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 OF UTAH, OHIO, ALABAMA, ALASKA, ARIZONA, FLORIDA, GEORGIA, INDIANA, LOUISIANA, MISSISSIPPI, MONTANA, NEW HAMPSHIRE, NORTH DAKOTA, OKLAHOMA, TEXAS, WEST VIRGINIA, AND WYOMING FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS WITHOUT 10 DAYS' NOTICE AND IN PAPER FORMAT

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Amici curiae, the States of Utah, Ohio, Alabama, Arizona, Alaska, Florida, Georgia, Indiana, Louisiana, Mississippi, Montana, New Hampshire, North Dakota, Oklahoma, Texas, West Virginia, and Wyoming, respectfully move for leave to file the accompanying brief in support of respondent States of Nebraska, Missouri, Arkansas, Iowa, Kansas, and South Carolina and in opposition to applicants President Biden and Secretary Cardona's Application to Vacate the Injunction (i) without 10 day's advance notice to the parties of amici's intent to file as ordinarily required by Sup. Ct. R. 37.2(a); and (ii) in an unbound format on 8½-by-11-inch paper rather than in booklet form.

President Biden and Secretary Cardona filed their Application on Friday, November 18, 2022. In light of this Court's call for a response by Wednesday, November 23, 2022 noon EST, it was not feasible to provide 10 days' notice to the parties. On Monday, the States provided notice of their intent to file this brief to counsel of record for both applicants and respondents. Counsel for respondents consented to the filing. Counsel for applicants did not respond to the notice. And the compressed timeframe prevented *Amici* States from having the brief finalized in sufficient time to allow it to be printed and filed in booklet form.

As set forth in the enclosed brief, the *Amici* States have a strong interest in Respondents' challenge of the unauthorized executive action at issue here. The political branches have repeatedly tried, and failed, to pass legislation canceling or reducing student-loan debt. The Executive Branch side-stepped these failures by claiming that it has long had the power to cancel debt under the HEROES Act of 2003—post-

September-11 legislation providing debt relief for the brave men and women fighting the war on terror. See Pub. Law No. 108-76. The Secretary of Education's mass cancellation—$400 billion of the $1.6 trillion outstanding federal student loan debt—is among the most egregious examples of unauthorized executive action in American History. Its impact reaches all Americans, not least because the Secretary's *ultra vires* maneuver adds astronomical costs to the federal deficit. Further, *Amici* States have compelling interests in objecting to the United States' standing arguments, which would allow such grave violations of the Constitution's separation of powers to remain unchecked.

The *Amici* States' brief includes relevant material not brought to the attention of the Court by the parties that may be of considerable assistance to the Court. *See* Sup. Ct. R. 37.1.

Amici States therefore seek leave to file this brief in support of Respondents.

DATED this 23rd day of November, 2022.

Respectfully submitted,

/s/ Melissa A. Holyoak

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INTEREST OF *AMICI* STATES

Amici curiae, the States of Utah, Ohio, Alabama, Alaska, Arizona, Florida, Georgia, Indiana, Louisiana, Mississippi, Montana, New Hampshire, North Dakota, Oklahoma, Texas, West Virginia, and Wyoming, respectfully submit this brief in support of Respondents. The *Amici* States have an interest in objecting to abuses of executive authority. Because the United States' standing theory would allow many such abuses to go unchallenged, and because the $400 billion debt-forgiveness plan at issue here involves a particularly egregious example of executive abuse, the *Amici* States are filing this brief.

ARGUMENT

"If to describe this case is not to decide it, the concept of a government of separate and coordinate powers no longer has meaning." *Morrison v. Olson*, 487 U.S. 654, 703 (1988) (Scalia, J., dissenting). The President is attempting one of the largest wealth transfers in American history. More precisely, he has proposed to forgive hundreds of billions of dollars in student loans. *Remarks by President Biden Announcing Student Loan Debt Relief Plan*, The White House (Aug. 25, 2022), https://perma.cc/8FWE-SKT9. But no law permits the President to do this. And the President has no inherent constitutional authority to forgive student debt. Accordingly, the loan-forgiveness program is illegal, and blatantly so.

