No. 22-535

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF EDUCATION, ET AL.,
Petitioners,

v.

MYRA BROWN, ET AL.,
Respondents.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether Respondents have Article III standing.

2. Whether Petitioners' Debt Forgiveness Program is statutorily authorized and was adopted in a procedurally proper manner.

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INTRODUCTION

Most agree that America's nearly $2 trillion of student-loan debt is a problem, but few agree how to solve it. Federal loan forgiveness raises a host of difficult questions—who gets left out, how much is forgiven, what effect it will have on the economy, and much more. Congress long ago decided that questions like these cannot be answered by the agency alone; they require maximally participatory procedures. Under the Higher Education Act and the Administrative Procedure Act, all regulations affecting student loans must go through both negotiated rulemaking and notice-and-comment. Together, these mandatory procedures give borrowers and other affected parties "meaningful input into the regulatory process," H.R. Rep. 105-481, at 145 (Apr. 17, 1998), and promote "fairness and informed administrative decisionmaking," *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979).

Yet the Secretary's Debt Forgiveness Program gives relief to 40 million borrowers without following these rulemaking procedures. Instead, the Secretary decided the key details of the Program behind closed doors, including which individuals will receive debt forgiveness, how much of their debt will be forgiven, and which types of debt will qualify. The result was predictable: some will benefit handsomely, some will be shortchanged, and others will be left out entirely.

Respondents are two individuals with federal student-loan debts. If the Secretary is going to provide debt forgiveness, Respondents believe their debts should be forgiven too. But Respondent Brown does

not qualify for debt forgiveness because the Program does not cover commercially held federal student loans that are not in default, and Respondent Taylor does not qualify for the full amount of debt forgiveness because he did not receive a Pell Grant in college. Respondents believe it is irrational, arbitrary, and unfair to exclude Brown from the Program just because her debt is commercially held and current, and to calculate the amount of debt forgiveness that Taylor receives based on the financial circumstances of his *parents*. Respondents want the opportunity to obtain tens of thousands of dollars in debt forgiveness. By adopting the Program without negotiated rulemaking and notice-and-comment, the Government deprived them of their "procedural right[s] to protect [their] concrete interests." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

The Government's only excuse for ignoring its rulemaking obligations is the HEROES Act—an uncontroversial bill designed to defer loan payments for soldiers fighting abroad. As the district court correctly held, the Act does not authorize the Secretary to cancel nearly half-a-trillion dollars in debts held by tens of millions of individuals. Indeed, it "strains credulity to believe that this statute grants the [Secretary] the sweeping authority that [he] asserts." *Ala. Ass'n of Realtors v. HHS*, 141 S.Ct. 2485, 2486 (2021).

While the district court correctly held that the HEROES Act does not authorize the Program, it incorrectly held that the Program was adopted in a procedurally proper manner. Because the HEROES Act does not authorize the Program, no statute excuses

the Secretary from his rulemaking obligations under the HEA and APA. The baseline procedures thus apply, and the Program was adopted in a procedurally improper manner. This Court should affirm the judgment below on that alternative ground.

STATEMENT OF THE CASE

Title IV of the Higher Education Act authorizes the Secretary of Education to issue student loans. Although loans generally must be repaid with interest, the Department has adopted regulations that permit debt forgiveness in various circumstances. Under the HEA and APA, all regulations concerning student loans must be adopted through a two-step process: first negotiated rulemaking, then notice-and-comment. Instead of following these procedures, the Secretary promulgated a half-trillion-dollar debt-forgiveness program by invoking the HEROES Act. Respondents sued the Government for failing to follow the proper procedures. After finding that Respondents had standing, the district court rejected their procedural arguments, but nevertheless vacated the Program because the HEROES Act does not authorize it.

A. The Higher Education Act

Federal loans are "[b]orrowed money for college or career school … [that] must be repaid with interest." *Types of Aid*, U.S. Dep't of Educ., perma.cc/7BCC-FL7B. Title IV of the HEA recognizes three student-loan programs: Federal Family Education loans, Direct loans, and Perkins loans. Br.3. About 43.5 million individuals currently have federal student loans, owing a collective $1.63 trillion. Br.3.

Though loans generally must be repaid, the HEA empowers the Secretary to implement dozens of loan-forgiveness and loan-repayment programs. *See Federal Student Loan Forgiveness and Loan Repayment Programs* 3, Cong. Rsch. Serv. (2018), bit.ly/3XEzhdt. The Secretary has adopted regulations to implement these programs. For example, borrowers employed in public service, such as teachers and public defenders, can have their loans forgiven. *E.g.*, 20 U.S.C. §1087ee(a)(2); 34 C.F.R. §§674.53, 674.57. Borrowers also can have their loans discharged when they experience certain unfortunate circumstances, such as permanent disability or bankruptcy. *E.g.*, 20 U.S.C. §1087(a)-(b); 34 C.F.R. §685.212. And borrowers can pause their monthly payments during times of financial or personal difficulty. *E.g.*, 20 U.S.C. §1087e(f); 34 C.F.R. §§685.204, 685.205. Beyond these programs, the HEA gives the Secretary general authority to "enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired." 20 U.S.C. §1082(a)(6); *see also id.* §§1087hh(2), 1087e(a)(1).

Under the HEA and APA, the Secretary must follow a two-step process for all regulations pertaining to student loans: (1) develop the proposed regulation through negotiated rulemaking, and (2) provide notice and an opportunity to comment.

Negotiated Rulemaking. The Department is "the only federal agency that must routinely use [a] process" known as "negotiated rulemaking." *Recalibrating Regulation of Colleges & Universities* 32, Report of the Task Force on Federal Regulation of

Higher Education (2015), perma.cc/KVV6-DMVP. Negotiated rulemaking brings an agency together with the various constituencies "affected by its regulations" to "discus[s]—and ideally reac[h] agreement on—the text of a proposed rule before it is issued." *Id.* "Unlike simple notice-and-comment rulemaking, the negotiated rulemaking process affords ample opportunities for the public to not only comment but also to understand the Department's proposed rules and policies." 87 Fed. Reg. 65904, 65907 (Nov. 1, 2022); *see* S. Rep. 102-204, at 58 (Nov. 12, 1991) (negotiated rulemaking "leads to fairer and more appropriate rules").

Negotiated rulemaking is "a mandatory step in the process" for "regulations related to student financial aid programs." *Recalibrating Regulation* 33. Specifically, the Secretary must use negotiated rulemaking for "[a]ll regulations pertaining" to Title IV of the HEA. 20 U.S.C. §1098a(b)(2). (Title IV, as a reminder, governs FFEL loans, Direct loans, and Perkins loans.) Under the negotiated-rulemaking process, the Secretary "shall obtain public involvement in the development of proposed regulations for" Title IV. §1098a (a)(1). In particular, the Secretary "shall obtain the advice of and recommendations from" the key stakeholders, including "students, legal assistance organizations that represent students, institutions of higher education, State student grant agencies, guaranty agencies, lenders, secondary markets, loan servicers, guaranty agency servicers, and collection agencies." *Id.* This collaboration ensures that "program participants [have] meaningful input" into all regulations affecting student loans. H.R. Rep. 105-481, at 145 (Apr. 17, 1998). The Secretary's proposed regulations "shall

conform to agreements resulting from such negotiated rulemaking" unless the Secretary "reopens" the process or "provides a written explanation to the participants" explaining the deviation. 20 U.S.C. §1098a (b)(2).

Notice and Comment. Negotiated rulemaking is "a supplement to the rulemaking provisions of the APA." *Recalibrating Regulation* 92. It "does not reduce in any way the agency's obligations to follow the APA process, to produce a rule within its statutory authority, or to adequately explain the result." *Id.*; *see* 5 U.S.C. §559. The Secretary thus cannot adopt a new rule except through notice-and-comment. 5 U.S.C. §553(b)-(c). The notice-and-comment process comes after the negotiated-rulemaking process. As it always does, notice-and-comment "gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes—and it affords the agency a chance to avoid errors and make a more informed decision." *Azar v. Allina Health Servs.*, 139 S.Ct. 1804, 1816 (2019).

B. The HEROES Act

In January 2002, four months after the September 11 terrorist attacks, Congress passed the HEROES Act to "provide the Secretary of Education with specific waiver authority to respond to conditions in the national emergency declared by the President on September 14, 2001." Pub. L. 107-122, 115 Stat. 2386 (Jan. 15, 2002). The HEROES Act let the Secretary "waive" and "modify" certain statutory and regulatory provisions to ensure that student-loan borrowers affected by September 11 were not "placed in a worse

position financially." *Id.* §2(a)(2)(A). Congress granted the Secretary this power "so that reservists leaving their jobs and families may be relieved from making student loan payments for a time." 147 Cong. Rec. H10891, H10892 (Rep. McKeon) (Dec. 19, 2001).

Because of the country's national emergency, Congress let the Secretary issue the waivers and modifications authorized by the Act without negotiated rulemaking or notice-and-comment. Pub. L. 107-122, §2(b)(1), (d). The Act was uncontroversial, passing by voice vote in the House and by unanimous consent in the Senate. 147 Cong. Rec. H10938 (Dec. 20, 2001); 147 Cong. Rec. S13311 (Dec. 14, 2001).

