No. 22A444

In the Supreme Court of the United States

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, ET AL.,
Applicants,

v.

STATE OF NEBRASKA, ET AL.,
Respondents.

ON APPLICATION TO VACATE THE INJUNCTION ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE, LEAVE TO FILE WITHOUT 10 DAYS' NOTICE, AND LEAVE TO FILE ON 8½- BY 11-INCH PAPER, AND BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF APPLICANTS' APPLICATION TO VACATE THE INJUNCTION ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Amici curiae are law professors at law schools around the nation. They respectfully move for leave to file the enclosed brief in support of Applicants' application to vacate the injunction entered by the United States Court of Appeals for the Eighth Circuit pending appeal of the preliminary injunction issued by the United States District Court for the Eastern District of Missouri, including leave to file without ten days' notice to the parties, as ordinarily required by this Court's Rule 37.2(a), and leave to file in 8½-by-11-inch format, as provided in Rule 33.2. *Amici* are:

- William Araiza, Stanley A. August Professor of Law, Brooklyn Law School
- Matthew Bruckner, Associate Professor of Law, Howard University School of Law
- Erwin Chemerinsky, Dean, and Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley School of Law
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- Peter Strauss, Betts Professor Emeritus of Law, Columbia Law School

Amici's professional expertise includes scholarship regarding student financial assistance programs under Title IV of the Higher Education Act of 1965, consumer finance, administrative and constitutional law, this Court's modes of statutory interpretation, and the development of precedent concerning the major questions doctrine. *Amici* have a strong interest in assisting this Court in resolving questions of law that go to the core of their professional expertise.

The attached brief reflects *Amici's* engagement with the statutory text of the HEROES Act of 2003 and this Court's precedents regarding the interpretation of that text, as well as the authority of administrative agencies more generally to act under authority granted to them by Congress. Accordingly, the proposed brief will assist the Court because it applies this Court's interpretive methodology to a heretofore-unlitigated act of Congress, demonstrating that the waiver announced by the Secretary of Education is authorized by the statute and that maintaining the Eighth Circuit's stay of the District Court's judgment is not justified by Respondents' low likelihood of success on the merits.

Counsel for *Amici* have consulted with the parties' counsel. In light of the briefing schedule, it was not feasible to give the parties ten days' notice of filing of this brief, but counsel for *Amici* informed counsel for all parties on November 18 (the day that Applicants filed their Application with this Court) of their intent to file. Applicants take no position on this motion. Counsel for Respondents have consented to the timely filing of an *amicus* brief.

To the extent that leave is required, *Amici* respectfully move for leave to file the attached brief on 8½- by 11-inch paper rather than in booklet form, given the expedited nature of the briefing. Should the Clerk's Office, the Circuit Justice, or the Court so require, *Amici* commit to re-filing expeditiously in booklet format. *See* S. Ct. Rule 21.2(c).

For the foregoing reasons, *Amici* respectfully move for leave to file the attached *amicus curiae* brief in support of Applicants' application for a stay of the injunction pending appeal.

Dated: November 22, 2022

Respectfully submitted,

/s/ Jeffrey B. Dubner

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae Dean Erwin Chemerinsky and Professors William Araiza, Matthew Bruckner, Pamela Foohey, Jonathan Glater, Luke Herrine, Dalié Jiménez, Jeffrey Lubbers, Chrystin Ondersma, Peter Shane, and Peter Strauss are professors of law at universities throughout the United States, with expertise in student financial assistance programs under Title IV of the Higher Education Act of 1965 and administrative and constitutional law. *Amici* file this brief in support of Applicants because this case presents important questions within *amici's* professional expertise, namely, the scope of the Department of Education's authority to provide relief to borrowers and the development of this Court's statutory interpretation methodology, particularly in the context of its precedent concerning the major questions doctrine.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should grant the application to vacate the injunction entered by the Eighth Circuit. The government's brief identifies the many reasons for that conclusion. This brief focuses on one of those reasons: the government is likely to prevail on the merits.[2] That is because Congress, through the plain language of the relevant statute, delegated precisely the authority exercised here, and the major questions doctrine does not alter that conclusion.

