

Nos. 22-506 and 22-535

In the Supreme Court of the United States

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

v.

STATE OF NEBRASKA, ET AL.

DEPARTMENT OF EDUCATION, ET AL., PETITIONERS

v.

MYRA BROWN, ET AL.

*ON WRITS OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURTS OF APPEALS
FOR THE EIGHTH AND FIFTH CIRCUITS*

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

	Page
I. Respondents lack Article III standing:	
A. The States lack standing	3
B. Brown and Taylor lack standing.....	11
II. The plan is lawful:	
A. The HEROES Act authorizes the plan.....	14
1. The Act clearly authorizes the plan	14
2. The major questions doctrine provides no basis to override the clear terms of the HEROES Act.....	18
3. Respondents' remaining statutory arguments lack merit	26
B. The plan is reasonable and reasonably explained	29
C. The Secretary's action was procedurally proper	32

TABLE OF AUTHORITIES

Cases:

<i>Alabama Ass'n of Realtors v. HHS</i> , 141 S. Ct. 2485 (2021)	25
<i>Allen Eng'g Co. v. Kays</i> , 152 S.W. 992 (Ark. 1913)	6
<i>Arizona v. Biden</i> , 40 F.4th 375 (6th Cir. 2022).....	10
<i>Arizonans for Official English v. Arizona</i> , 520 U.S. 43 (1997)	11
<i>Arkansas v. Texas</i> , 346 U.S. 368 (1953)	5, 6
<i>Atlantic Richfield Co. v. Christian</i> , 140 S. Ct. 1335 (2020)	34
<i>Azar v. Allina Health Servs.</i> , 139 S. Ct. 1804 (2019)	33
<i>Cedric Kushner Promotions, Ltd. v. King</i> , 533 U.S. 158 (2001).....	3

II

Cases—Continued:	Page
<i>Cherry Cotton Mills, Inc. v. United States</i> , 327 U.S. 536 (1946).....	6
<i>Erickson v. United States</i> , 264 U.S. 246 (1924).....	6, 7
<i>FDA v. Brown & Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000).....	21
<i>First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba</i> , 462 U.S. 611 (1983).....	5
<i>Florida v. Anderson</i> , 91 U.S. 667 (1875)	6
<i>Florida v. Mellon</i> , 273 U.S. 12 (1927).....	9
<i>Franchise Tax Bd. v. Alcan Aluminium Ltd.</i> , 493 U.S. 331 (1990).....	8
<i>Insurance Co. of N. Am. v. United States</i> , 159 F.2d 699 (4th Cir. 1947)	6
<i>King v. Burwell</i> , 576 U.S. 473 (2015).....	21
<i>Lebron v. National R.R. Passenger Corp.</i> , 513 U.S. 374 (1995).....	5
<i>Lincoln County v. Luning</i> , 133 U.S. 529 (1890).....	5
<i>MCI Telecomms. Corp. v. AT&T Co.</i> , 512 U.S. 218 (1994).....	16
<i>Michigan v. EPA</i> , 576 U.S. 743 (2015)	31
<i>OBB Personenverkehr AG v. Sachs</i> , 577 U.S. 27 (2015)	30
<i>Pennsylvania v. New Jersey</i> , 426 U.S. 660 (1976).....	8, 9
<i>Puerto Rico Ports Auth. v. Federal Maritime Comm’n</i> , 531 F.3d 868 (D.C. Cir. 2008), cert. denied, 555 U.S. 1170 (2009)	4
<i>Raines v. Byrd</i> , 521 U.S. 811 (1997)	3
<i>Sloan Shipyards Corp. v. United States Shipping Bd. Emergency Fleet Corp.</i> , 258 U.S. 549 (1922)	4
<i>TransUnion LLC v. Ramirez</i> , 141 S. Ct. 2190 (2021)	14

III

Cases—Continued:	Page
<i>Trustees of Dartmouth College v. Woodward</i> , 17 U.S. (4 Wheat.) 518 (1819).....	4
<i>United States v. Czarnikow-Rionda Co.</i> , 40 F.2d 214 (2d Cir.), cert. denied, 282 U.S. 844 (1930).....	6
<i>United States v. Strang</i> , 254 U.S. 491 (1921).....	4
<i>United States v. W. T. Grant Co.</i> , 345 U.S. 629 (1953)	11
<i>West Virginia v. EPA</i> , 142 S. Ct. 2587 (2022)	11, 19, 21, 24, 26
<i>Wyoming v. Oklahoma</i> , 502 U.S. 437 (1992)	9
Constitution, statutes, and regulations:	
U.S. Const.:	
Art. I, § 8, cl. 3 (Commerce Clause)	9
Art. II	13
Art. III.....	8-11, 14, 33
Higher Education Act of 1965,	
20 U.S.C. 1001 <i>et seq.</i>	13
Tit. IV, 20 U.S.C. 1070 <i>et seq.</i>	15, 16, 22, 26
20 U.S.C. 1070(b)	25
20 U.S.C. 1082	25
20 U.S.C. 1087	16
20 U.S.C. 1087a	16
20 U.S.C. 1087e	16
20 U.S.C. 1087dd(g)	16
20 U.S.C. 1098a(b)(1).....	33
20 U.S.C. 1098a(b)(2).....	33
Higher Education Relief Opportunities for Students Act of 2003, 20 U.S.C. 1098aa <i>et seq.</i> :	
20 U.S.C. 1098bb(a)(1)	15, 22, 27, 28, 31
20 U.S.C. 1098bb(a)(2)	15, 28
20 U.S.C. 1098bb(a)(2)(A).....	15, 17, 28, 25

IV

Statutes and regulations—Continued:	Page
20 U.S.C. 1098bb(a)(2)(B).....	17
20 U.S.C. 1098bb(a)(2)(B)-(E).....	17
20 U.S.C. 1098bb(a)(2)(C).....	17
20 U.S.C. 1098bb(a)(2)(D).....	17, 18
20 U.S.C. 1098bb(a)(2)(E).....	18
20 U.S.C. 1098bb(b)(1)	32, 33
20 U.S.C. 1098bb(b)(2)	17
20 U.S.C. 1098bb(b)(3)	28
20 U.S.C. 1098bb(d).....	34
20 U.S.C. 1098ee(2)(D).....	29
5 U.S.C. 553(e)	13
31 U.S.C. 3711(a)(1).....	31
42 U.S.C. 1395hh(a)(2)	33
34 C.F.R.:	
Pt. 674, Subpt. D.....	16
Pt. 682:	
Section 682.402.....	16
Pt. 685:	
Section 685.212.....	16
Miscellaneous:	
Tom Akana & Dubravka Ritter, <i>Expectations of Student Loan Repayment, Forbearance, and Cancellation: Insights from Recent Survey Data</i> , Fed. Reserve Bank of Phila. (2022), https://perma.cc/P5FA-ZSEN	28
149 Cong. Rec. 7923 (2003)	22
87 Fed. Reg. 61,512 (Oct. 12, 2022)	10, 16, 17
H.R. Rep. No. 122, 108th Cong., 1st Sess. (2003).....	22

