No. 22-506

In the Supreme Court of the United States

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, et al.,

Petitioners,

v.

STATE OF NEBRASKA, et al.,

Respondents.

On Writ of Certiorari before Judgment to the United States Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED

1. Whether State respondents have Article III standing.

2. Whether the Department of Education's loan-cancellation program exceeds the Secretary's statutory authority or is arbitrary and capricious.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT 2

A. Federal Student Loan Framework 2

B. The HEROES Act 4

C. COVID-19 and Student Loans....................... 5

D. The Loan Cancellation Program 7

E. Proceedings Below 11

SUMMARY OF ARGUMENT................................. 12

ARGUMENT 15

I. The States have standing................................. 15

A. The impending financial harm to MOHELA will injure Missouri. 15

B. The States are facing direct harm to specific tax revenues. 23

C. The Program prompted broad loan consolidation causing injury to the States. 26

II. The Program exceeds the Secretary's authority. 29

A. This is a major-questions case.................... 30

1. The key major-questions factors are present here. 31

2. The Government's efforts to avoid the major-questions doctrine lack merit. 36

B. The Secretary lacks colorable—let alone clear—congressional authorization. 38

1. Keeping borrowers from a "worse position" does not permit the mass discharge of loan principal. 39

2. The Program does not waive or modify the cited statutory and regulatory provisions.. 44

3. The Program rests on a tenuous and pretextual connection to a national emergency. 47

4. The Program's broad scope exceeds the Secretary's authority. 49

III. The Program is arbitrary and capricious. 50

CONCLUSION 53

TABLE OF AUTHORITIES

Cases

Ala. Ass'n of Realtors v. *HHS*,
141 S. Ct. 2485 (2021) 1, 31–32, 40, 42–43

Alfred L. Snapp & Son, Inc. v. *Puerto Rico*,
458 U.S. 592 (1982) 22, 26

Arkansas v. *Texas*,
346 U.S. 368 (1953) 19

Ass'n of Data Processing Serv. Orgs., Inc. v. *Camp*,
397 U.S. 150 (1970) 20, 25

Ayestas v. *Davis*,
138 S. Ct. 1080 (2018) 50

Biden v. *Missouri*,
142 S. Ct. 647 (2022) 38

Biden v. *Texas*,
142 S. Ct. 2528 (2022) 28

California v. *Azar*,
911 F.3d 558 (9th Cir. 2018) 26

Cas. Reciprocal Exch. v. *Missouri Emps. Mut. Ins. Co.*, 956 S.W.2d 249 (Mo. 1997) 17

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327 U.S. 536 (1946) 18

Clapper v. *Amnesty Int'l USA*,
568 U.S. 398 (2013) 25

Clinton v. *City of New York*,
524 U.S. 417 (1998) 20, 25

Davis v. *FEC*,
554 U.S. 724 (2008) 28

Dep't of Com. v. *New York*,
139 S. Ct. 2551 (2019) 20, 22–23, 27–28, 53

Dep't of Transp. v. *Ass'n of Am. Railroads*,
575 U.S. 43 (2015) 17

DHS v. *Regents of the Univ. of Cal.*,
140 S. Ct. 1891 (2020) 50–52

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264 U.S. 246 (1924) 18

FDA v. *Brown & Williamson Tobacco Corp.*,
529 U.S. 120 (2000) 30, 35

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142 S. Ct. 1638 (2022) 25–26, 29

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462 U.S. 611 (1983) 19

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273 U.S. 12 (1927) 24

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493 U.S. 331 (1990) 21–22, 27

Getty v. *Fed. Sav. & Loan Ins. Corp.*,
805 F.2d 1050 (D.C. Cir. 1986)............................. 51

Gonzales v. *Oregon*,
546 U.S. 243 (2006) 31, 41

Hunt v. *Wash. State Apple Advert. Comm'n*,
432 U.S. 333 (1977) 21, 26

Ins. Co. of N. Am. v. *United States*,
159 F.2d 699 (4th Cir. 1947) 18

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306 U.S. 381 (1939) 16

King v. *Burwell*,
576 U.S. 473 (2015) 37

Kisor v. *Wilkie*,
139 S. Ct. 2400 (2019) 35

Knox v. *SEIU, Local 1000*,
567 U.S. 298 (2012) 29

La. Pub. Serv. Comm'n v. *FCC*,
476 U.S. 355 (1986) 36

Lebron v. *Nat'l R.R. Passenger Corp.*,
513 U.S. 374 (1995) 16, 18, 20

Mackey v. *Lanier Collection Agency & Serv., Inc.*,
486 U.S. 825 (1988) 40

MCI Telecomms. Corp. v. *AT&T*,
512 U.S. 218 (1994) 45–46

Missouri v. *Illinois*,
180 U.S. 208 (1901) 19

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142 S. Ct. 661 (2022) 1, 31, 34, 48–49

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426 U.S. 660 (1976) 25

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547 U.S. 47 (2006) 15

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426 U.S. 26 (1976) 28

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Texas v. *United States*, 809 F.3d 134 (5th Cir. 2015) 26

Todd v. *Curators of Univ. of Missouri*, 147 S.W.2d 1063 (Mo. 1941)................................. 17

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Util. Air Regul. Grp. v. *EPA*, 573 U.S. 302 (2014) 34–35, 40

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American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (Mar. 11, 2021) 23, 38

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20 U.S.C. 1078-11 .... 2, 31

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20 U.S.C. 1087a 11

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20 U.S.C. 1087e(m) 31

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20 U.S.C. 1087dd(g) 11, 45

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20 U.S.C. 1098aa(b)(1)–(6) 4

20 U.S.C. 1098bb(a)(1)–(2)(A) 39
20 U.S.C. 1098bb(a)(1) 4, 32, 44, 47
20 U.S.C. 1098bb(a)(2) 4, 50
20 U.S.C. 1098bb(a)(2)(A) 4, 38–39, 42, 47, 49
20 U.S.C. 1098bb(a)(2)(B) 41
20 U.S.C. 1098bb(a)(2)(B)–(E) 5, 40
20 U.S.C. 1098bb(a)(2)(D) 41
20 U.S.C. 1098bb(b)(1) 5, 36
20 U.S.C. 1098ee(2)(C) 49
20 U.S.C. 1098ee(2)(D) 49
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Other Federal Statutes:
5 U.S.C. 706(2)(A) 50
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26 U.S.C. 61(a)(11) 23
26 U.S.C. 108(f)(5) 23
31 U.S.C. 3711(a)(1) 3, 52
State Statutes:
Iowa Code §422.7 23
Kan. Stat. Ann. §79-32,117(a) 23
Mo. Rev. Stat. §27.060 .... 18, 20
Mo. Rev. Stat. §173.360 .... 3, 17
Mo. Rev. Stat. §173.385 17
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Regulations:

31 C.F.R. part 902 3

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34 C.F.R. 674.53 45

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(Dec. 12, 2003) 5, 34–35, 40, 42, 46

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INTRODUCTION

This case calls on the Court once again to stop the administration from unlawfully invoking COVID-19 to assert power beyond anything Congress could have conceived. Previously, the Court stopped CDC's eviction moratorium. *Ala. Ass'n of Realtors* v. *HHS*, 141 S. Ct. 2485, 2490 (2021) (per curiam). Later, it stayed OSHA's vaccine-or-test mandate. *NFIB* v. *OSHA*, 142 S. Ct. 661, 666–67 (2022) (per curiam). Now, while President Biden declares the pandemic over, his Secretary of Education and Department of Education cite COVID-19 to justify the Loan Cancellation Program—an unlawful attempt to eliminate $430 billion of federal student-loan debt.

Canceling hundreds of billions of dollars in student loans—through a decree that extends to nearly all borrowers—is a breathtaking assertion of power and a matter of great economic and political significance. The Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act), Pub. L. No. 108-76, 117 Stat. 904 (Aug. 18, 2003)—which the Secretary has *never* used to cancel student loans—does not authorize the Program, much less with the clarity this Court's precedent requires.

The Act allows the Secretary to waive or modify existing provisions when necessary to keep certain borrowers from being placed in a *worse* position in relation to their loans because of a national emergency. But the Program places an estimated 43 million borrowers in a *better* position by eliminating *all* loan balances for 20 million and erasing up to $20,000 for over 20 million more. This vastly exceeds the Secretary's authority under the Act, and the Court

should affirm the Eighth Circuit's decision to enjoin the Program.

STATEMENT

A. Federal Student Loan Framework

Title IV of the Higher Education Act (HEA) covers three types of student loans. First, the Perkins Loan Program allowed schools to issue loans partially funded by federal money until that program ended in 2017. 20 U.S.C. 1087aa *et seq*. Second, the Federal Family Education Loan (FFEL) Program, initiated in 1965, authorized non-federal entities to issue Department-insured loans. *Id.* 1071 *et seq*. That program ended in 2010, *id.* 1071(d), but some FFEL Loans are still held by non-federal entities, while the Department has acquired others, J.A. 213–15. Third, Direct Loans, which first issued in 1994, are federally funded, 20 U.S.C. 1087a *et seq.*, but serviced by non-federal entities, J.A. 68–93. Borrowers may use the consolidation process to convert their FFEL Loans into Direct Loans. 20 U.S.C. 1078-3; *id.* 1087e(g); 34 C.F.R. 685.220.

Congress has specifically identified when student loans may be discharged. It has created loan-forgiveness programs for specific groups of borrowers. *E.g.*, 20 U.S.C. 1078-11 (borrowers serving in areas of national need). Congress also allows loan discharge in a few unfortunate circumstances, such as when a borrower dies or becomes disabled. *E.g.*, *id.* 1087. And it permits discharge of remaining loan principal at the end of certain repayment plans. *E.g.*, *id.* 1098e(b)(7).

