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.,
*Respondents.*

DEPT. OF EDUCATION, ET AL.,
*Petitioners,*
v.
MYRA BROWN, ET AL.,
*Respondents.*

**On Writs of Certiorari Before Judgment to the United States Courts of Appeals for the Fifth and Eighth Circuits**

## AMICI CURIAE BRIEF OF FORMER REP. HOWARD "BUCK" MCKEON, FORMER REP. JOHN KLINE, FORMER HOUSE SPEAKER JOHN BOEHNER AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

(For Continuation of Caption, See Inside Cover)

CALEB KRUCKENBERG
*Counsel of Record*
MICHAEL A. POON
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd., Ste. 1000
Arlington, VA, 22201
Tel: 202.888.6881
CKruckenberg@pacificlegal.org
MPoon@pacificlegal.org

*Counsel for Amici Curiae*
*Pacific Legal Foundation*
*Former Rep. Howard "Buck" McKeon*
*Former Rep. John Kline*
*Former House Speaker John Boehner*

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## IDENTITY AND INTEREST OF AMICI CURIAE[1]

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt, California corporation established for the purpose of litigating matters affecting the public interest. PLF provides a voice in the courts for Americans who believe in limited constitutional government, private property rights, and individual freedom.

PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the area of administrative law. PLF's attorneys have participated as lead counsel in several cases involving the role of the Judicial Branch as an independent check on the Executive and Legislative branches under the Constitution's Separation of Powers. *See U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Rapanos v. United States*, 547 U.S. 715 (2006) (agency regulations defining "waters of the United States"). It also regularly participates in this Court as *amici*. *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (SEC administrative-law judge is "officer of the United States" under the Appointments Clause). PLF also challenged the policy under review here in an original action, which is pending in the Seventh

[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Circuit Court of Appeals. *See Garrison v. Dept. of Ed.*, No. 22-2886 (7th Cir.).

Former Rep. Howard "Buck" McKeon served for 22 years as a Member of the U.S. House of Representatives from 1993 to 2015. During that time, Rep. McKeon served on the House Education and the Workforce Committee (formerly the Education and Labor Committee). He served as Chairman of that committee's Subcommittee on 21st Century Competitiveness, which had jurisdiction over the Higher Education Act during the 107th Congress, and as the Chairman of the full committee from January 3, 2006, to January 3, 2007.

Rep. McKeon was the original author of H.R. 3086, The Higher Education Relief Opportunities for Students (HEROES) Act of 2001, which he introduced on October 11, 2001. That bill, which provided the Secretary of Education with specific waiver authority to respond to national emergencies, passed the House on October 23, 2001, by a vote of 415-0. A revised, nearly identical bill (S. 1793) was introduced in the Senate on December 12, 2001, passed the Senate by unanimous consent on December 14, 2001, passed the House by voice vote on December 20, 2001, and was signed into the law by the President on January 15, 2002 (P.L. 107-122). The HEROES Act of 2001 served as the precursor to the HEROES Act of 2003.

Rep. McKeon intended for the HEROES Act of 2001 to serve as a limited measure in direct response to the September 11th tragedy. It was meant, as its text reflected, to provide emergency administrative relief for those men and women who put themselves in harms way in service of our country.

Congressman John Kline served from 2003 to 2017 as a Member of Congress, representing Minnesota's 2nd Congressional District. During his tenure, he served on the House Armed Services Committee, the House Intelligence Committee, the House Ethics Committee, and on the House Education and the Workforce Committee, including his last 6 years in Congress as Chairman of that Committee.

Prior to his Congressional service, Mr. Kline proudly served for more than 25 years in the U.S. Marine Corps. A decorated Marine, he served on active duty from 1969 to 1994. A helicopter pilot, he is a veteran of operations in both Vietnam and Somalia. Mr. Kline flew helicopters, including "Marine One," as a pilot in Marine Helicopter Squadron One, and he served as Marine Corps Aide to both Presidents Jimmy Carter and Ronald Reagan.

During his time in Congress, Mr. Kline spearheaded numerous legislative efforts, including authoring H.R.1412, the Higher Education Relief Opportunities for Students (HEROES) Act of 2003. During the War on Terror, thousands of service-members were called into active duty, often risking loss of assistance as a result of their service. As someone familiar with the needs of servicemen and women actively involved in military conflict while also a fiscal conservative, Mr. Kline knew any legislation needed to balance the needs of servicemembers and American taxpayers. For this reason, the HEROES Act was drafted to ensure that servicemembers would not face administrative difficulties related to their post-secondary education while serving in defense of our Nation but stopped short of offering loan

forgiveness. The legislative intent was to grant the Secretary of Education the authority to address the specific needs of each student whose education is interrupted when they are called to service.

Former House Speaker John Boehner chaired the House Committee on Education and the Workforce from 2001 to 2006, served as House Majority Leader and Minority Leader from 2006 to 2011, and led the House from January 2011 to October 2015. During this time, he navigated some of the most difficult legislative challenges of the modern era.

Born and raised in Cincinnati with eleven siblings, the son of a bartender, Mr. Boehner spent years running a small business in the packaging and plastics industry. After witnessing the challenges businesses encounter with government, he gradually entered the political arena, driven by a desire to make government less intrusive and more accountable to the people it serves. He represented the people of Ohio's 8th Congressional District in the House for nearly 25 years, leading the reform-minded "Gang of Seven" in the early 1990s that closed the scandal-ridden House Bank and forced a series of institutional changes in Congress, including measures requiring the House to be subject to annual independent audits of its financial records.

