

# GAME OF LOANS: A COMPARATIVE ANALYSIS OF THE HIGHER EDUCATION ACT OF 1965 AND THE HEROES ACT AS FOUNDATIONS FOR BROAD STUDENT LOAN FORGIVENESS

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## *Abstract*

*In Biden v. Nebraska, the United States Supreme Court struck down the first iteration of President Biden's student loan forgiveness initiative, which used the Higher Education Relief Opportunities for Students Act (HEROES Act) as the basis for emergency student-loan debt cancellation. In the wake of this judicial upset, the Biden administration continues to propose new student loan forgiveness initiatives. But the Court's controversial decision has left many observers wondering: Why did Biden's original forgiveness plan fail? And what could the Biden administration have done differently to survive the Court's scrutiny? This Article seeks to answer these weighty questions, outlining the legal arguments around Biden's original forgiveness plan and explaining how the Higher Education Act of 1965 provides a better, constitutionally permissible vehicle for sweeping student loan forgiveness.*

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## INTRODUCTION

For nearly a century, the United States has helped fund student higher education through federal loans and financing. Since the 1950s, the federal government has funded college and postsecondary education with the alleged intention of making higher education more accessible.<sup>1</sup> However, far from accomplishing this goal, student loan debt in the United States has skyrocketed to a total of \$1.757 trillion.<sup>2</sup> Now, over 43 million borrowers agonize over increasing tuition costs, interest rates, and seemingly unsustainable payment plans. According to one 2021 report, the average borrower takes twenty years to pay off their student loan balance.<sup>3</sup>

Of late, the coronavirus pandemic has added to these pressures. Approximately 9.6 million Americans lost their jobs during the pandemic, posing new and unexplored challenges to the national and state economies.<sup>4</sup> These challenges called for government intervention. In March 2020, the pandemic incentivized Congress to pass the Coronavirus Aid Relief and Economic Securities Act, allotting \$2.2 trillion to relieve Americans of economic hardships brought on by the pandemic.<sup>5</sup> Federal agencies played an integral role in navigating this national crisis; perhaps most notably, the Department of Education (ED) paused student loan repayments and temporarily zeroed interest rates.<sup>6</sup> Both the Trump and Biden administrations extended this pause past its original expiration date, relying on the Higher Education Relief Opportunities for Students Act (HEROES Act).<sup>7</sup> This 2001 legislation, passed after the events of 9/11, enables the Secretary of Education to “waive or modify any statutory or regulatory provision applicable to the student financial assistance programs ... as the Secretary deems necessary in connection with a ... national emergency. ...”<sup>8</sup>

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1 Pamela Ebert Flattau et al., *The National Defense Education Act of 1958: Selected Outcomes*, INST. DEF. ANALYSES SCI. & TECH. POL’Y INST. 1, 2 (Mar. 2006), <https://www.ida.org/-/media/feature/publications/t/th/the-national-defense-education-act-of-1958-selected-outcomes/d-3306.ashx>.

2 *Consumer Credit*, BD. GOVERNORS FED. RES. SYS., [https://www.federalreserve.gov/releases/g19/HIST/cc\\_hist\\_memo\\_levels.html](https://www.federalreserve.gov/releases/g19/HIST/cc_hist_memo_levels.html) (last updated Mar. 7, 2024).

3 Melanie Hanson, *Average Time to Repay Student Loans*, EDUC. DATA INITIATIVE, <https://educationdata.org/average-time-to-repay-student-loans> (last updated Sept. 25, 2023).

4 Jesse Bennett, *Fewer Jobs Have Been Lost in the EU Than in the U.S. During the COVID-19 Downturn*, PEW RSCH. CTR. (Apr. 15, 2021), <https://www.pewresearch.org/fact-tank/2021/04/15/fewer-jobs-have-been-lost-in-the-eu-than-in-the-u-s-during-the-covid-19-downturn/>.

5 Pub. L. No. 116-136, 134 Stat. 281 (2020).

6 FED. STUDENT AID, U.S. DEP’T EDUC., *COVID-19 Loan Payment Pause and 0% Interest*, <https://studentaid.gov/announcements-events/covid-19/payment-pause-zero-interest> (last visited Mar. 21, 2024).

7 Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108-76, 117 Stat. 904 (codified at 20 U.S.C. §§ 1098aa–1098ee); Brief for the Petitioners, *Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (Nos. 22-506 & 22-535), 2022 WL 11728905 [hereinafter Brief for Petitioners]; Amy Howe, *In a Pair of Challenges to Student-Debt Relief, Big Questions About Agency Authority and the Right to Sue*, SCOTUSBLOG, (Feb. 13, 2023, 6:50 PM), <https://www.scotusblog.com/2023/02/in-a-pair-of-challenges-to-student-debt-relief-big-questions-about-agency-authority-and-the-right-to-sue/>.

8 20 U.S.C. § 1098bb(a)(1).

As the country approached the end of the coronavirus state of emergency, President Biden declared that the ED would end the student loan repayment pause and replace it with a nationwide student-debt relief program, granting nearly 40 million qualifying Americans up to \$20,000 in student loan forgiveness.<sup>9</sup> Under this framework, the ED would cancel up to \$20,000 in loans for Pell Grant recipients who have loans with the ED and “up to \$10,000 in debt relief to non-Pell Grant recipients.”<sup>10</sup> In order to be eligible for this relief, borrowers needed to have an individual income less than \$125,000 (or \$150,000 for married couples).<sup>11</sup>

Almost immediately after Biden announced this plan, however, six Republican states—Nebraska, Missouri, Arkansas, Iowa, Kansas, and South Carolina—filed suit, arguing that Biden overstepped his legal authority.<sup>12</sup> Challengers to the program insisted that the Secretary of Education’s actions have no legal basis in the HEROES Act, while the Biden administration maintained that its actions fell within the plain reading of the Act, specifically the clause endowing the Secretary of Education with the power to “waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Higher Education Act or HEA].”<sup>13</sup>

Ultimately, the Supreme Court of the United States reviewed the states’ challenge, and on June 30, 2023, ruled in the states’ favor in *Biden v. Nebraska*.<sup>14</sup> The Supreme Court held that “the HEROES Act provides no authorization for the Secretary’s plan when examined using the ordinary tools of statutory interpretation. . . .”<sup>15</sup> However, the Supreme Court’s decision did not entirely extinguish the Biden administration’s efforts.

On the same day that Chief Justice Roberts delivered the Court’s seemingly damning decision, President Biden announced a new student loan forgiveness plan.<sup>16</sup> Specifically, Secretary of Education Miguel Cardona “initiated a rulemaking

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9 Statements and Releases, THE WHITE HOUSE, *FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most* (Aug. 24, 2022),

<https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/>.

10 *Id.*; FED. STUDENT AID, U.S. DEP’T EDUC., *The Biden-Harris Administration’s Student Debt Relief Plan Explained*, <https://studentaid.gov/debt-relief-announcement> (last visited Mar. 21, 2024).

11 Statements and Releases, THE WHITE HOUSE, *supra* note 9.

12 Annie Nova, *What to Know About the Two Student Loan Forgiveness Cases the Supreme Court Will Hear Legal Arguments on in February*, CNBC, <https://www.cnbc.com/2022/12/23/what-to-know-about-the-legal-challenges-over-student-loan-forgiveness.html#:~:text=On%20Sept.,was%20vastly%20overstepping%20his%20authority> (last updated Dec. 23, 2022, 1:45 PM).

13 20 U.S.C. § 1098aa(b)(1).

14 143 S. Ct. 2355, 2376 (2023).

15 *Id.* at 2375.

16 Statements and Releases, THE WHITE HOUSE, *FACT SHEET: President Biden Announces New Actions to Provide Debt Relief and Support for Student Loan Borrowers* (June 30, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/30/fact-sheet-president-biden-announces-new-actions-to-provide-debt-relief-and-support-for-student-loan-borrowers/> [hereinafter *New Debt Relief for Student Loan Borrowers*].

process aimed at opening an alternative path to debt relief ... using the Secretary's authority under the Higher Education Act."<sup>17</sup> This article will outline Petitioners' and Respondents' arguments in *Biden v. Nebraska*, analyze the Court's final decision, and ultimately explain how the Higher Education Act of 1965<sup>18</sup> is the better statutory vehicle for broad student loan cancellation.

First, we begin by looking at the legislative history and intent of the HEROES Act.

## I. THE HEROES ACT OF 2003

### A. *Legislative History and Intent*

There are few events that so devastated the American people than the terrorist attacks of September 11, 2001. Domestic soil had not been attacked since the bombing of Pearl Harbor, and the plane crashes of 9/11 left 2977 people dead.<sup>19</sup> As the Bush administration worked on formulating emergency security measures, higher education leaders advocated for financial relief for military personnel affected by 9/11. A few months after 9/11, these advocacy efforts manifested in the Higher Education Relief Opportunities for Students Act (HEROES Act).<sup>20</sup> Congress modeled this legislation after the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991, which similarly enabled the Secretary of Education to "waive or modify" student-loan programs to assist "the men and women serving on active duty in connection with Operation Desert Storm. ..."<sup>21</sup>

When debating the HEROES Act on the House floor in December of 2001, the House of Representatives articulated their basis for supporting the bill, focusing on the terrorist attacks that occurred just three months earlier.<sup>22</sup> One representative, California Republican Howard McKeon, rose in support of the bill, proclaiming that it was crucial "to ensure that the Secretary of Education has the ability to address the needs of students, their families, institutions of higher education, and loan providers as they relate to the events of September 11."<sup>23</sup> Echoing Representative McKeon's sentiments, California Republican George Miller emphasized that "[t]his act [would] give the Secretary of Education the authority to adjust the laws governing student aid programs, if necessary, in response to the September 11 attacks. ..."<sup>24</sup> The very next month, President George W. Bush signed the bill into law, with the stated purpose being to "provide the Secretary of Education with

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17 *Id.*

18 Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219.

19 *How 9/11 Reshaped Foreign Policy*, COUNCIL FOREIGN RELS., <https://www.cfr.org/timeline/how-911-reshaped-foreign-policy> (last visited Mar. 21, 2024).

20 Pub. L. No. 107-122, 115 Stat. 2386 (2002).

21 Pub. L. No. 102-25, 105 Stat. 75; *Biden v. Nebraska*, 143 S. Ct. at 2391 (Kagan, J., dissenting).

22 147 Cong. Rec. H10891 (Dec. 19, 2001).

23 *Id.*

24 *Id.*

specific waiver authority to respond to conditions in the national emergency declared by the President on September 14, 2001.”<sup>25</sup> The Act was set to expire a year later, but in 2003, Congress extended the Act for two more years and expanded its applicability to borrowers affected by “war or other military operation or national emergency.”<sup>26</sup> In 2007, Congress made the Act permanent.<sup>27</sup>

Ultimately, the 2003 version of the Act built upon its 2001 predecessor, endowing the Secretary of Education with additional authority in cases of national emergency.<sup>28</sup> In fact, one could argue that the 2003 legislation more accurately reflected Congress’s original intent, as even the original 2001 legislation was promulgated with the expectation that the Secretary would need to intervene in future events.<sup>29</sup> Just one month after the 9/11 attacks, U.S. House Representative John Boehner stated that, while the HEROES Act of 2001 “addresses the issue arising from [the 9/11 attacks], [it] also allows the Secretary to address needs arising from incidents *that may occur in the future*.”<sup>30</sup> Representative Boehner thus foreshadowed the 2003 amendments and later applications of the Act.

### ***B. Text of the HEROES Act***

The HEROES Act provides, in relevant part,

Notwithstanding any other provision of law ... the Secretary of Education ... 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 (2).<sup>31</sup>

Paragraph (2) of this section details the scope of the Secretary’s authority under paragraph (1), explaining that the Secretary’s waiver / modification powers are limited to situations where invoking such power is “necessary to ensure” one of five public policy objectives.<sup>32</sup> The first of these policy objectives, and the one most relevant to this discussion, is “to ensure that ... recipients of student financial assistance under title IV of the [HEA] who are *affected individuals* are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals.”<sup>33</sup>

25 Pub. L. No. 107-122, 115 Stat. 2386, 2386 (2002) (amended 2003).

26 Pub. L. No. 108-76, 117 Stat. 904 (2003).

27 Pub. L. No. 110-93, 121 Stat. 999 (2007) (codified as amended 20 U.S.C. §§ 1098aa–1098ee).

28 147 Cong. Rec. H7133 (Oct. 23, 2001).