Miscellaneous—Continued:	Page
Letter from Phillip L. Swagel, Director, Congressional Budget Office, to Sen. Richard Burr and Rep. Virginia Foxx, <i>Re: Costs of Suspending Student Loan Payments and Cancelling Debt</i> (Sept. 26, 2022), https://perma.cc/62FW-M6BQ	23
MOHELA FY 2022 Financial Statement	7
Office of Legal Counsel, U.S. Dep’t of Justice, <i>Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans</i> , 2022 WL 3975075 (Aug. 23, 2022)	17
Office of Management & Budget, Executive Office of the President:	
<i>Approved Apportionments</i> , https://apportionment-public.max.gov/	31
<i>Statement of Administration Policy</i> (Jan. 30, 2023), https://perma.cc/8FNC-22KX	27
Alicia Parlapiano et al., <i>Where \$5 Trillion in Pandemic Stimulus Money Went</i> , N.Y. Times (Mar. 11, 2022), https://www.nytimes.com/ interactive/2022/03/11/us/how-covid-stimulus- money-was-spent.html	20
Stop Reckless Student Loan Actions Act of 2022, H.R. 7656, § 4(d), 117th Cong., 2d Sess. (2022)	20

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For the last three years, Americans with federally held student loans have had their payment obligations and interest accrual suspended under HEROES Act waivers and modifications first adopted by then-Secretary DeVos. That across-the-board suspension has provided essential financial relief to borrowers affected by the COVID-19 pandemic. But Secretary Cardona found, and respondents do not dispute, that resuming payments without additional relief would cause delinquencies and defaults to spike above pre-pandemic

levels among vulnerable borrowers still recovering from the economic fallout of COVID-19. The Secretary responded to that looming crisis by again invoking the HEROES Act to provide one-time debt relief that will smooth the transition to repayment and ensure that an unprecedented pandemic does not leave lower-income borrowers worse off in relation to their loans.

Respondents ask this Court to deny that vital relief to tens of millions of borrowers, many of whom have already applied for and been approved to receive it. But respondents' briefs confirm that they lack standing to seek that profoundly disruptive result. The States have suffered no cognizable injury; instead, they assert harms to a separate legal entity that has chosen not to sue and harms they have inflicted upon themselves. Brown and Taylor, for their part, purport to want greater loan forgiveness but press a claim that would prevent the Secretary from granting HEROES Act relief to *anyone*—them included.

Respondents' arguments on the merits fare no better. Their assertion that the Secretary can never discharge loan principal contravenes the plain language of the HEROES Act, which authorizes the Secretary to waive or modify "any" student-loan provision to provide relief to borrowers affected by national emergencies. Respondents' attempt to invoke the major questions doctrine to override that clear text seeks not to implement Congress's intent, but to thwart it. Congress empowered the Secretary to respond to unforeseen emergencies by granting relief to student-loan borrowers. Discharge of principal is a paradigmatic form of financial relief falling squarely within that authorization. And the Secretary acted within the heartland of his authority—and in line with the central pur-

pose and function of the HEROES Act—by granting that relief in response to a once-in-a-century pandemic that starkly disrupted the Nation’s economy and borrowers’ ability to repay their loans. The Secretary’s interpretation is not just a plausible reading of the statute; it is the best reading. The Court should reject respondents’ distortion of the Act and their effort to deny student-loan borrowers the relief that Congress authorized and that the Secretary deemed essential.

I. RESPONDENTS LACK ARTICLE III STANDING

“The standing inquiry focuses on whether the plaintiff is the proper party to bring th[e] suit.” *Raines v. Byrd*, 521 U.S. 811, 818 (1997). Respondents are not proper parties because the plan causes them no cognizable injury.

A. The States Lack Standing

1. The States principally argue (Br. 15-20) that the plan will harm the Missouri Higher Education Loan Authority (MOHELA) and that injury to MOHELA is injury to Missouri itself. But a corporation is a distinct legal person with separate interests from its creators and owners. See *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). Missouri chose to organize MOHELA as a corporation with legal personality, the capacity to sue and be sued, and “express financial separation” from the State—including “the lack of any obligation for Missouri to pay MOHELA’s debts.” J.A. 145. Having reaped the benefits of that separation, Missouri cannot now claim MOHELA’s injuries as its own.

The States do not deny that, if MOHELA were a private corporation, it would have to sue in its own name to protect its interests. But they argue (Br. 16-20) that the normal rules do not apply because MOHELA was

created and is controlled by a State rather than private shareholders. That argument has no basis in history or precedent.

“At the time of our founding, the existence of a separate legal person, with the capacity to sue and be sued, was precisely what set certain * * * state entities apart from the state itself.” *Puerto Rico Ports Auth. v. Federal Maritime Comm’n*, 531 F.3d 868, 881 (D.C. Cir. 2008) (Williams, J., concurring), cert. denied, 555 U.S. 1170 (2009). Early Americans were familiar with “public corporations”—corporations “founded by the government for public purposes.” *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 668-669 (1819) (opinion of Story, J.). A public corporation, no less than a private one, was regarded as a separate legal entity, with the capacity of “suing and being sued” in its own name “in all things touching its corporate rights and duties.” *Id.* at 667. And a public corporation “maintained its separate identity” even if the State had “an unqualified financial interest in the corporation’s success,” granted it “sovereign powers,” or regarded it as an “integral part of the State.” *Puerto Rico Ports Auth.*, 531 F.3d at 881 (Williams, J., concurring) (citation omitted).

This Court’s precedents likewise recognize that for public as well as private corporations, “[t]he meaning of incorporation is that you have a [separate] person.” *Sloan Shipyards Corp. v. United States Shipping Bd. Emergency Fleet Corp.*, 258 U.S. 549, 567 (1922) (Holmes, J.); see, e.g., *United States v. Strang*, 254 U.S. 491, 493 (1921) (“Notwithstanding all its stock was owned by the United States [a corporation] must be regarded as a separate entity.”). That principle explains, for instance, why municipalities do not have sovereign

immunity: Because a municipal corporation is a legally distinct person, a suit against a municipality is not a suit against the State. See *Lincoln County v. Luning*, 133 U.S. 529, 530-531 (1890). In assessing standing, the States provide no reason to depart from the rule that “government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.” *First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-627 (1983); see *id.* at 625-626 (emphasizing the importance of respecting “the separate status of government instrumentalities” that have independent “assets and liabilities”).

The cases cited by the States (Br. 16-19) do not show otherwise. The States principally rely (Br. 16-17) on *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), which held that Amtrak is a state actor because it is government-created and -controlled and exists to advance governmental objectives. *Id.* at 399. But the question whether a corporation is a state actor is different from the question whether it is a separate legal person. A municipality, for example, is a state actor, yet a suit against a municipality is not a suit against the State. *Lebron* thus establishes at most that MOHELA may be a state actor bound by the Bill of Rights, not that Missouri can establish standing by asserting that the plan injures MOHELA.

