

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH R. BIDEN, PRESIDENT)
OF THE UNITED STATES, ET AL.,)
) Petitioners,)
) v.) No. 22-506
NEBRASKA, ET AL.,)
) Respondents.)

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10
11 Washington, D.C.
12 Tuesday, February 28, 2023

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14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United
16 States at 10:12 a.m.

17
18 APPEARANCES:
19 GEN. ELIZABETH B. PRELOGAR, Solicitor General,
20 Department of Justice, Washington, D.C.; on behalf
21 of the Petitioners.
22 JAMES A. CAMPBELL, Solicitor General, Lincoln,
23 Nebraska; on behalf of the Respondents.

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P R O C E E D I N G S

(10:12 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 22-506, Biden versus Nebraska.

General Prelogar.

ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR
ON BEHALF OF THE PETITIONERS

GENERAL PRELOGAR: Mr. Chief Justice, and may it please the Court:

COVID-19 is the most devastating pandemic in our nation's history and it has caused enormous disruption and economic distress. Over the past three years, millions of Americans have struggled to pay rent, utilities, food, and many have been unable to pay their debts.

To head off immediate harm for student-loan borrowers, two Secretaries across two administrations invoked the HEROES Act to suspend interest and payment obligations for all Americans with federally held loans. But, if that forbearance ends without further relief, it's undisputed that defaults and delinquencies will surge above pre-pandemic levels.

1 So Secretary Cardona again invoked the
2 HEROES Act to provide a measure of loan
3 forgiveness to ensure that this unprecedented
4 pandemic does not leave borrowers worse off in
5 relation to their student loans.

6 The states ask this Court to deny that
7 vital relief to millions of Americans, but they
8 lack standing to seek that result. They
9 principally assert harm to a separate legal
10 person, MOHELA, that could sue in its own name
11 but has chosen not to do so, and the states'
12 asserted harms to their tax revenues are
13 self-inflicted and indirect. The states' bare
14 disagreement with this policy is not the sort of
15 concrete injury that Article III demands.

16 On the merits: The states say the Act
17 doesn't authorize the Secretary to ever forgive
18 loan principal. But the Secretary's
19 interpretation of this text is not just a
20 plausible reading; it's the best reading.
21 Congress expressly authorized the Secretary to
22 waive or modify any Title IV provision in
23 emergencies to provide financial relief to
24 borrowers. Loan forgiveness is a paradigmatic
25 form of debt relief, and the Secretary acted

1 within the heartland of his authority and in
2 line with the central purpose of the HEROES Act
3 in providing that relief here.

4 To apply the major questions doctrine
5 to override that clear text would deny borrowers
6 critical relief that Congress authorized and the
7 Secretary deemed essential.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: General, is this a
10 waiver, or is it a modification?

11 GENERAL PRELOGAR: It's both a waiver
12 and a modification, Justice Thomas. This
13 appears at JA 261. That was the decision
14 document that the Secretary signed where he said
15 I hereby issue waivers and modifications of
16 multiple provisions under Title IV of the
17 student loan program. And then that language
18 was repeated in the Federal Register notice that
19 actually implemented that program and
20 constitutes the final agency action that the
21 states are challenging here.

22 JUSTICE THOMAS: Well, could you
23 explain then -- in -- in -- in other provisions,
24 there is express language as to cancellation,
25 and, of course, there isn't here.

1 So would you take a minute to explain
2 how a waiver or modification amounts to a waiver
3 -- to a cancellation?

4 GENERAL PRELOGAR: Of course. So the
5 Secretary identified various provisions in Title
6 IV that govern the terms and conditions of
7 student loans and also govern discharge and
8 cancellation in other circumstances, as your
9 question suggested. And I think the
10 straightforward way to think about how the verbs
11 map onto the Secretary's action is that he
12 waived elements of those provisions that contain
13 eligibility requirements for discharge and
14 cancellation that are inapplicable under this
15 program and then modified the provisions to
16 contain the limitations that he had announced as
17 part and parcel of announcing this loan
18 forgiveness.

19 Now you had suggested that there's no
20 express statement in the HEROES Act to discharge
21 loan principal, and that's true, but the
22 relevant and operative language here is the
23 provision that says the Secretary is empowered
24 to waive or modify any Title IV provision, and
25 so the HEROES Act isn't enumerating any of the

1 various forms of relief that have long been
2 authorized and implemented under this statute.

3 I don't think anything can be read
4 into the fact that there's no express reference
5 to particular forms of relief because Congress
6 was trying to broadly cover the field and ensure
7 that the Secretary had the tools to respond to
8 the national emergency with whatever relief
9 might be necessitated.

10 CHIEF JUSTICE ROBERTS: But, in an
11 opinion we had a few years ago by Justice
12 Scalia, he talked about what the word "modify"
13 means, and he said modified in our view connotes
14 moderate change. He said it might be good
15 English to say that the French Revolution
16 modified the status of the French nobility, but
17 only because there's a figure of speech called
18 understatement and a literary device known as
19 sarcasm.

20 We're talking about half a trillion
21 dollars and 43 million Americans. How does that
22 fit under the normal understanding of
23 "modifying"?

24 GENERAL PRELOGAR: So, of course, I
25 recognize that in MCI, Justice Scalia's opinion

1 adopted a narrower understanding of that term,
2 but I don't read that opinion to set forth a
3 universal meaning of "modify," no matter the
4 statutory context.

5 And, here, of course, we have a
6 broader phrase, "waive or modify." It's
7 undisputed and the states aren't contesting that
8 the ordinary meaning of "waive" means to
9 eliminate an obligation in its entirety. And I
10 think, if you look at that phrase in the context
11 of the statute, that means that "modify" has to
12 mean making a change up to the point of
13 wholesale elimination.

14 It would be really strange for
15 Congress to say you can eliminate obligations
16 altogether or tweak them just the littlest bit,
17 but you can't do anything in between.

18 CHIEF JUSTICE ROBERTS: Well, but it's
19 "waive" particular regulatory or statutory
20 provisions.

21 GENERAL PRELOGAR: That's right.

22 CHIEF JUSTICE ROBERTS: That to me
23 suggests a much more focused use of the word.

24 GENERAL PRELOGAR: Well, it's "waive
25 or modify" paired with the authority to do that

1 with respect to any Title IV provision. So I
2 think that that is the --

3 CHIEF JUSTICE ROBERTS: It doesn't say
4 waive -- modify or waive loan balances.

5 GENERAL PRELOGAR: That's true, but
6 it's very clear that under the Title IV
7 provisions that are expressly referenced in the
8 statute, things like repayment obligations,
9 cancellation, discharge, are core features of
10 the program and obvious candidates for waiver in
11 a statute, the central purpose of which is to
12 provide debt relief to borrowers.

13 You know, Congress itself has provided
14 for loan discharge in other circumstances in
15 response to borrower hardship. It's included
16 provisions in the Higher Education Act for
17 bankruptcy, for example, or for total disability
18 or school closure, other kinds of hardships.

19 And so it couldn't have surprised
20 Congress one bit that in response to hardship
21 posed by a national emergency, the Secretary
22 might consider similarly providing discharge if
23 that's what it takes to make sure borrowers
24 don't default.

25 CHIEF JUSTICE ROBERTS: You think

1 because there's a provision to allow waiver when
2 your school closes, that because of that,
3 Congress shouldn't have been surprised when half
4 a trillion dollars is wiped off the books?

5 GENERAL PRELOGAR: Well, I think it
6 demonstrates that in a statute that's centrally
7 focused on providing financial relief, that that
8 terminology should be given its plain meaning
9 and Congress could have anticipated that in a
10 particular situation, you might expect that the
11 way that you need to ameliorate the borrower
12 harm is through loan forgiveness.

13 And, Mr. Chief Justice, maybe I can
14 just use an example drawn from the initial
15 context of promulgation of this statutory
16 relief. It was initially a bill that was
17 limited just to helping service members who were
18 fighting in wars. And think about an example of
19 a service member who goes off to war and you can
20 provide HEROES Act relief to ensure that the
21 service member doesn't have to pay down the loan
22 while the term of service, but if something were
23 to happen that left that service member worse
24 off because of his service, say a disability
25 that doesn't qualify for total discharge, it

1 makes perfect sense to think that Congress would
2 have expected that the Secretary would have
3 authority under this Act to make the service
4 member whole and to ensure, just as the plain
5 language suggests, that that service member
6 isn't going to be left worse off because of the
7 circumstance that prompted his service in the
8 first place.

9 And so there's that first order
10 question of whether you can ever do any debt
11 discharge. And I think, in that context, it's
12 perfectly sensible to read this language to
13 authorize that.

14 JUSTICE SOTOMAYOR: General, the
15 amount at issue, the Chief mentioned the quarter
16 a trillion dollars or the half a trillion
17 dollars. How do you deal with that? Because
18 that seems to favor the argument that this is a
19 major question.

20 GENERAL PRELOGAR: Yes, Justice
21 Sotomayor. So, of course, we acknowledge that
22 this is an economically significant action, but
23 I think that that can't possibly be the sole
24 measure for triggering application of the Major
25 Questions Doctrine.

1 In prior cases, the Court has pointed
2 to economic and political significance, but it's
3 also reviewed a litany of additional factors
4 that have demonstrated that based on
5 common-sense understandings of how Congress is
6 likely to legislate, the agency is claiming
7 extravagant regulatory authority that it doesn't
8 actually have.

9 And I think, if the Court were to just
10 look at costs alone, it would take the Major
11 Questions Doctrine outside of that extraordinary
12 case because national policies these days
13 frequently do involve more substantial costs or
14 trigger political controversy.

15 Here, we think that there are any
16 number of additional factors that demonstrate
17 that this does not fit the Major Questions
18 paradigm. And the first thing I would point to
19 is that this is not an assertion of regulatory
20 authority at all.

21 This is the administration of a
22 benefits program. And the Court in prior cases
23 had -- has recognized that you -- using
24 common-sense interpretations of understanding
25 how Congress would legislate, Congress might

1 pause before empowering the executive to engage
2 in extravagant regulation with the corresponding
3 cost to individual liberty interests.

4 But, in the context of a benefits
5 program, there's not that same reason to
6 hesitate about what Congress might have intended
7 because it's perfectly logical for Congress to
8 broadly empower the executive to provide
9 benefits, especially in a crisis situation or an
10 emergency like we've seen with COVID-19.

11 JUSTICE ALITO: General, let's say
12 that nobody in Congress was aware that there is
13 such a thing in our case law called the Major
14 Questions Doctrine. So put that out of their
15 minds.

16 And you simply polled every member of
17 Congress and asked that person whether, in the
18 ordinary sense of the term, they would regard
19 what the government proposes to do with student
20 loans as a major question or something other
21 than a major question.

22 GENERAL PRELOGAR: Well, I certainly
23 acknowledge that in a colloquial sense, you
24 could characterize this as a major policy.
25 We're not disputing that point.

1 But, again, I think that that applies
2 to any number of actions that the government
3 might take, and especially in the context of
4 benefits programs, where just based on the size
5 of those programs and the number of individuals
6 affected, the costs can frequently run into the
7 billions of dollars.

8 So I don't --

9 JUSTICE ALITO: Is there any
10 conceptual reason why the Major Questions
11 Doctrine should apply to most regulatory matters
12 but not to the -- not to benefits programs?

13 GENERAL PRELOGAR: The reason we think
14 it shouldn't apply in the same way to benefits
15 programs is because it doesn't involve that
16 corresponding tradeoff on individual liberty
17 interests.

18 The Court in some of the prior cases
19 in this area has expressed concern that if the
20 government is claiming an extraordinary power to
21 regulate, that means it can encroach on the
22 lives of individuals, the affairs of businesses,
23 and quite directly impose onerous burdens on
24 them.

25 JUSTICE ALITO: It may have an effect

1 on important individual rights, but do you think
2 that the doctrine also or perhaps primarily has
3 a separation of powers component?

4 GENERAL PRELOGAR: Yes, of course, I
5 recognize the Court has grounded it in the
6 separation of powers, but I think that that cuts
7 in favor of the distinction that we're trying to
8 make because, if the Court were to apply Major
9 Questions in this benefits context, even in a
10 circumstance where you might think Congress
11 could quite reasonably want to legislate
12 broadly, then it would have the effect of
13 potentially overriding Congress's intent,
14 contrary to the same kind of separation of
15 powers principles the Court has focused on in
16 prior cases.

17 JUSTICE ALITO: Well, I don't
18 understand why it would under -- undermine
19 Congress's intent to a greater extent in that
20 context. But drawing a distinction between
21 benefits programs and other programs seems to
22 presume that when it comes to the administration
23 of benefits programs, a trillion dollars here, a
24 trillion dollars there, it doesn't really make
25 that much difference to Congress.

1 That doesn't seem very sensible.

2 GENERAL PRELOGAR: Of course, I
3 acknowledge that there can be substantial costs
4 associated with benefits programs, but I guess
5 the reason I'm pressing on this distinction is
6 because I'm trying to think through, you know,
7 what is Congress supposed to do when it wants to
8 empower the executive to --

9 JUSTICE ALITO: But, I mean, isn't the
10 question, looking at this program and looking at
11 this question, is this the sort of thing that
12 Congress is likely to address expressly or
13 through a contestable interpretation of some
14 statutory language?

15 GENERAL PRELOGAR: Well, of course, we
16 think Congress did address this expressly here,
17 and Congress directed that in the context of a
18 national emergency, that is the -- the
19 limitation of the HEROES Act, so the Secretary
20 can't invoke this whenever he wants. There has
21 to be that predicate war or military operation
22 or national emergency.