29 *Id.*

30 *Id.* (emphasis added).

31 20 U.S.C. § 1098bb(a)(1).

32 *Id.* § 1098bb(a)(2)(A–E)

33 *Id.* § 1098bb(a)(2)(A) (emphasis added).

Importantly, unlike its 2001 predecessor, the 2003 HEROES Act does not limit the definition of “affected individuals” to those affected by the events of 9/11.<sup>34</sup> As defined by the current legislation, “affected individuals” are those who “reside[] or [are] employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a *national emergency*,” and/or those who “suffered direct economic hardship as a direct result of a war or other military operation or *national emergency*, as determined by the Secretary.”<sup>35</sup> A “national emergency” is a “national emergency declared by President of the United States.”<sup>36</sup>

In essence, section 1098bb(a)(1), can be broken down into three clauses: the “notwithstanding” clause, the central operating clause, and the discretionary clause.<sup>37</sup> Looking at each of these clauses independently, the first clause in the provision is the “notwithstanding” clause (“Notwithstanding ... section. ...”), which exempts the Secretary from other statutory limitations.<sup>38</sup> This clause makes clear that the Secretary’s waiver and modification authority is not limited by *any other statutory provision*.<sup>39</sup> As the Supreme Court itself has noted, the “use of such a ‘notwithstanding’ clause clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override conflicting provisions of any other section.”<sup>40</sup> Thus, unless a statutory provision is enacted with specific reference to section 1098bb, the Secretary can exercise their own discretion.<sup>41</sup>

In fact, the third, or “discretionary clause,” states that the Secretary may invoke their authority as they “deem[] necessary in connection with a ... national emergency.”<sup>42</sup> In the instant case, the “national emergency” refers to the COVID-19 pandemic.

But what provisions is the Secretary permitted to waive or modify? The central operating clause provides that the Secretary’s waiver and modification authority applies to “statutory or regulatory provision[s] applicable to the student financial assistance programs under title IV [of the HEA].”<sup>43</sup> Title IV of the HEA governs student lending programs, including the Federal Direct Loan Program,<sup>44</sup> Federal

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34 20 U.S.C. § 1098; Memorandum from Christopher H. Schroeder, Assistant Att’y Gen., to the Gen. Couns. Dep’t Educ. (Aug. 23, 2022) (on file with U.S. Dep’t Just. webpage), <https://www.justice.gov/d9/2022-11/2022-08-23-heroes-act.pdf> [hereinafter Schroeder Memo].

35 20 U.S.C. §1098ee(2)(c)–(d) (emphasis added).

36 *Id.* §1098ee(4).

37 20 U.S.C. §1098bb(a)(1); Schroeder Memo, *supra* note 34, at 9.

38 20 U.S.C. §1098bb(a)(1); Schroeder Memo, *supra* note 34, at 9.

39 20 U.S.C. § 1098bb(a)(1); Schroeder Memo, *supra* note 34, at 9.

40 *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993); Schroeder Memo *supra* note 34, at 12; Brief for Petitioners, *supra* note 7, at 40.

41 20 U.S.C. § 1098bb(a)(1).

42 *Id.*

43 *Id.*

44 *Id.* §§ 1087a–1087j.

Family Education Loan (FFEL) Program,<sup>45</sup> and the Federal Perkins Loan Program.<sup>46</sup> These provisions dictate the terms and conditions of federal lending programs, the interest rates on loan balances, and the cancellation of loans for teachers and public service employees.<sup>47</sup> Thus, the HEROES Act authorizes the Secretary of Education to “waive or modify” any of these student-lending provisions.<sup>48</sup>

Once the Secretary of Education has invoked this authority under section 1098bb, they must then comply with two procedural requirements.<sup>49</sup> First, they must publish the waiver or modifications in the *Federal Register*, “includ[ing] the terms and conditions to be applied in lieu of such statutory and regulatory provisions”;<sup>50</sup> second, they must report the impacts of their action to the House of Representatives’ Committee on Education and the Workforce and the Senate’s Committee on Health, Education, Labor and Pensions of the Senate.<sup>51</sup> Those are the extent of the Secretary’s procedural obligations. The Secretary is not required to comport with ordinary rulemaking procedures, and they need not exercise their waiver/modification authority on a case-by-case basis.<sup>52</sup> In theory, this enables the Secretary to make quick decisions without fear of public disapproval or political chess games.

### C. *Prior Applications of the HEROES Act*

Since the enactment of the HEROES Act in 2003, the Secretary of Education has invoked the Act’s waiver and modification authority dozens of times.<sup>53</sup> First, in December of 2003, the Secretary published over a dozen waivers and modifications relating to procedural requirements under the HEA.<sup>54</sup> These waivers and modifications included changes to public service work requirements for loan cancellation, extensions on forbearance periods of Perkins loans, and changes to requirements for loan deferments.<sup>55</sup> In 2012, the Secretary made additional adjustments, leaving most of the 2003 alterations untouched, but waiving “annual

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45 *Id.* §§ 1071–1078-2; Congress discontinued the FFEL program in 2010, but—like the Perkins Loan Program—borrowers must still pay off their outstanding balances. Kat Tretina & Brianna McGurran, *What Are FFLELP Loans?*, FORBES ADVISOR, <https://www.forbes.com/advisor/student-loans/what-are-ffelp-loans/> (last updated June 4, 2021, 12:19 PM).

46 20 U.S.C. §§ 1087aa–1087ii.

47 *Id.* §§ 1098bb(a)(1), 1071–1078-2, 1087a–1087j, 1087aa–1087ii.

48 *Id.* § 1098bb(a)(1).

49 *Id.* §1098bb(b)(1)–(2), (c).

50 *Id.* §1098bb(b)(1)–(2).

51 *Id.* §1098bb(c).

52 *Id.* §1098bb(b)(3).

53 Brief for Petitioners., *supra* note 7, at 7–8.

54 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. 69, 312–18 (Dec. 12, 2003) [hereinafter Federal Student Aid Programs]; Brief for Petitioners., *supra* note 7, at 7.

55 Federal Student Aid Programs, *supra* note 54.

reevaluation requirements for borrowers” repaying loans under different repayment plans.<sup>56</sup>

More recently, in 2020, Secretary of Education Betsy DeVos invoked the HEROES Act in response to the coronavirus pandemic.<sup>57</sup> President Donald Trump declared the pandemic a national emergency on March 20, 2020,<sup>58</sup> and one week later, Secretary DeVos announced a student loan relief plan.<sup>59</sup> Under this regime, the U.S. ED zeroed federal student loan interest rates for a minimum of sixty days, enabled borrowers to suspend payments for two months, and authorized automatic suspended payments for certain defaulted borrowers.<sup>60</sup> Seven days later, Congress passed the Coronavirus Aid Relief and Economic Securities Act, which directed the Secretary to extend the suspensions through September 30, 2020.<sup>61</sup> A month before this extension was set to expire, President Trump issued a memorandum directing the Secretary to implement the “waivers and modifications” necessary to continue the student loan repayment pause and zeroed interest rates.<sup>62</sup> This memorandum extended the interest rate and repayment relief through December 13, 2020,<sup>63</sup> and when this relief was set to expire, Secretary DeVos turned again to the HEROES Act.<sup>64</sup> In early December, soon before the pause was set to lapse, Secretary DeVos issued a number of alleged “waivers “and “modifications” under the HEROES Act and extended the student loan repayment pause and interest rate through the end of Trump’s presidency.<sup>65</sup> In all these invocations, the “waived” or “modified” provisions were wholly procedural—that is, they dealt with application

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56 Federal Student Aid Programs (Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and the Federal Direct Loan Program), 77 Fed. Reg. 59311, 59317 (Sept. 17, 2012); Schroeder Memo, *supra* note 34, at 1.

57 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 (Dec. 11, 2020) [hereinafter DeVos HEROES Invocation]; Brief for Petitioners, *supra* note 7, at 8.

58 Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 13, 2020).

59 U.S. Dep’t Educ., Breaking News: Testing Waivers and Student Loan Forgiveness (Mar. 20, 2020), <https://www2d.gov/news/newsletters/edreview/2020/0320.html> (webpage deactivated); *Biden v. Nebraska*, 143 S. Ct. 2355, 2364 (2023).

60 DeVos HEROES Invocation, *supra* note 57.

61 Pub. L. No. 116-136, 134 Stat. 281 (2020).

62 Memorandum from Former President of the U.S. Donald J. Trump to the Sec’y Educ., 49585 (Aug. 8, 2020) (on file with the White House Archives) [hereinafter Trump Memo to Sec’y]; *Biden v. Nebraska*, 143 S. Ct. at 2364.

63 Trump Memo to Sec’y, *supra* note 62.

64 DeVos HEROES Invocation, *supra* note 57.

65 Press Office, U.S. Dep’t Educ., *Secretary DeVos Extends Student Loan Forbearance Period Through January 31, 2021, in Response to COVID-19 National Emergency* (Dec. 4, 2020), <http://web.archive.org/web/20201231233506/https://www.ed.gov/news/press-releases/secretary-devos-extends-student-loan-forbearance-period-through-january-31-2021-response-covid-19-national-emergency>; Diccon Hyatt, *Timeline: How Student Loan Forgiveness Reached Its Turning Point*, INVESTOPEDIA, <https://www.investopedia.com/student-debt-timeline-7112128#:~:text=Aug.,31%2C%202022> (last updated Feb. 23, 2023) (providing an insightful outline of the student loan relief initiatives from April of 2019 through February of 2023).

processes, fiscal calendars, repayment timelines, and administrative procedures. At most, they extended the eligibility of borrower defenses to repayment, which by extension, affected the borrower’s principal loan amount.

Hence, the Biden administration’s use of the HEROES Act to achieve mass student loan cancellation was the first attempt of its kind.

#### **D. The HEROES Act in *Biden v. Nebraska***

The controversy in *Biden v. Nebraska* centered around Secretary Cardona’s 2022 publication in the *Federal Register*, in which he claimed to “modify” two statutory provisions and three federal regulations.<sup>66</sup> First, Cardona “modified” 20 U.S.C. section 1087(a) and (e), which deal with the “program authority” and “terms and conditions of loans” under the Federal Direct Loan Program.<sup>67</sup> Next, he claimed to “modify” 20 U.S.C. section 1087(dd)(g), which governs the “terms of loans” under the Perkins Loan Program.<sup>68</sup> Looking next to the Code of Federal Regulations, Secretary Cardona “modified” the following regulations: 34 C.F.R. section 682.402, which deals (in part) with disability, unpaid refunds, and bankruptcy payments; 34 C.F.R. section 682.212, which governs the discharge of loan obligations; and 34 C.F.R. part 674, subpart D, which specifically prescribes student loan cancellation procedures.<sup>69</sup>

On appeal, the Supreme Court was asked to consider whether the HEROES Act enables the Secretary of Education to forgive nearly \$430 billion of federal student loan balances. President Biden and the Department of Education (Petitioners) argued “yes.”

##### *1. Arguments Regarding the Plain Text of the HEROES Act*

In their arguments to the Court, President Biden and the ED asserted that Secretary DeVos’s actions comported with the plain language of the HEROES Act.<sup>70</sup> Specifically, Petitioners argued that (1) the COVID-19 pandemic was a “national emergency” declared by the President of the United States<sup>71</sup>; (2) most borrowers eligible for student loan relief were “affected individuals”<sup>72</sup> because they “reside[d]” or were “employed”<sup>73</sup> in a declared disaster area; (3) even the few individuals who did not

<sup>66</sup> 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) (“modifying provisions of: 20 U.S.C. § 1087, which applies to the Direct Loan Program under 20 U.S.C. §§ 1087a & 1087e; 20 U.S.C. § 1087dd(g); and 34 C.F.R. pt. 674, subpart D, and 34 C.F.R. §§ 682.402 & 685.212...”) [hereinafter Cardona HEROES Invocation].

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Brief for Petitioners, *supra* note 7, at 34–37.

<sup>71</sup> Brief for Petitioners, *supra* note 7, at 34 (quoting 20 U.S.C. § 1098bb(a)(1)).

<sup>72</sup> Brief for Petitioners, *supra* note 7, at 35 (quoting 20 U.S.C. § 1098ee(2)).