The States also invoke (Br. 19) *Arkansas v. Texas*, 346 U.S. 368 (1953), which held that a State could sue on behalf of a state university. But the Court did so only because the university *lacked* separate legal personality: The university could not sue or be sued in its own name; instead, state law treated “a suit against the University” as “a suit against the State.” *Id.* at 370; see

Allen Eng'g Co. v. Kays, 152 S.W. 992 (Ark. 1913) (cited in *Arkansas*, 346 U.S. at 370 n.9). Far from endorsing the States' theory, *Arkansas* reaffirmed the fundamental principle that a State “must, of course, represent an interest of her own and not merely that of her citizens or corporations.” 346 U.S. at 370.

Finally, the States rely (Br. 18-19) on a handful of cases in which courts held that the United States or a State could sue to vindicate its *own* legal interests. In *Florida v. Anderson*, 91 U.S. 667 (1875), this Court held that Florida could bring a suit concerning trust property because Florida was the trust “beneficia[ry]” and thus had a “propriet[ary]” interest in the trust. *Id.* at 676. In *Cherry Cotton Mills, Inc. v. United States*, 327 U.S. 536 (1946), the Court held that the United States could assert a statutory right to set off a debt it owed to a taxpayer against a debt the taxpayer owed to a government-owned corporation whose “profits, if any, go to the Government” and whose “losses the Government must bear.” *Id.* at 539. And in *Insurance Co. of North America v. United States*, 159 F.2d 699 (1947), the Fourth Circuit collected decisions recognizing that the United States may sue “for the protection of its interest” when a corporation has acted on its behalf. *Id.* at 702. One of the cited cases, for example, held that the United States may sue “on contracts entered into by [a corporation] as its duly authorized agent.” *United States v. Czarnikow-Rionda Co.*, 40 F.2d 214, 216 (2d Cir.), cert. denied, 282 U.S. 844 (1930).¹

¹ In *Erickson v. United States*, 264 U.S. 246 (1924), the United States likewise “claim[ed] to have a direct and legal interest” in contracts made by a corporation on its behalf. *Id.* at 249. But it was unnecessary for the Court to decide whether the United States had standing to sue because the corporation was a plaintiff, and the

The States’ cases thus did not apply any special rule to governmental corporations; rather, they acknowledged that the government, no less than a private party, may sue to enforce its own legal rights. In this case, however, Missouri does not assert any legal rights of its own—whether under the law of trusts, the law of agency, a federal statute, or anything else. Instead, Missouri simply seeks to prevent an alleged injury to MOHELA, a legally separate person—with “revenues and liabilities” that are “completely independent of the State,” J.A. 145—that could sue in its own name if it wished to press that claim. The States fail to cite even a single case allowing such a suit.

2. The States next argue (Br. 20-23) that MOHELA owes money to Missouri and that the plan’s effects on MOHELA could cause it to miss those payments. That theory is both factually and legally deficient.

The States have alleged that MOHELA receives a fee for each loan it services and thus stands to lose revenue because the plan will result in the discharge of some of those loans. J.A. 29. But MOHELA also stands to earn offsetting fees for effectuating discharges under the plan, and the States have not alleged, much less shown, that any loss of servicing revenue would prevent MOHELA from fulfilling any of its financial obligations to the State. Nor have the States shown that any potential default would be caused by the plan as opposed to other circumstances; MOHELA has not made any payments to the relevant state fund since 2008 and announced before the plan that future payments were not “deemed probable.” MOHELA FY 2022 Financial Statement at 21; see ArchCity Defenders Amicus Br. 15-18.

Court held only that the case fell within a statutory grant of jurisdiction over “suits brought by the United States.” *Ibid.*

Even if the plan increased MOHELA’s risk of default, Missouri still could not bring this suit. The States appear to concede (Br. 22) that a bank cannot challenge a regulation that reduces one of its borrower’s revenues, even if that reduction causes the borrower to default. The States argue (*ibid.*) that Missouri is less like a bank and more like a shareholder that “controls and receives money from” a corporation. But in keeping with the general rule that a plaintiff “cannot rest his claim to relief on the legal rights or interests of third parties,” even a shareholder that otherwise satisfies Article III ordinarily cannot “initiat[e] actions to enforce the rights of the corporation.” *Franchise Tax Bd. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990) (citation omitted). That is true even if the shareholder “controls” the corporation and “receives money from” it. States Br. 22.

3. Four States argue (Br. 23-26) that the plan will diminish their income-tax revenues because they have chosen to track the Internal Revenue Code’s definition of gross income, which anticipates pandemic-related debt relief by excluding discharges of student loans between 2021 and 2025. But the States cannot reconcile that theory with the principle that no plaintiff “can be heard to complain about damage inflicted by its own hand.” *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (per curiam). The States note (Br. 25) that they adopted the federal definition of gross income before the Secretary announced the plan. But the same was true in *Pennsylvania*, where the Court emphasized that Pennsylvania could avoid the alleged injury by “withdrawing” a previously granted tax credit. 426 U.S. at 664. Regardless of the timing, the relevant point is that any “injuries to the plaintiffs’ fises were

self-inflicted, resulting from decisions by their respective state legislatures.” *Ibid.* That analysis likewise refutes the States’ argument (Br. 26) that they would suffer a legally cognizable injury by making changes to their “preferred system for calculating state taxable income.” As in *Pennsylvania*, “[n]othing required” the States to adopt the federal definition of gross income, and “nothing prevents” them from abandoning that definition now. 426 U.S. 664.

Nor can the States reconcile their theory with the longstanding principle that a federal policy’s “indirect” effect on state tax revenues is not an Article III injury. *Florida v. Mellon*, 273 U.S. 12, 18 (1927). Their reliance (Br. 23-24) on *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), is misplaced. There, Oklahoma adopted discriminatory regulations with the avowed purpose of reducing purchases of coal from Wyoming. *Id.* at 443. The Court held that Wyoming had standing to invoke this Court’s original jurisdiction and challenge the Oklahoma laws under the Commerce Clause because it had suffered “a direct injury in the form of a loss of specific [coal] tax revenues.” *Id.* at 448. This is not a suit by one State against another in the forum the Constitution provides for resolving such disputes. Nor do the States claim that the Secretary targeted or discriminated against them. They allege, at most, that the plan will have incidental effects on their general tax revenues. And *Florida* establishes that such incidental effects from federal policies are not Article III injuries.

The States fail to identify any meaningful limit to their contrary view. Virtually every federal policy has incidental effects on state revenues. Labor policy affects incomes (and hence state income taxes); agricultural policy affects food prices (and hence state sales

taxes); foreign policy affects oil prices (and hence state gasoline taxes); and housing policy affects real-estate values (and hence state property taxes). A system where any State can challenge any federal policy that incidentally affects its tax revenues would “make a mockery” of Article III. *Arizona v. Biden*, 40 F.4th 375, 386 (6th Cir. 2022) (Sutton, C.J.) (citation omitted).

4. Finally, three States argue (Br. 26-29) that the plan has encouraged borrowers to consolidate their Federal Family Education Loans into Direct Loans, harming state entities that hold or have invested in Federal Family Education Loans. But that theory, too, lacks merit.

