I explained earlier, that the word "waiver" 16 simply doesn't apply here.

17 Now, to the extent the Court looks at 18 the term "waiver" and finds that that's cause to 19 read the phrase "waive or modify" a little more 20 broadly, it still doesn't reach this program, because the Secretary is not dealing with any of 21 2.2 these existing provisions that he purports to 23 cite. He's not changing anything within them. 24 He's frankly ignoring what's there and creating 25 a brand-new program, and that's not within the

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1 language of this statute. 2 JUSTICE KAVANAUGH: You don't think that fits within "waiver"? 3 MR. CAMPBELL: I -- I don't believe it 4 does, no. A waiver is to take something away, 5 6 and the Secretary is not taking anything away 7 from the cited loan discharge provisions. 8 JUSTICE KAVANAUGH: And then, on the 9 body of precedent we've developed within the 10 pandemic on emergency powers and -- and major 11 executive actions, we have the eviction 12 moratorium case, we have the national OSHA mandate case, but, on the other hand, we have 13 14 the healthcare mandate case, and I think the 15 distinction -- one of the distinctions drawn 16 there was that was more in the -- in the 17 wheelhouse of the agency in question. 18 And I think the Solicitor General has 19 argued, and I'll just get your response, on this 20 is right in the wheelhouse -- and Justice 21 Sotomayor was just saying this -- right in the 2.2 wheelhouse of what the Secretary of Education 23 would normally be expected to do, unlike CDC doing an eviction moratorium. 24 25 I know you've addressed this a little

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1 bit, but just to get your response on that. 2 MR. CAMPBELL: Your Honor, I don't 3 think it's in the wheelhouse because it's creating a brand-new program. The only entity 4 that has created new loan discharge programs is 5 6 Congress. There's a number of them in the 7 Higher Education Act. But the Secretary has never before created a brand-new loan 8 cancellation program, particularly under the 9 10 HEROES Act. 11 As I mentioned at the outset, the 12 HEROES Act has never even been used to forgive a 13 single loan in the past. That's telling because 14 one of the things the Court looks at in its 15 major questions jurisprudence is if it's 16 unprecedented. And we certainly have an 17 unprecedented use of the statute here. 18 JUSTICE KAVANAUGH: Thank you. 19 CHIEF JUSTICE ROBERTS: Justice 20 Barrett? 21 JUSTICE BARRETT: Two questions, one 2.2 on merits, one on standing. First, on the 23 merits, do you agree that this Administration and the prior administration had authorization 24 25 under the HEROES Act to pause loan -- loan

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1 repayment obligations? 2 MR. CAMPBELL: Your Honor, it's a --3 we're not challenging it in this case. 4 JUSTICE BARRETT: I know, but --MR. CAMPBELL: I think it's a --5 6 JUSTICE BARRETT: -- the question is, 7 do you think it's within it? This kind of goes to the --8 9 MR. CAMPBELL: Sure. 10 JUSTICE BARRETT: -- scope of "waive or modify, " right? 11 12 MR. CAMPBELL: Yes. I -- I think that 13 the -- so if I can go through the timeline to 14 explain, so the first seven days, on March 20th, 15 2020, Secretary DeVos waived but didn't indicate 16 what legal authority she was using. I have no 17 way to assess that because I just don't know 18 what -- what authority she was using. 19 Then Congress came in seven days later 20 and enacted the CARES Act. The CARES Act put a 21 payment pause in place for six months. At the 2.2 end of that six-month period, Secretary DeVos extended it for three months. 23 24 I think, arguably, that was a 25 legitimate use of the HEROES Act because taking

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1 a congressionally created six-month program and 2 extending it for three months seems like it might be a modification. 3 But now that we're two years down the 4 road, we're beyond a modification. And not only 5 6 that, the connection to the national emergency 7 has become even more tenuous. 8 JUSTICE BARRETT: So your argument is 9 that even assuming that Secretary DeVos 10 initially had the authority to -- and you're --11 and you're kind of just whiffing on the question 12 about before the CARES Act was passed, right? 13 But you're talking about after the 14 CARES Act was passed, she arguably had authority 15 under the HEROES Act to extend the pause but 16 that at some point as that time dragged on post 17 the CARES Act, when the new administration came in, then it exceeded the authority to waive or 18 19 modify? 20 MR. CAMPBELL: Your Honor, it could 21 have been the -- Secretary DeVos had two 2.2 extensions. It could have been her second 23 extension. I don't think it hinges on who the administration was. 24