<sup>73</sup> Brief for Petitioners, *supra* note 7, at 34 (quoting 20 U.S.C. § 1098ee(2)(C)).

reside in a disaster area were “affected individuals”<sup>74</sup> because they suffered “direct economic hardship”<sup>75</sup> as a result of the pandemic, “a national emergency”<sup>76</sup>; (4) and Secretary DeVos’s student loan discharge was a permissible “waiver” or “modification”<sup>77</sup> of provisions under title IV of the HEA.

In their brief to the Court, Respondents did not dispute that the pandemic was a “national emergency” within the purview of 20 U.S.C. section 1098ee(4).<sup>78</sup> In fact, Respondents largely ignored the Act’s plain text, instead relying on the major-questions doctrine,<sup>79</sup> a point that Petitioners were quick to expose within their own brief.<sup>80</sup> However, as an alternative argument, Respondents asserted that Secretary Cardona’s actions did not constitute a “waiver” or a “modification” within the meaning of the Act.<sup>81</sup> To support this argument, Respondents cited the Court’s precedent in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, where Justice Scalia stated that the term “modify” indicates only a slight or incremental change.<sup>82</sup> Respondents insisted that the Secretary’s forgiveness initiative “‘is effectively the introduction of a whole new regime’ of loan cancellation,”<sup>83</sup> which “exceed[ed] what the word ‘modify’ permits.”<sup>84</sup>

Respondents further argued that Secretary Cardona’s actions were not a “waiver,” declaring that “‘waiving’ a provision refers to an ‘agency’s discretionary decision to refrain from enforcing an existing statutory requirement.’”<sup>85</sup> In Respondents’ view, Secretary Cardona did not dismiss the existing statutory provision; he invented one.<sup>86</sup>

Heeding Respondents’ arguments, the first questions the Court asked of the Petitioners in oral arguments was whether the Secretary’s conduct constituted a waiver or modification and what the difference was between those defined terms.<sup>87</sup> On behalf of Petitioners, Solicitor General Elizabeth B. Prelogar argued that Secretary Cardona’s actions were both a waiver and a modification, as Secretary Cardona

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74 Brief for Petitioners, *supra* note 7, at 35 (quoting 20 U.S.C. § 1098ee(2)).

75 *Id.* (quoting 20 U.S.C. § 1098ee(2)(D)).

76 Brief for Petitioners, *supra* note 7, at 34 (quoting 20 U.S.C. § 1098ee(4)).

77 Brief for Petitioners, *supra* note 7, at 37–39 (quoting 20 U.S.C. § 1098bb(a)(1)).

78 Brief for State of Nebraska, et. al., *Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (Nos. 22-506 & 22-535) [hereinafter Brief for Respondents].

79 *Id.* at 30–36. See Part III.D.2 for major-questions doctrine analysis.

80 Brief for Petitioners., *supra* note 7, at 38 (“Respondents make little effort to square their contrary position with the Act’s text.”).

81 Brief for Respondents, *supra* note 78, at 45–46.

82 *Id.* (citing *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994)).

83 *Id.* at 46 (quoting *MCI Telecomm. Corp.*, 512 U.S. at 234).

84 *Id.*

85 *Id.* (*Waiver*, BLACK’S LAW DICTIONARY (11th ed. 2019)).

86 Brief for Respondents *supra* note 78, at 46.

87 Transcript of Oral Argument at 5–6, *Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (Nos. 22-506 & 22-535).

*waived* the title IV provisions of the HEA governing eligibility requirements for discharge and then *modified* those same provisions to include the new student loan forgiveness parameters.<sup>88</sup> Petitioners maintained that the plain reading of “waive or modify” simply indicates that the Secretary may in some way change the relevant provisions.<sup>89</sup> In Petitioners’ view, the Act not only allows, but *requires*, the Secretary to then publish in the *Federal Register* the “the terms and conditions to be applied *in lieu* of such statutory and regulatory provisions.”<sup>90</sup> Petitioners argued that the phrase “in lieu of” necessarily grants the Secretary authority to *create* new provisions; otherwise, the phrase “in lieu of” would be rendered superfluous.<sup>91</sup>

In their response to Petitioners’ argument, Respondents directed the Court’s attention back to Justice Scalia’s opinion in *MCI Telecommunications Corp.*, reiterating their position that the Secretary’s actions reached beyond the meaning of “modify” and that no “waiver” occurred.<sup>92</sup>

Ultimately, the Court agreed with Respondents. While the Court did not provide a true definition for the term “waiver,” it noted that—in prior cases, when a provision has been “waived”—it meant that compliance with that provision was no longer necessary.<sup>93</sup> But the Court’s vague definition meant little in the grand scheme of its opinion, as the Court held that Secretary Cardona’s actions did not constitute a “waiver” anyway.<sup>94</sup> Specifically, the Court spotted that Secretary Cardona’s purported “waiver” “identifie[d] no specific legal provision” as actually having been “waived”; it just vaguely referred to the plan as a “waiver.”<sup>95</sup> Thus, the Court honed its analysis on whether the Secretary Cardona’s actions could reasonably be said to constitute a “modification.” On this point, the Court held no.<sup>96</sup>

The Court noted Respondents’ argument that, in *MCI Telecommunications Corp.*, the Court interpreted the word “modify” to mean only slight or incremental change.<sup>97</sup> The Court held that this precedent is supported by even the plain meaning of the word, noting that Webster’s Dictionary defines “modify” as “to make more

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88 Transcript of Oral Argument at 5–6, *Biden v. Nebraska*, 143 S. Ct. 2355, 5 (2023) (Nos. 22-506 & 22-535).

89 Brief for Petitioners, *supra* note 7.

90 20 U.S.C. § 1098bb(b)(2); Transcript of Oral Argument at 65, *Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (Nos. 22-506 & 22-535).

91 Transcript of Oral Argument at 65, *Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (Nos. 22-506 & 22-535) “[T]he states have suggested there was something improper about adding the [student loan forgiveness] requirements in, but the HEROES Act directs [the Secretary] to do this. That subsection [1098bb](b)(2) specifically says he has to publish the terms and conditions for the loan program that are going to apply *in lieu* of the waived and modified provision.” *Id.*

92 Transcript of Oral Argument at 5–6, *Biden v. Nebraska*, 143 S. Ct. 2355, 102 (2023) (Nos. 22-506 & 22-535).

93 *Biden v. Nebraska*, 143 S. Ct. at 2370.

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.* at 2368–69 (citing *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 234 (1994)).

temperate and less extreme,' 'to limit or restrict the meaning of,' or 'to make minor changes in the form or structure of [or] alter without transforming.'"<sup>98</sup> Writing for the majority, Justice Roberts stated that "[t]he Secretary's plan has 'modified' the cited provisions only in the same sense that the French Revolution modified the status of the French nobility—it has abolished them and supplanted them with a new regime entirely."<sup>99</sup>

The Court acknowledged the Act's requirement that the Secretary publish a notice in the *Federal Register* "includ[ing] the terms and conditions to be applied in lieu of" the original statutory provisions"; but the Court held that this authority was limited to modifications, and that Secretary Cardona's actions went far beyond what the term "modify" allows.<sup>100</sup> The Court held that—in order to be a modification—"no new term or condition reported pursuant to § 1098bb(b)(2) may distort the fundamental nature of the provision it alters,"<sup>101</sup> because the law enables the Secretary to make modifications, not to "draft new substantive statutory provisions at will."<sup>102</sup> With this in mind, the Court concluded that the "the Secretary ha[d] drafted a new section of the [Higher] Education Act from scratch by 'waiving' provisions root and branch and then filling the empty space with new text."<sup>103</sup> In essence, the Court held that Petitioners' reading of the HEROES Act gave the Secretary unlimited power to dismantle any statutory scheme it desired and replace the provision with one more suitable to the Secretary's preferences.<sup>104</sup>

Ultimately, encapsulating the core of the Court's opinion, Chief Justice Roberts wrote,

In sum, the Secretary's comprehensive debt cancellation plan is not a waiver because it augments and expands existing provisions dramatically. It is not a modification because it constitutes "effectively the introduction of a whole new regime." And it cannot be some combination of the two, because when the Secretary seeks to *add* to the existing law, the fact that he has "waived" certain provisions does not give him a free pass to avoid the limits inherent in the power to 'modify.' However, broad the meaning of "waive or modify" the language cannot authorize the kind of exhaustive rewriting of the statute that has taken place here.<sup>105</sup>

Nonetheless, the Court's reasoning begs the question, how could the Secretary publish the new modifications and waivers "in lieu of" the old, without creating

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98 *Biden v. Nebraska*, 143 S. Ct. at 2368–69 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1952 (2002)).

99 *Biden v. Nebraska*, 143 S. Ct. at 2369 (quoting *MCI Telecom. Corp.*, 512 U.S. at 228) (quotations omitted).

100 *Id.* at 2371 (citing 20 U.S.C. § 1098bb(b)(2)).

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.* at 2372.

105 *Id.* at 2358 (quoting *MCI Telecom. Corp.*, 521 U.S. at 234).

new provisions? Justice Kagan, joined by Justices Jackson and Sotomayor, answered this question in the dissenting opinion, criticizing the majority for relying so intently on the term “modify.”<sup>106</sup> Specifically, Justice Kagan argued that one cannot isolate the terms “modify” and “waive” and still capture the meaning of the statute as a whole.<sup>107</sup> She refers to the terms “waive” and “modify” as “twin verbs,” a couplet that cannot be read in isolation.<sup>108</sup>

Accepting the majority’s definition of “modify,” Kagan offered the only definition of “waive” in the Court’s opinion: “to abandon, renounce, or surrender.”<sup>109</sup> Thus, she argued that—in the context of the HEROES Act—“waiver” means to eliminate a regulatory requirement.<sup>110</sup> Reading those terms together, Kagan explained that the HEROES Act authorizes the Secretary to slightly adjust student loan payment obligations, eliminate those obligations in their entirety, or take any action in between, so long as they deem it necessary in response to the national emergency.<sup>111</sup> Summarized in laymen’s terms, Justice Kagan argued: “The phrase ‘waive or modify’ [] says to the Secretary: ‘Feel free to get rid of a requirement or, short of that, to alter it to the extent you think appropriate.’”<sup>112</sup>

Justice Kagan concluded that the majority’s interpretation subverts the Act’s plain meaning, and posed the following question to highlight the alleged absurdity: “Would Congress have given the Secretary power to wholly eliminate a requirement [waive], as well as to relax it just a little bit [modify], but nothing in between?”<sup>113</sup> To Justice Kagan, “the answer is no, because Congress would not have written so insane a law.”<sup>114</sup>

Justice Kagan then retorted the majority’s interpretation of procedural requirements under section 1098bb(2).<sup>115</sup> Recognizing that the Secretary’s modifications would leave gaps in the statutory provisions, Justice Kagan noted that the Secretary *must* then publish the new terms and conditions of the provisions “‘in lieu of’ the old.”<sup>116</sup> She argued that—contrary to the majority’s holding—the Secretary’s ability to add these terms is not limited to modifications;<sup>117</sup> rather, the plain text of the HEROES Act *requires* the Secretary to supply new terms and conditions *regardless* of whether

106 *Id.* at 2394. (Kagan, J., dissenting) (“The majority’s cardinal error is reading ‘modify’ as if it were the only word in the statutory delegation.”).

107 *Id.* (“[I]n the HEROES Act, the dominant piece of context is that ‘modify’ does not stand alone. It is one part of a couplet: ‘waive or modify.’”).

108 *Id.* at 2392.

109 *Id.* (quoting BLACK’S LAW DICTIONARY 1894 (11th ed. 2019)).

110 *Biden v. Nebraska*, 143 S. Ct. at 2392 (Kagan, J., dissenting).

111 *Id.* at 2395.

112 *Id.*

113 *Id.* at 2394.

114 *Id.* at 2394–95.

115 *Id.* at 2392–93 (citing 20 U.S.C. § 1098bb(b)(2)).

116 *Id.* at 2393 (Kagan, J., dissenting) (citing 20 U.S.C. § 1098bb(b)(2)).

117 *Id.* at 2395 (Kagan, J., dissenting).

they are waiving or modifying the provision.<sup>118</sup> Thus, by Justice Kagan's analysis, "the Secretary may amend, all the way up to discarding, those provisions and fill the holes that action creates with new terms designed to counteract an emergency's effects on borrowers."<sup>119</sup> To Justice Kagan, Secretary Cardona did what the Act *required* of him—he modified "pre-existing law and, in so doing, applied new 'terms and conditions' 'in lieu of' the old."<sup>120</sup>

## 2. Arguments on the Major-Questions Doctrine

While Petitioners' arguments relied heavily on the purpose and plain language of the HEROES Act, Respondents built their case around the major-questions doctrine.