When these congressionally prescribed cancellations are unavailable, Congress's charge to the Secretary is clear: "try to collect" the money owed. 31 U.S.C. 3711(a)(1). While the Secretary has some power to "compromise" claims, 20 U.S.C. 1082(a)(6), the Department's regulations narrowly confine that authority, 34 C.F.R. 30.70(e)(1) (incorporating standards from 31 C.F.R. part 902); 31 C.F.R. 902.2(a) (allowing compromise only in limited circumstances). And though that compromise authority has existed since 1965, see Higher Education Act of 1965, Pub. L. No. 89-329, §432(a)(6), 79 Stat. 1219 (Nov. 8, 1965), the Department admits that it has historically used that authority "on an individualized, case-by-case basis." *Sweet* v. *Cardona*, No. 19-cv-3674, D. Ct. Doc. 337, at 2 (N.D. Cal. Nov. 9, 2022). The Department did not invoke that power for targeted "group discharges" until 2019, and even now, that has occurred only a handful of times for attendees of specific schools engaged in malfeasance. *Ibid.*

Respondent States participate in the federal student-loan industry. The Higher Education Loan Authority of the State of Missouri (MOHELA) is a state "public instrumentality" that performs the "essential public function" of ensuring Missouri students "have access to student loans." Mo. Rev. Stat. §173.360. MOHELA services Direct Loans under a contract with the Department, J.A. 62–64, 68–93, and holds FFEL Loans that secure its bonds and provide "ongoing revenue streams," J.A. 64. Another state entity named the Arkansas Student Loan Authority (ASLA) holds FFEL Loans that provide the agency "a source of revenue." J.A. 133 ¶6. And the Nebraska Investment Council (NIC), which manages the State's assets,

invests in FFEL-based student-loan asset-backed securities (SLABS). J.A. 103 ¶¶4–7.

B. The HEROES Act

Congress enacted the HEROES Act to assist active-duty military in the wake of the 9/11 terrorist attacks. Pub. L. No. 108-76. This uncontroversial measure passed by a 421-1 vote in the House, see 149 Cong. Rec. H2553–54 (Apr. 1, 2003)—with the one "no" vote later clarifying that he "meant to vote 'yea,'" 149 Cong. Rec. E663 (Apr. 3, 2003)—and a unanimous voice vote in the Senate, 149 Cong. Rec. S10866 (July 31, 2003). Congress's findings focus on affording relief to people serving in the "military" for "our nation's defense." 20 U.S.C. 1098aa(b)(1)–(6).

The Act authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" when "necessary in connection with a war or other military operation or national emergency." 20 U.S.C. 1098bb(a)(1). The waiver or modification must also "be necessary to ensure that" one of five specific statutory goals is achieved. *Id.* 1098bb(a)(2). The first is to ensure that "recipients of student financial assistance . . . who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." *Id.* 1098bb(a)(2)(A). The other four goals are to (1) "minimize[]" "administrative requirements" on "affected individuals" to avoid "defaults," (2) "modif[y]" various "calculation[s]" for determining financial "need," (3) excuse withdrawing students from "return[ing]" a grant "overpayment," and (4) provide

"temporary relief" from requirements "rendered in-feasible or unreasonable." *Id.* 1098bb(a)(2)(B)–(E). The Secretary "shall" publish notice in the Federal Register when acting under the HEROES Act. *Id.* 1098bb(b)(1).

In December 2003, the Secretary issued the first set of HEROES Act waivers and modifications. 68 Fed. Reg. 69,312 (Dec. 12, 2003). Those changes were modest. They provided flexibility when calculating affected individuals' needed funds, *id.* at 69,313–14, exempted withdrawing students from "repay[ing] an overpayment of grant funds," *id.* at 69,314, relaxed various paperwork and documentation requirements, *id.* at 69,314–18, provided short extensions of borrower notice requirements, *id.* at 69,315, delayed commencement of loan repayment, *id.* at 69,315–16, eased requirements for and restrictions on specific statutory deferment and forbearance options, *id.* at 69,316–17, paused "collection on defaulted loans," *id.* at 69,316, and excused certain disruptions in service or missed payment for existing loan-cancellation, rehabilitation, and reinstatement programs, *id.* at 69,316–17.

While the Secretary later extended these waivers and modifications (with slight changes), *e.g.*, 72 Fed. Reg. 72,947 (Dec. 26, 2007); 77 Fed. Reg. 59,311 (Sep. 27, 2012); 82 Fed. Reg. 45,465 (Sep. 29, 2017), they are the only instances in which the Secretary invoked the Act before COVID-19. None of them discharged borrowers' loan principal.

C. COVID-19 and Student Loans

On March 20, 2020, then-Secretary Betsy DeVos, without specifying her source of authority, announced a 60-day pause on payments and interest accrual for

Department-held student loans. Dep't of Educ., *Delivering on President Trump's Promise* (Mar. 20, 2020), https://perma.cc/R7BG-GPSL. A week later, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which suspended until September 30, 2020, all payments due, interest accrual, and collection for Direct Loans and FFEL Loans held by the Department. Pub. L. No. 116-136, §3513, 134 Stat. 281 (Mar. 27, 2020). Later in 2020, Congress considered—but rejected—a COVID-relief bill that would have canceled up to $10,000 in student-loan debt. H.R. 6800, 116th Cong. §150117 (2020).

After the CARES Act payment pause expired, President Trump directed Secretary DeVos "to continue the temporary cessation of payments and the waiver of all interest on student loans held by the Department . . . until December 31, 2020." 85 Fed. Reg. 49,585, 49,585 (Aug. 8, 2020). In December 2020, Secretary DeVos published the first COVID-related HEROES Act notice in the Federal Register. 85 Fed. Reg. 79,856 (Dec. 11, 2020). That notice "modif[ied] the terms of the [payment pause] benefits provided under . . . the CARES Act such that they will continue to be provided to borrowers until December 31, 2020." *Id.* at 79,863. A subsequent HEROES Act notice extended that deadline until January 31, 2021. 86 Fed. Reg. 5,008, 5,008 (Jan. 19, 2021). Meanwhile, the Department's Office of General Counsel concluded that the HEROES Act does *not* authorize "mass cancellation . . . of student loan principal balances." Memorandum from Reed Rubinstein to Betsy DeVos at 6 (Jan. 12, 2021), https://perma.cc/D94K-A7AV (Rubinstein Memo).

President Biden's administration repeatedly extended the payment pause through various press releases but did not publish a HEROES Act notice until October 2022. *E.g.*, Dep't of Educ., *Biden Administration Extends Student Loan Pause until January 31, 2022* (Aug. 6, 2021), https://perma.cc/CUC3-XXZ5 ("announc[ing] a final extension of the pause" and "a definitive end date"); Dep't of Educ., *Biden-Harris Administration Extends Student Loan Pause through May 1, 2022* (Dec. 22, 2021), https://perma.cc/F47Y-XR9Y; Dep't of Educ., *Biden-Harris Administration Extends Student Loan Pause through August 31* (Apr. 6, 2022), https://perma.cc/5CT7-8MVK ("the economy continues to improve and COVID cases continue to decline"); 87 Fed. Reg. 61,512, 61,513–14 (Oct. 12, 2022) (extending the CARES Act's "Suspension of Payments").

D. The Loan Cancellation Program

Just weeks after the CARES Act passed, then-candidate Biden said that Congress's "next recovery package will need to" include "an immediate cancellation of a minimum of $10,000 of student debt per person." Biden, *Joe Biden Outlines New Steps to Ease Economic Burden on Working People*, Medium (Apr. 9, 2020), https://perma.cc/7SLA-XJ8Z (Biden, Medium). Going further, he "propose[d] to forgive all undergraduate tuition-related federal student debt from . . . public colleges and universities for debt-holders earning up to $125,000." *Ibid.*

Months later, "Biden entered the presidency deeply skeptical of the idea" that "he had the authority" to unilaterally "writ[e] off large chunks of student loan debt." Stratford & Daniels, *How Biden*

Finally Got to "Yes" on Canceling Student Debt, Politico (Aug. 25, 2022), https://perma.cc/H7X4-5URZ. So he reiterated his request for "Congress to immediately cancel $10,000 in student debt per borrower." Nova, *Biden Will Call on Congress to Forgive $10,000 in Student Debt for All Borrowers*, CNBC (Jan. 8, 2021), https://perma.cc/597N-2MTF. For the first year of his presidency, Biden was "consistent that Congress"—not the Department—"should cancel student loans." Friedman, *Biden Was Asked about $10,000 of Student Loan Cancellation. Here's What He Said.*, Forbes (Jan. 20, 2022), https://perma.cc/9ASL-PJ92. But when Congress did not act, and with the midterm election quickly approaching, the President took matters into his own hands.

On August 24, 2022, the President and the Department announced the Program through government websites and press briefings. J.A. 117–31, 195–207. Administration officials explained that "the President promised to provide targeted student debt relief" "[d]uring the [presidential] campaign" and was now "following through." J.A. 117–18. In an accompanying memorandum, the Department "formally rescinded" its prior position that the HEROES Act does not authorize the Secretary to cancel student-loan principal. 87 Fed. Reg. 52,943, 52,945 (Aug. 30, 2022).

The Program applies to Department-held Direct, FFEL, and Perkins Loans. 87 Fed. Reg. at 61,514. To be eligible, borrowers must have "an Adjusted Gross Income (AGI) below $125,000 for an individual taxpayer or below $250,000 for borrowers filing jointly . . . in either the 2020 or 2021 Federal tax

year." *Ibid.* These income cutoffs include almost all borrowers because approximately 95 percent of households earn less than $250,000 annually. J.A. 112–13, 119. The Department will cancel up to $20,000 for eligible borrowers who received a Pell grant and $10,000 for those who did not. 87 Fed. Reg. at 61,514.

The Department's administrative documents do not discuss the Program's cost, but the Congressional Budget Office estimates that the Program will eliminate $430 billion of the outstanding $1.6 trillion in federal student-loan debt. Letter from Congressional Budget Office to Members of Congress 3 (Sep. 26, 2022), https://perma.cc/62FW-M6BQ (CBO Letter). Another analysis projects the Program will cost up to $519 billion over ten years. J.A. 108. The Department announced that roughly 43 million borrowers will be eligible for the Program, and 20 million "will have their debt completely canceled." J.A. 119.

The Department's August 24 Rationale Memo tries to justify the Program. J.A. 232–55. It speculates that borrowers face a risk of "delinquency and default" because the payment pause is ending and current "[e]conomic conditions" are difficult. J.A. 233–39. While maintaining that COVID-19 caused the current economic conditions, the Department's analysis admits that "other factors (such as Russia's invasion of Ukraine)" have "contributed" to those economic conditions, including the "rise of inflation." J.A. 238. Without considering any option except loan cancellation, the memo concludes that reducing principal balances would decrease most eligible borrowers' monthly payments by a few hundred dollars, which, in turn, would reduce their likelihood of default. J.A.