In August 2003, shortly after the start of the Iraq War, Congress reauthorized and amended the HEROES Act. Pub. L. 108-76, 117 Stat. 904 (Aug. 18, 2003). Once again, Congress sought to give "the Reservists who are leaving from their jobs to go overseas right now relief from making student loan payments for a period of time while they are away." 149 Cong. Rec. H2521, H2522 (Apr. 1, 2003) (Rep. Garrett). The Act accomplished this goal by letting the Secretary "waive" and "modify" certain statutory and regulatory provisions to ensure that student-loan borrowers affected by a war, military operation, or national emergency are not "placed in a worse position financially." 20 U.S.C. §1098bb(a)(2). The HEROES Act of 2003 was again uncontroversial, passing the Senate by unanimous consent and the House by a vote of 421-1.[1]

[1] Representative Miller, the only "nay" vote, later explained that his vote was a mistake and that he "meant to vote 'yea.'" 149 Cong. Rec. E663 (Apr. 3, 2003).

149 Cong. Rec. H2553 (Apr. 1, 2003); 149 Cong. Rec. S10866 (July 31, 2003). Following its passage, the Secretary issued waivers and modifications to make it easier for reservists and other affected individuals to defer their student-loan payments. 68 Fed. Reg. 69312, 69316 (Dec. 12, 2003).

In 2005, Congress reauthorized the Act for another two years. Pub. L. 109-78, 119 Stat. 2043 (Sept. 30, 2005). The reauthorization was again designed to "ensure that those men and women serving in Iraq who have Federal student loans [will] not have to make payments on those loans while they are serving overseas." 151 Cong. Rec. H8111 (Sept. 20, 2005) (Rep. Van Hollen). As before, the Act passed by voice vote in the House and by unanimous consent in the Senate. *Id*. at H8112; 151 Cong. Rec. S10520 (Sept. 27, 2005). Following its passage, the Secretary extended the expiration date for the waivers and modifications that were issued in 2003. 70 Fed. Reg. 61037 (Oct. 20, 2005).

As the wars in Afghanistan and Iraq continued, Congress made the HEROES Act permanent in 2007. Pub. L. 110-93, 121 Stat. 999 (Sept. 30, 2007). Congress sought to "send a strong message of support to our troops" by giving them "the peace of mind that this program will continue throughout the duration of their current or any subsequent deployment." 153 Cong. Rec. H10789, H10790 (Sept 25, 2007) (Rep. Kline). The Act again passed by voice vote in the House and by unanimous consent in the Senate. *Id*. at H10790-91; 153 Cong. Rec. S12316 (Sept. 27, 2007). Following the 2007 reauthorization, the Secretary

again extended the waivers and modifications that were made in 2003. 72 Fed. Reg. 72947 (Dec. 26, 2007); *see also* 77 Fed. Reg. 59311 (Sept. 27, 2012) (same); 82 Fed. Reg. 45465 (Sept. 29, 2017) (same). Until now, the Secretary had never forgiven any individual's student-loan debt through the HEROES Act. App.293-94.

C. The Debate over Canceling Student Loans

Historically, few elected officials advocated for broad cancellation of student-loan debts. *See* Berman, *Where the 2020 Candidates Stand on Student Debt & College Affordability*, MarketWatch (July 30, 2019), perma.cc/TY4P-D99L. But things changed by 2019. Many were arguing that "[c]rushing student debt ha[d] reached crisis levels in America requiring big, bold solutions." *Press Release*, Sen. Warren (July 23, 2019), perma.cc/L9D4-ASRY (quoting Rep. Clyburn). Canceling student-loan debts, they believed, would "end the student debt crisis, help millions of struggling families obtain financial stability, and … begin to close the racial wealth gap." *Id.*

During the 2019-2020 legislative session, "[m]ore than 80 student loan forgiveness bills and other student loan legislation [were] introduced" in Congress. Kantrowitz, *Year in Review: Student Loan Forgiveness Legislation*, Forbes (Dec. 24, 2020), perma.cc/RKW4-TEJW. For example, in July 2019, Representative Clyburn and Senator Warren proposed the Student Loan Debt Relief Act of 2019, which would have cancelled up to $50,000 in student-loan debt for every person with a household income of $100,000 or less. *See* H.R. 3887, 116th Cong. §101(b) (2019); S. 2235,

116th Cong. §101(b) (2019). Opponents argued, among other things, that broad debt forgiveness was "fundamentally unfair" because it would force union members, community-college graduates, and other taxpayers to subsidize wealthier individuals who had borrowed heavily to receive "great degrees." Hearing Before the H. Comm. on Fin. Servs., 116th Cong. 56 (Sept. 10, 2019) (Rep. Duffy). The 116th Congress declined to pass any debt-forgiveness bill.

In the run-up to the 2020 election, nearly every Democratic presidential candidate proposed some type of student-loan forgiveness. Nova, *Where the 2020 Democratic Candidates Stand on Student Debt*, CNBC (Sept. 21, 2019), perma.cc/AF47-JRNY. Then-candidate Biden proposed to "forgive all undergraduate tuition-related federal student debt from two- and four-year public colleges and universities for debt-holders earning up to $125,000." Sen. Biden, *Joe Biden Outlines New Steps to Ease Economic Burden on Working People*, Medium (Apr. 9, 2020), perma.cc/X3ZN-X27T. Weeks before the election, Biden reiterated his commitment, promising that "I'm going to eliminate your student debt if you come from a family [making less] than $125,000 and went to a public university." Minsky, *Biden Affirms: "I Will Eliminate Your Student Debt,"* Forbes (Oct. 7, 2020), perma.cc/8NXW-79X4.

Following the presidential election, many elected officials urged the President to cancel debts through executive action. Most prominently, Senator Schumer, Representative Pressley, and others introduced

resolutions urging the President "to take executive action to broadly cancel Federal student loan debt." S. Res. 46, 117th Cong. (Feb. 8, 2021); H. Res. 100, 117th Cong. (Feb. 4, 2021). According to these resolutions, the President could act unilaterally because "Congress ha[d] already granted the Secretary of Education the legal authority to broadly cancel student debt under section 432(a) *of the Higher Education Act of 1965* (20 U.S.C. 1082(a))." *Id.* (emphasis added); *see* 20 U.S.C. §1082(a) ("[T]he Secretary may … compromise, waive, or release any right, title, claim, lien, or demand, however acquired."). In response, the President asked the Secretary to draft a memorandum outlining his legal authority to forgive student loans. Egan, *Biden to Review Executive Authority to Cancel Student Debt*, NBC News (Apr. 1, 2021), perma.cc/849S-FC5A.

D. The Debt Forgiveness Program

In the summer of 2022, reports emerged that the White House was considering forgiving student-loan debt for tens of millions of borrowers. *See* Pager, *Latest White House Plan Would Forgive $10,000 in Student Debt Per Borrower*, Wash. Post (May 27, 2022), perma.cc/QUN2-X9QX. But instead of promulgating a new rule through negotiated rulemaking and notice-and-comment, executive-branch officials secretly debated and decided the countless issues implicated by broadscale debt relief, including the amount of debt to forgive, the types of loans to cover, the metrics for identifying borrowers in need, the program's effects on inflation, the Secretary's legal authority, and more. App.176-81.

On August 24, the White House announced that it would immediately implement a new debt-forgiveness program. App.195. Under the Program, those who received a Pell Grant in college would get up to $20,000 in debt forgiveness, while those who did not would get $10,000. App.258. Although "[m]ost federal student loans" would qualify, individuals with federal loans that are commercially held and not in default would not be eligible. App.199-201. Borrowers in the top 5% of incomes—individuals making more than $125,000 individually or $250,000 as a household—also were ineligible. App.258; *Fact Sheet*, The White House (Aug. 24, 2022), perma.cc/4AWB-5E6W. Though prior executive loan-forgiveness proposals had focused on the HEA, the Government claimed that its new program was authorized by the HEROES Act. App.258-59. This legal justification was widely criticized, even by those supporting debt cancellation. *See, e.g.*, Shugerman, *Biden's Student-Debt Rescue Plan Is a Legal Mess*, The Atlantic (Sept. 4, 2022), perma.cc/SA7E-MJYB (acknowledging that "COVID is not the real reason for such a sweeping program" and criticizing the Department for not relying on Section 1082 of the HEA, whose purpose "fit[s] the real structural social reasons for the Biden administration's broad policy").

For most of September, the Government told the public that "borrowers with privately held federal student loans, such as through the FFEL … progra[m], can receive this relief by consolidating these loans into the Direct Loan Program." App.201. But in late September, after six States filed suit, the Government changed course, announcing that "[a]s of Sept. 29, 2022," borrowers with federal student loans that are

privately held "**cannot** obtain one-time debt relief by consolidating those loans into Direct Loans." App.215. The Government promised to continue "assessing whether there are alternative pathways to provide relief" to borrowers with these loans, "including FFEL Program … Loans." App.216.

On September 27, a month after announcing the Program, the Secretary sent a memorandum to two Department officials stating that he was implementing the Program by "issuing waivers and modifications" through the HEROES Act. App.261-62. The Secretary instructed these officials to implement the Program immediately. App.262.