Any effort to justify the program as an exercise of the Secretary of Education's authority under the HEROES Act of 2003 is unavailing. Passed after the September

11 attacks, the Act authorizes the Secretary to modify or waive student loan requirements for individuals in military service. It gives the Secretary similar authority with respect to those suffering economic hardship as a direct result of war, a military operation, or a national emergency. *See* 20 U.S.C. §1098ee(2). The government claims that the COVID-19 pandemic is a national emergency that justifies the loan-forgiveness program. But if Congress wanted the HEROES Act to empower the Secretary to cancel hundreds of billions of dollars in student-loan debt, it needed to do so clearly. It failed to do so; the HEROES Act clearly *does not* authorize the Secretary to forgive hundreds of billions of dollars in student debt based on a pandemic that is, in every relevant sense, over.

The many lawyers in the Executive Branch know this. So they attempted to gerrymander the debt-forgiveness program in ways that would prevent anyone from having standing to sue. *See* Corey Turner, *In a reversal, the Education Dept. is excluding many from student loan relief*, NPR (Sept. 30, 2022), https://perma.cc/9FA5-ADJK. They failed: the loan-forgiveness program injures MOHELA, a component of the State of Missouri, giving (at least) Missouri standing to sue. And now, the Solicitor General has the unenviable task of defending the indefensible before this Court—of aiding and abetting the President's unconstitutional decree.

The government's main argument is pretextual: it insists the cancelation responds to pandemic-related financial risk. Yet the President touts the loan forgiveness program as fulfillment of a "campaign commitment"—a commitment motivated by the belief that "the cost of borrowing for college" imposes "a lifelong burden that deprives" borrowers of the chance to build "a middle-class life." *FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most*, The White House (Aug. 24, 2002), https://perma.cc/Y93P-VDB2. That commitment has no plausible connection to the COVID-19 pandemic. The Solicitor General knows that. Otherwise-sympathetic scholars know that. *See, e.g.*, Jed Shugerman, *Biden's Student-Debt Rescue Plan Is a Legal Mess*, The Atlantic (Sept. 4, 2022), https://perma.cc/8JGM-T4AT. And, most important of all, the American people know that. This Court is "not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (citations omitted).

The program is part and parcel of the current Administration's modus operandi: invoking far-fetched legal arguments to launder abuses of executive authority, all in hopes that the courts will shrink from their role in checking executive abuse. *See, e.g., Remarks by President Biden on Strengthening American Leadership on Clean Cars and Trucks*, The White House (Aug. 5, 2021), https://perma.cc/87WU-UUNX (remarking that the eviction moratorium might not survive legal review after Supreme Court decision but the CDC could at least "keep it going" until overturned); *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 612 (5th Cir. 2021) (citing White House Chief of Staff Ron Klain's retweet of claim that "OSHA doing this vaxx mandate as an emergency workplace safety rule is the ultimate work-around for the Federal govt to require vaccinations."). The Court must not go along. It should deny the Application to Vacate the Injunction.

I. The HEROES Act of 2003 permits the Secretary of Education to waive or modify student-loan requirements in limited circumstances.

On September 11, 2001, terrorists attacked our country. That day, thousands watched helplessly as their places of work collapsed with their colleagues trapped inside. Thousands more were moved to enlist in the armed forces. Some of these individuals had school loans—loans for which payments would be due during a military deployment or unemployment brought about by the September 11 attack.

Congress responded with the Higher Education Relief Opportunities for Students (HEROES) Act of 2003, Pub. Law No. 108-76. President Bush signed it into law. The Act permits the Secretary of Education to:

> 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 war or other military operation or national emergency to provide *the waivers or modifications authorized*.

20 U.S.C. §1098bb(a)(1) (emphasis added). The authorized waivers or modifications are for "affected individuals." *Id.* §1098bb(a)(2). An "affected individual" is "an individual who":

> (A) is serving on active duty during a war or other military operation or national emergency;
>
> (B) is performing qualifying National Guard duty during a war or other military operation or national emergency;
>
> (C) resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency; or
>
> (D) suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary.

20 U.S.C. §1098ee(2); *see id.* §1098bb(a)(2).

Breaking this down, the Secretary may "waive or modify" certain provisions in the Higher Education Act. *Id.* §1098bb(a)(1). When may he do so? Only when "necessary in connection with a war or other military operation or other national emergency." *Id.* For whom may the provisions be waived or modified? "Affected individuals," which means individuals: serving in the military or the National Guard; living or working in an area declared a "disaster area" in connection with a national emergency; or suffering "direct economic hardship as a direct result of," a war, military operation, or national emergency. And what provisions may be waived or modified? To that last question, there are four answers.