240–44. The Secretary officially approved the Program at 9:25 a.m. the day he received the memo. J.A. 257–59.

Meanwhile, the Government has been undermining what the Department said in the Rationale Memo. As to the COVID-19 justification, the President declared "[t]he pandemic . . . over" in September 2022. *Biden Says COVID-19 Pandemic Is "Over" in U.S.*, CBS News (Sep. 19, 2022), https://perma.cc/6ZCB-TL65. And as to the current economic conditions, the White House announced that "household finances are *stronger* than pre-pandemic." Biden-Harris Economic Blueprint 29 (Sep. 2022), https://perma.cc/QFW5-DCAD (emphasis added).

The Program's details initially appeared only on the Department's website. J.A. 195–207. The website told "borrowers with privately held federal student loans," including FFEL Loans, that they could receive the Program's benefits "by consolidating . . . into the Direct Loan program." J.A. 201. This incentivized borrowers to consolidate those loans. See J.A. 133 ¶¶6–7. On September 29, 2022—the day this suit began, but after the complaint was filed—the Department edited its website to state that borrowers with non-federally held FFEL Loans can no longer become eligible "by consolidating," but that those who "applied to consolidate" before that date remain "eligible." J.A. 215. Compare D. Ct. Doc. 1 (suit filed at 9:54 a.m. Central), with Turner, *In a Reversal, the Education Dept. Is Excluding Many from Student Loan Relief*, NPR (Sep. 30, 2022), https://perma.cc/8S5Z-8VLC (suggesting the Department's website changed around 11:39 a.m. Eastern). The Department has

never explained this change, but reports indicate that the agency sought to avoid judicial review because entities holding and investing in FFEL Loans were "widely seen . . . inside . . . the administration[] as presenting the greatest legal risk" to the Program. Stratford, *Biden Administration Scales Back Student Debt Relief for Millions Amid Legal Concerns*, Politico (Sep. 29, 2022), https://perma.cc/24Q2-DV7M.

A few weeks later, on October 12, 2022, the HEROES Act notice detailing the Program was published in the Federal Register. 87 Fed. Reg. at 61,512. It states that "the Secretary modifies the provisions of: 20 U.S.C. 1087, which applies to the Direct Loan Program under 20 U.S.C. 1087a and 1087e; 20 U.S.C. 1087dd(g); and 34 CFR part 674, subpart D, and 34 CFR 682.402 and 685.212." *Id.* at 61,514. The Secretary modified—but did not waive—those provisions, all of which address the discharge or cancellation of loans, by rewriting them to create a new loan-cancellation program. See *ibid.*

E. Proceedings Below

The day they filed suit, the States moved for a preliminary injunction, arguing that the Secretary exceeded his authority by approving the Program and that the Program is arbitrary and capricious under the Administrative Procedure Act (APA). J.A. 1–44. The district court denied the States' motion and dismissed the case for lack of standing. J.A. 135–51.

The Eighth Circuit enjoined the Program pending appeal. J.A. 160–67. Starting with standing, the court observed that "MOHELA obtains revenue from the accounts it services," its revenue "will decrease if a

substantial portion of its accounts are no longer active," and this will produce an "unanticipated financial downturn." J.A. 164. The court also detailed the close relationship between Missouri and MOHELA: (1) Missouri's legislature created MOHELA; (2) MOHELA's board consists exclusively of individuals chosen by the governor and officials from other state agencies; and (3) state law requires MOHELA to contribute to the Lewis and Clark Discovery Fund (LCD Fund) in the State Treasury. J.A. 163. It "may well be," the court reasoned, that MOHELA is "an arm of the State of Missouri." J.A. 163–64 (collecting cases). Regardless, the Program's negative "financial impact on MOHELA . . . threatens to independently impact Missouri" by preventing or delaying MOHELA from satisfying its obligation to pay money to the State Treasury. J.A. 164.

The Eighth Circuit then explained that the States raised "substantial questions of law" and "the equities strongly favor an injunction considering the [Program's] irreversible impact." J.A. 165. Limiting the injunction's scope would fail to provide "complete relief" because MOHELA services millions of student-loan accounts nationwide. J.A. 165–66.

SUMMARY OF ARGUMENT

I. The States have standing to challenge the Program. *First*, the Program will inflict substantial financial losses on MOHELA, and those losses injure Missouri. MOHELA is a state-created and state-controlled public entity that performs essential public functions for the State. As such, MOHELA is part of Missouri, and the State has standing to challenge actions that impair MOHELA's finances. In addition,

MOHELA's financial losses harm Missouri by threatening to reduce, delay, or otherwise hinder MOHELA's financial contributions to the State Treasury and the State's financial-aid programs.

Second, Nebraska, Iowa, Kansas, and South Carolina have standing because the Program threatens the direct loss of income from taxing student-loan discharges. The States are set to begin taxing those discharges after 2025, and many student loans will be discharged at that time. But the Program will reduce the number and amount of those loans *now*, which will inevitably decrease the States' future tax revenue. That establishes standing.

Third, when this suit began, Arkansas, Missouri, and Nebraska were suffering financial harm because the Program prompted borrowers to consolidate non-federally held FFEL Loans into Direct Loans. This widespread consolidation reduces the revenue that Arkansas's ASLA earns from its FFEL Loans, deprives MOHELA of FFEL Loans that generate interest income and secure bonds, and undermines Nebraska's investments in FFEL-based SLABS. The Government wants to ignore those harms because the Department removed the consolidation pathway to access the Program *after* this suit began. But that raises a mootness issue—not a standing question—and the Government has not met its heavy burden to show that it will not reopen the consolidation pathway.

II. On the merits, the Program exceeds the Secretary's authority under the HEROES Act. To begin, this is a major-questions case. Discharging almost a half-trillion dollars owed to the Department is, as the

Government admitted below, undoubtedly a matter of economic and political significance. And the Secretary's unprecedented reading of the HEROES Act claims breathtaking and transformative power beyond his institutional role and expertise. In short, the Secretary's asserted cancellation power is the type of major question that courts presume Congress reserves for itself. That this case involves a government-benefit program is no cause to discard the major-questions doctrine because the doctrine's separation-of-powers underpinnings apply equally in this context as in others.

The Government has not shown colorable—let alone clear—congressional authorization for the Program. The HEROES Act permits the Secretary to keep borrowers from a "worse position" by maintaining the status quo. It does not allow the Secretary to put nearly every borrower in a better position by reducing or eliminating their principal balances. The Act also limits the Secretary to "waiving or modifying" statutory or regulatory provisions. Yet here, the Secretary's HEROES Act notice does not purport to "waive" the cited provisions, and his decision to rewrite those provisions to create a new loan-cancellation program goes way beyond "modifying" them. Nor did the Secretary sufficiently connect the Program to the COVID-19 emergency. His tenuous attempt to do so is a pretext masking his true purpose—to fulfill the President's campaign promise on student-loan forgiveness. The Program's broad scope also demonstrates its unlawfulness. It includes all but the top five percent of earners, and the Secretary's unpublished, self-reported data confirm that most eligible borrowers do *not* expect to need the relief given. This

complete failure to tailor the Program exceeds the Secretary's authority.

III. The Program is also arbitrary and capricious. The Secretary did not consider *any* alternatives to help borrowers besides mass loan cancellation. Nor did he assess the States' legitimate reliance interests. Also glaring is the Secretary's failure to explain the abrupt shift in the consolidation pathway to eligibility. All these failures violate the APA.

ARGUMENT

I. The States have standing.

"[T]he presence of one party with standing is sufficient" for Article III. *Rumsfeld* v. *FAIR*, 547 U.S. 47, 52 n.2 (2006). Standing requires "(1) an injury in fact, (2) a sufficient causal connection," and "(3) a likelihood that the injury will be redressed by a favorable decision." *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 157–58 (2014) (cleaned up). The States satisfy these elements for three groups of injuries: (1) financial harms to Missouri through MOHELA; (2) lost revenue from taxing student-loan discharges; and (3) financial injuries from the consolidation of FFEL Loans into Direct Loans.

A. The impending financial harm to MOHELA will injure Missouri.

The Government does not seriously dispute that the Program will inflict great financial harm on MOHELA. Nor could it. Last fiscal year, MOHELA earned $88.9 million—roughly 77.5 percent of its operating revenue—from servicing 5.2 million Direct Loan accounts. MOHELA FY 2022 Financial State-

ment at 4, 23, https://perma.cc/2F8G-WWWV (MOHELA Financial Statement). This revenue depends on how many accounts MOHELA services—the more accounts, the more it earns. J.A. 71–72. But the Department estimates that the Program will completely eliminate the debt of nearly half of all borrowers. J.A. 118–19. Because many of those borrowers have multiple accounts, see J.A. 94–101, the Program threatens at least half of the Direct Loan accounts MOHELA services—and likely more. That jeopardizes nearly 40 percent of MOHELA's total operating revenue—or $44 million annually. See MOHELA Financial Statement, *supra*, at 4, 23.

These financial losses establish Missouri's standing for two reasons: (1) MOHELA is a Missouri-created and -controlled public instrumentality, so its harms are harms to the State; and (2) MOHELA's losses jeopardize its financial contributions to Missouri.

1. Missouri has standing because MOHELA is a public instrumentality of the State. "Government-created and -controlled corporations are" often "part of the Government itself." *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995). Such corporations exist when the Government (1) "creates [the] corporation by special law," (2) "for the furtherance of governmental objectives," and (3) "retains for itself permanent authority to appoint a majority of the directors." *Id.* at 399. It matters not if those entities lack "sovereign immunity," *id.* at 392, or possess "the authority to-sue-and-be-sued," *Keifer & Keifer* v. *Reconstruction Fin. Corp.*, 306 U.S. 381, 390 (1939). "[T]he practical reality of [government] control and

supervision prevails" over corporate labels. *Dep't of Transp.* v. *Ass'n of Am. Railroads*, 575 U.S. 43, 55 (2015).