25 At some point, I think it goes beyond

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1 a modification and the connection to the 2 national emergency became too tenuous to 3 maintain it. JUSTICE BARRETT: So it's not that a 4 pause is different in your mind than canceling 5 6 the obligation to repay the principle. It's 7 that -- or -- or I guess it's a combination of 8 the distinction between a pause and a 9 cancellation and then the temporal --10 MR. CAMPBELL: Correct. 11 JUSTICE BARRETT: -- reach? 12 MR. CAMPBELL: Correct, because I do 13 think there are significant distinctions between 14 a pause and cancellation. I'll give you a few. 15 The first is a pause maintains the status quo. Cancellation puts people in a -- in 16 17 a far better -- this cancellation puts people in a far better position. 18 19 A pause keeps indebtedness from 20 rising, versus cancellation erases indebtedness. In addition, as I mentioned before, the 21 2.2 connection to the national emergency, when you 23 put a pause in place, when the nation is still dealing with lockdown conditions, that is a -- a 24 -- a there's a pretty close connection between 25

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1 that and a national emergency. 2 When two-and-a-half years down the road the Secretary, having much time to 3 contemplate this -- this -- the situation, comes 4 in and creates a debt forgiveness program for 5 6 95 percent of borrowers, the connection to the 7 -- to the national emergency is too tenuous. 8 JUSTICE BARRETT: Okay. I -- I 9 understand. Second question is on standing. Could 10 11 Missouri file suit to vindicate the interests of 12 the City of St. Louis? 13 MR. CAMPBELL: No, Your Honor, 14 because, when we look at the factors that we've 15 cited for why MOHELA is a state-created and 16 state-controlled entity, the leadership of the 17 City of Missouri is not selected by the governor or by the state. They're selected at the local 18 19 level. 20 JUSTICE BARRETT: Thank you. CHIEF JUSTICE ROBERTS: Justice 21 2.2 Jackson? 23 JUSTICE JACKSON: So can I just understand your view on waiver or modification 24 with respect to sort of the initial applications 25

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1	of this authority?
2	You know, we're sort of in a certain
3	species of it now, but I had understood from the
4	SG and from the briefs that originally we're
5	talking about wartime, and and so I'm just
6	trying to understand, are you saying that those
7	were not legitimate waivers or modifications
8	under this kind of power?
9	MR. CAMPBELL: Your Honor, we don't
10	question any of the uses of the HEROES Act prior
11	to 2020. So
12	JUSTICE JACKSON: Right. But I I
13	
14	MR. CAMPBELL: I don't know if I'm
15	understanding the question.
16	JUSTICE JACKSON: what what
17	is what is your view again, I'm just
18	trying to clarify your exchange with with
19	Justice Kavanaugh on what "waiver" means. So
20	are you saying that the Secretary would have had
21	to change something about the regulations but
22	not about their application with respect to the
23	obligations that they require of people?
24	MR. CAMPBELL: Your Your Honor, if
25	I can try to illustrate it with an example, I

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1 think this might get to it. 2 There is an existing loan discharge program for permanent disability that requires 3 an individual to expect to be permanently 4 disabled for at least 60 months. 5 If the Secretary came in and said, 6 7 because of the national emergency, if someone was affected because of that, they can reduce 8 that 60-month requirement down to, say, 36 9 months, that to me is a modification of an 10 11 existing program. That would be an example. 12 In terms of waiver, waiver is when the 13 Secretary goes in and would take out an 14 entire -- one of the existing requirements. And 15 that's not what the Secretary is doing here. 16 That --17 JUSTICE JACKSON: I understand. 18 But -- but -- but you're -- I guess my question 19 is, do you dispute that under the prior 20 circumstances people owed a certain amount, and 21 what the Secretary did was modified the amount 2.2 that they would owe as a result of this loan? 23 MR. CAMPBELL: Your -- Your Honor, I 24 think that's exactly what he was trying to do. And I think that highlights why there's a 25

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1	problem here. Let me point
2	JUSTICE JACKSON: Okay.
3	MR. CAMPBELL: the Court
4	specifically to the statute that we cite on
5	pages 46 through 47 of our brief. Congress
б	knows how to authorize the Secretary to waive or
7	modify an amount owed. We cite provisions in
8	the Higher Education Act that specifically say
9	the Secretary shall waive the amount owed.
10	Here, the Secretary wasn't given that
11	language. If the Secretary instead was given
12	the power to waive or modify provisions, and so
13	that's why the analysis here have
14	JUSTICE JACKSON: But why doesn't it
15	all why doesn't it all reduce to the same
16	thing? And this is where I go back to the sort
17	of original application.
18	I mean, so, fine, we have wartime
19	people who are away and you say you have no
20	problem with the Secretary modifying the
21	regulations insofar as it would help them, but
22	doesn't it reduce to just them not having to pay
23	as much? I don't understand why there's really
24	a distinction
25	MR. CAMPBELL: Well