On October 12, the Secretary published a document in the Federal Register that purported to implement the Program by "modif[ying]" certain statutory and regulatory provisions. 87 Fed. Reg. 61512, 61514 (Oct. 12, 2022). Specifically, the Secretary claimed to "modif[y]" five sets of provisions that authorize certain loan discharges. *Id.* at 61514 (citing 20 U.S.C. §1087; 20 U.S.C. §1087dd(g); 34 C.F.R. Part 674, Subpart D; 34 C.F.R. §§682.402, 685.212). Through these supposed "modifications," the Secretary claimed the authority to discharge loans according to the Program's specific terms. *Id.*

The administrative record contains no estimate of the Program's costs, but the nonpartisan Congressional Budget Office estimates that the Program will cost over $400 billion. *Costs of Suspending Student Loan Payments and Canceling Debt*, Cong. Budget

Off. (Sept. 26, 2022), perma.cc/2N85-PRGL. That figure is four times bigger than the Department of Homeland Security's annual budget, *Agency Profiles*, USAspending.gov, perma.cc/H7AA-B3EZ, and 47 times bigger than the estimated cost of the EPA's Clean Power Plan, *Clean Power Plan By The Numbers*, EPA (Aug. 3, 2015), perma.cc/5PJG-PNSR. Other economists put the number even higher, estimating that the Program will cost between $469 and $519 billion. App.108.

E. Proceedings Below

Respondent Myra Brown is a graduate of the University of Texas at El-Paso and the Cox School of Business at Southern Methodist University. App.188. To pay for her studies, she received FFEL loans. App.188. Brown currently has more than $17,000 in federal student-loan debt. App.188. Yet she is ineligible for debt forgiveness under the Program because her loan is commercially held and not in default. App.189.

Respondent Alexander Taylor is a graduate of the University of Dallas. App.190. To pay for his studies, Taylor received student loans through the Direct Loan Program. App.190. He currently has more than $35,000 in federal student-loan debt. App.190. Yet Taylor is ineligible for the full $20,000 in debt forgiveness because his parents made too much money for him to receive a Pell Grant in college. App.190-91.

If the Secretary is going to provide debt forgiveness, Respondents believe that their debts should be forgiven too. App.189, 191. In their view, it is irrational, arbitrary, and unfair to exclude Brown from the Program just because her debt is commercially

held and not in default and to deny Taylor full debt forgiveness based on the financial circumstances of his *parents* many years ago. App.189, 191. In fact, Taylor makes less than $25,000 a year, yet others making more than five times as much (up to $125,000 a year) will receive $20,000 in debt forgiveness because they received a Pell Grant. App.191. Respondents want an opportunity to present their views to the Government and to provide additional comments on any proposal to forgive student-loan debts. App.189, 191.

On October 10, Respondents sued the Government, claiming that it violated the APA by adopting the Program without conducting negotiated rulemaking or providing notice and an opportunity to comment. App.184-85. Respondents asked the district court to declare the Program unlawful, to enjoin the Government from implementing it, and to vacate it. App.186. Respondents moved for a preliminary injunction, which the district court later converted into a motion for summary judgment. App.272-75.

On November 10, the district court granted summary judgment to Respondents and vacated the Program. The district court first held, correctly, that Respondents had standing. App.277-82. Respondents were injured because they "alleged deprivation of their procedural right[s]" and have a "concrete interest in having their debts forgiven to a greater degree." App.277-80. Their injuries were traceable to the Government's actions because they "lost the chance to obtain more debt forgiveness, which flows directly from Defendants' promulgation of the Program's eligibility

requirements that failed to undergo a notice-and-comment period." App.280-81. And there was "at least some possibility that Defendants would reconsider the eligibility requirements of the Program if it were enjoined or vacated, which fulfills the lighter redressability requirement that applies when a procedural injury is alleged." App.281-82.

On the merits, the district court held, incorrectly, that the Government "did not violate the APA's procedural requirements." App.285-87. The court did not address the Secretary's failure to adopt the rule through negotiated rulemaking. But on the APA, the court concluded that "the Secretary may waive or modify any provision without notice and comment under the HEROES Act" as long as he "publish[es]" his actions in the Register. App.287. In other words, the court believed that the Secretary could disregard the APA's notice-and-comment requirement merely by *saying* that he was acting pursuant to the HEROES Act, even if the Program was not actually authorized by the HEROES Act. App.287. In fact, the district court later agreed with Respondents that the HEROES Act does not authorize the Program. App.287-94.

Turning to that "substantive" question, the district court held that the Secretary had no authority to implement the Program under the HEROES Act. App.287-94. As an initial matter, the court found that the major-questions doctrine applied. App.288-91. The Program has "vast economic significance" because it "will cost more than $400 billion," far more than the amount at stake in the eviction-moratorium case.

App.289 (citing *Ala. Realtors*, 141 S.Ct. at 2489 (describing an economic impact of $50 billion)). The Program also has "vast political significance" because "Congress has introduced multiple bills to provide student loan relief" in similar circumstances and "all have failed." App.289-90.

Applying the major-questions doctrine, the district court found no "'clear congressional authorization'" under the HEROES Act to implement the Program. App.291-94 (quoting *West Virginia v. EPA*, 142 S.Ct. 2587, 2614 (2022)). In particular, the HEROES Act "does not mention loan forgiveness," and the "'broad'" and "'general'" provisions that the Government pointed to don't "supply a clear statement" authorizing this sweeping relief. App.291-93. Also relevant was the fact that the Department has never relied on the HEROES Act to cancel student loans. App.293-94. Recognizing that the "'ordinary'" remedy under the APA is "'to vacate unlawful agency action,'" the court declared the Program unlawful and vacated it. App.294-95, 297.

On November 17, the Government filed an emergency motion with the Fifth Circuit to stay the judgment pending appeal. The Fifth Circuit denied the motion. App.308. On December 2, the Government filed a motion with this Court to stay the judgment pending appeal. The Court treated the application as a petition for a writ of certiorari before judgment and granted the petition. App.309. Over the Government's objection, the Court modified the questions presented to specifically review whether the Program "was

adopted in a procedurally proper manner." App.309; *see* BIO.3, 28-29; Reply.2, 9-10.

SUMMARY OF ARGUMENT

The Higher Education Act and the Administrative Procedure Act require all regulations pertaining to student loans to be adopted through negotiated rulemaking and notice-and-comment. Yet the Secretary adopted the Debt Forgiveness Program without using either procedure. Instead, he simply labeled his directives as "modifications" under the HEROES Act, a statute that plainly doesn't authorize the Program. Respondents thus lost an opportunity to obtain debt forgiveness: Brown will have none of her debts forgiven, and Taylor will receive only half of the full $20,000. Respondents have standing to remedy these injuries, and the Government violated the HEA and APA by failing to follow the proper procedures.

A plaintiff suffers an injury-in-fact when he is deprived of "a procedural right to protect his concrete interests." *Lujan*, 504 U.S. at 572 n.7. When plaintiffs assert a violation of procedural rights, "the normal standards for redressability and immediacy" do not apply. *Id.* A plaintiff "'who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered.'" *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). Instead, "[w]hen a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.*

Here, Respondents have shown an injury-in-fact because the Secretary failed to follow the proper procedures (negotiated rulemaking and notice-and-comment) and Respondents have "a concrete interest that is affected by the deprivation" of those rights, *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009)—namely, the lost opportunity to have their debts forgiven. Respondents' injuries are traceable to the Secretary's decision to exclude them from the Program. App.280. And Respondents' injuries are redressable because there is at least "some possibility" that the relief they seek "will prompt [the Secretary] to reconsider [his] decision." *Massachusetts*, 549 U.S. at 518.

The Government doesn't dispute that Respondents have shown an injury-in-fact and causation. It instead argues that Respondents' injuries aren't redressable because a ruling in Respondents' favor would mean that no one could receive debt forgiveness "under the HEROES Act." Br.32-33. But that framing is wrong. The question for purposes of standing is whether the Secretary could reconsider his decision to *withhold debt forgiveness* from Respondents if he follows the proper procedures. Although the Secretary lacks authority under the HEROES Act, the HEA authorizes him to "compromise, waive, or release any right, title, claim, lien, or demand." 20 U.S.C. §1082(a). And there is "some possibility" that he would forgive Respondents' debts under the HEA once this Court holds that he cannot avoid his rulemaking obligations by invoking the inapplicable HEROES Act. *Massachusetts*, 549 U.S. at 518. Article III requires nothing more.

The Government's only other standing argument is that Respondents cannot raise the "substantive claim" on which the district court granted relief. Br.31. But as the Government knows, Respondents never brought a "substantive claim," App.184-86, and they don't seek affirmance on that ground now. Although the district court correctly found that the HEROES Act does not authorize the Program, it erred by holding that the Secretary followed the proper procedures.

It is precisely *because* the HEROES Act does not authorize the Program that the Secretary had to use the procedures required by the HEA and APA. The HEROES Act excuses the Secretary's rulemaking obligations only when the waivers and modifications are authorized by that Act. 20 U.S.C. §1098bb(b)(1), (d). The Secretary cannot bypass the APA and HEA simply by *saying* that the HEROES Act applies. If the Program isn't authorized by the HEROES Act, then the Secretary has no "lawful excuse for neglecting [his] statutory [negotiated-rulemaking] and notice-and-comment obligations." *Azar*, 139 S.Ct. at 1808. The district court's judgment can be affirmed on this alternative ground, as this Court understood when it rewrote the Government's questions presented to include whether the Program was "adopted in a procedurally proper manner." App.309.

The HEROES Act plainly doesn't authorize the Program. To start, this is a textbook case for the major-questions doctrine. The Program has vast economic and political significance, as it would cancel

nearly half-a-*trillion* dollars in debt for tens of millions of individuals. And despite ample opportunity over the past two decades, the Department has never cancelled a single student's debt through the HEROES Act. The Act comes nowhere close to providing "'clear congressional authorization'" for the Program. *West Virginia*, 142 S.Ct. at 2609.