First, the Secretary may waive or modify provisions as needed to keep affected individuals from being placed "in a worse position financially in relation to" their student loans "because of their status as affected individuals." 20 U.S.C. §1098bb(a)(2)(A).

Second, the Secretary may waive or modify "administrative requirements placed on affected individuals" to the extent he can do so "without impairing the integrity of the student financial assistance programs." *Id.* §1098bb(a)(2)(B).

Third, the Secretary may "modif[y]" (but not "waive") the calculation of "annual adjusted family income … to reflect more accurately the financial condition of" affected individuals. *Id.* §1098bb(a)(2)(C).

Finally, the Secretary may "modif[y]" (but not waive) "the calculation" of refunds to institutions "so that no overpayment will be required to be returned or repaid." *Id.* §1098bb(a)(2)(D).

The Act thus provides the Secretary of Education with specific and limited waiver authority. Most prominently, it is the authority to protect soldiers from being disenrolled from school or financial-aid programs while they are deployed, and to reduce the administrative burden these individuals face when they answer the call of duty. But notably, unlike specific provisions of the Higher Education Act outlining public-service loan forgiveness, *see, e.g.,* 20 U.S.C. §1078-10 (teachers), nothing in the HEROES Act expressly authorizes any loan forgiveness.

The HEROES Act of 2003 reauthorized and expanded an earlier version, passed in the wake of September 11, which applied to terrorism-related emergencies. *See* Higher Education Relief Opportunities for Students Act of 2001, Pub. L. No. 107-122, 115 Stat. 2386 (2002). The 2003 bill was discussed in Congress only once before it unanimously passed the House. (One representative accidentally voted no, but later documented that he "meant to vote 'yea.'" 149 Cong. Rec. E663-01, 2003 WL 1789268.) Various congressmen described it similarly. For example:

> **Rep. Isakson (GA)**: "I support the HEROES Act of 2003, which gives the Secretary the authority under title IV of the Higher Education Act to make those waivers and deferrals that are necessary to ensure that our troops whose lives have been disrupted suddenly, and now serve us in the Middle East and in Iraq, to make sure that their families are not harassed by collectors and that their loan payments are *deferred until they return*; and also encourage those institutions of higher learning that have accepted tuition for semesters or quarters that now cannot be fulfilled because that Reservist has been activated to refund the tuition back to those Reservists."

149 Cong. Rec. H. No. 52, p. 2525 (Apr. 1, 2003) (emphasis added).

II. The HEROES Act gave the Secretary no authority to implement the President's student-loan-forgiveness program.

President Biden claims the HEROES Act empowered the Secretary's mass cancelation. On October 12, 2022, the Secretary of Education purported to issue a HEROES Act modification that would "discharge the balance of a borrower's eligible loans" up to a certain amount. Federal Student Aid Programs, 87 Fed. Reg. 61512-01, 61514 (Oct. 12, 2022). Even after accounting for the administration's arbitrary restrictions—$10,000 to $20,000 of windfall for couples with incomes up to $250,000—the discharge will cost between $400 and $519 billion, a large portion of the $1.6 trillion in student debt currently owed. *See* Cong. Budget Off., *Costs of Suspending Student Loan Payments and Canceling Debt* (Sept. 26, 2022), https://bit.ly/3SpZk6g; Penn Wharton Univ. of Pa., *The Biden Student Loan Forgiveness Plan: Budgetary Costs and Distributional Impact* (Aug. 26, 2022), https://bit.ly/3UAxpBI.

The HEROES Act gives the Secretary no authority to do this.

A. The loan-forgiveness program is illegal unless it is clearly authorized by statute.

Congress does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Assn's*, 531 U.S. 457, 468 (2001). Thus, Congress must speak clearly if it intends for an agency to "exercise powers of vast economic and political significance." *Nat'l Fed.'n of Indep. Bus. v. Dep't of Lab.*, 142 S.

Ct. 661, 665 (2022) (per curiam) (quoting *Ala. Ass'n of Realtors v. Dep't of Health and Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam)).

The Supreme Court recently applied this principle in rejecting OSHA's argument that a seldom-used provision in the Occupational Safety and Health Act empowered the agency to impose a COVID-19 vaccination mandate on tens of millions of American workers. The Court observed that the vaccine mandate "qualifie[ed] as an exercise" of significant political and economic authority. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct at 665. But the text of the relevant law did not "plainly authorize[]" OSHA to wield such extravagant authority. *Id.* What is more, OSHA had "never before adopted a broad public health regulation of th[at] kind." *Id.* at 666. The Court concluded, based on the "lack of historical precedent" and the absence of clear textual authority for OSHA's action, that federal law could not be understood as empowering OSHA to exercise such vast authority. *Id.* (internal quotation marks omitted).