The States acknowledge (Br. 28) that the plan as finalized by the Department and published in the Federal Register does not create an incentive to consolidate because it does not apply to loans consolidated on or after September 29, 2022. 87 Fed. Reg. 61,512, 61,514 (Oct. 12, 2022). The States assert (Br. 28) that this exclusion raises a question of mootness rather than standing because the Department “change[d]” the plan “after suit was filed.” But the States sued on September 29, before the final version of the plan was published. Accordingly, there was no “change” (*ibid.*) to the plan as adopted, only a change to the Department’s prior statements about what it *intended* to do. The States cite no authority suggesting that a plaintiff can transform a question of standing into a question of mootness by challenging an agency’s action before it is finalized.

In addition, the States cannot dispute that the Department determined *before* this suit was filed to exclude loans consolidated on or after September 29. See 22-cv-1040 D. Ct. Doc. 27-1, at 4, 35, 47-48 (Oct. 7, 2022). Thus, the plan’s eligibility requirements could not have

created an incentive to consolidate during this litigation whether looking at the plan as finalized or at the Department's intent regarding the plan's scope when the States filed their complaint.

In any event, this suit would not be justiciable even if one accepted the States' premise that they had standing at the moment they filed their complaint. Under Article III, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (citations omitted). No actual controversy exists now because the plan as finalized does not create any incentive to consolidate.

The States invoke (Br. 28-29) the principle that the defendant's voluntary cessation of the challenged conduct does not normally moot a case. But the voluntary-cessation exception exists to ensure that a defendant does not stop the challenged conduct after being sued and then "return to his old ways" once the litigation ends. *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). This case does not raise any such concerns: The plan as adopted did not include the feature that the States challenge, so the allegedly wrongful behavior "could not reasonably be expected to recur," *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022) (citation omitted). And that is particularly true because the Department decided to exclude loans consolidated on or after September 29 *before* the States sued. That timing makes clear that the decision was not a response to this suit.

B. Brown And Taylor Lack Standing

Brown and Taylor abandon the only claim on which the district court granted them relief—the substantive claim that the plan exceeds the Secretary's authority.

They concede (Br. 32-33) that they “didn’t bring” that claim, that the court committed an “analytical error” by deciding it, and that they “don’t seek affirmance” on that basis. They instead pursue (Br. 3) a claim the district court rejected—that the plan is unlawful because it was promulgated without the required procedures. But Brown and Taylor do not have standing to bring that claim either.

Brown and Taylor argue that, when a plaintiff alleges a deprivation of a “procedural right,” “the normal standards for redressability” do not apply, and the plaintiff need only show “some possibility” that the requested relief “will prompt the injury-causing party to reconsider the decision” that harmed her. Br. 22 (citations omitted). But their claim fails their own test.

Brown and Taylor contend (Br. 34-55) that, although the HEROES Act exempts certain actions from notice-and-comment and negotiated-rulemaking procedures, the exemption does not apply here because the plan exceeds the Secretary’s substantive HEROES Act authority. A judgment based on that theory would not “prompt the [Secretary] to reconsider” the decision that allegedly harmed Brown and Taylor, Br. 22 (citation omitted)—*i.e.*, the decision not to extend HEROES Act relief to borrowers such as Brown and the decision to extend only \$10,000 rather than \$20,000 in HEROES Act relief to borrowers such as Taylor. Such a judgment would mean that no one could receive HEROES Act relief at all—a result that would in no way redress Brown’s asserted injury, and that would cost Taylor \$10,000.

Brown and Taylor concede that the judgment they seek would preclude the Secretary from granting HEROES Act relief to them or anyone else. But they hy-

pothesize (Br. 30) that if the Secretary is prevented from providing relief under the HEROES Act, he might consider making an entirely *different* decision—granting debt relief under the Higher Education Act of 1965 (Education Act), 20 U.S.C. 1001 *et seq.*, a separate statute providing distinct authorities to be used for distinct purposes. And although Brown and Taylor broadly attack the idea of loan forgiveness in terms that are not limited to the HEROES Act, they assert without elaboration that the Education Act would authorize even greater relief for a wider class of borrowers, including them.

Brown and Taylor cite no decision endorsing their assertion that plaintiffs can establish standing to challenge an agency action that inflicts no injury on them by positing that invalidation of that action might prompt the agency to take some *other* action under a *different* statute. If Brown and Taylor would like the Secretary to grant them relief under the Education Act, they can ask for it, including by filing a petition for rulemaking. See 5 U.S.C. 553(e). But challenging the Secretary’s separate decision to forgive the loans of other borrowers under the HEROES Act will not lead to the relief that Brown and Taylor purport to seek. Instead, all they could achieve by challenging that distinct decision is to deny HEROES Act relief to others (and to Taylor) without getting anything for themselves. They do not have standing to do that.

* * * * *

Respondents are classic ideological plaintiffs—persons who have suffered no concrete injury, but who sue to prevent the government from violating the law as they see it. In their rush to vindicate their view of Article II, respondents urge this Court to ignore well-

established limits under Article III: Federal courts do not “exercise general legal oversight” over the Executive Branch. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). Accepting respondents’ convoluted theories of standing would flout that fundamental separation-of-powers principle. See Bray & Baude Amicus Br. 3-17.

II. THE PLAN IS LAWFUL

A. The HEROES Act Authorizes The Plan

The government’s opening brief explained (at 34-46) that the plain text of the HEROES Act authorizes the Secretary’s plan. In an effort to override the text, respondents invoke the major questions doctrine. But the doctrine does not apply here—and even if it did, the Act clearly authorizes the Secretary to discharge loan principal when the statute’s requirements are satisfied. Respondents’ other arguments—focused on details of the plan that cannot be characterized as major questions—likewise lack merit.

1. *The Act clearly authorizes the plan*

Respondents primarily argue that the HEROES Act does not authorize the Secretary to discharge loan principal under any circumstances. That is also the only interpretive issue that could even arguably raise a major question. But the Act’s unambiguous text answers that question in the Secretary’s favor.

The HEROES Act was enacted to authorize the Secretary to grant student-loan-related relief in enumerated circumstances. The Act’s central provision empowers the Secretary to “waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education] Act” that the Secretary “deems necessary” to “en-

sure” that borrowers are not left “in a worse position financially” because of a national emergency. 20 U.S.C. 1098bb(a)(1) and (2)(A). Congress’s express grant of authority to waive and modify “any” Title IV provision cannot plausibly be read to exclude the provisions governing loan repayment and discharge, which are among the most obvious candidates for waiver or modification under a statute designed to provide financial relief to borrowers affected by emergencies. Respondents’ contrary arguments lack merit.

Respondents first assert that, while Section 1098bb(a)(2)(A) authorizes the Secretary to issue relief “to ensure” that borrowers “are not placed in a worse position,” discharge of principal inevitably places borrowers in a “*better* position.” States Br. 39-40 (citation omitted). That is wrong. Like all other relief authorized by the HEROES Act, a discharge obviously puts borrowers in a better position than they would have occupied without that relief. But the relevant question is whether the relief ensures that borrowers are not left worse off “because of their status as affected individuals,” 20 U.S.C. 1098bb(a)(2)(A)—that is, because of the emergency. And depending on the impact of the emergency, discharge of principal may be necessary to ensure that borrowers are not in a worse position to repay their student loans.