But the HEROES Act doesn't authorize the Program even without the major-questions doctrine. The Program far exceeds the Secretary's limited power to "modify" statutory and regulatory provisions. Instead of making "moderat[e]" and "minor" changes, the Program fundamentally rewrites the statutory scheme. *MCI Tel. Corp. v. AT&T*, 512 U.S. 218, 225 (1994). Moreover, the Secretary can act only to ensure that borrowers "are not placed in a *worse* position financially," 20 U.S.C. §1098bb(a)(2)(A) (emphasis added), but the Program places every borrower in a *better* position than before the pandemic. And even if the Government could justify the use of the HEROES Act for a small subset of borrowers, it could never show that all borrowers (except those in the top 5% of incomes) require debt forgiveness to avoid delinquency and default.

In the end, because the Program isn't authorized by the HEROES Act, the Government has no excuse for ignoring its rulemaking obligations. The judgment below should be affirmed.

ARGUMENT

Respondents have Article III standing to bring their procedural claim. The Government's only defense to that claim is that the HEROES Act exempts the Program from negotiated rulemaking and notice-and-comment. But that defense fails because the HEROES Act does not, in fact, authorize the Program.

I. Respondents have standing.

Article III requires standing. *Collins v. Yellen*, 141 S.Ct. 1761, 1779 (2021). To establish it, a plaintiff must show that he "suffered an 'injury in fact' that is 'fairly traceable' to the defendant's conduct and would likely be 'redressed by a favorable decision.'" *Id.* (quoting *Lujan*, 504 U.S. at 560-61).

This test is less demanding when a plaintiff asserts the violation of "a procedural right to protect his concrete interests." *Lujan*, 504 U.S. at 572 n.7. Because "procedural rights" are "special," a plaintiff can sue "without meeting all the normal standards for redressability and immediacy." *Id.* It's enough to show "some possibility" that the requested relief "will prompt the injury-causing party to reconsider the decision." *Massachusetts*, 549 U.S. at 518. The Government doesn't dispute this principle, which comes from a trio of environmental cases.

The Court first explained the laxer test for procedural rights in *Lujan*. There, environmental organizations challenged a rule that exempted interagency consultation for certain actions taken in foreign nations. 504 U.S. at 558-59. The plaintiffs alleged that

they had standing because the ESA's citizen-suit provision gave them a "procedural right" to challenge an agency's failure to follow the statutory consultative procedure. *Id.* at 571-72. Writing for the Court, Justice Scalia recognized that "procedural rights" are "special." *Id.* at 572 n.7. A person "who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Id.* For example, a person "living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement." *Id.* That plaintiff has standing "even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years." *Id.* Individuals likewise have standing to enforce a "procedural requirement for a hearing prior to denial of their license application." *Id.* at 572. The plaintiffs in *Lujan* could not take advantage of this doctrine, however, because they couldn't identify any concrete interest protected by their asserted procedural right. *Id.* at 573-74 & n.8.

The plaintiffs in *Massachusetts v. EPA* successfully invoked this doctrine. There, Massachusetts challenged the EPA's refusal to regulate greenhouse gas emissions from motor vehicles. 549 U.S. at 510-14. Through the Clean Air Act, Congress had given Massachusetts a "procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious." *Id.* at 520. The Court recognized that, "[w]hen

a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.* at 518. Massachusetts had standing because its procedural right protected its quasi-sovereign interests, including the alleged risk of harm to its coastal lands due to rising sea levels. *Id.* at 521-23. Its ownership of this territory showed that its stake in the outcome of the case was "sufficiently concrete to warrant the exercise of federal judicial power." *Id.* at 519. Because there was "some possibility that the requested relief [would] prompt [EPA] to reconsider [its] decision," Massachusetts had standing to challenge EPA's refusal to regulate. *Id.* at 518-21. The state had standing even though, on remand, the EPA still might decide not to regulate the greenhouse gases. *Id.* at 534-35.

This Court addressed procedural rights again in *Summers*. The environmental groups there challenged the Forest Service's approval of a sale of timber known as the Burnt Ridge Project. 555 U.S. at 491. The groups alleged that the Service approved the project without providing notice, an opportunity to comment, and a procedure to appeal, as required by law. *Id.* at 490-91. This Court agreed that the plaintiffs had alleged a cognizable injury "in their challenge to the Burnt Ridge Project" because they "claim[ed] that but for the allegedly unlawful abridged procedures they would have been able to oppose the project that threatened to impinge on their concrete plans to observe nature in that specific area." *Id.* at 497. The plaintiffs alleged standing "despite the possibility that

[their] allegedly guaranteed right to comment would not be successful in persuading the Forest Service to avoid impairment of [their] concrete interests." *Id.* But because the parties had settled their dispute over the Burnt Ridge Project and the plaintiffs couldn't identify any other "concrete interest" affected by the deprivation of their procedural rights, the plaintiffs lacked standing. *Id.* at 496-97.

These cases dictate the result here. Respondents were deprived of their "procedural right[s] to protect [their] concrete interest" when the Government promulgated the Program without negotiated rulemaking and notice-and-comment, *Lujan*, 504 U.S. at 572 n.7, and there is "some possibility" that vacating the Program will prompt the Government to reconsider its decision to deny them debt forgiveness, *Massachusetts*, 549 U.S at 521. And unlike the plaintiffs in *Lujan* and *Summers*, Respondents haven't alleged a "procedural right *in vacuo*." *Summers*, 555 U.S. at 496. Respondents have federal student loans that are not being forgiven under the Program but could be if the Secretary followed the proper procedures. Their lost opportunities to obtain monetary relief are "concrete interests" separating Respondents from the general public. *Lujan*, 504 U.S. at 572 n.7; *see also Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 n.7 (2016) ("The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance."). Respondents satisfy all three requirements for standing.

Injury-in-Fact. The Government doesn't dispute that Respondents have an injury-in-fact. Br.31-33. Respondents were deprived of their "procedural right[s] to protect [their] concrete interests." *Lujan*, 504 U.S. at 572 n.7.

Respondents plainly have procedural rights. Specifically, the Secretary failed to follow the mandatory two-step process for promulgating regulations on student loans: (1) develop the rule through negotiated rulemaking, 20 U.S.C. §1098a(a)(1); and (2) provide notice of the rule and an opportunity to comment, 5 U.S.C. §553(b)-(c); *see also* 5 U.S.C. §§702, 706(2)(D) (agencies that act "without observation of procedure required by law" can be sued). Although the Government disputes that negotiated rulemaking and notice-and-comment are required, "[f]or standing purposes" the Court must "accept as valid the merits of [Respondents'] legal claims." *FEC v. Cruz*, 142 S.Ct. 1638, 1647-48 (2022).

Respondents also have "a concrete interest that is affected by the deprivation" of these rights. *Summers*, 55 U.S. at 496. The Secretary is pursuing a program of debt forgiveness, and Respondents want their debts forgiven. App.189, 191. But under the Program, Brown will get no debt relief, and Taylor will receive less debt relief. Both are down $10,000. This "pocketbook injury" is a "prototypical form of injury in fact." *Collins*, 141 S.Ct. at 1779.

That Respondents' interests are affected by the deprivation of these procedures isn't surprising; their interests are exactly what negotiated rulemaking and

notice-and-comment are "designed to protect." *Lujan*, 504 U.S. at 573 n.8. Through the HEA, Congress ordered the Secretary to "obtain the advice of and recommendations from individuals … involved in student financial assistance programs," including from current and former "students." 20 U.S.C. §1098a(a)(1); *see, e.g.*, 88 Fed. Reg. 1894, 1897 (Jan. 11, 2023) (placing "student loan borrowers" on a negotiated-rulemaking committee). And notice-and-comment requirements "ensure that affected parties"—like Respondents—"have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas." *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979); *see Chrysler Corp.*, 441 U.S. at 316 (the APA promotes "fairness and informed administrative decisionmaking" by "affording interested persons notice and an opportunity to comment").

That Respondents have no legal entitlement to debt forgiveness doesn't mean that they lack concrete interests. For example, applicants for a license have no legal entitlement to it, yet they have standing to enforce a "procedural requirement for a hearing prior to denial of their license application." *Lujan*, 504 U.S. at 572; *see, e.g.*, *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333-34 (1945) (standing to challenge the denial of a broadcasting license without a hearing). Individuals similarly have standing when they are deprived of an opportunity to pursue a benefit. *See, e.g.*, *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464 (2017) (standing where the plaintiffs "lost a chance to obtain a settlement"); *Ne. Fla. Chapter, Assoc. Gen.*

Contractors of Am. v. Jacksonville, 508 U.S. 656, 666 (1993) (standing to challenge a government-erected "barrier that makes it more difficult for members of one group to obtain a benefit"); *Casillas v. Madison Ave. Ass'n*, 926 F.3d 329, 334 (7th Cir. 2019) (Barrett, J.) (standing based on the plaintiff's "lost opportunity to try to change [an employer's] opinion of her"). Respondents' lost opportunity to obtain debt forgiveness is no different.

Causation. The Government also doesn't dispute causation. Br.31-33. Respondents' injuries are clearly traceable to the Secretary's actions because their "'lost chance'" to obtain debt forgiveness "flows directly from [the Government's] promulgation of the Program's eligibility requirements." App.280; *see Czyzewski*, 580 U.S. at 464 (standing where bankruptcy order caused plaintiffs to "los[e] a chance to obtain a settlement"). A plaintiff who alleges a deprivation of a procedural right "'never has to prove that if he had received the procedure the substantive result would have been altered.'" *Massachusetts*, 549 U.S. at 518; *see Lujan*, 504 U.S. at 572 n.7 (rejecting "the Government's argument that, *even if* the other agencies were obliged to consult with the Secretary, they might not have followed his advice"); *Seila Law LLC v. CFPB*, 140 S.Ct. 2183, 2196 (2020) (plaintiffs are "not required to prove that the Government's course of conduct would have been different in a 'counterfactual world' in which the Government had acted with constitutional authority").