Applying those factors, MOHELA is part of Missouri's government. First, the legislature created MOHELA by special law. Mo. Rev. Stat. §173.360. Second, Missouri declares that "the exercise by [MOHELA] of the powers conferred" on it, which include ensuring access to loans for Missouri students, is "the performance of an essential public function." *Ibid.* Third, the governor appoints five of MOHELA's seven members; the remaining two are officials of other state entities; and all seven are "remov[able] by the governor" for cause. *Ibid.*

Other considerations underscore Missouri's control over MOHELA. The State established MOHELA's powers, see *id.* §173.385, and in doing so controls MOHELA by limiting it to only those powers. Missouri also "assigned" MOHELA to its Department of Higher Education and Workforce Development and requires annual reports of MOHELA's finances. *Id.* §173.445. Additionally, the State preserved its authority "over assets of" MOHELA, *id.* §173.420, and may "abolish" MOHELA at its pleasure, see *Cas. Reciprocal Exch.* v. *Missouri Emps. Mut. Ins. Co.*, 956 S.W.2d 249, 255 (Mo. 1997) (en banc). And though not essential, MOHELA qualifies as a "public entity" entitled to sovereign immunity from tort claims under state law. See *id.* at 254 (discussing sovereign-immunity factors); *Todd* v. *Curators of Univ. of Missouri*, 147 S.W.2d 1063, 1064 (Mo. 1941) (immunity for entity that "may sue and be sued").

Because MOHELA is a Missouri-created and -controlled entity, the State may sue in its name to vindicate harms to MOHELA. Indeed, Missouri law authorizes its Attorney General to sue "in the name and on the behalf of the state . . . to protect the rights and interests of the state." Mo. Rev. Stat. §27.060.

Caselaw involving federally created corporations supports Missouri's standing. It is "well settled" that "when the United States acts through the agency of a wholly owned corporation, it may sue in its own name for the protection of its interest, without the joinder of the corporation." *Ins. Co. of N. Am.* v. *United States*, 159 F.2d 699, 702 (4th Cir. 1947) (collecting cases). In *Cherry Cotton Mills* v. *United States*, 327 U.S. 536, 539 (1946), for example, when a private company sued the Government for a tax refund, the Court allowed the Government to counterclaim based on the interests of the federally created Reconstruction Finance Corporation (without joining the corporation as a party) because Congress created the corporation to achieve "Governmental purposes." Similarly, *Erickson* v. *United States*, 264 U.S. 246, 248–49 (1924), held that the Government's lawsuit over a contract dispute between the federally created Spruce Corporation and a third party was "a suit brought by the United States" regardless of whether the corporation "join[ed] in the suit." See also *Lebron*, 513 U.S. at 395–96 (discussing other cases treating government-created corporations as "part of the Government"). That the entity in each of these cases took a corporate form did not "make it something other than what it actually is, an agency selected by Government to accomplish purely Governmental purposes." *Cherry Cotton Mills*, 327 U.S. at 539.

Precedent involving States is no different. For instance, *Arkansas* v. *Texas*, 346 U.S. 368, 370–71 (1953), held that "any injury" to the University of Arkansas was "an injury to Arkansas" because the legislature "created" the university, the governor "appointed" its board, the university "report[ed]" its finances to the State, and the university is "'a body politic and corporate' with power to issue bonds" (even though those bonds did "not pledge the credit of the State"). See also *Florida* v. *Anderson*, 91 U.S. 667, 675–76 (1875) (Florida's interest in a state-created entity controlled by state officials "is sufficiently direct to give [the State] standing"); cf. *Missouri* v. *Illinois*, 180 U.S. 208, 242 (1901) (Illinois was correctly "made a party" for the actions of a sanitary district that was "a public corporation . . . within the control of the state"). For similar reasons, Missouri has standing here.

The Government's argument ignores all that precedent, relying instead on general principles of "corporate separateness." Br. 28–29. The Government's primary case—*First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623–27 (1983) (*Bancec*)—involved foreign government corporations, recognized that corporate separateness often gives way when the corporation is controlled by another, *id.* at 629, and distinguished prior cases addressing "the legal status" of domestic "government instrumentalities" because they involved "contexts" not "relevant" there, *id.* at 623 n.12. By its own terms, then, *Bancec* did not displace the caselaw discussed above.

The Government emphasizes that MOHELA has a measure of separation—mainly "financial separation"—from Missouri. Br. 29. But the Government overplays this. As explained above, MOHELA is controlled by the State because its members are chosen by the governor or are officials of other state entities; the State gave MOHELA all its powers and can dissolve MOHELA and take its assets; and MOHELA annually reports its finances to the State. Also, as discussed below, MOHELA owes money to the State and helps fund the State's financial-aid programs. More importantly, quibbling about the degree of financial separation is beside the point because government-created and -controlled corporations are part of the government even if they are "distinct . . . financially." *Lebron*, 513 U.S. at 394–95. Nor is it relevant whether MOHELA was "involved with the decision of the Missouri Attorney General's Office" to file this suit. Br. 29. The Attorney General alone decides whether to sue to protect the "interests of the state." Mo. Rev. Stat. §27.060.

2. Missouri also has standing because MOHELA's financial losses jeopardize its monetary contributions to the State. Allegations of future injury establish standing if "there is a substantial risk that the harm will occur." *Dep't of Com.* v. *New York*, 139 S. Ct. 2551, 2565 (2019) (citation omitted). When the harm is financial, a plaintiff need only show "a sufficient likelihood of economic injury," *Clinton* v. *City of New York*, 524 U.S. 417, 432 (1998), which exists when the challenged action "might entail some future loss," *Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 152 (1970). Missouri satisfies that standard.

MOHELA transfers money to Missouri in two ways. First, MOHELA has given $245 million—and still owes $105 million—to the State's LCD Fund, see MOHELA Financial Statement, *supra*, at 20; Mo. Rev. Stat. §173.385.2, which supports "capital projects" at Missouri's "public colleges and universities," Mo. Rev. Stat. §173.392.2. Second, Missouri has authorized MOHELA to provide student financial aid, *id.* §173.385.1(19), and MOHELA has done so by contributing, at the governor's request, nearly $100 million over the last 12 years to the State's scholarship and grant programs, see J.A. 62; MOHELA Financial Statement, *supra*, at 10; Missouri Dep't of Higher Educ. and Workforce Development, Grants and Scholarships, https://perma.cc/4GR3-MDLD (listing the State's programs).

The Program's adverse "financial impact on MOHELA," as the Eighth Circuit held, "threatens to independently impact Missouri" by preventing or delaying MOHELA's contributions to "the LCD Fund." J.A. 164. The same is true of MOHELA's regular funding for Missouri's student-aid programs. By hindering MOHELA's contributions to the State, the Program risks financial injury to Missouri. See *Franchise Tax Bd. of Cal.* v. *Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990) (owners of subsidiaries "have Article III standing to challenge the taxes that their . . . subsidiaries are required to pay" because higher taxes on the subsidiaries "threaten[] to cause actual financial injury" to the owners); *Hunt* v. *Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 345 (1977) (state agency has standing when harm to the industry that pays assessments to the agency "could reduce the amount" it receives).

The Government objects that this argument relies on "[g]uesswork about how the plan will affect MOHELA and how MOHELA will react." Br. 28. Not so. As explained, the Program jeopardizes at least half of MOHELA's operating revenue. See pp. 15–16, *supra*. Such a massive loss will reduce, delay, or stop MOHELA's contributions to Missouri. Indeed, MOHELA affirms that "*[a]ny available funds* above its operating needs and reasonable reserves are devoted . . . to student financial aid." C.A. Docket Entry Attachment at 1 (Nov. 1, 2022) (emphasis added). Crippling MOHELA's operating revenue will necessarily shrink its "available funds" to contribute to the State's "student financial aid." This "predictable effect" on MOHELA's contributions to the State goes beyond "mere speculation." *Dep't of Com.*, 139 S. Ct. at 2566.

The Government also argues that accepting this standing theory would allow "banks [to] sue anyone who causes financial harm to their borrowers." Br. 27. Yet unlike a bank's arms-length relationship with borrowers, Missouri created MOHELA, selects its members, tasked it with performing essential functions for the State, and directed it to return funds to the State. This case is thus akin to an entity challenging financial harm inflicted on a corporation that it controls and receives money from, which satisfies Article III. See *Alcan*, 493 U.S. at 336. Those situations are not comparable to a bank's relationship with its borrowers. Missouri is also dissimilar from a bank because of its quasi-sovereign interest in ensuring that Missouri students and universities have adequate funding for education. See *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 607 (1982) (State

has "quasi-sovereign interest" in the "well-being—both physical and economic—of its residents").

B. The States are facing direct harm to specific tax revenues.

Nebraska, Iowa, Kansas, and South Carolina have standing because they will suffer a "direct injury in the form of a loss of specific tax revenues." *Wyoming* v. *Oklahoma*, 502 U.S. 437, 448 (1992). Those States use federal adjusted gross income (AGI) to calculate state taxable income. Neb. Rev. Stat. §77-2714.01(1); Iowa Code §422.7; Kan. Stat. Ann. §79-32,117(a); S.C. Code §12-6-40. Normally, federal AGI includes student-loan discharge. 26 U.S.C. 61(a)(11). But the American Rescue Plan Act of 2021 (ARPA) temporarily excludes those discharges from federal AGI until January 1, 2026. Pub. L. No. 117-2, §9675, 135 Stat. 4 (Mar. 11, 2021) (26 U.S.C. 108(f)(5)). The Program harms the States by immediately causing $430 billion in non-taxable loan discharges that will reduce the amount of future discharges for the States to tax.

The States have shown "a substantial risk that the harm will occur." *Dep't of Com.*, 139 S. Ct. at 2565 (citation omitted). Billions of dollars in student-loan principal are set to be discharged after 2025. Some of that will come from the Department's Income-Driven Repayment (IDR) plans, which cancel outstanding principal after borrowers make payments for 20 or 25 years. See 34 C.F.R. 685.221(f). Between 2026 and 2030, 1.2 million IDR loans will cross the 20- or 25-year threshold and become potentially eligible for forgiveness. U.S. Gov't Accountability Office, *Federal Student Aid: Education Needs to Take Steps to Ensure Eligible Loans Receive Income-Driven Repayment*

Forgiveness 16 fig.3 (2022), https://perma.cc/4AAY-EE5K. Those 1.2 million loans collectively amount to billions of dollars. See *id.* at 10. But the Program will erase or reduce most of those loans now, J.A. 118–19, 242–43, and thus prevent the States from taxing them.