This case illustrates the point. The Secretary determined that when payments resume, lower-income borrowers are likely to experience *higher* default and delinquency rates than they did before the pandemic. That conclusion was supported by data documenting the pandemic’s severe financial consequences, particularly on lower-income borrowers’ ability to repay outstanding loans. The Secretary thus acted to ensure affected

borrowers would not be left in a “worse position” as a result of the pandemic by reducing their loan burden in amounts sufficient to ameliorate the “risk that delinquency and default rates will rise *above pre-pandemic levels*.” J.A. 242 (emphasis added).

Respondents likewise err in asserting (States Br. 44-47; Brown Br. 48-49) that the HEROES Act does not authorize the Secretary to waive or modify the Title IV provisions governing loan cancellation and discharge. See J.A. 261-262 (Secretary’s memorandum “issuing waivers and modifications” of 20 U.S.C. 1087, 1087a, 1087e, 1087dd(g); 34 C.F.R. Pt. 674, Subpt. D, 682.402, 685.212); 87 Fed. Reg. at 61,514 (same). Nothing in the Act—which grants the Secretary power to waive and modify “any” Title IV provision—indicates that those provisions are uniquely off limits. Thus, to effectuate the plan, the Secretary waived and modified the loan cancellation and discharge provisions to permit a one-time discharge in an additional circumstance: to assist borrowers affected by the continuing economic fallout of a global pandemic who satisfy defined criteria for relief. That action accords with a straightforward understanding of the statutory verbs, which authorize the Secretary to eliminate or change the requirements imposed by any Title IV student-aid provision.

Citing *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 225 (1994), respondents assert (States Br. 45; Brown Br. 48-49) that “‘modify’ ‘means to change moderately or in a minor fashion.’” But unlike in *MCI*, the term “modify” here is part of a phrase granting broader authority to “waive or modify,” and respondents do not dispute that the term “waive” empowers the Secretary to eliminate legal obligations in their entirety. It would make little sense to construe

the Act to allow the Secretary to eliminate legal obligations wholesale or to alter them to a marginal degree, but nothing in between. Instead, “Congress granted the Secretary the power both to eliminate legal obligations (‘waive’) and to reduce them to any extent short of waiver (‘modify’) as long as the other requirements of the statute are satisfied.” Office of Legal Counsel, U.S. Dep’t of Justice, *Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans*, 2022 WL 3975075, at *8 (Aug. 23, 2022).

Respondents suggest (States Br. 46; Brown Br. 49-50) that the Secretary can only eliminate requirements but never add them. But the HEROES Act specifically contemplates that when the Secretary publishes waivers and modifications in the Federal Register, he will also publish “the terms and conditions to be applied in lieu of such statutory and regulatory provisions.” 20 U.S.C. 1098bb(b)(2). That is precisely what the Secretary did here, publishing the eligibility criteria for the one-time discharge alongside the relevant waivers and modifications. 87 Fed. Reg. at 61,514.

Finally, the States err in asserting (Br. 40-41) that discharging loan principal to ensure that affected borrowers “are not placed in a worse position financially” due to an emergency, 20 U.S.C. 1098bb(a)(2)(A), would render superfluous or conflict with the other waivers and modifications authorized in subparagraphs (B)-(E). Those provisions address different circumstances and impose different requirements. Subparagraph (B) addresses “administrative requirements,” not borrowers’ ability to pay. Subparagraph (C) deals with students seeking financial assistance, not repayment of loans already received. Subparagraph (D) addresses students who withdraw from school early; the statute

allows the Secretary to waive otherwise-applicable repayment obligations but—unlike subparagraph (A)—does not condition relief on the student’s financial position. And subparagraph (E) addresses lenders and schools, not borrowers.

The States are wrong to contend (Br. 40) that the purportedly “modest” scope of those other provisions compels an atextually restrictive reading of subparagraph (A). In fact, each provision addresses a particular context and authorizes the Secretary to provide complete relief in that context. For example, subparagraph (D), on which the States principally rely (Br. 41), allows the Secretary to entirely eliminate a special repayment obligation imposed on withdrawing students. Congress’s inclusion of those other authorities to ensure that the HEROES Act covers the waterfront of applicants, students, borrowers, and others involved in the student-loan program simply confirms that Congress authorized the Secretary to fully respond to national emergencies—including discharging principal when necessary to avoid leaving borrowers in a worse position financially in accordance with subparagraph (A)’s plain language.

2. The major questions doctrine provides no basis to override the clear terms of the HEROES Act

Respondents seek to avoid the HEROES Act’s text by invoking the major questions doctrine. But that doctrine should not be extended to strip the Secretary of his clear statutory authority to provide essential debt relief to student-loan borrowers. The Secretary’s determination that the HEROES Act empowers him to discharge loan principal falls comfortably within the authority that Congress could reasonably be expected to have granted in a statute specifically authorizing him to

respond to a crisis by modifying any of the requirements of a government benefit program at the heartland of his expertise and existing authority. Respondents' contrary arguments seek to transform the major questions doctrine from an interpretive principle grounded in "a practical understanding of legislative intent," *West Virginia*, 142 S. Ct. at 2609, into a straitjacket that would thwart Congress's ability to empower agencies to respond to unforeseen events.

a. Respondents assert (States Br. 1, 29, 31-32, 37; Brown Br. 41-44) that the plan's "economic and political significance," without more, triggers the major questions doctrine. But heightened-specificity requirements do not apply simply because courts consider agency action to be significant, whether economically or politically; indeed, this Court has often decided challenges to highly significant actions without invoking any clear-statement requirement. See Gov't Br. 47. The question is not simply whether the agency action meets some (ill-defined) threshold of significance, which would hardly confine the major questions doctrine to exceptional cases, see *West Virginia*, 142 S. Ct. at 2609; the Court has instead demanded an *additional* showing that the claimed power is such an "[e]xtraordinary grant[] of regulatory authority" that it extends "beyond what Congress could reasonably be understood to have granted." *Ibid.*

In addition, respondents' assessment of the plan's "significance" is itself flawed. Brown and Taylor argue (Br. 42) that the plan's economics are "considerably larger" than the costs of regulatory actions in "other cases applying the major questions doctrine." But each of the cited cases involved agency action that imposed *regulatory burdens*, rather than (as here) offering addi-

tional *benefits*. See pp. 21-22, *infra*. The plan’s scale, moreover, reflects the size of the federal student-loan portfolio (approximately \$1.63 trillion), the number of borrowers (approximately 43 million), and the unprecedented scope of the once-in-a-century COVID-19 pandemic (which has triggered over \$5 trillion in government spending on other relief measures, see Alicia Parlapiano et al., *Where \$5 Trillion in Pandemic Stimulus Money Went*, N.Y. Times (Mar. 11, 2022)).