Even more recently, the Supreme Court rejected the EPA's attempt to restructure the American energy market. *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022). The Court reiterated that it greets an agency's assertion of "'extravagant statutory power over the national economy' with 'skepticism.'" *Id.* at 2609 (quoting *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). Yet the EPA produced no "clear congressional authorization" for its action. *Id.* at 2614. Instead, the EPA sought to adopt a regulatory program "that Congress had conspicuously and repeatedly declined to enact itself." *Id.* at 2610.

Similar reasoning applies here. The power to unilaterally forgive hundreds of billions of dollars of loans—effectively, the power to take on hundreds of billions of dollars in debt—is undoubtedly a power of "vast economic and political significance." *Nat'l Fed. of Indep. Bus.*, 142 S. Ct at 665 (internal quotation marks omitted). The Secretary has never before interpreted the Act to confer loan-cancellation authority. And the Secretary seeks to implement a loan-forgiveness program that Congress has conspicuously and repeatedly declined to enact. *See, e.g.,* S. 2235, 116th Cong. §101 (2019) (cancelling up to $50,000 of student loan debt for those who make under $100,000); H.R. 2034, 117th Cong. §2 (2021) (cancelling the outstanding balance on loans for all borrowers under a certain income cap). The Court presumes that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *West Virginia*, 142 S. Ct. at 2609 (internal quotation marks omitted). That presumption applies here.

The government argues that the major-questions doctrine does not apply because the cancelation involves a "government benefit program." App. to Vac. at 25. The Court has made no such exception. The major-questions doctrine looks to whether the asserted "highly consequential power [is] beyond what Congress could reasonably be understood to have granted." *West Virginia*, 142 S. Ct. at 2609. The question is not whether that power imposes or lifts administrative burdens, but whether exercise of that power has vast economic and political significance. Excepting agency action that delivers a benefit would mean federal benefit programs could rely on vague assertions of power to implement major social and economic policy decisions.

It follows from all this that the HEROES Act cannot be understood to confer such authority unless it does so clearly.

B. The HEROES Act does not authorize, clearly or otherwise, the Secretary's plan to forgive student debt *en masse*.

The HEROES Act does not clearly empower the Secretary to implement the loan-forgiveness program. Instead, it unambiguously *does not* empower the Secretary to adopt this program.

1. Many beneficiaries are not "affected individuals" eligible for relief under the HEROES Act.

As an initial matter, the plan is illegal because it applies to people who are not "affected individuals." Relevant here, the Secretary can waive or modify rules where 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*." 20 U.S.C. §1098bb(a)(2)(A) (emphasis added). The government claims that this provision could permit the student-loan-forgiveness plan. *See* App. to Vac. at 18.

The government's argument fails for a very simple reason: whereas this provision allows the Secretary to waive or modify certain provisions in their application to "affected individuals," the loan-forgiveness program confers benefits on a class that includes many debtors *who are not* "affected individuals."

Recall that the Act defines "affected individual" as an individual (A) serving on active duty; (B) performing qualifying National Guard duty; (C) residing in an area declared a “disaster area” in connection with a national emergency; or (D) who suffered direct economic hardship as a direct result of a war or other military operation or national emergency. 20 U.S.C. §1098ee(2). The program here forgives student debt without regard to military status, meaning the beneficiaries are not “affected individuals” under subsections (A) and (B). Instead, the government argues that, under subsection (C), all borrowers living in the United States are “affected individuals” because President Trump’s 2020 COVID-19 disaster declaration remains in effect. App. to Vac. at 8, 19.

To begin, subsection (C) applies only to people who “reside[] or [are] employed in an area that is declared a disaster area … *in connection with a national emergency*.” 20 U.S.C. §1098ee(2)(C) (emphasis added). And while the entire nation (remarkably) remains a declared disaster zone because of COVID-19, it is doubtful that the COVID-19 pandemic constitutes a “national emergency” for purposes of the HEROES Act. Under the associated-words cannon, “words grouped in a list should be given related meanings.” Scalia & Garner, *Reading Law* §31, p.195 (2012) (quoting *Third Nat’l Bank in Nashville v. Impac Ltd.*, 432 U.S. 312, 322 (1977)). Thus, when the phrase “national emergency” appears in the phrase “war or other military operation or national emergency,” it should be understood as referring only to the sort of national emergencies similar in nature to a war or military operation—not (for example) to a pandemic that is over in every relevant sense, or to the opioid crisis, which has been a declared national emergency for five years now. Ctrs. for Medicare & Medicaid

Servs., *Ongoing emergencies & disasters* (last updated Oct. 28, 2022), https://perma.cc/RP7N-X8EJ.