Mr. Boehner became chairman of the House Committee on Education and the Workforce in 2001. As chairman, he developed a reputation for bringing Republicans and Democrats together and solving big legislative puzzles on topics like education policy and pension reform. Mr. Boehner took the gavel as Speaker of the House in January 2011, dedicating his

speakership to addressing the drivers of the nation's debt.

Speaker Boehner was instrumental in the passage of each version of the HEROES Act, and in achieving the bipartisan goal that no servicemember should be put in a worse position with regard to their student loans because of their service to their country. Speaker Boehner, however, worked hard to ensure that this aim was tempered by fiscal responsibility and the need to ensure that any administrative relief be budget neutral.

This case is about the Department of Education's effort to implement a radical change in the entire framework governing federal student loans *despite* the statutory scheme that Congress enacted. The decisions under review correctly recognized the Department's overreach and the profound consequences for constitutional order. But to the extent that there is any doubt about what Congress intended when it granted the Secretary of Education limited authority to relax certain administrative burdens under the HEROES Act of 2003, *amici* write separately to make clear that Congress *never* intended anything like the loan cancellation effort underway here.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Student debt cancellation is among the most contentious and hotly-debated proposals in the nation today. And although Congress has erected certain pathways for loan forgiveness, such as the Public Service Loan Forgiveness program, some call for the

government to cancel loan principals more broadly. Nevertheless, Congress has declined to do so.

Dissatisfied with Congress's response, the President announced in August that Secretary of Education Miguel Cardona and the Department of Education will unilaterally cancel up to $20,000 in loan principal for each of 40 million borrowers at a cost of over $500 billion.

Despite the staggering scope of this regulatory action, it was taken with breathtaking informality and opacity. The Department did not undertake the notice-and-comment process required for rulemaking, much less solicit any public input. It did not even issue a formal order or directive setting out its cancellation program. Instead, it issued a press release on August 24th along with two legal memoranda providing its justifications, and, later, a hastily created FAQ section on its website.

The claimed basis for the cancellation is the HEROES Act of 2003, 20 U.S.C. § 1098bb(a)(1), a statute enacted in 2003 during the Iraq war to provide relief to servicemembers and their families. But never before has the Act been used to unilaterally cancel debts *en masse*, much less at a cost of half a trillion dollars. *Amici* Rep. McKeon, Rep. Kline, and Speaker Boehner, know perhaps better anyone why the Department's justification is wholly at odds with the Act's text, the context in which it was passed, and what has always been understood to be the limits of the Act's reach. Rep. McKeon was the original author of the Act's 2001 precursor, while Rep. Kline authored the 2003 HEROES Act, and Speaker Boehner helped guide each iteration of the Act as Chair of the House

Education and the Workforce Committee. As they know, firsthand, Congress did not, and surely could not, have ever expected the Act to be misused and distorted by the Department in the policy now before this Court.

## I. THIS COURT'S ROLE IS TO SAFEGUARD CONGRESSIONAL SUPREMACY IN LAWMAKING

Whenever this Court reviews the propriety of administrative action it starts with a simple inquiry—"whether Congress in fact meant to confer the power the agency has asserted." *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022). And part of that inquiry looks carefully at the context and consequences of that action. *Id.* This Court uses its "common sense as to the manner in which Congress would have been likely to delegate such power to the agency at issue," and asks whether it was likely "that Congress had actually done so." *Id.* at 2609 (cleaned up). This Court will "presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Id.* (cleaned up).

Thus, "there are extraordinary 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" to an administrative agency. *Id.* at 2608 (cleaned up). The Court does not assume that Congress has assigned to the Executive Branch questions of "vast economic and political significance" without a "clear statement" to that effect. *Id.* at 2605. This is particularly so "[w]hen an agency claims to

discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

But aside from just the breadth of the action taken by the regulation under review, this Court also carefully examines what Congress would have expected from the statutes it enacted. For "controversial" policies, particularly those that Congress "considered and rejected" before, it seems much less likely that Congress meant to covertly grant an agency the sweeping authority it has declined to exercise. *West Virginia*, 142 S. Ct. at 2610, 2614. "Common sense" suggests that Congress did not mean to hide "extraordinary grants of regulatory authority" in "modest words" *Id.* at 2609. "Radical or fundamental change" in the understanding of a statute are also suspect—a statute is not an "open book to which the agency may add pages and change the plot line." *Id.*

While these rules of construction make sense as an interpretive matter, they serve a much more important constitutional role. "When Congress seems slow to solve problems, it may be only natural that those in the Executive Branch might seek to take matters into their own hands. But the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people's representatives." *Id.* at 2626 (Gorsuch, J., concurring). The "major questions doctrine" "helps safeguard that foundational constitutional promise." *Id.*

As Respondents' point out in their merits brief, there is little doubt that the context of the Department's loan cancellation policy raises a host of red flags warranting skeptical review. *See* Brief of State of Nebraska, *et al.*, at II.A ("This is a major questions case."). As Members of Congress intimately involved in enacting the legislation at issue, *amici* write to provide context concerning the Act's passage and stress the implications of the Department's policy for the separation of powers. Congress never imagined that the HEROES Act would be used as the Department has attempted. The Act is a simple, but profoundly important, effort to relax administrative burdens for borrowers, primarily servicemembers, who find themselves in the middle of military actions or directly burdened by profound emergencies. It was not an unlimited grant of authority for the Secretary of Education to fundamentally remake the higher education system in his own image.

