



# Supreme Court Invalidates Student Loan Cancellation Policy Under the HEROES Act

July 5, 2023

On June 30, 2023, the Supreme Court decided two cases concerning the Department of Education’s (ED’s) [plan](#) to cancel up to \$20,000 of outstanding federal student loan debt for certain borrowers. In [Biden v. Nebraska](#), the Court held that the State of Missouri had [standing](#) to challenge the loan cancellation policy and that the policy exceeded the Secretary of Education’s (Secretary’s) statutory authority under the [Higher Education Relief Opportunities for Students Act of 2003 \(HEROES\) Act](#) to “waive or modify” laws and regulations applicable to student financial assistance in Title IV of the Higher Education Act (HEA) in response to a national emergency. In a companion case, [Department of Education v. Brown](#), the Court held that individual borrower plaintiffs lacked standing to challenge ED’s promulgation of the cancellation policy without having followed certain public-participation procedures. This Sidebar summarizes the Court’s analyses in these two cases, as well as the potential implications of the Court’s holdings.

## The Cancellation Policy

As described in this [CRS report](#), the Court’s two decisions arise from a student loan cancellation policy announced by the Biden Administration on August 24, 2022. Under that policy, ED proposed to cancel up to \$20,000 of certain federal student loan balances for borrowers with adjusted gross incomes in 2020 or 2021 below \$125,000 (for individuals or for married borrowers who file federal taxes separately) or \$250,000 (for married couples filing jointly). For borrowers who met this income requirement, their status as Pell Grant recipients (a [type of federal student financial assistance](#) for individuals who show financial need) would have determined the amount of cancellation benefits they would receive. While all eligible borrowers [would have seen](#) up to \$10,000 in cancellation benefits, eligible borrowers who received a Pell Grant at any point would have received up to an additional \$10,000 for up to \$20,000 in total benefits. Not all federal student loans would have been [eligible for cancellation](#). Among others, loans made under the Federal Direct Loan Program (FDLP) would have been eligible. FDLP loans compose the largest share of the [federal student loan portfolio](#), accounting for [\\$1.4 trillion](#) of ED’s \$1.6 trillion loan portfolio as of December 31, 2022.

In support of this cancellation policy, the Secretary cited his authority under the HEROES Act. The relevant provision of the HEROES Act [authorizes](#) the Secretary to “*waive or modify* any statutory or

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regulatory provision applicable to the student financial assistance programs” under Title IV of the HEA “as the Secretary deems necessary” to ensure that individuals affected by a national emergency “are not placed in a worse position financially” in relation to that assistance because of the emergency.

Both Presidents Trump and Biden declared the COVID-19 pandemic a national emergency. During both Administrations, ED used the HEROES Act to provide most borrowers with a pause on federal student loan repayment, interest accrual, and involuntary collections. At the same time that it announced the cancellation policy, ED stated that it would end these payment pauses and return borrowers to repayment on January 1, 2023. ED explained that the cancellation policy was intended to address heightened risks of delinquency or default faced by certain borrowers following a return to repayment. The HEROES Act had not been used previously to cancel existing student loan balances. Estimates of the policy’s potential cost varied, but ED **predicted** a cost of \$379 billion, while the Congressional Budget Office **estimated** the cost at \$400 billion.

## Missouri Has Standing to Challenge Cancellation Policy

In both cases, the government contended that the parties did not have standing to challenge the cancellation policy. Under Article III of the Constitution, plaintiffs must show that they have standing to sue before they may invoke the jurisdiction of the federal courts. This **standing inquiry** requires a plaintiff to suffer an “injury in fact” that is fairly traceable to the defendant’s allegedly unlawful conduct and that is likely to be redressed by the remedy sought from the court. In a suit where multiple plaintiffs assert the same claims, **only one plaintiff must show standing** for a federal court to proceed to the merits of those claims.

