Student Loan Cancellation Under the HEROES Act

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SUMMARY

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April 14, 2023

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On August 24, 2022, Secretary of Education Miguel Cardona announced that he would invoke the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) to cancel up to $20,000 of federal student loan debts for borrowers who fell below certain income thresholds. The HEROES Act authorizes the Secretary to "waive or modify" statutory or regulatory provisions applicable to federal student financial assistance programs under Title IV of the Higher Education Act (HEA) of 1965 to ensure that borrowers are not placed in a worse position financially in relation to their student loans as a result of a war, other military operation, or national emergency.

During the course of the COVID-19 pandemic, which Presidents Trump and Biden both declared a national emergency, the Secretary of Education (Secretary) has used the HEROES Act to provide a number of flexibilities to both borrowers and schools that participate in HEA student loan programs. These flexibilities include a pause on federal student loan repayment, interest accrual, and involuntary collections during the entirety of the pandemic. Secretary Cardona has said that the cancellation policy is intended to address heightened risks of delinquency or default caused by the end of two years of loan repayment forbearance. However, the HEROES Act has not been used previously to cancel existing student loan balances. Estimates of the policy's cost vary, but for its part, the Department of Education (ED) predicts a cost of $379 billion.

Plaintiffs filed multiple lawsuits challenging the cancellation policy before any borrowers could obtain relief under it. Certain suits resulted in two federal court orders blocking implementation of the program. The Supreme Court agreed to review these two cases, *Biden v. Nebraska* and *Department of Education v. Brown*, and heard oral argument on February 28, 2023. The questions for which the Court granted certiorari generally can be divided into *jurisdictional questions*, that is, whether federal courts may hear the challenges to the cancellation policy, and *merits questions*, that is, assuming jurisdiction exists, whether the cancellation policy is lawful.

With respect to the jurisdictional questions, the Court is considering whether the plaintiffs in the two cases have demonstrated that they have *standing* to sue to challenge the policy—that is, whether the plaintiffs have suffered an injury-in-fact that is fairly traceable to the policy and likely to be redressed by the remedies that the plaintiffs seek. In *Biden v. Nebraska*, the plaintiffs are several states. The *Nebraska* plaintiffs argue that the cancellation policy would result in financial harm and reduced state income tax revenues. The plaintiffs in *Department of Education v. Brown* are individual student loan borrowers. The *Brown* plaintiffs argue that they have been injured by the Secretary's adoption of the policy without public participation in its design, resulting in policy eligibility criteria that limit debt relief for these borrowers.

With respect to the cancellation policy's lawfulness, the parties focus on how broadly or narrowly to read the HEROES Act's waiver and modification authority, as well as whether the cancellation policy is sufficiently related to addressing the effects of the pandemic on student loan borrowers. The plaintiffs argue that the policy should be evaluated under the Court's "major-questions doctrine," which counsels against reading ambiguous statutory text to delegate administrative authority to make radical or fundamental changes to a statutory scheme in the absence of clear congressional authorization. Beyond these statutory authority questions, the Court may also consider whether the Secretary reasonably explained his decision to adopt the policy and comported with procedures for exercising such authority.

The Court's decisions in these cases could have a variety of implications for the federal student loan programs that ED administers. The Court's rulings will likely resolve whether up to 40 million borrowers will receive loan balance discharges under the policy. The rulings may also clarify ED's authority to invoke the HEROES Act in the future to waive or modify provisions of law applicable to federal student financial assistance programs. Finally, the rulings may further develop important aspects of Supreme Court doctrine with applications beyond federal student loan programs, including the Article III standing of states as plaintiffs and the Court's major-questions doctrine.

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On August 24, 2022, Secretary of Education (Secretary) Miguel Cardona announced that the pandemic-related pause on federal student loan repayment, interest accrual, and involuntary collections (payment pause) would end on December 31.[1] The Secretary found that for some borrowers, the transition to repayment after more than two years of forbearance posed a heightened risk of delinquency or default.[2] If a borrower fell into these nonpayment statuses, the Secretary reasoned, they would be worse off in relation to their federal student loans than they were before the pandemic, even accounting for the benefits of the payment pause.[3]

To forestall these perceived risks, the Secretary invoked asserted authority under the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) to cancel the student loan debts of certain borrowers.[4] The statute authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" of Title IV of the Higher Education Act (HEA) of 1965 "as the Secretary deems necessary" in connection with a war or national emergency to provide certain relief.[5] In particular, the Act authorizes the Secretary to waive or modify such provisions "as may be necessary to ensure that" recipients of Title IV assistance "are not placed in a worse position financially" in relation to that assistance because of a national emergency.[6]

Under the Secretary's cancellation policy, the Department of Education (ED) would provide up to $10,000 in cancellation benefits to borrowers with adjusted gross incomes in 2020 or 2021 falling below stated thresholds.[7] ED would apply cancellation to, among others, Federal Direct Loan Program loans and Federal Family Education Loan Program loans held by ED or one of its guaranty agencies that disbursed before June 30, 2022.[8] If a borrower had received a Pell Grant at any time, ED would provide up to an additional $10,000 in benefits, for a total of $20,000.[9]

The Secretary's decision could have far-reaching effects if implemented. According to ED, over 40 million borrowers (about 88%) are eligible for some amount of cancellation under the policy. Full participation in the policy by eligible borrowers would leave 20 million borrowers (about 44%) with no remaining federal student loan debt.[10] ED expects, though, that not all eligible borrowers would claim the benefit. If 81% did, ED expects that the policy would increase the federal government's cost of having made affected loans or loan guarantees by $379 billion.[11]

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[1] Memorandum from Miguel Cardona, Jr., Secretary of Education, to Richard Cordray, Chief Operating Officer of Federal Student Aid 1 (Aug. 24, 2022) [hereinafter Cardona Memo] (filed as Exhibit B to Decl. of James Richard Kvaal, Nebraska v. Biden, No. 4:22-cv-01040 (E.D. Mo. filed Oct. 7, 2022)).

[2] *See id.*

[3] *See id.*

[4] *See id*.

[5] 20 U.S.C. § 1098bb(a)(1).

[6] *Id*. § 1098bb(a)(2).

[7] Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program), 87 Fed. Reg. 61512, 61514 (Oct. 12, 2022).

[8] *Id*.

[9] *Id*.

[10] *See* Attachment 1 to Memorandum from James Richard Kvaal, Under Secretary of Education, to Miguel A. Cardona, Secretary of Education, on the Rationale for Pandemic-Connected Loan Cancellation Program 12 (Aug. 24, 2022) [hereinafter Supporting Analysis] (filed as Exhibit A to Decl. of James Richard Kvaal, Nebraska v. Biden, No. 4:22-cv-01040 (E.D. Mo. filed Oct. 7, 2022)).

[11] *U.S. Department of Education Estimate: Biden-Harris Student Debt Relief to Cost an Average of $30 Billion Annually Over Next Decade*, U.S. DEP'T OF EDUC., https://www.ed.gov/news/press-releases/us-department-education-

The Secretary's decision drew debate over whether Congress had delegated authority to the Secretary to discharge student loan balances on this scale, which ED has not previously attempted to do under the HEROES Act or any other authority. Within weeks of the Secretary's decision, individuals, groups, and states filed lawsuits challenging the policy. By November 2022, plaintiffs in two such cases obtained court orders blocking the policy's implementation, so that to date ED has yet to cancel any student loan debt under the policy.[12]

Those two cases are now before the Supreme Court for review. The cases, argued before the Court on February 28, 2023, raise important, unsettled questions of standing and statutory authority. In the first case, *Biden v. Nebraska*, six states allege impending financial harm or tax-revenue injury on account of the policy.[13] The second case, *Department of Education v. Brown*, features two borrowers who claim procedural injury from not having been able to participate in the policy's development.[14] Both suits include arguments that the cancellation policy exceeds the Secretary's HEROES Act authority.

The Court's decision on these and other important questions of standing and statutory authority will likely determine whether the Secretary can implement the cancellation policy. This report begins by placing those important questions in their context, surveying affected federal student loan programs,[15] past uses of HEROES Act authority,[16] and congressional debates concerning student loan cancellation.[17] The report then describes the cancellation policy itself[18] and traces the history of *Nebraska* and *Brown* in the lower courts.[19] This report next assesses the parties' key legal arguments about standing,[20] statutory authority for the policy,[21] and whether the Secretary adopted the policy in a procedurally valid manner.[22] Finally, this report concludes with a discussion of potential implications of decisions in *Nebraska* and *Brown* for the cancellation policy, for the Secretary's HEROES Act authority, and for legal doctrines that are not confined to the federal student loan context.

Background

Federal Student Loan Programs

For decades, the federal government has helped students and their parents finance higher education under several federal student loan programs, authorized under the HEA[23] and other

estimate-biden-harris-student-debt-relief-cost-average-30-billion-annually-over-next-decade (last visited Apr. 14, 2023) [hereinafter ED Cost Estimate].

[12] *See infra* "Supreme Court Review of Cancellation Policy: Procedural History."

[13] *See infra* "Nebraska v. Biden."

[14] *See infra* "Brown v. U.S. Department of Education."

[15] *See infra* "Federal Student Loan Programs."

[16] *See infra* "Legislative History and Prior Exercises of the HEROES Act."

[17] *See infra* "Recent Public Debate over Student Loan Cancellation"

[18] *See infra* "Cancellation Policy Design."

[19] *See infra* "Supreme Court Review of Cancellation Policy: Procedural History."

[20] *See infra* "Do Plaintiffs Have Standing to Challenge the Cancellation Policy?"

[21] *See infra* "Is the Cancellation Policy Substantively Valid?"

[22] *See infra* "Is the Cancellation Policy Procedurally Valid?"

[23] *See, e.g.*, *infra* "The Federal Family Education Loan Program" and "The Federal Direct Loan Program."

statutes.[24] The vast majority of outstanding federal student loans were made under HEA authorities.[25] The Biden Administration has identified only certain HEA loan balances as eligible for cancellation.[26]

Plaintiffs in *Nebraska* and *Brown* press claims that implicate two HEA loan programs: the Federal Family Education Loan Program and the William D. Ford Direct Loan Program.

The Federal Family Education Loan Program

Until its authority terminated in June 2010,[27] the Federal Family Education Loan Program (FFELP) facilitated making loans to students and their parents to help finance a higher education. The FFELP is a federal loan guarantee program. Nonfederal lenders—state entities and certain private entities[28]—originated FFELP loans using their own funds. While federal statute required listed provisions that had to be included in a loan's note for it to be insurable under the program,[29] the original parties to that note were the borrower and the nonfederal lender. The lender was the loan's initial *holder*.[30] FFELP loans that remain with lenders are potential revenue sources.[31] The lender receives payments of principal, interest, and other fees.

The FFELP encouraged lending through, among other things, loan guarantees comprised of a system of insurance offered by guaranty agencies (GAs) and reinsurance of GA insurance by ED. The Secretary entered agreements with GAs to help administer the FFELP.[32] GAs are state or private nonprofit organizations.[33] They serve as an "intermediary" between the lender and ED.[34]

A lender may invoke an FFELP loan guarantee if a borrower defaults.[35] A lender must make diligent efforts to collect on a defaulted loan.[36] If those efforts fail, the lender may file a default

[24] For example, Title VII of the Public Health Service Act authorized a federal student loan guarantee program known as the Health Education Assistance Loan (HEAL) program, which facilitated private lending to students pursuing a degree in certain health care fields. *See* 42 U.S.C. § 292a. Authority to issue new loan guarantees lapsed in Sept. 1998, *id.*, yet HEAL program loans remain outstanding, *see* FED. STUDENT AID, U.S. DEP'T OF EDUC., FISCAL YEAR 2021 ANNUAL REPORT 38 fig. 19 (2021), https://www2.ed.gov/about/reports/annual/2021report/fsa-report.pdf; *see also* CRS Report R46720, *Student Loan Programs Authorized by the Public Health Service Act: An Overview*, by Elayne J. Heisler and Alexandra Hegji.

[25] CRS Report R47196, *Federal Student Loan Debt Cancellation: Policy Considerations*, coordinated by Alexandra Hegji, at 4 tbl. 1.

[26] Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program), 87 Fed. Reg. 61512, 61513 (Oct. 12, 2022).

[27] 20 U.S.C. § 1071(d).

[28] *Id*. § 1085(d)(1).

[29] *See, e.g.*, *id*. § 1077(a) (stating that "a loan by an eligible lender shall be insurable" under the FFELP program "only if evidenced by a note or other written agreement" which, among other things, provides for specified payment deferments); *see also id.* § 1077a (regulating loan interest rates).

[30] *See Holder*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Someone who has legal possession of a negotiable instrument and is entitled to receive payment on it.").

[31] FFELP loans could be sold to third parties after origination and, as discussed below, assigned to guaranty agencies. Each of these subsequent owners would be the loan's holder during the time it owned the loan. For ease of reference, this report refers to lender-held FFELP loans as those held by entities other than a GA or ED.

[32] 34 C.F.R. § 682.400(a).

[33] *Id*. § 682.200(b) (guaranty agency).

[34] Great Lakes Higher Educ. Corp. v. Cavazos, 911 F.2d 10, 15 (7th Cir. 1990).

[35] FFELP lenders may file claims with a GA in other circumstances as well, such as when a borrower's loan is discharged because of their and permanent disability. *See, e.g.*, 34 C.F.R. § 682.402(c)(8)(i)(A)–(B).

[36] *Id*. § 682.411(a).

claim with the GA to be compensated for the unpaid balance of principal and accrued interest.[37] Upon payment of the default claim, the lender *assigns* the loan to the GA,[38] transferring title to the loan to the GA.[39] Having received title, the GA must itself make diligent efforts to collect before it, too, may be compensated for unpaid balances under its reinsurance agreement with ED.[40] The GA assigns a defaulted loan to ED upon payment of a reinsurance claim.[41]

Though the FFELP has not insured new loans since June 2010, more than $200 billion remained outstanding on FFELP loans at the end of 2022.[42] Different entities hold outstanding FFELP loans.[43] At the end of FY2022, borrowers owed lenders—that is, entities other than ED or a GA—about $103 billion.[44]

Lenders have used the revenue-generating potential of FFELP loans to access credit markets through asset-backed securities known as Student Loan Asset-Backed Securities (SLABS). An asset-backed security is a bond or note whose cash flow derives from an asset such as a third party's debt.[45] SLABS, in particular, are backed by a pool of pledged student loans, including FFELP loans. For example, in 2021, the Higher Education Loan Authority of the State of Missouri (MOHELA or the Missouri Authority) offered SLABS for sale to investors, explaining that the notes were payable solely from the proceeds of a pool of FFELP loans.[46] SLABS generate returns based on, among other factors, the payments borrowers make on pooled loans.[47] An investor's expected yield on SLABS thus depends, in part, on predicting how long borrowers will make payments on pooled loans, with longer time periods translating to greater interest

[37] *Id*. § 682.412(e)(2).

[38] *See id*. § 682.410(b)(5)(vi).

[39] *See Assign*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("To convey in full; to transfer (rights or property) . . . .).

[40] *See* 20 U.S.C. § 1078(c) (authorizing the Secretary to "enter into a guaranty agreement with any guaranty agency, whereby the Secretary shall undertake to reimburse it . . . with respect to losses (resulting from the default of the student borrower) on the unpaid balance of the principal and accrued interest of any insured loan").

[41] 34 C.F.R. § 682.409(a)(1).

[42] U.S. DEP'T OF EDUC., *Federal Student Aid Portfolio Summary*, FED. STUDENT AID, https://studentaid.gov/sites/default/files/fsawg/datacenter/library/PortfolioSummary.xls (last visited Apr. 14, 2023).

[43] U.S. DEP'T OF EDUC., *Location of Federal Family Education Loan Program Loans*, FED. STUDENT AID, https://studentaid.gov/sites/default/files/fsawg/datacenter/library/LocationofFFELPLoans.xls (last visited Apr. 14, 2023) (describing FFELP loan amounts held by lenders, GAs, and ED).

[44] *Id*.

[45] Morgan Tanafon, *Market Crises and Dodd-Frank: Does the Act Protect Against Hazardous Student Loan Securitization?*, 38 REV. BANKING & FIN. L. 869, 878 (2019).

[46] *See* HIGHER EDUC. LOAN AUTH. OF THE STATE OF MO., TAXABLE STUDENT LOAN ASSET-BACKED NOTES, SERIES 2021-3 OFFERING MEMORANDUM 5 (2021), https://www.mohela.com/DL/common/publicInfo/investorInformation.aspx?idx=2340 [hereinafter OFFERING MEMORANDUM] ("The only sources of funds for payment of the Notes issued under the Indenture are the Financed Eligible Loans and investments pledged to the Trustee and the payments the Issuer receives on those Financed Eligible Loans and investments.") (filed as Exh. A to Decl. of Michael E. Talent, Nebraska v. Biden, No. 4:22-cv-01040 (E.D. Mo. filed Sept. 29, 2022)); *see also* MO. REV. STAT. § 173.390 (authorizing MOHELA to issue bonds "payable solely from and secured by a pledge of revenues derived from or by reason of the ownership of student loan notes and investment income or as may be designated in a bond resolution authorized by the authority").

[47] *See* U.S. DEP'T OF THE TREASURY, OPPORTUNITIES AND CHALLENGES IN ONLINE MARKETPLACE LENDING 7 fig. 3 (2016), https://home.treasury.gov/system/files/231/Opportunities_and_Challenges_in_Online_Marketplace_Lending_white_paper.pdf (illustrating securitization by direct lenders).

payments.[48] If loan prepayments exceed expectations, then actual yields can fall below expected yields.[49]

The Federal Direct Loan Program

Nearly all borrowers who today obtain federal student loans do so under the William D. Ford Direct Loan Program (FDLP), authorized by Congress in 1993.[50] The designation of this federal credit program as a "direct loan" program means that, when making an FDLP loan, the federal government disburses funds to a nonfederal borrower under a contract with the borrower that requires repayment.[51] Unlike some other HEA student loan programs, such as the FFELP, the borrower enters a contractual relationship with the federal government directly upon borrowing the loan. The federal government is the loan holder, receiving payments of principal, interest, and other fees on account of the FDLP loan.

The federal government makes several type of loans under the FDLP. Eligible undergraduate borrowers may receive need-based Direct Subsidized Loans. Undergraduate and graduate students may obtain Direct Unsubsidized Loans as well. Direct PLUS Loans are available to graduate students and to the parents of dependent undergraduate students.[52]

Borrowers may also "consolidate education loans made under certain Federal programs,"[53] including loans made under the FFELP, by borrowing a Direct Consolidation Loan.[54] Unlike other FDLP loans, Direct Consolidation Loan proceeds are not used to directly pay tuition, fees, and similar costs. Instead, ED pays consolidation-loan proceeds to the holder of an existing education loan to discharge that loan.[55] Thus, if a borrower consolidates an existing FFELP loan held by a lender, ED pays the consolidation proceeds to the FFELP lender to pay the existing loan's balance in full.[56] Going forward, the borrower makes payments to ED on account of the new Direct Consolidation Loan.

Among other loan types, ED holds tens of millions of FDLP loans—at the end of FY2022, more than $1.42 trillion was outstanding on loans made on behalf of 37.8 million recipients.[57] To administer these and other federally held student loans, ED contracts with third-party *loan servicers*.[58] A loan servicer is a company that ED contracts with "to handle the billing and other

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[48] *See* OFFERING MEMORANDUM, *supra* note 46, at B-2.

[49] *See* OFFERING MEMORANDUM, *supra* note 46, at 96 ("The rates of payment of principal on the Notes and the yield on the Notes may be affected by prepayments of the Financed Eligible Loans.").

[50] Student Loan Reform Act of 1993, Pub. L. No. 103-66, tit. IV, § 4011, 107 Stat. 312, 341.

[51] *See* 2 U.S.C. § 661a(1).

[52] CRS Report R45931, *Federal Student Loans Made Through the William D. Ford Federal Direct Loan Program: Terms and Conditions for Borrowers*, by Alexandra Hegji, at 4–5.

[53] 34 C.F.R. § 685.220(a).

[54] *See id*. § 685.220(b).

[55] *Id*. § 685.220(f)(2).

[56] *See id.*

[57] *See supra* note 42.

[58] *See, e.g.*, 20 U.S.C. § 1087f(b)(2) (authorizing the Secretary to enter into contracts for "the servicing and collection of loans made or purchased under" the FDLP program).

services on" an ED-held federal student loan.[59] ED engages several servicers[60] and allocates borrower accounts among servicers.[61] ED generally pays servicers based on the number and types of assigned accounts and the work that the servicer performs on ED's behalf.[62]

Legislative History and Prior Exercises of the HEROES Act

The Secretary identified the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) as statutory authority for the cancellation policy. The Act allows the Secretary to "waive or modify any statutory or regulatory provision applicable to the" Title IV programs "in connection with a . . . national emergency" to ensure, among other things, that "affected individuals are not placed in a worse position financially" in relation to their Title IV assistance.[63]

The HEROES Act evolved from an earlier HEROES Act of 2001, itself enacted in response to the terrorist attacks of September 11, 2001.[64] The original 2001 version of the statute provided similar waiver and modification authority for individuals affected by the national emergency declared for the attacks of September 11, 2001, or a subsequent national emergency declared for a terrorist attack.[65] The 2001 law was subject to a sunset at the end of FY2003.[66]

Before that sunset date arrived, Congress replaced the statute with the current HEROES Act of 2003.[67] The 2003 legislation used a definition of "national emergency" that did not include the "terrorist attack" qualifier used in the original 2001 law.[68] The HEROES Act of 2003 otherwise resembled the 2001 law in many respects. Under both laws, for example, the Secretary was empowered to "waive" or "modify" statutory and regulatory provisions applicable to Title IV programs to bring about certain relief for "affected individuals."[69]

Like its predecessor statute, the HEROES Act of 2003 was subject to a two-year sunset.[70] Congress extended the HEROES Act authority in 2005 and made the statute permanent in 2007.[71]

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[59] U.S. DEP'T OF EDUC., *Who's My Student Loan Servicer?*, FED. STUDENT AID, https://studentaid.gov/manage-loans/repayment/servicers (last visited Apr. 14, 2023); *see also* CRS Report R44845, *Administration of the William D. Ford Federal Direct Loan Program*, by Alexandra Hegji, at 19–20 (describing common servicing activities).