More important, even assuming the COVID-19 pandemic at some point qualified as a "national emergency," certainly it does not qualify today, when American life is mostly indistinguishable from what it looked like in pre-pandemic times. But even though COVID-19 is now irrelevant to nearly all Americans, the entire country remains in a state of declared disaster. *Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic*, 87 Fed. Reg. 10289 (Feb. 18, 2022). This reflects the reality that government actors are reluctant to terminate "indefinite states of emergency" that vest them with special authority. *See Does 1-3 v. Mills*, 142 S. Ct. 17, 21 (2021) (Gorsuch, J., dissenting). That is all the more reason to interpret narrowly the powers that "disaster" status confers.

But even subsection (C)'s broad and perhaps-interminable reach cannot save the program. That is because the program forgives the debts even of individuals who do not live or work in the United States or its territories. The government attempts to evade this flaw by claiming that those individuals living abroad are affected individuals under subsection (D). To no avail. Under subsection (D), affected individuals include those who "suffered *direct* economic hardship as a *direct* result of a war or other military operation or national emergency." 20 U.S.C. §1098ee(2)(D) (emphasis added). But the plan makes no attempt to ensure these individuals satisfy this direct-hardship requirement.

Indeed, the Secretary does not, and cannot, point to any class-wide hardship stemming from COVID-19. Borrowers are entitled to loan forgiveness—they are included within the covered class—as long as (1) they owe debt held by the federal government; and (2) they fall below the income threshold needed to obtain forgiveness. *See* 87 Fed. Reg. at 61514. That the pandemic caused "global economic harms," as the government claims, App. to Vac. at 19, is insufficient to show these borrowers currently suffer hardship, much less hardship that *directly* results from the pandemic.

2. The loan-forgiveness program goes beyond maintaining the pre-emergency *status quo*.

The "affected individual" issue is the least of the program's problems. The bigger issue is that the program exceeds any authority the Secretary has to take actions for the benefit of affected individuals.

The Act empowers the Secretary to waive requirements 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." 20 U.S.C. §1098bb(a)(2)(A) (emphasis added). The loan-forgiveness program fails, because individuals receiving debt discharge are not being preserved in their pre-disaster status: rather than placing the loans in forbearance, or even canceling the accrual of interest, the loan-forgiveness program cancels student-loan debt altogether, thus placing borrowers in a more-favorable position relative to the *status quo ante*. In statutory terms, the loan-forgiveness program goes well beyond ensuring that affected individuals are not in a "worse position financially" as a result of their status as affected individuals.

Even worse, the program targets hardships that borrowers have not endured *as a result* of their affected-individual status. That is fatal because the HEROES Act permits waivers and modifications only insofar as they relieve affected individuals of hardships they sustained *because* they are "affected individuals." An example illustrates how the Department of Education has traditionally understood the required connection between hardship and affected-individual status. Federal borrowers normally qualify for some amount of loan cancellation "if they are employed full-time in specified occupations, such as teaching, childcare, or law enforcement." 68 Fed. Reg. 69312-01, 69317 (Dec. 12, 2003). The Secretary, in 2003, waived "the requirements that apply to the various loan cancellations that such periods of service be uninterrupted and/or consecutive, if the reason for the interruption is related to the borrower's status as an affected individual." *Id*. Those requirements put an affected borrower in a worse position in relation to his loans because, but for the borrower's affected-individual status, the borrower could have completed uninterrupted teaching or law-enforcement service and could have qualified for some relief. The waiver restored the borrowers to the position they would otherwise have been in.

The loan-forgiveness program flunks this requirement: it grants forgiveness to people whose financial situations are not strained *because of* their status as affected individuals. That is in part because the Secretary has defined "affected individuals" to consist of every federal loan holder, rather than defining them with reference to some specific, shared attribute (like being active-duty military). An individual given multiple raises during the pandemic, an individual who left a lucrative career voluntarily, and an individual suffering financially due to picking the wrong major or graduating at the bottom of his class, have not been "placed" in a worse financial position *because of* COVID-19 or any local so-called disaster. And yet they all qualify for relief. Even though the HEROES Act does not require an individualized assessment, the Secretary has not plausibly shown that the class to whom the program applies is, as a class, suffering hardship because of COVID-19.