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

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

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

The Secretary's action coincides with the Department of Education's plan to resume collections on federally held student loans, following a nearly three-year suspension of such payments in response to a global health crisis. Even as repayments resume, millions of borrowers continue to face personal financial difficulties emanating from the COVID-19 pandemic and its substantial ongoing effects. The Secretary reasonably concluded that borrowers with incomes below $125,000 ($250,000 for joint filers) will face a significant risk of default and other harmful financial repercussions, and hence announced that the Department would pair the resumption of repayments with a one-time, partial relief of repayment obligations on federally held student debt for lower-income borrowers. This action was an appropriate and lawful exercise of the Department's authority under the HEROES Act.

In the face of the clear statutory text, the Eighth Circuit's declining to explain its conclusion that this case raises "substantial" merits questions is insufficient to support an injunction. For their part, in their briefing below, Respondents relied on invented limits on the explicit waiver and modification authority that have no

support in the statutory text and are inconsistent with past agency practice across Administrations.

Respondents' invocation of the major questions doctrine is likewise unavailing. The Secretary has not "'claim[ed] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority,'" *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022) (quoting *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)), exerted an "unprecedented power over American industry," *id.* at 2612 (quoting *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645 (1980)), or regulated a sector of the economy that Congress did not intend it to regulate, *id.* at 2612-13. It took the exact type of action Congress empowered it to take (waiver or modification of provisions of Title IV of the Higher Education Act) in the precise context Congress authorized it to act (national emergencies) for the specific purpose Congress intended (relief of borrowers affected by an emergency). This is not the exceptional case calling for application of a special mode of statutory analysis. And regardless, the statute provides "clear congressional authorization" for the power that the Department has exercised, *id.* at 2609 (quoting *Utility Air*, 573 U.S. at 324).

ARGUMENT

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

As this Court has repeatedly explained, statutory interpretation begins with the text of a statute, with "plain and unambiguous statutory language" enforced "according to its terms," *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251

(2010). The HEROES Act of 2003 "plainly authorizes" the Department to issue the limited debt relief here. *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022) (per curiam).

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

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

The Secretary's action faithfully implements this authority to waive or modify provisions of Title IV. As the administrative record shows, all the provisions waived or modified in this case fall within Title IV, and thus within the clear grant of authority in the HEROES Act. *See* 87 Fed. Reg. 61,512 (Oct. 12, 2022) (waiving or modifying various provisions governing loan terms, payment conditions, cancellation, and discharge of Title IV loans at 20 U.S.C. §§ 1087a, 1087e, 1087dd; 34 C.F.R. Part 674, Subpart D; 34 C.F.R. §§ 682.402, 685.212). There is no serious question (and Respondents below did not contest) that, if the other prerequisites for exercising the Secretary's authority are met, the Secretary's waivers and modifications of these provisions were permissible.

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

The HEROES Act authorizes waivers of Title IV provisions in connection with a "national emergency." 20 U.S.C. § 1098bb(a)(1). The COVID-19 pandemic, including its past, present, and future effects, constitutes such an emergency. In March 2020, President Trump declared that the COVID-19 outbreak was a national emergency that threatened to strain the nation's healthcare systems. 85 Fed. Reg. 15,337 (Mar. 13, 2020). In February 2022, President Biden continued the national emergency, 87 Fed. Reg. 10,289 (Feb. 18, 2022); by then, the United States had documented more than 78 million cases of COVID-19 and more than 934,000 deaths from the disease, and those numbers are still rising.[3]

Respondents have nevertheless argued that "national emergenc[ies] are by nature temporary, and the same must be true of the relief afforded." Resp. C.A. Mot. For Inj. Pending Appeal (Resp. Mot.) 20 (emphasis omitted). The statute contains no such limitation. The Act explicitly authorizes the Secretary to "waive or modify" student-loan provisions. 20 U.S.C. § 1098bb(a)(1). Congress did not use more limited language, such as the power to "suspend," as it has in some other emergency statutes. *See*, *e.g.*, 43 U.S.C. § 1341(c) (Secretary of the Interior may "suspend operations under any lease" for development of outer Continental Shelf "during a . . . national emergency"); 40 U.S.C. § 3147 (President may "suspend" statutory wage requirements for federal contractors "during a national emergency"); 46 U.S.C.