23 In that context, in line with
24 Congress's limitations on who can count as an
25 affected individual by that emergency, in line

1 with the purposes that relief has to serve,
2 Congress said you can waive or modify any Title
3 IV provision in order to get relief to
4 borrowers.

5 And, Justice Alito, I would point to
6 the forbearance policy that's been in place for
7 the prior three years, put into place right at
8 the beginning of the pandemic by then Secretary
9 DeVos. That has been an economically
10 significant program. It's currently costing the
11 federal government more per year than this loan
12 forgiveness plan would cost the government
13 annually.

14 But I would argue that that is right
15 in the heartland of what the HEROES Act aimed to
16 do. It was critical relief that was rushed out
17 at the beginning of this devastating pandemic to
18 ensure that we didn't see spikes in delinquency
19 and default across the nation.

20 JUSTICE ALITO: May I ask you a
21 question about standing? So it's the case,
22 isn't it, that if any party in either of these
23 two cases has standing, then it would be
24 permissible for us to reach the merits of the
25 issue?

1 GENERAL PRELOGAR: Yes. In -- in the
2 states' case, if you conclude that any party has
3 standing, then the Court could go on to the
4 merits. In the case that the Court is going to
5 hear next, we think that there are objections to
6 the procedural claim with respect to the
7 borrowers' objections there.

8 JUSTICE ALITO: Okay. Then let me ask
9 you a question about MOHELA or maybe a question
10 or two.

11 If MOHELA itself had brought this
12 suit, would you contest Article III standing?

13 GENERAL PRELOGAR: No, we would not.
14 So we think that if MOHELA made allegations that
15 the plan was going to have financial effects on
16 it, it could sue in its own name and we would
17 not contest Article III standing.

18 JUSTICE ALITO: All right. So then we
19 would consider the Article III standing of the
20 State of Missouri, right?

21 GENERAL PRELOGAR: That's right.

22 JUSTICE ALITO: And the -- the -- the
23 most -- part of the Article III test that's most
24 disputed is injury in fact, is that correct?

25 GENERAL PRELOGAR: That's right.

1 We're also contesting causation --

2 JUSTICE ALITO: Right.

3 GENERAL PRELOGAR: -- and
4 redressability here, but I think injury in fact
5 is one of the critical points in dispute with
6 respect to MOHELA and the state's attempt to
7 assert MOHELA's injury.

8 JUSTICE ALITO: Okay. Injury in fact
9 is a factual question. So I understand a big
10 thrust of your argument to be that Missouri
11 lacks standing because MOHELA is -- is
12 separately incorporated. But why should that
13 formal distinction govern the determination of
14 injury in fact?

15 GENERAL PRELOGAR: So we think that
16 the injury in fact analysis here has both a
17 factual and a legal component. In the first
18 place, of course, we're making arguments that
19 even if there's a financial injury to MOHELA,
20 the state hasn't carried its -- its burden to
21 show that that will have downstream effects on
22 the state or that those would be cognizable.

23 MOHELA hasn't paid money into the
24 relevant state fund for the past 15 years. It
25 said that further payments were not deemed

1 probable even before this plan was announced.

2 But even putting the -- the factual
3 discrepancies to the side, there's a fundamental
4 problem as a matter of law with the claim of
5 injury, and I think it arises directly from two
6 sets of blackletter law principles.

7 The first is that the whole point of
8 incorporation is that you're creating a separate
9 legal person with its own rights and interests.
10 And Missouri has derived substantial benefits
11 from structuring MOHELA that way.

12 And the second is the basic Article
13 III principle that a party has to come to court
14 and assert her own rights and interests.

15 JUSTICE ALITO: Right.

16 GENERAL PRELOGAR: She can't invoke
17 the interests of a third party.

18 JUSTICE ALITO: All of that is
19 certainly true. You think that our -- that
20 the lack -- the fact that MOHELA is incorporated
21 is the end of the day? That's enough to -- to
22 defeat standing?

23 GENERAL PRELOGAR: We think, as a
24 matter of first principles, yes, that this Court
25 has several times emphasized that when you have

1 a separately incorporated instrumentality like
2 that, the corporate separateness should be
3 respected and that that --

4 JUSTICE ALITO: Well, what about --

5 GENERAL PRELOGAR: -- serves
6 important --

7 JUSTICE ALITO: -- Lebron and Amtrak?

8 GENERAL PRELOGAR: So those are
9 doctrines not focused on Article III standing,
10 of course, but instead are testing for other
11 things.

12 In Lebron, that was a state action
13 case, and the Court's reasoning was that you
14 shouldn't be able to parcel out governmental
15 functions to an instrumentality and thereby
16 evade the strictures of the Constitution.

17 JUSTICE ALITO: Well, have we ever
18 decided a case that presents what you see is the
19 issue here or what the parties see as the issue,
20 as one of the issues, which is whether for
21 Article III standing purposes a -- an entity is
22 part of a state?

23 GENERAL PRELOGAR: No. So the Court
24 hasn't addressed this issue in the context of
25 Article III. There aren't cases that are

1 directly on point on either side, but I think
2 that we definitely have the better argument of
3 the first principles here based on the
4 propositions I mentioned earlier, including
5 those that generally make clear that the Court
6 won't countenance third-party claims seeking to
7 invoke rights and interests of individuals or
8 entities that aren't before the Court.

9 And I think it would be particularly
10 anomalous to recognize some kind of exception to
11 those principles here for two reasons.

12 JUSTICE ALITO: No, but the question
13 would be whether MOHELA is part of the State of
14 Missouri for present purposes. And where we're
15 considering injury in fact, why should the test
16 turn solely or why should the lack of corporate
17 status be a necessary element? Why shouldn't
18 the test be something more like whether the
19 relationship between this entity and the State
20 of Missouri is such that an injury to MOHELA
21 will necessarily or presumptively be an injury
22 to the state?

23 And if that's the case, doesn't that
24 all point to the reasons for setting up MOHELA
25 as a very relevant factor and the degree of

1 state control, the degree of the governor's
2 control over MOHELA as a very important factor?

3 GENERAL PRELOGAR: I don't think that
4 those factors should count as important in the
5 analysis, and to the extent the Court is
6 inclined to broaden out the analysis beyond the
7 principles I've articulated about corporate
8 separateness, I think the most critical fact
9 would be whether there's financial entanglement
10 and whether Missouri has itself decided to blur
11 those lines for purposes of making it
12 responsible for MOHELA's own liabilities.

13 JUSTICE JACKSON: And, in fact, isn't
14 that really, as you say, the most important
15 thing if economic injury is the point?

16 GENERAL PRELOGAR: Yes.

17 JUSTICE JACKSON: I mean, I had
18 understood that the injury that was being
19 asserted here was an economic injury, but if we
20 look at MOHELA and we see that its financial
21 interests are totally disentangled from the
22 state, it stands alone, it's incorporated
23 separately, the state is not liable for anything
24 that happens to MOHELA, I don't know how that
25 could possibly be a reason to say that an injury

1 to MOHELA should count as an injury to the
2 state.

3 GENERAL PRELOGAR: Yes, we agree
4 exactly with that analysis. And it's important
5 to think about the benefits that Missouri has
6 obtained from structuring MOHELA that way.

7 This is not the first lawsuit that
8 MOHELA's been involved in. Actually, MOHELA is
9 not involved in this particular suit, but in
10 prior suits, when MOHELA's been sued, the
11 state's been entirely absent because state law
12 makes clear that Missouri cannot be on the hook
13 for MOHELA's liabilities. It creates a wall of
14 separation financially between the two entities,
15 and Missouri gets a lot of benefit from that.

16 JUSTICE SOTOMAYOR: General --

17 JUSTICE JACKSON: And so, if MOHELA is
18 being injured as a result of the plan or at
19 least if that's the allegation, MOHELA has the
20 ability to defend itself and its interests,
21 correct?

22 GENERAL PRELOGAR: Exactly. It's a
23 separate legal person. It has the right to sue
24 or be sued in its own name. There is nothing
25 that stands in the way of MOHELA asserting these

1 interests if it's experiencing financial harm,
2 and there's no --

3 JUSTICE JACKSON: But wouldn't --

4 GENERAL PRELOGAR: -- principle that
5 would support allowing Missouri now to interfere
6 with the separation it itself has created --

7 JUSTICE JACKSON: And so would we be
8 breaking --

9 GENERAL PRELOGAR: -- just because it
10 doesn't like the policy.

11 JUSTICE JACKSON: -- would we breaking
12 new ground then if on this basis we found
13 standing?

14 GENERAL PRELOGAR: Yes. I'm not aware
15 of any case that would support standing on this
16 basis.

17 JUSTICE ALITO: Well, would we be
18 breaking new ground if we found that there was
19 standing since we've never been presented, as
20 you admitted earlier, with a case that presents
21 precisely the issue that's here?

22 GENERAL PRELOGAR: It's true that it's
23 a new fact pattern, but I think that the Court
24 would be breaking new ground with respect to the
25 general principles that it's asserted in

1 third-party standing contexts. There, for
2 example, one of the critical facts the Court has
3 highlighted is whether there's some impediment
4 that would prevent the party whose rights and
5 interests are implicated from pursuing its own
6 claim. There is nothing like that here, and the
7 Court has never recognized a doctrine of
8 third-party standing on facts like these.

9 JUSTICE KAGAN: Do you have any
10 understanding about why MOHELA isn't here?

11 GENERAL PRELOGAR: No. The only
12 evidence in the record about MOHELA is that its
13 involvement in this suit has been responding to
14 sunshine law requests. I think it's possible
15 that loan servicers have --

16 JUSTICE KAGAN: Sunshine law requests
17 brought by?

18 GENERAL PRELOGAR: Brought by the
19 state. So Missouri served sunshine law requests
20 on MOHELA to get information about its financial
21 interests.

22 JUSTICE KAGAN: Because MOHELA was not
23 giving over information voluntarily?

24 GENERAL PRELOGAR: That's correct. I
25 think it just reinforces the sense that there

1 was separation here between the state and this
2 instrumentality. If I had to speculate, I think
3 that loan servicers, during the course of the
4 forbearance policy, have seen some of their
5 servicing fees be reduced in light of that
6 policy and it's possible that they are waiting
7 for forbearance to lift so that they can start
8 collecting those fees again, and that might be a
9 possible reason why they made the judgment that
10 they don't want to stand in the way of this
11 forgiveness policy, because it's a critical
12 component of allowing payments to resume.

13 JUSTICE ALITO: Do you think there
14 might be a dependent relationship between
15 agencies like MOHELA and the federal government
16 since we're speculating about why they're not
17 here?

18 GENERAL PRELOGAR: Certainly, there
19 are contractual relationships, yes.

20 JUSTICE SOTOMAYOR: General --

21 JUSTICE JACKSON: Can I ask you, you
22 -- oh, I'm sorry.

23 JUSTICE SOTOMAYOR: General, there was
24 a Missouri case in 1979, Menorah Medical Center,
25 with an agency much like MOHELA, and there the

1 Missouri Supreme Court said that that entity was
2 not the state. States are free to organize
3 themselves and structure themselves in any way
4 they want, correct?

5 GENERAL PRELOGAR: Correct, yes.

6 JUSTICE SOTOMAYOR: And it would be
7 odd for us to have a state say we're creating a
8 corporation, we're not going to be responsible
9 for its debts, we're not going to be responsible
10 for any of its contracts, we're not going to be
11 responsible for anything it does financially,
12 and the state itself says this is not the state,
13 it's an independent corporation, and we're going
14 to say instead that it is the state, correct?

15 GENERAL PRELOGAR: Yes. I think that
16 it would be really anomalous to override the
17 separation that Missouri itself created between
18 it and MOHELA in the context of this case, this
19 case --

20 JUSTICE SOTOMAYOR: Or to override its
21 own state supreme court's decision that it is
22 not the state?

23 GENERAL PRELOGAR: Yes, that's
24 correct.

25 JUSTICE BARRETT: General, I'm

1 thinking of, in Arkansas versus Texas, it was
2 significant in that case that Arkansas owned the
3 land of the university. So it does seem that
4 Missouri has created this separateness with
5 respect to the liabilities of MOHELA.

6 What if -- and I'll ask this to the
7 other side. It's not really clear to me what
8 happens to MOHELA's assets. I mean, what if
9 MOHELA itself dissolves? There are no
10 shareholders. I mean, does your answer change
11 if, even though Missouri is not responsible for
12 the liabilities, it does have an ownership stake
13 in the assets of MOHELA?

14 GENERAL PRELOGAR: I think it's clear
15 under state law, Justice Barrett, that Missouri
16 doesn't have that kind of ownership interest in
17 the assets of MOHELA. And I would point in
18 particular to Missouri Revised Statute 173.410.
19 This is the provision that makes clear that
20 Missouri cannot take the assets of MOHELA and
21 appropriate them. They don't go into the
22 general treasury. It makes clear instead that
23 those assets are under MOHELA's exclusive
24 control.

25 So I think, as a matter of state law

1 here, we don't have anything like the Arkansas
2 case that you just referenced. And as well, the
3 flip side of that is the provision of state law
4 that likewise says Missouri is not going to be
5 liable for any agreements or obligations or
6 liability of MOHELA so that if MOHELA goes out
7 there in the world and harms someone, the
8 state's not on the hook for the damage.

9 And that's another distinction from
10 the Arkansas case where, under state law there,
11 it was clear that a suit against the
12 instrumentality was a suit against the state
13 itself.

14 JUSTICE BARRETT: Would you have the
15 same position with respect to federal
16 corporations? Like what about the FDIC or, you
17 know, organizations like that, what if the
18 agency didn't want to sue? Could the United
19 States sue to protect the federal government's
20 interests if the corporate identity was separate
21 like here?