## II. THE PLAIN TEXT OF THE HEROES ACT OF 2003 DOES NOT EMPOWER THE DEPARTMENT TO CANCEL STUDENT LOAN BALANCES

To understand what Congress intended, we must begin, as always, with the text. Under the Act, "[t]he Secretary of Education ... may waive or modify any statutory or regulatory provision applicable to ... student financial assistance programs ... as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide ... waivers or modifications." 20 U.S.C. § 1098bb(a)(1)−(2)(A). The waivers or modifications must "be necessary to ensure that ... recipients of student financial assistance ... who are affected

individuals are not placed in a worse place financially in relation to that financial assistance because of their status as affected individuals[.]" *Id*. They are also permitted for "affected individuals who are recipients of student financial assistance are minimized, to the extent possible without impairing the integrity of the student financial assistance programs[.]" *Id*.

An "affected individual" includes "an individual who ... resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency" and an individual who "suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary." *Id*. § 1098ee(2).

To put this in context, the Higher Education Act (HEA) allows eligible students at participating schools to borrow money directly from the Department. 20 U.S.C. §§ 1077, 1091. It also establishes certain programs to help borrowers repay their loans. Under income-driven repayment (IDR) programs, for example, borrowers contribute a portion of their income toward their loans. 20 U.S.C. §§ 1087e(d), 1098e. At the end of a set period, the remaining balance is forgiven. 34 C.F.R. § 685.209. Similarly, under the public-service loan forgiveness (PSLF) program, borrowers who make 120 payments while working in qualifying public-interest positions are eligible to have their balances forgiven. *Id*. § 1087e(m).

The Department now seeks to cancel $10,000 of federal student loan debt for every borrower who, in either 2020 or 2021, earned less than $125,000 (or

$250,000 for those married filing jointly or heads of households). The amount canceled would increase to $20,000 for eligible borrowers who had received Pell Grants. And to justify that action, the Department looks only to the HEROES Act's modification and waiver provision.

The Department's proposal obviously violates at least four key limits in the Act. First, a blanket forgiveness policy that applies to every borrower below the income threshold is not limited to affected individuals who suffered "direct economic hardship as a direct result" of the pandemic. Second, the outright cancellation of a loan balance is not the same as an authorized "waiver" or "modif[ication]" of loan regulations. Third, the purported waivers violate the statutory directive that they not "impair[] the integrity of the student financial assistance programs." Fourth, outright cancellation is hardly "necessary" to mitigate the harms associated with the pandemic, particularly since no relevant borrower has been required to make a single payment since it began.

### A. Not Every Borrower in America Suffered Direct Economic Hardship from the COVID-19 Pandemic

The Secretary may provide waivers only to individuals who would otherwise be (1) "in a worse position financially" (2) "in relation to their financial assistance" (3) "because of their status as affected individuals." 20 U.S.C. § 1098bb(a)(2)(A). The Department's debt cancellation far exceeds these limits.

First, cancellation will be available to those who are in a *better* financial position, such as those whose wealth or income have increased since 2020 when the COVID-19 pandemic started. Because the cancellation program's sole substantive criterion is an income of less than $125,000 in either 2020 or 2021 (or $250,000 for households), those whose income has increased from 2019 to 2020 to 2021 will be eligible for cancellation. This flies in the face of the statutory requirement that the waiver be only for "affected individuals" who are "in a worse position financially" because of the pandemic. *See id.*

Second, no borrower will be worse off "in relation to their financial assistance." *See id.* That's because repayments and interest accrual have been paused "since March 2020." 87 Fed. Reg. 41,878, 41,884 (July 13, 2022). Additionally, participants in PSLF and IDR continue to earn credit toward the payments necessary to obtain forgiveness under those programs, despite making no payments. Once again, the policy broadly acts as though the opposite were true.

### B. Outright Cancellation Is Not a Waiver or Modification of Existing Requirements

Recall that the Act lets the Secretary "waive or modify" relevant "statutory or regulatory provision[s]." 20 U.S.C. § 1098bb(a)(1). But the "waiver" or "modification" of regulatory requirements is not the same as wholesale cancellation of a loan balance.

Waivers or modifications would normally be understood to simply alter or relax existing

requirements. Every English speaker likely understands that to modify something is to "make minor changes" in it. "Modify." *Merriam-Webster.com Dictionary,* https://www.merriam-webster.com/dictionary/modify; *see also MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994) ("modify" in federal statute "has a connotation of increment or limitation"). Waivers go a bit further, but rather than rewrite the rules, they simply let certain requirements slide. *See* "Waiver," *Merriam-Webster.com Dictionary,* https://www.merriam-webster.com/dictionary/waiver ("the act of intentionally relinquishing or abandoning a known right, claim, or privilege"); WAIVER, Black's Law Dictionary (11th ed. 2019) ("The voluntary relinquishment or abandonment—express or implied—of a legal right or advantage.").

There are many administrative and technical requirements for federal student loan borrowers that appear readily amenable to waivers and modifications. For instance, the Secretary is tasked with designing different types of repayment plans, each with unique characteristics and terms. *See* 20 U.S.C. § 1087e(d). Likewise, the Secretary is supposed to establish certain fiscal controls for lending institutions. *See id.* at § 1087e(k). It makes sense for the HEROES Act to relax some of these requirements when a borrower is serving his or her country while deployed in the armed forces, or even ease the administrative controls of a lender when its offices are flooded in the wake of a hurricane.