[3] Edouard Mathieu et al., *Coronavirus (COVID-19) Cases*, Our World in Data, https://bit.ly/3AuMyMQ (last updated Nov. 22, 2022).

§ 8301(d)(1) (Secretary of Homeland Security may "suspend any part" of regulations concerning crew makeup on Coast Guard vessels "during a national emergency").

Moreover, the Secretary has previously used HEROES Act authority to grant permanent financial relief to borrowers. *See infra* Section II.A.1; Applicants' Br. 22-23. Respondents have not cited any authority for the proposition that emergencies cannot be met with relief that has permanent effects, nor could they. Indeed, this Court recently held that the COVID-19 emergency justified the imposition of vaccination requirements on workers in healthcare facilities, *Biden v. Missouri*, 142 S. Ct. 647 (2022), a permanent measure that "cannot be undone at the end of the workday," *NFIB*, 142 S. Ct. at 665 (citation omitted).

Respondents' apparent intuition that temporary emergencies only justify temporary relief would be a curious and unheard-of constraint on government action; after all, the federal government does not ask disaster victims to return other forms of financial assistance provided to assist with post-disaster recovery, such as funds for housing and home repair, energy subsidies, or funeral expenses.[4]

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

Respondents have also argued that the debt cancellation exceeds the Secretary's authority because the program's beneficiaries do not live in a "disaster area" and some beneficiaries may not have suffered "direct economic hardship as a direct result" of the COVID-19 emergency. Resp. Mot. 21. Again, the text of the statute forecloses their argument.

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

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

Respondents have emphasized a different definition of "affected individual": those who have "suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary," *id.* § 1098ee(2)(D); *see, e.g.*, Resp. Mot. 21. But subsections (2)(D) and (2)(C) are *alternative* definitions of "affected individual." *Cf., e.g.*, *Horne v. Flores*, 557 U.S. 433, 454 (2009) ("Use of the disjunctive 'or' makes it clear that each of the provision's three grounds for relief is independently sufficient."). Respondents' insistence that any relief be limited to those who suffered direct hardship as a result of the COVID-19 national emergency would transform Congress's "or" into an "and." Congress could have limited the Secretary's waiver authority in disaster areas only to those directly

affected, but it chose not to, and this choice "requires respect, not disregard." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2072 (2018).

Additionally, the HEROES Act explicitly relieves the Secretary of any requirement that he "exercise the waiver or modification authority . . . on a case-by-case basis." 20 U.S.C. § 1098bb(b)(3). Rather than requiring individual-by-individual judgments about hardship for millions of borrowers, Congress permitted the Secretary to make reasonable determinations about classes of borrowers when tailoring relief. To interpret the statute otherwise ignores both the statute's plain text and Congress's obvious intent to empower the Secretary to act with the scale and speed necessary to address national emergencies. *See also id.* § 1098bb(a)(2)(B) (authorizing Secretary to ensure that "administrative requirements placed on affected individuals . . . are minimized, . . . to ease the burden" on student borrowers).

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

As the Secretary explained, the diverse effects of a national emergency on individuals' financial positions relative to their loans can include increased likelihood of default, inability to afford repayment without depleting funds for necessities and savings, and a reduction in borrowers' future abilities to obtain credit or employment. *See* App. 37a-39a. The HEROES Act authorizes the Secretary to consider these harmful effects and waive repayment provisions as he "deems necessary" to ensure that a national emergency does not place borrowers "in a worse position financially" than they would have been in otherwise. 20 U.S.C. § 1098bb(a)(1), (a)(2)(A).