The direct and specific nature of this tax harm is akin to *Wyoming*. There, Wyoming had standing because the challenged Oklahoma law caused "a *direct* injury in the form of a loss of *specific* tax revenues"—a severance tax on extracted coal. *Wyoming*, 502 U.S. at 448 (emphases added). The States here similarly present a direct harm to specific tax revenues—income tax on student-loan discharges.

The *Wyoming* Court distinguished cases where States challenge actions that allegedly injure their "economy," which, in turn, "cause[] a decline in *general* tax revenues." *Ibid.* (emphasis added). That describes *Florida* v. *Mellon*, 273 U.S. 12, 17–18 (1927), which the Government cites, see Br. 23. Florida speculated that a federal inheritance tax would prompt taxpayers to take independent action—"withdraw-[ing] property from the state"—which might result in less overall property to tax. *Florida*, 273 U.S. at 17–18. Such an "indirect" effect on Florida's general tax revenues did not establish standing. *Id.* at 18. Here, however, the States challenge the loss of particular tax revenue that the Program directly causes. The Government is thus wrong to claim that recognizing the States' tax injury would give every State "standing to challenge almost any federal policy." Br. 24. It would give States no more standing than *Wyoming* allows.

Moreover, the likelihood of the injury in this case exceeds that of prospective economic injuries accepted in other cases. In *Clinton*, federal action left groups on "[un]equal footing with their competitors," 524 U.S. at 427, thus "inflict[ing] a sufficient likelihood of economic injury to establish standing," *id.* at 432. And in *Association of Data Processing Service Organizations*, businesses alleged that agency action allowing new competitors "might entail some future loss of profits." 397 U.S. at 152. In both cases, it was unclear whether the plaintiffs would suffer actual economic harm. But here, the injury is near certain. Barring a change in the law, the States will resume taxing student-loan discharges, and the number and amount of the taxable discharges will be less because of the Program. Article III requires no more.

Nor is this a self-inflicted injury. Contra Br. 22–23. Such injuries describe situations when plaintiffs *respond to* defendants' allegedly unlawful conduct by inflicting harm on themselves. In *Clapper* v. *Amnesty International USA*, 568 U.S. 398, 415 (2013), the plaintiffs took "costly and burdensome measures" in reaction to suspected government surveillance. Similarly, in *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 664 (1976) (per curiam), the States' harms were "self-inflicted" because they voluntarily incurred a cost—tax credits to offset taxes their citizens paid to other States—in response to other States' actions. See also *FEC* v. *Cruz*, 142 S. Ct. 1638, 1647 (2022) (describing *Pennsylvania* as involving States' "independent response to taxes levied"). Yet here, the legal framework causing the States' harm existed before the Program. That harm is not self-inflicted.

Even if the States could respond by changing their tax laws, that would not erase their injury. States have a sovereign right "to create . . . a legal code." *Alfred L. Snapp*, 458 U.S. at 601. Forcing States to exercise that power by upending their preferred system for calculating state taxable income is itself an injury, and "the possibility that a plaintiff could avoid [one] injury by incurring [another] does not negate standing." *Texas* v. *United States*, 809 F.3d 134, 156–57 (5th Cir. 2015), *aff'd by an equally divided court*, 579 U.S. 547 (2016); see also *Cruz*, 142 S. Ct. at 1647 (finding standing even though plaintiffs "chose to subject themselves to [the challenged] provisions"). That is why many circuits have declined to "treat[] the availability of changing state law as a bar to standing." *Texas*, 809 F.3d at 157; *accord California* v. *Azar*, 911 F.3d 558, 574 (9th Cir. 2018).

C. The Program prompted broad loan consolidation causing injury to the States.

When this suit began, the Program was injuring Arkansas, Missouri, and Nebraska by causing the widespread consolidation of non-federally held FFEL Loans into Direct Loans. Those three States' injuries, each of which is slightly different, are all cognizable.

First, Arkansas's ASLA held $100 million in FFEL Loans before the Program existed. J.A. 133 ¶6. In the first 35 days after the Program was announced, consolidation eliminated $5 to $6 million of those loans. J.A. 133 ¶7. Because ASLA's administrative fee is based on the amount of its FFEL Loans, the Program has reduced ASLA's revenue, J.A. 133 ¶8, and inflicted injury, see *Hunt*, 432 U.S. at 345 ("reduc[ing]

the amount of [a state agency's] assessments" harms the agency).

Second, MOHELA also holds FFEL Loans, which it uses to secure bonds and provide a source of interest income. J.A. 64–65. Diminishing those FFEL Loans inflicts an "actual financial injury" by "reducing the return on [MOHELA's] investments." *Alcan*, 493 U.S. at 336.

Third, Nebraska invests tens of millions in FFEL-secured SLABS. J.A. 103 ¶¶4–7. Consolidating FFEL Loans raises repayment rates, which returns the SLABS's principal and ends the interest income early. See J.A. 57 ("incentive for FFEL[] Loan borrowers to consolidate" risks raising "repayment rates" and "increasing monthly distributions of principal"); J.A. 58–59 (FFEL-backed securities are undermined when "prepayments" of FFEL Loans increase because they "are consolidated under the Direct Loan Program"); J.A. 103 ¶8. This, too, is an injury in fact. *Alcan*, 493 U.S. at 336.

For all those consolidation-based injuries, causation is satisfied. See *Dep't of Com.*, 139 S. Ct. at 2565–66. The Program caused the injuries because it explicitly advised borrowers with privately held FFEL Loans that they could receive the Program's benefits "by consolidating . . . into the Direct Loan program." J.A. 201. Telling borrowers that they can erase up to $20,000 of student loans through consolidation is an irresistible incentive, as demonstrated by ASLA losing about six percent of its FFEL Loans in just 35 days. J.A. 133 ¶¶6–7. The States' "theory of standing thus does not rest on mere speculation about the decisions of third parties; it relies instead on the

[demonstrated] effect of Government action on the decisions of third parties." *Dep't of Com.*, 139 S. Ct. at 2566. The Government's preferred precedent—*Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42–43 (1976)—is nothing like this case because *Simon* lacked evidence showing a link between the challenged action and the harm.

The final standing factor—redressability—was also satisfied "when the suit was filed." *Davis* v. *FEC*, 554 U.S. 724, 734 (2008) ("[T]he standing inquiry remains focused on . . . when the suit was filed."). Setting aside or enjoining the Program at that time would have eliminated the compelling incentive to consolidate and stopped the consolidation injuries.

The Government dismisses those consolidation harms because of a change the Department implemented *after* this suit began. Br. 25. The day the States sued but after the complaint was filed, the Department updated its website to say that borrowers with privately held FFEL Loans could no longer become eligible for the Program through consolidation. J.A. 215. Though the Government says that it decided to make this change "before the States sued," Br. 25, what matters is when reviewable agency action occurred, *Biden* v. *Texas*, 142 S. Ct. 2528, 2544–45 (2022), and that happened—at the earliest—when the website changed after suit was filed.

"It is the doctrine of *mootness*, not standing, that addresses whether an intervening circumstance has deprived the plaintiff of a personal stake in the outcome of the lawsuit." *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2607 (2022) (cleaned up). "[V]oluntary cessation does not moot a case unless it is absolutely clear

that the allegedly wrongful behavior could not reasonably be expected to recur." *Ibid.* (cleaned up). Here, the Secretary cannot satisfy that "heavy" burden, *ibid.*, because the change is an obvious attempt "to insulate [his] decision from [judicial] review," *Knox* v. *SEIU, Local 1000*, 567 U.S. 298, 307 (2012), and the Department continues to express its desire "to provide relief to borrowers" with non-federally held FFEL Loans, J.A. 216.

These consolidation injuries allow the States to challenge both the Program's initial inclusion of the consolidation pathway and the Program's debt discharge. These inextricably intertwined features of the Program—both of which existed when the suit began—cannot be separated because consolidation's enticement hinged on the promise of debt discharge. Litigants have standing to challenge the various aspects of "the *one* Government action that causes their harm." *Cruz*, 142 S. Ct. at 1650.

II. The Program exceeds the Secretary's authority.

The Court should "hold unlawful and set aside" the Program because it exceeds the Secretary's "statutory . . . authority." 5 U.S.C. 706(2)(C). The major-questions doctrine applies because the Secretary's claimed power to cancel loan principal for virtually all borrowers is a matter of immense economic and political significance, a novel use of a 20-year-old statute, and a breathtaking and transformative assertion of power beyond the Secretary's institutional and policy expertise. This "counsels skepticism" toward the Secretary's action, and he has failed to establish "clear"—

or even plausible—"congressional authorization" for the Program. *West Virginia*, 142 S. Ct. at 2614.

A. This is a major-questions case.

Analysis of an agency's statutory authority "must be 'shaped, at least in some measure, by the nature of the question presented'—whether Congress in fact meant to confer the power the agency has asserted." *West Virginia*, 142 S. Ct. at 2608 (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). Major-questions cases are those "in which the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *Ibid.* (cleaned up).

The major-questions doctrine is a constitutionally based clear-statement canon rooted in "both separation of powers principles and a practical understanding of legislative intent." *Id.* at 2609. The Court "presume[s] that Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Ibid.* (cleaned up). And the Court exercises "common sense as to the manner in which Congress is likely to delegate a policy decision of . . . economic and political magnitude." *Brown & Williamson*, 529 U.S. at 133.

Clear-statement rules "ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation." *Spector* v. *Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005) (plurality opinion). They "operate[] as a vital check on expansive and aggressive assertions of executive authority." *U.S. Telecom Ass'n* v. *FCC*, 855

F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

1. The key major-questions factors are present here.

As the Government conceded below, see D. Ct. Doc. 27, at 41, the claimed authority to cancel loan principal for virtually all borrowers is a matter of great "economic and political significance." *West Virginia*, 142 S. Ct. at 2608. This one use of that power erases $430 billion owed to the Government, see CBO Letter, *supra*, at 3, and costs taxpayers more than a half-trillion dollars over ten years, J.A. 108. See *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (applying the doctrine when the economic effect was $50 billion). To put that in perspective, a 2007 House Report projected that the Public Service Loan Forgiveness program and forgiveness for borrowers working in areas of national need would collectively cost $2.6 billion over ten years. H.R. Rep. No. 110-210, at 69–72 (2007); see College Cost Reduction and Access Act, Pub. L. No. 110-84, §401, 121 Stat. 784 (Sep. 27, 2007) (20 U.S.C. 1087e(m)); Higher Education Opportunity Act, Pub. L. No. 110-315, §430, 122 Stat. 3078 (Aug. 14, 2008) (20 U.S.C. 1078-11). The Program dwarfs that by orders of magnitude. A half-trillion-dollar agency action is no "everyday exercise of federal power." *NFIB*, 142 S. Ct. at 665 (citation omitted).