[60] U.S. DEP'T OF EDUC., *Servicer Loan Portfolio by Loan Status*, FED. STUDENT AID, https://studentaid.gov/sites/default/files/fsawg/datacenter/library/servicer-portfolio-by-loan-status093022.xls (last visited Apr. 14, 2023).

[61] *See, e.g.*, U.S. DEP'T OF EDUC., CONTRACT NO. ED-FSA-11-D-0012 WITH MOHELA 15 (2011) (describing account allocation) (filed as Exh. B to Decl. of Michael E. Talent, Nebraska v. Biden, No. 4:22-cv-01040 (E.D. Mo. filed Sept. 29, 2022)).

[62] *See id.* at 1 (describing unit pricing for borrowers in different repayment statuses).

[63] 20 U.S.C. § 1098bb(a)(1).

[64] Higher Education Relief Opportunities for Students Act of 2001, Pub. L. No. 107-122, 115 Stat. 2386 (2002).

[65] *Id.* § 5(4), 115 Stat. at 2388.

[66] *Id.* § 6, 115 Stat. at 2389.

[67] Higher Education Relief Opportunities for Students Act of 2003, Pub L. No. 108-76, 117 Stat. 904.

[68] *Id.* § 5(4), 117 Stat. at 907.

[69] *Compare* Higher Education Relief Opportunities for Students Act of 2001, Pub. L. No. 107-122, § 2(a)(2), 115 Stat. 2386, 2386 (2002) (authorizing waivers or modifications deemed necessary "to ensure that borrowers of Federal student loans who are affected individuals are not placed in a worse position financially in relation to those loans because of their status as affected individuals"), *with* Higher Education Relief Opportunities for Students Act of 2003, Pub L. No. 108-76, § 2(a)(2), 117 Stat. at 904 (similar waiver for "recipients of student financial assistance under Title IV" of the HEA "who are affected individuals").

[70] *Id.* § 6, 117 Stat. at 908.

[71] Student Financial Assistance—Extension, Pub. L. No. 109-78, 119 Stat. 2043 (2005) (extension to Sept. 30, 2007);

Neither of these legislative actions made substantive changes to the waiver or modification authority provided by the HEROES Act.[72]

It does not appear that ED has ever invoked the HEROES Act to afford relief as broad as the cancellation policy announced by Secretary Cardona in 2022. For instance, past Secretaries invoked the HEROES Act to expand available forbearance relief for certain Federal Perkins Loan borrowers "who reside or are employed in a disaster area."[73] In doing so, however, the Secretaries did not forgive or cancel any outstanding loan balances and also did not modify the rule that interest ordinarily accrues during forbearance.[74] Past Secretaries likewise invoked the HEROES Act to suspend the collection of defaulted loans from borrowers "who reside or are employed in a disaster area,"[75] but these did not expressly contemplate forgiveness or cancellation of such defaulted loan balances. Other early examples of HEROES Act use include waivers and modifications that addressed loan deferrals, extensions of the maximum period of loan forbearance, and waivers of the requirement that students return overpayments of certain grant funds.[76]

The scope of HEROES Act waivers grew during the COVID-19 pandemic. On March 20, 2020, then-Secretary of Education Betsy DeVos announced that "[a]ll borrowers with federally held student loans" would "automatically have their interest rates set to 0% for a period of at least 60 days."[77] The Secretary also offered such borrowers "the option to suspend their payments for at least two months."[78] A week later, Secretary DeVos announced that ED would also "halt collection actions and wage garnishments to provide additional assistance to borrowers."[79] While neither of the Secretary's March 2020 announcements specified the statutory authority she

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Higher Education—Permanent Extension of Waiver Authority, Pub. L. No. 110-93, § 2, 121 Stat. 999 (2007) (permanent authorization).

[72] *See id.*

[73] *See, e.g.*, Federal Student Aid Programs (Student Assistance General Provisions, Federal Perkins Loan Program, Federal Direct Loan Program, Federal Family Education Loan Program and the Federal Pell Grant Program), 68 Fed. Reg. 69312, 69314–15, 69316 (Dec. 12, 2003) [hereinafter *2003 Federal Register Notice*] ("Under [the HEA and its implementing regulations], there is a 3-year cumulative limit on the length of forbearances that a Federal Perkins Loan borrower can receive. To assist Perkins borrowers who are affected individuals in this category, the Secretary is waiving these statutory and regulatory requirements so that any forbearance based on a borrower's status as an affected individual is excluded from the 3-year cumulative limit.").

[74] *Compare* 34 C.F.R. § 674.33(d)(7) (specifying that "[i]nterest accrues during any period of forbearance" on a Federal Perkins Loan), *with, e.g.*, *2003 Federal Register Notice*, *supra* note 73, at 69316.

[75] *See 2003 Federal Register Notice*, *supra* note 73, at 69314–16 ("In accordance with [ED regulations], schools and guaranty agencies must attempt to recover amounts owed from defaulted Perkins and FFEL[P] borrowers. The Secretary is waiving the regulatory provisions that require schools and guaranty agencies to attempt collection on defaulted loans for the time period during which the borrower is an affected individual. The school or guaranty agency *may* stop collection activities upon notification by the borrower, a member of the borrower's family, or another reliable source that the borrower is an affected individual in this category.") (emphasis added).

[76] *See* Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans, 46 O.L.C. ___, slip op, at *4 (Op. O.L.C. Aug. 23, 2022), https://www.justice.gov/d9/2022-11/2022-08-23-heroes-act.pdf [hereinafter OLC Opinion].

[77] *Delivering on President Trump's Promise, Secretary DeVos Suspends Federal Student Loan Payments, Waives Interest During National Emergency*, U.S. DEP'T OF EDUC. (Mar. 20, 2020), https://content.govdelivery.com/accounts/USED/bulletins/2823e37 [hereinafter *March 20, 2020 Announcement*].

[78] *Id.*

[79] *Secretary DeVos Directs FSA to Stop Wage Garnishment, Collections Actions for Student Loan Borrowers, Will Refund More than $1.8 Billion to Students, Families*, U.S. DEP'T OF EDUC. (Mar. 25, 2020), https://content.govdelivery.com/accounts/USED/bulletins/28317e2 [hereinafter *March 25, 2020 Announcement*].

invoked to grant this relief,[80] ED later clarified that the Secretary based the relief on the HEROES Act.[81]

Congress subsequently enacted the Coronavirus Aid, Relief, and Economic Security (CARES) Act.[82] Section 3513(a) of the CARES Act required the Secretary to "suspend all payments due" for ED-held FDLP and FFELP loans through September 30, 2020.[83] Section 3513(e) in turn required the Secretary to "suspend all involuntary collection related to" such loans during Section 3513(a)'s payment suspension period.[84] Section 3513(b) provided that interest would not accrue on those loans during the suspension period.[85] Section 3513 was subject to a sunset date of September 30, 2020.[86]

In August 2020, as Section 3513's sunset date approached, Secretary DeVos "extend[ed] the student loan relief to borrowers initiated by the President and Secretary in March 2020 through December 31, 2020."[87] Like the March 2020 relief, ED based the August 2020 extension on the HEROES Act.[88] The Trump and Biden Administrations have since extended Section 3513 repeatedly.[89] The payment pause continues in effect as of this publication. Under the most recent extension, it will last, at the latest, until August 29, 2023 (i.e., 60 days after June 30, 2023). If the Supreme Court resolves the student loan litigation before June 30, then the payment pause will end 60 days after the date of the Court's decision.[90]

Recent Public Debate over Student Loan Cancellation

The Biden Administration expressly describes its announced cancellation policy as a response to the COVID-19 pandemic. However, Congress has considered legislation to provide broad-based student loan cancellation since at least as early as 2019. During the first session of the 116th

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[80] *See March 20, 2020 Announcement*, *supra* note 77; *March 25, 2020 Announcement*, *supra* note 79.

[81] FED. STUDENT AID, ANNUAL REPORT FY 2020, at 38 (2020), https://www2.ed.gov/about/reports/annual/2020report/fsa-report.pdf [hereinafter *FSA Annual Report*] ("The relief provided to borrowers from March 13, 2020 through March 26, 2020 . . . was provided under the Secretary's authority in the [HEROES Act]."); *Secretary DeVos Extends Student Loan Forbearance Period Through January 31, 2021, in Response to COVID-19 National Emergency*, U.S. DEP'T OF EDUC. (Dec. 4, 2020), https://www.ed.gov/news/press-releases/secretary-devos-extends-student-loan-forbearance-period-through-january-31-2021-response-covid-19-national-emergency [hereinafter *December 2020 Announcement*] (stating that the Secretary "used her authority under the HEROES Act" to implement the Mar. 2020 relief).

[82] Pub. L. No. 116-136, 134 Stat. 281 (2020).

[83] *Id.* § 3513(a) (codified at 20 U.S.C. § 1001 note).

[84] *Id.* § 3513(e).

[85] *Id.* § 3513(b).

[86] *Id.* § 3513(a).

[87] U.S. DEP'T OF EDUC., *Secretary DeVos Fully Implements President Trump's Presidential Memorandum Extending Student Loan Relief to Borrowers Through End of Year* (2020), https://content.govdelivery.com/accounts/USED/bulletins/29b4634 [hereinafter *August 2020 Announcement*].

[88] *See* Federal Student Aid Programs (Student Assistance General Provisions, Federal Perkins Loan Program, William D. Ford Federal Direct Loan Program, and Federal-Work Study Programs), 85 Fed. Reg. 79856–57, 79862 (Dec. 11, 2020) [hereinafter *2020 Federal Register Notice*]; *FSA Annual Report*, *supra* note 81, at 38.

[89] *See, e.g.*, Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program), 87 Fed. Reg. 61512, 61513–14 (Oct. 12, 2022) (listing extensions). *See also* CRS Legal Sidebar LSB10568, *The Biden Administration Extends the Pause on Federal Student Loan Payments: Legal Considerations for Congress*, by Kevin M. Lewis and Edward C. Liu.

[90] *See COVID-19 Emergency Relief and Federal Student Aid*, FED. STUDENT AID, https://studentaid.gov/announcements-events/covid-19 (last visited Apr. 14, 2023).

Congress, some Members introduced bills to cancel, to varying degrees, portions of outstanding federal student loan debt.[91] Proponents of these proposals generally argued that cancellation would address a student debt crisis that arose because of increasing tuition costs.[92] However, as the COVID-19 pandemic progressed, some Members suggested bills providing for student loan cancellation as a means of addressing the economic impact of the pandemic on borrowers.[93]

In 2020, Congress considered omnibus legislation called the Heroes Act (not to be confused with the HEROES Act of 2003), which would have addressed a wide variety of pandemic-related issues.[94] Although the House of Representatives passed a version of the bill that would have directed the Secretary to cancel or repay up to $10,000 of student loan debt for "economically distressed borrowers," Congress ultimately did not enact that measure.[95] The following year, Congress enacted the American Rescue Plan Act of 2021 (ARPA), which included a provision amending the treatment of discharged student loans for federal income tax purposes.[96]

In addition to these legislative proposals, academics and some Members of Congress suggested the possibility of executive action to discharge student loan balances based on existing statutory authorities.[97] In January 2021, ED under the outgoing Trump Administration concluded that the HEROES Act did not authorize cancellation of student loan balances, a decision that the Office of Legal Counsel (OLC) of the Department of Justice (DOJ) rejected in 2022 in concert with the Biden Administration's announcement of the cancellation policy.[98]

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[91] Student Debt Cancellation Act of 2019, H.R. 3448, 116th Cong. (2019) (authorizing cancellation of federal student loan balances as well as authorizing ED to purchase, and subsequently cancel, outstanding private education loans); College for All Act of 2019, S. 1947, 116th Cong. (2019) (same); Student Loan Debt Relief Act of 2019, H.R. 3887, 116th Cong. (2019) (authorizing cancellation of up to $50,000 of federal student loan balances for borrowers, subject to an income phase-out between $100,000 and $250,000), S. 2235, 116th Cong. (2019) (same).

[92] *See Senator Warren, House Majority Whip Clyburn Introduce Legislation to Cancel Student Loan Debt for Millions of Americans*, SEN. ELIZABETH WARREN (July 23, 2019), https://www.warren.senate.gov/newsroom/press-releases/senator-warren-house-majority-whip-clyburn-introduce-legislation-to-cancel-student-loan-debt-for-millions-of-americans; *AFT President Randi Weingarten on Sen. Warren's Student Debt and College Affordability Proposals*, AM. FED'N OF TEACHERS (Apr. 22, 2019), https://www.aft.org/press-release/aft-president-randi-weingarten-sen-warrens-student-debt-and-college.

[93] *See*, *e.g.*, Student Loan Forgiveness for Frontline Health Care Workers Act, H.R. 6720, 116th Cong. (2020) (providing for partial cancellation of student loan balances for certain health care professions engaged in COVID-related health services); Frontline Health Care Worker Student Loan Assistance Act of 2020, H.R. 8393, 116th Cong. (2020) (providing a smaller degree of cancellation for similar borrowers). *But see*, Student Loan Relief Act, H.R. 8514, 116th Cong. (2020) (providing up to $25,000 of cancellation of student loan balances for all borrowers).

[94] *See* The Heroes Act, H.R. 6800, 116th Cong. (2020).

[95] *Id.* at Div. O, Title I, § 150117.

[96] American Rescue Plan Act of 2021, Pub. L. No. 117-2, tit. IX, § 9675, 135 Stat. 4, 185–86. This provision is discussed in more detail below under "Tax Revenue Injury."

[97] *See* Luke Herrine, *The Law and Political Economy of A Student Debt Jubilee*, 68 BUFF. L. REV. 281 (2020); *Chuck Schumer Says Biden Could Forgive $50,000 in Student Debt with Executive Order*, CNBC (Nov. 17, 2020), https://www.cnbc.com/2020/11/16/schumer-suggests-student-debt-forgiveness-through-executive-order.html; H.R. Res. 100, 117th Cong. (2021) (calling on the President of the United States to take executive action to broadly cancel Federal student loan debt); S. Res. 46, 117th Cong. (2021) (same).

[98] Memorandum from Reed D. Rubinstein, Principal Deputy General Counsel of the U.S. Department of Education, to Betsy DeVos, Secretary of Education (Jan. 12, 2021), https://static.politico.com/d6/ce/3edf6a3946afa98eb13c210afd7d/ogcmemohealoans.pdf [hereinafter Rubinstein Memo]; OLC Opinion, *supra* note 76. These competing interpretations are discussed in more detail below at "Waiver, Modification, and the Major-Questions Doctrine."

Cancellation Policy Design

On August 24, 2022, Secretary of Education Miguel Cardona determined that he would exercise asserted authority under the HEROES Act to provide relief to student loan borrowers in connection with the pandemic.[99] Secretary Cardona decided he would extend the payment pause until December 31, 2022, and that this would be the "final extension" of the pause.[100] However, the Secretary found that "many borrowers" would be at "heightened risk of loan delinquency and default" once payment resumed in 2023.[101] If borrowers fell into delinquency or default, they would be "worse off than they were before the pandemic," even accounting for the benefits afforded them by the payment pause.[102] To avoid this result, Secretary Cardona decided that he would waive and modify statutory and regulatory provisions to discharge federal student loan balances.[103]

The Secretary's August 24 announcement was followed roughly five weeks later by a modification to ED's website affecting cancellation eligibility for Direct Consolidation Loans. On September 29, within hours of the *Nebraska* plaintiffs filing suit,[104] ED announced that a borrower's Direct Consolidation Loan would be eligible for cancellation only if it derived from a consolidation application filed with ED on or before September 29 (the consolidation limit).[105] The *Nebraska* plaintiffs characterize this development as a "change" to the policy.[106] These aspects of the cancellation policy are discussed below.

August 2022 Cancellation Eligibility

In his initial directives about the cancellation policy, the Secretary settled on three related criteria to identify borrowers eligible to receive cancellation and the amount of cancellation benefits they would receive.

The Secretary's first two eligibility criteria would work in tandem to identify borrowers and loans eligible to receive cancellation. First, ED would use income thresholds to identify borrowers with eligible loan types who could receive cancellation. Thresholds differ based on a borrower's taxpayer status and would use adjusted gross income (AGI) in tax years 2020 or 2021.[107] Those who file individually (whether single or married) would be eligible if their AGI was less than $125,000 in either tax year. Those who file jointly, as head of household, or as a qualifying

[99] Cardona Memo, *supra* note 1, at 1.

[100] *Id*. at 2.

[101] *Id*. at 1.

[102] *Id*.

[103] *Id*.

[104] The federal petitioners do not appear to dispute that the *Nebraska* plaintiffs filed their complaint before ED's website vendor published the consolidation limit on the Federal Student Aid website. *Compare* Br. of Pet'rs' at 25, Biden v. Nebraska, No. 22-506, and Dep't of Educ. v. Brown, No. 22-535 (U.S. Jan. 4, 2023) (describing the consolidation limit as "a decision the Department made before the States sued and announced and made effective the day they sued") [hereinafter Federal Pet'rs' Br.], *with* Br. of Resp'ts' at 10, Biden v. Nebraska, No. 22-506 (U.S. Jan. 27, 2023) [hereinafter State Pls.' Br.].

[105] *See infra* "Consolidation Injury."

[106] *See* State Pls.' Br., *supra* note 104, at 10–11.

[107] The Secretary's initial memorandum referred only to "income" generally. *See* Cardona Memo, *supra* note 1, at 1. In later publications concerning the policy, ED has used Adjusted Gross Income to describe the income thresholds. *See* Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program), 87 Fed. Reg. 61512, 61514 (Oct. 12, 2022).

widow or widower would be eligible if their AGI was less than $250,000 in either tax year.[108] Second, ED would apply cancellation benefits to only certain federal student loans. Cancellation would be available for FDLP loans and FFELP loans held by a GA or by ED that had been disbursed as of June 30, 2022.[109] Direct Consolidation Loans would also be eligible for cancellation, provided the loan's proceeds were used to consolidate education loans outstanding as of the June 30, 2022, cutoff.[110] But FFELP loans held by a lender would not be eligible for cancellation.

The Secretary's income threshold and loan type criteria identify the borrowers eligible to receive cancellation benefits. A third criterion identifies the amount of benefits eligible borrowers would receive. The Secretary decided that all eligible borrowers would receive up to $10,000 in cancellation benefits.[111] Eligible borrowers would receive up to an additional $10,000 in cancellation benefits, for up to $20,000, if they had received a Pell Grant at any point.[112] ED awards Pell Grants to "help financially needy students meet the cost of their postsecondary education."[113]

September 2022 Consolidation Limit

FFELP loans held by a lender are not, themselves, eligible for cancellation under the policy. Even so, borrowers with such loans initially had a route to gain cancellation eligibility: consolidation into the FDLP. Take a borrower with only lender-held FFELP loans who met the cancellation policy's applicable income threshold and was otherwise able to obtain a Direct Consolidation Loan.[114] The lender-held FFELP loans would not themselves be eligible for cancellation. After consolidation of these loans into the FDLP, though, the new Direct Consolidation Loan would be eligible for cancellation because the Direct Consolidation Loan would consolidate only loans that disbursed before June 30, 2020.[115]

ED's initial public statements about the cancellation eligibility of Direct Consolidation Loans did not state a deadline by which a borrower would need to apply for consolidation into the FDLP. In September 2022, ED decided to revise its website to explain that "consolidation loans comprised

[108] 87 Fed. Reg. at 61514. ED decided to use parental income for enrolled dependent student borrowers. *See, e.g*., Supporting Analysis, *supra* note 10, at 12.

[109] *See* Cardona Memo, *supra* note 1, at 1. Secretary Cardona also listed Perkins Loans held by ED as among the loan types eligible for cancellation. *Id*. Neither *Nebraska* nor *Brown* implicate Perkins Loans.

[110] *See, e.g*., *One-Time Student Loan Debt Relief*, FED. STUDENT AID (pdf version of Department of Education website as it existed on Sept. 28, 2022) (stating that Direct Consolidation Loans would be eligible for cancellation if "[u]nderlying loans disbursed on or before June 30, 2022") (filed as Exh. E to Decl. of James A. Campbell, Nebraska v. Biden, No. 4:22-cv-01040 (E.D. Mo. filed Oct. 11, 2022)).

[111] *See* Cardona Memo, *supra* note 1, at 1.

[112] *See id*.

[113] 34 C.F.R. § 690.1; *see also generally* CRS Report R45418, *Federal Pell Grant Program of the Higher Education Act: Primer*, by Cassandria Dortch.

[114] *See* 34 C.F.R. § 685.220(d) (describing eligibility rules for obtaining a Direct Consolidation Loan, such as a requirement that at the time the borrower applies for the loan the borrower is not "subject to a judgment secured through litigation, unless the judgment has been vacated[,]" on the "loans being consolidated"); *see also* 20 U.S.C. §§ 1078-3(a)(3), 1087e(g).