22 GENERAL PRELOGAR: No. I think that
23 our principles would apply with respect to our
24 own instrumentalities. We could, of course, sue
25 to protect interests -- distinct rights and

1 interests of the United States. And so
2 Respondents have cited some cases, for example,
3 where an instrumentality entered into a contract
4 on behalf of the United States in the name of
5 the United States as its agent, and we had a
6 contract right that we could enforce in our own
7 name, or there was another case that involved a
8 statutory right in the tax context to offset,
9 and the United States was permitted to sue on
10 that basis because it had its own rights and
11 interests.

12 But we've never done what the states
13 are doing here and, in the absence of any
14 underlying contract right or statutory right or
15 trust right, just asserted this all-purpose
16 ability to blur the distinction between the
17 sovereign and instrumentalities when they're
18 separately incorporated in this way.

19 JUSTICE BARRETT: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you --
21 thank you, General. I just have a question on
22 -- on the Major Questions Doctrine, and I wanted
23 just a little bit of background for why -- I
24 want to get your views on how it applies.

25 You're -- you're arguing here that no

1 notice-and-comment proceeding was required
2 before the action taken on the half trillion
3 dollars of loans and that because of your view
4 that the President can act unilaterally, that
5 there was no role for Congress to play in this
6 either, and at least in this case, given your
7 view of standing, there's no role for us to play
8 in this -- in this either.

9 Now we take very seriously the idea of
10 the separation of powers and that power should
11 be divided to prevent its abuse, and there are
12 many procedural niceties that have to be
13 followed for the same purpose.

14 The case reminds me of the one we had
15 a few years ago under a different administration
16 where the administration tried acting on its own
17 to cancel the Dreamers program, and we blocked
18 that effort.

19 And I just wondered, given the posture
20 of the case and given our historic concern about
21 the separation of powers, you would recognize at
22 least that this is a case that presents
23 extraordinarily serious, important issues about
24 the role of Congress and about the role that we
25 should exercise in scrutinizing that,

1 significant enough that the Major Questions
2 Doctrine ought to be considered implicated?

3 GENERAL PRELOGAR: Well, Mr. Chief
4 Justice, let me try to respond to the concerns
5 about both the role for the judiciary and the
6 role for Congress here.

7 We are not suggesting that there's no
8 role for the judiciary to play. It's that these
9 plaintiffs are not proper plaintiffs in this
10 case. Of course, the Court is bound by Article
11 III, and as I acknowledged to Justice Alito, we
12 think that loan servicers, for example, would
13 have standing to challenge this plan.

14 But the fact that the loan servicers
15 haven't yet challenged to date doesn't provide a
16 basis to overlook those fundamental Article III
17 requirements and distort the meaning of how this
18 Court has previously articulated standing
19 principles in a circumstance where the states
20 can't otherwise demonstrate their standing to
21 sue.

22 With respect to the role for Congress,
23 I think what's clear is, of course, we're
24 recognizing that Congress could take additional
25 action if it disapproves this plan. In fact,

1 there were bills introduced to alter the text of
2 the HEROES Act to specifically provide that the
3 Secretary can't authorize loan discharge. Those
4 bills didn't pass, but that's one role Congress
5 can play.

6 I think, though, that if the Court is
7 focused on trying to ensure that Congress's role
8 in this process is respected, that just argues
9 in favor of reading this text in line with what
10 the plain language suggests. You know, these
11 are not words of limitation in the actual
12 assertion of authority here, waive or modify any
13 Title IV provision.

14 The states want this Court to say
15 Congress really only meant waive or modify some
16 of the provisions, not all of them, not the
17 central provisions that govern repayment and
18 cancellation, when those would have been obvious
19 candidates for waiver or modification in a loan
20 discharge program.

21 And if the Court overrides that clear
22 HEROES Act language here, I think that it could
23 only thwart Congress's intent in this particular
24 posture of ensuring that you have the tools, the
25 Secretary has the tools he needs to take care of

1 Americans in a -- a national emergency
2 situation.

3 CHIEF JUSTICE ROBERTS: But whether
4 Congress acted or not was a factor that we
5 considered in the Major Questions Doctrine, and
6 the way we considered it is whether or not the
7 issue that was before the Court is something
8 that had been seriously considered and debated
9 and was a matter of political controversy before
10 Congress.

11 That certainly is the case here,
12 right?

13 GENERAL PRELOGAR: That's right.
14 We're not disputing that this is a politically
15 significant action. But, if you're focused --

16 CHIEF JUSTICE ROBERTS: Well, not just
17 a politically significant action but one that
18 has the attention of Congress. The fact that it
19 hasn't acted under the Major Questions Doctrine
20 but has considered the matter we cited as
21 support for the notion that maybe it should be
22 one for Congress.

23 If you're talking about this in the
24 abstract, I think most casual observers would
25 say, if you're going to give up that much amount

1 of money, if you're going to affect the
2 obligations of that many Americans on a subject
3 that's of great controversy, they would think
4 that's something for Congress to act on.

5 And if they haven't acted on it, then
6 maybe that's a good lesson to say for the
7 President or -- or the administrative
8 bureaucracy that maybe that's not something they
9 should undertake on their own.

10 GENERAL PRELOGAR: Well, let me react
11 to that in a couple of different ways, Mr. Chief
12 Justice.

13 First is to emphasize that the
14 unenacted legislation that the states are
15 pointing to here did not mirror the particulars
16 of this plan, so I don't think it would be right
17 to say that Congress has specifically focused on
18 this plan and disapproved it.

19 And if the Court were to go down that
20 road, I'd point again to the fact that
21 there's -- there's legislative inaction on the
22 other side of not amending the HEROES Act.

23 But I would think that the Court, as
24 it usually does, would place more focus on
25 enacted legislation. And, here, during the

1 pandemic, Congress enacted a provision of the
2 American Rescue Plan that specifically
3 anticipated and sought to facilitate a program
4 of loan discharge by providing that it wouldn't
5 be subject to federal taxation from 2021 to
6 2025.

7 So I think that that congressional
8 action actually carries more weight in the
9 analysis.

10 CHIEF JUSTICE ROBERTS: Thank you.

11 Justice Thomas, anything further?

12 JUSTICE THOMAS: Just briefly.

13 There's some discussion in the briefs
14 that going past with this provision or that
15 modification or waiver, that this is, in effect,
16 a cancellation of a debt -- that's really what
17 we're talking about -- and that as a
18 cancellation of \$400 billion in debt, in effect,
19 this is a grant of \$400 billion, and it runs
20 head long into Congress's appropriations
21 authority, and I'd like to give you some time to
22 respond to that.

23 GENERAL PRELOGAR: Sure. And so,
24 first, I want to take on the argument that some
25 amici have made in this case about implicating

1 appropriations authority.

2 Of course, implementing this program
3 doesn't require that any money be drawn from the
4 Treasury, and so I don't think that it strictly
5 raises an appropriations issue, which is why I
6 think the states aren't raising that argument
7 here.

8 And to the extent that the concern is
9 about the Secretary taking action in a way that
10 Congress didn't authorize, it seems to me that
11 it just collapses back into the central
12 interpretive question in this case, which is
13 does the HEROES Act authorize the Secretary's
14 action or not.

15 With respect to the concern you raised
16 that the -- the effect of loan forgiveness here
17 will result in cancellation of a measure of debt
18 for the affected borrowers, of course, that's
19 true, but I don't think that that is materially
20 different from the kind of effects you can see
21 from other types of authority that's long been
22 exercised under the HEROES Act.

23 You know, take the forbearance policy
24 that I mentioned. This has been powerful relief
25 for debtors -- I'm sorry, for student-loan

1 borrowers while it's been in place with respect
2 to their debt.

3 And it's had, you know, kind of
4 permanent financial effects on the government,
5 over \$150 billion over the course of that
6 forbearance program by the end of it, but it's
7 been absolutely critical relief. And it's
8 provided that kind of help to the student-loan
9 borrowers as well who haven't had to make those
10 interest payments or any payments on their loans
11 while it's been in place.

12 And that too can have the kind of
13 consequence of resulting in cancellation of
14 principal. During the period of forbearance,
15 the -- the years that borrowers spent in
16 forbearance count towards loan forgiveness
17 programs, for example. So, at the end of the
18 day, those borrowers in income-driven repayment
19 or public service loan forgiveness are going to
20 pay less on their loan overall.

21 It will be forgiven three years
22 earlier or without those three years of payments
23 that they weren't obligated to make. But I
24 don't think that in any sense calls into
25 question the legitimacy and authorization behind

1 the forbearance policy.

2 JUSTICE THOMAS: Well, I -- I think
3 that forbearance fits more comfortably in
4 modify -- waive or modify language. It's you
5 simply forbearing on collecting an underlying
6 debt, but you don't cancel the debt. And that's
7 what we're talking about here.

8 And, certainly, there's a cost to
9 that, I understand, but I -- I still think that
10 you haven't fully explained why, if you looked
11 at this, you could not -- you would not argue
12 that the Secretary could actually grant four
13 billion -- \$400 billion.

14 GENERAL PRELOGAR: Okay.

15 JUSTICE THOMAS: Do we agree on that?

16 GENERAL PRELOGAR: I'm sorry --

17 JUSTICE THOMAS: You could not give
18 grants of --

19 GENERAL PRELOGAR: -- outside the
20 context of the HEROES Act?

21 JUSTICE THOMAS: Yes.

22 GENERAL PRELOGAR: That's right. We,
23 of course, are premising the relief here --

24 JUSTICE THOMAS: So you would --

25 GENERAL PRELOGAR: -- specifically on

1 the HEROES Act.

2 JUSTICE THOMAS: -- you would rely on
3 appropriations from Congress for that, right?

4 GENERAL PRELOGAR: Yes.

5 JUSTICE THOMAS: And the argument is
6 that you are, in effect, doing that without
7 appropriations from Congress?

8 GENERAL PRELOGAR: Well, Justice
9 Thomas, I don't see how you could distinguish
10 that from any of the other forms of relief under
11 the HEROES Act. All of those forms of relief
12 cost the federal government money and often in
13 significant sums.

14 You know, one of the quintessential
15 forms of relief that the government has offered
16 before in periods of extended deferment for
17 soldiers fighting abroad is to pay the interest
18 on their loans for them.

19 And I think you could probably make
20 the same argument of -- of questioning, well,
21 does that cost the government money? Is there
22 an appropriations overlay there? Does that
23 transform the nature of the program because it
24 takes a loan with interest and makes it an --
25 effectively an interest-free loan?

1 But that's exactly what Congress
2 attend -- intended under this authority. It's
3 to make those changes to the program in direct
4 response to and in direct proportion to the
5 situation the Secretary confronts that will
6 otherwise leave that borrower worse off.

7 CHIEF JUSTICE ROBERTS: Justice Alito?
8 Justice Sotomayor?

9 JUSTICE SOTOMAYOR: Returning to the
10 standing question, the states basically say
11 we're going to lose money in taxation one way or
12 another.

13 In the Texas case, you argued that we
14 should be looking at the cost benefit, and some
15 of the amici here say that there will be a
16 tremendous benefit to the states from this
17 cancellation because that extra money will
18 result in increased consumer spending and
19 decreased housing insecurity, less defaults on
20 other loans that those borrowers may have, et
21 cetera.

22 Do you agree with those amici that the
23 economic benefits outweigh any alleged financial
24 harm in this case?

25 GENERAL PRELOGAR: As a factual

1 matter, we do not disagree. As a legal matter,
2 we haven't asked the Court to rely on that as a
3 basis for standing because we think that the
4 invocation of these harms to tax revenues are so
5 easily answered under this Court's precedent.

6 And I would point the Court to the
7 Pennsylvania versus New Jersey case. It is on
8 all fours with this one precisely identical.
9 And so we just think you don't need to go down
10 the road of thinking about some of the broader
11 arguments about tax injury in this case because
12 it's so clear that this Court has already
13 rejected the very injury the states are
14 asserting under the Pennsylvania case.

15 JUSTICE SOTOMAYOR: In Pennsylvania,
16 it was a tax credit that was going to be
17 removed, so it's almost identical to this,
18 correct?

19 GENERAL PRELOGAR: Exactly.
20 Pennsylvania had issued its tax credit before
21 the New Jersey law that they were opposed to and
22 had extended it to residents when they pay taxes
23 in other states.

24 And then New Jersey came along and
25 changed its tax code to impose newly a -- a

1 commuter tax that would ultimately deplete
2 Pennsylvania's tax revenues, and the Court said
3 that's self-inflicted because nothing required
4 Pennsylvania to extend that tax credit, nothing
5 prohibits Pennsylvania from withdrawing it now.

6 And that analysis applies equally here
7 because, of course, there is nothing that
8 requires the states to tie their definition of
9 gross income to the federal tax code. Two of
10 the states here, Arkansas and Missouri, don't do
11 that. And there's nothing that prevents them
12 from changing that if they don't want to honor
13 the -- the forgiveness from taxation that the
14 federal government is now under.

15 JUSTICE SOTOMAYOR: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?

17 JUSTICE KAGAN: General Prelogar, I
18 want to change the subject a bit. The -- your
19 friends on the states' side and also the
20 borrowers in the other case have a number of
21 statutory arguments.

22 They frame them as statutory
23 arguments, saying this wasn't necessary under
24 the terms of the statute, saying that it leaves
25 borrowers better off, not worse off, again,

1 pointing to statutory language saying that, you
2 know, it -- the borrowers it targets aren't
3 worse off because of the pandemic.

4 Now I'm not sure that I understand
5 really those arguments as statutory arguments as
6 much as I understand them as arbitrary and
7 capricious arguments, that, essentially, they
8 are saying that the Secretary just did not say
9 the right things, did not make the right
10 findings, did not properly justify what he did
11 here, that there's no sense in which we read
12 this memorandum and we come away thinking, oh,
13 yes, these harms were caused by the pandemic and
14 -- and there's a basis for this action and --
15 and a -- and a sufficient basis for this action.