Redressability. Respondents' injuries are redressable because there is "some possibility" that the

relief Respondents seek "will prompt [the Secretary] to reconsider [his] decision" to withhold debt forgiveness from them. Respondents sought, among other things, a declaration that the Secretary failed to follow the proper procedures and an order vacating the Program. App.186. Because vacatur "neither compels nor restrains further agency decision-making," *Texas v. United States*, 40 F.4th 205, 220 (5th Cir. 2022), the Secretary would remain free to lawfully pursue a new debt-forgiveness program through the proper rulemaking procedures, *see Summers*, 555 U.S. at 497 (judgment for plaintiffs could redress failure to provide notice-and-comment); *see also* App.117-19, 128-29, 267 (describing the President's "campaign commitment" to forgive student-loan debts).

The Government argues that Respondents' injuries aren't redressable because a ruling in their favor "would mean that no one could receive debt-cancellation relief *under the HEROES Act*." Br.32-33 (emphasis added). But whether the Government could forgive Respondents' debts "under the HEROES Act" isn't the proper inquiry. The question is whether the Secretary could "reconsider [his] decision" to *withhold debt forgiveness* from Respondents. *Massachusetts*, 549 U.S. at 518. In this context, Article III asks whether the agency could have made a different decision had it followed the proper procedures, not whether it could have made a different decision had it continued violating its procedural obligations. *Id.*; *see Summers*, 555 U.S. at 497. This Court has never described the redressability inquiry as limited to a particular theory of statutory authority. *See, e.g.*, *Summers*, 555 U.S. at 497 (redressability where the agency could reconsider

its decision to approve a timber-sale project); *Lujan*, 504 U.S. at 572 n.7 (redressability where the agency could reconsider its decision to construct a dam). The "relevant inquiry" turns on the Government's "'allegedly unlawful conduct,'" not on any particular "provision of law." *Collins*, 141 S.Ct. at 1779.

The Government's myopic focus on the HEROES Act makes sense only if that statute were the only authority for student-loan forgiveness. But that premise isn't correct. The HEA gives the Secretary the power to "compromise, waive, or release any right, title, claim, lien, or demand." 20 U.S.C. §1082(a)(6); *see also id.* §§1087hh(2), 1087e(a)(1). The Government itself boasts that the HEA allows for "substantial" debt forgiveness and that the Secretary has used it "many times" to "discharg[e] debts owed by student-loan borrowers, including on a class-wide basis and for substantial amounts." Br.3-4 & n.1 (listing examples). And it's not just the Government. Dozens of elected officials have urged the Secretary to use the HEA to broadly forgive student-loan debts. S. Res. 46, 117th Cong. (Feb. 8, 2021); H. Res. 100, 117th Cong. (Feb. 4, 2021). Multiple legal scholars have too. *See, e.g.*, Hunt, *Jubilee Under Textualism*, 48 J. Legis. 31, 37-39 (2021); Herrine, *The Law and Political Economy of a Student Debt Jubilee*, 68 Buff. L. Rev. 281, 341-43 (2020). And, of course, a ruling that the Program isn't authorized by the HEROES Act wouldn't preclude the Secretary from forgiving Respondents' debts under the HEA.

Importantly, the Government has never disputed that a properly promulgated debt forgiveness program—one where Respondents' and others' voices were heard—could forgive Respondents' debts. For Brown, the Secretary has repeatedly expressed an interest in "expand[ing] eligibility to borrowers [like Brown] with privately owned federal student loans." App.201. Indeed, until the States sued, the Government allowed (and encouraged) borrowers with privately held federal loans to obtain debt forgiveness by "consolidating these loans into the Direct Loan Program." App.201, 215. For Taylor, he is being arbitrarily denied $10,000 in forgiveness because he did not receive a Pell Grant years ago. His level of debt forgiveness could easily increase if the Secretary based eligibility on a more relevant metric, such as current income. In fact, Taylor makes less than $25,000 a year, but individuals making exponentially more than that ($250,000 for joint filers or $125,000 for individuals) will receive $20,000 in debt forgiveness if they received a Pell Grant. App.190-91, 196. The Secretary could reconsider this arbitrary line if forced to hear

from low-income borrowers and defend his decision in negotiated rulemaking and notice-and-comment.[2]

The Government's remaining argument is that Respondents "lack standing to raise the substantive claim on which the district court granted relief." Br.31. But as the Government recognizes, Br.62, Respondents didn't bring a claim that the Program was adopted "in excess of statutory … authority," 5 U.S.C. §706(2)(C); App.184-86. And Respondents don't seek affirmance on that ground now. The district court correctly found that the Secretary "lacks the authority to implement the Program under the HEROES Act." App.287-94. But this issue is relevant only because the Government raises the HEROES Act as an *excuse* for adopting the Program without negotiated rulemaking and notice-and-comment. Respondents did

[2] Despite what the Government argued below, filing a petition for rulemaking "is neither a substitute for nor an alternative to compliance with the mandatory [rulemaking] requirements." *Nat'l Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978); *see Seila Law*, 140 S. Ct. at 2196 ("While [a contested removal] is certainly one way to review a removal restriction, it is not the only way."). Respondents wouldn't have the same opportunity to obtain debt forgiveness *after* the Secretary cancels nearly half-a-trillion dollars in debt. And unlike a failure to follow the proper rulemaking procedures, it is "'only in the rarest and most compelling of circumstances'" that a court "'overturn[s] an agency judgment not to institute rulemaking.'" *Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 919, 921 (D.C. Cir. 2008).

not bring a standalone claim based on the APA's "substantive requirements." App.287.[3]

The district court's analytical error matters little, however, because Respondents have standing to bring their original procedural claim, and this Court can "affirm the judgment below on alternative grounds." *Morgan Stanley Capital Grp. Inc. v. Pub. Utility Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 552 (2008). This Court reviews judgments, not opinions, *Camreta v. Greene*, 563 U.S. 692, 704 (2011); and it can affirm the district court's judgment based on Respondents' procedural claim alone. Though the Government's reply will surely boast that Respondents "do not defend the district court's reasoning," that fact is unremarkable. The district court *rejected* Respondents' argument that the Program was not adopted in a procedurally proper manner, and so of course Respondents disagree with its reasoning on that point.

Respondents' procedural claim is independently and squarely presented. This Court agreed at the certiorari stage—at Respondents' insistence and over the Government's objection—to review whether the Program "was adopted in a procedurally proper manner."

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[3] The Government doesn't argue that Respondents lack "standing" to dispute—as part of their procedural claim—whether the Program is authorized by the HEROES Act. That argument would make little sense. Respondents don't separately need standing to rebut an *argument* that the Government raises in response to their procedural *claim*. *See Citizens United v. FEC*, 558 U.S. 310, 330-31 (2010) (distinguishing arguments from claims); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S.Ct. 2367, 2379 n.6 (2020) (standing needed for "each claim for relief").

App.309. It should resolve that claim against the Government on the merits.

II. The Secretary adopted the Program without following the proper procedures.

Under the HEA and APA, the Secretary was required to use negotiated rulemaking and notice-and-comment before adopting the Program, and it is undisputed that the Secretary did not take these steps. The Government relies solely on the HEROES Act as its excuse. But that statute relieves the Secretary from his rulemaking obligations only when he issues waivers and modifications that are authorized by the Act. 20 U.S.C. §1098bb(b)(1), (d). The Government's argument that it can bypass the APA and HEA simply by *saying* that the HEROES Act authorizes the Program—even when it doesn't—is meritless. Because the HEROES Act does not authorize the Program, the baseline rules apply, and the Secretary acted unlawfully by adopting the Program without following the proper procedures.

A. The Secretary cannot avoid his rulemaking obligations unless the Program is authorized by the HEROES Act.

The Government has never disputed that, but for the HEROES Act, the Secretary could adopt the Program only through negotiated rulemaking and notice-and-comment. *See* Dkt.24 at 3-4 (recognizing that negotiated rulemaking and notice-and-comment are "otherwise-applicable procedural requirements"). For good reason. Negotiated rulemaking is required because the Program is a regulation that "pertain[s]" to

Title IV of the HEA, the subchapter governing student loans. 20 U.S.C. §1098a(b)(2). And notice-and-comment is required because the Program is a legislative "rule" under the APA. 5 U.S.C. §551(4). Specifically, the Program has the "'force and effect of law,'" *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (2015), and "'affect[s] individual rights and obligations'" to repay debts, *Chrysler Corp.*, 441 U.S. at 302. The Program also amends "existing regulations" that permit debt forgiveness only in limited circumstances. *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995); *see, e.g.*, 34 C.F.R. §30.70(a)(1), (e)(1); 81 Fed. Reg. 75926, 75933-34, 76070 (Nov. 1, 2016) (adopting §30.70 after negotiated rulemaking and notice-and-comment).