[115] *See supra* note 27 and accompanying text (noting that authority to make FFELP loans terminated in 2010 so that all FFELP loans were necessarily disbursed before the cancellation policy's June 30, 2022 cut-off).

of any FFELP or Perkins loans not held by ED are also eligible, as long as the borrower applied for consolidation before Sept. 29, 2022."[116]

ED communicated these changes to the private firm that serves as website vendor for the Federal Student Aid website on September 28, 2022—the day before the complaint in *Nebraska* was filed—and the changes were visible to the public the next day, September 29.[117] Borrowers of lender-held FFELP loans could still apply for consolidation on or after September 29, but the resulting loan would not be eligible for cancellation.[118] In another revision to its website made public on September 29, ED stated that it was "assessing whether there are alternative pathways to provide relief to borrowers with federal student loans not held by ED," including FFELP loans.[119] To date, ED has not identified an alternative cancellation pathway for federal student loans that are not held by ED.

On October 12, 2022, ED published the waivers and modifications that comprise the policy in the *Federal Register*.[120] These published waivers include the consolidation limit.[121]

ED's "Supporting Analysis"

As ED deliberated on the cancellation policy, it prepared a paper that "summarizes the basis for and key design elements of" the initiative.[122] The federal petitioners refer to this document as ED's "Supporting Analysis."[123] They have relied on the Supporting Analysis in the student loan litigation as the main evidence of why the cancellation policy is necessary to ensure that borrowers are not placed in a worse position financially in relation to their federal student loans because of the pandemic.[124] The Supporting Analysis expresses three general conclusions relevant to the litigation: (1) that borrowers face a heightened delinquency or default risk with the end of the payment pause; (2) that, in general, the cancellation of student loan balances would avert such risks; and (3) that the policy's income and Pell Grant eligibility criteria reasonably cabined benefit eligibility to borrowers who need it.

First, the Supporting Analysis determined that ending the payment pause would expose borrowers to a heightened delinquency or default risk on their federal student loans.[125] For purposes of federal student loans, a borrower is *current* on a loan if the borrower makes a monthly payment

[116] *One-Time Student Loan Debt Relief*, FED. STUDENT AID (Sept. 28, 2022 copy edit document showing changes to ED's website in redline form) (filed as Exhibit D to Decl. of James Richard Kvaal, Nebraska v. Biden, No. 4:22-cv-01040 (E.D. Mo. filed Oct. 7, 2022)).

[117] *See* Decl. of James Richard Kvaal at ¶ 4, Nebraska v. Biden, No. 4:22-cv-01040 (E.D. Mo. Oct. 7, 2022).

[118] *See supra* note 116.

[119] *One-Time Student Loan Debt Relief*, FED. STUDENT AID (Sept. 28, 2022 copy edit document showing changes to website content in redline form) (filed as Exhibit D to Decl. of James Richard Kvaal, Nebraska v. Biden, No. 4:22-cv-01040 (E.D. Mo. filed Oct. 7, 2022)).

[120] Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program), 87 Fed. Reg. 61512 (Oct. 12, 2022).

[121] *Id*. at 61514 ("Direct Consolidation loans disbursed after June 30, 2022, and for which the repaid loans include a FFEL loan not held by ED, are only eligible for relief if the borrower submitted an application to consolidate such loans prior to September 29, 2022.").

[122] Supporting Analysis, *supra* note 10, at 1.

[123] Federal Pet'rs' Br., *supra* note 104, at 9.

[124] *See, e.g*., Federal Pet'rs' Br., *supra* note 104, at 44 (relying on the Supporting Analysis to argue that the cancellation policy's income eligibility criterion is appropriately tailored to benefit borrowers at risk of delinquency or default after the payment pause ends).

[125] Supporting Analysis, *supra* note 10, at 1.

within 30 days of its due date.[126] If the borrower does not make a monthly payment within 30 days of its due date, the borrower is then *delinquent* until the point when the borrower either returns to current status or defaults.[127] A borrower *defaults* by failing to make a monthly payment within 270 days of its due date.[128]

To gauge default and delinquency risks, ED looked first to the payment behavior of borrowers affected by certain 2017 natural disasters who were in mandatory administrative forbearance.[129] Default rates among these borrowers spiked once forbearance ended.[130] In the year before the disaster declaration that led to the forbearance, 0.3% of borrowers entered default, whereas 6.5% entered default in the calendar year after exiting forbearance.[131] Increases in default rates were even higher among Pell Grant recipients.[132]

ED also found evidence of delinquency and default risk in data from a survey of borrowers, who expected that despite the payment pause they would have more difficulty making full loan payments post-pandemic than they had pre-pandemic.[133] ED explained that other studies of delinquency rates for debts not affected by the payment pause (e.g., non-student loan debt) confirmed the views expressed in the borrower survey.[134]

Second, the Supporting Analysis found that loan cancellation could reduce delinquency and default risks by reducing or eliminating the amount that borrowers would have to repay each month.[135] If ED provided up to $20,000 in cancellation and all eligible borrowers claimed that benefit, 20 million borrowers would have no remaining student loan balance and thus no risk of falling into delinquency or default on such debt.[136] With full participation by eligible borrowers, another 23 million would still have amounts owing after application of cancellation benefits.[137] ED would reamortize the loans of borrowers with remaining balances, and their monthly payments would decline by an estimated $200 to $300.[138] ED estimated that the payment pause, by comparison, saved the average borrower in repayment $233 per month.[139]

Third, the Supporting Analysis explained use of borrower income as a cancellation-policy eligibility criterion.[140] ED determined that the higher a borrower's income, the more likely the

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[126] FED.STUDENT AID, DEP'T OF EDUC., FISCAL YEAR 2022 ANNUAL REPORT 33 (2023), https://www2.ed.gov/about/reports/annual/2022report/fsa-report.pdf.

[127] *Id*.

[128] 20 U.S.C. § 1085(l).

[129] Supporting Analysis, *supra* note 10, at 2 (examining borrowers affected by hurricanes as well as wildfires in northern California).

[130] Supporting Analysis, *supra* note 10, at 2.

[131] Supporting Analysis, *supra* note 10, at 2.

[132] Supporting Analysis, *supra* note 10, at 2 (noting that 7% of Pell borrowers "enter[ed] default in the calendar year after exiting mandatory administrative forbearance compared to 5 percent" of borrowers who were not Pell Grant recipients).

[133] Supporting Analysis, *supra* note 10, at 2–3.

[134] *See, e.g*., Supporting Analysis, *supra* note 10, at 3 (stating that data from the Federal Reserve Bank of New York showed that delinquency rates on student loans not affected by the payment pause had returned to pre-pandemic levels).

[135] Supporting Analysis, *supra* note 10, at 4.

[136] Supporting Analysis, *supra* note 10, at 5.

[137] Supporting Analysis, *supra* note 10, at 5.

[138] Supporting Analysis, *supra* note 10, at 5.

[139] Supporting Analysis, *supra* note 10, at 5.

[140] Supporting Analysis, *supra* note 10, at 6.

borrower could make timely payments on their federal student loans.[141] In particular, as compared to their lower-income counterparts, borrowers in higher income categories made loan payments more consistently; expressed a greater ability to repay future loans; were less likely to report financial insecurity; and were less likely to have lost employment at the beginning of the pandemic.[142] In some cases, ED found that there were particularly large differences in repayment capacity between borrowers who made less than $125,000 and those who made more than $125,000.[143] As a result, ED determined that the "$125,000 income mark" would be "a reasonable ceiling for discharge eligibility."[144]

The Supporting Analysis also contended that a borrower's past receipt of a Pell Grant, another policy eligibility criterion, helped predict a borrower's delinquency or default risk in ways that a borrower's current income alone could not.[145] As ED explained, a borrower's Pell Grant eligibility was based on family financial resources at the time of Pell Grant application, when recipients tended to have "lower wealth and familial monetary resources" than nonrecipients.[146] While this determination relates to the status of a Pell Grant recipient at the time of application for the grant, ED also found significant differences in borrower repayment between Pell Grant recipients and nonrecipients.[147] In every imputed income band, a Pell Grant recipient was about twice as likely to have defaulted on their loans as a non-Pell Grant recipient borrower in the same band six to ten years after entering repayment.[148]

Budgetary Impacts of HEROES Act Uses

One facet of the lawsuits challenging the cancellation policy is the magnitude of the economic impact of this exercise of the HEROES Act. According to the plaintiffs, the dimensions of the policy show that ED proposes to use the HEROES Act to address a question of major economic as well as political significance. Thus, plaintiffs urge the Supreme Court to apply the "major-questions doctrine" to assess whether the statute authorizes the policy.[149] The federal petitioners respond, in part, by focusing on the financial effects of the payment pause,[150] portions of which ED implemented using HEROES Act authority. Given the "permanent and substantial effects" of this prior use of the HEROES Act, the federal petitioners contend that the cancellation policy is

[141] Supporting Analysis, *supra* note 10, at 6.

[142] Supporting Analysis, *supra* note 10, at 7–10.

[143] *See, e.g*., Supporting Analysis, *supra* note 10, at 8 ("There is a break in repayment capacity at around $125,000. After forbearance, nearly 20 percent of borrowers earning between $100,000 and $124,000 expect to experience difficulty repaying loans, comparted to 14 percent of those earning above $125,000."); *id*. at 7, 9 (stating that inconsistent payment rates and expressions of financial insecurity for borrowers in the $100,000 to $124,000 income band are about double the rates of borrowers with incomes between $125,000 and $149,000).

[144] Supporting Analysis, *supra* note 10, at 7. The Supporting Analysis does not expressly relate indicators of a borrower's ability to repay student loans to household income as opposed to individual income. *Id*. at 6.

[145] Supporting Analysis, *supra* note 10, at 11 (describing Pell Grant recipient status as an "independent and valuable" indicator of delinquency or default risk).

[146] Supporting Analysis, *supra* note 10, at 11.

[147] Supporting Analysis, *supra* note 10, at 12.

[148] Supporting Analysis, *supra* note 10, at 12.

[149] *See* State Pls.' Br., *supra* note 104, at 31.

[150] Federal Pet'rs' Br., *supra* note 104, at 51.

not an "unheralded" exercise of claimed statutory authority and thus is not on par with those administrative actions the Court has invalidated in its major-questions cases.[151]

While the economic impact of the payment pause and the cancellation policy could perhaps be framed in more than one way, the parties have quantified the economic impacts of ED's actions by citing their estimated budgetary costs. The Federal Credit Reform Act of 1990 prescribes how agencies measure and account for these costs.[152]

When an agency makes a direct loan or loan guarantee, it estimates the "cost" to the federal government of that commitment.[153] In simplified terms, this "cost" figure estimates the value to the government, when the commitment is made, of the future cash flows of a loan or loan guarantee.[154] Cash flows are amounts the agency expects to pay to and receive from a third party over the lifetime of the commitment, stated in today's dollars.[155] The agency obligates existing budget authority to cover this cost when it originates a direct loan or makes a loan guarantee.[156] If an agency then *modifies* a commitment—for example, by exercising "administrative discretion under existing law" to change a commitment's terms[157]—in a way that increases the estimated cost of the outstanding direct loan or loan guarantee, the agency obligates more budget authority to cover the increased cost.[158]

ED used HEROES Act authority to extend the payment pause originally instituted by the CARES Act.[159] By suspending loan repayment and interest accrual on covered federal student loans, the payment pause increased the cost to the federal government of having made the loans. The exact extent of the cost increase is unclear because there does not appear to be a public estimate of the cost of the entire HEROES Act payment pause from October 2020 to the present. ED states that the payment pause extensions made during FY2021 resulted in increased costs of $49.5 billion, while the extensions made during FY2022 increased costs by an additional $48.6 billion.[160]

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[151] Federal Pet'rs' Br., *supra* note 104, at 51.

[152] 2 U.S.C. § 661a, *et seq*.

[153] 2 U.S.C. § 661c(d). ED estimates initial and updated costs on a cohort basis, grouping together in a single cohort all of the direct loans (or loan guarantees) made in a given fiscal year. *See* FED.STUDENT AID, U.S. DEP'T OF EDUC., FISCAL YEAR 2022 ANNUAL REPORT 170 (2023), https://www2.ed.gov/about/reports/annual/2022report/fsa-report.pdf.

[154] 2 U.S.C. § 661a(5).

[155] *See id.* § 661a(5)(B)–(C). According to the Government Accountability Office (GAO), there is no FDLP cohort whose borrowers have all finished repaying their loans. Thus, as of 2022, ED continued to monitor the "costs" of the FDLP's inaugural, FY94 loan cohort, as well as all subsequent cohorts. *See* GOV'T ACCOUNTABILITY OFF., STUDENT LOANS: EDUCATION HAS INCREASED FEDERAL COST ESTIMATES OF DIRECT LOANS BY BILLIONS DUE TO PROGRAMMATIC AND OTHER CHANGES, GAO-22-105365, at 7–8 (2022) [hereinafter DIRECT LOAN COST REPORT].

[156] *See* 2 U.S.C. § 661c(d).

[157] *Id*. § 661a(9).

[158] *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR NO. A-11: PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET § 185.7 (rev. Aug. 2022).

[159] *See* Pub. L. No. 116-36, § 3513(a)–(b), 134 Stat. 281, 404 (2020). ED has stated that for a thirteen-day period preceding enactment of the CARES Act it also used the HEROES Act to provide similar payment relief to borrowers. *See* FED. STUDENT AID, U.S. DEP'T OF EDUC., FISCAL YEAR 2020 ANNUAL REPORT 38 (2020), https://www2.ed.gov/about/reports/annual/2020report/fsa-report.pdf. No public estimate of the costs of this relief appears to exist.

[160] *See* U.S. DEP'T OF EDUC., FY 2022 AGENCY FINANCIAL REPORT 21, 69 (2023), https://www2.ed.gov/about/reports/annual/2022report/agency-financial-report.pdf (explaining that the FY2022 cost increase included the cost of extending the payment pause through Dec. 31, 2022).

According to the Government Accountability Office (GAO), the payment pause in effect between October 2020 and May 2022 increased the cost of FDLP loans by $77.8 billion.[161]

The cancellation policy would also affect the cost to the government of federal student loans by discharging all or part of an eligible loan's outstanding balance. As a result of this discharge, the federal government would forgo payments of principal and accrued interest that it once estimated it would receive. By canceling principal, the federal government would also forgo interest that would have accrued on this principal. Cost estimates for the policy vary. ED estimates that for all eligible loan cohorts, cancellation would result in a roughly $379 billion cost increase.[162] The Congressional Budget Office (CBO) places the cost of cancellation at about $400 billion.[163] The two cost estimates diverge because, among other things, they rest on different assumptions about the number of eligible borrowers who would apply for cancellation.[164]

Supreme Court Review of Cancellation Policy: Procedural History

The Supreme Court has accepted jurisdiction over two cases challenging the cancellation policy, *Nebraska v. Biden* and *Brown v. U.S. Department of Education*. Different plaintiffs brought the two cases, and the cases were heard in different lower courts. The two groups of plaintiffs describe different types of harm that the cancellation policy would allegedly cause, and the plaintiffs raise different claims to avert this alleged harm. The paths that each of these cases traveled to the Supreme Court are summarized below.

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[161] GOV'T ACCOUNTABILITY OFF., DIRECT LOAN COST REPORT, *supra* note 155, at 14. Relying on GAO's analysis, the federal petitioners argue that "previous invocations of the [HEROES] Act had permanent and substantial economic effects. Most significantly, the previous COVID-19 relief measures, including the suspension of loan payments and interest accrual, are estimated to have cost the federal government *$102 billion.*" Federal Pet'rs' Br., *supra* note 104, at 51 (emphasis added). This $102 billion figure adds the $77.8 billion cost of the payment pause that is attributable to the HEROES Act to the $24.6 billion cost that is attributable to the CARES Act. However, costs incurred because of the CARES Act seem not relevant to the federal government's argument concerning payment-pause-cost figures, which is that the cancellation policy is not an "unheralded" use of HEROES Act authority. *See also* Transcript of Oral Argument at 31:24, Dep't of Educ. v. Brown, No. 22-535 (Feb. 28, 2023) (statements at oral argument by the federal petitioners that the payment pause had cost "150 billion dollars"), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/22-535_ba7d.pdf.

[162] *See* ED Cost Estimate, *supra* note 11.

[163] Letter from Phillip L. Swagel, Director, Congressional Budget Office, to Richard Burr, Ranking Member, Committee on Health, Education, Labor, and Pensions, U.S. Senate, and Virginia Foxx, Ranking Member, Committee on Education and Labor, U.S. House of Representatives at 3 (Sept. 26, 2022), https://www.cbo.gov/system/files/2022-09/58494-Student-Loans.pdf (last visited Apr. 14, 2023) [hereinafter CBO Cost Estimate]. CBO estimated that $430 billion in loan balances will be canceled under the policy. *See id*. CBO set its "cost" estimate lower, though, because it concluded a portion of canceled balances would, under current law, already have been discharged under programs such as income-driven repayment plans. *See id*.

[164] *Compare* ED Cost Estimate, *supra* note 11 (assuming an 81% participation rate), *with* CBO Cost Estimate, *supra* note 163 (assuming "90 percent of income-eligible borrowers will apply for debt cancellation").

Nebraska v. Biden

The first filed of these cases is captioned *Nebraska v. Biden*, initiated by a complaint filed in the U.S. District Court for the Eastern District of Missouri on September 29, 2022.[165] The plaintiffs in *Nebraska* are six states: Nebraska, Missouri, Arkansas, Iowa, Kansas, and South Carolina.[166]

The *Nebraska* complaint includes three counts. Count 1 is titled "Separation of Powers" and alleges that the cancellation policy is "ultra vires" and "violates the separation of powers" because the HEROES Act does not authorize the policy.[167] Count 2 claims that the policy violates the Administrative Procedure Act (APA) because ED adopted the policy in excess of its statutory authority.[168] Count 3 asserts that the policy violates the APA because it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[169] Whereas Counts 1 and 2 mainly focus on the asserted lack of statutory authority for the policy,[170] Count 3 claims that the Secretary's decision to adopt the policy did not result from reasoned decisionmaking.[171]

Along with their complaint, the *Nebraska* plaintiffs filed a motion for a preliminary injunction.[172] The *Nebraska* plaintiffs asked the district court to enjoin the federal petitioners from implementing or enforcing the policy because, at that time, ED had said that it would "start cancelling loan balances" for certain borrowers as early as October 2022,[173] a move that assertedly would have inflicted harm on the plaintiffs.

On October 20, the district court denied the *Nebraska* plaintiffs' motion and dismissed the suit.[174] The district court did not reach the merits of the plaintiffs' claims by asking (for example) whether the states were likely to prevail on their argument that the HEROES Act did not authorize the cancellation policy.[175] Instead, the district court held that none of the plaintiffs had shown Article III standing under any of their injury theories.[176]

The *Nebraska* plaintiffs appealed the district court's judgment to the U.S. Court of Appeals for the Eighth Circuit (Eighth Circuit).[177] They simultaneously asked the Eighth Circuit for two related forms of relief. The *Nebraska* plaintiffs first asked for an administrative stay of the cancellation policy to give the Eighth Circuit time to consider their second form of relief before

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[165] *See* Compl., Nebraska v. Biden, No. 4:22-cv-01040 (E.D. Mo. Sept. 29, 2022).

[166] *Id*. ¶¶ 12–20.

[167] *Id*. ¶¶ 142–48.

[168] *Id*. ¶¶ 149–58.

[169] *Id*. ¶¶ 159–71.

[170] Id. ¶¶ 146–48, 155–56.

[171] *Id*. ¶ 166.

[172] Mot. for Prelim. Inj., Nebraska v. Biden, No. 4:22-cv-01040 (E.D. Mo. Sept. 29, 2022). A preliminary injunction is a temporary court order, issued before final judgment, compelling or preventing an action to prevent an irreparable injury to the party requesting the injunction. *Injunction*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[173] Pl. States Memo. in Supp. of Mots. for TRO and Prelim. Inj. at 3, Nebraska v. Biden, No. 4:22-cv-01040 (E.D. Mo. Sept. 29, 2022). ED subsequently stated that it would not discharge student loan debt under the policy until late October 2022. *See* Decl. of James Richard Kvaal at ¶ 5, Nebraska v. Biden, No. 4:22-cv-01040 (E.D. Mo. Oct. 7, 2022). Before then, though, the U.S. Court of Appeals for the Eighth Circuit entered injunctive relief to stay the policy's implementation, relief that remains in effect as of the date of this publication. *See infra* notes 180–181 and accompanying text.

[174] Nebraska v. Biden, No. 4:22-cv-1040, 2022 WL 11728905, at *7 (E.D. Mo. Oct. 20, 2022).

[175] *See id*. (dismissing complaint for lack of jurisdiction).

[176] *Id*. at *4–7.

[177] Not. of Appeal, Nebraska v. Biden, No. 4:22-cv-01040 (E.D. Mo. Oct. 20, 2022).

ED began implementing the policy.[178] The *Nebraska* plaintiffs also asked for an injunction of the policy pending appeal.[179]

On October 21, 2022, the Eighth Circuit summarily granted the administrative stay.[180] On November 14, the court entered an injunction pending appeal.[181] The Eighth Circuit explained that at least one of the states, Missouri, had likely shown standing based on the policy's effects on MOHELA.[182] The Eighth Circuit also found that the appeal involved "substantial," unresolved questions of law about ED's statutory authority.[183] The equities, the court reasoned, supported an injunction, because allowing the policy to go into effect would have an "irreversible impact" on the plaintiffs, while staying implementation would not harm eligible borrowers already covered by the payment pause.[184]

Brown v. U.S. Department of Education

As *Nebraska* progressed, two student loan borrowers pressed a separate challenge to the cancellation policy in a case captioned *Myra Brown v. U.S. Department of Education*, filed on October 10, 2022, in the U.S. District Court for the Northern District of Texas.[185] One of the *Brown* plaintiffs is current on lender-held FFELP loans and thus is not eligible for cancellation.[186] The only FFELP loans eligible for cancellation under the policy are those held by ED or in default at a GA.[187] The second plaintiff owes FDLP loans and thus is eligible for up to $10,000 in cancellation.[188] The second plaintiff would not receive an additional $10,000 in cancellation, though, because he did not receive a Pell Grant.[189]

The *Brown* complaint includes a single APA count, which focuses on ED's failure to follow allegedly applicable procedures for developing the policy. In particular, the *Brown* plaintiffs say that the cancellation policy qualifies as a "regulation" or "rule" as those terms are used in the HEA and the APA, respectively.[190] Because the policy allegedly fits these categories, the plaintiffs contend they had a right to participate in the policy's development, which ED did not allow them.[191] Like the *Nebraska* plaintiffs, the *Brown* plaintiffs filed a motion for preliminary injunction alongside their complaint.[192]

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[178] *See* Dkt. Entry Granting Mot. for Administrative Stay, Nebraska v. Biden, No. 22-3179 (8th Cir. Oct. 21, 2022).