16 So I wanted to give you a chance to
17 talk about that. It's -- it's essentially the
18 tie to the pandemic of the sort of harms that
19 the Secretary said made relief appropriate.

20 GENERAL PRELOGAR: So let me say at
21 the outset that I agree that those kinds of
22 arguments, I think, find a much more natural
23 home in an arbitrary and capricious analysis,
24 and the reason for that is because it's clear
25 that Congress tolerated overbreadth in this

1 statute. It told the Secretary, for example,
2 that he can act on a class-wide basis. He
3 doesn't need to go case by case with respect to
4 each individual borrower who stands to benefit
5 under HEROES Act relief. It said he should take
6 action to ensure, that is, make certain, that
7 borrowers aren't left worse off as may be
8 necessary, not as strictly necessary.

9 So, once we're in the world where it's
10 clear under the statute that the Secretary isn't
11 violating the HEROES Act by providing relief
12 that's class-wide and may have the effect of
13 offering critical benefits to borrowers who, as
14 it turns out, wouldn't have needed them in the
15 absence of the relief, then I think the question
16 boils down to has the Secretary justified his
17 line-drawing and the scope of relief, and that
18 really should function under arbitrary and
19 capricious review.

20 And, here, I think, with respect to
21 all of the states' arguments, they lack merit
22 when you look at the Secretary's explanation for
23 why this relief, in his judgment, was necessary.
24 He documented the substantial economic impacts
25 of the COVID pandemic across the entire country

1 that's already necessitated unprecedented levels
2 of aid that we've never seen before, 5 trillion
3 dollars in other pandemic relief efforts, this
4 forbearance policy under the HEROES Act that the
5 Department had never put into place before.

6 So he documented those financial
7 effects the pandemic has had on borrowers, and
8 then he explained, using data that he examined,
9 that huge swaths, substantial percentages of
10 borrowers were going to be at serious risk of
11 default and delinquency or inability to pay
12 their loans once forbearance ends.

13 And that ultimately justified his
14 decision about how to craft the limits within
15 the program and the scope of relief to offer.
16 And I think that all of the states' arguments
17 about how that wasn't strictly necessary or that
18 maybe it doesn't have enough of a connection to
19 the pandemic are answered in full by the
20 Secretary's analysis here.

21 JUSTICE KAGAN: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Gorsuch?

24 JUSTICE GORSUCH: I'd like to follow
25 up on Justice Kagan's question, General. Under

1 State Farm, one of the things that the
2 government must normally do is, in its
3 memoranda, explain not just the benefits of its
4 proposed course of action but also grapple with
5 the costs or negative effects of a program that
6 it proposes.

7 And your friends on the other side
8 argue that that's another deficiency in the
9 Secretary's memorandum, and I'd like to give you
10 the chance to respond to that.

11 GENERAL PRELOGAR: Yes, of course. So
12 I want to say at the outset that my friends are
13 mistaken to suggest that the Secretary didn't
14 even consider costs here. The Department
15 extensively modeled the costs associated with
16 this program and submitted those --

17 JUSTICE GORSUCH: Oh, I -- I -- I --

18 GENERAL PRELOGAR: -- cost estimates
19 to OMB.

20 JUSTICE GORSUCH: -- I'm -- I don't
21 just mean the numbers --

22 GENERAL PRELOGAR: Yeah.

23 JUSTICE GORSUCH: -- but, generally,
24 the -- the negative effects to the economy, to
25 other persons, to people who don't have this

1 opportunity for debt relief. There are a
2 variety of factors that, under State Farm,
3 normally the government would have to consider,
4 and -- and your friends on the other side argue
5 those are not present in this memorandum.

6 GENERAL PRELOGAR: Well, I think that
7 those were -- were certainly part and parcel of
8 the Secretary's determination about how to
9 tailor this relief. The Secretary recognized
10 that the central purpose of the HEROES Act was
11 implicated here because there were going to be
12 millions and millions of student-loan borrowers
13 who were at serious risk of default and who were
14 in a worse position because of the pandemic.

15 But then he decided to tailor the plan
16 to look at those particular risks and decide on
17 the scope of relief to offer those borrowers.
18 And, of course, the costs associated with that
19 are the flip side of providing HEROES Act relief
20 in any circumstance.

21 There are always going to be the --
22 the costs to the government of offering that
23 benefit to borrowers, and it's in line --

24 JUSTICE GORSUCH: Again, not -- not
25 just the costs to the government. I'm sorry to

1 interrupt. But --

2 GENERAL PRELOGAR: Yeah.

3 JUSTICE GORSUCH: -- what I think they
4 argue that is missing is costs to other persons
5 in terms of fairness, for example, people who
6 have paid their loans, people who don't -- plan
7 their lives around not seeking loans and people
8 who are not eligible for loans in the first
9 place and that a half a trillion dollars is
10 being diverted to one group of favored persons
11 over others.

12 I think that's the nature of their
13 argument, in addition to, as you point out, the
14 cost to the fisc.

15 GENERAL PRELOGAR: The --

16 JUSTICE GORSUCH: And I didn't see
17 anything in the memorandum that dealt with those
18 kinds of questions, and if there is something,
19 I'd be appreciative if you could point me to it.

20 GENERAL PRELOGAR: No, there's not,
21 but that's because I think that those kinds of
22 arguments are inconsistent with the statutory
23 scheme that Congress set up here. Congress
24 already made the judgment that in the context of
25 a national emergency, you should be able to

1 provide borrowers with this kind of relief to
2 serve this purpose.

3 And so I think, for -- for the states
4 to suggest that it's incumbent on the Secretary
5 to say, actually, I'm not going to do that, even
6 though Congress wanted me to ensure that
7 borrowers won't be left worse off, is just at
8 war with the whole statutory purpose.

9 JUSTICE GORSUCH: I appreciate that.

10 Congress has given the executive
11 branch a lot of emergency authority, and I think
12 your argument rests on that. But it also
13 requires generally the President to specify the
14 provisions of law under which he proposes that
15 he or others will act. That's 50 U.S.C. 1631, I
16 think, if my notes are right.

17 And I'm just wondering, did that
18 happen here?

19 GENERAL PRELOGAR: Yes, it did. So
20 the COVID-19 emergency, the specific provisions
21 that he invoked were part of the Social Security
22 Act and HHS's authority to target the spread of
23 disease. I can't give you the exact citation
24 here, but that determination was made.

25 JUSTICE GORSUCH: Did he indicate

1 anything under the HEROES Act or the Department
2 of Education that's acting in this case?

3 GENERAL PRELOGAR: No, but I think
4 that it's clear that the HEROES Act is linked to
5 the declaration of the national emergency, not
6 the other way around.

7 JUSTICE GORSUCH: Okay. And then,
8 finally, on standing, in the New York census
9 case, the majority of this Court held that the
10 failure to count an individual, potential
11 failure to count an individual, undercount the
12 census, would have potential effects to the
13 State of New York in the term -- in terms of the
14 benefits it might later receive, that kind of
15 knock-on effect was sufficient to constitute
16 standing in that case.

17 And I'd just like to get your thoughts
18 on how you'd have us distinguish that.

19 GENERAL PRELOGAR: Sure. So, in that
20 case, of course, the Court was looking at a
21 census count that was going to plug in directly
22 to the amount of federal funding that the state
23 would receive. And I think that, you know, in
24 the kind of terminology that we've been using
25 and thinking about this issue with, that was a

1 direct effect, that, effectively, the action
2 would, by virtue of determining federal funding
3 for the state in that way, operate directly on
4 the state or -- or at least determine its rights
5 and interests.

6 And, here, there's not the same kind
7 of direct effect. Of course, as I've already
8 mentioned to Justice Sotomayor, we think that
9 this is a self-inflicted injury to begin with,
10 so the Court doesn't need to get into those
11 issues. But, even if it does, here, the kind of
12 downstream effects on tax revenues bring this
13 case within Florida versus Mellon as the closest
14 analogue and not Department of Commerce.

15 JUSTICE GORSUCH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh?

18 JUSTICE KAVANAUGH: I'd like to pick
19 up on the Chief Justice's and Justice Thomas's
20 questions on statutory text and then our
21 precedent.

22 I think you said earlier what was
23 Congress in 2003 supposed to do in terms of
24 advance authorization, but, of course, they
25 could have in 2003 referred to loan cancellation

1 and loan forgiveness, and those are not in the
2 statutory text.

3 So then that leaves us with a
4 situation that I think we've seen before, an old
5 statute with kind of general language, Congress
6 specifically considering the present issue
7 repeatedly but not, as you acknowledge, passing
8 legislation that would authorize the specific
9 action and then, in the wake of Congress not
10 authorizing the action, the executive,
11 nonetheless, doing a massive new program.

12 And that seems problematic under --
13 going back to the benzene case, the Brown &
14 Williamson, UARG, you know the line of cases.

15 So why did does this case not fit into
16 that formula that we've seen before in prior
17 cases?

18 GENERAL PRELOGAR: So there was a lot
19 packed in there, and I want to be careful and
20 try to respond to each of the considerations you
21 raise because I think, actually, down the line,
22 this case is a far cry from those prior
23 situations the Court has confronted.

24 You mentioned the idea of taking an
25 old statute with, you know, general language or

1 cryptic language and pressing it into service.
2 I don't think that that is a fair
3 characterization of this use of the HEROES Act.
4 The whole point of this statute, its central
5 mission and function, is to ensure that in the
6 face of a national emergency that is causing
7 financial harm to borrowers, the Secretary can
8 do something. He can alter the student loan
9 program to ensure that they're not worse off.

10 So there's not the same mismatch here
11 of taking an old statute and dusting it off and
12 deploying it in a context where Congress could
13 never have imagined it would be used before.
14 Instead, this is a perfect fit with the problem
15 that the Secretary confronted.

16 You also suggested that there would
17 have been a clearer way for Congress to
18 formulate this language, that there's no express
19 reference here. But I think that that doesn't
20 carry a lot of significance in this context
21 because, of course, Congress didn't enumerate
22 any of the possible forms of relief under the
23 HEROES Act. It says that the Secretary can
24 consider waiving or modifying all Title IV
25 provisions.

1 And, certainly, if there was an
2 enumerated list, you might be able to draw
3 inferences from that, but, here, I think the
4 opposite inference applies, that Congress wanted
5 to cover the waterfront and ensure in advance
6 that the Secretary had the tools depending on
7 whatever situation he confronted to make sure
8 that student-loan borrowers weren't going to be
9 left worse off.

10 You mentioned the congressional
11 inaction. And I think that it's true that I
12 acknowledge that that demonstrates that this is
13 a politically significant issue. We have -- we
14 have never contested that point, but there
15 again, as I mentioned to the Chief Justice, we
16 have inaction on both sides.

17 Congress has not amended the HEROES
18 Act and instead enacted the provision of the
19 American Rescue Plan that anticipated this --
20 this program in particular and facilitated it by
21 ensuring that those discharges would not be
22 subject to federal taxation.

23 And then the other thing I would add,
24 you did -- you did not put this in, but if
25 you'll indulge me --

1 JUSTICE KAVANAUGH: Yeah.

2 GENERAL PRELOGAR: -- this is not a
3 situation where the Secretary is acting outside
4 the heartland of his authority. In some of the
5 cases that you've mentioned, you have, you know,
6 concerns that the -- the agency is acting
7 outside the core of its domain, the CDC
8 inserting itself in the landlord/tenant
9 relationship, for example.

10 But that's not what we have here.
11 This is the student loan program. That falls
12 within the wheelhouse of the Secretary of
13 Education. He exercises comprehensive authority
14 over that program. These are federal loans
15 between the federal government and student-loan
16 borrowers. So this is a situation where the
17 Secretary is really acting within the core of
18 his expertise and his authority.

19 JUSTICE KAVANAUGH: Something else you
20 said earlier was that we shouldn't necessarily
21 apply that line of precedent in this situation
22 because this is not a regulatory program but a
23 -- but a benefits program.

24 But I want to push back a little bit
25 on that and get your response, which is, in

1 something like this, there are going to be
2 winners and losers, and that raises similar
3 concerns about individual rights, individual
4 liberty that are present arguably in regulatory
5 programs as well.

6 And why, therefore, wouldn't the same
7 line of precedents that we've applied in the
8 regulatory context apply also in the benefits
9 context to consider whether we need specific
10 express congressional authorization?

11 GENERAL PRELOGAR: Well, I think that
12 at the very least, to the extent that there are
13 those considerations that you referenced,
14 they're not direct in the same way that
15 expansive regulatory authority is.

16 You know, when you've got a government
17 program that is -- as the Court has said before,
18 constitutes extravagant regulatory authority,
19 that takes an identifiable group of individuals
20 or entities and directly imposes burdens or
21 costs on them.

22 And I think there is a distinction
23 with the benefit context when it comes to how
24 Congress is likely to legislate and its general
25 comfort level with broadly empowering the

1 executive to provide benefits to Americans,
2 especially in the context of an emergency
3 situation.

4 But even if you didn't think that that
5 benefits and regulation distinction should carry
6 the day and be a bright-line rule, at the very
7 least, I think it should factor into the
8 analysis when applying interpretive principles
9 here and in looking at what Congress is -- is
10 doing.

11 And as I mentioned before and -- and
12 would love to finish here, you know, think about
13 what Congress is supposed to do. There you are,
14 Congress in 2003, thinking we can't predict the
15 future, we don't know exactly what national
16 emergencies will happen, but we -- what we want
17 to ensure is that we are empowering the federal
18 government to take care of student-loan
19 borrowers and not leave them at substantial risk
20 of being worse off with their ability to repay
21 their loans.