The political significance is likewise undeniable. Student-loan cancellation is a matter of "earnest and profound debate." *Gonzales* v. *Oregon*, 546 U.S. 243, 267 (2006). The issue is "regularly in the top five issues in the correspondence that the White House receive[s] from Americans each week." Stratford &

Daniels, *supra*. The President has also acknowledged the political importance by calling on Congress to cancel student debt. Nova, *supra*. Yet Congress has "conspicuously and repeatedly declined to enact" student-loan discharge bills, *West Virginia*, 142 S. Ct. at 2610, including one COVID-relief bill that would have canceled $10,000 for certain borrowers, *e.g.*, H.R. 2034, 117th Cong. (2021); H.R. 6800, 116th Cong. §150117(h) (2020); S. 2235, 116th Cong. (2019). Instead, Congress chose in the CARES Act to grant limited forgiveness by canceling Direct Loans only "for a recipient" who "withdraws" from school "as a result of" COVID-19. Pub. L. No. 116-136, §3508(c). Now, the Department is "attempting to work around the legislative process to resolve for itself a question of great political significance." *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (cleaned up).

Through the Secretary's broad reading of the HEROES Act, he claims "a breathtaking amount of authority." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. He asserts power to cancel student debt, of any amount, for any borrower, originating from any kind of federal student loan (Direct, FFEL, or Perkins), even a decade after a war, military operation, or national emergency begins. See J.A. 293; 20 U.S.C. 1098bb(a)(1) (applying to "any" loan program under "title IV" of the HEA). Under his view, the Secretary could erase all $1.6 trillion in outstanding loans, including those held by non-federal entities, if he thinks it warranted after the exigencies of an emergency have subsided. Courts rightly greet such assertions of "extravagant statutory power" with skepticism. *West Virginia*, 142 S. Ct. at 2609.

While the Government says that the HEROES Act "applies only in a limited set of circumstances," Br. 50, any "national emergency declared by the President" triggers it, 20 U.S.C. 1098ee(4). Presidents routinely declare such emergencies over all sorts of matters. *E.g.*, 84 Fed. Reg. 4,949, 4,949 (Feb. 15, 2019) ("national emergency . . . at the southern border"); 74 Fed. Reg. 55,439, 55,439 (Oct. 23, 2009) ("H1N1 influenza pandemic"). So if future Presidents announce national emergencies about any far-reaching issue—such as climate change, inflation, gun control, or general economic conditions, cf. 86 Fed. Reg. 7,037, 7,037 (Jan. 20, 2021) (directing action "to confront the climate crisis"), the Secretary could erase hundreds of billions of dollars more in loans.

This broad assertion of power is also "unheralded." *West Virginia*, 142 S. Ct. at 2610. Until now, the Secretary has not "relied on the HEROES Act" during its 20-year history for the "mass cancellation . . . of student loan principal balances." Rubinstein Memo, *supra*, at 6. The Congressional Research Service agrees that "[c]ategorical cancellation . . . reflects a use of [the Secretary's] HEROES Act authority that is unlike past invocations." Cong. Rsch. Serv., *Statutory Basis for Biden Administration Student Loan Forgiveness* 1 (Sep. 13, 2022). Even the current administration's Office of Legal Counsel (OLC) suggests that "the direct cancellation of the principal balances of student loans would be a new application of the statute." Office of Legal Counsel, U.S. Dep't of Justice, *Use of the Heroes Act of 2003 to Cancel the Principal Amounts of Student Loans*, 2022 WL 3975075, at *12 (Aug. 23, 2022) (OLC Op.). "It is telling" that the Sec-

retary "has never before adopted" a new loan-forgiveness program under the HEROES Act. *NFIB*, 142 S. Ct. at 666.

The Government denies that the Secretary asserts novel authority, citing the COVID-19 payment pause as a comparator. Br. 51. But the legality of that action presents "unresolved questions regarding the Secretary's authority," Cong. Rsch. Serv., *The Biden Administration Extends the Pause on Federal Student Loan Payments* 2–4 (Jan. 27, 2021), "never addressed by a court," *West Virginia*, 142 S. Ct. at 2610. Regardless, the payment pause is no analogue. It never discharged loan principal; its purpose and direct effect were to maintain borrower status quo; it originated during extreme exigencies at the outset of the pandemic; it cost a fraction of the Program; and Congress has at least partially approved it through the CARES Act, see Pub. L. No. 116-136, §3513. Even if the Government could identify instances where the pause's indirect effect reduces a borrower's total payments over the life of a loan, "there is an obvious difference" between directly erasing loan principal and an action "that may end up causing an incidental" reduction in total payments. *West Virginia*, 142 S. Ct. at 2613 n.4. The Program is not "just business as usual." *Ibid.*

This novel power is also a "transformative expansion" of the Secretary's authority. *Util. Air Regul. Grp.* v. *EPA*, 573 U.S. 302, 324 (2014) (*UARG*). Prior uses of the Act maintained borrower status quo, 85 Fed. Reg. at 79,863, relaxed various paperwork and documentation requirements, 68 Fed. Reg. at 69,314–18, provided short extensions of borrower notice re-

quirements, *id.* at 69,315, and waived specific eligibility requirements for existing loan-forgiveness programs, *id.* at 69,317. The power exercised here is different in kind. The Secretary is no longer just administering loan-forgiveness programs; he is creating them. And he is not merely preserving the status quo for borrowers but elevating them far beyond their pre-emergency position.

The Secretary's broad cancellation authority likewise moves the Department outside its legitimate institutional role and "policy expertise." *West Virginia*, 142 S. Ct. at 2612. The agency is not equipped to "balanc[e] the many vital considerations of national policy implicated" when establishing a half-trillion-dollar loan-forgiveness program, including its impact on the national debt and funding levels for other federal programs. *Ibid.* That balancing is a task for Congress. Additionally, this invocation of the HEROES Act required the Secretary to speculate that COVID-19 is the main cause of the nation's "current economic conditions." J.A. 235–39 (capitalization omitted). Yet the Department has "no comparative expertise" in macroeconomics or the causes of national economic trends. *West Virginia*, 142 S. Ct. at 2613 (quoting *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2417 (2019)). By proffering a justification based on such analysis, the Secretary assumed a role beyond what Congress could have intended.

The Secretary's asserted cancellation authority is also "'incompatible' with 'the substance of Congress' regulatory scheme.'" *UARG*, 573 U.S. at 322 (quoting *Brown & Williamson,* 529 U.S. at 156). The HEA establishes specific classes of borrowers eligible for

loan discharge and narrow circumstances when discharge is permitted. The Secretary's reading of the HEROES Act overrides those choices by authorizing him to craft new loan-cancellation programs whenever the President declares a national emergency—and even after he says the emergency is over. In addition, the HEA's "negotiated rulemaking" requirements recognize that Congress generally values notice, comment, and collaboration when the Department regulates on matters of student financial assistance. 20 U.S.C. 1098a(b)(2). It is implausible that Congress authorized the Secretary to engage in one of the Department's most costly actions ever—a half-trillion-dollar loan-cancellation program—without any rulemaking procedures. *Id.* 1098bb(b)(1).

2. The Government's efforts to avoid the major-questions doctrine lack merit.

The Government dismisses the major-questions doctrine because this case involves "a government benefit program." Br. 48. But as discussed, the doctrine rests on "separation of powers principles and a practical understanding of legislative intent" that "presume[s] . . . Congress intends to make major policy decisions itself." *West Virginia*, 142 S. Ct. at 2609. Those principles apply regardless of whether an agency is regulating private actors or administering a congressionally created benefit program. In both contexts, "an agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 374 (1986). So what matters is not whether the agency is regulating private parties or administering benefits, but

whether it is exercising the type of power that courts would expect Congress to clearly delegate.

Unlike the Government's narrow view, the Court has recognized that major-questions cases "arise[] from all corners of the administrative state." *West Virginia*, 142 S. Ct. at 2608. Notably, *King* v. *Burwell*, 576 U.S. 473, 485–86 (2015), applied the doctrine to a government-benefit program—a federal tax-credit program under the Affordable Care Act—because those tax credits "involv[ed] billions of dollars in spending each year," "affect[ed] . . . millions of people," and presented a question of deep "economic and political significance." For the same reasons, the doctrine applies here.

The Government next argues that extending benefits to citizens does not "encroach[] into the lives of individuals and the affairs of entities." Br. 49 (quotation mark omitted). Yet the Secretary's asserted cancellation power—which applies to any loan under title IV of the HEA—reaches beyond Department-held loans. Accordingly, that claim of authority infringes the rights of those who hold and invest in non-federally held loans, those who service any federal student loans, and countless others "involved in student financial assistance programs." 20 U.S.C. 1098a(a)(1). More broadly, many federal benefit programs—including grants to college students, SNAP food benefits, and social security—affect the daily lives of tens of millions of people. It is baseless to suggest that the major-questions doctrine plays no role in those contexts.

The Government also argues that the ARPA provision making "student-loan discharges . . . tax-free"

until 2025 "anticipated" that the Secretary would use the HEROES Act to cancel debt. Br. 52–53 (discussing Pub. L. No. 117-2, §9675). It did no such thing. Wholly apart from the HEROES Act, existing IDR programs—and other congressionally created loan-forgiveness programs—guarantee the ongoing discharge of student-loan debt under that ARPA provision. See pp. 23–24, *supra*. Thus, ARPA says nothing about what Congress thinks of the HEROES Act. Even if it did, "the views of one Congress as to the construction of a statute adopted many years before by another Congress have very little, if any, significance." *United States* v. *Sw. Cable Co.*, 392 U.S. 157, 170 (1968) (cleaned up).