Respondents have argued that, because relief in this instance takes the form of a reduction in principal owed by qualifying borrowers, the Secretary's action puts these borrowers in a better position than they were in prior to the pandemic, rather than ensuring that they are not placed in a worse position because of the pandemic. *See* Resp. Mot. 19. The administrative record, however, supports the Department's conclusion that the pandemic emergency caused substantial deterioration in lower-income borrowers' financial positions, with these borrowers substantially more likely to have trouble making payments in 2022 than in 2019. App. 37a-39a. The Department found that borrowers whose loan obligations would be eliminated by the Secretary's action were disproportionately likely to be low income and at high risk of default; and for remaining borrowers, the effect of loan forgiveness on their monthly payments was roughly equivalent to the payment pause that has persisted throughout the pandemic. App. 40a-41a.

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

Respondents' argument is likewise belied by Congress's decision to vest the Secretary with the authority to "deem [relief] necessary" to avoid borrowers being in a worse position relative to their loans than they would have been absent the

pandemic. 20 U.S.C. § 1098bb(a)(1), (a)(2)(A). The statute thus anticipated a discretionary determination. *See*, *e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018) (statute authorizing President to "suspend the entry of all aliens or any class of aliens . . . for such period as he shall deem necessary" or subject to "any restrictions he may deem to be appropriate" constituted a "comprehensive delegation" that authorized the suspension of entry of nationals from several countries); *Webster v. Doe*, 486 U.S. 592, 600 (1988) (statute allowing termination of CIA employees when the Director "'shall deem [] necessary' . . . exudes deference to the Director"); *see also, e.g.*, *Texas v. EPA*, 983 F.3d 826, 836-37 (5th Cir. 2020) (statutory text giving EPA Administrator "discretion to make changes whenever it 'deems necessary'" gave "the agency discretion to determine when changes are necessary, not merely authority to make changes when it has no other option").

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

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

In *West Virginia*, this Court explained that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." 142 S. Ct. at 2607 (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)). Where a statute's purpose is to confer power upon an executive agency, "that inquiry must be 'shaped . . . by the nature of the question presented'—whether Congress in fact meant to confer the power the agency has asserted." *Id.* at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). In "ordinary" cases—that is, the vast majority of cases—that context has "no great effect on the appropriate analysis." *Id.* But in rare "'extraordinary cases' . . . the 'history and the breadth of the

authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *Id.* (quoting *Brown & Williamson*, 529 U.S. at 159-60). Those extreme cases in which an agency "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority" are subject to the major questions doctrine. *Id.* at 2610 (quoting *Utility Air*, 573 U.S. at 324).

The cases that the Court has treated as "extraordinary" show what types of agency actions are unheralded and transformative in the relevant sense. *Brown & Williamson* involved the FDA's assertion of "the power to regulate, and even ban, tobacco products," which had never before fallen within the FDA's jurisdiction. *Id.* at 2608. *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (per curiam), involved the CDC's assertion of authority to regulate landlords' eviction practices nationwide. *Utility Air* concerned the EPA's regulation of "millions of small sources, such as hotel and office buildings, that had never before been subject to such [EPA] requirements." *West Virginia*, 142 S. Ct. at 2608. *Gonzales v. Oregon* dealt with the Attorney General's attempt to rescind state-issued medical licenses. 546 U.S. 243 (2006). *NFIB v. OSHA* considered the occupational-health agency's ability to require vaccinations and weekly testing *outside* of the workplace. 142 S. Ct. at 665. *King v. Burwell* involved the IRS's interpretation of the Affordable Care Act, where Congress was unlikely to delegate construction of the statute to an agency with "no expertise in crafting health insurance policy." 576 U.S. 473, 486 (2015). And in *West Virginia* itself, the EPA attempted to convert an authority that had always been understood

to "ensur[e] the efficient pollution performance of [an] individual regulated source" into one that allowed it to "forc[e]" one segment of the power industry to "cease making power altogether." 142 S. Ct. at 2612. In each case, an agency regulated far beyond where or what Congress expected it to regulate.