3. The loan-forgiveness program neither waives nor modifies any provision in the Higher Education Act.

Even if the Secretary could clear these many hurdles, one more remains. The HEROES Act empowers the Secretary to give "waivers" and "modifications" of certain loan-repayment requirements in the Higher Education Act. 20 U.S.C. §1098bb(a)(1) (emphasis added). The Secretary claims to modify—not waive—the provisions of 20 U.S.C. §1087; 20 U.S.C. §1087dd(g); 34 C.F.R. part 674, subpart D; and 34 C.F.R. §§682.402 and 685.212. 87 Fed. Reg. at 61514. The so-called modification "provide[s] that" the Department of Education will discharge $10,000 to $20,000 in loans for individuals who meet certain income thresholds. *Id*.

The attempt to characterize the program as a "modification" fails for two reasons.

a. First, to modify means "to change moderately or in minor fashion." *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.,* 512 U.S. 218, 225 ("modify" in federal statute "has a connotation of increment or limitation"). For example, the Higher Education Act defines "total income" for purposes of needs-based student assistance by using figures from the "preceding tax year." 20 U.S.C. §1087vv(a)(1)(A). The Secretary modified that requirement in 2003, using the "award year" instead of the "preceding tax year" so as "to reflect more accurately the financial condition of an affected individual and his or her family," 68 Fed. Reg. at 69313. That minor alteration qualifies as a modification.

Rather than making minor alterations of this sort, the Secretary established an altogether new loan-forgiveness program. This regulatory invention does not "change" the Higher Education Act's operation in a "moderate[]" or "minor fashion." *MCI*, 512 U.S. at 225. It constitutes a significant, and significantly costly, act of invention.

b. Second, and relatedly, the establishment of the loan-forgiveness program does not entail changing (or even waiving the application of) any particular provision in the Higher Education Act. Indeed, none of the provisions the Secretary claims to be modifying are being modified in any way. This brief considers each in turn.

20 U.S.C. §1087 and 34 C.F.R. §685.402. The Secretary first claims to modify 20 U.S.C. §1087, along with its corresponding regulation, 34 C.F.R. §682.402. The statute contains four subsections. Subsections (a) and (d) tell the Secretary what to do with loans that a borrower cannot repay because of death or disability. 20 U.S.C. §1087(a), (d). Subsection (b) addresses the payment of loans held by debtors who declare bankruptcy. *Id.* §1087(b). And subsection (c) provides for loan discharge where the student is "unable to complete the program in which such student is enrolled due to the closure of the institution." *Id.* §1087(c)(1).

The loan-forgiveness program does not "waive" any of these provisions. It does not "modify" any of them either. The program, rather than repaying the loans of a borrower who "dies" or becomes "disabled," discharges an arbitrary amount for every borrower below an income threshold. So rather than modifying these provisions, the Secretary has created a new program in which debt can be forgiven in circumstances unrelated to anything the statute addresses.

20 U.S.C. § 1087dd(g). Now consider 20 U.S.C. §1087dd(g), the second statute whose requirements the Secretary claims to have modified. This provision, like 20 U.S.C. §1087(c)(1), permits discharge where the school closes down while the student is enrolled (and requires the Secretary to seek repayment from the school). *Id.* §1087dd(g). And this provision, just like §1087(c)(1), has nothing to do with the Secretary's actions—the loan-forgiveness program neither waives nor modifies it.

34 C.F.R. part 674, subpart D. Subpart D of 34 C.F.R. Part 674 discusses loan cancellation in specific circumstances, such as working full-time as a teacher or nurse, or being the widow of a victim of September 11.

The Secretary has previously addressed Subpart D in making HEROES Act modifications. "Generally, to qualify for loan cancellation, borrowers must perform uninterrupted, otherwise qualifying service for a specified length of time." 68 Fed. Reg. at 69317. Since this would disqualify, for example, borrowers on active duty in the military, the Secretary has waived "the requirements … that such periods of service be uninterrupted and/or consecutive, if the reason for the interruption is related to the borrower's status as an affected individual." *Id.* Therefore, while teachers with

Perkins Loans generally must "teach full-time for a complete academic year or its equivalent" to qualify for limited cancellation, the HEROES Act could permit an affected borrower to piece together portions of a year to qualify for that limited cancellation. *See* 34 C.F.R. §674.53(d).