For context, in 2022 the Supreme Court rendered its landmark decision in *West Virginia v. Environmental Protection Agency*.<sup>121</sup> In that case, the Environmental Protection Agency (EPA) had imposed limits on power plants' greenhouse gas emissions, citing the Clean Air Act as the basis for its authority.<sup>122</sup> In this highly controverted opinion, the Court held that the EPA overstepped its authority, and Chief Justice Roberts formulated the "major-questions doctrine" as the basis for that holding.<sup>123</sup> Under this new doctrine, if an administrative agency's decision implicates a topic of great political or economic significance, it must point to something more than a plausible textual basis for the action; it must point to *clear congressional authorization*.<sup>124</sup> In *West Virginia v. EPA*, the Court held that the Clean Air Act provided an insufficient basis for the EPA's actions and that the EPA lacked clear congressional authorization for the emissions cap.<sup>125</sup>

In the wake of this decision, the major-questions doctrine became a formidable obstacle to administrative initiatives. Thus, it is unsurprising that the major-questions doctrine became the foundation of Respondents arguments in *Biden v. Nebraska*. In their brief to the Court, Respondents asserted that Biden's student loan forgiveness initiative was a matter of great "economic and political significance" implicating the major-questions doctrine.<sup>126</sup> Noting that the Secretary's actions would erase up to \$430 billion in student loan balances, Respondents argued that "[a] half-trillion dollar agency action is no 'everyday exercise of federal power,'" but rather an economic impact requiring clear congressional authority.<sup>127</sup> Respondents also argued that, even without the economic component, the political significance of Biden's plan necessitated a clear statement of authorization from Congress, stating

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118 *Id.* at 2393 (citing 20 U.S.C. § 1098bb(b)(1)).

119 *Id.* at 2393 (Kagan, J., dissenting).

120 *Id.* at 2394 (quoting 20 U.S.C. § 1098bb(b)(2)).

121 597 U.S. 697 (2022).

122 *Id.* at 707–17.

123 *Id.* at 723.

124 *Id.*

125 *Id.* at 732–35.

126 Brief for Respondents, *supra* note 78, at 31 (quoting *West Virginia*, 597 U.S. at 721).

127 *Id.* (quoting *NFIB v. OSHA*, 142 S. Ct. 661, 666–67 (2022)).

that “student-loan cancellation is a matter of ‘earnest and profound debate.’”<sup>128</sup> In their view, the inherent controversy around student-loan forgiveness demanded the heightened standard of the major-questions doctrine and “clear statement” rule.<sup>129</sup> Respondents maintained that the ED’s actions extended beyond the agency’s expertise; from their standpoint, the ED “is not equipped to balanc[e] the many vital considerations of national policy implicated’ by such a forgiveness program.<sup>130</sup> Rather, Respondents insisted that such “balancing is a task for Congress,” and a task that Congress could not have intended to delegate to the ED.<sup>131</sup>

In rebuttal, Petitioners argued that the case did not implicate the major-questions doctrine at all.<sup>132</sup> While they conceded that Biden’s forgiveness plan would have significant economic and political impacts, they asserted that the major-questions doctrine does not extend to government benefit programs.<sup>133</sup> Citing a litany of Supreme Court decisions, Petitioners noted that “[e]very [prior] case in which th[e] Court has invoked the major questions doctrine to invalidate an agency action involved an agency asserting the power to regulate, and not simply the provision of government benefits.”<sup>134</sup> In support, Petitioners explained that the major-questions doctrine protects the principles of separation of powers and seeks to incorporate a “‘practical understanding of legislative intent’”;<sup>135</sup> it thus applies to “‘assertions of ‘expansive regulatory authority’” over significant political and economic activity.<sup>136</sup> Petitioners asserted that broad grants of government welfare do not raise the same “‘reasons to hesitate’” as exercises of “‘regulatory authority’” because there is no encroachment on the lives of private citizens.<sup>137</sup>

Petitioners pointed out several other distinctions between Biden’s forgiveness plan and previous cases invoking a major-questions analysis.<sup>138</sup> For example, Petitioners argued that—unlike in *West Virginia v. EPA*—the statutory scheme here is not “‘vague,’ ‘cryptic,’ ‘ancillary,’ or ‘modest.’”;<sup>139</sup> rather, they asserted that the statutory authority is “direct, concrete, and central to the HEROES Act,” and that the Secretary’s plan was well within the ED’s “particular domain.”<sup>140</sup>

128 *Id.* (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006)).

129 *Id.*

130 *Id.* at 35 (quoting *West Virginia*, 597 U.S. at 729).

131 *Id.*

132 Brief for Petitioners, *supra* note 7, at 48.

133 *Id.*

134 *Id.* (citing *West Virginia*, 597 U.S. at 721; *NFIB v. OSHA*, 142 S. Ct. 661, 666 (2022); *Alabama Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021); *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014); *Gonzales v. Oregon*, 546 U.S. 243, 266–68 (2006)); *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 465–68 (2001); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–161 (2000)).

135 Brief for Petitioners, *supra* note 7, at 49 (quoting *West Virginia*, 597 U.S. at 723).

136 *Id.* (quoting *United States Telecom Ass’n v. FCC*, 855 F.3d 381, 421 (D.C. Cir. 2017)).

137 *Id.* (quoting *West Virginia*, 597 U.S. at 721–23).

138 *Id.* at 50.

139 *Id.* (quoting *West Virginia*, 597 U.S. at 721–26).

140 *Id.* at 51 (quoting *Alabama Ass’n of Realtors*, 141 S. Ct. at 2489).

Petitioners further contended that, as opposed to the carbon emissions cap challenged in *West Virginia*, Secretary Cardona's actions were neither "sweeping" nor "transformative";<sup>141</sup> rather, Petitioners asserted that the relief was tailored to a limited set of circumstances and a defined class of individuals.<sup>142</sup> Ultimately, Petitioners concluded that their case was "far afield from cases like *West Virginia*, where the Court found that the agency action at issue would have required a complete reorganization of American infrastructure,"<sup>143</sup> and implored the Court to hold that the major-questions doctrine did not apply.<sup>144</sup>

However, in anticipation of the Court's concerns, Petitioners offered an alternative argument: even if the major-questions doctrine *did* apply, the HEROES Act's unambiguous text provides "clear congressional authorization" for Secretary Cardona's plan.<sup>145</sup> Referring the Court back to the Act's plain text, Petitioners argued that "Congress's express grant of authority to the Secretary to waive and modify 'any' such Title IV provision cannot plausibly be read to exclude such obvious candidates for debt relief. . . ."<sup>146</sup> Rebutting Respondents' claim that Congress could not have intended to delegate the economics of student loan forgiveness to the ED, Petitioners argued that Congress has delegated that responsibility on numerous occasions.<sup>147</sup> As examples, Petitioners noted that Congress has authorized the Secretary to discharge Family Education Loans and Perkins Loans in cases of total disability or death<sup>148</sup> and to establish borrower defenses to repayment.<sup>149</sup> In essence, Petitioners summarized that "there is nothing surprising" about the Secretary's actions because discharge of student loans is "a quintessential form of debt relief Congress clearly could have contemplated."<sup>150</sup>

However, once again, the Court disagreed. Rejecting Petitioners' arguments, the majority analogized Secretary Cardona's program to the EPA's emissions cap in *West Virginia v. EPA*, holding that it raised comparable questions of economic and political significance.<sup>151</sup> The Court estimated that Biden's plan would "cost taxpayers" between \$469 billion and \$519 billion, having "ten times the 'economic impact' that [the Court] found significant in concluding that an eviction moratorium implemented by the Centers for Disease Control and Prevention triggered analysis under the major questions doctrine."<sup>152</sup> Given this comparison, the Court

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141 *Id.* at 50 (quoting *West Virginia*, 597 U.S. at 721–26).

142 *Id.* (citing 20 U.S.C. §§ 1098bb(a)(1)–(22), 1098ee(2), 1098bb(a)(2)(A)).

143 *Id.* (quoting *West Virginia*, 597 U.S. at 714).

144 *Id.* at 53.

145 *Id.*

146 *Id.* at 54 (quoting 20 U.S.C. § 1098bb(a)(1)).

147 *Id.*

148 *Id.* (citing 20 U.S.C. §§ 1087(a), 1087dd(c)(1)(F)(ii)).

149 *Id.* (citing 20 U.S.C. § 1087e(h)).

150 *Id.* (quoting *West Virginia*, 597 U.S. at 729).

151 *Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023).

152 *Id.*

held that there could be no “serious dispute” that Secretary Cardona’s actions raise questions of economic significance.<sup>153</sup> The Court also rejected Petitioners’ argument that government welfare programs do not implicate the major-questions doctrine.<sup>154</sup> Justice Roberts noted that the Court has never exempted government welfare programs from a major-questions analysis because major questions “have arisen from all corners of the administrative state.”<sup>155</sup> The Court explained that one of Congress’s “most important authorities is its control of the purse” and that it would be illogical to ignore the separation of powers concerns raised by an agency’s actions “simply because the Government is providing monetary benefits rather than imposing obligations.”<sup>156</sup>

Holding that the major-questions doctrine did apply, the Court quickly moved into the merits of the major-questions analysis. Looking for a clear statement of congressional authorization for Secretary Cardona’s actions, the Court found none.<sup>157</sup> Rather, the Court held that the scale of the Secretary’s program was unprecedented because “the plan exceeded the Secretary’s statutory authority.”<sup>158</sup>

In scathing rebuttal, the dissenting Justices lambasted the majority’s major-questions analysis.<sup>159</sup> Justice Kagan criticized the majority for evading the Act’s plain text and “resort[ing]” to the “so-called major-questions doctrine.”<sup>160</sup> As a threshold argument, Kagan rejected the notion that the major-questions doctrine even applied.<sup>161</sup> She rejected the majority’s position that this case shared “indicators from [the Court’s] previous major questions cases,”<sup>162</sup> adopting Petitioners’ view that the HEROES Act was neither “ancillary” to the student loan-forgiveness scheme nor outside the ED’s “particular domain.”<sup>163</sup> The dissent argued that “this delegation was the entire point of the HEROES Act,” that “[s]tudent loans are in the Secretary’s wheelhouse” and that Congress thought so too when it adopted the law.<sup>164</sup> Ultimately, Justice Kagan argued that the Court’s decision made the already anomalous major-questions doctrine that much more arbitrary, citing two main points.

First, Kagan suggested that the majority’s reliance on legislative history was self-serving; she pointed out that the suspension of student loan payments and interest accrual throughout the pandemic had an economic impact of over \$100 billion and

153 *Id.*

154 *Id.* at 2375.

155 *Id.* (quotation omitted) (citation omitted).

156 *Id.*

157 *Id.*

158 *Id.* at 2365.

159 *Id.* at 2391.

160 *Id.* (Kagan, J., dissenting)

161 *Id.* at 2398–99.

162 *Id.* at 2374.

163 *Id.* at 2398–99 (quoting *West Virginia v. EPA*, 597 U.S. 697, 721–26 (2022); *Alabama Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021)).