The state plaintiffs in *Nebraska* based their standing on theories of financial harm from the policy that varied from state to state. However, one state stood apart: only Missouri asserted **financial harm based on a theory of injury to one of ED’s loan servicers**, the Higher Education Loan Authority of the State of Missouri (MOHELA). ED compensates MOHELA based in part on the number of accounts that MOHELA services. Implementation of the policy likely would have caused accounts to close, as many borrowers owed less than the maximum cancellation benefit to which they would have been entitled. Account closure would translate into lost servicer revenue, which Missouri estimated could total up to **\$44 million in lost revenue per year**.

The Court was **unanimous** in concluding that this description of the cancellation policy’s effect on MOHELA would satisfy Article III requirements if MOHELA were the party suing. However, MOHELA was not a party to the states’ suit. The Court divided over whether the threatened injury to MOHELA could be considered sufficient injury in fact to Missouri to support standing for the state.

Writing for a six-Justice majority, **Chief Justice Roberts held** that by “law and function, MOHELA is an instrumentality of Missouri: It was created by the State to further a public purpose, is governed by state officials and state appointees, reports to the State, and may be dissolved by the State.” Though MOHELA has a legal existence **separate from the state and the power to sue** in its own name, the Court wrote the same was true in a prior case involving a **state plaintiff that was permitted to sue to vindicate the contract interests of a state corporation** that was absent from the suit and able to sue in its own name. In *Nebraska*, **the Chief Justice concluded**, the “Secretary’s plan harms MOHELA in the performance of its public function and so directly harms the State that created and controls MOHELA.”

In her dissent, Justice Kagan wrote that the “**separateness, both financial and legal, between MOHELA and Missouri makes MOHELA alone the proper party.**” To support her conclusion, Justice Kagan emphasized MOHELA’s separate legal existence, as well as provisions of state law that make MOHELA and the state **not liable for the debts of one another or entitled each other’s revenues**.

## Cancellation Policy Exceeds Authority Under HEROES Act

After concluding that Missouri had standing, the Chief Justice analyzed the legality of the cancellation policy, ultimately holding that the policy exceeded the authority granted by the HEROES Act. In particular, the central interpretive question addressed by the Court was how far the Secretary's authority under that act to "waive or modify" statutory and regulatory student loan provisions extended. In support of the policy, the Biden Administration argued that the Secretary had used this authority to waive and modify the requirements of existing [statutory provisions](#) that granted the Secretary the power to discharge student loan balances in limited circumstances, such as a borrower's death, disability, bankruptcy, or inability to complete an educational program due to school closure. In ED's [view](#), the Secretary had first waived the requirements addressing eligibility for discharge under these existing HEA provisions, and then modified them to provide for the cancellation policy's income and loan eligibility requirements.

Beginning first with the term "modify," the Court [held](#) that the term connotes only moderate or minor alterations to statutory and regulatory provisions, rather than transformative changes, consistent with the Court's previous decision in *MCI Telecommunications Corp. v. AT&T*. Based on that understanding, the Court [found](#) the changes wrought by the cancellation policy were neither "moderate" nor "minor" but instead "created a novel and fundamentally different loan forgiveness program" than existed previously.

As for the term "waiver," the Court first [noted](#) that previous HEROES Act waivers had been "straightforward," relieving certain borrowers of the obligation to comply with a *particular* legal requirement, such as a student's need to submit a written request for a leave of absence. The Court [held](#) that the cancellation policy could not be justified solely as a waiver because it went beyond the mere nullification of existing statutory or regulatory provisions and instead expanded their scope dramatically.

Finally, the Court held that the cancellation policy could not be justified as the combined effect of a waiver and a modification. While the Court [acknowledged](#) that the HEROES Act permits the Secretary to use his modification authority to patch holes left by the waiver of a provision, the Court concluded that those modifications must still be of a scope and character that is modest rather than dramatic. The Court rejected the Administration's [argument](#) that the HEROES Act's use of the terms "waive or modify" together expands the scope of "modify" beyond its traditionally modest understanding. In the Court's [view](#), adopting the Administration's interpretation would permit the Secretary to undertake an exhaustive rewriting of Title IV of the HEA by "'waiving' provisions root and branch and then filling the empty space with radically new text."