Similarly, as evidence of the plan’s political significance, respondents emphasize (States Br. 32; Brown Br. 42-44) Congress’s refusal to enact three student-loan-relief bills. But the cited bills differed markedly from the plan: one preceded the pandemic, another proposed substantially greater relief, and the third appeared in an omnibus multi-trillion-dollar relief package containing several contested provisions. Gov’t Br. 52 & n.3. The more reliable indicator of congressional intent is the *enacted* legislation specifically anticipating pandemic-related loan forgiveness under the Secretary’s existing authority by providing a special tax exemption from 2021-2025. *Id.* at 52-53. And if any inference is to be taken from unenacted legislation, it cuts against respondents: Congress refused to enact several bills that would have amended the HEROES Act to forbid discharge of loan principal.²

b. Context matters in determining how Congress is likely to legislate—and every case in which this Court has invoked the major questions doctrine to invalidate

² See, e.g., Stop Reckless Student Loan Actions Act of 2022, H.R. 7656, § 4(d), 117th Cong., 2d Sess. (2022) (seeking to amend the HEROES Act to provide that the Secretary “may not cancel the outstanding balances, or a portion of the balances, on covered loans due to the COVID-19 national emergency”).

an agency action involved the power to regulate, not the provision of government benefits. The States invoke (Br. 37) *King v. Burwell*, 576 U.S. 473 (2015), but the Court did not impose a clear-statement requirement of the sort respondents urge here; instead, *King* held only that the IRS’s interpretation of the statute was not entitled to deference—and nevertheless *upheld* the agency’s action. *Id.* at 485-486.

Respondents offer no persuasive reason to extend the major questions doctrine to this distinct context. They argue that agency determinations about federal benefit programs can affect individuals, States Br. 37, or involve substantial sums, Brown Br. 47, but neither feature justifies requiring clearer-than-ordinary congressional authorization. This Court has instead reserved such “skepticism” for cases in which an agency has claimed expansive authority to *regulate* private conduct. *West Virginia*, 142 S. Ct. at 2609 (citation omitted). Here, in contrast, Congress authorized an agency to provide government benefits as a lifeline in response to national emergencies that wreak financial havoc on citizens’ lives and ability to pay their student loans. “[C]ommon sense as to the manner in which Congress is likely to delegate,” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), supports interpreting that statutory authority in accordance with its plain meaning—not imposing on Congress the near-impossible burden to identify and enumerate every possible application of the statute to various future crises. The separation-of-powers principles that respondents invoke (States Br. 36-37; Brown Br. 47) would be undermined, not advanced, by changing the rules of statutory construction to curtail Congress’s ability to preauthor-

ize the Executive to provide critical benefits in response to national emergencies.³

c. Even if the Court were inclined to extend the major questions doctrine to this distinct context, this case lacks many of the features the Court has characterized as extraordinary. Respondents argue that the agency’s assertion of power is some combination of “unheralded,” “transformative,” States Br. 33-34 (citations omitted), and “unprecedented,” Brown Br. 45 (citation omitted). But they do not meaningfully dispute that the Secretary has previously issued class-wide relief under the HEROES Act, or that such relief had substantial economic effects.

Respondents attempt to draw (States Br. 33-36; Brown Br. 42-46) a categorical distinction between discharge of principal and all previous forms of relief, but nothing in the HEROES Act supports such a line. To the contrary, the Act authorizes the Secretary to “waive or modify any statutory or regulatory provision applicable to the student financial assistance programs,” 20 U.S.C. 1098bb(a)(1), so long as the Act’s predicates for relief are satisfied. As respondents do not dispute, the Title IV terms governing repayment and discharge are central to the student-loan programs; Congress’s broad authorization to the Secretary to waive and modify “any” Title IV provision in a statute specifically de-

³ Indeed, the legislators who enacted the HEROES Act understood the Act to grant substantial discretion to the Secretary to respond to unforeseen emergencies. *E.g.*, H.R. Rep. No. 122, 108th Cong., 1st Sess. 9 (2003) (describing Act as “[p]rovid[ing] the Secretary with the authority to implement waivers deemed necessary and not yet contemplated”); 149 Cong. Rec. 7923 (2003) (Rep. McKeon) (Act allows the Secretary “to act quickly should a situation arise that has not been considered”); see also Miller Amicus Br. 18-21.

signed to provide financial relief to borrowers thus plainly encompasses those terms.

Economically, moreover, no principled line separates discharge of principal from other types of relief that likewise reduce the total amount a borrower will ultimately pay the government. Take the across-the-board suspension of interest accrual and payments maintained since March 2020. Depending on a borrower’s loan balance and interest rate, a three-year suspension of interest accrual could be worth significantly more than the plan’s \$10,000 forgiveness. See J.A. 243-244. And the corresponding cost to the government is likewise permanent; just like discharge of principal, suspending payment obligations and interest accrual directly reduces the value of the government’s loan portfolio—by roughly \$5 billion per month, or over \$100 billion since the suspension was instituted nearly three years ago. Respondents’ contrary position rests on a misunderstanding of basic accounting principles and the present value of a loan. Previous uses of the Act did not merely “maintain borrower status quo,” States Br. 34; instead, they permanently reduced borrower financial obligations and the value of the debt held by the government. See, *e.g.*, Letter from Phillip L. Swagel, Director, Congressional Budget Office, to Sen. Richard Burr and Rep. Virginia Foxx, 1 (Sept. 26, 2022), <https://perma.cc/62FW-M6BQ> (calculating the “present-value cost” of extending forbearance).

Perhaps because no principled economic line separates forgiveness from forbearance, respondents now attempt (States Br. 34; Brown Br. 45-46) to cast doubt on forbearance as well. But respondents have never objected to the suspension of payments and interest accrual before; to the contrary, the States have consist-

ently treated that relief as uncontroversial, even telling the district court that they “would have been okay with continued forbearance.” D. Ct. Oral Arg. 39:40-41:30, <https://www.youtube.com/watch?v=iA8wm41bk2Q>. Respondents’ late-breaking change highlights the difficulty of their position: Forbearance was adopted in 2020, effectively ratified by Congress, carried forward across two administrations for three years, and never questioned by any court. If respondents’ reading would have precluded that vital and uncontroversial program, that is a strong indication their interpretation is wrong.

Respondents also err in arguing that the Secretary “asserts power to cancel student debt, of any amount, for any borrower,” even “a decade after” a national emergency. States Br. 32-33 (citation omitted); see Brown Br. 46-47. That is a strawman: The Secretary can only issue relief under the HEROES Act that he determines is necessary to ameliorate the harmful economic consequences of a particular emergency for affected borrowers, subject to the Act’s express limitations. Here, the plan reflects the Secretary’s determination that a one-time discharge of a limited measure of debt for a subset of affected borrowers is necessary to ensure that those borrowers are not placed in a worse position as they and the country work to recover from the immediate effects of COVID-19—nothing akin to the unlimited power respondents posit.