164 *Id.* at 2398 (Kagan, J., dissenting).

affected far more borrowers than Biden's forgiveness plan, yet the majority opinion did not address that comparison.<sup>165</sup> Second, Kagan shared Petitioners' view that the forgiveness plan's unparalleled *scale* was only proportional to the pandemic's "unparalleled *scope*."<sup>166</sup> Mirroring Petitioners' language, Justice Kagan explained that the Secretary's actions provided "unprecedented relief for an unprecedented emergency" but did not extend beyond what Congress authorized in the HEROES Act.<sup>167</sup> She argued that the Court's decision highlights an inherent flaw in the Court's "made-up" major-questions doctrine: it allows the Court to arbitrarily "kill significant regulatory action" when ordinary rules of statutory construction cannot sustain the Court's decision.<sup>168</sup> And—worse—Kagan argues, is that the Court's decision now "moves the goalposts" for when that doctrine applies.<sup>169</sup>

But, assuming for the sake of argument that the major-questions doctrine did apply, Kagan argued that the Secretary's actions were still authorized by a clear statement from Congress and that the HEROES Act is a "delegation both purposive and clear."<sup>170</sup> The dissent repudiated the majority's position that Congress could not have authorized the Secretary to implement such a forgiveness program, retorting that the HEROES Act was designed for precisely such action.<sup>171</sup> Justice Kagan noted that the Act was designed to "deal with national emergencies—typically major in scope, often unpredictable in nature."<sup>172</sup> From the dissent's perspective, Congress intended the Secretary to have broad discretion during national emergencies to relieve hardships on student-loan borrowers, and "drafted a statute saying as much."<sup>173</sup>

## E. Analyzing the Court's Decision

### 1. The Plain Language of the HEROES Act

Based on the rules of statutory interpretation, the Supreme Court's analysis should have centered around the plain text of the HEROES Act. The starting point in any statutory interpretation is to look at the statute's plain language, and as the Court itself has noted, it is "a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary, contemporary, common meaning at the time Congress enacted the statute."<sup>174</sup> If a statute's plain text is clear, the reviewing court must take the statutory provision at face value and enforce the statute according to its terms.<sup>175</sup>

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165 *Id.* at 2399.

166 Brief for Petitioners, *supra* note 7, at 52; *Biden v. Nebraska*, 143 S. Ct. at 2399 (Kagan, J., dissenting).

167 *Biden v. Nebraska*, 143 S. Ct. at 2399 (Kagan, J., dissenting).

168 *Id.* at 2400 (Kagan, J., dissenting).

169 *Id.* at 2399.

170 *Id.* at 2398.

171 *Id.*

172 *Id.* at 2396.

173 *Id.*

174 *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018).

175 *King v. Burwell*, 576 U.S. 473, 486 (2015).

Simply put, the HEROES Act authorizes 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 HEA].”<sup>176</sup> As Justice Kagan succinctly noted in her dissent, “[a]ny’ of the referenced provisions means, well, any of those provisions.”<sup>177</sup> Thus, the plain text of the HEROES Act authorizes the Secretary of Education to waive or modify *any* of the statutory or regulatory provisions governing student financial assistance programs, including provisions dealing with discharge of student loan balances.<sup>178</sup> But what is a waiver or modification?

Both the majority and dissent correctly noted that the ordinary meaning of “modify” is “to make more temperate and less extreme,’ ‘to limit or restrict the meaning of,’ or ‘to make minor changes in the form or structure of [or] alter without transforming.”<sup>179</sup> Likewise, *Black’s Law Dictionary* defines “modify” as “[t]o make somewhat different; to make small changes to,” or “[t]o make more moderate or less sweeping.”<sup>180</sup> Both the laymen and legal definitions of “modify” are consistent with the Court’s precedent in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, where the Court interpreted the word “modify” to mean only slight or incremental change.<sup>181</sup>

By contrast, the ordinary meaning of “waive” is to “refrain from insisting upon, ... to forbear to claim or demand.”<sup>182</sup> *Black’s Law Dictionary* similarly defines “waive” as “[t]o abandon, renounce, or surrender (a claim, privilege, right, etc.); to give up (a right or claim) voluntarily ... [t]o refrain from insisting on (a strict rule, formality, etc.); to forgo.”<sup>183</sup>

With these definitions in mind, we must read the words “modify” and “waive” together. As Justice Kagan correctly noted, one cannot read the terms in isolation,<sup>184</sup> “language, plain or not, depends on context.”<sup>185</sup>

Reading the terms together and substituting their definitions into the statute’s text, the statute reads, “[T]he Secretary may *make minor changes to or renounce/forgo* 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 ... national emergency.”<sup>186</sup> Thus, Justice Kagan correctly identified that the

176 20 U.S.C. § 1098bb(a)(1).

177 *Biden v. Nebraska*, 143 S. Ct. at 2392 (Kagan, J., dissenting) (quoting 20 U.S.C. § 1098bb(a)(1)).

178 20 U.S.C. §§ 1087, 1087dd(g); 34 C.F.R. pt. 674, subpt. D; 34 C.F.R. §§ 682.402, 685.212.

179 *Biden v. Nebraska*, 143 S. Ct. at 2368–69 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1952 (2002)).

180 *Modify*, BLACK’S LAW DICTIONARY (11th ed. 2019).

181 512 U.S. at 234 (1994).

182 *Waive*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/view/Entry/225159>.

183 *Waive*, BLACK’S LAW DICTIONARY (11th ed. 2019).

184 *Biden v. Nebraska*, 143 S. Ct. at 2394 (Kagan, J., dissenting).

185 *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991).

186 20 U.S.C. § 1098bb(a)(1); *Modify*, BLACK’S LAW DICTIONARY (11th ed. 2019); *Waive*, Black’s Law Dictionary (11th ed. 2019).

Secretary may “amend, all the way up to discarding” any of the title IV provisions governing student financial assistance programs.<sup>187</sup> The plain text of the HEROES Act overtly authorizes Secretary Cardona to “renounce” or “forgo” any of the student loan discharge requirements.<sup>188</sup> However, the majority opinion raised a legitimate concern about the procedural aspect of Cardona’s actions.

When interpreting section 10988bb(1), the majority agreed with Petitioners that the plain text of the HEROES Act permits the Secretary to “waive” certain student lending provisions under the HEA.<sup>189</sup> But the Court noted that the Secretary’s publications in the *Federal Register* never purported to waive any specific provision; they just vaguely referred to the Secretary’s actions as a waiver.<sup>190</sup> On this point, the majority was correct. The Secretary *referred* to his actions as both a waiver *and* a modification, but the body of the publication only purports to “modif[y]” the student loan discharge provisions.<sup>191</sup>

And if one reads the statutory provisions Secretary Cardona claims to “modify,” it is easy to see why the Court rejected Biden’s plain language argument. For instance, consider the second statutory provision Cardona claimed to “modify,” 20 U.S.C. section 1087(dd)(g). This provision reads,

If a student borrower who received a loan made under this part on or after January 1, 1986, is unable to complete the program in which such student is enrolled due to the closure of the institution, then the Secretary shall discharge the borrower’s liability on the loan (including the interest and collection fees) and shall subsequently pursue any claim available to such borrower against the institution and the institution’s affiliates and principals, or settle the loan obligation pursuant to the financial responsibility standards described in section 498(c).<sup>192</sup>

Secretary Cardona’s alleged modification reads,

[T]he Secretary modifies 20 U.S.C. 1087dd(g); and 34 CFR part 674, subpart D, and 34 CFR 682.402 and 685.212 to provide that ... the Department will discharge the balance of a borrower’s eligible loans up to a maximum of: (a) \$20,000 for borrowers who received a Pell Grant and had an Adjusted Gross Income (AGI) below \$125,000 for an individual taxpayer or below \$250,000 for borrowers filing jointly or as a Head of Household, or as a qualifying widow(er) in either the 2020 or 2021 Federal tax year; or (b) \$10,000 for borrowers who did not receive a Pell Grant and had an AGI on a Federal

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187 *Biden v. Nebraska*, 143 S. Ct. at 2393 (Kagan, J., dissenting); 20 U.S.C. § 1098bb(a)(1).

188 *Waive*, BLACK’S LAW DICTIONARY (11th ed. 2019).

189 *Biden v. Nebraska*, 143 S. Ct. at 2370.

190 *Id.*; Cardona HEROES Invocation, *supra* note 66, at 61514.

191 Cardona HEROES Invocation, *supra* note 66, at 61514. (“Pursuant to the HEROES Act, 20 U.S.C. 1098bb(a)(1), the Secretary *modifies* the provisions of: 20 U.S.C. 1087, which applies to the Direct Loan Program under 20 U.S.C. 1087a and 1087e; 20 U.S.C. 1087dd(g); and 34 CFR part 674, subpart D, and 34 CFR 682.402 and 685.212.”) *Id.* (emphasis added)

192 20 U.S.C. § 1087(dd)(g) (emphasis added).

tax return below \$125,000 if filed as an individual or below \$250,000 if filed as a joint return or as a Head of Household, or as a qualifying widow(er) in either the 2020 or 2021 Federal tax year.<sup>193</sup>

As shown, 20 U.S.C. section 1087(dd)(g) deals *very specifically* with those who are unable to complete their educational program “due to the closure of the institution.”<sup>194</sup> It requires an impressive degree of analytical acrobatics to “modify” that provision to include income-based student loan cancellation. The same logic applies to Cardona’s modification of 34 C.F.R. section 682.402; this regulation deals (in part) with disability, loan discharge due to death, unpaid refunds, and bankruptcy payments. One cannot reasonably stretch that regulation’s meaning to provide student loan cancellation for able-bodied, living, non-bankrupt borrowers.

A similar issue applies to the first statutory provision Cardona claims to modify, 20 U.S.C. section 1087(a). This provision outlines, very generally, the Secretary’s ability to disburse and purchase Federal Direct Loans.<sup>195</sup> Again, applying the plain meaning of the term “modify,” there is no way to “limit or moderate” this provision to include income-based student loan cancellation. The problem ultimately boils down to the Secretary’s overbroad publication in the *Federal Register*. Rather than systematically listing *each provision* he intended to modify and explaining the logical bridge between the old and new provisions, Cardona wrote a single page on debt discharge in which he claimed to *modify* five separate and entirely different provisions.<sup>196</sup>

As a point of reference for how attenuated Secretary Cardona’s forgiveness plan was from the provisions he claimed to modify, compare Secretary Cardona’s publications in the *Federal Register* to those published by former Secretary Betsy DeVos.

As mentioned earlier, Secretary DeVos also invoked the HEROES Act during the pandemic, “waiving” and “modifying” the title IV provisions governing loan interest rates. Specifically, Secretary DeVos waived 34 C.F.R. sections 682.202 and 682.209, the regulatory provisions governing interest rates on loans and repayment of loan balances.<sup>197</sup> In her publication in the *Federal Register*, the Secretary stated,

Section 682.209 provides that interest accrues on an FFEL loan during the interval between scheduled payments. On March 13, 2020, the President announced that the interest on all FFEL loans held by the Department and on all Direct Loans would be waived amid the coronavirus outbreak. ... On March 20, 2020, the Secretary announced that interest rates for such loans would be set to zero percent (0%) for a period of at least 60 days, during which time borrowers would have the option to suspend their monthly loan payments. ... [T]he Secretary is further extending ... the waivers of the regulatory provisions in §§ 682.202 and 682.209 that require that interest be

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193 Cardona HEROES Invocation, *supra* note 66, at 61514.

194 20 U.S.C. § 1087(dd)(g).

195 20 U.S.C. § 1087(a).

196 Cardona HEROES Invocation, *supra* note 66, at 61512–14.

197 DeVos HEROES Invocation, *supra* note 57, at 79862 (extending the waivers of 34 C.F.R. §§ 682.202, 682.209 (2022)).

charged on FFEL loans held by the Department from March 13, 2020, through March 27, 2020, and from October 1, 2020 through December 31, 2020.<sup>198</sup>

After reading 34 C.F.R. sections 682.202 and 682.209,<sup>199</sup> the average reader can see how Secretary DeVos's waiver is logically related to the cited provisions. Secretary DeVos waived the interest rates and repayment schedules, but she did not fundamentally replace the scheme with an unrelated scheme. This fact highlights the Biden administration's shortcomings; if Secretary Cardona had been more strategic in which statutory or regulatory provision he "waived" or "modified," or at least had been more specific in his modifications, his cancellation initiative may have fallen within the HEROES Act's authority.