[179] Emergency Mot. for Inj. Pending Appeal, Nebraska v. Biden, No. 22-3179 (8th Cir. Oct. 21, 2022).

[180] Dkt. Entry Granting Mot. for Administrative Stay, Nebraska v. Biden, No. 22-3179 (8th Cir. Oct. 21, 2022).

[181] *See* Nebraska v. Biden, 52 F.4th 1044 (8th Cir. 2022).

[182] *Id*. at 1046–47.

[183] *Id*. at 1047–48.

[184] *Id*. at 1048. Four days before, on November 10, 2022, the *Brown* district court entered a judgment of vacatur setting aside the cancellation policy. *See infra* note 198 and accompanying text.

[185] Compl., Brown v. U.S. Dep't of Educ., No. 4:22-cv-00908-O (N.D. Tex. Oct. 10, 2022).

[186] *Id*. ¶¶ 13–14.

[187] *See supra* note 109 and accompanying text.

[188] Compl. at ¶¶ 15–16, Brown v. U.S. Dep't of Educ., No. 4:22-cv-00908-O (N.D. Tex. Oct. 10, 2022).

[189] *Id*. ¶ 16.

[190] *Id*. ¶¶ 65–73.

[191] *Id*. ¶ 72.

[192] Pls.' Mot. for Prelim. Inj., Brown v. U.S. Dep't of Educ., No. 4:22-cv-00908-O (N.D. Tex. Oct. 10, 2022).

On November 10, the district court entered judgment for the *Brown* plaintiffs.[193] The district court held that the plaintiffs had standing based on a procedural injury theory.[194] Turning to the merits, the district court then considered the *Brown* plaintiffs' single APA claim as relating to the APA's "procedural" and "substantive" requirements.[195] As to procedure, the district court reasoned that because ED issued the policy "under the HEROES Act, which exempts" the policy from public comment requirements, the policy "did not violate the APA's procedural requirements."[196] Then, under the rubric of the APA's "substantive requirements," the district court held that the HEROES Act did not in fact authorize the policy.[197] As a remedy, the district court declared the policy unlawful and ordered that it be vacated.[198]

The federal petitioners took an immediate appeal to the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit)[199] and asked the Fifth Circuit to stay the district court's judgment pending appeal.[200] On November 30, the Fifth Circuit summarily denied that motion.[201]

Supreme Court Grants Certiorari Before Judgment

By mid-November 2022, orders issued by two courts—the Texas district court's November 10 judgment of vacatur[202] and the Eighth Circuit's November 14 injunction[203]—barred ED from implementing the cancellation policy. In November and December 2022, the federal petitioners thus asked the Supreme Court for orders that would allow ED to move forward with the cancellation policy while the appellate courts heard the appeals.[204]

In the alternative, the federal petitioners asked the Supreme Court to grant certiorari before judgment.[205] Federal statute empowers the Court to accept jurisdiction over a case "before judgment has been rendered in the court of appeals."[206] This is not the typical route used to arrive at the Court. The Court's rules of practice say that certiorari before judgment is reserved for cases of "such imperative public importance as to justify deviation from normal appellate practice."[207]

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[193] *See* Brown v. U.S. Dep't of Educ., No. 4:22-CV-0908-P, 2022 WL 16858525, at *15 (N.D. Tex. Nov. 10, 2022).

[194] *Id*. at *7–9. The procedural injury theory is discussed in more detail. *See infra* "Procedural Injury."

[195] *See Brown*, 2022 WL 16858525 at *10–11.

[196] *Id*. at *11.

[197] *Id*. at *13–14.

[198] *Id*. at *14–15.

[199] Not. of Appeal, Brown v. U.S. Dep't of Educ., No. 4:22-cv-00908-P (N.D. Tex. Nov. 10, 2022).

[200] Defs.-Appellants' Emergency Mot. for Stay Pending Appeal, Brown v. U.S. Dep't of Educ., No. 22-11115 (5th Cir. Nov. 17, 2022).

[201] Order, Brown v. U.S. Dep't of Educ., No. 22-11115 (5th Cir. Nov. 30, 2022).

[202] *See supra* note 198.

[203] *See supra* note 181.

[204] Appl. to Vacate the Inj. Entered by the U.S. Ct. of Appeals for the Eighth Cir., Biden v. Nebraska, No. 22A444 (U.S. Nov. 18, 2022); Appl. to Stay the J. Entered by the U.S. District Ct. for the N. District of Tex., U.S. Dep't of Educ. v. Brown, No. 22A489 (U.S. Dec. 2, 2022).

[205] *See, e.g.*, Appl. to Vacate the Inj. Entered by the U.S. Ct. of Appeals for the Eighth Cir. at 4, Biden v. Nebraska, No. 22A444 (U.S. Nov. 18, 2022).

[206] 28 U.S.C. § 2101(e).

[207] SUP. CT. R. 11.

In December 2022, the Supreme Court deferred rulings on the federal petitioners' applications for relief from the restraining effects of the lower court orders.[208] As a result, both orders continue to bar ED from carrying out the cancellation policy.

The Supreme Court also granted certiorari in both cases and identified the questions it will consider.[209] In *Nebraska*, the Court will examine whether the state plaintiffs have Article III standing, whether statute authorizes the cancellation policy, and whether the Secretary's exercise of any such authority was arbitrary or capricious.[210] In *Brown*, the Court will consider the borrower plaintiffs' Article III standing and whether the policy is statutorily authorized and adopted in a procedurally proper way.[211]

Do Plaintiffs Have Standing to Challenge the Cancellation Policy?

Under Article III of the Constitution, the judicial power of the United States extends only to "Cases" and "Controversies."[212] In particular, plaintiffs, whether individuals, businesses, or governmental entities, must show that they have *standing* to sue before they may invoke the jurisdiction of the federal courts.[213] The Supreme Court has repeatedly held that to have standing, a plaintiff must demonstrate that (1) they have suffered some injury-in-fact, (2) that the injury is fairly traceable to the defendant's allegedly unlawful conduct, and (3) that the injury is likely to be redressed by the remedy sought from the court.[214] As described by the Court in 2021, this requirement ensures that federal courts only decide cases involving the "rights of individuals" within the courts' "proper function in a limited and separated government."[215]

For an alleged harm to constitute an *injury-in-fact*, it must be both concrete (i.e., not abstract or conjectural)[216] and particularized (i.e., affecting the plaintiff individually).[217] Common examples of concrete harms include physical injuries or monetary losses,[218] but concrete harms may also include intangible injuries such as reputational harms or interference with a person's

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[208] Dkt. Entry, Biden v. Nebraska, No. 22-506 (U.S. Dec. 1, 2022); Dkt. Entry, Dep't of Educ. v. Brown, No. 22-535 (U.S. Dec. 12, 2022).

[209] Dkt. Entry, Biden v. Nebraska, No. 22-506 (U.S. Dec. 1, 2022); Dkt. Entry, Dep't of Educ. v. Brown, No. 22-535 (U.S. Dec. 12, 2022).

[210] Dkt. Entry, Biden v. Nebraska, No. 22-506 (U.S. Dec. 1, 2022) (referencing the federal petitioners' application to identify questions presented in *Nebraska*); Appl. to Vacate the Inj. Entered by the U.S. Ct. of Appeals for the Eighth Cir. at 38, Biden v. Nebraska, No. 22A444 (U.S. Nov. 18, 2022).

[211] Dkt. Entry, Dep't of Educ. v. Brown, No. 22-535 (U.S. Dec. 12, 2022) (stating questions presented).

[212] U.S. CONST. art. III, § 2.

[213] Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016) (explaining that Article III standing "doctrine limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong").

[214] Hollingsworth v. Perry, 570 U.S. 693, 704 (2013).

[215] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021) (internal quotation marks omitted) (distinguishing between those cases that are properly within the judicial power and "hypothetical or abstract disputes" which are not).

[216] *See* Carney v. Adams, 141 S. Ct. 493, 498 (2020) ("[A] grievance that amounts to nothing more than an abstract and generalized harm to a citizen's interest in the proper application of the law does not count as an injury in fact." (internal quotation marks omitted)).

[217] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 n.1 (1992).

[218] Collins v. Yellen, 141 S. Ct. 1761, 1779 (2021) (stating that "pocketbook injury is a prototypical form of injury in fact").

constitutional right of free speech.[219] The harm must be "real and immediate" and not hypothetical or imagined.[220] With respect to particularity, the Court has explained that this inquiry generally requires asking whether the plaintiff claims an injury that is personal, rather than a grievance the plaintiff "suffers in some indefinite way in common with people generally."[221]

Traceability generally requires a causal link between the defendant's allegedly unlawful conduct and the plaintiff's injury.[222] The Court has stated that it may be "substantially more difficult" to establish causation where the asserted chain of events connecting unlawful action to harm includes the actions of third parties who are not parties to the suit.[223]

Redressability requires a court to examine the particular relief requested by the plaintiff and ask whether it likely would address the alleged injury.[224] For example, a plaintiff lacks standing to request an injunction to prevent future harm where they have failed to allege continuing or threatened injury from an underlying violation of law.[225]

The *Brown* and *Nebraska* plaintiffs advance different standing theories, which fall into three general categories. First, certain *Nebraska* plaintiffs allege that the cancellation policy causes them financial harm based on its effects on loan servicers and lender-held FFELP loans. Second, certain *Nebraska* plaintiffs assert harm in the form of lost state tax revenue. Third, the *Brown* plaintiffs claim that the Secretary adopted the policy in disregard of alleged procedural rights to participate in the policy's development and that this procedural-right deprivation harmed their interest in receiving cancellation benefits.

Financial Harm

The states of Missouri, Nebraska, and Arkansas argue that they have standing to pursue their claim based on alleged financial harm.

Missouri's financial-harm standing theories are unique for two reasons. First, only Missouri claims to be injured because of the cancellation policy's effects on direct loan servicers. Second, Missouri's claims of financial harm depend on an alleged injury suffered in the first instance by a nonparty, MOHELA. Missouri thus offers two theories of how harm to MOHELA harms the state. One theory alleges that financial harm to MOHELA results in direct, simultaneous harm to Missouri because of the state's degree of control over MOHELA. The second theory contends that MOHELA's financial losses will indirectly harm Missouri by impairing MOHELA's ability to make statutorily required payments to the state or scholarship contributions in lieu of such payments.

Missouri, Nebraska, and Arkansas each claim a second type of financial harm. The states allege that the policy gave borrowers of lender-held FFELP loans an incentive to consolidate into the FDLP, which inflicted injury on these states in a variety of ways described below.

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[219] *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 340 (2016) ("Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete.").

[220] City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983) (internal quotation marks omitted).

[221] DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344 (2006).

[222] *Lujan*, 504 U.S. at 560.

[223] Warth v. Seldin, 422 U.S. 490, 505 (1975).

[224] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 (1998).

[225] *Lyons*, 461 U.S. at 102–03.

The following sections first examine the issues uniquely affecting Missouri's standing before turning to the second financial harm theory—the consolidation injury—asserted by the three states.

Servicer Injury

Missouri's unique theory of financial harm focuses on the cancellation policy's alleged effects on MOHELA in its capacity as one of ED's loan servicers. ED contracts with third parties—loan servicers—to perform many of the day-to-day administrative functions of the student loan accounts that correspond to the tens of millions of student loans that ED holds.[226] ED allocates accounts to its servicers and then pays servicers based on the number and type of accounts and the work that the servicer performs on ED's behalf.[227]

MOHELA is one of ED's loan servicers. In FY2022, ED paid MOHELA $88.9 million in direct-loan servicer fees.[228] These fees were the largest source of MOHELA's revenue in that fiscal year.[229] Missouri thus argues that the cancellation policy will cause financial harm to MOHELA because ED has stated that if all eligible borrowers applied for cancellation, up to 20 million would have no remaining student loan balance after cancellation.[230] The elimination of student loan balances, Missouri says, means the closure of accounts—sometimes more than one per affected borrower—that are assigned to ED's servicers.[231] These closures, in turn, would impact servicer fees.[232] If half of ED's accounts close as a result of the policy, then Missouri argues that MOHELA could lose "at least half of" the accounts allocated to it and "nearly 40 percent" of its total operating revenue.[233]

In its briefs, the federal government appears to dispute that the policy will cause MOHELA to lose servicer fees.[234] It is unclear whether this position later changed at oral argument. On the one hand, the Solicitor General said at oral argument that "if MOHELA made allegations that the" policy "was going to have financial effects on it, it could sue in its own name and" the federal petitioners "would not contest Article III standing."[235] On the other hand, the Solicitor General reiterated arguments from the briefs that, as a factual matter, Missouri failed to demonstrate that loan discharge under the policy would cause MOHELA to suffer a net revenue loss because ED would compensate MOHELA for processing policy-related discharges. This new discharge-processing revenue, according to the federal petitioners, could offset lost servicer revenue caused

[226] *See supra* notes 58–60 and accompanying text.

[227] *See supra* notes 61–62 and accompanying text.

[228] *See* HIGHER EDUC. LOAN AUTH. OF THE STATE OF MO., FINANCIAL STATEMENTS 4 (2022). As of June 2022, MOHELA had been allocated 5.2 million federal accounts for servicing. *Id*.

[229] *Id*. at 4, 23.

[230] *See supra* note 136 and accompanying text. As discussed above, though, ED does not anticipate that all eligible borrowers will apply for cancellation. *See supra* note 164 (noting ED's use of an 81% participation rate in its cost estimates).

[231] State Pls.' Br., *supra* note 104, at 16.

[232] State Pls.' Br., *supra* note 104, at 16.

[233] State Pls.' Br., *supra* note 104, at 16.

[234] Federal Pet'rs' Br., *supra* note 104, at 28 ("The plan may not cause a significant drop in MOHELA's revenue at all.").

[235] Transcript of Oral Argument at 18:8–16, Nebraska v. Biden, No. 22-506 (Feb. 28, 2023), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/22-506_5426.pdf.

by the policy, so that MOHELA potentially would not suffer a net revenue loss and thus no financial harm.[236]

In the lower courts, the parties do not appear to have specifically focused on these potentially offsetting servicer fees.[237] As a result, it is unclear (for example) what rate ED would use to compensate MOHELA for policy-related discharges.[238] It is possible that the Supreme Court could conclude, though, that one-time fees associated with discharging loans under the policy likely would not offset the recurring fees that those same accounts would otherwise generate over a longer term absent discharge.[239]

Direct Harm Theory

With respect to Missouri's first theory of how harm to MOHELA harms the state, the parties offer differing descriptions of the relationship between MOHELA and Missouri. Missouri argues that MOHELA "is a Missouri-created and -controlled public instrumentality."[240] The federal petitioners, by contrast, emphasize features of state law separating MOHELA from the state.[241] Missouri argues that its description of the MOHELA-Missouri relationship fits within Supreme Court cases that permitted a sovereign to litigate claims on behalf of its separately incorporated public entity, while the federal petitioners seek to distinguish those cases.

There is support in Missouri state law for the parties' differing views of the Missouri-MOHELA relationship. On the one hand, MOHELA's statutory charter describes the Missouri Authority as an entity created for a public purpose that operates like a public entity with related privileges. Missouri established MOHELA as a "public instrumentality" to pursue goals such as ensuring that eligible students would have access to student loans.[242] Missouri granted MOHELA statutory authorities and stated that when it used these authorities, it would be performing "an essential public function."[243] Likewise, the Missouri General Assembly declared MOHELA a "separate public instrumentality of the state," whose income and property are exempt from all state-law

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[236] *See id*. at 72:9–16 ("JUSTICE JACKSON: So we don't know really what the ultimate loss would be to MOHELA, even if we believe that MOHELA is part of the state [of Missouri]? GENERAL PRELOGAR: That's right. The states haven't offered any evidence in that regard to substantiate their assertion of standing); *see also id.* at 71:23-72:8 (Solicitor General argument) (contending that MOHELA would receive "fees for discharging accounts" under the policy that would have to be factored into a calculation of the net loss in servicer fees, if any, that MOHELA might experience).

[237] *See, e.g*., Defs. Memo. of Law in Oppo. to Plfs. Mot. for Prelim. Inj. at 15, Nebraska v. Biden, No. 4:22-cv-01040 (E.D. Mo. Oct. 7, 2022)) (arguing that Missouri's servicer injury theory was impermissibly speculative because the policy could either "reduce MOHELA's portfolio" or "create increased demand for Direct Loans" and thereby increase the "pool of debt available for MOHELA to service").

[238] A June 2020 contract states that ED pays MOHELA specified amounts for "discharge processing." DEP'T OF EDUC., CONTRACT NO. 91003120D0002 WITH MOHELA 4 (June 23, 2020) (filed as Exh. C to Decl. of Michael E. Talent, Nebraska v. Biden, No. 4:22-cv-01040 (E.D. Mo. filed Sept. 29, 2022)). However, this task relates to "discharge categories authorized under *the Higher Education Act*." *Id*. at 11 (emphasis added).

[239] *See supra* note 233 and accompanying text (framing the possible extent of account closures).

[240] State Pls.' Br., *supra* note 104, at 16.

[241] Federal Pet'rs' Br., *supra* note 104, at 29 ("Missouri and MOHELA are legally separate entities. Missouri thus cannot establish its own standing by asserting that the [policy] injures MOHELA.").

[242] MO. REV. STAT. § 173.360. To this end of improving access to student loans, the charter specifically authorized MOHELA to originate FFELP loans. *See id.* § 173.387.

[243] *Id*. § 173.360.

taxation.[244] MOHELA's proceedings and actions "shall comply with all statutory requirements respecting the conduct of public business by a public agency."[245]

MOHELA is also accountable to Missouri state officials. It is led by a seven-member board.[246] The governor appoints five members, by and with the advice and consent of the Missouri Senate, while the two other members are Missouri state officials.[247] The governor may remove any authority member for cause.[248] Statute also "assign[s]" MOHELA to the state's Department of Higher Education and Workforce Development (the Missouri Department).[249] MOHELA must report financial information to the Missouri Department annually.[250] MOHELA must also receive the Missouri Department's approval before it may sell certain of its student loan notes.[251]

These features of MOHELA's charter describe state control over the Missouri Authority's activities. However, other features of its charter describe structural and financial separation between MOHELA and the state. MOHELA is a separate legal entity—that is, it is a "body politic and corporate."[252] It has many powers of a corporation, including authority to "sue and be sued and to prosecute and defend."[253] Missouri is not "liable in any event for the payment of the principal of or interest on any bonds of the authority" or the performance of any MOHELA agreement; MOHELA's debt is not the debt of the state or any of its political subdivisions.[254] Its student loan notes are not "public property."[255] MOHELA and Missouri cannot rely on each other's assets to pay their separate expenses. That is, MOHELA cannot use its assets "for the payment of debt incurred by the state,"[256] and in turn MOHELA's assets generally are not "revenue of the state" or "subject to appropriation by" the General Assembly.[257]

These differing descriptions of the MOHELA-Missouri relationship are background for arguments concerning Court precedent in two areas—original jurisdiction cases brought by states and suits brought by the United States, both of which saw the sovereign government assert interests that the opposing party argued belonged to one of the sovereign's separately incorporated public entities, capable of suing in its own name.[258]

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[244] *Id*. § 173.415.

[245] *Id*. § 173.365.

[246] *Id*. § 173.360.

[247] *Id*. (stating that a member of the state's coordinating board and its commissioner of higher education shall serve on MOHELA's board). The nine-member coordinating board heads the Missouri Department of Higher Education and Workforce Development, and the commissioner of higher education (commissioner) acts as its chief administrative officer. *See, e.g*., MO. CONST. art. IV, § 52; MO. REV. STAT. §§ 173.005 & 173.007. The governor appoints coordinating board members, by and with the advice and consent of the Missouri Senate. MO. REV. STAT. § 173.005. The coordinating board, in turn, appoints the commissioner. *Id*. § 173.007.

[248] MO. REV. STAT. § 173.360.

[249] *Id*. § 173.445.

[250] *Id*.

[251] *Id*. § 173.385.8.

[252] *Id*. § 173.385.1.

[253] *Id*. § 173.385.3.

[254] *Id*. § 173.410.

[255] *Id*. § 173.425.

[256] *Id*. § 173.386.

[257] *Id*. § 173.425; *but see infra* notes 293–298 and accompanying text (discussing the Lewis and Clark Discovery Fund (LCD Fund)).