The States likewise miss the mark in asserting that the plan falls outside the Department’s “legitimate institutional role and ‘policy expertise’” because the agency is not equipped to balance the relevant fiscal considerations. Br. 35 (quoting *West Virginia*, 142 S. Ct. at 2612). Congress has tasked the Secretary with administering the Department’s \$1.63 trillion loan port-

folio, vesting him with substantial “powers and responsibilities” in “carry[ing] out” the student-loan programs, 20 U.S.C. 1070(b), 1082 (emphasis omitted); the plan falls within the heartland of that authority. Likewise, the States’ contention (Br. 35) that the “Secretary assumed a role beyond what Congress could have intended” by determining that the financial effects of COVID-19 necessitated student-loan relief ignores that Congress charged him with making precisely this sort of determination, which is inherent in deciding what relief is necessary to ensure that borrowers “are not placed in a worse position financially.” 20 U.S.C. 1098bb(a)(2)(A). This case is thus far afield from those in which the Court believed that an agency had asserted authority far outside its “particular domain.” *Alabama Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam).

Finally, the States argue (Br. 35-36) that cancellation authority is incompatible with the regulatory scheme because the Education Act establishes particular circumstances in which loan discharge is permitted. But the Education Act also specifically authorizes the other forms of relief the Secretary has long granted under the HEROES Act. If specific reference in the Education Act precluded relief under the HEROES Act, the latter would have no meaningful application. Instead, the very point of the HEROES Act is to allow the Secretary to issue relief *beyond* what is already provided in the Education Act when warranted by a national emergency. And the fact that discharge is a form of relief authorized throughout the Education Act only confirms that such relief would have surprised Congress not one whit.

* * * * *

This Court has explained that the major questions doctrine is a principle of statutory interpretation aimed at faithfully implementing Congress’s intent and rooted in the “fundamental canon” that “the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *West Virginia*, 142 S. Ct. at 2607 (citation omitted). But respondents wield the doctrine as a trump card to override plain text for all agency actions that can be characterized as significant. That departure from the text is unwarranted here, where the Secretary is not imposing onerous regulations, invoking a backwater provision, or claiming authority outside his lane and outside the core purpose of the statute. The central function of the HEROES Act is to provide debt relief in emergencies; discharge of principal is a quintessential form of debt relief that Congress could foresee; and Congress clearly authorized the Secretary to provide that relief when it empowered him to waive or modify any Title IV provision within the limits established by the Act. That is not merely a “plausible” or “colorable” interpretation of the statute, *id.* at 2609; it is the best reading. Overriding that reading thus would not implement Congress’s intent, but thwart it.

3. Respondents’ remaining statutory arguments lack merit

Respondents briefly assert that even if the HEROES Act sometimes authorizes discharge, that relief was not authorized here. Those arguments are likewise meritless.

a. The States assert (Br. 47-48) that the Secretary’s plan has too “tenuous” a connection to a national emergency. It is of course true that the acute public-health

emergency caused by COVID-19 is abating. But the HEROES Act and the Secretary’s plan are not aimed at stopping the spread of disease; they are concerned with *economic* consequences. The Secretary found—and respondents do not seriously deny—that those consequences persist. Thus, the Secretary permissibly acted to ensure that borrowers are not worse off in connection with the COVID-19 emergency as the country—and especially lower-income borrowers—continue to recover from the economic effects of an unprecedented global pandemic.⁴

The States object (Br. 47-48) that current economic conditions are not attributable “solely” to COVID-19, but Congress did not include any such limitation in the HEROES Act. With good reason: Our economy is complex, and the conditions borrowers face are never attributable solely to one factor. Respondents’ contrary theory would write words into the statute and effectively nullify the Act because the Secretary would never be able to determine that a borrower’s economic difficulty is attributable “solely” to a national emergency, unaffected by any other force or circumstance.⁵

⁴ Consistent with the transition from the acute phase of the pandemic, the Administration has announced that it intends to allow the COVID-19 national emergency to expire on May 11, 2023. See Office of Management and Budget, *Statement of Administration Policy* (Jan. 30, 2023), <https://perma.cc/8FNC-22KX>. But that expiration would not affect this case: The HEROES Act requires that the Secretary’s waivers and modifications be “in connection with a * * * national emergency,” 20 U.S.C. 1098bb(a)(1), not that he provide relief *during* the emergency.

⁵ Respondents mischaracterize (States Br. 49; Brown Br. 53) the study published by the Federal Reserve Bank of Philadelphia. While the study noted the uncontroversial reality of “chronic repayment struggles” even aside from COVID-19, it also emphasized “the prev-

Finally, the States’ suggestion (Br. 47-49) that the Department relied on COVID-19 as a pretext to issue student-loan relief is based on legally irrelevant political statements that cast no doubt on the Secretary’s stated rationale, which reasonably explains that the economic consequences of an unprecedented global pandemic warrant one-time targeted relief to affected borrowers.

b. Respondents also criticize (States Br. 49-50; Brown Br. 51-55) other features of the plan—primarily, the Secretary’s decisions about which borrowers should be eligible for relief. But respondents provide no reason to invalidate the Secretary’s application of the HEROES Act in the particular factual circumstances presented by the COVID-19 pandemic—particularly since Congress expressly authorized the Secretary to err on the side of over-inclusion by providing that he need not act “on a case-by-case basis” and should grant relief as he “deems necessary” to “ensure” that affected individuals are not worse off with respect to their student loans. 20 U.S.C. 1098bb(a)(1) and (2), (b)(3).

Respondents assert (States Br. 49; Brown Br. 54), the Secretary should have excluded the small fraction of eligible borrowers who live and work abroad because they do not qualify as “affected individuals” by virtue of living or working in a declared disaster area. But those borrowers separately qualify as affected individuals because the Secretary reasonably “determined” that they

alence of shocks during the pandemic” and the substantially higher number of borrowers who anticipate difficulty making loan payments when forbearance ends than report struggling before the pandemic. Tom Akana & Dubravka Ritter, *Expectations of Student Loan Repayment, Forbearance, and Cancellation: Insights from Recent Survey Data* 2, 7 (2022), <https://perma.cc/P5FA-ZSEN>; see *id.* at 9 Tbl. 1.

“suffered direct economic hardship,” 20 U.S.C. 1098ee(2)(D), as a result of a pandemic that had devastating economic effects across the globe.

Similarly, the States’ contention (Br. 50) that the Secretary should have excluded any borrower whose earnings increased during the pandemic ignores that Congress specifically authorized the Secretary to act on a class-wide basis to provide full relief, even at risk of over-inclusion. The States likewise overlook that such borrowers may have experienced pandemic-related economic hardships, including layoffs and acute inflationary pressures on household budgets for basic necessities. And the plan’s income thresholds are consistent with the available evidence, which established that “[t]here is a break in repayment capacity at around \$125,000.” J.A. 247; see J.A. 245-246.

The States emphasize (Br. 50) that some eligible borrowers do not expect to experience difficulty repaying loans, but they ignore the data showing that between 19% and 51% of borrowers in each income bracket below \$125,000 anticipate difficulty making student-loan payments when forbearance ends. J.A. 235-236, 247-248 & fig. 3. Given the substantial penalties imposed on borrowers who default on student-loan payments, the Secretary reasonably determined that adopting a \$125,000 income threshold was necessary to ensure that substantial swaths of “borrowers are not in a worse position financially due to the pandemic with regard to their ability to repay their loans.” J.A. 258.