22 And the language that Congress enacted
23 here is a perfect fit to accomplish that goal.
24 And it's hard to see what Congress could have
25 done differently.

1 JUSTICE KAVANAUGH: Last question.
2 Broadening it out and thinking about, you
3 mentioned emergencies, the history of this Court
4 with respect to executive assertions of
5 emergencies.

6 Some of the biggest mistakes in the
7 Court's history were deferring to assertions of
8 executive emergency power. Some of the finest
9 moments in the Court's history were pushing back
10 against presidential assertions of emergency
11 power. And that's continued not just in the
12 Korean War but post-9/11 in some of the cases
13 there.

14 So, given that history, there's a
15 concern, I suppose, that I feel at least about
16 how to handle an emergency assertion. You know,
17 some of the amicus briefs, one of them from a
18 professor says this is a case study in abuse of
19 executive emergency powers. I'm not saying I
20 agree with that. I'm just saying that's the
21 assertion.

22 And I want to get your assessment --
23 this is a big-picture question, so I'll give you
24 a little time -- of how we should think about
25 our role in assertion of presidential emergency

1 power given the Court's history.

2 GENERAL PRELOGAR: Well, I think,
3 in -- in light of that history in all of the
4 contexts that you identified, it's aware the
5 distinction between regulation and benefits
6 really makes a difference. And it actually
7 tracks some of the concerns that have been
8 raised about standing and the Chief Justice's
9 questions about who could actually sue on this
10 plan and what role there is for the judiciary.

11 To the extent that there is a limited
12 category of people who have the actual kind of
13 cognizable Article III harm that would permit
14 standing in a case like this one, I think that
15 just shows that that's because, when the
16 government is administering a benefits program,
17 there are fewer reasons to be concerned that it
18 is going to have the kind of profound burdens
19 or -- or regulatory effects that might prompt a
20 note of caution in other contexts involving
21 exercises of emergency powers.

22 Instead, I think that the
23 considerations all line up on the other side
24 when you think about an emergency situation. It
25 is logical for Congress, in -- in confronting

1 that possibility, to think we want to make sure
2 that without delay the executive branch can take
3 care of Americans and can get them essential
4 benefits.

5 It did so here with language that has
6 many other limitations, so we are not claiming
7 just limitless authority for the federal
8 government to do what it wants in an emergency.

9 The HEROES Act limits the
10 circumstances that can trigger the authority.
11 It says who you can help. It says how you can
12 help them. And it enumerates the purposes that
13 the aid has to serve.

14 So, in all of those ways, Congress can
15 find that authority, but in a circumstance like
16 this one, where the Secretary has made the
17 findings that without this critical relief for
18 debtors we are going to have a wave of default
19 across the country with all of the negative
20 consequences that has for borrowers, I think it
21 is precisely the type of context where the
22 executive should be able to implement those
23 emergency powers.

24 JUSTICE KAVANAUGH: Thank you very
25 much.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett?

3 JUSTICE BARRETT: General, my first
4 question is clarifying because I think I may
5 have misunderstood. You said at the start of
6 your argument that the Secretary both waived and
7 modified.

8 I had understood that the Secretary
9 only relied on the modification in the Federal
10 Register at the relevant cites at 87 Federal
11 Register 61512 and 61514.

12 Is it in those same -- did I just miss
13 in there, did he also specifically say waive?

14 GENERAL PRELOGAR: So I -- I
15 understand where your confusion comes from --

16 JUSTICE BARRETT: Yes.

17 GENERAL PRELOGAR: -- because, at
18 times in the Federal Register, he spoke of
19 modifications and then, if you read down in the
20 next paragraph, he said these waivers will. So
21 I think he was treating these as both waivers
22 and modifications.

23 And the relevant decision memo
24 specifically says, I hereby issue waivers and
25 modifications of the relevant provisions of

1 Title IV. That's at the cite I gave earlier at
2 JA 261. So I would look at that as well to
3 understand what the Secretary was doing.

4 JUSTICE BARRETT: Okay. And to be
5 clear, and I think maybe some of the confusion
6 is waivers. I guess, when I saw that in the
7 language, I thought he was talking -- using
8 waiver as a synonym for cancellation there with
9 respect to the underlying debt, the waiver of
10 the obligation to pay back the principal.

11 And just to be clear, waiver in the
12 statute refers to waiving the statutory and
13 regulatory provisions, not waiving the
14 obligation to repay?

15 GENERAL PRELOGAR: That's correct.
16 So, if you kind of trace through the specific
17 provisions that he invoked, they are statutory
18 and regulatory provisions and they establish the
19 terms of the student loan program and then also
20 deal with discharge and cancellation authority.

21 And he said that he was issuing
22 waivers and modifications of -- of all of those
23 provisions, and I think the right way to
24 conceptualize this is that he was waiving the
25 elements of the discharge and cancellation

1 provisions that are inapplicable in this program
2 that would limit eligibility to other contexts
3 and then modifying the provisions to bring it in
4 line with this program and the -- and the
5 student-loan borrowers who are eligible for
6 relief.

7 JUSTICE BARRETT: So kind of like if
8 you think of it as red penciling, both deleting
9 and then adding back in, waiving and then
10 putting his own requirements in?

11 GENERAL PRELOGAR: That's right. And
12 the states have suggested there was something
13 improper about adding the requirements in, but
14 the HEROES Act directs him to do this, that
15 subsection (b)(2) specifically says he has to
16 publish the terms and conditions for the loan
17 program that are going to apply in lieu of the
18 waived and modified provision.

19 So there's nothing improper about the
20 Secretary delineating how those waivers and
21 modifications were going to operate.

22 JUSTICE BARRETT: Okay. Next question
23 is also a clarification because I want to be
24 sure I understand your position on Lebron and
25 the overlap potentially between when we're

1 thinking about are you acting as an arm of the
2 government for purposes of say, like in the
3 Amtrak sense, are you bound by the First
4 Amendment and are -- is MOHELA part of the
5 government of Missouri for purposes of standing.

6 So could MOHELA, say, deny loans to
7 people on the basis of their race or their
8 religion? Would the First Amendment bind
9 MOHELA?

10 GENERAL PRELOGAR: I think that MOHELA
11 likely would qualify as a state actor under the
12 Lebron test, but I don't think that the Lebron
13 test should in any way be controlling for
14 Article III standing purposes.

15 JUSTICE BARRETT: Well, why would that
16 be? How can they be part of the government for
17 purposes of the state action doctrine but then
18 not for purposes of standing? Either they are
19 or they are not part of the government of
20 Missouri, right?

21 GENERAL PRELOGAR: So we're certainly
22 not disputing that they could be, that they're a
23 public instrumentality, that they have
24 governmental functions, and that's the kind of
25 inquiry the Court would engage in to determine

1 whether they're brought within the state action
2 doctrine.

3 But one way to think about this is
4 that the Court, in trying to kind of analyze
5 who's a state actor, has made clear that it
6 would be inappropriate for a state to be able to
7 separately incorporate an instrumentality, for
8 example, and that way evade the strictures of
9 the Constitution. There's kind of a good
10 equitable reason to ensure that states can't
11 thereby unbind themselves from the Bill of
12 Rights with respect to fundamental rights of
13 citizens.

14 Here, I think all of the equitable
15 considerations line up in precisely the opposite
16 direction. We have a situation here where
17 Missouri has benefited from the corporate
18 separateness. It's ensured that it's not going
19 to be responsible for MOHELA's debts. And to
20 now allow it to come in and blur that line and
21 say actually you should just treat it and this
22 separate corporation as one and the same would
23 actually produce the kind of inequity that the
24 state action doctrine is guarding against.

25 JUSTICE BARRETT: So two different

1 buckets, three if you throw in sovereign
2 immunity too? You would say one test is for
3 purposes of state action, another test for
4 purposes of sovereign immunity, and another test
5 for purposes of standing?

6 GENERAL PRELOGAR: That's right. And
7 for sovereign immunity, I just want to be clear
8 that we don't think MOHELA actually qualifies as
9 an arm of the state for sovereign immunity
10 purposes because, there, one of the critical
11 factors is whether a lawsuit against the
12 instrumentality can get at the state treasury.
13 And, here, the financial separation makes clear
14 that there is a strict wall and that Missouri's
15 not going to be responsible for MOHELA's debts.

16 Lower courts have gone both directions
17 on this, but we think that under this Court's
18 precedent, MOHELA wouldn't qualify as an arm of
19 the state. Even if it did, though, yes, we
20 think that there is a different inquiry under
21 Article III.

22 JUSTICE BARRETT: Right. Okay. And
23 now I just want to return to Justice Kagan's
24 questions about whether we think about these as
25 statutory arguments or arbitrary and capricious

1 arguments, some of these arguments about are you
2 leaving them worse off or better off.

3 Specifically, I want to focus on the causation.

4 It seems to me that the government's
5 position must be that the HEROES Act permits
6 but-for causation, and it doesn't require
7 proximate cause, because the Secretary's memo
8 also refers to things like Russia's invasion of
9 Ukraine and, you know, inflation and other
10 things that would -- well, I mean, the invasion
11 of Ukraine has nothing to do with COVID, but the
12 other things that would have a more attenuated
13 relationship to COVID.

14 So is that your position, it would be
15 a but-for?

16 GENERAL PRELOGAR: Yes, that is our
17 position. We think that it should be but-for
18 causation. And the states were challenging that
19 below. They haven't actually revived those
20 arguments here, and I don't understand them to
21 be -- to be urging a different standard or at
22 least they haven't made that a central aspect of
23 their arguments in the Court.

24 JUSTICE BARRETT: But would that bear
25 on the question of whether this is a statutory

1 interpretation question or not, whether this is
2 within the Secretary's authority? I mean, below
3 the government took the position too that even
4 in 10 years from now it could forgive loans
5 based on COVID if effects were lingering, right?

6 GENERAL PRELOGAR: No. The district
7 court completely misunderstood that colloquy at
8 oral argument. What government counsel said in
9 that oral argument is, if the national emergency
10 is ongoing, if we are still in 10 years in the
11 midst of a raging COVID pandemic and it's
12 producing all of those same harms, he said it
13 would be hard to fathom. And, of course, we
14 know that we are actually as a nation now
15 working to recover from the pandemic. But, in
16 the counterfactual world, as he understood the
17 hypothetical, he said the HEROES Act authority
18 would continue to apply.

19 We are not suggesting that you could
20 have that kind of temporal attenuation from a
21 national emergency and say that, you know,
22 ending today and going forward 10 years from
23 now, you could point back to COVID and this time
24 period as a basis for HEROES Act relief.

25 But, of course, we don't have anything

1 like that. The Secretary acted now in the midst
2 of the pandemic and in -- in recognition that
3 it's time for the forbearance policy to end, but
4 that is going to leave huge numbers of borrowers
5 unable to pay their loans.

6 JUSTICE BARRETT: That's very helpful.
7 Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Jackson?

10 JUSTICE JACKSON: Yes. I have two
11 questions, one concrete and one big picture.

12 The concrete question comes from a
13 statement that you make in your reply brief
14 about MOHELA standing to earn offsetting fees.
15 Can you spell out what those -- and by that, I
16 mean offsetting fees from the discharges so that
17 we aren't even really sure, you know, what the
18 net loss would be.

19 Can you spell out a little bit more
20 about those?

21 GENERAL PRELOGAR: Yes. So, under the
22 Department's contracts with MOHELA, MOHELA
23 receives fees for discharging accounts. And we
24 were making the point that, here, Missouri
25 hasn't come forward with any allegations that

1 MOHELA will actually, sum total, suffer
2 financial injury under this plan.

3 And this is all just in service of
4 making the broader point that any financial
5 effects downstream on the state here are
6 attenuated and speculative.

7 JUSTICE JACKSON: So we don't know
8 really what the ultimate loss would be to
9 MOHELA, even if we believe that MOHELA is part
10 of the state?

11 GENERAL PRELOGAR: That's right. The
12 states haven't offered any evidence in that
13 regard to substantiate their assertion of
14 standing.

15 JUSTICE JACKSON: All right. And --
16 and I also have a big-picture question about
17 standing. You've been arguing that standing
18 here would be a reach if we were to, for
19 example, find that, you know, MOHELA somehow --
20 losses to it count for the purposes of the state
21 based on established standing principles.

22 And what I've been mulling and
23 wondering is whether the same concerns about the
24 political significance of this case that the
25 Chief pointed to could be a reason for us to

1 hold the line in terms of thinking about our
2 standing doctrine and whether or not we should
3 expand it in this area.

4 I understood that the standing bar
5 really, you know, as applied in a case like
6 this, would allow the political branches to hash
7 this out without interference, you know, from a
8 torrent of lawsuits brought by states and
9 entities and individuals who don't have a real
10 personal stake in the outcome. And, in some
11 ways, it's not unlike a case we heard last week
12 where people were very concerned about, you
13 know, lawsuits against tech companies and how
14 they might hobble these companies if we allowed
15 them to go forward.

16 And I guess I have that same worry
17 about the operation of the federal government
18 and -- and its ability to govern. If we look at
19 our standing doctrine in cases like this and we
20 find that, you know, even the most minor state
21 interest, a dormant fund that hasn't been, you
22 know, funded or used by the state in 15 years,
23 if that can be the basis for standing, I guess
24 I'm concerned that we're going to have a problem
25 in terms of -- of -- of the federal government's

1 ability to operate.

2 So my question is, is this a
3 legitimate concern and should we think -- be
4 thinking in cases like this about that type of
5 concern as we ponder whether to expand our
6 standing doctrines?