[258] The Court has also concluded that when the government "creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that

Original Jurisdiction Case Law: Possible Application of Arkansas v. Texas

The Constitution defines the Supreme Court's original jurisdiction as including "cases" in "which a state is a party,"[259] meaning that, with the Supreme Court's leave, a state can file its complaint directly in the Court rather than in a district court.[260] A state may invoke this original jurisdiction only to pursue a "direct interest of its own" and not to "seek recovery" on behalf of others.[261]

Seventy years ago in *Arkansas v. Texas*, though, the Court declined to dismiss a suit brought by a state for injuries suffered in the first instance by a state-created and -controlled entity that was not itself a party to the litigation. Texas sought dismissal of Arkansas's original-jurisdiction action challenging Texas's efforts in its own courts to enjoin a contract to finance a new hospital at the University of Arkansas (the University).[262] The contract named the University as a party to the agreement but not the state of Arkansas as such.[263]

Texas claimed that the University's injury was not also Arkansas's injury.[264] The Court disagreed.[265] State law established the University, the Court wrote, as "an official state instrumentality" in a way that meant that "any injury under the contract to the University is an injury to Arkansas."[266] Looking beyond state law's description of the University, the Court also held that "in substance the claim is that of the State," which was the "real party in interest."[267]

It is unclear how the framework set forth by the Court in *Arkansas*, used there to decide when harm suffered by a separately incorporated state entity is shared by the state that created it, might apply to MOHELA in the student loan cancellation litigation. The federal petitioners assert that because Missouri created MOHELA as "a separate legal entity," the state cannot maintain that it and the state "are one and the same" for standing purposes.[268] Yet Arkansas had also established its University as a "body politic and corporate" with all the powers of a corporation.[269] These powers include, as the Arkansas Supreme Court explained in 1963, the power to sue and be

corporation," the corporation may be subject to constitutional limitations such as the First Amendment. Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 399 (1995). Missouri argues that under this precedent, MOHELA is part of the state despite those aspects of its charter that indicate separation. *See id*. at 391 (noting that Amtrak's statutory charter that it was not "an agency or establishment of the United States Government" (internal quotation marks omitted)). Missouri's argument concludes that because MOHELA is part of the state, and because the Missouri attorney general has authority to protect state interests in litigation, the state can sue in MOHELA's name. *See* State Pls.' Br., *supra* note 104, at 17–18. The federal petitioners respond that *Lebron* and related cases address only whether MOHELA is a state actor for purposes of the Constitution's individual rights protections or the separation of powers; the *Lebron* line of cases does not expressly address questions of standing. Reply Br. of Federal Petitioners, at 5 Biden v. Nebraska, No. 22-506 (U.S. Feb. 15, 2023) [hereinafter Reply Br.].

[259] U.S. CONST. ART. III, § 2.

[260] SUP. CT. R. 11 (describing procedure in original actions).

[261] *See, e.g*., State of Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387, 396 (1938).

[262] 346 U.S. 368 (1953).

[263] *Id*.

[264] *Id*. at 369.

[265] *Id*. at 370.

[266] *Id*.

[267] *Id*. at 371.

[268] Federal Pet'rs' Br., *supra* note 104, at 30.

[269] *State of Ark.*, 346 U.S. at 370 (internal quotation marks omitted).

sued.[270] MOHELA and the University otherwise had similar structural connections to the states that created them.[271]

The ability to sue and be sued thus does not distinguish MOHELA from the University at issue in *Arkansas*, but the two entities do differ in a potentially important respect. In *Arkansas*, the Court noted that the state owned "all the property used by" the University, including the medical center whose construction Texas was preventing.[272] The Court also stated that Arkansas was the real party in interest to the construction contract.[273] These statements appear to focus on the benefit that Arkansas derived from its suit. If Texas were compelled to allow construction, Arkansas would then own new University property.[274] If Missouri prevails in its suit, by contrast, MOHELA would perhaps retain servicer fees it might otherwise lose with broad loan cancellation, but those fees would not be directly accessible to Missouri under existing state law.[275]

Federally Chartered Corporations Case Law: Possible Application of *Cherry Cotton Mills, Inc. v. United States*

The Supreme Court has also considered whether the United States could litigate claims that allegedly belonged to a federally chartered corporation that was absent from the suit and able to bring the same claim on its own. Decided in 1946, *Cherry Cotton Mills, Inc. v. United States* concerned two debts: a federal tax refund, and the taxpayer's separate debt to the Reconstruction Finance Corporation (RFC).[276] The Department of the Treasury issued the taxpayer's refund check to the RFC to partially offset the RFC debt.[277] The taxpayer claimed the offset was improper, and sued the United States to recover the refund.[278] The United States counterclaimed to recover the RFC debt, arguing that the debt to the RFC was a claim "on the part of the Government."[279]

The RFC was not a party to the suit,[280] and it had the power to sue on debts that were owed to it.[281] The taxpayer thus argued that the RFC's debt should not be the basis for a government

[270] *See* Cammack v. Chalmers, 284 Ark. 161, 163 (1984) ("The legislature designates the Board of Trustees of the University as the corporate entity capable of being sued."). The federal petitioners argue that the "university could not sue or be sued in its own name" because the Arkansas Supreme Court had described the state's district agricultural schools as lacking those powers. Reply Br., *supra* note 258, at 5. However, the Arkansas statutes established state district agricultural schools separately from the University, and those separate statutory authorities vested only the University with "all the powers of a corporate body." Ark. Code Ann. § 6-64-202.

[271] For example, both were led by multimember boards appointed by state officials and described in state law as public instrumentalities serving public purposes. *Compare State of Ark.*, 346 U.S. at 370, *with* MO. REV. STAT. § 173.360.

[272] *State of Ark.*, 346 U.S. at 370.

[273] *Id*. at 371.

[274] *Id*. at 370.

[275] *See supra* note 257 and accompanying text.

[276] 327 U.S. 536, 537 (1946).

[277] *Id*. at 537–38.

[278] *Id*. at 538.

[279] *Id*. (internal quotation marks omitted).

[280] *See id.*

[281] Act of Jan. 22, 1932, Pub. L. No. 72-2, § 4, 47 Stat. 1, 2 (1932) (providing that the Reconstruction Finance Corporation "shall have the power" "to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal").

counterclaim; just like a privately owned corporation, the RFC would have to pursue recovery of its debt in separate litigation.[282]

The Supreme Court nonetheless allowed the counterclaim to proceed.[283] The counterclaim statute, the Court reasoned, "was intended to permit the Government to have adjudicated in one suit all controversies between it and those granted permission to sue it."[284] This intended purpose encompassed the RFC's claims. Though Congress had referred to the RFC as a corporation, in actuality it was "an agency selected by Government to accomplish purely Governmental purposes" because of the United States' pervasive control over the RFC.[285]

The Court offered specific examples of this pervasive control, and the parties dispute whether these examples are sufficiently similar to Missouri's relationship with MOHELA. The Court in *Cherry Cotton Mills* noted that the President appointed all of the RFC's directors and that the RFC was tasked with accomplishing a public purpose.[286] Missouri argues that the same is true of the relationship between it and MOHELA.[287] The Court also noted that the United States was financially tied to the RFC: all of the RFC's money "came from" the United States, and the United States both received all of the RFC's profits and bore all of its losses.[288] The federal petitioners stress that the same is not true of Missouri's ties to MOHELA.[289]

Cherry Cotton Mills is also not a perfect fit for Missouri's standing theory. Except for MOHELA's obligation to make Lewis and Clark Discovery Fund (LCD Fund) distributions, no direct financial connection exists between the state and MOHELA.[290] Missouri would not suffer the same type of direct pocketbook injury on account of servicer injury that the United States would suffer from having RFC debts go uncollected.[291] To say that a case is not a perfect fit for a theory does not mean that the case provides no support, and Missouri's nonfinancial connections to MOHELA resemble those present in *Cherry Cotton Mills*. The question confronting the Court, then, is which of these connections—financial connections, other forms of control, or both—is most legally salient for deciding whether a sovereign may assert the rights of a separately incorporated entity with its own power to vindicate those interests.

Indirect Harm Theory

Missouri's direct-harm theory posits that MOHELA's injuries are also injuries of the state. The state's indirect-harm theory contends that the cancellation policy will financially harm MOHELA and thereby affect its ability to make two types of related payments to the state.[292]

[282] *See Cherry Cotton Mills, Inc.*, 327 U.S. at 538.

[283] *Id*. at 539.

[284] *Id*.

[285] *Id*.

[286] *Id*.

[287] State Pls.' Br., *supra* note 104, at 18.

[288] *Cherry Cotton Mills, Inc.*, 327 U.S. at 539.

[289] Reply Br., *supra* note 258, at 6.

[290] *See supra* notes 254–257 and accompanying text.

[291] *See, e.g.*, MO. REV. STAT. § 173.410 ("The state shall not be liable in any event for the payment of the principal of or interest on any bonds of the authority or for the performance of any pledge, mortgage, obligation, or agreement of any kind whatsoever which may be undertaken by the authority.").

[292] State Pls.' Br., *supra* note 104, at 21 ("By hindering MOHELA's contributions to the State, the Program risks financial injury to Missouri.").

Missouri refers to the first type of payments as "distributions."[293] MOHELA must make distributions worth $350 million to Missouri's LCD Fund.[294] When the LCD Fund has a balance, the Missouri General Assembly is able to appropriate from the Fund to support capital projects at the state's public colleges and universities and the Missouri Technology Corporation's work with colleges and universities.[295]

MOHELA states that as of June 30, 2022, it still owed the LCD Fund $105.1 million and last made a distribution in 2008.[296] When further distributions will occur is unclear. State law allows MOHELA to ask the state for an extension of the due date.[297] In FY2017, MOHELA received an extension to September 30, 2024, "with one year extensions for each additional $5 million" of educational-assistance contributions.[298]

MOHELA's payments to state educational funds that assist Missouri students are the second type of payments that Missouri says will be indirectly impacted by the cancellation policy. MOHELA contributes to Missouri Department of Higher Education and Workforce Development programs.[299] These contributions include $65 million paid to the state's Access Missouri Financial Assistance Program.[300] MOHELA made these payments to the Access Missouri program in fiscal years 2011, 2012, and 2013 in exchange for the state granting extensions of prior LCD Fund distribution due dates.[301]

The federal petitioners argue that Missouri's indirect-harm theory faces two problems, one that is mainly legal and other mainly factual. On the legal front, the federal government argues that the rights Missouri attempts to assert are not its own.[302] That is, the federal government argues that Missouri looks to sue for injuries suffered as a legal matter by MOHELA. The federal petitioners argue that the state's attempt to rely on these injuries is no different from an ordinary creditor trying to base its standing on injury to its debtor, which the Court's case law does not allow.[303]

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[293] *See* MO. REV. STAT. § 173.385.2.

[294] *Id.*

[295] *Id*. § 173.392.2; *see also id.* § 348.251.2 (authorizing the Missouri governor to establish "a private not-for-profit corporation named the 'Missouri Technology Corporation,' to carry out the provisions" of the Revised Statutes).

[296] HIGHER EDUC. LOAN AUTH. OF THE STATE OF MO., FINANCIAL STATEMENTS 20–21 (2022).

[297] MO. REV. STAT § 173.385.2 ("Notwithstanding the ability of the authority to delay any distribution required by this subsection" if the lack of delay would have certain adverse effects on MOHELA, "the distribution of the entire three hundred fifty million dollars of assets by the authority to the Lewis and Clark discovery fund shall be completed no later than September 30, 2013, unless otherwise approved by the authority *and the commissioner of the office of administration*." (emphasis added)).

[298] HIGHER EDUC. LOAN AUTH. OF THE STATE OF MO., FINANCIAL STATEMENTS 21 (2022).

[299] *Id*. at 10 (listing MOHELA's annual contributions to scholarship funds including those administered by Missouri such as the A+ Scholarship Program); *see also* MO. REV. STAT. § 160.545.

[300] *See, e.g*., MO. REV. STAT. § 173.1104 (describing eligibility rules for the Access Missouri Financial Assistance Program (Access Missouri)).

[301] HIGHER EDUC. LOAN AUTH. OF THE STATE OF MO., FINANCIAL STATEMENTS 9 (2022). MOHELA continues contributing to Department of Higher Education and Workforce Development programs, but it is unclear whether future extensions of the distribution due date are contingent on such contributions. MOHELA's financial statements describe an agreement with the state for "one year extensions" beyond FY2024 "for each additional $5 million" in payments MOHELA makes to a different recipient program, the Missouri Scholarship and Loan Foundation (the Foundation). MOHELA created the Foundation as a nonprofit to assist Missouri residents attending Missouri postsecondary institutions. *Id*. at 9–10, 29.

[302] Federal Pet'rs' Br., *supra* note 104, at 27.

[303] Federal Pet'rs' Br., *supra* note 104, at 27 (stating that this standing theory equates to "the proposition that, if A causes financial harm to B, and B owes money to C, C has standing to sue A").

To distinguish its standing theory from the ordinary debtor example, Missouri relies on the Court's 1990 decision in *Franchise Tax Board of California v. Alcan Aluminum Ltd*.[304] There, the Court found that two corporations had Article III standing to challenge California taxes on their respective wholly owned subsidiaries.[305] The allegedly illegal taxes threatened to lower the value of their holdings in the subsidiaries.[306] Missouri thus likens MOHELA to a wholly owned subsidiary, citing its control over MOHELA and the distributions that the Missouri Authority must make to the state.[307] Whether the Court accepts Missouri's analogy to *Aluminum Ltd*. appears to depend on how closely it views the statutory relationship between Missouri and MOHELA.[308]

On the factual front, the federal government argues that Missouri can only speculate that the policy's effects on MOHELA will cause it to default on payments to the LCD Fund.[309] The Court has said that to show standing, "possible future injury" is not enough.[310] Injury must be "certainly impending."[311] The Court has also usually been reluctant "to endorse standing theories that rest on speculation about the decisions of independent actors."[312] Whether the Court views Missouri's predictions of the cancellation policy's effects as certainly impending harm or mere speculation will likely depend on its view of the extent of the harms that MOHELA may suffer, such as server injury, because of the policy.[313] The larger that harm, the more likely that the policy will affect MOHELA's ability to make required distributions or contributions to educational assistance programs for distribution extensions.

Consolidation Injury

Missouri, Nebraska, and Arkansas claim a second type of financial harm, the cancellation policy's alleged effects on lender-held FFELP loans. Since unveiling the policy, ED has maintained that

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[304] 493 U.S. 331 (1990). Missouri also relies on *Hunt v. Washington State Apple Advertising Commission*, in which the Court stated that the interests of the Washington State Apple Advertising Commission (the Commission) "may" have been impacted by a North Carolina statute that barred the sale of apples labeled as "Washington Apples," even though Commission did not itself participate in the "Washington Apples" market. 432 U.S. 333, 341, 345 (1977). The Commission received annual assessments from Washington producers based on the sales volume of that market. *Id*. at 345. If the label requirement impacted sales of Washington Apples, "it could reduce the amount of the assessments due the Commission and used to support its activities." *Id*. Despite these comments, the Court appears to have based its finding of Article III standing on a separate theory of representational standing. Under that theory, the Commission was able to sue on behalf of Washington Apple producers in the same manner as a trade association representing the interests of its members. *See id*. ("We . . . agree with the District Court that the Commission has standing to bring this action in a representational capacity.").

[305] *Alcan Aluminum Ltd*., 493 U.S. at 335–36.

[306] *Id*.

[307] State Pls.' Br., *supra* note 104, at 21 ("By hindering MOHELA's contributions to the State, the Program risks financial injury to Missouri.").

[308] *See Alcan Aluminum Ltd*, 493 U.S. at 335–36 (agreeing with the appellate court's holding that standing existed because the parent corporation's ownership interest in the subsidiaries gave the parents a "personal stake" in the litigation that ensured the parties would be adverse to one another and "sharply" present issues for determination by federal courts).

[309] Federal Pet'rs' Br., *supra* note 104, at 28.

[310] Whitmore v. Arkansas, 495 U.S. 149, 158 (1990).

[311] *Id*.

[312] Clapper v. Amnesty Int'l USA, 568 U.S. 398, 414 (2013).

[313] *See supra* "Servicer Injury" and *infra* "Consolidation Injury" (describing the types of financial harms that MOHELA alleges).

lender-held FFELP loans would not themselves be eligible for cancellation.[314] ED has also maintained that certain Direct Consolidation Loans would be eligible for cancellation.[315] ED has said that so long as a Direct Consolidation Loan consolidated loans that were disbursed before June 30, 2022, it would be a loan type eligible for cancellation.[316] At first, ED set no deadline by which a borrower would need to apply for consolidation.[317] All lender-held FFELP loans capable of being consolidated into the FDLP would have met the June 30 criterion because FFELP loans disbursed no later than June 2010.[318] Thus, borrowers of lender-held FFELP loans could initially access cancellation by obtaining a Direct Consolidation Loan.

The states argue that because the borrower of a lender-held FFELP loan could access cancellation through consolidation into the FDLP, the cancellation policy as originally announced created an incentive to consolidate into the FDLP.[319] ED pays the remaining balance of a lender-held FFELP loan using a Direct Consolidation Loan's proceeds.[320] This form of loan prepayment, the states argue, injured them.[321]

How those consolidation injuries allegedly manifest themselves varies by state. Missouri claims injury from the fact that MOHELA holds FFELP loans.[322] Along with receiving interest income from the loans, MOHELA uses the loans as security for the SLABS that it issues.[323] The consolidation of MOHELA-held FFELP loans eliminates their future interest income and also allegedly undermines the value of associated MOHELA-issued SLABS by reducing future yield to investors.[324] The Arkansas Student Loan Authority (ASLA) also holds FFELP loans.[325] ASLA receives an administrative fee based on the amount of its total outstanding FFELP balances.[326] It estimates that \$5 million-\$6 million of its \$100 million FFELP loan portfolio was consolidated into the FDLP between August 24 and September 29, 2022.[327] Additionally, the Nebraska Investment Council invests in SLABS payable from lender-held FFELP loans.[328] As with Missouri's claim of injury, Nebraska argues that consolidation reduces the value of its SLABS holdings.[329]

Standing theories that rest on alleged consolidation injuries raise two primary questions. First, the states' incentive-to-consolidate theory depends on an FFELP borrower deciding to prepay their loans through a Direct Consolidation Loan to gain cancellation eligibility. The federal petitioners

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[314] *See supra* note 109 and accompanying text.

[315] *See supra* note 110 and accompanying text.

[316] *See supra* note 110 and accompanying text.

[317] *See supra* note 116 and accompanying text.

[318] *See supra* note 27 and accompanying text.

[319] State Pls.' Br., *supra* note 104, at 27–28.

[320] *See supra* note 55 and accompanying text.

[321] State Pls.' Br., *supra* note 104, at 26–27.

[322] *See* HIGHER EDUC. LOAN AUTH. OF THE STATE OF MO., FINANCIAL STATEMENTS 51 (2022).

[323] *See, e.g.*, *supra* note 46 and accompanying text.

[324] *See supra* note 49 (MOHELA SLABS Offering Memorandum explaining that "rates of payment of principal on the Notes and the yield on the Notes may be affected by prepayments of the Financed Eligible Loans").

[325] *See* Decl. of Tony Williams at ¶¶ 5–6, Nebraska v. Biden, No. 4:22-cv-01040 (E.D. Mo. Sept. 29, 2022).

[326] *Id.* at ¶ 6.

[327] *Id*. at ¶ 7.

[328] Decl. of Michael Walden-Newman at ¶¶ 4–7, Nebraska v. Biden, No. 4:22-cv-01040 (E.D. Mo. filed Sept. 29, 2022).

[329] State Pls.' Br., *supra* note 104, at 27.

argue, though, that the states can only speculate that a particular consolidation related to the policy and not to other factors.[330] A plaintiff might lack Article III standing if the "independent" action of a third party breaks the causal chain between the defendant's conduct and the plaintiff's injury.[331] In that event, judicial relief will not "remove" harm that results from the actions of a third party who is not before the court.[332] However, if the defendant's conduct has a "determinative" or "coercive" effect on the third party's action, the Court's cases do not consider the third party's decision to be "independent" of the defendant's.[333]

There is no record evidence of why particular borrowers made consolidation decisions. Rather, for proof of the incentive to consolidate, plaintiffs rely on ASLA's experience with consolidation between August 24 and September 29, 2022, as well as the amount of cancellation benefits available, up to $20,000. Whether this evidence is enough to show the policy's determinative effects on consolidation decisions is unclear, but the Court might place the most weight on the amount of cancellation benefits available after consolidation.[334] Perhaps, as the government argues, there are costs to consolidation that affect a borrower's calculus.[335] For those FFELP borrowers who were aware of the policy and chose consolidation, however, the prospect of cancellation of debt, tax free under federal law,[336] is likely to have weighed heavily in their decisions.

The second question raised by the states' asserted consolidation injuries is the effect of ED's September 2022 consolidation limit on the states' consolidation injury theory. The parties appear to alternatively cast the limit as bearing on two separate but related issues. The federal petitioners claim that the consolidation limit defeats efforts to demonstrate an injury for standing purposes. The state plaintiffs claim that the limit raises only questions of mootness, but that the federal petitioners have failed to carry their burden of showing mootness.

The federal petitioners argue that the consolidation limit is not a change to the cancellation policy. According to the petitioners, earlier statements concerning the policy that did not include the consolidation limit reflected the Secretary's intentions concerning the policy at that time, before the policy had been finalized with publication of ED's modifications in the *Federal Register* in October 2022.[337] Even before the *Nebraska* plaintiffs filed suit on September 29, the Secretary had decided to adopt the consolidation limit, and the limit was part of the policy as finalized.[338] In the federal government's telling, then, during the time period relevant to the *Nebraska* plaintiffs' suit and its request for prospective injunctive relief, there was no incentive to consolidate, and thus no injury on account of incentivized consolidation.[339]

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[330] Federal Pet'rs' Br., *supra* note 104, at 26.

[331] Bennett v. Spear, 520 U.S. 154, 169 (1997) (internal quotation marks omitted).

[332] Warth v. Seldin, 422 U.S. 490, 505 (1975).

[333] *Spear*, 520 U.S. at 169.

[334] The state plaintiffs do not offer evidence of how frequently borrowers of ASLA-held FFELP loans consolidated into the FDLP before the policy was announced, so it is unclear how the $5-6 million volume compares to time periods before the policy was announced.