For example, take Secretary Cardona's alleged modification of 34 C.F.R. part 674, subpart D, which specifically prescribes student loan cancellation procedures.<sup>200</sup> This regulatory provision details the numerous categories of employees that are eligible for federal student loan cancellation. These categories include teachers, nurses, librarians, firefighters, etc.<sup>201</sup> Hypothetically, Secretary Cardona could have "modified" this regulation to include a more inclusive group of professionals. He could have expanded the definition of "teachers" or waived the requirement that librarians have master's degrees, etc. Or, even better, Secretary Cardona could have modified other provisions under the HEA that govern student loan cancellation. For example, consider HEA sections 428J and 428K.<sup>202</sup>

These sections provide student loan forgiveness for teachers and those in "service in areas of national need."<sup>203</sup> Under section 428K, the Secretary of Education shall forgive "the qualified loan amount ... of the student loan obligations of a borrower who (A) is employed full-time in an area of national need ... and (B) is not in default on a loan for which the borrower seeks forgiveness."<sup>204</sup> This statute defines borrowers in "areas of national need" as early childhood educators, nurses, foreign language specialists, librarians, highly qualified teachers serving students in low-income/non-English proficient/underrepresented communities, child welfare workers, speech-language pathologists and audiologists, public sector employees, nutrition professionals, medical specialists, mental health professionals, dentists, physical therapists, STEM employees, superintendents and principals, and allied health professionals.<sup>205</sup> Again, under the plain reading of

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198 *Id.*

199 It is highly encouraged to read these provisions before looking at Secretary DeVos's waivers and modifications. Secretary DeVos's waivers and modifications serve as a strong example of the authority provided by the "waive" or "modify" authority under the HEROES Act. If Secretary Cardona had used these provisions as a template for the student loan forgiveness, this would have given the initiative a stronger foothold to use the statute's authority for this purpose.

200 Loan Cancellation. 34 C.F.R. pt. 674 (D) (2023).

201 Loan Cancellation. 34 C.F.R. pt. 674 (D) (2023).

202 20 U.S.C. §§ 1078-10, 1078-11.

203 *Id.*

204 20 U.S.C. § 1078-11(a)(1).

205 *Id.* § 1078-11(b).

section 1098 of the HEROES Act, the Secretary of Education could have expanded or “modified” the definition of “areas of national need” to include lawyers, plumbers, food service employees, or any category of worker he thought would be affected by the coronavirus pandemic. This at least would have formed a more logical bridge between the loan cancellation and the “national emergency.” The major-questions doctrine notwithstanding, perhaps then Cardona’s *modification* would have survived the Supreme Court’s scrutiny.

Instead, Secretary Cardona tied the student loan relief to statutory provisions and regulations that were too distantly related to the alleged modifications. Therefore, his actions did not constitute a “modification” under the HEROES Act, but rather a fundamental and illegal change to the student loan program.

But one of the easier ways for Secretary Cardona to have shielded the forgiveness plan from the Court’s axe would have been to *waive* the relevant loan provisions. Though the Court found that the plan was too sweeping to constitute a modification under the Act, it may have constituted a waiver. As mentioned earlier, a waiver is the abandonment of a privilege or right, or the decision to “refrain from insisting upon” some rule or obligation.<sup>206</sup> At the end of the day, Secretary Cardona was trying to renounce the ED’s claim to borrowers’ student loan balances or abandon the ED’s claim to that sum. The goal was waiver or *discharge*, which—as Justice Kagan identified in her dissent—is entirely permissible under the Act.<sup>207</sup> However, Secretary Cardona’s publication did not actually waive any specific provision; it only claimed to *modify*. That is why the Court struck down Petitioners’ textual argument: because the plan was an improper modification *advertised* as a waiver.

Thus, as is often the case, the problem rested not in the theory of Biden’s forgiveness plan, but rather in its execution. Whether the Secretary’s limited use of the word “modify” was a deliberate omission or a misnomer, this was a fatal oversight. If Secretary Cardona had instead purported to *waive* the discharge provisions, the plan may have had a firmer ground within the Act’s plain text.

## 2. *The Amorphous Major-Questions Doctrine*

Looking beyond the statute’s plain text, the more contentious debate centers around the Court’s major-questions analysis. There is no denying that the Supreme Court’s articulation of the major-questions doctrine in *West Virginia v. EPA* inflamed passions across the country. While Justice Kagan criticized the majority in *Biden v. Nebraska* for relying on the “made-up” major-questions doctrine,<sup>208</sup> the majority made a point to defend the doctrine, arguing that “while the major questions ‘label’ may be relatively recent, it refers to an identifiable body of law that has developed over a series of significant cases spanning decades.”<sup>209</sup> However, to many scholars, the major-questions doctrine was an overt judicial power grab dealing a devastating blow to the administrative state; or, at the very least, it demonstrated a shift away

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206 *Waive*, BLACK’S LAW DICTIONARY (11th ed. 2019).

207 *Biden v. Nebraska*, 143 S. Ct. at 2392–93 (Kagan, J., dissenting).

208 *Id.* at 2400.

209 *Id.* at 2374 (quotations omitted) (citation omitted).

from the traditional deference afforded to administrative agencies under *Chevron v. National Resource Defense Council*.<sup>210</sup> While some aspects of the Court's actions may be accredited to ideological differences on the role of administrative agencies, one must wonder, does the major-questions doctrine undermine the predictability of the Court's decisions? In other words, should scholars and lawyers worry about arbitrary judicial opinions influenced by political riptides? The Court's major-questions analysis in *Biden v. Nebraska* explains why the answer to those questions is "yes."

As explained above, a case triggers a major-questions analysis when the administrative action is of vast "economic and political significance."<sup>211</sup> Of course Biden's student loan forgiveness plan met that low threshold—but what administrative action doesn't? The essence of the administrative state, the very purpose for which agencies exist, is to make economically and politically significant decisions that Congress has neither the resources nor expertise to make on its own. As Justice Kagan noted in her dissent, "Congress delegates to agencies often and broadly ... for sound reasons. Because Congress knows that if it had to do everything ... *necessary* things wouldn't get done."<sup>212</sup>

For better or worse, the major-questions doctrine is the law, so the majority was justified to hold that the major-questions doctrine applied. Biden's forgiveness plan was concededly a question of economic and political significance, and Petitioners' argument that government benefit programs are exempted from a major-questions analysis was a somewhat of a reach. True, benefits programs are *less* problematic than regulatory programs in terms of separation of powers; the government benefit programs do not raise the same level of concerns about agencies usurping legislative power. However, the Court has never recognized an exception for benefits programs, and Justice Robert correctly noted that one of Congress's most important powers is its spending power. But, putting aside this "regulatory versus government-benefits" argument, even if the major questions doctrine objectively did apply, the Court erred in holding that Cardona's actions lacked clear congressional authority.

To support its position that Congress could not have authorized the ED's student loan forgiveness plan, the Court noted that no prior invocations under the HEROES Act had ever allowed for blanket discharge of loan balances.

To the Court's credit, the numerous invocations of the HEROES Act shed light on the scope of its applicability. And the HEROES Act has never been used for

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210 467 U.S. 837 (1984); *See generally* Alabama Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021); *See also* NFIB v. OSHA, 142 S. Ct. 661, 667 (2022); Rachel Reed, *What Critics Get Wrong—and Right—About the Supreme Court's New 'Major Questions Doctrine'*, HARV. L. TODAY (Apr. 19, 2023), <https://hls.harvard.edu/today/what-critics-get-wrong-and-right-about-the-supreme-courts-new-major-questions-doctrine/>; Jeevna Smith & Devon Ombres, *Loper Bright and Relentless: Ending Judicial Deference to Cement Judicial Activism in the Courts*, CTR. AM. PROGRESS (Jan. 10, 2024), <https://www.americanprogress.org/article/loper-bright-and-relentless-ending-judicial-deference-to-cement-judicial-activism-in-the-courts/#:~:text=Another%20path%20the%20court%20could,doctrine%20rests%20on%20the%20premise.>

211 *West Virginia v. EPA*, 597 U.S. 697, 721 (2022).

212 *Biden v. Nebraska*, 143 S. Ct. at 2397 (Kagan, J., dissenting) (emphasis added).

blanket student loan cancellation. However, as stated by proponents of Biden's forgiveness plan, "even if the direct cancellation of the principal balances of student loans would be a new application of the statute, novelty alone would not itself be a reason to conclude that an agency's exercise of statutory authority is unlawful."<sup>213</sup> On the surface, this assertion holds merit. The fact that no one has attempted broad loan cancellation through the HEROES Act does not itself make the attempt unlawful. As Justice Kagan noted, the Secretary's program was "unprecedented relief for an unprecedented emergency."<sup>214</sup>

At its core, the HEROES Act was intended to serve a simple purpose: to give the Secretary of Education broad authority in times of national crisis. In fact, anticipating the Court's review of *Biden v. Nebraska*, former Representative George Miller voiced his support in favor of the Biden administration, stating,

We [the House of Representatives] wanted to make sure that federal student-aid recipients who are affected by national emergencies are not placed in a worse position financially in relation to that financial assistance because of the emergency. And we thought the education secretary would be in the best position to determine how best to effectuate that goal.<sup>215</sup>

However, Respondents correctly noted that the Secretary's relief must be that which he deems necessary to ensure "affected individuals" are not left in a worse position because of a national emergency; they argued that the Secretary's plan did not prevent "affected individuals" from being left in a "worse position" because of the pandemic, but "place[d] them in a far better position by eliminating or reducing their loan principal."<sup>216</sup> As a nod to Respondents' point, the majority noted that Secretary Cardona implemented this plan in 2022, as the pandemic was (arguably) winding down.<sup>217</sup> Respondents argued not only that the program was too extensive but that it was too late. However, whether Secretary Cardona acted swiftly enough under the HEROES Act is a question separate and distinct from whether the Act offers clear congressional authorization for student loan forgiveness. Given the statute's plain text and legislative purpose, there is no question that the Act allows for some form of permanent student loan cancellation; the only question is what form that cancellation may take.

But given all the Court's concerns and the challenges raised by Respondents, it is fair to wonder, why did the Biden administration rely on HEROES at all? Surely the ED anticipated the challengers' arguments? The answer to this question can be summarized by Winston Churchill's adage: "Never let a good crisis go to waste."<sup>218</sup>

213 Schroeder Memo, *supra* note 34, at 18 (citing *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1750 (2020)).

214 *Biden v. Nebraska*, 143 S. Ct. at 2399 (Kagan, J., dissenting).

215 George Miller, *Can Biden Legally Cancel Student Debt? There's No Question* (Feb. 22, 2023 at 6:45 AM), <https://www.washingtonpost.com/opinions/2023/02/22/student-debt-cancellation-congress-heroes-act/>.

216 Brief for Respondents, *supra* note 78, at 30–36.

217 *Biden v. Nebraska*, 143 S. Ct. at 2374.

218 "Never Waste a Good Crisis," ELGL (Aug. 14, 2020), <https://elgl.org/never-waste-a-good-crisis-how-human-resources-networking-and-training-are-changing-during-these-turbulent-times/>.

When President Trump declared the pandemic a national emergency, the HEROES Act presented as a tool for the Biden administration to make good on its campaign promises to mitigate the student debt crisis. Best of all, the HEROES Act allowed the administration to evade traditional notice-and-comment rulemaking procedures and all the partisan stonewalling that comes with it. With that understanding, one cannot fault the administration for such thinking; as any administrative lawyer would say, notice and comment rulemaking is a tedious and time-consuming process. So, in all probability, the Biden administration likely saw the pandemic as an opportunity to evade other traditional and more laborious lawmaking procedures.

Ultimately, the Biden administration did not err in its decision to use the HEROES Act as a *channel* for student loan forgiveness. It did, however, use the Act improperly, and, in doing so, compromised its first student loan forgiveness initiative. Nonetheless, alternative—and potentially better—routes to mass student loan cancellation are available. More specifically, the Biden administration could rely on the Secretary of Education's compromise and modification authority under the Higher Education Act of 1965.

## II. THE HIGHER EDUCATION ACT OF 1965

On the same day that Chief Justice Roberts delivered the Court's opinion in *Biden v. Nebraska*, the Biden administration announced a new student loan forgiveness plan, this time relying on the Secretary of Education's authority under the Higher Education Act of 1965.<sup>219</sup> However, scholars and politicians had advocated for student loan cancellation through the HEA even prior to the Court's decision in *Biden v. Nebraska*.<sup>220</sup> After all, the HEROES Act ties itself to the title of the HEA governing financial assistance to students.<sup>221</sup> So, scholars ask, why not rely on the source legislation? To answer this question, we begin with an overview of the HEA's legislative history and purpose.

### A. Legislative History and Intent

The Higher Education Act of 1965 was arguably the most formative piece of legislation in higher education law. Prior to the adoption of the HEA, the only civilian federal student aid program was that proposed in President Eisenhower's National Defense Education Act of 1958 (NDEA).<sup>222</sup> The NDEA established the

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219 Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat 1219; *New Debt Relief for Student Loan Borrowers*, *supra* note 16.