What doesn't follow, however, is that these waivers or modifications could result in the outright cancellation of loan balances. After all, when Congress

has ordered loan balances to be wiped out, it has used specific language such as "discharge," "repayment," "forgiveness," and "cancellation." These terms have established meanings. "Discharge" describes what happens when the Secretary releases "the borrower's liability on the loan" for specific reasons. *See* 20 U.S.C. § 1087dd(g)(1). Similarly, "repayment," occurs when the Secretary "discharge[s] the borrower's liability on the loan by repaying the amount owed on the loan," such as when the borrower dies or when they are employed in certain professions. *See* 20 U.S.C. §§ 1078-12(d)(2); 1087(a)(1). Whereas the terms "forgiveness" and "cancellation" refer to what happens when a borrower makes an affirmative showing that he or she has completed certain requirements allowing the ongoing obligation to be written off. A borrower "seeks forgiveness" of the loan based on completing certain requirements. *See* 20 U.S.C. § 1087j(b)(2). Once forgiveness is given, the loan is "cancelled." *See* 20 U.S.C. §§ 1087e(m)(1), 1087j(b), 1087ee(a). If Congress really meant for the HEROES Act to confer this type of authority on the Secretary, it would have said so.

Buttressing this understanding is the temporary nature of the HEROES Act's provisions. The waivers or modifications are supposed to be in "response to military contingencies and national emergencies," which suggests that they are time limited. *See* 20 U.S.C. § 1098bb (title). But the Department's proposal is a permanent solution to a temporary problem—it is a wholesale cancellation of the balances going forward.

### C. Mass Cancellation of Loans Threatens the Integrity of Student Assistance Programs

Of course, one thing Congress clearly said was that the Secretary's waiver authority extends only to the extent he can do so "without impairing the integrity of the student financial assistance programs[.]" 20 U.S.C. § 1098bb(a)(2)(B).

In 2022, tens of millions of borrowers owed approximately $1.6 trillion in federal student loan debt. U.S. Dept. of Education, Federal Student Loan Portfolio, https://studentaid.gov/data-center/student/portfolio, (last accessed Jan. 13, 2022). And those are *loans*, which are designed to be paid back by borrowers with interest. This is money owed to the American taxpayers at large. If they are not paid back, then it threatens the basic solvency of the federal student loan programs.

This reality is reflected in the statutory structure. Unsurprisingly, the HEA requires repayment under set terms, with identified interest rates. *See* 20 U.S.C. §§ 1078 (Direct Stafford Loans), 1078-2 (Direct PLUS Loans); 1078-3 (Direct Consolidation Loans); 1078-8 (Direct Unsubsidized Stafford Loans); 1087e (loans made after June 30, 2010). For instance, the HEA *limits* the kind of "repayment incentives" the Secretary can give to borrowers for making timely payments, with loans disbursed before 2012 being limited to those incentives that "are cost neutral," and incentives being banned outright for new loans. 20 U.S.C. § 1087e(b)(9).

But the Department's proposal would cast aside that careful structure and wipe out approximately a *third* of borrowers' financial obligations to taxpayers. The Department estimates that approximately 40 million borrowers will be eligible for cancellation. *See FACT SHEET: The Biden-Harris Administration's Plan for Student Debt Relief*, White House (Sept. 20, 2022) https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/20/fact-sheet-the-biden-harris-administrations-plan-for-student-debt-relief-could-benefit-tens-of-millions-of-borrowers-in-all-fifty-states. An independent study estimated that, altogether, this one-time cancellation will cost approximately $519 billion. Chen, Smetters & Paulson, *The Biden Student Loan Forgiveness Plan: Budgetary Costs and Distributional Impact*, University of Pennsylvania, Penn Wharton School (Aug. 26, 2022) https://budgetmodel.wharton.upenn.edu/issues/2022/8/26/biden-student-loan-forgiveness.

With its proposal to simply write off more than $500 billion in debts to the American public, the Department seems intent to destroy student financial assistance programs at large. But the HEROES Act specifically foreclosed this result. *See* 20 U.S.C. § 1098bb(a)(2)(B).

### D. Mass Loan Cancellation Is Not Necessary to Alleviate Isolated Financial Harms

Under § 1098bb(a)(2)(A), waivers are permitted only if "necessary" to ensure affected individuals are not placed in a worse position with respect to their federal loans because of their status as affected individuals. As discussed, by suspending repayment

and interest accrual, the Department has placed borrowers in the same position now as before the pandemic with respect to their federal loans.

Debt cancellation is clearly unnecessary to achieve the statutory goal under § 1098bb(a)(2)(A). This "necessary" requirement is meant to place real limits on the Secretary's discretion, as demonstrated by contrast with the broader "as the Secretary deems necessary" language just one paragraph earlier, *see id.* § 1098bb(a)(1) (emphasis added). *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[I]t is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of statutory language).

The Department's disregard for necessity is most obvious in their plan to refund loan payments to borrowers who have finished paying off their loans and reimpose debt in the refunded amount—just so they can cancel that debt and give those once-borrowers a windfall. Nothing could suggest this is necessary to protect these individuals from being worse off with respect to their student loans. They do not even currently have such loans.

## III. CONTEXT PROVES THAT CONGRESS NEVER INTENDED TO GRANT THE SECRETARY THE POWER TO CANCEL STUDENT LOAN BALANCES

While the plain text of the Act answers the question before this Court, the history, context, and subsequent use of the Act provides key insight into what Congress has always understood to be the scope of the statute. Prior to the Department's proposal, no Member of Congress thought that the Act allowed

cancellation of student loan balances. Indeed, the unbroken consensus for the past 20 years was that the Act could not be used in this fashion. Recasting the HEROES Act from a statute permitting limited modifications to one that can sweep away debt for 40 million people and effectively spend more than $500 billion "effects a fundamental revision of the statute, changing it from one sort of scheme ... into an entirely different kind." *West Virginia*, 142 S. Ct. at 2596.