Ignoring this context, Respondents have contended that the Secretary's action triggers the major questions doctrine merely because it involves a large amount of money and because recent proposals for sweeping debt-relief legislation were not enacted. But the major-questions analysis requires more. Consideration of the Department's prior assertions of HEROES Act authority, its traditional mission and expertise, and the structure of the Act all compel the opposite conclusion: The challenged waivers and modifications do not amount to an unheralded, transformative power. And even if this Court were to adopt Respondents' preferred mode of analysis, which finds no purchase in the case law and which the Court should reject, the Secretary's action still would not trigger the doctrine, and would satisfy it if triggered.

1. The Secretary's action is not unheralded.

Respondents portray the Secretary's action here as unprecedented in two ways: the scope of affected individuals is broad, and the waiver of a payment obligation provides permanent relief. But neither is in any way new. The history and breadth of the Department's prior uses of its HEROES Act authority show that the challenged waivers and modifications align with its longstanding, uncontroversial understanding of that authority. Far from novel, unheralded assertions of authority, the Secretary's action here is consistent with the scope and effect of prior waivers and

modifications. *Compare, e.g.*, *NFIB*, 142 S. Ct. at 666 (striking down OSHA vaccine mandate where "OSHA, in its half century of existence, ha[d] never before adopted a broad public health regulation" of that kind), *with Biden v. Missouri*, 142 S. Ct. at 653 (upholding HHS vaccine mandate where "the Secretary routinely imposes conditions of participation" on healthcare workers and "has always justified" such requirements by reference to the statutory provisions in question).

First, this is not the first time that the Department has drawn on its HEROES Act authority to relieve a broad, nationwide class of borrowers from repayment and other obligations in response to the COVID-19 pandemic, nor the first Administration to do so. Beginning in March 2020, Secretary DeVos temporarily eliminated the accrual of interest and suspended payment on all federally held student loans, and she paused collection actions and wage garnishment to recoup delinquent loans. *See* 85 Fed. Reg. 79,856 (Dec. 11, 2020). That relief was made available to all federal borrowers across the United States, all of whom the Secretary determined—as a categorical matter—were affected by the COVID-19 pandemic. *See id.* at 79,857. The incoming Biden Administration extended these waivers. *See Pausing Federal Student Loan Payments*, White House Statements & Releases (Jan. 20, 2021), https://bit.ly/3UmyWKZ; *see also* Press Release, U.S. Dep't of Educ., Department of Education Announces Expansion of COVID-19 Emergency Flexibilities to Additional Federal Student Loans in Default (Mar. 30, 2021), https://bit.ly/3UjVb48. The waivers remain in effect today and are currently set to expire at the end of the year. *See* 87 Fed. Reg. at 61,512.

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

Second, the substance of the challenged action is not markedly different from previous exercises of authority under the Act. The Department has in the past permanently waived payments and otherwise made it easier for borrowers to discharge debts. For example, soon after the passage of the Act, the Department waived the requirement that borrowers return unearned grant funds, which they are ordinarily obligated to do under the Higher Education Act, when they withdraw from an institution because they reside in a disaster area or have suffered economic hardship because of a national emergency. *See id.* at 69,314. Likewise, under the Department's ongoing pause on loan payments and elimination of interest accrual, borrowers who have continued to pay their principal during the moratorium will have lower monthly interest payments when the pause is lifted. These waivers and modifications amount to permanent reductions in borrowers' repayment obligations of the type that Respondents argue falls outside the bounds of permissible emergency relief. *See* Resp. Mot. 20.