[335] Federal Pet'rs' Br., *supra* note 104, at 26 (arguing that the costs of consolidation include "a longer repayment period and the loss of discounts associated with the existing loans").

[336] *See* 26 U.S.C. § 108(f)(5).

[337] *See* Reply Br., *supra* note 258, at 10.

[338] *See* Reply Br., *supra* note 258, at 10–11.

[339] *See* Reply Br., *supra* note 258, at 10–11.

The state plaintiffs, by contrast, contend that the September 2022 consolidation limit goes not to standing but to mootness. Mootness concerns whether a circumstance that occurred after the filing of the complaint deprived the plaintiff of a personal stake that it once had in the outcome of the litigation.[340] The states argue that the consolidation limit relates to mootness because although ED publicly announced the limit the same day that the *Nebraska* plaintiffs filed suit, the announcement did not occur until hours after the complaint's filing.[341]

As the Supreme Court has explained, the distinction between standing and mootness matters because the law assigns burdens differently based on the doctrine that is at issue.[342] The party invoking a federal court's jurisdiction—here, the states—must demonstrate standing.[343] The federal petitioners, though, bear "the burden to establish that a once-live case has become moot."[344] When the government claims that a case is moot because it has voluntarily ceased allegedly unlawful conduct, its burden of showing mootness is "heavy."[345] Voluntary cession "does not moot a case unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[346]

In one respect, the consolidation limit resembles an effort at voluntary cessation where the alleged injurious conduct might recur because ED has expressed an interest in extending relief to lender-held FFELP loans in the future. Alongside the limit, ED explained that it was "assessing whether there are alternative pathways to provide relief to borrowers with federal student loans not held by ED," arguably suggesting a willingness on ED's part to resume conduct that, in the states' view, would encourage consolidation and alleged, attendant financial harm.[347] Moreover, press reports published before the *Nebraska* plaintiffs filed suit raised the prospect of claims apparently predicated on consolidation injuries.[348]

In another respect, though, the limit might not implicate some concerns that underlie the Supreme Court's voluntary cessation case law, such as attempts to insulate agency action from ongoing judicial review. Even though the consolidation limit was not publicly announced until *after* the *Nebraska* plaintiffs filed suit, ED instructed its vendor to carry out that announcement the day *before* the plaintiffs filed suit,[349] and it included the limit in the "finalized" policy.[350] At that time,

[340] *See, e.g.*, Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 72 (2013).

[341] State Pls.' Br., *supra* note 104, at 28 ("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." (emphasis added)).

[342] W. Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2607 (2022).

[343] Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992).

[344] *W. Virginia*, 142 S. Ct. at 2607.

[345] *Id.*

[346] *Id*. (internal quotation marks omitted).

[347] *See supra* note 119 and accompanying text.

[348] *See, e.g.*, Ayelet Sheffey, *The CEO of a Major Student-Loan Company Says He Won't Sue Biden on Debt Cancellation Even Though He 'Clearly' Has Standing*, BUS. INSIDER (Sept. 16, 2022), https://www.businessinsider.com/navient-ceo-wont-sue-biden-student-loan-debt-forgiveness-standing-2022-9 (last visited Apr. 14, 2023) (quoting Navient Chief Executive Officer that the company "would clearly have standing as a holder of FFELP loans, but it's not clear whether or not some political entity that might have standing in their state because of a state agency that owns FFELP loans will or will not decide to sue").

[349] *See supra* note 117 and accompanying text.

[350] *See* Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program), 87 Fed. Reg. 61512, 61514 (Oct. 12, 2022).

there was no pending lawsuit that invoked a theory of consolidation injury.[351] ED also does not appear to have taken further action of establishing alternative pathways for relief for borrowers of lender-held FFELP loans.

Procedural Injury

While the *Nebraska* plaintiffs advance several standing theories whose particulars sometimes vary state to state, the *Brown* plaintiffs advance a single standing theory alleging that both borrower plaintiffs suffered the same type of injury and that an order vacating the policy will remedy this injury for both plaintiffs. In particular, the *Brown* plaintiffs seek to establish standing to challenge the cancellation policy based on a procedural injury theory.

In a procedural injury case, a plaintiff claims that Congress gave him a "procedural right to protect his concrete interests."[352] The plaintiff suffers an "injury" for Article III standing purposes when an agency denies the plaintiff the procedural right in a way that harms a concrete interest.[353] As with standing more generally, a plaintiff alleging a procedural injury must show that the relief he seeks will redress the harm suffered. The Court, however, has stated that in some respects procedural injury theories are "special."[354] That is because "normal standards for redressability" do not apply.[355] All that the plaintiff must show is that there is "some possibility" that requiring the agency to honor the procedural right will cause it to reconsider the action that is harmful to the plaintiffs' concrete interest.[356]

The procedural-injury framework first requires a plaintiff to identify a procedural right. The *Brown* plaintiffs assert a right to participate in the development of rules and regulations pertaining to Title IV programs conferred by the HEA and the APA.

First, the *Brown* plaintiffs argue that the cancellation policy should have been the subject of *negotiated rulemaking* under the HEA because it is a "regulation" that "pertain[s]" to Title IV.[357] Under this process, the Secretary must obtain "advice and recommendations" from those involved in Title IV programs, including "students."[358] He then submits "draft regulations" to negotiated rulemaking.[359] The Secretary selects participants in negotiated rulemaking from individuals nominated by stakeholder groups.[360] If the participants in negotiated rulemaking agree on the regulation, the Secretary's published proposed regulation must presumptively conform to the

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[351] While the Court is considering appeals in only *Nebraska* and *Brown*, other plaintiffs have filed lawsuits challenging the cancellation policy on various grounds, some of which are still pending in lower courts. To date *Nebraska* is the only suit to feature a consolidation injury standing theory.

[352] Massachusetts v. E.P.A., 549 U.S. 497, 517 (2007) (internal quotation marks omitted).

[353] *See* Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009) (explaining that "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right [in a vacuum]—is insufficient to create Article III standing").

[354] Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 n.7 (1992).

[355] *Id*.

[356] *Massachusetts*, 549 U.S. at 517–18.

[357] Br. of Resp'ts' at 26, Dep't of Educ. v. Brown, No. 22-535 (U.S. Jan. 27, 2023) [hereinafter Borrower Pls.' Br.]; *see also* 20 U.S.C. § 1098a(b)(2) (describing the actions to which negotiated rulemaking applies).

[358] 20 U.S.C. § 1098a(a)(1), (b)(1).

[359] *Id*. § 1098a(b)(1). However, the Secretary may exempt certain regulations from negotiated rulemaking if he determines that process would be impracticable, unnecessary, or contrary to the public interest. *See id.* § 1098a(b)(2).

[360] *Id*. § 1098a(b)(1).

agreement.[361] The Secretary may, however, reopen negotiated rulemaking or depart from the agreements reached if he provides a written explanation of his decision.[362]

Second, the *Brown* plaintiffs argue that the policy is a "rule" under the APA.[363] The *Brown* plaintiffs argue that, under the APA's notice-and-comment rulemaking provisions, the Secretary should have published notice of the proposed rule, given "interested persons an opportunity to participate in the rule making," and considered the views presented before finalizing the rule.[364]

The procedural-injury framework next requires a plaintiff to identify a concrete interest threatened by denial of the procedural right. The *Brown* plaintiffs describe this interest as "'pocketbook injury'": a desire to have their student loan debts canceled.[365] Plaintiff Myra Brown would not receive any cancellation because she is the borrower on current, lender-held FFELP loans, a loan type not eligible for cancellation under the policy.[366] Plaintiff Alexander Taylor would receive up to $10,000 in cancellation. However, though he earns less than $25,000 a year, he would not receive an additional $10,000 in cancellation because he was not a Pell Grant recipient.[367]

As noted above, the *Brown* plaintiffs must show that there is "some possibility" that if the policy is vacated and ED is required to follow HEA and APA procedural requirements, it will reconsider those aspects of the policy that deny cancellation benefits and adopt a new policy.[368] As proof of this possibility, the *Brown* plaintiffs state that during the 2020 presidential election, then-candidate Biden stated he would "forgive all undergraduate tuition-related federal student debt from two- and four-year public colleges and universities for debtholders earning up to $125,000."[369] The *Brown* plaintiffs appear to argue that this and other statements are evidence of a willingness to adopt a more generous cancellation policy that would grant them cancellation benefits (in plaintiff Brown's case) or greater benefits (in plaintiff Taylor's case).[370]

ED argues that the *Brown* plaintiffs have not shown that an order vacating the policy would redress the concrete harms they allege: the denial of cancellation benefits. The plaintiffs contend the HEROES Act's exceptions from HEA and APA procedural requirements do not apply to the policy because the Secretary lacks substantive authority under the Act to cancel loans.[371] Under

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[361] *Id*. § 1098a(b)(2).

[362] *Id*.

[363] Borrower Pls.' Br., *supra* note 357, at 26.

[364] 5 U.S.C. § 553(c).

[365] Borrower Pls.' Br., *supra* note 357, at 26 (quoting Collins v. Yellen, 141 S. Ct. 1761, 1779 (2021)).

[366] Decl. of Myra Brown at ¶¶ 2, 4–5, Brown v. U.S. Dep't of Educ., No. 4:22-cv-00908-O (N.D. Tex. filed Oct. 10, 2022).

[367] Decl. of Alexander Taylor at ¶¶ 2–3, 5, 7, Brown v. U.S. Dep't of Educ., No. 4:22-cv-00908-O (N.D. Tex. filed Oct. 10, 2022).

[368] Massachusetts v. E.P.A., 549 U.S. 497, 517–18 (2007).

[369] *See, e.g*., Borrower Pls.' Br., *supra* note 357, at 10, 29 (internal quotation marks omitted).

[370] The *Brown* plaintiffs would not benefit from then-candidate Biden's campaign statement because the cancellation it described would not have applied to loans borrowed to attend private universities. *See* Decl. of Myra Brown at ¶¶ 2, 4, Brown v. U.S. Dep't of Educ., No. 4:22-cv-00908-O (N.D. Tex. filed Oct. 10, 2022) (stating that she obtained FFELP loans to pay for graduate school at Southern Methodist University); Decl. of Alexander Taylor at ¶ 2, Brown v. U.S. Dep't of Educ., No. 4:22-cv-00908-O (N.D. Tex. filed Oct. 10, 2022) (stating that he obtained FDLP loans to attend the University of Dallas). The *Brown* plaintiffs appear to cite the statement as proof, generally, of a willingness on the Administration's part to adopt a different version of cancellation benefits.

[371] Federal Pet'rs' Br., *supra* note 104, at 32.

that theory, the federal petitioners say that "the Secretary would lack authority to provide loan forgiveness to any borrower—Brown and Taylor included."[372]

It is unclear how the Supreme Court might analyze redressability. Plaintiffs argue that it is "myopic" to focus only on the HEROES Act when considering whether ED would have authority to provide more generous cancellation benefits.[373] The plaintiffs say that the federal petitioners "boast[]" in their brief that the HEA itself—not just the HEROES ACT—"allows for substantial debt forgiveness."[374]

In particular, Section 432(a)(6) of the HEA states that the Secretary may "enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption."[375] In other litigation, ED has said that it used Section 432's compromise-and-waive language to provide student loan discharges for at least seven groups of borrowers.[376] These discharge groups, announced between 2019 and 2022, range in size from 7 to 560,000 borrowers.[377] The aggregate, estimated loan discharge amounts across the groups is more than $11.6 billion.[378] ED says it used Section 432 as authority for an eighth proposed group discharge, a class settlement in *Sweet v. Cardona*. In November 2022, a district court granted final approval of the *Sweet* settlement.[379] As to that eighth group, ED estimates that the settlement will yield at least $7.5 billion in loan discharges.[380]

Measured in terms of the estimated loan amounts that it will discharge, the cancellation policy is more than twenty-two times as large ($430 billion, using CBO's estimate of the face amount of loans that might be canceled under the policy[381]) as all alleged prior uses of Section 432 authority (about $19.1 billion).[382] Moreover, only one district court appears to have agreed that Section 432 authorizes group-based discharge, addressing a circumstance that the district court said entailed forgiveness of "over six billion dollars in loans."[383] If Section 432 were used to replace the HEROES Act for cancellation on a much larger scale, that shift in legal rationale could raise questions of statutory authority like those raised by use of the HEROES Act.

One question, then, for the *Brown* plaintiffs is whether the Supreme Court would factor into its redressability analysis whether an alternative source of statutory authority exists to provide such cancellation. If the Court concludes that the parties have not identified an alternative source of

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[372] Federal Pet'rs' Br., *supra* note 104, at 32.

[373] Borrower Pls.' Br., *supra* note 357, at 30.

[374] Borrower Pls.' Br., *supra* note 357, at 30.

[375] 20 U.S.C. § 1082(a)(6).

[376] *See* Joint Resp. to Nov. 4, 2022 Order at 2, Sweet v. Cardona, No. 3:19-cv-03674-WHA (N.D. Cal. Nov. 9, 2022). In their opening brief the federal petitioners likewise refer to some of these same group discharges as having been accomplished under Section 432. *See* Federal Pet'rs' Br., *supra* note 104, at 4 n.1.

[377] *See* Joint Resp. to Nov. 4, 2022 Order at 2, Sweet v. Cardona, No. 3:19-cv-03674-WHA (N.D. Cal. Nov. 9, 2022).

[378] *See id*.

[379] Order Granting Final Settlement Approval at 25, Sweet v. Cardona, 3:19-cv-03674-WHA (N.D. Cal. Nov. 16, 2022).

[380] *Id*. at 5. If implemented the settlement could result in the discharge of additional amounts for another group of borrowers, "Post-Class Applicants," whose loans do not figure in the $7.5 billion estimate. *See id.* at 5–6.

[381] *See supra* note 163.

[382] *See supra* notes 377–380 and accompanying text.

[383] *See* Order Granting Final Settlement Approval at 5, 8, Sweet v. Cardona, 3:19-cv-03674-WHA (N.D. Cal. Nov. 16, 2022) ("Upon a plain reading," Section 432(a)(6) "bestows the Secretary with broad discretion over handling—and discharging—student loans.").

statutory authority, it might conclude that the *Brown* plaintiffs' injuries are not redressable for the reasons the federal petitioners advance. Alternatively, the Court might reason that it would not need to consider whether an alternative source of statutory authority exists unless some other party with standing to do so challenges the reconsidered policy in a future case. No Supreme Court case cited by the parties appears to directly answer these redressability questions.

Tax Revenue Injury

A theory of standing asserted by several of the state plaintiffs in *Nebraska* arises from the treatment of discharges of student loan debt for purposes of federal income taxes. Under the Internal Revenue Code (IRC), discharges of debt are generally included as gross income for purposes of an individual's federal income taxes unless excluded under IRC Section 108.[384] Historically, Section 108 excluded from gross income student loan discharges that were contingent upon the borrower working in a certain profession for a period of time or granted on account of the borrower's death or permanent disability.[385]

However, in 2021, ARPA temporarily expanded the categories of discharged student loans that could be excluded from gross income.[386] Specifically, Section 108 now excludes any discharges of most student loans that occur between 2021 and 2025.[387] As a result of the ARPA amendments, individuals who receive some debt relief under the cancellation policy would not appear to incur additional federal tax liability for that cancellation.

Like the IRC, many states with income taxes also include discharges of debt as income. Several of the plaintiff states similarly exclude discharges of loans that would be excluded for federal income tax purposes under Section 108, including the temporarily expanded exclusion of student loan discharges for tax years 2021 through 2025.[388] These states argue that the cancellation policy will consequently result in lost state tax revenue.[389] They argue that by canceling debt now, the cancellation policy will reduce the amount of loan discharges that would otherwise have occurred after January 1, 2026 (and would therefore be taxable under federal law and, consequently, also under state law).[390] The U.S. District Court for the Eastern District of Missouri rejected this argument, holding that claims of future lost tax revenues were merely speculative and that the states were not prohibited from enacting changes to their tax codes to avoid the anticipated loss in revenue.[391]

The question of whether the loss of tax revenue resulting from another jurisdiction's actions is a cognizable harm for Article III purposes may be informed by three decisions of the Supreme Court. First, *Florida v. Mellon*, decided in 1927, involved a challenge to a federal inheritance tax, which provided a credit for similar state inheritance taxes paid on an estate.[392] Because Florida did not have an inheritance tax, it argued that the federal policy would create an incentive to

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[384] I.R.C. §§ 61(a)(11), 108.

[385] *Id.* § 108(f) (2020).

[386] American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9675, 135 Stat. 185.

[387] I.R.C. § 108(f)(5).

[388] Borrower Pls.' Br., *supra* note 357, at 23 (citing Neb. Rev. Stat. § 77-2714.01(1); Iowa Code § 422.7; Kan. Stat. Ann. § 79-32,117(a); S.C. Code § 12-6-40).

[389] Borrower Pls.' Br., *supra* note 357, at 23.

[390] Borrower Pls.' Br., *supra* note 357, at 23.

[391] Nebraska v. Biden, No. 4:22-cv-1040, 2022 WL 11728905 (E.D. Mo. Oct. 20, 2022).

[392] Florida v. Mellon, 273 U.S. 12, 15 (1927).

move property out of the state, resulting in lower general tax revenues for Florida.[393] The Court disagreed, holding that such an injury was too remote and speculative and could also potentially be addressed by increasing the state's rate of taxation.[394]

Second, in the Court's 1976 decision in *Pennsylvania v. New Jersey*, Pennsylvania challenged a New Jersey law that taxed nonresident income earned domestically, taxed resident nondomestic income, and excluded resident nondomestic income subject to another state's taxes.[395] Pennsylvania provided a tax credit to residents for taxes paid to other states.[396] As a result, the taxes imposed by New Jersey on nonresidents resulted in tax credits against Pennsylvania taxes.[397] The Court held that Pennsylvania was not injured by the New Jersey law because nothing required Pennsylvania to offer a tax credit for taxes imposed by other states.[398] Therefore, any claimed injuries to Pennsylvania's tax revenues were self-inflicted.[399]

Third, in *Wyoming v. Oklahoma*, decided in 1992, Wyoming invoked the Supreme Court's original jurisdiction to bring a dormant commerce clause challenge to an Oklahoma law. The Oklahoma law required Oklahoma coal power plants to use at least 10% Oklahoma-mined coal. The law expressly evidenced an intent to reduce Oklahoma's use of Wyoming-mined coal. Wyoming argued that it was injured because the Oklahoma law would reduce Wyoming coal production, resulting in less tax revenue from Wyoming coal-mining activities. The Court agreed, holding that the loss of specific tax revenues, as opposed to a loss of general tax revenues attributable to a decline in the state's general economy, constituted direct injury for purposes of Article III standing.[400]

The outcomes in *Wyoming v. Oklahoma* and *Pennsylvania v. New Jersey* may appear to be divergent. To distinguish the two cases in subsequent litigation involving a state's claims of financial injury caused by changes in the laws of another sovereign, lower courts have noted that in *Pennsylvania v. New Jersey*, the plaintiff states explicitly tied their finances to other states' taxes on nonresident income, while Wyoming's tax on domestic coal production was not explicitly tied to the legislative enactments of Oklahoma.[401]

The federal petitioners in the student loan cancellation litigation have argued that the states' tax-injury challenge to the cancellation policy is foreclosed by *Pennsylvania v. New Jersey*.[402] Because the state plaintiffs have chosen to enact their state income tax codes in a way that directly incorporates by reference the federal treatment of discharges of debt, their claimed injury is self-inflicted, as was Pennsylvania's claimed injury.[403]

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[393] *Id.* at 17–18.

[394] *Id.* at 18.

[395] Pennsylvania v. New Jersey, 426 U.S. 600 (1976).

[396] *Id*. at 663.

[397] *Id*.

[398] *Id*. at 664.

[399] *Id*.

[400] Wyoming v. Oklahoma, 502 U.S. 437, 448 (1992).

[401] *See* California v. Azar, 911 F.3d 558, 574 (9th Cir. 2018) (federal rule exempting employers from mandate to cover contraception would increase costs to state and local programs that provide contraception); Texas v. United States, 809 F.3d 134, 158 (5th Cir. 2015) (challenge to DAPA), *aff'd by an equally divided court sub nom.* United States v. Texas, 579 U.S. 547 (2016).

[402] Federal Pet'rs' Br., *supra* note 104, at 23.

[403] Federal Pet'rs' Br., *supra* note 104, at 23.

For their part, the state plaintiffs argue that the situation is more like the Court's decision in *Wyoming*.[404] They argue that they are alleging the loss of specific tax revenues, like the coal tax revenues Wyoming claimed.[405] They also argue that the case is distinguishable from the "self-inflicted" harm in *Pennsylvania v. New Jersey* because their tax codes were enacted before the cancellation policy existed.[406]

Is the Cancellation Policy Substantively Valid?

Assuming that the Court finds that one or more parties have standing to challenge the cancellation policy, the Court would then turn to the question of whether the cancellation policy is a lawful exercise of ED's authority. Perhaps the most important part of this lawfulness inquiry, raised in both *Nebraska* and *Brown*, is whether the HEROES Act authorizes the cancellation policy. This section discusses disputed questions of the policy's substantive validity.