### A. The Consensus View Was That the Original 2001 HEROES Act Did Not Allow Loan Cancellation

A few months after the September 11, 2001, terrorist attacks, Rep. McKeon introduced, and Congress passed, the first Higher Education Relief Opportunities for Students Act. It "provided the Secretary of Education with specific waiver authority to respond to conditions in the national emergency declared by the President on September 14, 2001," "or subsequent national emergencies declared by the President by reason of terrorist attacks." Pub. L. No. 107-122, 115 Stat. 2386, 2388 (2002).

Like its successor, the Act authorized the Secretary to "waive or modify any statutory or regulatory provision applicable to" student loan programs "as may be necessary to ensure that" "affected individuals"—those who "suffered direct economic hardship as a direct result" of the emergency—were "not placed in a worse position financially in relation to those loans" because of the emergency. *Id*. at 2386, 2388. The Act also limited the waivers to those that could ease "administrative"

burdens "without impairing the integrity of the student loan programs." *Id.*

The scope of the 2001 Act was more limited than future versions in key respects. Like the current Act, the 2001 version applied as "necessary in connection with" a "national emergency." *Id.* However, a relevant "national emergency," was either the September 11th attacks "or subsequent national emergencies declared by the President by reason of terrorist attacks." *Id.* And the Act was set to expire on September 30, 2003. *Id.*

Every speech made on the House floor concerning the Act's initial introduction in October 2001 recognized its intent to provide solely administrative benefits to servicemembers, without threatening the solvency of student loan programs more broadly. Rep. McKeon introduced the bill as an effort "to relieve administrative requirements" for servicemembers who "will be put in the difficult position of having to make student loan payments while on active duty." 147 Cong. Rec. (Bound) 20372 (Oct. 23, 2001). As he said, "Under the bipartisan HEROES bill, the Education Secretary can grant waivers so that reservists leaving their jobs and families may be relieved from making student loan payments, *for a time*; victims' families may be relieved from receiving collection calls from lenders, and consecutive service requirements for loan forgiveness programs may be considered uninterrupted. The waiver authority is similar to that provided to the

Secretary during the Desert Shield and Desert Storm operations in 1991." *Id.* (emphasis added).[2]

Several members highlighted what the Act did not do—forgive a single loan balance. Indeed, this was a point of contention.

Rep. Carolyn McCarthy explained that under the Act, "The Secretary may relax repayment obligations for our active-duty Armed Forces, provide a period of time victims and their families may reduce or delay monthly student loan payments, and assist institutions and lenders with reporting requirements." *Id.* Calling it a "good bill," she argued that Congress was "missing a good opportunity" to vote on another bill to "provide[] spouses with desperately needed financial relief," but such "language was not included" in the HEROES Act. *Id.* at 20372–73. That bill, H.R.3163, September 11 Surviving Spouse Student Loan Relief Act, proposed "cancellation of student loan indebtedness for spouses" of "an individual who served as a policeman, fireman, other safety or rescue personnel or as a member of the Armed Forces, or any other individual, who died (or dies) or became (or becomes) permanently and totally disabled due to injuries suffered in the terrorist attack on September 11, 2001." This proposed "cancellation" relied on

[2] This was an apparent reference to the Higher Education Technical Amendments of 1991, Pub. L. No. 102-26 (Apr. 9, 1991). The 1991 Act contained a provision allowing the Secretary to "waive or modify" student financial aid rules for active duty personnel, and listed examples of relevant modifications, such as how the borrowers demonstrated their income. *See id.* at Sec. 4.

provisions of the HEA that were later amended to incorporate other cancellation programs. *Id.*[3]

Rep. Bill Roemer also explicitly recognized this point of contrast. Under the HEROES Act, "we do not forgive the widow or widower's loan, or have direct loan forgiveness in this legislation." *Id.* at 20374. Instead, the Act merely "ensures that those in the military do not have to make student loan payments while on active duty and that they have a grace period upon returning to civilian life. It also adjusts the eligibility for aid for students affected by the September 11 attacks and adjusts deadlines for borrowers, schools, and lenders who live in the affected areas or are due to mail delays." *Id.* Like Rep. McCarthy, he described the lack of cancellation as "one shortcoming in this legislation." *Id.* He closed by urging Congress to "include in this legislation that direct loan forgiveness." *Id.*

Rep. Jerrold Nadler echoed the same sentiment. He "wished the bill was broader than it is," because "[c]urrent law forgives the loans of the victims who were killed,"[4] "[b]ut if a victim is killed, a police officer, a firefighter, an innocent civilian who works in the World Trade Center, their spouse, their family is left with any loans that they may have taken out; but

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[3] Years later, the Third Higher Education Extension Act of 2006, Pub. L. No. 109-292, adopted loan forgiveness for those surviving spouses as a part of the HEA. Notably, such forgiveness requires a borrower to submit an application demonstrating entitlement to the forgiveness, and the provision did not alter the HEROES Act in any way.

[4] Certain federal loan balances have been discharged for borrowers upon death since at least 1986. *See* 20 U.S.C. § 1087 (1986); Pub. L. No. 99–498, § 437 (October 17, 1986); 34 C.F.R. § 685.212 (1996).

the income with which to pay those loans is substantially, maybe totally substantially diminished, maybe totally eliminated." *Id.* at 20375. The HEROES Act "does not … exercise the same loan forgiveness for the spouses of people who died in this terrorist attack." *Id.*

Because the Act *didn't* provide a path for any type of loan forgiveness, it was not immediately passed. Instead, after further negotiations, and action by the Senate, it was amended slightly to "make[] clear that those individuals called to active duty in the National Guard in response to the national emergency called by the President would be included in those individuals eligible to participate in the regulatory relief provided by the Secretary of Education." 147 Cong. Rec. H10891 (Dec. 19, 2001) (Rep. McKeon). It did not address loan forgiveness, though. Rep. George Miller expressed his frustration, saying, "I find it ironic that we are doing this piece of legislation, but we are not going to do the previous legislation under discussion to help these families who have been devastated by these attacks." *Id.* at H10892.[5]