Indeed, when promulgating other regulations authorizing debt forgiveness, the Department has used the proper procedures. For example, one Department rule governs the "discharge of loans due to death, total and permanent disability, attendance at a school that closes, false certification … and unpaid refunds." 34 C.F.R. §682.402(a). This rule was promulgated and amended through negotiated rulemaking and notice-and-comment. *See, e.g.*, 81 Fed. Reg. 75926, 75933-34, 76079-80 (Nov. 1, 2016); 67 Fed. Reg. 67048, 67050, 67079-80 (Nov. 1, 2002); 64 Fed. Reg. 58938, 58940, 58960 (Nov. 1, 1999). Again, the Government's only excuse for not following the same procedures here is its claimed authority under the HEROES Act.

The Government points to §1098bb(b)(1) of the HEROES Act. Br.62-63. That provision states that "[n]otwithstanding … [the APA], the Secretary shall, by notice in the Federal Register, publish the waivers

or modifications of statutory and regulatory provisions the Secretary deems necessary to achieve the purposes of this section." 20 U.S.C. §1098bb(b)(1). This provision, according to the Government, excuses the Secretary from the ordinary rulemaking requirements so long as he "determin[es] that the HEROES Act applies and that waivers or modifications are necessary," regardless of whether "the HEROES Act actually authorizes the Secretary's action." Br.62-63. This argument fails.

To begin, §1098bb(b)(1) of the HEROES Act says nothing at all about excusing the Secretary from negotiated rulemaking. That topic is instead addressed in §1098bb(d) of the Act. Section 1098bb(d), in turn, states that §1098a (the HEA section requiring negotiated rulemaking) "shall not apply to the waivers and modifications *authorized* or *required* by [the HEROES Act]." 20 U.S.C. §1098bb(d) (emphasis added). Nothing "require[s]" the Program, so the key question is whether the Program is "authorized" by the HEROES Act. If it isn't, then the Program needed to go through negotiated rulemaking.

The Government argues that §1098a of the HEA "has no application" because its negotiated-rulemaking requirements apply only to "proposed regulations" and the Secretary "need not issue 'proposed regulations'" because the Act "express[ly] exempt[s] [the Program] from notice-and-comment procedures." Br.63. The Government's premise is wrong because the Program isn't exempt from the notice-and-comment process, as explained further below. Regardless, §1098a of the HEA isn't limited to "proposed regulations." It

states that "*[a]ll regulations* pertaining" to Title IV "shall be subject to a negotiated rulemaking." 20 U.S.C. §1098a(b)(2) (emphasis added). Because the Program is a "regulation" that pertains to Title IV, the HEA's negotiated-rulemaking requirements apply.

Moreover, the Government's reading would render §1098bb(d) of the HEROES Act superfluous. If the HEA's negotiated-rulemaking requirements never apply (because actions taken under the HEROES Act are never "proposed regulations"), then the HEROES Act wouldn't have needed to separately excuse the Secretary from negotiated rulemaking in §1098bb(d). At a minimum, Congress would have excused the Secretary with much broader language, rather than excusing negotiated rulemaking only for "waivers and modifications *authorized* or *required*" by the Act. (Emphasis added.)

The Government's excuses for bypassing notice-and-comment fare no better. Before an agency can avoid notice-and-comment, it must show that Congress "expressly" carved out an exception to that procedural requirement. 5 U.S.C. §559. "Exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed." *Marcello v. Bonds*, 349 U.S. 302, 310 (1955). Any "legislative departure from the norm must be clear." *Dickinson v. Zurko*, 527 U.S. 150, 155 (1999).

Here, the Program falls under no "clear" exception to notice-and-comment. While the HEROES Act does

contain an exception to notice-and-comment, that exception applies only to the modifications that are authorized by the Act:

> Notwithstanding … [the APA], the Secretary shall, by notice in the Federal Register, publish *the waivers or modifications* of statutory and regulatory provisions the Secretary deems necessary to achieve the purposes of this section.

20 U.S.C. §1098bb(b)(1) (emphasis added). As reflected by the definite article "the," subsection (b)(1) is referencing "the waivers or modifications" that are "authorized" earlier in subsection (a). *See* §1098bb(a) (titled "Waivers and modifications"); §1098bb(a)(1) (empowering the Secretary to issue "the waivers or modifications *authorized* by paragraph (2)" (emphasis added)); §1098bb(a)(2) (titled "Actions *authorized*" (emphasis added)); *id*. ("The Secretary is *authorized* to waive or modify [in five situations]" (emphasis added)). In other words, subsection (a) authorizes certain waivers and modifications and, when the Secretary exercises *that* authority, subsection (b)(1) exempts *those* waivers from notice-and-comment. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 185 (2004). Subsection (b)(1) doesn't let the Secretary unilaterally decide what counts as a waiver or modification authorized by the Act. *See, e.g.*, *MCI Tel. Corp.*, 512 U.S. at 225 (rejecting an agency's assertion that its action was a "modification").

The Government reads subsection (b)(1) as allowing the Secretary to "dee[m]" that a particular regulation is exempt from notice-and-comment, Br.62-63, but that's not what the statute says. The word "dee[m]" modifies "necessary to achieve the purposes of this section," not "waivers or modifications." 20 U.S.C. §1098bb(b)(1). It refers to the Secretary's *policymaking* discretion—conferred by subsection (a)—to determine whether an authorized modification would serve the Act's purposes. *See* §1098bb(a)(1). It does not give the Secretary the power to "dee[m]" whether something *is* a modification authorized by the Act. The Government's contrary reading would override statutory text and grant the Secretary a "breathtaking amount of authority." *Ala. Realtors*, 141 S.Ct. at 2488-89.

The Government's reading further contradicts longstanding principles of administrative law. "Agencies have never been able to avoid notice and comment simply by mislabeling their substantive pronouncements." *Azar*, 139 S.Ct. at 1812; *see CBS v. United States*, 316 U.S. 407, 416 (1942) ("The particular label placed upon [an action] by [an agency] is not necessarily conclusive, for it is the substance of what the [agency] has purported to do and has done which is decisive."). The Court must "loo[k] to the *contents* of the agency's action, not the agency's self-serving *label,* when deciding whether statutory notice-and-comment demands apply." *Azar*, 139 S.Ct. at 1812. Here, the Secretary can't simply label a new rule a "modification" under the HEROES Act; the actions themselves must "*in fact*" be modifications that are authorized by the Act. *Id.* at 1811-12.

Indeed, if labels alone were decisive, the Secretary could rewrite the Department's regulations simply by invoking the HEROES Act, and no one could ever challenge his failure to follow the proper procedures. Congress doesn't create such obvious loopholes to the rulemaking process. *See Action on Smoking & Health v. CAB*, 713 F.2d 795, 800 (D.C. Cir. 1983) (permitting an agency "to forgo notice and comment procedures" through "[b]ald assertions" that "good cause" exists would "permit the [APA's] exceptions to carve the heart out of the statute"). Nothing in the HEROES Act supports such a clear "legislative departure from the norm." *Dickinson*, 527 U.S. at 155.

The Government contends that allowing a procedural challenge to its actions would mean that plaintiffs could "reconceptualiz[e]" "substantive challenges … as procedural claims" and thereby "end-run" the "'normal standards for redressability and immediacy.'" Br.63-64. But Respondents have challenged only the Secretary's failure to follow the proper procedures. App.184-86. True, Respondents' procedural claim requires this Court to determine whether the HEROES Act authorizes the Program, but that feature of the case is the *Government's* fault, not Respondents'. The Government is the one pointing to the HEROES Act as its defense for not using negotiated rulemaking and notice-and-comment, and so now it must defend that assertion of authority. *See Sorenson Comm. v. FCC*, 755 F.3d 702, 706-07 (D.C. Cir. 2014) (an agency invoking the "good cause" exception to notice-and-comment has the burden to prove it applies). Taking the Government's word for it would let agencies "end-run"

the important procedural constraints that Congress placed on their authority.

Simply put, if the HEROES Act doesn't authorize the Program, then the Act's exceptions to the rule-making process don't apply. And as explained below, it is not so authorized.

B. The HEROES Act does not authorize the Program.

When a statute "confers authority upon an administrative agency, that inquiry must be 'shaped, at least in some measure, by the nature of the question presented'—whether Congress in fact meant to confer the power the agency has asserted." *West Virginia*, 142 S.Ct. at 2607-08. In the ordinary case, "that context has no great effect on the appropriate analysis." *Id.* But "there are 'extraordinary cases' that call for a different approach—cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *Id.* In these "major questions" cases, the Court demands "something more than a merely plausible textual basis for the agency action." *Id.* at 2609. The agency instead "must point to 'clear congressional authorization' for the power it claims." *Id.*

This case has all the hallmarks of a major questions case. Four points stand out.

First, the Program has "vast 'economic and political significance.'" *Ala. Realtors*, 141 S.Ct. at 2489.

The Program will cancel the debts of 40 *million* borrowers at a cost of more than 400 *billion* dollars. App.289, 303. That's no "'everyday exercise of federal power.'" *NFIB v. OSHA*, 142 S.Ct. 661, 665 (2022). Indeed, the "size [and] scope" of the Program are considerably larger than other cases applying the major-questions doctrine. *E.g.*, *Ala. Realtors*, 141 S.Ct. at 2489 (eviction moratorium would affect "between 6 and 17 million tenants" and have an "economic impact" of $50 billion); *NFIB*, 142 S.Ct. at 666 (OSHA's mandate would have imposed "billions of dollars in unrecoverable compliance costs").