Scope of HEROES Act Authorization

The HEROES Act allows the Secretary to "waive or modify any statutory or regulatory provision applicable to the" Title IV programs "in connection with a . . . national emergency" to ensure that "affected individuals are not placed in a worse position financially . . . because of their status as affected individuals."[407] In the case of the cancellation policy, Secretary Cardona stated that he was modifying statutory and regulatory provisions of the HEA that address loan cancellation and discharge in particular circumstances, such as the death or permanent disability of the borrower, to provide more broad-based relief.[408] The Secretary also characterized these actions generally as a waiver available to eligible borrowers.[409] At the Supreme Court, the federal petitioners similarly argue that the conditions under which borrowers are obliged to repay loans or obtain cancellation or discharge, are "unquestionably statutory or regulatory provisions" applicable to the federal student loan programs. Those provisions, the petitioners argue, are consequently susceptible to waiver or modification by the Secretary to ensure that borrowers are not "worse off in relation to their student-loan obligations because of the pandemic."[410]

Therefore, examining whether the cancellation policy is authorized by the HEROES Act appears to require answering the following questions: (1) Is cancellation of loan balances under the cancellation policy a waiver or modification under the HEROES Act?; and (2) Does the cancellation policy ensure that affected individuals are not placed in a worse financial position because of their status as affected individuals? Each of these questions is discussed below.

Waiver, Modification, and the Major-Questions Doctrine

A central question during the debates leading up to and after the announcement of the cancellation policy is how far the Secretary's authority to "waive or modify" statutory and

[404] State Pls.' Br., *supra* note 104, at 24.

[405] State Pls.' Br., *supra* note 104, at 25.

[406] State Pls.' Br., *supra* note 104, at 25.

[407] 20 U.S.C. § 1098bb(a)(1).

[408] Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program), 87 Fed. Reg. 61512, 61514 (Oct. 12, 2022).

[409] *Id.*

[410] Federal Pet'rs' Br., *supra* note 104, at 36.

regulatory provisions extends.[411] In particular, much of the debate has focused on whether a discharge of loan balances can fairly be included as a "waiver or modification" under the Act.

The federal petitioners assert that the Secretary has waived and modified Sections 437 and 464(g) of the HEA, and accompanying regulations, to implement the cancellation policy.[412] These provisions respectively authorize the discharge of FDLP and Perkins loans made to borrowers who are unable to complete programs of study due to a school closure.[413] At oral argument, the Solicitor General argued that

> the straightforward way to think about how the verbs [waive or modify] map onto the Secretary's action is that he waived elements of those provisions that contain eligibility requirements for discharge and cancellation that are inapplicable under this program and then modified the provisions to contain the limitations that he had announced as part and parcel of announcing this loan forgiveness.[414]

Stated otherwise, the Secretary *waived* the requirement under Sections 437 and 464(g) that a borrower was unable to complete a program of study due to a school closure in order to receive a discharge. The Secretary then *modified* Sections 437 and 464(g) to limit such relief to individuals who met the income and other requirements described above.[415]

Whether the HEROES Act provides ED with the authority to implement the cancellation policy likely turns on how broadly the text of the Act is read. When interpreting statutory provisions, the Supreme Court begins with the text itself to determine whether the statutory language is plain.[416] If so, then that plain meaning should control.[417] At the same time, the Supreme Court has said that provisions of a statute should not be read in isolation,[418] and that courts must read those provisions' words in the context of the overall statutory scheme.[419]

Dictionary definitions of "waive" generally mean "[t]o refrain from insisting on."[420] Arguably then, the HEROES Act's authorization for the Secretary to waive a statute or regulation could be read to mean that the Secretary could refrain from insisting on compliance with that law. Similarly, dictionaries generally define "modify" as "[t]o make somewhat different," "to make small changes to," "to make more moderate or less sweeping," or "to reduce in degree or extent."[421]

In a January 12, 2021, memorandum written by ED's then-Principal Deputy General Counsel Reed Rubinstein (the Rubinstein memorandum), Rubinstein concluded that the terms "waive" or "modify" under the HEROES Act did not include discharging loan balances.[422] The Rubinstein

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[411] *See* 20 U.S.C. § 1098bb(a)(1).

[412] 87 Fed. Reg. at 61514 (citing 20 U.S.C. §§ 1087, 1087dd(g) and 34 C.F.R. §§ 674.51–674.64, 682.402).

[413] 20 U.S.C. §§ 1087, 1087dd(g). Section 437 nominally applies to FFELP, but is made applicable to the FDLP through 20 U.S.C. §§ 1087a, 1087e.

[414] Transcript of Oral Argument at 6:10–:18, Nebraska v. Biden, No. 22-506 (Feb. 28, 2023), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/22-506_5426.pdf.

[415] *See supra* at "Cancellation Policy Design."

[416] King v. Burwell, 576 U.S. 473, 486 (2015).

[417] *Id.*

[418] *Id.*

[419] *Id.*

[420] *Waive*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[421] *Modify*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[422] Rubinstein Memo, *supra* note 98.

memorandum focused on the term "modify" and relied heavily on the Supreme Court's reading of that term in *MCI Telecommunications Corp. v. AT&T Co.*[423] In that 1994 case, the Supreme Court interpreted a provision of the Communications Act of 1934 that required certain entities to file tariffs with the Federal Communications Commission (FCC) but also authorized the FCC, "for good cause shown," to "*modify* any requirement" that the tariffing provision imposed.[424] The FCC purported to invoke that modification authority to make tariff filing optional for many communications industry participants.[425] Based on its dictionary definition, the Court concluded that "modify" contemplates only a "moderate change" to the thing being modified and cannot be used to enact "fundamental" changes.[426] In the Court's view, rendering a "crucial provision of the statute" like the tariffing requirement inapplicable to "40% of a major sector of the industry" was "much too extensive to be considered a 'modification'" under the plain meaning of that term.[427]

More recently in 2022, the Supreme Court in *West Virginia v. EPA* described its holding in *MCI* as an example of the *major-questions doctrine*.[428] Under that doctrine, "separation of powers principles and a practical understanding of legislative intent" make the Court "reluctant to read into ambiguous statutory text" a delegation of authority to make a "radical or fundamental change" to a statutory scheme without "clear congressional authorization."[429] Therefore, the Court in *West Virginia* held that EPA's general authority to regulate power plant emissions did not empower the agency to "force a nationwide transition away from the use of coal to generate electricity."[430] In another recent major-questions doctrine case arising during the COVID-19 pandemic, the Court held that the Centers for Disease Control and Prevention could not leverage its authority to "make and enforce such regulations . . . to prevent the introduction, transmission, or spread of communicable diseases" to create a nationwide residential eviction moratorium.[431]

Finding that the use of the HEROES Act to discharge loan balances would be a fundamental change to the federal student loan programs, the Rubinstein memorandum concluded that discharge was not within the scope of the Secretary's authority to "waive or modify" under the Act. After the Court's decision in *West Virginia v. EPA*, OLC issued an opinion rejecting the conclusions of the Rubinstein memorandum.[432] OLC asserts that the major-questions doctrine should not constrain the construction of the HEROES Act because the "sweeping" waiver or modification language of the Act is unlike the "vague" or "ancillary" statutory text to which the Court applied the major-questions doctrine in *MCI* and *West Virginia*. The HEROES Act text, OLC contends, provides the "clear congressional authorization" that those other cases lacked.[433]

Throughout the course of the cancellation policy litigation, the applicability of the major-questions doctrine on the construction of the HEROES Act has remained prominent. The U.S.

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[423] 512 U.S. 218, 220, 224–25 (1994).

[424] *Id.* (emphasis added).

[425] *Id*. at 220, 231.

[426] *Id.* at 228.

[427] *Id.* at 231.

[428] *See* West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587 (2022).

[429] *Id.* at 2609. In a concurrence joined by Justice Alito, Justice Gorsuch further argued that the "major-questions doctrine" protects the separation of powers by ensuring that the federal legislative power remains with Congress. *Id.* at 2617 (Gorsuch, J., concurring).

[430] *Id.* at 2616.

[431] Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021).

[432] OLC Opinion, *supra* note 76.

[433] OLC Opinion, *supra* note 76, at 15.

District Court for the Northern District of Texas, the only court thus far to issue a holding on the scope of the HEROES Act, held that the major-questions doctrine applies and that the "broad or general language" of waiver and modification is insufficiently clear congressional authorization.[434]

Consistent with the OLC opinion described above, the federal petitioners have argued that the HEROES Act is distinguishable from prior cases in which the Supreme Court has applied the major-questions doctrine because the provisions of the HEROES Act are not the kind of "vague, cryptic, ancillary, or modest" provisions at issue in previous cases.[435] In their view, the major-questions doctrine is not an opportunity to question any economically or politically significant agency action.[436] Rather, the Court has only applied the doctrine where an agency claims an "extraordinary grant of *regulatory* authority."[437]

In contrast, the HEROES Act's modification authority is not part of the ordinary HEA framework that governs the day-to-day aspects of federal student loan assistance. Instead, Congress enacted the HEROES Act to authorize the Secretary to respond to extraordinary events, such as wars or national emergencies, to provide "additional relief" to ensure that borrowers are not placed in a worse position as a result of such events.[438] In the federal petitioners' view, broad grants of authority to provide such emergency benefits do not "pose a serious threat to individual liberty" and therefore do not implicate the same separation of powers concerns as broad claims of regulatory authority.[439]

For their part, the plaintiffs argue that the application of the major-questions doctrine to the cancellation policy is appropriate principally because the authority to discharge loan balances is a "breathtaking" and "new application of the statute."[440] Additionally, the *Nebraska* plaintiffs argue that the national emergency trigger for the exercise of the HEROES Act is not a significant limit on the use of an asserted cancellation authority, because "Presidents routinely declare such emergencies over all sorts of matters."[441] The plaintiffs also argue that major-questions cases are not limited to cases involving regulatory actions, and point to *King v. Burwell*, a case in which the Court declined to defer to an Internal Revenue Service interpretation providing a more generous tax credit.[442] In *Burwell*, the Court held that there was "reason to hesitate before concluding that Congress" implicitly delegated to the agency the authority to answer a question involving billions of dollars in spending and health insurance prices for millions of individuals.[443] The federal petitioners argue that *Burwell* is distinguishable from other major-questions cases because it did not impose a clear statement rule and the Court ultimately upheld the agency's interpretation of the statute.[444]

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[434] Brown v. U.S. Dep't of Educ., No. 4:22-cv-0908, 2022 WL 16858525 (N.D. Tex. Nov. 10, 2022).

[435] Federal Pet'rs' Br., *supra* note 104, at 50.

[436] Federal Pet'rs' Br., *supra* note 104, at 46.

[437] Federal Pet'rs' Br., *supra* note 104, at 47 (emphasis added); Reply Br., *supra* note 258, at 21.

[438] *See* 20 U.S.C. § 1098bb(a)(2)(A).

[439] Federal Pet'rs' Br., *supra* note 104, at 49 (citing West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring)).

[440] State Pls.' Br., *supra* note 104, at 32–33.

[441] State Pls.' Br., *supra* note 104, at 32, 33. *See also* CRS Legal Sidebar LSB10267, *Definition of National Emergency under the National Emergencies Act*, by Jennifer K. Elsea.

[442] State Pls.' Br., *supra* note 104, at 37.

[443] King v. Burwell, 576 U.S. 473, 485–86 (2015).

[444] Reply Br., *supra* note 258, at 21.

With respect to the terms of the HEROES Act specifically, the plaintiffs argue that the cancellation policy cannot be achieved through a waiver or modification of the provisions cited by the Secretary.[445] As noted above, those provisions address discharge or cancellation in specific contexts.[446] Plaintiffs argue that justifying the cancellation policy as a "waiver" of these provisions is not correct, because the Secretary is not merely refraining from insisting on compliance with those provisions, but instead altering the terms to impose entirely different limitations.[447] Additionally, plaintiffs argue that such changes are not fairly construed as "modifications" because they are not "small" or "moderate" changes.[448] In response, the federal petitioners note that the HEROES Act directs the Secretary to publish notice of "terms and conditions to be applied in lieu of" waived and modified statutory and regulatory provisions.[449] They argue that this language evidences Congress's intent that HEROES Act relief could be qualified with such added "terms and conditions."[450] The federal petitioners also argue that adopting the modest reading of "modify" used by the Court in *MCI* does not make sense because, under that reading, the Secretary would have the authority to eliminate legal obligations wholesale through a waiver or modify them to a marginal degree but oddly would not be able to do something in between.[451]

Ensuring Affected Individuals Not Placed in a Worse Position

Separately from whether loan discharge fits the HEROES Act's waive-or-modify categories, the parties also dispute whether the cancellation policy meets the Act's additional requirements limiting such "waivers or modification" to those "as may be necessary to ensure that . . . affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals."[452]

The HEROES Act defines "affected individual" to include, among other persons, any individual who "resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency" or who "suffered direct economic hardship as a direct result of a" national emergency.[453] The HEROES Act in turn defines a "national emergency" as "a national emergency declared by the President of the United States."[454]

President Trump issued a national emergency declaration for the COVID-19 pandemic on March 13, 2020.[455] President Trump also issued major disaster declarations related to COVID-19 in all fifty states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.[456] The national emergency

[445] State Pls.' Br., *supra* note 104, at 44; Borrower Pls.' Br., *supra* note 357, at 48.

[446] State Pls.' Br., *supra* note 104, at 45.

[447] State Pls.' Br., *supra* note 104, at 46; Borrower Pls.' Br., *supra* note 357, at 48.

[448] State Pls.' Br., *supra* note 104, at 45; Borrower Pls.' Br., *supra* note 357, at 48–49.

[449] 20 U.S.C. § 1098bb(b)(2).

[450] Reply Br., *supra* note 258, at 17 (emphasis added) (citing 20 U.S.C. § 1098bb(b)(2)).

[451] Reply Br., *supra* note 258, at 16–17 (citing OLC Opinion, *supra* note 76, at 8).

[452] 20 U.S.C. § 1098bb(a)(1).

[453] *Id.* § 1098ee(2).

[454] *Id.* § 1098ee(4).

[455] Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15337 (Mar. 13, 2020).

[456] CRS Report R46326, *Stafford Act Declarations for COVID-19 FAQ*, by Elizabeth M. Webster, Erica A. Lee, and William L. Painter at 1.

declaration was annually renewed multiple times by the Biden Administration and ultimately terminated on April 10, 2023.[457] The major disaster declarations remain in effect. As a result, all borrowers who currently reside in the United States appear to be "affected individuals" under the HEROES Act.[458] Those borrowers who do not reside in the United States might alternatively qualify under the "economic hardship" definition of "affected individuals."[459] The litigants do not appear to disagree that the scope of "affected individuals" encompasses all borrowers within the United States.[460] However, the plaintiffs argue that no determination of economic hardship has been made with respect to overseas borrowers.[461]

Assuming that the scope of "affected individuals" is sufficiently broad, the next question is whether the cancellation policy ensures that they are not placed in a worse position as a result of their status as affected individuals. The federal petitioners argue that the Secretary "deem[ed]" relief "necessary to ensure" that lower-income affected individuals "are not placed in a worse position" because of the COVID-19 pandemic.[462]

For their part, the plaintiffs argue that the cancellation policy exceeds the HEROES Act because it places many borrowers in a "far better position" than at the beginning of the pandemic.[463] This is in contrast to prior exercises of the HEROES Act, which they argue merely "maintain[ed] the status quo," such as delaying commencement of loan repayment, pausing collection on defaulted loans, providing additional deferment and forbearance options, and pausing ongoing payment obligations.[464] The federal petitioners disagree with this characterization, noting that its Supporting Analysis found that the pandemic had created a "risk that delinquency and default rates will rise *above pre-pandemic levels*."[465]

The litigants also contest the relationship between the harms the cancellation policy attempts to address and the COVID-19 pandemic. The federal petitioners have asserted that the cancellation policy is necessary to avoid an expected rise in delinquencies and defaults once repayment restarts.[466] However, the state plaintiffs argue that the asserted risks of default or delinquency for borrowers are also attributable to conditions that predated the pandemic.[467]

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[457] 86 Fed. Reg. 11599 (Feb. 26, 2021); 87 Fed. Reg. 10289 (Feb. 23, 2022); 88 Fed. Reg. 9385 (Feb. 14, 2023) (anticipating termination of the emergency on May 11, 2023); H.J.Res 7, 118 Cong. (2023). In briefs submitted before the termination of the national emergency, the federal petitioners have taken the position that expiration of the national emergency prior to a decision by the Court would not affect the litigation, because the HEROES Act only requires that waivers and modifications be "in connection with a . . . national emergency" and do not require that relief be provided "*during* the emergency." Reply Br., *supra* note 258, at 27 n.4.

[458] *See 2020 Federal Register Notice*, *supra* note 88, at 79856, 79857 (declaring that any "student enrolled in a postsecondary institution" qualifies as an "affected individual" for the purposes of the COVID-19 emergency).

[459] *See* Reply Br., *supra* note 258, at 28–29 (citing 20 U.S.C. § 1098ee(2)(D)).

[460] State Pls.' Br., *supra* note 104, at 49; Borrower Pls.' Br., *supra* note 357, at 54.

[461] State Pls.' Br., *supra* note 104, at 49; Borrower Pls.' Br., *supra* note 357, at 54.

[462] Federal Pet'rs' Br., *supra* note 104, at 35–36.

[463] State Pls.' Br., *supra* note 104, at 40.

[464] State Pls.' Br., *supra* note 104, at 40.

[465] Reply Br., *supra* note 258, at 15–16.

[466] Federal Pet'rs' Br., *supra* note 104, at 35–36.

[467] Borrower Pls.' Br., *supra* note 357, at 53; State Pls.' Br., *supra* note 104, at 47.

Is the Cancellation Policy Procedurally Valid?

Nebraska and *Brown* both raise the question of whether the HEROES Act provides substantive authority to adopt the cancellation policy, but the cases also include claims challenging the policy's procedural validity. In *Nebraska*, the plaintiffs allege that the Secretary's adoption of the policy is arbitrary and capricious because the Secretary did not provide a reasonable explanation for his action. In *Brown*, the plaintiffs attack the policy for being adopted without the Secretary observing allegedly applicable requirements for public participation in the policy's development. The sections below discuss these disputed questions of the policy's procedural validity.

Arbitrary-and-Capricious Claim

The last count of the *Nebraska* plaintiffs' complaint alleges that the cancellation policy violates the APA because it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[468] This portion of the APA requires that an agency action be "reasonable and reasonably explained."[469] The agency must "examine the relevant data and articulate a satisfactory explanation for" its decisions.[470] When performing this review, a court "simply ensures that the agency has acted within a zone of reasonableness."[471] Arbitrary-and-capricious review is "narrow" and does not allow a court to replace the agency's policy judgment with the court's own.[472]

When the Supreme Court applies the arbitrary-and-capricious standard, a litigant typically bases that claim on arguments that the agency relied on statutorily irrelevant factors; did not consider an important part of an issue; or explained the decision in a way that contradicts the evidence before it.[473] A litigant also might claim that the justification that the agency offered for its action is pretextual or "contrived" because there is a sufficiently large "disconnect between the decision made" and the stated explanation.[474] The *Nebraska* plaintiffs invoke each of these bases to have the policy invalidated as arbitrary and capricious.

Whether the Secretary Considered Alternatives to the Cancellation Policy

First, the *Nebraska* plaintiffs say that ED did not consider "*any* alternative[]" actions that *the Secretary* might take.[475] According to these plaintiffs, statements in the Supporting Analysis comparing loan discharges to a borrower enrolling in ED's income-driven repayment (IDR) plans allegedly focused instead on actions that the *borrower* might take to lower their monthly payment.[476]

[468] 5 U.S.C. § 706(2)(A); *see also* Compl. ¶¶ 159–71, Nebraska v. Biden, No. 4:22-cv-01040 (E.D. Mo. Sept. 29, 2022).

[469] Fed. Commc'ns Comm'n v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 (2021).

[470] Biden v. Missouri, 142 S. Ct. 647, 653 (2022) (internal quotation marks omitted).

[471] *Prometheus Radio Project*, 141 S. Ct. at 1158.

[472] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[473] *Id*.

[474] Dep't of Com. v. New York, 139 S. Ct. 2551, 2575 (2019).

[475] State Pls.' Br., *supra* note 104, at 50–51 (emphasis in original).

[476] State Pls.' Br., *supra* note 104, at 51; *see also* Supporting Analysis, *supra* note 10, at 4 ("Loan discharges can reduce delinquency and default risks even though borrowers have other options to reduce monthly payments, like income-driven repayment (IDR) plans.").

The Supporting Analysis stated that the visibility of the cancellation policy and the benefits it offered would draw more borrowers to apply for the benefit than have enrolled in IDR as a result of ED's Office of Federal Student Aid's efforts to increase enrollment in IDR.[477] ED cited a Federal Reserve Bank of Philadelphia study for the proposition that "lower-income individuals were much less likely to expect to make full payments notwithstanding the existence of IDR plans."[478] The Federal Reserve elaborated on this point, stating that the lower-income borrowers it surveyed did not expect to make full payments after the payment pause "even though many of those borrowers are likely to be eligible for *or are already receiving payment reductions via income-driven repayment*."[479] Thus, ED appears to have considered alternatives to cancellation, including its efforts to increase IDR enrollment, but concluded that the option of (or actual enrollment in) IDR would not forestall the delinquencies or defaults it is attempting to avoid.

Reliance Interests

Second, the *Nebraska* plaintiffs argue that ED did not consider any reliance interests implicated by the existing state of federal student loans.[480] In particular, the *Nebraska* plaintiffs fault ED for not considering "the States' legitimate reliance interests" as "lenders, secondary market participants" (i.e., participants in the SLABS market), and as "loan servicers."[481] ED does not dispute the claim that it did not consider these interests. Instead, ED argues that it was not required to consider any such interests, because they either are not "cognizable" or not "serious."[482]

The federal petitioners say that the *Nebraska* plaintiffs' interests are not cognizable for the same reasons that the interests fail to show financial harm for standing purposes.[483] However, even interests that are assertedly not legally cognizable can form an important enough part of an issue that an agency risks acting arbitrarily or capriciously by ignoring those interests. The Supreme Court's 2020 decision in *Department of Homeland Security v. Regents of the University of California* is an example.[484] There, the Court examined rescission of the Deferred Action for Childhood Arrivals (DACA) program, part of which provided forbearance of removal for certain aliens without legal immigration status.[485] The Court explained that an agency might act arbitrarily and capriciously by not considering a reliance interests that is not "legally cognizable," meaning not backed by "substantive rights."[486] DACA recipients had no substantive right to forbearance.[487] Yet it was arbitrary for the Department of Homeland Security to rescind the DACA program without considering the DACA recipients' interests in continued forbearance.[488]

[477] Supporting Analysis, *supra* note 10, at 5.