The HEROES Act authorizes waiver only of statutory and regulatory provisions, and the Court found no specific provision of the HEA establishing an obligation on the part of borrowers to repay their student loans, and hence there could be no waiver of such a provision. In the Court's [view](#), the absence of a specific provision to waive required the Secretary to take the "more circuitous approach" to achieve the Administration's policy aims by waiving the eligibility requirements for existing loan discharge programs rather than directly waiving the loan balances or obligation to repay. Waiving requirements of existing loan discharge programs did not carry with it the authority to replace them with alternative requirements, the Court explained, so to implement the cancellation policy, the Secretary would have to augment the waivers through the modification authority to spell out the specific eligibility and other parameters of the cancellation policy. The Court held that such augmenting changes went beyond a mere modification of the HEA.

The Court's resolution of how broadly or narrowly to construe the terms of the HEROES Act was informed not just by the act's text and structure but also by a line of cases that the Court has commonly referred to as describing a "[major-questions doctrine](#)." Under this doctrine, courts are reluctant to read

ambiguous statutory text as authorizing a federal agency to decide an issue of vast economic and political significance absent clear congressional authorization for such action, particularly when the asserted authority is “unheralded,” or when the agency claims a newly discovered use of a statutory provision. In *Nebraska*, the Court noted that many of these indicators were present, such as the policy’s scope and the fact that no Secretary had previously used the HEROES Act to achieve an effect of similar magnitude or character. The Court also expressly [rejected](#) the assertion that the major-question doctrine does not apply with similar weight when an administrative action provides a benefit to nonfederal entities rather than imposing a regulatory burden on such entities.

With respect to the HEROES Act, Justice Kagan’s dissent [criticized](#) the majority for, in her view, examining the terms of the statute on a piecemeal basis in a manner inconsistent with the statute’s overall meaning. Justice Kagan characterized the HEROES Act as a broad delegation to the Secretary to waive or modify statutory or regulatory provisions to provide necessary relief to borrowers that may be impacted by an unanticipated national emergency. Justice Kagan then argued that it is contrary to Congress’s goal in enacting the HEROES Act to read the phrase “waive or modify” narrowly with the effect of restricting the Secretary from making more than modest changes. Justice Kagan also [argued](#) that *Nebraska* did not bear the indicia of past cases in which the Court has invoked the major-questions doctrine, in particular characterizing the HEROES Act’s “waive or modify” delegation as providing clear congressional authorization to provide relief from student loan obligations in the case of a national emergency.

## Individual Borrowers Lack Standing

While the Justices disagreed over how to dispose of the arguments in *Nebraska*, they were [unanimous in \*Brown\*](#). The Court concluded that the borrower plaintiffs there [lacked Article III standing](#) to challenge the cancellation policy.

The borrower plaintiffs rooted their standing arguments in a [theory of procedural injury](#). They asserted a procedural right to participate in the policy’s development—an alleged right that ED did not honor because it adopted the policy without seeking public input under [HEA negotiated rulemaking](#) or [APA notice-and-comment rulemaking](#). The borrower plaintiffs contended they were injured by ED’s failure to seek public involvement in crafting the policy as one borrower would receive no cancellation under the policy while the second borrower would receive only \$10,000 in cancellation. The borrower plaintiffs sought to have the policy vacated for allegedly having been adopted in a procedurally improper manner.

The HEROES Act included [express exemptions](#) from both rulemaking requirements. The borrower plaintiffs [argued those exemptions were not available](#) because the cancellation policy exceeded the Secretary’s HEROES Act authority for reasons similar to those advanced by the states in *Nebraska*.

To the federal government, this interaction between the borrower plaintiffs’ standing theory and the HEROES Act’s procedural exemptions [created a redressability problem](#). To establish standing, the federal government argued that the borrower plaintiffs would have to prevail on their argument that the Secretary could not pursue loan cancellation under the HEROES Act. Even if the borrower plaintiffs prevailed on this argument, though, a judgment vacating the policy would not result in the plaintiffs receiving loan cancellation.