7 GENERAL PRELOGAR: I think it is a
8 legitimate concern. The Court has never
9 suggested before that it should alter ordinary
10 Article III principles and allow plaintiffs to
11 sue based on concerns about the significance of
12 the action.

13 And, in fact, the Court has said again
14 and again that the fact that no one might have
15 standing to sue about an action doesn't mean
16 that you should alter Article III and allow a
17 suit to proceed, because the judiciary doesn't
18 sit as a roving commission to rule on the
19 legality of either Congress's enactments or the
20 executive's implementation of those enactments.

21 But I think it would be particularly
22 anomalous in this case to accept any of the
23 states' attenuated theories of standing because
24 there isn't even a situation where there's no
25 other identifiable plaintiff or possibility to

1 have the -- the courts weigh in on these issues.

2 The problem here is that the states
3 aren't the proper plaintiff to bring this suit.

4 JUSTICE JACKSON: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 General.

7 General Campbell.

8 ORAL ARGUMENT OF JAMES A. CAMPBELL

9 ON BEHALF OF THE RESPONDENTS

10 MR. CAMPBELL: Mr. Chief Justice, and
11 may it please the Court:

12 The Secretary is attempting to bypass
13 Congress on one of today's most debated policy
14 questions, student loan forgiveness. After many
15 failed legislative efforts, the Secretary seeks
16 to write off nearly a half-trillion dollars in
17 loans for over 40 million borrowers. No statute
18 authorizes this sweeping action.

19 On standing, Missouri has the right to
20 vindicate the harms to MOHELA. MOHELA is a
21 state-created and state-controlled public
22 instrumentality that performs the essential
23 public function of providing financial aid to
24 Missouri students.

25 The Secretary's program threatens to

1 cut MOHELA's operating revenue by 40 percent.
2 That will directly undermine MOHELA's ability to
3 further its critical public purposes, and the
4 state has standing to assert those harms.

5 On the merits, this is a major
6 questions case. A nearly half-trillion dollar
7 debt cancellation program is undoubtedly a
8 matter of vast economic and political
9 significance. It is also unprecedented. Never
10 before has the HEROES Act been used to forgive a
11 single loan.

12 In addition, the Secretary here
13 asserts a breathtaking power, to do anything
14 that he thinks might reduce the risk of
15 borrowers defaulting, even years after a
16 national emergency arises. He needs clear
17 congressional authorization for such power. But
18 he doesn't have it here because the HEROES Act
19 does not authorize this program.

20 The Act permits the Secretary to waive
21 or modify existing provisions because of a
22 national emergency. It does not permit him to
23 rewrite existing provisions to create a new
24 program that covers 95 percent of borrowers and
25 applies to them regardless of how the pandemic

1 affected them.

2 This Court should declare this program
3 unlawful, and I welcome the Court's questions.

4 JUSTICE THOMAS: General, I think at
5 the beginning you should comment some on the
6 relationship between MOHELA and the State of
7 Missouri, primarily, the -- as you've heard, the
8 effect of this forgiveness program on MOHELA
9 and, by extension, on the State of Missouri for
10 the -- at least to establish standing.

11 MR. CAMPBELL: Sure, Justice Thomas.
12 To start with the effect on MOHELA, so MOHELA
13 approximately -- as of last fiscal year,
14 77 percent of its operating revenue came from
15 servicing direct loans.

16 The Secretary tells us that nearly
17 half of all loans -- all borrowers' loans will
18 be discharged under this program. So it stands
19 to reason that about half of MOHELA's operating
20 revenue from direct loans will be cut and
21 overall that amounts to about 40 percent of its
22 operating revenue.

23 Now, Justice Jackson asked the
24 question about whether there are offsetting
25 fees. It -- it's very hard to believe, and the

1 government doesn't offer any details in its
2 reply brief, that a one-time payment of fees for
3 discharging loans will offset the ongoing fee
4 that MOHELA earns from servicing those loans.
5 So --

6 JUSTICE JACKSON: But isn't that your
7 burden? I mean, I -- I understood the
8 government to say that you are bringing this
9 lawsuit and you have to establish standing.

10 And so to the extent we're trying to
11 assess whether or not MOHELA is actually going
12 to be injured, I -- I don't think you can answer
13 but the government hasn't said something about
14 the fees.

15 MR. CAMPBELL: Well, the -- my point
16 in bringing that up, Justice Jackson, is that
17 the government has -- hasn't said anything about
18 the fees in responding to what we've already
19 substantiated through the documents we've put
20 in.

21 We have put in documents indicating
22 that this will amount to approximately a
23 40 percent loss of operating revenue for MOHELA.
24 And in response, the government referenced
25 potential offsetting costs, which they don't

1 quantify. And they don't show that that would
2 significantly reduce the injury that we're
3 anticipating. Now --

4 JUSTICE KAGAN: MOHELA isn't here,
5 General Crawford; is that correct?

6 MR. CAMPBELL: MOHELA is not here but
7 --

8 JUSTICE KAGAN: It has the ability --

9 MR. CAMPBELL: -- its interests are
10 here.

11 JUSTICE KAGAN: -- to sue and be sued.
12 It's been set set up as an independent corporate
13 entity with the ability to bring suits on its
14 own. Usually we don't allow one person to step
15 into another's shoes and say I think that that
16 person suffered a harm, even if the harm is very
17 great.

18 We -- we -- we leave it to the person,
19 him or her or itself, to make that judgment.
20 Now, here the state has derived very substantial
21 benefits from setting up MOHELA as an
22 independent body with financial distance from
23 the state and sue and be sued authority.

24 So why isn't MOHELA responsible for
25 deciding whether to bring this suit?

1 MR. CAMPBELL: We don't deny that
2 MOHELA has -- could file a suit like that, but
3 the state's interest is directly implicated here
4 so it is allowed to assert the interests it has
5 in MOHELA directly.

6 JUSTICE KAGAN: But I guess -- I mean,
7 there are third-parties all the time who have an
8 interest in, gosh, I -- I wish that party over
9 there would bring a suit because I have some
10 relationship with that third-party and I would
11 like it very much if that third-party
12 represented its own interests better in my view.

13 But we don't do that. We -- we -- we
14 don't allow that kind of interference with the
15 decision of the entity involved to decide
16 whether the harm is of the kind that -- that
17 they want to sue for.

18 MR. CAMPBELL: Well, the government is
19 different. This Court has recognized that in
20 cases like Cherry Cotton Mills and Erickson
21 where it's allowed the federal government to
22 assert the interests of federally created
23 corporations.

24 JUSTICE KAGAN: I -- I -- I believe in
25 those cases, the federal government had an

1 independent interest. So the federal government
2 was not saying oh, we just have an entitlement
3 to stand in the shoes of the -- the federal
4 corporation.

5 MR. CAMPBELL: Two -- two responses.
6 The first response is I don't think that's the
7 best reading, certainly, of Cherry Cotton Mills.
8 Cherry Cotton Mills, the Court discussed a
9 number of facts and then at the end said the
10 reason why the government can assert the federal
11 corporation's interest is because it is
12 performing purely governmental purposes.

13 That's exactly what's happening here.
14 The State of Missouri has declared that
15 everything MOHELA does is the performance of an
16 essential public function. So that's the first
17 response.

18 The second response is even if the
19 state does need an interest, the state has an
20 interest here. I'd identify at least three.

21 The first interest is that the state
22 created MOHELA to provide financial aid for
23 Missouri students and that's what it does. The
24 second interest is in the Lewis and Clark
25 Discovery Fund. And the third interest is in

1 the regular contributions that MOHELA makes to
2 the state scholarship programs.

3 Now, there was some discussion earlier
4 about the Lewis and Clark Fund and some
5 suggestion that it's a dormant fund that no
6 longer exists. I -- I think it's clear -- I --
7 I think we need to clarify what exactly is the
8 status.

9 So, yes, it's true that there hasn't
10 been a contribution in the last 15 years but
11 that's because the state has negotiated with
12 MOHELA for MOHELA, in lieu of making the Lewis
13 and Clark contributions, to contribute over \$65
14 million directly to the state scholarship
15 program. And in exchange for those agreements,
16 the -- the state has allowed the Lewis and Clark
17 deadline to be extended.

18 So at this point, the question is
19 what's going to happen at the next deadline?
20 The next deadline is coming up next year. And
21 if -- if -- the question before this Court is
22 whether cutting MOHELA's operating revenue by
23 40 percent will increase the risk that it either
24 won't make the next contribution to the Lewis
25 and Clark Fund or it won't make the next payment

1 to the scholarship fund in lieu of the Lewis and
2 Clark Fund.

3 JUSTICE BARRETT: That's --

4 JUSTICE KAGAN: So --

5 JUSTICE BARRETT: -- what's most
6 important to you now is the Lewis and Clark
7 Fund?

8 MR. CAMPBELL: No, it's not, Your
9 Honor. What's most important to us is that the
10 state speak directly for MOHELA but I was
11 responding to the question about the interest
12 that --

13 JUSTICE BARRETT: I guess I understood
14 the interests to be if MOHELA was really
15 Missouri, the loss of the servicing fees. Am I
16 misunderstanding that?

17 MR. CAMPBELL: No, you're not --

18 JUSTICE BARRETT: You have two
19 different arguments, right?

20 MR. CAMPBELL: That's correct.

21 JUSTICE BARRETT: You have that
22 argument and then you have this argument about
23 the Lewis and Clark Fund.

24 MR. CAMPBELL: That's correct. My
25 first response to Justice Kagan I was trying to

1 focus on the first theory. And then the second
2 response where I got into the Lewis and Clark
3 Fund, I was responding under the second theory.

4 JUSTICE BARRETT: So let's --

5 JUSTICE SOTOMAYOR: On the first
6 theory, it's hard to imagine how the State of
7 Missouri can claim an injury, putting the Lewis
8 and Clark and the scholarship issues aside, when
9 it's not responsible for the debts of MOHELA,
10 it's not responsible for the contracts it enters
11 into. It doesn't own the assets of that
12 corporation.

13 There is on paper no financial
14 obligation by the state or loss to the state by
15 anything MOHELA does or anything it gets.
16 I'm -- I'm putting aside Lewis and Clark. It's
17 hard -- it's just very hard for me to say that
18 there is an interest sufficient for the state to
19 speak on behalf of an entity who has a right to
20 sue or be sued.

21 MR. CAMPBELL: When this Court in
22 Lebron and when the Missouri Supreme Court in
23 Casualty Reciprocal Exchange consider whether an
24 entity is a part of a government, it looks at a
25 far more --

1 JUSTICE SOTOMAYOR: But those are --

2 MR. CAMPBELL: -- broad analysis.

3 JUSTICE SOTOMAYOR: -- different --
4 those are different issues. Standing has to do
5 with injury. It doesn't have to do with are you
6 evading the Constitution, are you trying to
7 delegate public functions. Those are all, are
8 you immune because you are acting in a way only
9 a state can. Those are very, very different
10 questions.

11 This is the question of standing which
12 relies on injury in fact. How can you have --
13 I'm putting the Lewis and Clark aside -- how can
14 you have injury in fact if you immunize -- you,
15 the state, have immunized yourself from any
16 liability or any injury that MOHELA can
17 experience?

18 MR. CAMPBELL: Because the state
19 speaks for MOHELA. The state represents MOHELA
20 entities.

21 JUSTICE SOTOMAYOR: Well, it decided
22 to give this entity the right to sue and be
23 sued. So it -- it chose to say I'm not injured
24 in fact. Speaking is not the same as injury.

25 MR. CAMPBELL: Your Honor, the -- the

1 federally-created corporations in Cherry Cotton
2 Mills and Erickson also had the right to sue and
3 be sued but that didn't stop the federal
4 government from asserting their interests.

5 In addition, if we're focusing just on
6 the right to sue or be sued, the Secretary had
7 the right to sue or be sued. That doesn't
8 disable the Department of Justice for -- from
9 speaking for Erickson.

10 JUSTICE SOTOMAYOR: Now, let's go back
11 to Lewis and Clark a moment. The arrangement
12 that MOHELA and the state engaged in predated
13 the pandemic, correct? It started in 2009,
14 2010?

15 MR. CAMPBELL: The Lewis and Clark
16 Fund started --

17 JUSTICE SOTOMAYOR: Yes --

18 MR. CAMPBELL: -- in --

19 JUSTICE SOTOMAYOR: -- the suspension
20 of MOHELA's contributions to it, correct?

21 MR. CAMPBELL: Started in 2008.

22 JUSTICE SOTOMAYOR: Isn't it a series
23 of speculations that in 2004, absent this
24 program, that the state won't continue that
25 arrangement it currently has and continue to

1 defer obligations?

2 MOHELA said that it -- MOHELA has
3 already said publicly that it doesn't think that
4 contributions to the Lewis and Clark Fund are
5 within its wheelbarrow obligations. That was
6 one of the reasons this arrangement has been
7 made, correct?

8 MR. CAMPBELL: Well, MOHELA recognizes
9 that it still owes \$105 million to the Lewis and
10 Clark Fund.

11 JUSTICE SOTOMAYOR: Well, it's -- in
12 fact, I understand it's not writing it off as an
13 obligation anymore.

14 MR. CAMPBELL: But it still --

15 JUSTICE SOTOMAYOR: It doesn't carry
16 it on its books anymore.

17 MR. CAMPBELL: Your Honor, if you look
18 at page 20 through 21 of the financial statement
19 we cite in our brief, MOHELA acknowledges that
20 it still owes \$105 million to that fund.

21 And the point that I was making
22 earlier is that the fund -- contributions to the
23 fund and contributions to the scholarship
24 program are different sides of the same coin.
25 The state has been constantly -- throughout the

1 entire time from 2007 until now, has been
2 constantly receiving payments from MOHELA, and
3 those payments have taken the form sometime of
4 Lewis and Clark, but more -- more often
5 recently, it has taken the form of a scholarship
6 contribution.