The Act was passed unanimously, with no cancellation provision. Instead, the final language made clear that any action had to preserve the integrity of the student financial assistance

[5] Somewhat ironically, Rep. Miller has filed an *amicus* brief with this Court, claiming that this legislative history supports the current cancellation policy. *See* Brief of Former Rep. George Miller, *Biden v. Nebraska*, Nos. 22-506 & 535 (Jan. 11, 2023). Rep. Miller's brief, however, omits entirely the discussion of the forgiveness legislation that Rep. Miller seemed to champion, and which he believed was so needed to make up for the lack of forgiveness mechanisms in the HEROES Act. *See id.*

framework. Thus, there was no doubt in the minds of the members of the 107th Congress—the HEROES Act could not possibly extend to outright cancellation of loan balances. Those lawmakers, including the undersigned, surely did not intend to allow the Department to do just that.[6]

### B. The HEROES Act of 2003 Extended Limited Administrative Relief to More Servicemembers

In April of 2003, Rep. Kline wrote and introduced H.R.1412, which ultimately became what we now know as the HEROES Act. As chair of the House Committee on Education and the Workforce, Speaker Boehner helped shepherd the bill to the House floor. The Act differs from the current law only in that it was originally set to expire in 2005.

The Act, which was passed unanimously in both chambers, was intended to only be an extension of the existing policy, not a different grant of authority. In his floor speech, Rep. Kline said, "This is a bill that expresses the support and commitment of the United States House of Representatives to the troops who protect and defend the United States." 149 Cong. Rec. H2523–24 (Apr. 1, 2003). The Act "is specific in its intent to ensure that as a result of a war, military contingency operation, or national emergency our men and women are protected. By granting flexibility to the Secretary of Education, the HEROES

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[6] Notably, the Congressional Budget Office concurred. In its analysis it concluded that the Act "would not have any impact on the federal budget." CBO, Pay-As-You-Go Estimate, S. 1793, Higher Education Relief Opportunities for Students Act of 2001, Jan. 8, 2002.

Act will protect recipients of student financial assistance from further financial difficulty generated when they are called to serve, minimize administrative requirements without affecting the integrity of the programs, adjust the calculation used to determine financial need to accurately reflect the financial condition of the individual and his or her family, and provide the Secretary with the authority to address issues not yet foreseen." *Id.* at H.R.2524.

Rep. Kline also noted *why* the bill had been expanded to allow waivers related to other military actions and natural disasters, not just those connected to the September 11 attacks. Operation Iraqi Freedom began on March 20, 2003. H.R.1412 was considered by the House just 11 days later.

As Rep. Kline said, "Following the September 11, 2001, attacks on our Nation, Members of this House united to unanimously pass similar legislation which helped ease the burden on students, institutions, and families affected by the attacks on our Nation. Today, the men and women serving in Operation Iraqi Freedom and in other parts of the world deserve the same support." *Id.*

The active conflict in Iraq, as well as related conflicts around the world, loomed large in nearly all the speeches discussing the bill. For instance, Rep. McKeon urged his "colleagues to unite in their support for the brave men and women fighting in Operation Iraqi Freedom and elsewhere." *Id.* at H2525. So too did Rep. Sheila Jackson-Lee, who urged support for the "[h]undreds of thousands of young men and women have been called to active duty in our Army, Navy, Air Force, Marine Corps, and Coast Guard." *Id.*

at H2527. Rep. Rahm Emanuel called it a "symbol of support for the brave men and women involved in Operation Iraqi Freedom and for all of those who selflessly devote their lives to protecting our nation and our freedom." *Id.*

Notably, however, was the complete lack of any suggestion that the bill was meant for much broader purposes, or for actions taken for whole segments of the American population. Every Member understood the primary aim was to pay back the sacrifices of those serving in times of emergency. *See id.* ("This bill will ensure that those members of our Armed Services who have put their studies on hold are not placed in a worse financial position as a result of their service to our nation. This is the least we can do.") (Rep. Silvestre Reyes). And, as Rep. Reyes noted, while it did also address other emergencies, the Act was meant to assist "students whose lives may be disrupted by a national disaster connected to the current war effort." *Id.* But this effort was still measured to only those administrative requirements that could be relaxed without threatening the integrity of the student loan system. *See id.* at H.R.2524 (Rep. Kline).

House Membership understood as well what the bill didn't do—forgive even the *interest* on student loans. As the prior Congress had understood the first Act didn't allow any kind of cancellation, this session recognized that the same language wouldn't forgive interest.

For instance, Rep. Timothy Ryan noted that under the Act "the Secretary will have the opportunity to forbear a loan as our servicemen and servicewomen

are activated, this will allow them not to pay on their student loans for the time that they are active. Unfortunately, while they are still serving our country, making great sacrifices, the interest on their loan will still be accruing; so this is a great first step, but I think we can do much better." *Id.* Rep. Phil Gingrey also recognized that any forgiveness would "extend relief even more than this bill will do in regard to mitigating the accrual of interest during the time that these young men and women are serving our country." *Id.* at H2526.