1 JUSTICE JACKSON: -- between waiving 2 the -- the regulations in the way that you're 3 reading this and waiving the amount a person owes under a regulation that relates to a loan. 4 MR. CAMPBELL: Your Honor, there's 5 6 never been a past use of the HEROES Act that 7 would eliminate the amount that someone owes. So I don't think there's a prior comparator to 8 look to. 9 10 JUSTICE JACKSON: Okay. Let me just 11 ask you one final question on my big-picture 12 concern. 13 So I was listening carefully to your 14 opening statement, and you started by indicating 15 that this is one of today's most debated policy 16 questions, and you ended by saying that we, the 17 courts, should essentially answer it by 18 invalidating this program. 19 And what concerns me is that to the 20 extent you're talking about separation of powers and major questions, the judiciary is part of 21 2.2 the same constitutional separation of powers 23 dynamic that compels us to think about questions 24 like the major questions doctrine. 25 And I feel like we really do have to

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1 be concerned about jumping into the political 2 fray, unless we are prompted to do so by a lawsuit that is brought by someone who has an 3 actual interest. So this is why I'm sort of 4 pressing really hard on the standing point. 5 And so do -- do you dispute that the 6 7 ordinary standing rule would be that a plaintiff cannot establish standing by asserting the 8 9 interests of an independent actor or by saying that an independent actor not before the Court 10 11 will respond to the defendant's actions in a 12 certain way? I mean, isn't the ordinary rule one 13 14 that really doesn't cover you and what you're 15 asking for in a way is an extension of our 16 standing principles to allow for the state to 17 proceed with this action? 18 MR. CAMPBELL: Your Honor, I don't 19 believe so. I think what we're asking for is the same treatment that the federal government 20 21 got in Cherry Cotton Mills and Erickson. 2.2 We're asking for the ability to assert 23 the interests of the public corporation that the State of Missouri created, that it controls and 24 25 that it charged with performing nothing but

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1 essential government functions. 2 JUSTICE JACKSON: All right. So we'll go back and look at that case, and if we find 3 that the federal government had some sort of a 4 separate interest that it was asserting, do you 5 6 I mean, is that your only case that is lose? 7 going to make it be the case that we can find standing for you? 8 MR. CAMPBELL: No, Your Honor. 9 Ι 10 think that those cases are certainly helpful. Ι would direct the Court, if the Court wants to 11 12 look under either federal law to see what it 13 takes to be a part of the government, I would 14 direct the Court to Lebron and Department of 15 Transportation that we cite. 16 If the Court wants to look --17 JUSTICE JACKSON: So you reject the 18 distinction that the -- that the SG pointed to 19 with respect to what those cases were about? 20 Those were not standing cases. We have 21 different doctrines that apply when we're 2.2 looking at different issues. 23 And the issue of whether or not you 24 are injured by, you know, an injury to another 25 entity, an independent corporation, seems to me

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1 to be a separate thing. 2 So do you have a case that would help 3 us to understand whether an entity like MOHELA that has totally been isolated through state law 4 from liability, that can sue for itself, et 5 6 cetera, do you have a case where we've said that 7 same kind of entity you can sue as a state in -because you're injured for standing purposes? 8 9 MR. CAMPBELL: Your Honor, I think the closest cases we have are the ones I referenced 10 11 before, Cherry Cotton Mills and Erickson. 12 But I will say that part of the 13 inquiry has to look to state law to see if 14 Missouri is charged with speaking -- has the 15 ability to speak on behalf of MOHELA. 16 And on that front, I would point the 17 Court to two things. One is Missouri Statute 18 27.06 -- .060, which gives the attorney general 19 the right to determine whether to litigate in 20 the name of the state to protect any interest of the state. And because MOHELA is a --21 2.2 JUSTICE JACKSON: But, of course, 23 that's the question here, right? MR. CAMPBELL: -- but because MOHELA 24 25

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1	JUSTICE JACKSON: Yeah.
2	MR. CAMPBELL: is a part of the
3	state
4	JUSTICE JACKSON: I see.
5	MR. CAMPBELL: and the second point
6	that I would direct the Court to is the Casualty
7	Reciprocal Exchange case. That's the case that
8	specifically identified what it means to be a
9	public corporation under Missouri state law.
10	And it identifies the same factors
11	that Lebron looked to. It's whether it was
12	created by the government, controlled by the
13	government, and whether it's performing
14	essential public purposes.
15	JUSTICE JACKSON: Thank you.
16	MR. CAMPBELL: Thank you.
17	CHIEF JUSTICE ROBERTS: Thank you,
18	counsel.
19	Rebuttal, General?
20	REBUTTAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR
21	ON BEHALF OF THE PETITIONERS
22	GENERAL PRELOGAR: Thank you, Mr.
23	Chief Justice.
24	I'll pick up with standing and focus
25	on the MOHELA-related arguments.