220 Luke Herrine, *An Administrative Path to Student Loan Forgiveness* DEMOCRACY INITIATIVE (Dec. 2019), [https://rooseveltinstitute.org/wp-content/uploads/2021/08/GDI\\_Administrative-Path-to-Student-Debt-Cancellation\\_201912.pdf](https://rooseveltinstitute.org/wp-content/uploads/2021/08/GDI_Administrative-Path-to-Student-Debt-Cancellation_201912.pdf); Letter from Eileen Connor et al., Legal Dir. at Legal Serv. Ctr. for Harv. Law Sch., to Elizabeth Warren, U.S. Senator (Sept. 14, 2020), <https://static.politico.com/4c/c4/dfaddbb94fd684ccfa99e34bc080/student-debt-letter-2.pdf>.

221 20 U.S.C. § 1098bb(a)(1).

222 Pub. L. No. 85-864, 72 Stat. 1580; Matthew B. Fuller, *A History of Financial Aid to Students*, 44 J. STUDENT FIN. AID, 42, 51 (2014), <https://ir.library.louisville.edu/cgi/viewcontent.cgi?article=1078&context=jsfa>.

National Defense Student Loan System, later named the National Direct Loan System, and today known as the Perkins Loan Program.<sup>223</sup> Under this system, the federal government issued payments to the student's university, who then offered loans to the students with repayments beginning upon graduation.<sup>224</sup> For individuals, loans varied from \$1000 to \$5000 at a fixed interest rate of three percent with a ten-year payment term.<sup>225</sup>

But President Johnson rejected the ideology behind Eisenhower's NDEA lending program and Eisenhower's view that higher education was merely a means to fortifying a national military defense.<sup>226</sup> President Johnson himself had relied on loans throughout his own education and recognized that, to navigate the world, "higher education [was] no longer a luxury, but a necessity."<sup>227</sup> The Johnson administration believed that "the ability to pay for higher education should not be the controlling factor for educational attainment"<sup>228</sup>; hence came the Higher Education Act of 1965.

Seeking to increase the federal government's role in higher education policy making and make higher education more widely accessible, U.S. House Representatives Wayne Morse and Edith Green sponsored the HEA, with the Act's stated purpose being to "strengthen the educational resources of our colleges and universities and to provide financial assistance for students in postsecondary education."<sup>229</sup>

One form of assistance manifested in the form of an intermediary loan program called Guaranteed Student Loans (GSL), renamed the Federal Family Education Loan (FFEL) Program in 1992.<sup>230</sup> Before the HEA, students borrowed funds directly from the U.S. Treasury.<sup>231</sup> However, the Johnson administration wanted to protect students from reliance on private lending.<sup>232</sup> Recognizing that many banks would not be willing to participate in a lending program without some guarantee from the government, under the GSL program, the federal government backed, or

223 Fuller, *supra* note 223, at 51; National Defense Act of 1958, Pub. L. No.85-864, 72 Stat. 1580.

224 Fuller, *supra* note 223, at 51.

225 *Id.*

226 Gerhard Peters & John T. Woolley, *Statement by the President Upon Signing the National Defense Education Act*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/statement-the-president-upon-signing-the-national-defense-education-act> (last visited Mar. 21, 2024).

227 Angelica Cervantes et al., *Opening the Doors to Higher Education: Perspectives on the Higher Education Act 40 Years Later*, TG RSCH. & ANALYTICAL SERVS. 1, 12 (Nov. 2005), <https://files.eric.ed.gov/fulltext/ED542500.pdf>.

228 Cervantes et al., *supra* note 228, at 18.

229 Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat 1219; *Background Brief: Higher Education Act Reauthorization*, NAT'L ASS'N STUDENT AFFS. ADM'RS, <https://www.naspa.org/policypapers/background-brief-higher-education-act-reauthorization> (last visited Mar. 21, 2024). The original statute authorized federal funding for university libraries, community service involvement, teacher training programs, facilities maintenance, and student financial aid programs. Cervantes et al., *supra* note 228, at 19–27.

230 Fuller, *supra* note 223, at 54.

231 *Id.*

232 Cervantes et al., *supra* note 228, at 24.

“guaranteed,” loans between students and private lenders.<sup>233</sup> This program helped low-income and middle-class students obtain funding for higher education.<sup>234</sup>

As another part of Johnson’s plan to phase out the NDEA’s direct lending model, the HEA constructed the National Defense Student Loan Program, or the now Perkins Loan Program.<sup>235</sup> Proposed alongside the GSL program, the National Defense Student Loan Program included full loan forgiveness for students after they taught in underserved areas for seven years.<sup>236</sup> This program laid the foundation for changes made during the 1972 reauthorization of the HEA.

The 1972 reauthorization made several changes to federal aid administration, loosening student eligibility requirements and establishing new aid programs.<sup>237</sup> Perhaps most notably, this reauthorization created the Basic Educational Opportunity Grant, ultimately renamed the Pell Grant upon the HEA’s reauthorization in 1980.<sup>238</sup> Under this program, the federal government issued need-based financial aid to undergraduate students that—unlike the federal loans—did not require repayment.<sup>239</sup> When Congress reauthorized the HEA in 1992, it expanded these aid programs even further, extending unsubsidized loans to students regardless of their financial need, so long as they were at least enrolled half-time at a qualifying college or university.<sup>240</sup> The 1992 amendment also birthed the Free Application for Federal Student Aid (program as a model for income-based repayment).<sup>241</sup>

In sum, the HEA is the central authority for federal student financial aid programs, including Pell Grants, the Federal Direct Loan Program,<sup>242</sup> the FFEL Program,<sup>243</sup> and the Federal Perkins Loan Program.<sup>244</sup>

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233 Fuller, *supra* note 223, at 54; U.S. DEP’T OF EDU., FEDERAL STUDENT LOAN PROGRAMS DATA BOOK FY 1997–FY 2000, <https://www2.ed.gov/finaid/prof/resources/data/flspdata97-01/edlite-intro.html#:~:text=The%20GSL%20program%2C%20renamed%20the,1992%2C%20has%20experienced%20enormous%20growth> (last visited Mar. 21, 2024).

234 Fuller, *supra* note 223, at 54.

235 Cervantes, *supra* note 228, at 27.

236 *Id.*

237 Antoinette Flores, *Fact Sheet: A Legislative History of the Federal Government’s Reliance on Accreditation*, CTR. AM. PROGRESS (Nov. 27, 2018),

<https://www.americanprogress.org/article/fact-sheet-legislative-history-federal-governments-reliance-accreditation/>; Prior to the 1972 reauthorization, only students at accredited universities were eligible for aid; now, if a student’s university took reasonable steps toward accreditation or could show that the credits were accepted at three other accredited schools, the student could bypass the accreditation requirement altogether. *Id.*

238 *Id.*

239 CASSANDRIA DORTCH, CONG. RSCH. SERV., R45418, FEDERAL PELL GRANT PROGRAM OF THE HIGHER EDUCATION ACT: PRIMER (2023).

240 Heidi Rivera, *The Complete History of Student Loans*, BANKRATE (July 19, 2023), <https://www.bankrate.com/loans/student-loans/history-of-student-loans/#repaye>.

241 *Id.*

242 20 U.S.C. §§ 1087a–1087j.

243 *Id.* §§ 1071–1078-2.

244 *Id.* §§ 1087aa–1087ii.

### ***B. The Text of the Higher Education Act***

As the central authority for federal student aid, the HEA entails eight separate titles, together spanning nearly 1000 pages. However, the building blocks of a true student loan forgiveness plan presents in title IV, the source of the Secretary of Education's compromise authority.

Section 432 of the HEA provides, in relevant part,

[T]he Secretary may ... subject to the specific limitations in this part, consent to modification, with respect to rate of interest, time of payment of any installment of principal and interest or any portion thereof, or any other provision of any note or other instrument evidencing a loan which has been insured by the Secretary under this part ... [and] enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption ... [These transactions] ... shall be final and conclusive upon all accounting and other officers of the Government.<sup>245</sup>

Put briefly, the HEA authorizes the Secretary of Education to compromise/release loans as well as modify loan balances.<sup>246</sup> However, the text of section 432 provides that the Secretary's powers are "subject to the specific limitations in this part";<sup>247</sup> the only statutory constraint on the Secretary's compromise authority is imposed by 20 U.S.C. section 1082(b), which states,

The Secretary may not enter into any settlement of any claim under [Title IV] that exceeds \$1,000,000 *unless* (1) the Secretary requests a review of the proposed settlement of such claim by the Attorney General and (2) the Attorney General responds to such request, which may include, at the Attorney General's discretion, a written opinion related to such proposed settlement.<sup>248</sup>

The following sections of this article will explain the Secretary's authority under the HEA, the interplay between that authority and any statutory or regulatory constraints, and any foreseeable arguments by potential challengers and supporters of a student loan forgiveness scheme.

### ***C. Prior Applications of the Higher Education Act***

The HEA has been used as a vehicle for student loan cancellation for decades. In fact, the HEA endowed the Secretary of Education with their "compromise" authority since its initial enactment in 1965.<sup>249</sup> In the years that followed, the Secretary capitalized on this authority to alleviate loan balances. For example, in

245 *Id.* § 1082(a)(4), (a)(6), (b).

246 *Id.* § 1082(a)(5), (6).

247 *Id.* § 1082(a)(4).

248 20 U.S.C. § 1082(b); Letter from Eileen Connor et Al., *supra* note 221 (emphasis added).

249 Letter from Eileen Connor et Al., *supra* note 221.

1992, Congress proposed a “pilot version” of Income-Contingent Repayment, under which borrowers’ monthly loan payments were adjusted proportionally to the borrowers’ incomes.<sup>250</sup> Originally, eligibility for these loans was limited to Federal Direct Loan balances, but Congress later expanded the program’s applicability to include some FFEL and Parent Plus borrowers.<sup>251</sup> One of the most noteworthy student loan reforms came in 2007, however, with the passage of the College Cost Reduction and Savings Act (CCRA).<sup>252</sup> Signed into law by President Bush, the CCRA amended sections 1087e and 1088 of the Higher Education Act, establishing the Income-Based Repayment (IBR) and the Public Service Loan Forgiveness programs (PSLF).<sup>253</sup> Under the IBR program, the government capped borrowers’ monthly payments at either ten or fifteen percent, with remaining balances being forgiven after twenty or twenty-five years, depending on when the borrowers took out their loans.<sup>254</sup>

The PSLF was equally as transformative. Through the PSLF program, the Secretary of Education cancels a borrower’s remaining loan balance once he or she has made 120 monthly payments on an eligible Federal Direct Loan, if the borrower works for an eligible public service employer at the time he or she applies for forgiveness.<sup>255</sup> Both the IBR and PSLF programs are examples of how the Secretary of Education has exercised their compromise or modification authority under the HEA to discharge student loan balances.

The Secretary of Education has also exercised her authority under the HEA to “modify” student loans to a balance of zero.<sup>256</sup> In one case, *Carr et al. v. DeVos*, Plaintiffs sued the Secretary of Education, seeking discharge of student loan balances after being allegedly misled by their universities.<sup>257</sup> Plaintiffs Tina Carr and Yvette Colon were students at the Sandford-Brown Institute (SBI) who took out federal student loans to pay for their education; however, SBI allegedly misrepresented the employment opportunities available to students upon graduation, and when the Plaintiffs completed their respective programs, they were shocked to find that their degrees were effectively worthless.<sup>258</sup> When the Plaintiffs defaulted on their loans, they pursued a “borrower defense.”<sup>259</sup> Under this defense, when a student relies

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250 David Wessel & Persis Yu, *Income-Driven Repayment of Student Loans: Problems and Options for Addressing Them*, HUTCHINS CTR. FISCAL & MONETARY POL’Y 1, 3 (Mar. 2022), <https://www.brookings.edu/wp-content/uploads/2022/03/IDR-student-loan-report.pdf>.

251 *Id.*

252 Pub. L. No. 110-84, 121 Stat. 784 (2007).

253 Robert Wu, *America’s Unforgiving Forgiveness Program: Problems and Solutions for Public Service Loan Forgiveness*, 72 HASTINGS L.J. 959, 967–78 (2021); College Cost Reduction and Savings Act, Pub. L. No. 110-84, 121 Stat. 784 (2007) (amending 20 U.S.C. §§ 1087e, 1088).

254 Wessel & Yu, *supra* note 254, at 3.

255 *Id.*

256 *Carr et al. v. DeVos*, 369 F. Supp. 3d 554 (S.D.N.Y. 2019).