Thus, unlike the CDC's novel use of a decades-old statute to regulate evictions (*Ala. Ass'n of Realtors*, 141 S. Ct. at 2489) or EPA's sector-threatening restrictions on coal power production (*West Virginia*, 142 S. Ct. at 2610-11), the Department's determination is comparable in key respects to its prior, uncontroversial exercise of its authority under the HEROES Act.

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

Similarly, the challenged action does not work a "'radical or fundamental change' to a statutory scheme," *West Virginia*, 142 S. Ct. at 2609-10 (quoting *MCI*, 512 U.S. at 229), nor one that would effect a "transformative expansion in [its] regulatory authority," *id.* (quoting *Utility Air*, 573 U.S. at 324).

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

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

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

Nor is the Department attempting to exploit an "ancillary provision" of a statute, one "designed to function as a gap filler." *West Virginia*, 142 S. Ct. at 2610; *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress "does not . . . hide elephants in mouseholes."). The HEROES Act's waiver and modification authority is not some "previously little-used backwater" of a broader statute, *see id.* at 2613; it is the heart of a statute designed to give the Secretary "specific waiver authority to respond to . . . [a] national emergency." Act of Aug. 18, 2003, Pub. L. No. 108-76, 117 Stat. 904 (Aug. 18, 2003). In fact, § 1098bb is the *only* provision in the tightly drawn HEROES Act that gives effect to the law's central purpose; the Act does not contain back channels through which undelegated stores of agency authority might be sneaking. *See generally* 20 U.S.C. §§ 1098aa-1098ee.

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

As explained above, the hallmark of a major-questions case is an agency's exercise of unheralded, transformative power, *see supra* Sec. II.A.1-2, and this Court should reject Respondents' treatment of "economic and political significance" as an isolated, amorphous test. But even if the Court were to accept Respondents' conception of economic and political significance, which it should not, the major questions doctrine still would not govern the Department's action.

a. This Court should resist Respondents' desire to view economic significance in a vacuum. The Department's action may concern a large amount of money—approximately $13.3 billion per year, by one early analysis[5]—but this figure must be viewed in the context of the federal student-loan program as a whole, comprising 43 million borrowers with loans totaling approximately $1.6 *trillion*.[6]

Given the overall size of the student-loan program, Department actions managing this portfolio regularly involve large sums. For example, the Department cancelled an estimated $6.8 billion in federal student debt under the Public Service Loan Forgiveness program and an additional $7.8 billion for borrowers with disabilities from January 2021 to April 2022—a total of $14.6 billion in debt cancellation.[7] Likewise, the Department regularly discharges billions of dollars of federal student loans held by hundreds of thousands of borrowers who have attended educational institutions that the Department later determined misrepresented their

[5] *See* Letter from Phillip L. Swagel, Director, Cong. Budget Office, to Members of Congress (Sept. 26, 2022), https://bit.ly/3U71fwE.
[6] *Id.* at 3.
[7] *See* Press Release, U.S. Dep't of Educ., Department of Education Announces Actions to Fix Longstanding Failures in the Student Loan Programs (Apr. 19, 2022), https://bit.ly/3DDF9wr.

credentials and accreditation or otherwise misled students about the value of the education provided.[8] For example, over the course of three months this year, the Department discharged more than $11 billion in federal loans held by borrowers who attended just three institutions.[9] When managing a $1.6 trillion loan portfolio, virtually *every* action that the Department takes to relieve borrowers might trigger the major questions doctrine if courts looked only to the bottom-line amount.[10] That would work a massive expansion in the major questions doctrine—a rule reserved for "extraordinary" circumstances, *West Virginia*, 142 S. Ct. at 2608.

Moreover, the "cost" in question is not the type of cost considered in previous cases, which involved "'billions of dollars in spending' by private persons or entities," *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (quoting *King*, 576 U.S. at 485)), resulting from an exercise of "unprecedented power over American industry," *id.* at 2612 (quoting *Indus. Union Dep't*, 448 U.S. at 645); *see also, e.g.*, *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (considering the "financial burden on landlords" resulting from CDC's eviction moratorium). Respondents here point instead to the cost imputed

[8] *See* U.S. Dep't of Educ., Office of Fed. Student Aid, Borrower Defense Findings, https://bit.ly/3DhundS (last visited Nov. 22, 2022) (cataloguing Department's discharges of debt against institutions).