[478] Supporting Analysis, *supra* note 10, at 4–5.

[479] TOM AKANA & DUBRAVKA RITTER, FEDERAL RESERVE BANK OF PHILA., EXPECTATIONS OF STUDENT LOAN REPAYMENT, FORBEARANCE, AND CANCELLATION: INSIGHTS FROM RECENT SURVEY DATA 8 (2022), https://www.philadelphiafed.org/-/media/frbp/assets/consumer-finance/reports/covid-19-cfi-survey-student-loan-repayment-external-report.pdf.

[480] State Pls.' Br., *supra* note 104, at 51–52.

[481] State Pls.' Br., *supra* note 104, at 15, 52 (internal quotation marks omitted).

[482] Federal Pet'rs' Br., *supra* note 104, at 60.

[483] Federal Pet'rs' Br., *supra* note 104, at 60.

[484] 140 S. Ct. 1891 (2020).

[485] *Id*. at 1901.

[486] *Id*. at 1913–14 (internal quotation marks omitted).

[487] *Id.* at 1913.

[488] *Id*. at 1913–14.

The lack of a substantive right to continued forbearance merely affected the weight of this reliance interest.[489] Thus, the *Nebraska* plaintiffs' second arbitrary-and-capricious argument would appear to turn not on whether their interests as FFELP loan holders, SLABS market participants, or student loan servicers are "cognizable" but whether the interests are "serious" enough to have warranted express consideration by the Secretary.

Considering Important Aspects of a Problem and the Consolidation Limit

Third, the plaintiff states contend that the Secretary ignored other aspects of the cancellation policy: its costs and ED's duty under the Federal Claims Collections Standard (FCCS) Act[490] "to try to collect a claim of the United States Government."[491] The federal petitioners dispute that they ignored the policy's cost, citing their FCRA estimates of the policy.[492] Moreover, the federal petitioners argue that if the HEROES Act authorizes student loan cancellation, the FCCS does not impose a conflicting demand to collect on amounts to be discharged.[493]

The *Nebraska* plaintiffs also argue that the Secretary did not reasonably explain the "arbitrary distinction between borrowers who applied to consolidate non-federally held FFEL Loans before September 29 and those who did not," which they view as an illegitimate attempt at "[e]vading judicial review."[494] The federal petitioners respond, though, that the fact that the policy would not provide relief for all borrowers does not mean that the relief it would provide is either unreasonable or not reasonably explained.[495]

Pretext

Fifth and finally, the *Nebraska* plaintiffs contend that the Secretary's use of the pandemic as justification for the cancellation policy is pretextual.[496] The evidence of pretext offered has a few facets. One facet is the *Nebraska* plaintiffs' contention that the "current economic conditions" that serve as the stated basis of the policy are not "solely" or even "primarily" attributable to the pandemic.[497] Another is that the contention that ED's pandemic-related justification for the policy is, in truth, a pretext for the President to "fulfill his campaign promise" to cancel debt once Congress did not.[498] The plaintiffs argue that the Administration has used the pandemic as cover to address what it has elsewhere characterized as decades-old "systemic failings in federal student-loan programs."[499]

The ordinary rule in arbitrary-and-capricious review is that a court is limited to the "agency's contemporaneous explanation in light of the administrative record."[500] A court cannot reject an

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[489] *Id*.

[490] *See* State Pls.' Br., *supra* note 104, at 52.

[491] 31 U.S.C. § 3711(a)(1).

[492] *See* Reply Br., *supra* note 258, at 30.

[493] *See* Reply Br., *supra* note 258, at 31 (stressing that the HEROES Act authorizes secretarial actions "'[n]otwithstanding any other provision of law'" (quoting 20 U.S.C. § 1098bb(a)(1)).

[494] *See* State Pls.' Br., *supra* note 104, at 52–53.

[495] *See* Reply Br., *supra* note 258, at 32.

[496] *See* State Pls.' Br., *supra* note 104, at 53.

[497] State Pls.' Br., *supra* note 104, at 47 (internal quotation marks omitted).

[498] State Pls.' Br., *supra* note 104, at 48.

[499] State Pls.' Br., *supra* note 104, at 48–49.

[500] Biden v. Texas, 142 S. Ct. 2528, 2546 (2022) (internal quotation marks omitted).

agency's stated reasons because the agency "might have been influenced by [unstated] political considerations or prompted by an Administration's priorities."[501] The Supreme Court has characterized pretext as a "narrow exception" to this general rule "against inquiring into the mental processes of administrative decisionmakers."[502] When the Court has applied the pretext exception, it has done so based on apparently much stronger evidence of contrivance than that offered by the *Nebraska* plaintiffs.[503]

Department of Commerce v. New York saw the Court apply the pretext exception. There, the Court considered a claim that the Secretary of Commerce's decision to reinstate a citizenship question on the 2020 Census questionnaire was arbitrary and capricious.[504] The Commerce Department's stated reason for the addition was that DOJ had asked for the question so that it could use the collected citizenship data to better enforce the Voting Rights Act (VRA).[505] To assess that proffered reason, the Court reviewed an administrative record that was "rare" in terms of its size.[506] According to the Court, the record disclosed that the Secretary of Commerce decided to seek addition of the citizenship question "about a week into his tenure" but did not then offer a reason for the addition to his senior staff.[507] The Commerce Department then asked entities other than DOJ's VRA enforcement arm whether they would request that the question be included in the Census questionnaire.[508] The Commerce Department also considered its authority to add the question without a request from another agency.[509] Eventually, the Secretary of Commerce contacted the Attorney General directly.[510] DOJ's VRA enforcement arm began showing interest in the question, but even then "the record suggests that DOJ's interest was directed more to helping the Commerce Department than to securing the data."[511] To the Court, "the VRA enforcement rationale—the sole stated reason—seem[ed] to have been contrived."[512]

There arguably is not a complete administrative record regarding the loan cancellation policy in *Nebraska*, much less one as "rare" and "extensive" as in the Census litigation.[513] In *Brown*, the federal petitioners unsuccessfully asked the district court not to consolidate the plaintiffs' preliminary injunction motion with trial on the merits. ED said the merits decision "should await production of the administrative record."[514] ED otherwise filed the same documents as its stated justification in both cases.[515] The filed documents do not reveal the same sort of evolving

[501] Dep't of Com. v. New York, 139 S. Ct. 2551, 2573 (2019).

[502] *Id*. (internal quotation marks omitted).

[503] *See id*. at 2574–76.

[504] *Id*. at 2563.

[505] *Id*. at 2562.

[506] *Id*. at 2575.

[507] *Id*.

[508] *Id*.

[509] *Id*.

[510] *Id*.

[511] *Id*.

[512] *Id*.

[513] *Id*.

[514] Defs' Resp. to Order on Advancing the Merits of Plfs' Compl. at 4, No. 4:22-cv-00908-P, Brown v. U.S. Dep't of Educ. (N.D. Tex. Nov. 4, 2022); *see also* Decl. of James Richard Kvaal at ¶ 6, Nebraska v. Biden, No. 4:22-cv-01040 (E.D. Mo. Oct. 7, 2022) (explaining that the federal petitioners had filed materials such as the Supporting Analysis "before the compilation and certification of an administrative record").

[515] The parties' joint appendix, for example, states that ED filed in *Nebraska* and *Brown* identical versions of Secretary Cardona's August 24, 2022 Memorandum, related implementing memoranda, and the Supporting Analysis. *See* J.A. at

justifications present in the Census litigation. Absent a contrivance finding, the Supreme Court will likely assess whether the policy is "reasonable and reasonably explained" by focusing on the justification that ED offered in decisional documents such as the Supporting Analysis, rather than on other possible, unstated reasons.[516]

Public-Participation Claim

The *Brown* plaintiffs' complaint includes a single claim under the APA.[517] That claim seeks to "hold unlawful and set aside agency action, findings, and conclusions found to be without observance of procedure required by law."[518]

The *Brown* plaintiffs allege that the Secretary was required to seek public participation in developing the cancellation policy.[519] In particular, they assert that the Secretary should have followed a two-step process: negotiated rulemaking under the HEA,[520] followed by notice-and-comment rulemaking under the APA.[521] The Secretary did not follow these procedures.[522]

The federal petitioners dispute that the policy is subject to either of these public participation requirements, and they offer two arguments explaining why. Both arguments rely on provisions of the HEROES Act that except the Secretary's waivers and modifications from public participation requirements. Both exception provisions appear in 20 U.S.C. § 1098bb. The exceptions reference APA notice-and-comment rulemaking and HEA negotiated rulemaking in particular.

Section 1098bb(b)(1) references APA notice-and-comment rulemaking. It states that, notwithstanding the APA's notice-and-comment requirement, "the Secretary shall, by notice in the Federal Register, publish the waivers or modifications of statutory and regulatory provisions the Secretary deems necessary to achieve the purposes of this section."[523] Section 1098bb(d) references HEA negotiated rulemaking. It states that the HEA provision "shall not apply to the waivers and modifications authorized or required by this part."[524]

The federal petitioners posit two views of how these provisions except secretarial actions from public participation requirements. One view is that because the HEROES Act *in fact authorizes the policy*, both public participation exceptions apply to the policy.[525] Whether the HEROES Act authorizes the policy is discussed elsewhere in this report.[526]

II n.*, Biden v. Nebraska, No. 22-506, and Dep't of Educ. v. Brown, No. 22-535 (U.S. Jan. 4, 2023) ("Exhibits A-C to the First Declaration of James Richard Kvaal in *Brown*" are "identical to Exhibits A-C to the Declaration of James Richard Kvaal in *Nebraska* (D. Ct. Doc. 27-1).").

[516] Fed. Commc'ns Comm'n v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 (2021); *see also* Biden v. Texas, 142 S. Ct. 2528, 2547 (2022).

[517] Compl. ¶¶ 62–73, Brown v. U.S. Dep't of Educ., No. 4:22-cv-00908-P (N.D. Tex. Oct. 10, 2022).

[518] 5 U.S.C. § 706(2)(D).

[519] Compl. ¶¶ 72–73, Brown v. U.S. Dep't of Educ., No. 4:22-cv-00908-P (N.D. Tex. Oct. 10, 2022).

[520] *See supra* notes 357–362 and accompanying text (describing the negotiated rulemaking requirements of the HEA codified at 20 U.S.C. § 1098a).

[521] *See supra* notes 363–364 (summarizing the notice-and-comment requirements of the APA codified at 5 U.S.C. § 553).

[522] Borrower Pls.' Br., *supra* note 357, at 34.

[523] 20 U.S.C. § 1098bb(b)(1).

[524] *Id*. § 1098bb(d).

[525] Federal Pet'rs' Br., *supra* note 104, at 64.

[526] *See supra* at "Scope of HEROES Act Authorization."

The second view is that the HEROES Act's procedural exceptions apply to the Secretary's waivers or modifications *regardless of whether the Act authorizes those actions*.[527]

More specifically, the federal petitioners argue that "the notice-and-comment exception does not depend on whether, as a substantive matter, the HEROES Act actually authorizes the Secretary's action."[528] Rather, the notice-and-comment exception only requires that the Secretary determine that "the HEROES Act applies and that waivers or modification are necessary."[529]

The federal petitioners further argue the HEROES Act "cannot plausibly be read to condition the procedural exception" from negotiated rulemaking "on the substantive validity of the Secretary's action."[530] Negotiated rulemaking prepares "'proposed regulations' for public comment."[531] Yet, as noted above, the federal petitioners say that the Secretary's determination that the HEROES Act applies means that a particular action does not need to undergo public comment. If the Secretary does not need to publish his action for public comment, the federal petitioners contend, then he also does not need to engage in negotiated rulemaking that is aimed at producing regulations for comment.[532]

The HEROES Act states that negotiated rulemaking does not apply to "the waivers and modifications authorized or required by" the Act.[533] To say that an action is "authorized by" a statute is to say that the statute "sanction[s]" or gives "legal authority" for the action.[534] While this rule is not inflexible,[535] courts generally prefer to read a statute in a way that avoids treating text as surplus.[536] Moreover, if secretarial action is excepted from negotiated rulemaking by virtue it of being excepted from notice-and-comment rulemaking, the Act arguably would not require a separate subsection that specifically references negotiated rulemaking.[537] Thus, the Supreme Court might conclude that unless the HEROES Act authorizes secretarial action, the Act's negotiated rulemaking exception does not apply.

The exception for notice-and-comment rulemaking is perhaps a closer call. The Supreme Court has sometimes reasoned that when Congress includes language in one part of a statute but omits it elsewhere "Congress acts intentionally and purposefully in the disparate inclusion."[538] Unlike the

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[527] Federal Pet'rs' Br., *supra* note 104, at 62.

[528] Federal Pet'rs' Br., *supra* note 104, at 62.

[529] Federal Pet'rs' Br., *supra* note 104, at 63.

[530] Federal Pet'rs' Br., *supra* note 104, at 63.

[531] Federal Pet'rs' Br., *supra* note 104, at 63 (quoting 20 U.S.C. § 1098a(b)).

[532] Federal Pet'rs' Br., *supra* note 104, at 63.

[533] 20 U.S.C. § 1098bb(d).

[534] *Authorize*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("To give legal authority; to empower. . . . To formally approve; to sanction); *Authorize*, MERRIAM-WEBSTER UNABRIDGED ("to endorse, empower, justify, or permit by or as if by some recognized or proper authority . . . . to endow with authority or effective legal power, warrant, or right"), https://unabridged.merriam-webster.com/unabridged/authorize (last visited Apr. 14, 2023).

[535] Rimini St., Inc. v. Oracle USA, Inc., 139 S. Ct. 873, 881 (2019) ("Sometimes the better overall reading of the statute contains some redundancy.").

[536] Bd. of Trs. of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc., 563 U.S. 776, 788 (2011) (noting the Court's "general reluctance to treat statutory terms as surplusage" (internal quotation marks omitted)).

[537] *But see* Freeman v. Quicken Loans, Inc., 566 U.S. 624, 635 (2012) (noting that Congress sometimes engages in "lawyerly iteration" by having different statutory terms "all mean the same thing").

[538] Russello v. United States, 464 U.S. 16, 23 (1983) (internal quotation marks omitted).

subsection of § 1098bb that addresses negotiated rulemaking, the notice-and-comment subsection does not state that its exception applies to waivers and modifications "authorized by" the Act.[539]

The *Brown* plaintiffs argue, though, that reading the notice-and-comment rulemaking exception in context of the section as a whole shows that the HEROES Act excepts from notice-and-comment rulemaking only waivers and modifications that are authorized by the Act. Section 1098bb begins by stating in paragraph (a)(1) that the Secretary "may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under" Title IV of the HEA "as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide the waivers or modifications authorized by" paragraph (a)(2)."[540] Paragraph (a)(2) then states that the Secretary "*is authorized* to waive or modify any provision described in paragraph (1) as may be necessary to ensure that" stated purposes are achieved.[541] The *Brown* plaintiffs say that these are "the waivers and modifications" that the Act then excepts from notice-and-comment rulemaking in paragraph (b)(1): waivers and modifications authorized under subsection (a).[542] Therefore, if the Secretary acts outside of the authorization of subsection (a), the Secretary may not rely on the exception to notice-and-comment rulemaking in subsection (b).

Potential Implications of *Nebraska* and *Brown*

Nebraska and *Brown* pose multiple contested legal issues, and it is difficult to predict how the Court might resolve questions such as the plaintiffs' Article III standing or the scope of authority that Congress delegated to the Secretary by enacting the HEROES Act. Despite this uncertainty, decisions in *Biden* and *Brown* are likely to have implications falling into at least three general categories. Most directly, the decisions likely will determine whether ED may begin discharging debt under the cancellation policy. The decisions may also shape the Secretary's authority to invoke the HEROES Act in the future to waive or modify provisions of law in times of war, other military operations, or national emergencies. Finally, the decisions could shape legal doctrines with effects extending beyond federal student loan programs.

Potential Effects on the Cancellation Policy

The immediate consequences of the Supreme Court's decisions in *Nebraska* and *Brown* will be for the cancellation policy itself. For the policy to be implemented, the Court would likely reach one of two general conclusions: (1) that all of the plaintiffs lack standing, meaning that federal courts do not have jurisdiction to consider the merits of any claim, or (2) that the claims of plaintiffs who the Court concludes have standing lack merit. If the Court reaches such a conclusion, it would likely set aside the Eighth Circuit stay pending appeal and affirm the Missouri trial court's judgment. Further, the Court would also presumably vacate or reverse the Texas district court's judgment of vacatur.

On the other hand, if the Court determines that a plaintiff has standing and that the HEROES Act does not authorize the policy, the Court's opinion could direct that plaintiffs are to prevail in their

[539] *Compare* 20 U.S.C. § 1098bb(b)(1), *with id*. § 1098bb(d).

[540] *Id*. § 1098bb(a)(1).

[541] *Id*. § 1098bb(a)(2) (emphasis added).

[542] *See* Borrower Pls.' Br., *supra* note 357, at 38.

suits. For example, the Court might affirm the Texas district court judgment of vacatur. In that event, ED would be unable to implement the cancellation policy.[543]

It is also possible (though perhaps not probable) for the Court's decisions to leave issues for lower courts to decide, in which case the cancellation policy's fate would not be finally determined by the Court's opinion. For example, the Court could potentially agree with Missouri that financial harm suffered by MOHELA directly harms the state as well. The Court could determine, though, that the parties should further litigate in the lower courts the extent of financial harm, if any, that MOHELA is likely to suffer on account of the policy, such as the amount of "fees for discharging accounts" that MOHELA might realize from implementing the policy.[544]

Potential Effects on HEREOS Act Authority

Decisions in *Nebraska* and *Brown* may also shape the Secretary's authority to invoke the HEROES Act in times of war, other military operations, or national emergencies. Perhaps most importantly, the decisions could accelerate the end of the existing payment pause. The end date of the existing pause is expressly contingent, in part, on when the *Nebraska* and *Brown* litigation resolves. The payment pause will end 60 days after the earlier of (1) the date that the litigation is resolved, whether by a ruling in favor of the plaintiffs or the federal petitioners, or (2) June 30, 2023.[545]

Moreover, private lenders that offer refinancing for existing student loans have challenged the existing payment pause as unlawful.[546] If those private lender claims are not mooted by the payment pause ending by its own terms, the Court's decisions could inform resolution of that suit as well.

The scope of authority that the HEROES Act grants to the Secretary is the core merits question in both *Nebraska* and *Brown*. If the Court reaches this scope-of-authority question, its decision could significantly impact the waivers and modifications that could issue in the future under the Act. For instance, if the Court agrees with the federal petitioners' reading of the HEROES Act, future Administrations could perhaps provide similar loan cancellation so that borrowers are not placed in a worse position financially because of a war, other military operation, or national emergency.

On the other hand, if the Court agrees with the plaintiffs' more narrow reading of the HEROES Act, future Administrations would have relatively less authority to provide relief to borrowers and others under the Act. Much will depend on the particular rationale provided by the Court. The Court could, for example, hold that broad-based cancellation is never permissible under the HEROES Act. Alternatively, the Court could decide that loan cancellation is not *per se* unlawful, but that in this instance the causal connection between the COVID-19 national emergency and the policy was not sufficient under the Court's reading of the Act.

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[543] *See, e.g*., Final J., Brown v. U.S. Dep't of Educ., No. 4:22-cv-00908-P (N.D. Tex. Nov. 10, 2022) ("The Court DECLARES UNLAWFUL and VACATES the Program.").

[544] *See supra* notes 237–239 and accompanying text.

[545] *See COVID-19 Emergency Relief and Federal Student Aid*, FED. STUDENT AID, https://studentaid.gov/announcements-events/covid-19 (last visited Apr. 14, 2023).

[546] Compl. ¶ 7, SoFi Bank, N.A. v. Cardona, No. 23-CV-599 (D.D.C. Mar. 3, 2023) (alleging that the existing payment pause is unlawful because it "applies to *all* federal borrowers in the country, not just those suffering hardship as a result of the current phase of the pandemic").

Potential Effects on Broader Legal Doctrine

Though the core merits question in both *Nebraska* and *Brown* is the Secretary's authority under the HEROES Act, the cases also pose questions for the Court that could have consequences outside of the federal student loan context: Article III standing and the Court's major-questions doctrine.

States shape contemporary legal doctrine in their capacity as plaintiffs challenging federal government action,[547] and the Court's resolution of the varied Article III standing theories in *Nebraska* could either facilitate or limit this role in certain cases. For example, the Court could clarify when alleged financial impacts to state investments or state tax revenues constitute injury-in-fact. The Court's decision could also help clarify whether financial separation between a state and a separate entity that the state established and controls prevents the state from directly basing its own standing on harm suffered by that entity.

If the Court reaches the HEROES Act scope-of-authority question, its rationale could provide further guidance regarding how the federal courts should apply the major-questions doctrine. In particular, the Court's decisions in *Nebraska* or *Brown* may address whether the doctrine applies to agency claims of statutory authority to provide a benefit in a similar manner as the doctrine applies to agency assertions of statutory authority to impose a regulatory requirement.[548]

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[547] *E.g.*, Dep't of Com. v. New York, 139 S. Ct. 2551 (2019).

[548] Federal Pet'rs' Br., *supra* note 104, at 49 (distinguishing, for purposes of the major-questions doctrine, between authority to provide "benefits" and "grants or regulatory authority" (internal quotation marks omitted)).