257 *Id.*

258 *Id.*

259 *Id.*

on a misrepresentation from his or her higher education institution regarding the institution's accreditation or postgraduation employment rates, the student may seek to be relieved of his or her obligation to pay their debt.<sup>260</sup> Plaintiffs sought a declaratory judgment relieving them of their obligation to pay on the grounds that "(i) the Secretary of Education is immune from suit; (ii) the specific loans that Plaintiffs received do not trigger a private right of action against the Secretary; and (iii) administrative remedies have not been exhausted."<sup>261</sup> Ultimately, Secretary Cardona exercised his authority under the HEA to "modify" Plaintiff Carr's direct loan balances to zero such that she was relieved of her obligation to pay.<sup>262</sup> Thus, the *Carr* dispute provides yet another example of how the Secretary of Education can use their compromise and modification authority under the HEA to effectively discharge student loan balances.

#### ***D. Arguments Under the Higher Education Act of 1965***

##### *1. The Secretary's Compromise, Release, and Waiver Authority*

As mentioned above, higher education policy makers have advocated for the use of the HEA as a basis for student loan cancellation for years now. These advocates have detailed their own analyses of the Secretary's authority under the HEA, arguing that the plain language of the statute enables a broad student loan forgiveness plan.<sup>263</sup> Proponents' plain text analyses hinge on the definitions of "compromise," "release," "waive," and "modify."

As pointed out by one scholar, *Black's Law Dictionary* defines "compromise" as "an agreement between two or more persons to settle matters in dispute between them."<sup>264</sup> *Black's Law Dictionary* similarly defines "release" as "[l]iberation from an obligation, duty, or demand" or "the act of giving up a right or claim to the person against whom it could have been enforced."<sup>265</sup> Thus, the terms "compromise," "release," and "waive,"<sup>266</sup> while not completely interchangeable, all indicate that the Secretary has the discretion to relinquish legal claims to "any right, title, claim, lien, or demand [under the HEA]."<sup>267</sup>

However, as anyone could have predicted, the Biden administration's new student loan forgiveness plan does not go unchallenged. The New Civil Liberties Alliance, which has previously represented challengers to Biden's student loan

260 *Id.*

261 *Id.*

262 *Id.*

263 Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat 1219; Letter from Eileen Connor et al., *supra* note 221.

264 *Compromise*, BLACK'S LAW DICTIONARY (11th ed. 2019); Herrine, *supra* note 221, at 24.

265 *Release*, BLACK'S LAW DICTIONARY (11th ed. 2019); Herrine, *supra* note 221, at 24.

266 See *supra* notes 109, 182–83, 207 and accompanying text.

267 20 U.S.C. § 1082(a)(6); "Whereas 'compromise' indicates situations in which a (potential) litigant settles a potential legal claim subject to an agreement with the person(s) against whom she has a claim, 'waive' and 'release' both indicate a unilateral decision to give up a (potential) legal claim, regardless of the reason why." Herrine, *supra* note 221, at 6.

plans, has openly questioned the legal basis of the ED's latest loan forgiveness plan.<sup>268</sup> Other critics have followed suit. So—as stated by one scholar—“the Department of Education's interpretation of the HEA may face the crucible of judicial review, requiring the Department to defend its view that the HEA permits widespread student loan forgiveness.”<sup>269</sup>

Challengers to this plan will likely rely on the one statutory constraint imposed by 20 U.S.C. § 1082(b), which states that the Secretary “may not enter into any settlement of any claim under [title IV] that exceeds \$1,000,000 unless (1) the Secretary requests a review of the proposed settlement of such claim by the Attorney General and (2) the Attorney General responds to such request.”<sup>270</sup> Challengers may argue that this language indicates the Secretary cannot discharge any sum *totaling* an excess of \$1,000,000 without the Attorney General's approval. The foreseeable argument is that the Secretary cannot unilaterally offer student loan forgiveness in excess \$1,000,000, thus undermining any sweeping loan forgiveness plan.

However, in anticipation of such arguments, proponents argue that the most “natural reading” of the provision governing the Secretary's compromise/release/waiver authority is that the Secretary must consult the Attorney General if he chooses to compromise/release an *individual* debt greater than \$1,000,000.<sup>271</sup> Given that the average student borrower in the United States has federal student loan debt of \$37,338, proponents argue that section 1082(b) is no obstacle to mass cancellation.<sup>272</sup> Further, even if there are borrowers who owe greater than the \$1,000,000 threshold, their debts can still be compromised; the Secretary need only “provide [the Department of Justice] an opportunity to review and comment on any proposed resolution of a claim arising under any Title IV program that exceeds \$1 million.”<sup>273</sup>

However, proponents also anticipate arguments from challengers regarding 34 C.F.R. section 30.70, a federal regulation explaining how the Secretary may compromise or terminate collection on a debt Subsection (a)(1) of this regulation provides that “the Secretary uses the standards in the [Federal Claims Collection Standards], 31 CFR part 902, to determine whether compromise of a debt is

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268 Ali Wong & Zachary Schermele, *Biden's Student Loan Forgiveness Talks Are Nearing an End. Here Are a Few Takeaways.*, USA TODAY (Feb. 22, 2024), <https://www.usatoday.com/story/news/education/2024/02/22/biden-student-loan-forgiveness-plan-meeting-updates/72633121007/#>.

269 Colin Mark, *May the Executive Branch Forgive Student Loan Debt Without Further Congressional Action?* 42 NAT'L ASS'N ADMIN. L. JUDICIARY 115 (2022), <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1691&context=naalj>.

270 20 U.S.C. § 1082(b).

271 Herrine, *supra* note 221, at 7.

272 Melanie Hanson, *Average Student Loan Debt*, EDUC. DATA INITIATIVE, <https://educationdata.org/average-student-loan-debt#:~:text=The%20average%20federal%20student%20loan,them%20have%20federal%20loan%20debt> (last updated May 22, 2023). Even accounting for medical students, who maintain the highest average student loan balance, the average debt amounts to \$200,000, far less than the HEA's \$1,000,000 maximum. *Id.*

273 20 U.S.C. § 1082(b); Letter from Eileen Connor et al., *supra* note 221, at 4.

appropriate *if the debt arises under a program administered by the Department, unless compromise of the debt is subject to paragraph (b) of this section.*" The Federal Claims Collection Standards (FCCS) issues additional policies and procedures for government debt collection that—if applicable—would hinder a student loan forgiveness plan.<sup>274</sup>

However, paragraph (b) of that same regulation states that "[f]or purposes of this section ... a program authorized under the Higher Education Act of 1965 ... is a [not] an applicable Department program."<sup>275</sup> Furthermore, paragraph (e)(1) of the same regulation states that "[t]he Secretary may compromise a debt in any amount, or suspend or terminate collection of a debt in any amount, if the debt arises under the Federal Family Education Loan Program ... the William D. Ford Federal Direct Loan ... or the Perkins Loan Program ... of the HEA."<sup>276</sup> Once again, the only limitation is that if the compromise is of a debt which exceeds \$1,000,000, the Secretary of Education must submit a request to the Department of Justice.<sup>277</sup>

Thus, proponents will argue that the plain text of 34 C.F.R. section 30.70(c) exempts programs under the HEA and that the FCCS does not constrain the Secretary of Education's authority to compromise, release, or waive loan balances. Furthermore, even if the Secretary of Education *were* constrained by 34 C.F.R. section 30.70(c), the Secretary could repeal or replace the regulation with one which gives the Secretary broader discretion.<sup>278</sup> However, this is an arduous process and one that is likely unnecessary.

The compromise of loan balances under the HEA aligns with how the Secretary has always used their authority under 20 U.S.C. section 1082(a)(5)—for example, with loan cancellation through the Public Service Loan Forgiveness program.<sup>279</sup> In fact, the Biden–Harris administration recently identified PSLF and IDR plans as potential avenues for student-loan cancellation. In February of 2024, the administration announced it would use the Secretary of Education's authority under the HEA to expand PSLF and IDR eligibility.<sup>280</sup> A month later, President Biden announced another plan awarding over \$5.8 billion in student debt forgiveness for public service workers, reducing the number of payments required before borrowers qualify for forgiveness. These new plans implement precisely the types of policies that this article proposes, and given the plain text of the HEA, there is no reason these efforts should be struck down.

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274 Federal Claims Collection Standards, 65 Fed. Reg. 70389 (Dec. 22, 2020).

275 34 C.F.R. § 30.70(b) (2017).

276 *Id.* § 30.70(e)(2).

277 *Id.*

278 Herrine, *supra* note 221, at 5.

279 Christian Paz, *The Supreme Court Just Struck Down Biden's Student Loan Forgiveness Plan. Here's Plan B.*, VOX.COM (Jun. 30, 2023, 4:46 pm), <https://www.vox.com/23762367/student-loan-forgiveness-supreme-court-biden-cancellation>.

280 Press Office, U.S. Dep't Educ., *Biden-Harris Administration Approves Additional \$5.8 Billion in Student Debt Relief for 78,000 Public Service Workers* (Feb. 21, 2024), <https://www.ed.gov/news/press-releases/biden-harris-administration-approves-12-billion-loan-forgiveness-over-150000-save-plan-borrowers>.

## 2. *The Secretary's Authority to Consent to Modification of Loan Balances*

While the Secretary may choose to exercise their authority to compromise, waive, or release a borrower's obligation to pay, they may also "consent to modification ... of interest, time of payment of any installment of principal and interest or any portion" of the HEA governed loans.<sup>281</sup> Proponents argue that "[m]odification of existing loans under Title IV programs is outside of" the FCCS, which "address compromise and settlement, but not modification."<sup>282</sup> Thus, the debate around the Secretary's modification powers would boil down to the plain meaning of "modification." At a glance, this would bring the HEROES Act conversation full circle, with courts once again battling over the plain meaning of "modification."

On this point, we would see similar arguments from both supporters and challengers of the plan, arguing over whether the term "modify" connotes small or incremental changes. However, proponents would add that—in the context of the HEA—"modification" has been known to include total cancellation of loan balances.<sup>283</sup> Pointing to the 2019 development in *Carr*, advocates assert that the Secretary's authority to "modify" includes the authority to reduce loan balances to zero.<sup>284</sup>

In response, one would expect challengers to reraise arguments regarding the limited definition of "modify" and of course, the major-questions doctrine. Given the scale of sweeping student loan forgiveness initiatives, the major-questions doctrine would almost certainly be implicated. However, just as in *Biden v. Nebraska*, advocates would argue that the HEA offers clear congressional authority for loan forgiveness.

As shown, a forgiveness plan rooted in the HEA would face similar obstacles to one based on the HEROES Act, with the major-questions doctrine being the most mercurial obstacle. However, the statement of congressional authorization for student loan cancellation is far clearer in the HEA than the HEROES Act. Thus, if a court applied the major-questions doctrine as it should, recognizing that the HEA contains a clear statement of congressional authorization, there is no legal reason why an HEA-based forgiveness plan should not survive a court's review.

### III. CONCLUSION

In summary, the HEA is the best statutory vehicle for a student loan forgiveness initiative. Given that the country is no longer in a state of national emergency due to the pandemic, the HEROES Act is no longer a feasible avenue for student loan relief. The Secretary of Education's compromise authority under the HEA provides a stronger, alternative statutory basis for widespread student loan forgiveness. The Secretary's compromise authority is only limited by two procedural requirements,

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281 20 U.S.C. § 1082(a)(6).

282 Letter from Eileen Connor et al., *supra* note 221, at 6.

283 *Id.*; Carr et al. v. DeVos, 369 F. Supp. 3d 554 (S.D.N.Y. 2019).

284 Letter from Eileen Connor et al., *supra* note 221, at 5 (citing *Carr*, 369 F. Supp. 3d 554).

and these limitations only apply in cases where the Secretary compromises individual claims greater than \$1,000,000.<sup>285</sup>

Based on the foregoing analysis, the wiser option for the Biden administration was to continue the student loan repayment pause using the HEROES Act, while simultaneously forming a forgiveness plan using the Secretary's compromise authority under the HEA. In conclusion, now that the pandemic has passed, the executive branch should continue to capitalize on the attention gleaned from its first loan forgiveness initiative and cancel student loans using the Secretary of Education's compromise authority under 20 U.S.C. section 1082 of the HEA.

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285 20 U.S.C. § 1082(b).