Finally, the Government's reliance on *Biden* v. *Missouri*, 142 S. Ct. 647, 652–53 (2022) (per curiam), which affirmed CMS's COVID-19 vaccine mandate, is misplaced. Because CMS's "longstanding practice" is to impose infection-control measures, and because vaccine requirements are "a common feature" of the healthcare industry, the Court held that the vaccine mandate was a "straightforward and predictable" use of CMS's power. *Ibid.* But using the HEROES Act to cancel loan principal has never been the Secretary's practice. Nor is it straightforward or predictable to invoke a statute designed to keep borrowers from a "worse position," 20 U.S.C. 1098bb(a)(2)(A), and use it to put them in a decidedly better position by canceling their debt.

B. The Secretary lacks colorable—let alone clear—congressional authorization.

The major-questions rule requires the Secretary to demonstrate "clear congressional authorization" for

the Program. *West Virginia*, 142 S. Ct. at 2609. A "plausible" or "colorable textual basis" will not do. *Ibid.* The HEROES Act fails to provide even plausible support for the Program.

The Act permits the Secretary to (1) "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" when (2) "necessary in connection with a . . . national emergency" and (3) "necessary to ensure that recipients of student financial assistance . . . who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." 20 U.S.C. 1098bb(a)(1)–(2)(A). This text does not authorize the Program for four reasons. First, keeping borrowers from a "worse position" does not permit the mass discharge of loan principal because that puts those borrowers in a better position. Second, the Program does not "waive or modify" the "statutory or regulatory provision[s]" the Secretary invokes. Third, the Secretary provides only a tenuous and pretextual "connection" to a "national emergency." Fourth, the Program's broad scope vastly exceeds the Secretary's power.

1. Keeping borrowers from a "worse position" does not permit the mass discharge of loan principal.

The HEROES Act permits action "necessary to ensure" that affected individuals "are not placed in a worse position financially in relation to [their] financial assistance." 20 U.S.C. 1098bb(a)(2)(A). The Secretary may do that through measures that main-

tain the status quo. These include delaying commencement of loan repayment, 68 Fed. Reg. at 69,315–16, pausing "collection on defaulted loans," *id.* at 69,316, easing requirements for or restrictions on temporary deferment and forbearance options, *id.* at 69,316–17, and pausing ongoing payment obligations, 85 Fed. Reg. at 79,863. The Program goes much further. It creates a new loan-discharge program for nearly all borrowers that places them in a far *better* position by eliminating or reducing their loan principal. That exceeds the statutory authorization.

The other statutory bases for invoking the HEROES Act confirm this. See *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488 (construing the meaning of one sentence by consulting the powers in the next sentence); *UARG*, 573 U.S. at 320 ("words of a statute must be read in their context"). Besides keeping borrowers from a "worse position," the Act permits actions that (1) "minimize[]" "administrative requirements" on "affected individuals" to avoid "defaults," (2) "modif[y]" various "calculation[s]" for determining financial "need," (3) excuse withdrawing students from "return[ing]" a grant "overpayment," or (4) provide "temporary relief" from requirements "rendered infeasible or unreasonable." 20 U.S.C. 1098bb(a)(2)(B)–(E). That the "worse position" provision is set among such modest goals demonstrates that Congress did not give the Secretary power to cancel loan principal en masse. Plus, the Government's broad reading of the "worse position" clause would render superfluous some of the others, see *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988) (canon against

surplusage), particularly the provision allowing adjustments to "administrative requirements" to avoid "defaults," 20 U.S.C. 1098bb(a)(2)(B).

Most telling is the provision allowing affected individuals who withdraw from school to keep a grant "overpayment." *Id.* 1098bb(a)(2)(D). This limited congressional authorization for specific students (withdrawing students) to retain certain aid otherwise owed to the Department (grant overpayments) strongly suggests that this is the only situation where the HEROES Act authorizes the Secretary to excuse the repayment of funds owed. "It would be anomalous for Congress to have so painstakingly described the [Secretary's] limited authority" to excuse the return of funds owed, "but to have given him, just by implication, authority to declare" over 40 million borrowers exempt from paying $430 billion owed to the Government. *Gonzales*, 546 U.S. at 262.

Even the OLC opinion that attempts to justify the Program illustrates why it exceeds the Secretary's authority. The opinion says that the Secretary must "put loan recipients back into the financial position they would be in were it not for the national emergency." OLC Op., 2022 WL 3975075, at *14. The Program does not do that. The Department estimated that for 20 million borrowers, the Program will wipe away *all* their loan balances. J.A. 242–43. And the "median debt" for another 23 million will "fall[] from $29,400 to $13,600." J.A. 243. That does not maintain or restore the status quo ante. It's a windfall.

The Government says the Program does not place borrowers in a "better position" because "reducing the[ir] principal" will "reduc[e] their monthly

payments" and those lower monthly payments might "ameliorate the 'risk that delinquency and default rates will rise *above pre-pandemic levels*.'" Br. 43 (quoting J.A. 242). That blinks reality. Borrowers whose principal balances decrease by up to $20,000 are in a much better position. The Secretary has other tools, such as payment pauses and repayment extensions, to address his concerns over delinquency and default. Canceling principal for nearly all borrowers is not one of the available options.

The Government's multistep argument—that it is (1) erasing principal (2) to reduce monthly payments (3) to decrease delinquency and default—further establishes that the Secretary's actions are unprecedented. Past uses of the HEROES Act have directly prevented borrowers from being placed in a "worse position financially in relation to [their] financial assistance." 20 U.S.C. 1098bb(a)(2)(A). Pausing payments and interest accrual ensures that principal balances do not increase because of interest capitalization. 85 Fed. Reg. at 79,863. And waiving consecutive-work requirements for existing loan-cancellation programs guarantees that borrowers do not lose their place in those programs. 68 Fed. Reg. at 69,317. But erasing principal to reduce monthly payments in hopes that some of the tens of millions of eligible borrowers with remaining balances might not default "relates . . . far more indirectly" to protecting borrowers' loan status. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488. Such a "downstream connection . . . is markedly different" than what the Secretary has done in the past, *ibid.*, and thus confirms that he is exceeding his authority.

The Government also claims that the agency has "substantial discretion" because the Secretary need only "deem" his action "necessary" or show it "may be necessary" to achieve the statutory goal. Br. 36–37. *Alabama Association of Realtors* is instructive on this point. The statute there similarly authorized the relevant official to take actions that "in his judgment are necessary" or "in his judgment may be necessary." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2487; see *Deem*, Black's Law Dictionary (11th ed. 2019) ("deem" means to "judge"). Despite that text, the Court did not defer to the CDC but rather invalidated its eviction moratorium because it exceeded the agency's authority. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488–89. The Court should do the same here because the mass discharge of debt for virtually all borrowers—like the eviction moratorium—is not the kind of power Congress bestowed.

Nor does *Webster* v. *Doe*, 486 U.S. 592, 600 (1988), see Br. 36–37, help the Government. The statute in *Webster* empowered the CIA Director to terminate employees when he "deem[s] such termination necessary *or advisable in the interests of the United States*." 486 U.S. at 594 (emphasis added). That language "exudes deference" to an agency, *id.* at 600, in a way that "deems necessary" does not.

The Government further contends that "there is nothing surprising" about this use of the HEROES Act because the Secretary has recently used his "compromise" authority in 20 U.S.C. 1082(a)(6) for a handful of targeted class-wide loan discharges benefitting attendees of certain corrupt schools. Br. 54–55. But

the Department elsewhere admits that it has historically used this Section 1082(a)(6) "authority to compromise student loan debts on an individualized, case-by-case basis." *Sweet*, *supra*, D. Ct. Doc. 337, at 2. Though that compromise authority was part of the original HEA in 1965, see Pub. L. No. 89-329, §432(a)(6), the Department did not use it for group discharges until 2019—long after the HEROES Act was adopted—and the handful of class-wide discharges under that provision have benefitted only attendees of specific schools, *Sweet*, *supra*, D. Ct. Doc. 337, at 2. This recent and targeted group-discharge practice under a different statute says nothing about the HEROES Act. If anything, the absence of Secretary-imposed class-wide discharges when the HEROES Act passed confirms that Congress did not contemplate anything like the Program.

The Government repeatedly says that the Secretary needs to discharge loans if he hopes to "quickly" assist borrowers during a national emergency. Br. 6, 39, 44, 55. But the word "quickly" does not describe an agency announcing a loan-cancellation program two-and-a-half years after an emergency began. If acting swiftly is the purpose, the Secretary has other tools at his disposal, as past uses of the Act illustrate. Debt cancellation must await congressional action.

2. The Program does not waive or modify the cited statutory and regulatory provisions.

The Act authorizes the Secretary to "waive or modify any statutory or regulatory provision." 20 U.S.C. 1098bb(a)(1). The Program does not stay within those parameters.

The four sets of provisions cited in the Secretary's HEROES Act notice, see 87 Fed. Reg. at 61,514, address the discharge or cancellation of different types of federal loans:

First, 20 U.S.C. 1087 and 34 C.F.R. 682.402 direct the Secretary to discharge FFEL Loans when students die or are disabled, 20 U.S.C. 1087(a), borrowers file for certain bankruptcy relief, *id.* 1087(b), school closures keep students from completing programs, *id.* 1087(c), schools falsely certify borrower eligibility, *ibid.*, or schools fail to refund loan proceeds owed to students, *ibid.*

Second, 20 U.S.C. 1087dd(g) orders the Secretary to cancel Direct Loans when school closures prevent borrowers from completing their programs.

Third, 34 C.F.R. 685.212 outlines other situations when the Secretary discharges Direct Loans, including for the reasons listed in 20 U.S.C. 1087 and various types of public service.

Fourth, 34 C.F.R. part 674, subpart D addresses the circumstances in which Perkins Loans are cancelled. Those reasons include death or disability, 34 C.F.R. 674.61, service in law enforcement, correctional facilities, or the military, *id.* 674.57, 674.59, and work as a teacher, *id.* 674.53, 674.55.