In addition, loan forgiveness has long been "the subject of an 'earnest and profound debate' across the country." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006). Forgiving student debt raises a host of contentious issues—whether forgiveness mostly benefits the rich, whether it fuels inflation or the rising cost of college, whether it's unfair to those who already repaid their loan or didn't attend college, where to draw the line, how much to spend, and much more. Indeed, the Secretary provided debt forgiveness "that Congress ha[s] conspicuously and repeatedly declined to enact itself." *West Virginia*, 142 S.Ct. at 2610; *see* App.265-66, 289-90; *see also* Pub. L. 116-136, §3508(c), 134 Stat 281, 398 (Mar. 27, 2020) (CARES Act authorizing loan cancellation only for those borrowers who "withdra[w] from the institution of higher education during the payment period as a result of" COVID-19). And the Program is enormously controversial. *See, e.g.*, Shear, *Biden Gave in to Pressure on Student Debt Relief After Months of Doubt*, N.Y. Times (Aug. 26, 2022), perma.cc/T75A-3J9L (noting that the Program has "drawn

fierce criticism from Republicans, who describe it as a costly giveaway to many who do not deserve it," and "ignited an intense debate about the economic consequences").

Contrast the political stalemate over loan forgiveness with the congressional unity on the HEROES Act. In the Act's authorization and three subsequent reauthorizations, only *one* legislator ever voted against the bill—and it was an accident. *Supra* n.1. The Act was uncontroversial because Congress thought it was doing little more than relieving active-duty military from "making student loan payments for a period of time while they are away." 149 Cong. Rec. H2521, H2522 (Apr. 1, 2003) (Rep. Garrett). Over and over, legislators recognized this purpose.[4] The Government identifies not a shred of evidence that Congress believed it was authorizing the Secretary to cancel debts—let alone cancel nearly half-a-trillion dollars in debt for tens of millions of borrowers.

The Government conceded below that "this is a case of economic and political significance." App.290. Its efforts to backtrack now fail. On its face, a half-

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[4] *See, e.g.*, 149 Cong. Rec. H2522, H2524 (Apr. 1, 2003) (Rep. Isakson) (the Act ensures that our troops who "serve us in the Middle East and in Iraq" and their families "are not harassed by collectors and that their loan payments are deferred until they return"); *id.* at H2525 (Rep. Burns) ("The HEROES bill would excuse military personnel from their Federal student loan obligations while they are on active duty in service to the United States."); *id.* at H2524 (Rep. Ryan) (the Act gives the Secretary "the opportunity to forbear a loan as our servicemen and servicewomen are activated" so that they will not have "to pay on their student loans for the time that they are active").

trillion-dollar, one-time spending program is different from mine-run agency actions that may "implicat[e] billions of dollars." Br.47. And contrary to the Government's assertion, legislation that Congress recently rejected wasn't "meaningfully differe[nt]" from the Program. Br.52; *see, e.g.*, S. 2235, 116th Cong. §101 (2019) (canceling up to $50,000 of student-loan debt for those who make under $100,000); H.R. 2034, 117th Cong. §2 (2021) (canceling the outstanding loan balances for borrowers making under $100,000 individually or $200,000 if married filing jointly). Nor did Congress "anticipat[e]" the Program by passing the American Rescue Plan Act, Br.52-53, one provision of which exempts *all* debt discharges from taxation and never references the HEROES Act, Pub. L. 117-2, §9675(a), 135 Stat. 4, 185-86 (Mar. 11, 2021); *see also NFIB*, 142 S.Ct. at 666 (ARPA "said nothing about OSHA's [subsequent] vaccine mandate").

Second, Congress "'could not have intended to delegate' such a sweeping and consequential authority 'in so cryptic a fashion.'" *West Virginia*, 142 S.Ct. at 2608. If Congress wanted to authorize the Secretary to cancel student-loan debts, it would have said so. Congress has explicitly authorized the Secretary to cancel student-loan debt in numerous other circumstances. *See, e.g.*, 20 U.S.C. §1087ee(a)(2) ("[l]oans shall be canceled" for certain individuals engaging in public service); §1087j(a)-(b) (the Secretary shall "carry out a program of canceling the obligation [of certain teachers] to repay a qualified loan amount"); *see also* §1078-11(a)(1); §1078-12; §1087e(m)(1). But the HEROES Act never "mention[s] loan forgiveness."

App.291. Congress never would have given the Secretary this enormous power through an "implicit delegation." *Gonzales*, 546 U.S. at 267.

Third, the Program is "'unprecedented.'" *West Virginia*, 142 S.Ct. at 2608 (quoting *Ala. Realtors*, 141 S.Ct. at 2489). Despite the September 11 attacks and multiple wars, the Department has "'never relied on its [HEROES-Act] authority'" to cancel a single student's debts. *Id.* at 2608-09. Indeed, the Department's previous view was that it had no such authority. App.265. The Government also can't identify any other agency action of similar size, scale, and importance that was lawfully created through the stroke of a pen, without notice-and-comment or any other similar process. Nor does the Government provide any reason why Congress—which just three years before the HEROES Act had strengthened the negotiated-rulemaking process due to "frustration … over the way in which the Secretary [was] formulat[ing] and issu[ing] regulations," H.R. Rep. 105-481, at 145 (Apr. 17, 1998)—would have wanted the Secretary to create a half-trillion-dollar program affecting millions of individuals with no public involvement. This "'lack of historical precedent'" is a "'telling indication'" that the agency has overstepped. *NFIB*, 142 S.Ct. at 666.

The Government points to its use of the HEROES Act "since March 2020 … to afford relief to all borrowers" in response to COVID-19 as evidence that its actions are legal now. Br.51-52. But no court has ever upheld these actions, and the Administration's actions in response to COVID-19 have repeatedly been found unlawful when challenged. *See, e.g.*, *Ala. Realtors*, 141

S.Ct. at 2488-90; *NFIB*, 142 S.Ct. at 665-66. Regardless, these repayment freezes are meaningfully different from the Program. Payments and interest accrual were merely "pause[d]" and "suspend[ed]," not lost forever. Br.8. Some of these pauses were directly ordered by Congress. *See* Pub. L. 116-136, §3513, 134 Stat. 281, 404-05 (Mar. 27, 2020) (providing "temporary relief for federal student loan borrowers" through September 30, 2020). And were it not vacated, the Program here would have been implemented long after the President declared the pandemic "'over.'" App.292-93. These recent actions thus provide little justification for the Program.

Fourth, the Government's theory has "no limit." *Ala. Realtors*, 141 S.Ct. at 2489. Under the Government's theory, the Secretary could eliminate *all student-loan debts*—more than $1.6 trillion—because every borrower in America is an "affected individual" and total cancellation would "'ensure'" that they aren't "'placed in a worse position'" because of the pandemic. Br.35 (quoting 20 U.S.C. §1098bb(a)(2)); *see* App.242 (noting that "discharging the entire loan amount would permanently avoid [the] harm" of delinquency and default). And because a "national emergency" is simply "'a national emergency declared by the President,'" Br.34-35 (quoting 20 U.S.C. §1098ee(4)), nothing would stop the next Administration from identifying other "emergencies" (say, income inequality, climate change, the war on drugs, or even the student-debt crisis) to justify any amount of debt cancellation. Congress never would have given the Secretary such

broad authority "'in so cryptic a fashion,'" *West Virginia*, 142 S.Ct, at 2408, and without requiring ample public participation and procedural safeguards.

The Government's final argument is that the major-questions doctrine should never apply to agency actions related to "government benefit program[s]." Br.48-49. But the doctrine stems from "separation of powers principles and a practical understanding of legislative intent." *West Virginia*, 142 S.Ct. at 2609. It reflects the "presum[ption] that 'Congress intends to make major policy decisions itself.'" *Id.* Agency actions concerning "government benefits" can readily implicate these same concerns. Consider, for example, an agency's attempt to privatize or abolish social security—the notorious "third rail" of politics. The Government provides no reason why trillions of dollars of government spending should be uniquely exempt from the major-questions doctrine. The Constitution, which gives *Congress* the power of the purse, suggests otherwise. *E.g.*, Art. I, §9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

Because the major-questions doctrine applies, the Government must show "'clear congressional authorization'" for the Program. *West Virginia*, 142 S.Ct. at 2609; *e.g.*, *NFIB*, 142 S.Ct. at 665-66. It cannot. The HEROES Act never mentions loan forgiveness. The Department has never used the Act to cancel debts, despite ample opportunity and incentive. And nothing in the Act's text or history indicates that Congress authorized the Secretary to cancel student-loan debts, let alone for tens of millions of borrowers at a cost of

$400 billion. Even if the Government could conjure a "plausible textual basis" for its actions, *West Virginia*, 142 S.Ct. at 2609, it simply "strains credulity to believe that this statute grants the [Secretary] the sweeping authority that [he] asserts," *Ala. Realtors*, 141 S.Ct. at 2486.

Even without the major-questions doctrine, the HEROES Act does not give the Secretary authority to enact the Program. The Government argues that the Secretary can cancel student loans through his power to "waive" or "modify" provisions concerning student loans. Br.36, 38 (citing 20 U.S.C. §1098bb(a)(1)). Not so.

To begin, the Secretary's waiver authority is irrelevant because the Secretary never purported to "waive" any provision to create the Program. *See* 87 Fed. Reg. at 61514 ("Pursuant to the HEROES Act, … the Secretary modifies the provisions of ….). The Secretary has never explained what the Program "waives." Indeed, the Secretary couldn't have effectuated the Program through a "waiver" because none of the referenced provisions impose any obligation on borrowers to repay their loans. *Id.* The Secretary instead purported to create the Program through five "modifications" of existing statutory and regulatory provisions. *Id.* (citing 20 U.S.C. §1087; 20 U.S.C. §1087dd(g); 34 C.F.R. Part 674, Subpart D; 34 C.F.R. §§682.402, 685.212).