The Secretary's action in connection with the loan-forgiveness program neither modifies nor waives the requirements of subpart D. A modification, as illustrated in 2003, 68 Fed. Reg. at 69313, and again in 2012, 77 Fed. Reg. 59311-01, 59316 (Sept. 27, 2012), does not eliminate a borrower's liability. Rather, it makes loan-cancellation programs more flexible to accommodate borrowers experiencing hardship because of an unavoidable disaster or their commendable service. The Secretary's attempt to "modify" loan cancellation programs—without referencing which programs are being modified or how they are being modified—again indicates he is creating a program, not adjusting one.

34 C.F.R. §685.212. The final provision the Secretary claims to have modified, 34 C.F.R. §685.212, lays out the Secretary's obligations with respect to loan discharges in various circumstances. Specifically, this provision's subsections, labeled (a) through (k), say what the Secretary should do:

> (a) if the borrower dies;
>
> (b) if the borrower becomes totally and permanently disabled;
>
> (c) if the borrower's loan-repayment obligations are discharged in bankruptcy;
>
> (d) if the borrower's school closes;
>
> (e) if a loan is discharged based on false certification of student eligibility or unauthorized payment under 34 C.F.R. §685.215;

> (f) if a loan is discharged under 34 C.F.R. §685.216 for a school closure and the school fails to make a required refund;
>
> (g) if the Secretary receives a payment after a loan is discharged;
>
> (h) if a loan is discharged under the teacher-loan-forgiveness program;
>
> (i) if a loan is discharged under the Public Service Loan Forgiveness Program;
>
> (j) if a borrower's loan is discharged under a program relating to September 11 survivors; and
>
> (k) if the borrower's defense or application for discharge under specified provisions is approved.

34 C.F.R. §685.212.

Which of these subsections' requirements does the loan-forgiveness program waive or modify? None of them. Instead, the program creates an altogether new category of dischargeable loans not covered by the regulation. No statute empowers the Secretary to do that. His doing so is therefore illegal.

III. The State of Missouri has Article III standing to challenge the Secretary's unlawful student-loan cancellation.

Article III of the Constitution limits federal courts to deciding "Cases" and "Controversies." For a legal dispute to qualify as a case or controversy, at least one plaintiff must have standing to sue. *Dep't of Commerce*, 139 S. Ct. at 2565. Standing doctrine "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong" and "confines the federal courts to a properly judicial role." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). To have standing, a plaintiff must establish "an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733 (2008). States are "entitled to special solicitude in [the] standing analysis." *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

The district court determined that the Plaintiff States lack standing. App.26a. The Eighth Circuit disagreed. App.5a. Rightly so. As the Eighth Circuit recognized, Missouri will suffer direct injury due to the program, because of the financial losses that the Secretary's plan will inflict on MOHELA. *Id.*

MOHELA is "a public instrumentality" of the State of Missouri. Mo. Rev. Stat. §173.360. It is "assigned to" Missouri's Department of Higher Education and Workforce Development. *Id.* §173.445. Missouri's Governor appoints five of MOHELA's seven board members with the advice and consent of the Missouri Senate. *Id.* §173.360. The governor may remove any board member for "misfeasance, malfeasance, willful neglect of duty, or other cause after notice and a public hearing." *Id.*

Missouri law tasks MOHELA with "an essential public function"—making sure "all eligible postsecondary education students have access to student loans" and providing financial support to Missouri's public colleges and universities. *Id.* In fiscal year 2022, MOHELA performed these functions, in part, by originating over $4 million in loans for Missouri students and contributing $6 million to various financial assistance programs managed by the State's Department of Higher Education. *See* MOHELA FY 2022 Financial Statements at 9–10, https://tinyurl.com/bdzbyrz8. MOHELA funds its performance of these "essential public function[s]" by servicing and providing support for Direct Loans. During fiscal year 2022, for example, MOHELA earned $88.9 million for servicing 5.2 million Direct Loan accounts. *See id*. at 4, 9.