B. The Plan Is Reasonable And Reasonably Explained

The States also maintain (Br. 50-53) that the plan is arbitrary and capricious in five ways. The States failed to raise several of these contentions below, and all of them are unfounded.

First, the States err in asserting (Br. 50) that the Secretary did not consider “*any*” alternatives to the plan. In fact, the Secretary considered options such as increasing enrollment in income-driven repayment plans and continued forbearance. The Department’s supporting analysis, for example, compares the likely success of the plan in “reduc[ing] delinquency and default risks” against “efforts to increase enrollment in [income-driven repayment plans].” J.A. 241. And the plan was an essential component of the Secretary’s determination that forbearance should end rather than continue indefinitely. The States likewise overlook how the Secretary tailored the plan—from the income eligibility thresholds, to the discharge amounts, to the limitation to existing loans—after rejecting other alternatives as either excessive or insufficient.

Second, the States maintain that the Secretary failed to consider relevant reliance interests. But the States lack cognizable reliance interests. See pp. 3-11, *supra*. And none of the “industry participants” the States mention (Br. 52) have challenged the plan—undercutting the suggestion that the Secretary ignored serious reliance interests.

Third, the States argue that the Secretary failed to consider the plan’s costs and the Department’s duty to recover debt owed. Those arguments were “never presented to any lower court and [are] therefore forfeited.” *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 37 (2015). And the States’ new arguments are meritless in any event. The Department extensively modeled the cost of debt relief, submitting cost estimates to the Office of Management and Budget shortly after announc-

ing the plan.⁶ Moreover, this is not a case where an agency disregarded cost in implementing a regulatory priority, see, *e.g.*, *Michigan v. EPA*, 576 U.S. 743, 750 (2015); rather, the plan involves the Department, acting as creditor, determining how best to administer its loan portfolio after a devastating national emergency. In analyzing the amount of debt to discharge and the number of eligible borrowers, see J.A. 242-245, the Secretary necessarily considered the government’s “costs”—they are two sides of the same coin.

Nor was the Secretary obligated to expressly address the “general duty to recover on debt owed” imposed on all agencies by 31 U.S.C. 3711(a)(1). The question confronting the Secretary, and analyzed in the plan’s supporting analysis, was whether the pandemic warranted a deviation from that norm under the HEROES Act, which authorizes the Secretary to grant relief “[n]otwithstanding any other provision of law.” 20 U.S.C. 1098bb(a)(1).

Fourth, the States criticize the Department for failing to explain the exclusion of borrowers who applied to consolidate Federal Family Education Loans on or after September 29. But assisting borrowers with non-federally held loans implicates distinct and complex considerations, including the effects on the private entities that hold those loans. After extensive discussion with industry leaders, stakeholders, and participants, the Department reasonably determined that it needed additional time to “assess[] whether there are alterna-

⁶ See Office of Management and Budget, Executive Office of the President, *Approved Apportionments*, <https://apportionment-public.max.gov/> (publishing approved apportionments for plan’s budgetary costs, in “Department of Education” folder for “Fiscal Year 2023”).

tive pathways to provide relief to borrowers with federal student loans not held by [the Department].” J.A. 216. An agency is not required to resolve either all or none of a problem. In any event, the States lack standing to challenge the exclusion of borrowers with private loans because (by their own admission, see pp. 3-11, *supra*) they have no interest whatsoever in *expanding* eligibility for relief.

Finally, the States’ characterization of the Secretary’s reliance on COVID-19 as pretextual fails for the reasons discussed above. See p. 28, *supra*.

C. The Secretary’s Action Was Procedurally Proper

Brown and Taylor, but not the States, argue (Br. 34-41) that the plan was procedurally defective. They do not dispute, however, that their procedural challenge necessarily fails if the plan was authorized by the HEROES Act. And their procedural arguments also fail for additional, independent reasons.

1. By its terms, the HEROES Act’s exemption from notice-and-comment is conditioned on only one criterion: that “the Secretary deem[ed]” those waivers or modifications “necessary to achieve the purposes of this section,” 20 U.S.C. 1098bb(b)(1). The exemption thus turns on the Secretary’s determination that the challenged waivers and modifications are warranted under the HEROES Act, not on whether that determination survives a subsequent legal challenge.

Brown and Taylor’s contrary arguments lack merit. The government has never suggested that subsection (b)(1) “allow[s] the Secretary to ‘deem’ that a particular regulation is exempt from notice-and-comment,” Brown Br. 39 (brackets and citation omitted); rather, the government explained (Br. 63) that the exemption turns on the Secretary’s “determination that the HEROES Act

applies and that waivers or modifications are necessary”—a determination that he indisputably made here.

Azar v. Allina Health Services, 139 S. Ct. 1804 (2019), is not to the contrary. There, the Court explained that the Secretary of Health and Human Services could not avoid the Medicare Act’s notice-and-comment requirements by “mislabeling” the agency’s action. *Id.* at 1812. But unlike Section 1098bb(b)(1) of the HEROES Act, the procedural exemption at issue in *Azar* did not turn on any determination by the Secretary; rather, that statute required HHS to allow notice-and-comment for any “rule, requirement, or other statement of policy” setting a legal standard for “the payment for services.” 42 U.S.C. 1395hh(a)(2). And there is no potential for the Department to engage in “mislabeling” mischief here; because the Secretary adopted the plan under the HEROES Act, the waivers and modifications are either authorized by the Act and therefore valid, or not authorized under the Act and therefore substantively invalid. The only “mislabeling” is Brown and Taylor’s characterization of a substantive challenge as a procedural one in service of their roundabout effort to circumvent Article III.

2. Brown and Taylor’s negotiated-rulemaking challenge is likewise meritless. The referenced negotiated-rulemaking requirements apply only to “proposed regulations” issued for public comment, see 20 U.S.C. 1098a(b)(1) and (2), so that provision cannot apply where, as here, the Act provides an express exemption from notice-and-comment procedures and the Secretary need not issue “proposed regulations” at all.

Brown and Taylor note that Congress adopted separate provisions exempting HEROES Act waivers and

modifications from both notice-and-comment and negotiated-rulemaking procedures. But Congress often employs that sort of “belt and suspenders approach” to ensure its aims are clear, *Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1350 n.5 (2020)—particularly where, as here, it intends to waive requirements in two distinct statutes.

More fundamentally, the only consequence of Brown and Taylor’s reading would be to enable procedural gambits like the one they pursue here. If the Secretary’s plan is substantively unauthorized by the HEROES Act, then it is invalid—regardless of the procedures used to adopt it. If Brown and Taylor believe that the Act does not authorize the plan, they could have brought a straightforward substantive challenge on that basis—as the States did. But Brown and Taylor have disclaimed any such challenge because they obviously lack standing to bring it. The Court should reject a reading of Section 1098bb(d) that would allow them to assert the exact same claim by labeling it “procedural.”

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the district court in *Nebraska* should be affirmed and the judgment of the district court in *Brown* should be reversed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
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