7 JUSTICE JACKSON: Have you expressed
8 any plans to actually use the fund to pursue
9 projects in the foreseeable future, and, if so,
10 what projects?

11 MR. CAMPBELL: At this point, the
12 projects have been put on pause.

13 JUSTICE JACKSON: I see. So we're
14 talking about a fund that hasn't been
15 contributed into because the state has waived
16 the obligation to do so for at least a temporary
17 period of time, and then, even if the funds were
18 to go into this particular fund, you don't have
19 a set of plans that you are planning to pursue
20 with them?

21 MR. CAMPBELL: But all that requires
22 is the legislature and the governor to move
23 forward once the money -- once the fund has been
24 funded.

25 JUSTICE JACKSON: Yes. No, I

1 understand, but we're trying to find out the
2 degree to which the state is injured by the
3 money not being there. And so, on the one hand,
4 you know, I hear Justice Sotomayor exploring
5 with you the fact that the state has allowed the
6 money not to be there in the recent past by
7 saying don't worry, you don't have to put it in
8 there, MOHELA. So that seems to be a sort of
9 strike against the state now saying we're so
10 injured because the money isn't there.

11 And then we have on top of that your
12 representation here that the state isn't even
13 actively seeking or interested in the money
14 insofar as it's decided that it's going to
15 engage in some sort of project that we need the
16 money for.

17 So I'm just wondering about the
18 speculative, attenuated nature of the harm that
19 you're alleging on the basis of there not being
20 -- or of the risk that we won't have extra money
21 put into this fund.

22 MR. CAMPBELL: Your Honor, I -- I
23 disagree with -- with what you said, that the
24 state has waived the obligation under the fund.
25 What the state has done is it's engaged in a

1 quid pro quo discussion with MOHELA, and it has
2 said that in exchange for \$65 million in
3 payments to the scholarship fund, it has allowed
4 the -- the timeline to be extended. That's not
5 a waiver.

6 JUSTICE JACKSON: Yes, I apologize.
7 I'm just saying the state has not pressed MOHELA
8 to put money into the fund, right?

9 MR. CAMPBELL: Because it -- correct,
10 but because it has been receiving money in
11 another fund all along.

12 JUSTICE JACKSON: I -- I appreciate
13 that, but I guess I'm just still trying to
14 understand how you can look at that fund as the
15 basis for the injury that you're claiming with
16 respect to this particular plan.

17 MR. CAMPBELL: Your Honor, because the
18 next due date for the fund is a year from now.

19 JUSTICE JACKSON: And you can't extend
20 it?

21 MR. CAMPBELL: It can be extended, but
22 that would be in exchange for them giving
23 another contribution to a scholarship fund,
24 which is further showing that there are further
25 financial contributions coming.

1 JUSTICE JACKSON: And there -- the
2 plan is not totally ridding them of any
3 opportunity to make money, so they do have some
4 other income, yes?

5 MR. CAMPBELL: MOHELA?

6 JUSTICE JACKSON: Yes.

7 MR. CAMPBELL: Whether MOHELA has
8 other --

9 JUSTICE JACKSON: Yes.

10 MR. CAMPBELL: Yes, MOHELA has other
11 --

12 JUSTICE JACKSON: All right. So we
13 could believe that the income that MOHELA gets
14 from its other sources of revenue could be used
15 to pay off in a year the -- the amount that the
16 state says it requires in order to put off the
17 obligation yet again, right?

18 MR. CAMPBELL: I -- I don't -- I don't
19 think -- well, here's the key point in response:
20 What MOHELA says in the letter that the
21 government filed as supplemental authority with
22 the Eighth Circuit is that they take all
23 available funds beyond their expenses and
24 reasonable reserves and they devote them to
25 student financial aid in Missouri.

1 So, if their operating revenues are
2 cut by 40 percent, we know what they do with the
3 money at the top, the excess money. They give
4 it to students attending school in Missouri.
5 So, if their operating revenues go down, that's
6 the first thing that's going to go.

7 JUSTICE BARRETT: General, I'd like to
8 put aside the Lewis and Clark Fund for a minute,
9 and I want to return to the direct injury
10 argument, the MOHELA is an arm of the state
11 argument. Justice Sotomayor was pointing out
12 statutorily MOHELA has the right to sue and be
13 sued, the state doesn't have responsibility for
14 its liabilities, and the state has disclaimed
15 any -- any claim to the assets. Is that
16 correct?

17 MR. CAMPBELL: I would disagree with
18 the last point. I don't think --

19 JUSTICE BARRETT: Okay.

20 MR. CAMPBELL: -- the state has
21 disclaimed any interest in the assets.

22 JUSTICE BARRETT: So explain to me why
23 --

24 MR. CAMPBELL: I --

25 JUSTICE BARRETT: -- because, on the

1 one hand, you have -- you know, in Missouri
2 statute 173.420, you have -- the last sentence
3 says that nothing in these sections shall be
4 construed to deprive the state and its
5 governmental subdivisions of their respective
6 powers over assets of the authority. But then,
7 in the next section, 425, it says no asset of
8 the authority shall be considered to be part of
9 the revenue of the state.

10 So which is it? I mean, because it
11 would be hard to see how a win for the state
12 would benefit MOHELA or a win for MOHELA would
13 benefit the state if the assets are completely
14 separate. You don't get any money out of it,
15 putting aside Lewis and Clark because I'm not
16 really interested in that.

17 MR. CAMPBELL: So, Your Honor, to --
18 to go to the second provision you read, 425, it
19 says no asset of the authority shall be
20 considered to be part of the revenue of the
21 state within the meaning of a specific state
22 constitutional provision.

23 So I would then say --

24 JUSTICE BARRETT: Okay.

25 MR. CAMPBELL: -- that's only for a

1 limited purpose. The prior provision that you
2 read, where the state has preserved its
3 authority over MOHELA's assets, shows that any
4 residual interest in MOHELA's assets belongs to
5 the state.

6 So we cited the Reciprocal Casualty
7 Exchange case in our brief that shows that the
8 legislature could abolish an entity like MOHELA,
9 and if it did, the money would come back to the
10 state. So the state does have the ultimate
11 interest in the property of MOHELA.

12 JUSTICE BARRETT: If the state wanted
13 money from MOHELA right now, the state just
14 wanted to pull assets out, say, because the
15 state was going to make a decision to fund the
16 Lewis and Clark Fund, does the state have the
17 authority to do that?

18 MR. CAMPBELL: Acting through the
19 legislature, it does.

20 JUSTICE BARRETT: Okay.

21 MR. CAMPBELL: Acting -- and -- and I
22 think the Lewis and Clark Fund is actually a
23 great example of that. So the Lewis and Clark
24 Fund wasn't created until 26 years after MOHELA
25 began its operations, and at that point, the

1 legislature came in and said, MOHELA, you have
2 to start giving this source of funding to the
3 state. So the legislature can come in at any
4 time and -- and request money.

5 JUSTICE BARRETT: Do you want to
6 address why MOHELA's not here?

7 MR. CAMPBELL: MOHELA is not here
8 because the state's asserting its interests.
9 MOHELA doesn't need to be here because the state
10 has the authority to speak for them. And that
11 brings me to --

12 JUSTICE BARRETT: Why didn't the state
13 just make MOHELA come then? If -- if MOHELA is
14 really an arm of the state and all of this would
15 be a lot easier -- I mean, the Solicitor General
16 conceded that if MOHELA was here, MOHELA would
17 have standing. If MOHELA is an arm of the
18 state, why didn't you just strong-arm MOHELA and
19 say you've got to pursue this suit?

20 MR. CAMPBELL: Your Honor, that's a
21 question of state politics, but we believe as a
22 matter of law that the state has the authority
23 to assert its interests. Under the factors in
24 Lebron, under the factors that the state --
25 Missouri state supreme court recognized in

1 Casualty Reciprocal Exchange, if it's a
2 state-created and state-controlled entity that
3 performs government functions, the state can
4 speak for it regardless --

5 JUSTICE KAGAN: Just -- just along the
6 same lines, I mean, it's true that you couldn't
7 even get documents from MOHELA without filing
8 the state equivalent of a FOIA request.

9 MR. CAMPBELL: Your Honor, that was
10 the -- the mechanism by which we went about
11 acquiring the documents, but that just further
12 --

13 JUSTICE KAGAN: Well, that was the
14 mechanism. I think that if MOHELA was willing
15 to hand you over the documents, you wouldn't
16 have filed a state FOIA request.

17 MR. CAMPBELL: Your Honor, I think
18 that further shows that MOHELA is a state
19 entity. They're subject to public records laws.
20 They're subject to open meeting laws. They are
21 a entity of the State of Missouri.

22 JUSTICE JACKSON: And when you say
23 acting through the legislature in response to
24 Justice Barrett, do you mean that sort of the
25 structure of MOHELA would have to be revisited

1 through the legislature? In other words, you've
2 now set it up -- we have a law in Missouri that
3 structures this corporation in a certain way,
4 and it is separate.

5 So, when you say acting through the
6 legislature, do you mean that there would have
7 to be some kind of amendment to the way in which
8 MOHELA is and operates in order to allow for you
9 to reach its assets?

10 MR. CAMPBELL: I think it would have
11 to be an act of the legislature. Whether it
12 took the form of amending the existing statutes
13 or whether it was a new statute, it would have
14 to be an act of the legislature.

15 JUSTICE GORSUCH: Counsel, on the
16 merits, if I could direct you to the Solicitor
17 General's argument suggesting the Major
18 Questions Doctrine does not apply because this
19 is a benefits program, despite our -- our
20 holding in King versus Burwell, and -- and
21 arguing that it doesn't implicate the
22 Appropriations Clause authority of Congress.

23 Can you address that argument, please?

24 MR. CAMPBELL: Yes, Your Honor. The
25 whole point of the Major Questions Doctrine is

1 to preserve the separation of powers, and it
2 rests on the presumption that Congress intends
3 to address major questions for itself.

4 JUSTICE GORSUCH: I understand that.
5 But this is a more specific question with
6 respect to benefits programs --

7 MR. CAMPBELL: Right.

8 JUSTICE GORSUCH: -- and the
9 relationship between it and the Appropriations
10 Clause and King versus Burwell.

11 MR. CAMPBELL: Your Honor, the reason
12 why I referenced the underlying doctrine and why
13 it exists is that those same reasons apply in
14 this benefits context no less than they do in a
15 different regulatory context. The separation of
16 powers is implicated here because we're dealing
17 with a congressionally created program.

18 In addition, if anything, I would say
19 that there are more reasons to apply the Major
20 Questions Doctrine here, because what the agency
21 is effectively doing is exercising the power of
22 the purse by going into the federal balance
23 sheet and crossing off nearly a half-trillion
24 dollars in loans payable to the government.

25 That is a quintessentially legislative

1 function. So that's even more reason why the
2 Major Questions Doctrine should apply.

3 JUSTICE KAVANAUGH: Isn't the -- well,
4 do you have --

5 JUSTICE SOTOMAYOR: I was just going
6 to ask, that's the whole purpose of the HEROES
7 Act. The whole purpose of the HEROES Act is to
8 say in -- either for veterans or -- not for
9 veterans, for people who are in military service
10 or in a national emergency, we give you the
11 authority to impose debt on us.

12 The forbearance of payment is -- is it
13 5 billion a month or something like that? It's
14 an outrageous sum. And yet that isn't -- no one
15 is disputing that the Secretary -- that the
16 Secretary has that power. It's not the amount
17 of money. The question is what's Congress's
18 intent.

19 And we know from the HEA Act that
20 Congress recognized that there would be
21 cancellation of debt for schools that close at
22 least. Why would you think that Congress didn't
23 intend under the HEROES Act to permit
24 cancellations of debt if a national emergency
25 required it?

1 MR. CAMPBELL: Because what Congress
2 said in the HEROES Act is that the Secretary has
3 the power to waive or modify existing
4 provisions. It did not give the Secretary the
5 power to rewrite --

6 JUSTICE SOTOMAYOR: But all of those
7 waiver --

8 JUSTICE KAGAN: Well, yes, it did.
9 Sorry. May I?

10 JUSTICE SOTOMAYOR: Go ahead. Yes.

11 JUSTICE KAGAN: General Campbell, I
12 mean, it -- it says waive or modify any
13 statutory or regulatory provision applicable to
14 the student financial assistance programs, and
15 then it says the Secretary can add terms and
16 conditions to be applied in lieu of such
17 statutory and regulatory provisions.

18 So it's really quite clear here, it's
19 like you can waive or modify the old ones, and
20 then you can add new ones in lieu of the old
21 ones. So, you know, Congress could not have
22 made this much more clear.

23 I mean, Congress didn't say exactly
24 the circumstances in which it wanted the
25 Secretary to use this authority. Of course not.

1 This is -- this is a -- a bill about, like, what
2 happens when you have an emergency.

3 So what Congress said is what happens
4 when you have an emergency is the Secretary has
5 the power to take care of emergencies, and it
6 has that power by way of waiving or modifying
7 any provision and adding others in lieu of them.

8 MR. CAMPBELL: A couple responses.

9 The adding in lieu of language, that
10 has to be understood to mean adding along the
11 lines of a modification. It can't be adding
12 just anything the Secretary wants. It has to be
13 read in context with the terms --

14 JUSTICE KAGAN: Or a waiver.

15 MR. CAMPBELL: -- waive or modify.

16 JUSTICE KAGAN: Or a -- and, you know,
17 it's not just modified, it's waived. So it's
18 modify even if we take a kind of MCI-type
19 reading of modify, all -- you know, through more
20 major changes, all the way up to waive, and then
21 you can say what terms and conditions should be
22 applied in lieu of those provisions.