The House also recognized the reason why the HEROES Act *couldn't* be used to forgive any portion of loan balances—it had to be budget neutral. As then-Rep. Boehner noted, to take such an action "under the 1973 Budget Act we are required to find offsets," and a separate bill to forgive interest for active duty servicemembers came with "about a $10 million cost estimate" that would need to be offset. *Id.* at H2525. But, as mentioned, the 2001 Act's identical language "would not have any impact on the federal budget." CBO, Pay-As-You-Go Estimate, S. 1793, Higher Education Relief Opportunities for Students Act of 2001, Jan. 8, 2002. Rep. Ryan therefore urged his colleagues to consider a separate bill, H.R.1168, Active Reservists and National Guard Student Loan Relief Act of 2003, which would have amended the HEA to authorize loan "deferment during active duty."[7]

[7] That separate effort also eventually succeeded, resulting in an amendment to the HEA's forgiveness and cancellation provisions in 2008. *See* 20 U.S.C. § 1087e(o).

Like its predecessor, the 2003 Act sailed through the House and Senate. Only a single Member voted no—Rep. Miller, who had so strenuously objected to the 2001 Act's lack of cancellation authority (and has now urged this Court to find such power in the 2003 Act). *See* 118th Cong., 1st Sess., Roll Call 96, H.R.1412.[8]

Moreover, the 118th Congress understood what has long since become obvious. The 2003 Act does not allow any loan cancellation, much less the wholesale policy set forth here. Even for authorized actions, the 2003 Act applied only so much administrative relief to those immediately harmed by war or an emergency, such as a hurricane or terrorist attack, as was strictly necessary.

### C. The Act's 2005 Reauthorization Confirmed Its Intent to Apply Only in Times of War or Dire Emergencies

In 2005 Rep. Kline wrote and introduced H.R.2132, which was enacted and extended the HEROES Act for two more years. As he said at the time of its introduction, this was meant to address the ongoing need to provide administrative relief to students in the armed services "who will continue to serve beyond" the original expiration date. 151 Cong. Rec. H8111 (Sept. 20, 2005). Indeed, because of "our involvement in the war on terrorism, many thousands of men and women who serve our Nation in the Reserves or National Guard or the Armed Forces, whether Army, Marine Corps, Navy, Air Force or

[8] Rep. Miller later claimed to have mistakenly voted against the bill.

Coast Guard, have been called to active duty or active service. As our Nation seeks to rebuild the communities devastated by Hurricane Katrina, many more of our men and women in uniform have been asked to serve." *Id.* The extension was simply to protect those people "when they are called to serve." *Id.*

Rep. Tom Osborne echoed this sentiment, saying the bill was needed because "[w]e currently have many Guardsmen and Reservists who are still being called up out of college, some to battle Hurricane Katrina; but many more are serving in Iraq and Afghanistan." *Id.* at H8112.

As before, however, several members expressed concern because the bill did not allow the Secretary to forgive interest on the loans. Rep. Chris Van Hollen, for instance, noted that the Act gave the Secretary "the authority to ensure that those men and women serving in Iraq who have Federal student loans not have to make payments on those loans while they are serving overseas, while they are in combat, and while they are on active duty." *Id.* at H8111. "But the problem is this: while they are on active duty, while they do not have to make payments, the interest payments on those loans continues to accrue and accumulate. So, then, that man or woman, the soldier, comes back to the United States owing a larger bill than when he or she was deployed." *Id.* Rep. Osborne agreed. *Id.* at H8112. Thus, Rep. Van Hollen urged the House to take up other legislation that would amend the Higher Education Act to address cancellation of interest for servicemembers. *Id.* at H8111.

With the passage of the 2005 amendment, context once again proves Congress' continued understanding of the scope of the Act. It simply did not extend as far as the Department now insists.

### D. The 2007 Amendment Confirms the Types of Future Emergencies Contemplated by Congress

The 2007 Amendment to the HEROES Act made the statute permanent. Rep. Joe Sestak, the bill's sponsor, explained, once again, that the intent of this legislation was simple: "to provide the Secretary of Education with the permanent authority to ensure that active duty military personnel are not financially harmed by the service that they perform." 153 Cong. Rec. H10789 (Sept. 25, 2007). Rep. Sestak then described the three powers it granted the Secretary: "first, protecting borrowers from further financial difficulty when they are called to serve. … Second, minimizing administrative requirements without impacting the integrity of the Federal Student Aid program. … Third, adjusting the calculation used to determine students' eligibility for aid for those whose financial circumstances change because the student or his or her parents are called to serve[.]" *Id.*

Rep. Sestak also addressed the scope of the other applicable natural disasters. "Because of unforeseen national emergencies, such as Hurricane Katrina, as well as our continued military engagement overseas, it is important that we pass the legislation before us and allow the Secretary of Education to continue providing this needed relief." *Id.*

Rep. Kline was once again instrumental in the 2007 Amendment. In his speech, he again emphasized the need "to protect the higher education interest of members of the Armed Forces," from "education-related financial or administrative difficulties while they defend our Nation." *Id.* at H10790. And speaking to the need to make the Act permanent, he spoke of "our involvement in this war on terrorism," and the need to provide our troops "with the peace of mind that this program will continue throughout the duration of their current or any subsequent deployment." *Id.*

Rep. McKeon also noted that the Amendment was intended to serve the "men and women of the Armed Forces [who] give selflessly to defend our freedom overseas and respond to emergencies here at home." *Id.* The permanent extension was meant to "ensure members of the military will always be afforded the flexibility and support they need." *Id.* at H10789.

The 2007 Amendment passed without opposition in either chamber, and, as with every other time Congress debated the statute, the common understanding was clear. Permanent authorization did not mean the Act became of unlimited scope. Times of "national emergency" were also defined, discrete events.

### E. Subsequent Use Confirms the Limited Scope Envisioned by Congress

Until COVID-19, the Department "generally invoked the HEROES Act relatively narrowly to grant relief to limited subsets of borrowers, such as deployed

military service members or victims of certain natural disasters." Kevin M. Lewis & Edward C. Liu, *The Biden Administration Extends the Pause on Federal Student Loan Payments: Legal Considerations for Congress*, Congressional Research Service, LSB10568 Version 3, at 2–3 (Jan. 27, 2021), https://crsreports.congress.gov/product/pdf/LSB/LSB10568.