Missouri law also requires MOHELA to distribute $350 million into a fund in the State Treasury for the Lewis and Clark Discovery Fund, *see* Mo. Rev. Stat. §173.385.2, a fund whose purposes include "funding of capital projects at public colleges and universities." *Id*. §173.392; *see also* MOHELA FY 2022 Financial Statements, at 20. MOHELA has yet to fund $105.1 million of this obligation. MOHELA FY 2022 Financial Statements, at 20.

There can be no dispute that the Secretary's Debt Cancellation will wipe out a significant number of the accounts MOHELA services. This, in turn, will slow or prevent MOHELA's fulfillment of its "essential public function[s]" of funding higher education in Missouri. And "a loss of even a small amount of money" is an injury that confers standing. *Czyzewski v. Jevic Holding Corp*., 137 S. Ct. 973, 983 (2017); *see also Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797-802 (2021) (concluding a $1 nominal damages award can satisfy the redressability prong of standing).

The government attempts to obscure this direct injury in a few ways. *First*, it tries to distance MOHELA from the State of Missouri, claiming—as the district court did—that MOHELA is an independent legal entity that is distinct from Missouri. This is a red herring, though. Missouri relies on MOHELA for funding several aspects of higher education in the State. MOHELA funds these "essential public function[s]" by servicing Direct Loans. And the mass cancellation will reduce the number of Direct Loan accounts for which MOHELA can earn revenue. Missouri, therefore, will suffer a concrete and particularized injury—a decrease in funding for the Lewis and Clark fund, financial assistance for Missouri students—if the cancellation wipes out a significant portion of MOHELA's revenue.

The government next argues that this injury is too removed from Missouri. According to the government, Missouri's theory of standing is akin to concluding that "banks could sue anyone who causes financial harm to their borrowers, credit-card companies could sue anyone who causes financial harm to their customers, and governments could sue anyone who causes financial harm to taxpayers." App. to Vac. at 17. But the government's analogy is inapt. Missouri created MOHELA to perform essential public functions *for the State*. *See* Mo Rev. Stat. §173.360. The cancellation impedes the goals Missouri sought to fulfill when it created MOHELA. Missouri is suing the government to protect its *own* interests, not the interests of some unrelated third party.

The government also suggests that finding standing here would "conflict[] with this Court's 'usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors.'" App. to Vac. at 17 (quoting *Clapper v. Amnesty Int'l*, *USA*, 568 U.S. 398, 414 (2013)). But Missouri's "theory of standing … does not rest on mere speculation about the decisions of third parties; it relies instead on the predictable effect of Government action"—a valid basis for standing under this Court's precedents. *Dep't of Commerce*, 139 S. Ct. at 2566.

Department of Commerce illustrates why Missouri's standing theory belongs to the "predictable effect of Government action" category that this Court accepts as a valid basis for standing. In *Department of Commerce*, several States challenged the Secretary of Commerce's choice to ask about respondents' citizenship status on the census questionnaire. *Id*. at 2563. The States' theory of standing relied on a multi-step causal chain. First, the States claimed that illegal immigrants residing in the States wouldn't respond to the census—even though it was illegal to refuse to respond—for fear that law enforcement would (illegally) use their citizenship status against them. *Id*. at 2565. This, in turn, could reduce those States' recorded populations. *Id*. Finally, the States argued, they would receive fewer federal funds tied to population. *Id*.

The United States argued, as it does here, that the States' alleged harms were not traceable to the challenged government action because such harm would depend on several layers of intervening, speculative third-party action—illegal immigrants choosing to violate their legal duty to respond to the census based on fears that the federal government would "itself break the law by using noncitizens' answers against them for law enforcement purposes." *Id*. at 2566. This Court responded: "[W]e are satisfied that, in these circumstances, respondents have met their burden of showing that third parties will likely react in predictable ways to the citizenship question, even if they do so unlawfully and despite the requirement that the Government keep individual answers confidential." *Id*. Because "Article III 'requires no more than *de facto* causality,'…traceability [was] satisfied." *Id*. (quoting *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.)).

It is far more "predictable," *id.*—if not certain—that the mass cancellation's significant reduction in MOHELA's main source of revenue will impede Missouri's ability to fund higher education in the State. Moreover, the cancellation will delay MOHELA in fulfilling its remaining $105 million dollar obligation to Missouri's Lewis and Clark Fund. These are concrete, and particularized harms that would be redressed by a favorable ruling in this case. This Court "may therefore consider the merits of" the Plaintiff States' claims. *Id.*

CONCLUSION

The Court should deny the Application to Vacate the Injunction.

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Respectfully submitted,

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