The Secretary claimed to "modif[y]" those provisions by announcing a new cancellation program. 87 Fed. Reg. at 61,514. But "modify" "means to change moderately or in a minor fashion." *MCI Telecomms. Corp.* v. *AT&T*, 512 U.S. 218, 225 (1994) (citing dictionaries); accord *Modify*, Black's Law Dictionary (11th ed. 2019) ("to make small changes"). Rewriting

statutes and regulations to add a new cancellation program—with unique eligibility requirements and discharge amounts—"is effectively the introduction of a whole new regime" of loan cancellation. *MCI*, 512 U.S. at 234. It exceeds what the word "modify" permits.

The Secretary's HEROES Act notice does not purport to "waive" those provisions. See 87 Fed. Reg. at 61,514. That makes sense because "waiving" a provision refers to an "agency's discretionary decision to refrain from enforcing an existing statutory requirement." *Waiver*, Black's Law Dictionary (11th ed. 2019). To illustrate, the Secretary has "waiv[ed] the requirements" that "periods of service" for loan forgiveness "be uninterrupted and/or consecutive, if the reason for the interruption" is a national emergency. 68 Fed. Reg. at 69,317. The Program looks nothing like that. The Secretary is not excusing compliance with an eligibility requirement in existing loan-discharge provisions. Rather, he is crafting a new cancellation program.

On the Government's telling, the Secretary appropriately "eliminate[d] or reduce[d] the requirements . . . that establish . . . discharge eligibility." Br. 38. But in fact, he *ignored* those requirements, preferring instead to construct a new discharge program. Because that is neither a waiver nor a modification, the HEROES Act does not allow it.

In essence, the Secretary is trying to waive or modify the *amount of debt itself*. Congress knows how to give the Secretary power to "waive the amounts that students" owe. 20 U.S.C. 1091b(b)(2)(D)–(E). But the HEROES Act does not use that language. Rather,

the Act authorizes the Secretary to "waive" or "modify" a "statutory or regulatory provision." Because the Secretary did not comply with those requirements, he exceeded his authority.

3. The Program rests on a tenuous and pretextual connection to a national emergency.

The Act requires a direct connection to a national emergency. It does so by demanding, first, that the Secretary's action be "necessary in connection with a . . . national emergency," 20 U.S.C. 1098bb(a)(1), and second, that borrowers face "a worse position financially in relation to [their] financial assistance *because of*" the emergency, *id.* 1098bb(a)(2)(A) (emphasis added). The Program—which the Department was implementing when the President declared the emergency over—does not satisfy those requirements.

The Secretary justifies the Program mainly by citing "current economic conditions." J.A. 235–39 (capitalization omitted). But those conditions are not solely—or even primarily—attributable to COVID-19. They are influenced by myriad factors, including global demand for products, geopolitical events, federal legislation, and Federal Reserve policies. See McCausland, *What Is Causing Inflation? Economists Point Fingers at Different Culprits*, NBC (Feb. 16, 2022), https://perma.cc/35VP-YBJQ. Even the Secretary admits that the cause of these economic conditions includes "other factors (such as Russia's invasion of Ukraine)." J.A. 238. The Secretary's "indiscriminate approach" to economic conditions—reminiscent of OSHA's invalid vaccine-or-test mandate—"fails to account for [the] crucial distinction" between

economic risk from COVID-19 and economic "risk more generally." *NFIB*, 142 S. Ct. at 666.

The Secretary also says that the Program is needed because the payment pause is ending. J.A. 234–35. If the Secretary means that stopping payment pauses inherently prompts more defaults, then the Department—not COVID-19—caused the problem. Or if the Secretary thinks that resuming payments is concerning only because broader economic conditions are challenging, the end of the payment pause adds little to the analysis. Either way, the link between the Program and the pandemic is tenuous.

It is no surprise that the Program's connection to COVID-19 is weak. That rationale was a pretext for the President to fulfill his campaign promise once Congress declined his request to forgive student debt. The evidence of pretext is compelling: the President has long supported student-loan forgiveness, Biden, Medium, *supra*; the Secretary did not consider any relief options other than loan discharge, see pp. 50–51, *infra*; and the Program, which reaches all borrowers with incomes outside the top five percent of households, is not tailored to individuals financially harmed by the pandemic, see pp. 49–50, *infra*.

Make no mistake, the President is trying to address what he views as systemic failings in federal student-loan programs. In the administration's press briefing, officials complained that college costs have "nearly tripled" in 40 years and that student loans often impose a "lifelong burden" keeping borrowers from "a middle-class life." J.A. 117–18. Material that the Secretary cites, see J.A. 236 n.4, 241 n.19, con-

firms that "chronic repayment struggles are *not* primarily the result of pandemic-related transitory financial shocks but are more systemic in nature." Akana & Ritter, *Expectations of Student Loan Repayment, Forbearance, and Cancellation*, Fed. Reserve Bank of Phila. 2 (2022), https://perma.cc/P5FA-ZSEN (emphasis added). Any perceived student-loans problem is thus not a COVID-19 crisis, and agencies cannot issue decrees directed at one concern under the guise of addressing a different emergency. If the Department succeeds here, "declarations of emergencies [will] never end," and "our Constitution's separation of powers . . . [will] amount to little." *NFIB*, 142 S. Ct. at 670 (Gorsuch, J., concurring).

4. The Program's broad scope exceeds the Secretary's authority.

The Program's vast scope also exceeds the Secretary's authority. For starters, the Secretary has not limited the Program to "affected individuals." 20 U.S.C. 1098bb(a)(2)(A). Even if affected individuals include every borrower in the country under the theory that all States have been "declared a disaster area," *id.* 1098ee(2)(C), the agency records never explain why the Program includes borrowers overseas. Contrary to what the Government says, *nowhere* did the Secretary "'determine[]' that . . . borrowers living and working abroad . . . have suffered 'direct economic hardship' due to the pandemic." Br. 35 (quoting 20 U.S.C. 1098ee(2)(D)).

Nor has the Department targeted "affected individuals" at risk of facing "a worse position financially in relation to" their loans "because of" COVID-19. 20 U.S.C. 1098bb(a)(2)(A). Many eligible borrowers—

such as those whose earnings have *increased* substantially since the pandemic's onset—face no such peril. Even the Secretary's unpublished, self-reported data show that most borrowers earning any income whatsoever do *not* "expect to experience difficulty repaying loans." J.A. 247–48 & fig.3. When the Secretary's own evidence says the Program is unnecessary for most eligible borrowers, he has gone too far.

The Government argues that the phrase "may be necessary to ensure," 20 U.S.C. 1098bb(a)(2), permits the Secretary to craft an "overinclusi[ve]" policy. Br. 43–44. Yet broad overinclusiveness cannot be squared with the word "necessary." In this context, "necessary" must at least mean "important." *Ayestas* v. *Davis*, 138 S. Ct. 1080, 1093 (2018). This requires the Secretary to show that the Program is important to ensure included borrowers do not experience delinquency or default because of COVID-19. But including all borrowers except the top five percent of earners, regardless of how the pandemic affected them financially, does not come close to satisfying that standard.

III. The Program is arbitrary and capricious.

The Program is also "arbitrary" and "capricious" and should be "set aside" for five reasons. 5 U.S.C. 706(2)(A).

First, the Secretary did not consider *any* alternatives to the Program. "[W]hen an agency rescinds a prior policy its reasoned analysis must consider the alternatives that are within the ambit of the existing policy." *DHS* v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (cleaned up). The Secretary determined that he should decrease borrowers' monthly payments to limit delinquencies and defaults. J.A.

240–44. But he jumped right to debt discharge and did not evaluate any other option—such as extending repayment periods—that would minimize the risk of delinquency and default or reduce borrowers' monthly payments. That failure "renders [the] decision arbitrary and capricious." *Regents*, 140 S. Ct. at 1913.

The Government insists that the Secretary did "consider[] . . . the availability of 'other options to reduce monthly payments.'" Br. 58–59. But he did not consider what *he* might do to reduce monthly payments; rather, the Rationale Memo simply observed that "*borrowers* have other options to reduce monthly payments, like income-driven repayment (IDR) plans." J.A. 241 (emphasis added). Nor did the Secretary determine that "loan discharges would reduce delinquency and default risks beyond what could be accomplished through efforts to increase enrollment in IDR." Br. 60 (cleaned up). The Rationale Memo never compared loan discharge against other options. The Government's post hac assertion that it considered alternatives "is not a substitute" for actually considering them. *Getty* v. *Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986).

Second, because the Department was "not writing on a blank slate, it *was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Regents*, 140 S. Ct. at 1915 (cleaned up). Nothing in the agency materials suggests the Department considered a single reliance interest.

The Government accepts that it ignored the States' reliance interests but asserts that those interests are not "cognizable" or "serious." Br. 60. Yet the HEA itself recognizes the vital interests of the "groups involved in student financial assistance programs," including the States' roles as "lenders," secondary-market participants, and "loan servicers." 20 U.S.C. 1098a(a)(1). Tens of billions of dollars pass through the federal student-loan industry each year. Weissman, *An Extremely Important Statistic about Student Debt That Has Never Been Published*, Slate (Mar. 24, 2021), https://perma.cc/XRJ7-5QVL. It is specious to suggest that the interests of those industry participants are not serious. Besides, contesting "the strength of [the] reliance interests" does not excuse the agency's failure to consider them "in the first instance." *Regents*, 140 S. Ct. at 1913–14.

Third, the Secretary "failed to consider [other] important aspect[s] of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In particular, he did not assess the costs of the Program or mention the Department's general duty to recover on debt owed. See 31 U.S.C. 3711(a)(1). By focusing exclusively on the interest of borrowers, he showed no concern for any countervailing considerations.

Fourth, the Secretary failed to "reasonably explain[]" his arbitrary distinction between borrowers who applied to consolidate non-federally held FFEL Loans before September 29 and those who did not. *State Farm*, 463 U.S. at 52. Although the Government never attempts to explain this, it was apparently an attempt to avoid legal challenges to the Program. See

Stratford, *supra*. Evading judicial review is not a "factor[]" Congress "intended [the Secretary] to consider." *State Farm*, 463 U.S. at 43.

Fifth, for all the reasons discussed above, see pp. 47–49, *supra*, the Secretary's reliance on COVID-19 as justification for the Program is "pretextual," and thus his action is unlawful. *Dep't of Com.*, 139 S. Ct. at 2573–76.

CONCLUSION

The Court should affirm the Eighth Circuit's injunction and reverse the district court's judgment.

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