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

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

to the federal government by a reduction in projected income generated by a federal program. The absence of any costs to private parties is, on its own, sufficient to end the major-questions inquiry.[11]

Indeed, in describing the injury that supposedly gives rise to this case, Respondents don't allege that the action will trigger billions of dollars in costs to private parties, nor could they. They merely contend that the debt-relief measure will cost Missouri's state-affiliated loan servicer money in lost account fees and that states may lose some unspecified amount in tax revenue. *See* Resp. Mot. 8-13. These tenuous allegations of marginal economic harm are a far cry from the effects one would expect were the Department exercising an "extravagant statutory power over the national economy," *West Virginia*, 142 S. Ct. at 2609 (quoting *Utility Air*, 573 U.S. at 324).

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

Aside from their own disagreement, all that Respondents point to as evidence of political significance is that Congress has failed to enact debt-relief measures over the last three years. Resp. Mot. 17-18. But two of the three proposals that they have cited are much broader in scope than the Department's action here. *See, e.g.*,

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

H.R. 2034, 117th Cong. (2021) (bill introduced in House that would cancel all student debt for all borrowers with adjusted gross incomes up to $100,000); S. 2235, 116th Cong. (2019) (bill introduced in Senate proposing cancellation of up to $50,000 for all borrowers regardless of income). And the third was one provision of a $3 trillion stimulus bill. *See* H.R. 6800, 116th Cong. § 150117(h) (2020).

Far more than this "simple inaction by Congress" is required to provide meaningful evidence of intent. *See Brown & Williamson*, 529 U.S. at 155 (drawing on 35-year history of specific congressional action at odds with agency's assertion of authority); *West Virginia*, 142 S. Ct. at 2610 (Congress's "conspicuously and repeatedly declin[ing] to enact" a particular regulatory scheme was evidence of congressional intent); *see also Johnson v. Transp. Agency,* 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting) ("[O]ne must ignore rudimentary principles of political science to draw any conclusions regarding [congressional] intent from the *failure* to enact legislation.").

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

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

The Secretary's action does not implicate the major questions doctrine, and no further inquiry is necessary. But even if the challenged action did raise a major statutory question, it is supported by clear congressional authorization, for "the

[underlying provision] plainly authorizes the Secretary's" action. *NFIB*, 142 S. Ct. at 665.

For the reasons already explained, *see supra* Sec. I, the plain text of the HEROES Act authorizes the Department's action here. The text of the Act explicitly authorizes the Department to modify or waive federally held student-debt requirements in connection with a national emergency to ensure that affected borrowers are not placed in a worse position financially. *See* §§ 1098bb(a)(1)-(2), 1098ee(2)(D). The Act permits the Secretary to modify or waive *any* provision that applies to the three student-loan programs that the federal government administers under the Higher Education Act. *See* 20 U.S.C. §§ 1087a-1087j. This broad grant of authority naturally encompasses the ability to waive or modify the statutory and regulatory provisions that obligate borrowers to repay their loans and specify the consequences of failure to repay. *See* 20 U.S.C. §§ 1080, 1087e, 1087dd; 34 C.F.R. §§ 682.102, 682.402, 685.207, 685.212-218. And because the Secretary's action here fits squarely within the text and purpose of the statute, the Court need not strain to determine whether a statutory term designed for one context can be the basis for regulation in another. *See, e.g.*, *West Virginia*, 142 S. Ct. at 2614-15 (finding ambiguity in the term "system," which, when "shorn of all context . . . is an empty vessel").

CONCLUSION

The Court should grant Applicants' application to vacate the injunction.

Respectfully submitted,

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