But the Secretary cannot "modify" provisions to create the Program either. Br.38. As Congress knew, the word "modify" means "to change moderately or in

minor fashion." *MCI*, 512 U.S. at 225. The Secretary can't use a "modification" to make "basic and fundamental changes in the [statutory and regulatory] scheme." *Id.*

Yet basic and fundamental changes are precisely what the Program purports to do. Consider 20 U.S.C. §1087. That statutory provision provides, in part:

> If a student borrower who has received a [FFEL] loan … dies or becomes permanently and totally disabled … the Secretary shall discharge the borrower's liability on the loan by repaying the amount owed on the loan.

20 U.S.C. §1087(a)(1). The Secretary has now "modified" this provision as follows:

> If a student borrower ~~who~~ has received a [FFEL] loan **that is "held by the Department or subject to collection by a guaranty agency" and was not consolidated after September 29, 2022** … ~~dies or becomes permanently and totally disabled~~ the Secretary shall discharge the borrower's liability ~~on the loan by repaying the amount owed on the loan~~ **"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 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," as long as the borrower "appl[ies] by the deadline established by the Secretary."**

87 Fed. Reg. at 61514. This change is not "moderate" or "minor." *MCI*, 512 U.S. at 225. It is "the introduction of a whole new regime" of loan forgiveness. *Id.* at 234. The other regulatory and statutory provisions that the Secretary purports to "modify" have the same problem. *See* 87 Fed. Reg. at 61514. Indeed, the Secretary has purported to modify an entire *subpart* of the Department's regulations, one that contains 14 separate provisions and spans 19 pages of the federal code. *See id.* ("modif[ying]" 34 C.F.R. Part 674, subpart D (34 C.F.R. §§674.51-64); *see also id.* ("modif[ying]" 34 C.F.R. §682.402 (containing 19 subsections and spanning 32 pages)).

If Congress wanted to authorize the Secretary to cancel student-loan debts, it would have said so, just like it has in other circumstances. This Court shouldn't "read [debt cancellation] into" the HEROES Act "when it is clear that Congress knew how to [authorize it] when it wanted to." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004); *see* Scalia & Garner, *Reading Law* 182 (2012) (noting the "'familiar easy-to-say-so-if-that-is-what-was-meant rule of statutory interpretation'"). And although the Act "does not list"

other "forms of relief" like forbearance and deferment either, Br.39-40, debt *cancellation* is a different order of magnitude. It is "highly unlikely that Congress" would have authorized loan cancellation "through such a subtle device as permission to 'modify.'" *MCI Tel.*, 512 U.S. 231; *see Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (Congress doesn't "hide elephants in mouseholes").

The Government further ignores a key limitation in the HEROES Act: the Secretary can issue waivers and modifications only to ensure that borrowers "are not placed in a *worse* position financially in relation to [their] financial assistance." 20 U.S.C. §1098bb (a)(2)(A) (emphasis added). In other words, the Secretary can preserve the status quo while individuals deal with temporary challenges like a "military operation" or "national emergency." §1098bb(a)(1). Yet the Program places every borrower in a far *better* position by canceling individuals' underlying principal. Indeed, 18 million individuals would "have their federal student loans discharged in their entirety," App.306, and the remaining borrowers would have their "median debt fal[l] from $29,400 to $13,600," App.243. This forgiveness far exceeds the Secretary's authority.

Even if the HEROES Act allowed some form of debt cancellation, the Program's scope is too broad and untailored to fit within the statute. To begin, the Secretary can act only to prevent harm that would occur "because of" the individual's status as an affected individual. 20 U.S.C. §1098bb(a)(2)(A). While the Government contends that the Program targets only

"lower-income borrowers" who are at a high risk of delinquency and default "because of" the pandemic, Br.35-36, that isn't true. The Program covers everyone except "the top 5% of incom[e]" earners—individuals making up to $125,000 individually or $250,000 jointly. *Fact Sheet*, The White House (Aug. 24, 2022), perma.cc/4AWB-5E6W. Even if some of the bottom 95% are at risk of default or delinquency "because of" the pandemic, the Program isn't remotely tailored to those borrowers. For the same reasons, the Government cannot show that the Program is even arguably "necessary" to ensure that the 40 million individuals receiving debt forgiveness under the Program don't default or become delinquent. 20 U.S.C. §1098bb (a)(2)(A). The Secretary's "indiscriminate approach fails" to target borrowers who truly are at risk of default and delinquency because of the pandemic. *NFIB*, 142 S.Ct. at 666.

The Secretary's dearth of evidence justifying the Program only highlights why Congress required him to use the ordinary rulemaking process. Br.42-43. The Department's untested, lightly sourced, 13-page memorandum is the thinnest of reeds to justify a half-*trillion*-dollar program. App.232-55. If the Secretary had gone through the proper rulemaking process, he likely would have received tens of thousands of comments and the preamble to the rule would be hundreds of pages long. Yet the Secretary approved it in a two-page order, apparently spending half a morning reviewing the evidence. *See* App.232, 259 (approving the Program the same day he received the memo, August 24, at 9:25am).

There are numerous reasons to "dispute [the Department's] determinations." Br.43. Its primary evidence is a survey of student-loan borrowers. App.235-36 & n.4. But that survey found that most borrowers do *not* need forgiveness to avoid delinquency and default, and those who do need forgiveness need it *regardless of* the pandemic. Akana, *Expectations of Student Loan Repayment, Forbearance, and Cancellation: Insights from Recent Survey Data* 2-3 (May 2022), perma.cc/245V-UGS7. Most borrowers who are expected to struggle with payments are "*chronically struggling* and neither made payments in 2019 nor expect to make payments" when forbearance ends. *Id.* at 7, 11 (emphasis in original).

Other facts similarly disprove the Secretary's conclusion that the Program is needed "because of" the pandemic. When the Secretary announced the program in August, the unemployment rate was at 3.5%, "match[ing] the lowest it's been in more than 50 years." *Statement by President Biden on the July Jobs Report*, White House (Aug. 5, 2022), perma.cc/9MH7-QTPM. Nearly 80 percent of all student-loan borrowers "saw increases to their credit scores during the pandemic." Mangrum, *Three Key Facts from the Center for Microeconomic Data's 2022 Student Loan Update*, Fed. Rsrv. Bank of N.Y. (Aug. 9, 2022), perma.cc/9EV3-PS4X. The Secretary had already paused loan payments and suspended interest accrual for nearly two and a half years, Br.8, and Congress had approved roughly $5 trillion in spending to help those affected by the pandemic, *see* Parlapiano, *Where $5 Trillion in Pandemic Stimulus Money Went*, N.Y. Times (Mar. 11, 2022), perma.cc/FXP6-V3BS. Families "across the

income spectrum" had "seen their checking account balances increase compared to pre-pandemic, with the largest gains among the lowest-income families." *The Biden-Harris Economic Blueprint* 29, White House (Sept. 2022), perma.cc/3W44-XFRG. And in September the President declared that the pandemic was "'over.'" App.292-93. Given these circumstances, the Program was not possibly "necessary" to ensure that all borrowers except those in the top 5% of incomes don't default or become delinquent on payments "because of" the pandemic.

The Program also improperly extends loan forgiveness to borrowers who are not "affected individuals." 20 U.S.C. §1098bb(a)(2)(A). Because the Program is not limited to those serving on "active duty" or in the "National Guard," §1098ee(2)(A)-(B), the Government points to §1098ee(2)(C) and (D) of the HEROES Act. But the Program is not limited to those who "reside[d] or [were] employed in an area that is declared a disaster area," §1098ee(2)(C), because the nine million individuals who were living abroad during the pandemic are eligible for debt forgiveness too, *see Consular Affairs by the Numbers*, U.S. Dep't of State (Jan. 2020), perma.cc/L8PN-BCX4. And there is no evidence that those individuals "suffered *direct* economic hardship as a *direct* result of" the pandemic. 20 U.S.C. §1098ee(2)(D) (emphasis added).

Recognizing that the Secretary "err[ed] on the side of overinclusion," Br.43-44, the Government argues that the Program's expansive scope is permissible because the Secretary can "issue relief to classes of borrowers rather than on a 'case-by-case basis.'" Br.36

(quoting 20 U.S.C. §1098bb(b)(3)), and because the phrases "'deems necessary'" and "'necessary to ensure'" imply substantial "'deference'" to the Secretary, Br.36-37, 43 (quoting 20 U.S.C. §1098bb(a)). But these provisions aren't "'a roving license to ignore the statutory text.'" *Am. Elec. Power v. Connecticut*, 564 U.S. 410, 427 (2011); *accord Ala. Realtors*, 141 S.Ct. at 2489 (agency can't assert a "breathtaking amount of authority" simply by "deem[ing] a measure 'necessary'"). The waivers and modifications still must be "authorized" by the Act. 20 U.S.C. §1098bb(a)(1)-(2). Nor are the Program's mismatches minor imprecisions that inevitably occur when providing "categorical relief." Br.7. They are the kind of gross over-inclusiveness that show that the agency made no serious attempt to "exercise discretion within [the Act's] defined statutory limits." *Am. Elec. Power*, 564 U.S. at 427.

CONCLUSION

This Court should affirm the judgment below.

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