In response, the borrower plaintiffs argued that if a court vacated the policy for having been adopted in a procedurally improper manner, the Secretary [could invoke other statutory authority to pursue the same end](#), namely Section 432 of the HEA. [The latter statute states](#), with respect to Federal Family Education Loan Program loans—one type of federal student loans—that the Secretary may “enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption.”

Writing for the Court, Justice Alito agreed with the federal government that the borrower plaintiffs lacked standing [but wrote that](#) “the deficiencies of respondents’ claim are clearest with respect to traceability.” Justice Alito explained that the borrower plaintiffs [had not alleged an injury](#) flowing from their ineligibility or partial eligibility for cancellation benefits under the policy; they claimed the policy was substantively unlawful and thus could not have provided them with cancellation. Because the borrower plaintiffs could not trace their lack of cancellation to the policy’s adoption, they lacked standing to challenge the policy.

As the Court explained, the borrower plaintiffs’ lack of cancellation benefits in fact flowed from the Secretary’s decision—at that time—[not to pursue loan cancellation under the HEA](#). (The Court [expressed no opinion](#) on “the substantive lawfulness of any action the Department might take under the HEA.”) In the Court’s view, the borrower plaintiffs [failed to show](#) that the Secretary’s decision to pursue loan cancellation under the HEROES Act impaired their ability to pursue cancellation benefits under the HEA authority. The two authorities “[function independently of each other](#).” The [remedy available to the borrower plaintiffs](#) was to “[petition for the issuance](#)” of a “rule” under the Administrative Procedure Act, not to challenge a separate cancellation policy.

## Biden Administration’s Response and Potential Implications

By finding that the cancellation policy exceeds ED’s authority under the HEROES Act, the Supreme Court has precluded the Biden Administration from moving forward with granting student loan discharges under that policy. The policy has been enjoined since October 21, 2022, before any cancellation had been granted to any borrowers. Hours after the Court issued its decisions in *Nebraska* and *Brown*, the Biden Administration announced that it was beginning a regulatory process, called negotiated rulemaking, to consider providing loan cancellation under the HEA rather than the HEROES Act.

ED’s [negotiated rulemaking notice](#) describes a multistep regulatory process to consider whether to effect loan cancellation under [Section 432\(a\) of the HEA](#), the same HEA provision invoked by the borrower plaintiffs in *Brown*. ED has scheduled a [virtual public hearing for July 18, 2023](#), to solicit oral comments providing “advice and recommendations” from interested parties on this topic. Those interested may also [submit written comments](#) on or before July 18. After the July 18 hearing, ED has stated that it intends to consider the comments received and [solicit nominations for individual negotiators](#) “who represent the communities of interest that would be significantly affected by the proposed regulations.” ED plans to [select negotiated rulemaking committee members](#) from these nominations, and thereafter work with the committee to prepare proposed regulations. The Biden Administration has stated that it could take “[months](#)” to promulgate a rule using this process. The Administration has not revealed any further detail about the type of loan cancellation policy it would consider, such as the classes of borrowers who might qualify for cancellation benefits or the amount of such benefits.

Beyond its direct impact on the cancellation policy, the Court’s decisions may affect future litigation over federal student loan programs. For example, the Court’s standing analysis in *Nebraska* could lead states to rely on similar standing theories in future lawsuits challenging ED actions that are alleged to diminish servicer revenues. The Court’s decisions may also affect how ED interprets its HEROES Act authority in the future. Although the Court did not address any application of the HEROES Act other than the cancellation policy, other uses of the act’s waiver and modification authority during national emergencies that go beyond the simple waiver of a discrete legal requirement or modest modification to Title IV student assistance programs may be vulnerable to a legal challenge. The Court’s decision in *Nebraska* also further develops the Court’s major-questions doctrine, rejecting the contention that the doctrine does not apply to agency actions that confer benefits on nonfederal parties. As a result, future agency actions

that provide benefits in a manner that implicates significant political or economic questions without clear congressional authorization to provide such benefits may be subject to challenge.

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