1	Justice Barrett, you asked about the
2	provision of state law 173.420. This is a
3	provision that refers generally to Missouri
4	reserving rights over the assets of MOHELA.
5	I think, if you look at that in
6	context, it clearly functions as a savings
7	clause. It's making clear that notwithstanding
8	all of the other provisions we've pointed to,
9	like 173.425, .4210 410, these are the
10	provisions that create the strict financial
11	separation, that Missouri is reserving its
12	rights under other sources of law, like eminent
13	domain or search and seizure, and it's not
14	actually limiting its ability to obtain assets
15	in that way.
16	I understand my friend to have
17	conceded that actually Missouri would have to
18	change its law and change the structure of
19	MOHELA if it wanted to have any direct access to
20	MOHELA's assets. And that makes sense because
21	these other provisions that I just pointed you
22	to are very clear that there is absolute
23	financial separation between the state and
24	MOHELA.
25	You asked as well about control over

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You asked as well about control over

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1 MOHELA, which my friend has emphasized several 2 times. That's actually one of the relevant questions under the arm-of-the-state doctrine, 3 whether you could direct the authority in any 4 way. I'd point to Justice Kavanaugh's decision 5 in the D.C. Circuit in the Puerto Rico Ports 6 7 Authority case. There, it was significant that you could direct the -- the authority to sue. 8 9 And, here, that's obviously lacking, and the state hasn't attempted to do that. 10 11 My friend several times brought up the 12 Cherry Cotton Mill and Erickson cases. In Cherry Cotton Mill, there was an express 13 14 statutory right of the United States to tax 15 offsets, and the Court was interpreting that 16 statutory language and determined that the 17 United States had its own interest in the 18 statutory right and further emphasized that with 19 respect to that particular public corporation --20 and I'm reading from the language of the Court's 21 opinion -- that for the public corporation, "its 2.2 profits, if any, go to the Government; its 23 losses the Government must bear." There wasn't the financial separation 24 25 in that case that exists here, and there was a

distinct statutory right on behalf of the United

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2 States. Erickson is even further afield. 3 Tt. wasn't a case about standing at all. And there, 4 the United States had a contract right that the 5 6 instrumentality had entered into as an agent of 7 the federal government. The instrumentality was itself a plaintiff in that case, and there was 8 no Article III issue in the case. 9 Finally, I'll focus on the 10 11 contributions to the Lewis and Clark Discovery 12 Fund. This is the secondary argument as it 13 relates to MOHELA. There are huge factual 14 deficiencies in trying to premise standing on 15 that basis. As we've explained, they haven't 16 been able to bring forward allegations that 17 would substantiate the asserted financial

18 impacts on MOHELA and certainly haven't 19 established that that will be the likely cause

20 of any default to a fund that hasn't been paid 21 for the last 15 years.

But there's also a more fundamental legal problem with their theory. It has no logical stopping point. There's nothing, for example, that would prevent anyone who's owed a

1 debt to say that suddenly they can have standing 2 to challenge a regulation that doesn't affect them in any way because it might affect the 3 debtor, who then will be unable to make good on 4 that -- on that liability. And there is no 5 precedent in this Court's Article III doctrine 6 7 to support that kind of broad expansion of Article III standing here. 8 Turning to the merits, I want to pick 9 up on the colloquies that my friend was having 10 11 about the meaning of the term "waive or modify." 12 And if I understand the gloss that he's putting on that language, I don't think that there would 13 14 be any room to grant any kind of HEROES Act 15 relief whatsoever. 16 He says that there was no waiver or 17 modification here, but there was. The Secretary 18 took the provisions that deal with discharge and 19 cancellation and he waived the existing 20 eligibility requirements and modified those 21 provisions to add an additional basis for 2.2 relief. 23 This is how Secretaries across 24 administrations have implemented the HEROES Act. 25 For example, with deferment, the Secretary, in

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1 prior uses of the HEROES Act, took the 2 provisions that exist for deferment and waived the existing eligibility requirements and then 3 granted additional deferment in line with the 4 national emergency. 5 6 That fits with the plain language of 7 the statute, and to suggest that that automatically creates a brand-new program would 8 9 leave very little room for the HEROES Act to 10 operate at all. 11 My friend is getting it exactly 12 backwards. The fact that there are already statutory provisions for things like deferment 13

14 and forbearance and discharge demonstrates that 15 Congress could foresee that all of those are 16 ways that you grant financial relief to 17 student-loan borrowers.

18 And in the context of a statute like 19 this one that is centrally focused on ensuring 20 that the Secretary can act in unforeseen 21 circumstances outside the existing scope of 2.2 those provisions, Congress directed that the 23 Secretary has the authority to "waive or modify" 24 in order to expand eligibility for those forms 25 of relief.

1	So we'd ask the Court to reject the
2	states' arguments here.
3	CHIEF JUSTICE ROBERTS: Thank you,
4	counsel. The case is submitted.
5	(Whereupon, at 12:15 p.m., the case
б	was submitted.)
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