The Secretary first implemented HEROES Act waivers in 2003, and, as expected, implemented a series of discrete administrative waivers for affected borrowers. 68 Fed. Reg. 69,312 (Dec. 12, 2003). For instance, the Secretary allowed borrowers flexibility in how they demonstrated income when they missed tax deadlines "because he or she was called up for active duty or for qualifying National Guard duty during a war or other military operation or national emergency," and waived requirements for written forbearance agreements for 3 months, because written agreements might be hard to complete in a disaster zone. *Id.* at 69,315–16. There were no provisions granting any cancellation of either loan principle or interest. *See id.*

The Secretary followed this model for the next 20 years. The initial provisions were extended, without substantive modification, several times. *See* 82 Fed. Reg. 48,195 (Oct. 17, 2017) (recounting history). In 2012, the Secretary updated the waivers, only slightly, reaffirming the prior waivers and adding new waivers for required certifications for affected borrowers. 77 Fed. Reg. 59,311 (Sept. 27, 2012). Then, in final regulations issued in 2017, and effective until Sept. 30, 2022, the Secretary yet again reaffirmed the limited administrative waivers. *See* 82 Fed. Reg.

48,195 (Oct. 17, 2017). None of these rules ever contemplated granting the forgiveness or cancellation of any borrower obligation under the HEROES Act. *See id.*

The pandemic changed the political environment, however, even as the legal framework stayed the same. Prior to the expiration of the 2017 rule, the Secretary implemented waivers in 2020 that extended the same types of administrative relief to borrowers nationwide—primarily deferred payments. *See* Department of Education, Office of the General Counsel, *Memorandum to Betsy DeVos, Secretary of Education* (Jan. 12, 2021) https://static.politico.com/d6/ce/3edf6a3946afa98eb13c210afd7d/ogcmemohealoans.pdf. But some questioned whether the Secretary had the power to go further, and the Department considered the question in a memo. *See id.*

Ultimately, the Department concluded, "Our opinion has not changed. … [W]e believe the Secretary does not have the statutory authority to cancel, compromise, discharge, or forgive, on a blanket or mass basis, principal balances of student loans, and/or to materially modify the repayment amounts or terms thereof." *Id*. at 1. The memo continued, "the Department has never relied on the HEROES Act or any other statutory, regulatory, or interpretative authority for the blanket or mass cancellation, compromise, discharge, or forgiveness of student loan principal balances, and/or the material change of repayment amounts or terms, and rightly so, for the statutory text does not permit, authorize, or support such action. We believe it is impossible to escape the conclusion that Congress funds student loans with the expectation that such loans will be repaid in full with

interest, except in identified circumstances, and did not authorize [the Secretary] to countermand or undermine that expectation." *Id.* at 6.

And then in light of that understanding, Congress did what it was supposed to—it considered whether loan cancellation was an appropriate policy to implement. *See* Student Loan Debt Relief Act of 2019, S. 2235, 116th Cong. (2019); Income-Driven Student Loan Forgiveness Act, H.R.2034, 117th Cong. (2021). In fact, in 2020 Congress considered, and ultimately rejected, a whole *other* HEROES Act, which was meant to enact virtually the same policy ED seeks to adopt here.

The Heroes Act of 2020, "would require the Secretary to cancel or repay (in the case of those loans not held by ED) up to $10,000 in outstanding balance of Direct Loan, FFEL [Federal Family Education Loan], and Perkins Loan program loans for borrowers who are economically distressed." This proposal, which passed the House but stalled in the Senate, did not reference the HEROES Act of 2003 even once in its more than 1800 pages of text. Instead, it proposed to amend earlier pandemic legislation to provide that the Secretary of Education "shall cancel or repay an amount on the outstanding balance due … on the Federal student loans … of an economically distressed borrower that is equal to the lesser of … $10,000; or … the total outstanding balance due on such loans of the borrower." 116th Cong., H.R.6800, Sec. 150117. In other words, a majority of the House that voted on the Heroes Act of 2020 seemed to understand that existing law did not give the Secretary authority to cancel $10,000 of student loan balances, even for "economically distressed" borrowers. *See id.*

## CONCLUSION

Public service, almost by definition, involves sacrifice. But as lawmakers, *amici* wanted to repay the brave Americans who endure great personal hardship in service to their country with a modest protection against the distractions of administrative obligations arising from their student loans. But *amici* didn't seek to empower the Secretary to radically change the student loan system itself, much less absolve borrowers who haven't suffered hardship from the responsibilities they took on as borrowers. Our colleagues in Congress understood this intent clearly. They did not grant the Secretary the power to cancel student loans using the HEROES Act as a pretext. As the past 20 years of consistent understanding prove—Congress only ever understood the Act as a limited administrative tool to be used in narrow circumstances. Out of respect for the role Congress has played in this issue, and particularly for the lines Congress did not cross, this Court should affirm the lower courts and set aside the loan cancellation policy.

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Respectfully submitted,

CALEB KRUCKENBERG
*Counsel of Record*
MICHAEL POON
Pacific Legal Foundation
3100 Clarendon Blvd,
Ste. 1000
Arlington, VA, 22201
CKruckenberg@pacificlegal.org
MPoon@pacificlegal.org

*Counsel for Amici Curiae*
*Former Rep. Howard "Buck" McKeon,*
*Former Rep. John Kline,*
*Former House Speaker John Boehner*
*and Pacific Legal Foundation*