23 Congress doesn't get much clearer than
24 that. We -- we deal with congressional statutes
25 every day that are really confusing. This one

1 is not.

2 MR. CAMPBELL: Your Honor, I -- I
3 disagree that what we're dealing with here is a
4 waiver or modification. Three points on waiver.
5 In terms of when -- when we look at the -- the
6 publication in the -- in the Federal Register,
7 it says the Secretary modifies the following
8 provisions. So the Secretary didn't even
9 purport to waive the loan discharge provisions
10 that were cited.

11 Second point, that makes sense because
12 the Secretary wasn't actually excusing
13 compliance with any of the existing
14 requirements. The Secretary was ignoring all of
15 those requirements and creating brand-new ones
16 to -- to put in place a brand-new program.

17 And the third point is, again, we know
18 that there was no waiver here because affected
19 individuals can continue to access all those
20 existing loan discharge programs.

21 If somebody qualifies for the public
22 loan service program, they're able to access it
23 right now. So there was no waiver here. All we
24 have is an attempt to modify, but this goes far
25 beyond a modification because it -- it is the

1 creation of a brand-new program that goes far
2 beyond what Congress intended.

3 In fact, if Congress --

4 JUSTICE KAGAN: Do you think that
5 there is an ability to modify provisions
6 respecting discharge? So, you know, is there
7 any ability? Because there are these -- these
8 particular discharge provisions, right? And it
9 has to do with death and with when your school
10 closes and so forth.

11 So suppose the Secretary says, that's
12 not enough, I want to do some more.

13 MR. CAMPBELL: Your -- Your Honor, I
14 think there's a good example where the
15 Secretary's done it in the past that was
16 acceptable. So, in 2003, the Secretary used the
17 power under the HEROES Act to modify an existing
18 requirement to access student loan and it was
19 under one of those profession-based programs
20 where, if you work for a teacher for a certain
21 amount of years, you can get into the program.

22 JUSTICE KAGAN: So let me give you an
23 example. Suppose, like, there's an earthquake.
24 We'll use an earthquake instead of a pandemic.
25 And the Secretary says this isn't enough, people

1 are -- are really being hurt by this. So we
2 have a provision about the borrower dying. The
3 Secretary says, I'm also going to allow
4 dischargers where the primary earner in the
5 borrower's household dies.

6 Could the Secretary do that?

7 MR. CAMPBELL: Your Honor, I don't
8 believe so because it doesn't sound like a
9 modification of an existing program. It sounds
10 like the creation of a brand-new program.

11 JUSTICE KAGAN: Really, just from the
12 borrower dying, the Secretary is allowed to do
13 that, but the Secretary in -- in -- in -- in the
14 face of this massive earthquake is not allowed
15 to say, you know, or not just the borrower but
16 the -- the -- the primary earner in the
17 borrower's family?

18 MR. CAMPBELL: Your Honor, the
19 question would come down to whether that is a
20 modification. It sounds to me like it might go
21 too far because it's creating a new program.
22 But even if that was --

23 JUSTICE KAGAN: I mean, this is very
24 broad language, go -- go modify or waive any
25 statutory or regulatory provision and come up

1 with new ones, and you're not even going to
2 allow me that?

3 MR. CAMPBELL: Your Honor, I was going
4 to say, even if that would be sufficient here,
5 it's nothing like this program. This is a
6 program that includes 95 percent of borrowers
7 regardless of how they were affected by the
8 pandemic. So we --

9 JUSTICE KAGAN: Could the Secretary
10 say, well, there was this terrible earthquake
11 and lots of people's houses were destroyed and
12 so I'm going to discharge the loans of people
13 whose houses were destroyed in this terrible
14 earthquake?

15 MR. CAMPBELL: Your Honor, it sounds
16 like to me like creating a new program. I don't
17 think that that would be okay under the HEROES
18 Act. Now what I would say --

19 JUSTICE KAGAN: See, I -- I -- I -- I
20 guess, you know, this is an emergency provision.
21 There's an emergency. It's an earthquake. You
22 don't think Congress wanted to give -- and --
23 and not just wanted. It's not what Congress
24 thought. It's what Congress said, to give the
25 Secretary power to say, oh, my gosh, people have

1 had their homes wiped out, we're going to
2 discharge their student loans.

3 MR. CAMPBELL: Your -- Your Honor,
4 when it comes to taking that ultimate step to
5 discharging loans, Congress wanted to preserve
6 that for itself. And I think we note -- we --
7 Congress acts in pandemics --

8 JUSTICE KAGAN: Where do you see that
9 in this statute? I mean, the -- the provision
10 of the statute says any statutory or regulatory
11 provision applicable to the student loan
12 program, you can waive, you can add another, to
13 deal with an emergency.

14 This isn't a massive delegation to the
15 Secretary of Education. It's -- it's designed
16 to deal with emergency conditions. You have a
17 lot of power in emergencies. When those
18 people's homes are destroyed, you have the power
19 to -- to discharge their loans.

20 MR. CAMPBELL: But Congress still has
21 a voice in emergencies, and we see that through
22 the CARES Act here.

23 JUSTICE KAGAN: Congress used its
24 voice. Congress used its voice in enacting this
25 piece of legislation. All this business about

1 executive power, I mean, we worry about
2 executive power when Congress hasn't authorized
3 the use of executive power.

4 Here, Congress has authorized the use
5 of executive power in an emergency situation.
6 We're in that sphere, you know, in those --
7 all -- all those zones, we're in that sphere
8 where the executive is acting with congressional
9 authorization.

10 MR. CAMPBELL: Your Honor, I disagree
11 that this is congressional authorization because
12 it's not a modification. It goes way beyond
13 that. It creates a brand-new program, and
14 that's not what the HEROES Act allowed.

15 If the HEROES Act did allow the
16 wholesale rewriting of statutes whenever an
17 emergency arose, then that would create an
18 issue -- constitutional issue under Clinton
19 versus City of New York, and it essentially
20 would be allowing the executive branch to go in
21 and rewrite statutes after the fact, and the
22 executive branch doesn't have that power.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 Counsel.

25 Just pick up on the discussion that

1 we've been having, the breadth of the statute at
2 issue here.

3 How does it compare to the breadth of
4 the statutes that were at issue in our Major
5 Questions Doctrine, where we indicated enough
6 even though the breadth of some of those
7 provisions would by their terms literally cover
8 the authority that the agency exercised, that
9 given the nature of the authority and its
10 consequences, that was not clear enough?

11 MR. CAMPBELL: Your Honor, I think
12 it -- it fits within those cases. And I would
13 point the Court specifically to Alabama
14 Association of Realtors. In that case, the
15 statute authorized the relevant federal official
16 to engage in actions that he thought in his
17 judgment were necessary or in his judgment may
18 be necessary.

19 Yet this Court looked at that language
20 and said that it was not broad enough to -- to
21 authorize the -- the action at issue there, the
22 CDC eviction moratorium, and it did so because
23 of the Major Questions Doctrine.

24 CHIEF JUSTICE ROBERTS: Justice
25 Thomas?

1 Justice Alito?

2 Justice Sotomayor?

3 JUSTICE SOTOMAYOR: This is
4 substantially different because the Secretary is
5 authorized to cancel loans under HEA. So this
6 is not an action as a moratorium on eviction
7 which had never occurred previously or wasn't
8 within the wheelhouse of the agency. At least
9 that's what the Court said. I had -- I had a
10 difference of opinion.

11 Putting that aside, this is not an
12 action that could come as a surprise because it
13 is expressly permitted under the HEA Act, and
14 nothing in the HEROES Act says that the
15 Secretary can't do something that's in the
16 normal course of his business in circumstances
17 that justify it, like a school closing or like a
18 school engaged in fraud.

19 Those are exceptions that clearly are
20 permitted under the HEA to cancel a debt. So
21 why would I have a view that Congress didn't
22 understand that, in a proper emergency, debt
23 cancellation would be right?

24 MR. CAMPBELL: I would go back to my
25 prior -- prior answer, which is there is a

1 difference between modifying an existing loan
2 forgiveness program in light of the national
3 emergency, which is appropriate -- and an
4 example of that is to take the existing loan
5 discharge program for teachers, and there has to
6 be consecutive service, and to say if the reason
7 why that teacher would fall out of the
8 consecutive service requirement is because of
9 the national emergency, it's okay to waive that
10 requirement or to modify that requirement.

11 JUSTICE SOTOMAYOR: That's changing
12 the program. I mean, it's semantics. Clearly,
13 a waiver is an extinguishment. Whether you're
14 -- whether you're rewriting it to say a national
15 emergency will pause your service years, the
16 statute says you have to serve consecutively,
17 and the Secretary is saying you don't have to,
18 you're rewriting the statute. You just want to
19 say this is a bigger rewrite than I like. But
20 it's not rewriting the statute. It's just
21 saying this obligation is terminated.

22 MR. CAMPBELL: Your Honor --

23 JUSTICE SOTOMAYOR: This obligation to
24 serve continuously is terminated for this period
25 of time.

1 MR. CAMPBELL: It's a bigger rewrite
2 than the words "waive or modify" allow.

3 JUSTICE SOTOMAYOR: That -- that
4 really has us, as the third branch of
5 government, changing Congress's words because we
6 don't think we like what's happening.

7 MR. CAMPBELL: Your Honor, I would --

8 JUSTICE SOTOMAYOR: There's a -- 50
9 million students who are -- will benefit from
10 this who today will struggle. Many of them
11 don't have assets sufficient to bail them out
12 after the pandemic. They don't have friends or
13 families or others who can help them make these
14 payments. The evidence is clear that many of
15 them will have to default. Their financial
16 situation will be even worse because once you
17 default, the hardship on you is exponentially
18 greater. You can't get credit. You're going to
19 pay higher prices for things. They are going to
20 continue to suffer from this pandemic in a way
21 that the general population doesn't.

22 And what you're saying is now we're
23 going to give judges the right to decide how
24 much aid to give them. Instead of the person
25 with the expertise and the experience, the

1 Secretary of Education, who's been dealing with
2 educational issues and the problems surrounding
3 student loans, we're going to take it upon
4 ourselves, instead of leaving that decision in
5 the hands of the person who has experience with
6 these questions.

7 MR. CAMPBELL: Your Honor, there are
8 additional statutory clues showing that Congress
9 didn't intend the creation of new loan discharge
10 programs. I'd point the Court to subsection
11 (a)(2)(D). That -- there, Congress specifically
12 identified one limited instance where the
13 Secretary could excuse the return of funds owed
14 to the government. That was grant overpayments.

15 JUSTICE SOTOMAYOR: Counsel --

16 MR. CAMPBELL: By identifying --

17 JUSTICE SOTOMAYOR: -- that was an
18 emergency, or that was a situation that was sui
19 generis. That's what emergencies are.

20 MR. CAMPBELL: Your -- Your Honor --

21 JUSTICE SOTOMAYOR: Sui generis
22 situations that the Secretary can address in a
23 particular situation.

24 MR. CAMPBELL: Your Honor, I think by
25 identifying that specific example, Congress was

1 sending a message that it did not want the other
2 provisions to be used to create new loan
3 discharge programs.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?
5 Justice Gorsuch?

6 JUSTICE GORSUCH: I had understood the
7 Office of Legal Counsel's memorandum to suggest
8 that the Secretary, under the statute, had
9 authority to put student borrowers in -- in the
10 same condition that they were in prior to the
11 emergency and that the nature of your argument
12 is that that -- that test is not met.

13 Do you agree with the OLC's position
14 and understanding of the statute? And -- and --
15 and do you -- and how do you -- how do you argue
16 that it's exceeded that authority?

17 MR. CAMPBELL: Your Honor, I disagree
18 with most everything in the OLC opinion, but I
19 agree with that part of the OLC opinion. I
20 think it's right that that's what the phrase "no
21 worse position" means. It means Congress was
22 telling the -- the Secretary he had the
23 authority to keep borrowers near the status quo.

24 But what we have here is a program
25 that, for 20 million borrowers, is going to

1 leave them without a single outstanding loan.
2 That goes well beyond putting them back in the
3 status quo ante.

4 And for the other approximately 20
5 million borrowers that stand to benefit from
6 this, their average debt is going to go from
7 \$29,000 to \$13,000, again, far beyond returning
8 to the status quo ante.

9 JUSTICE GORSUCH: And I understand the
10 Secretary has considerable expertise when it
11 comes to educational affairs, but with -- in
12 terms of macroeconomic policy, do we normally
13 assume that every -- every Secretary, cabinet
14 member, as learned as they are, has that kind of
15 knowledge?

16 MR. CAMPBELL: No, we don't. When
17 we're dealing with a nearly half-trillion dollar
18 loan cancellation program, this is squarely in
19 the ken of Congress. Congress has the power and
20 expertise to weigh the balancing, competing
21 fiscal implications, particularly at that scale.
22 So this is something that's outside the
23 Secretary's expertise.

24 CHIEF JUSTICE ROBERTS: Justice
25 Kavanaugh?

1 JUSTICE KAVANAUGH: I think when we're
2 talking about emergency powers, that certainly
3 focuses the inquiry, but that doesn't mean that
4 the executive can't take action. And it all
5 then turns on the -- I think, the language of
6 the statute at issue and the kind of action
7 taken.

8 And I think you have a good argument
9 on "modify," but what do you do with the word
10 "waive"? That is an extremely broad word. In
11 2003, Congress was very aware of potential
12 emergency actions in the wake of September 11th
13 and war, possible terrorist attacks, and yet it
14 puts that extremely broad word, "waive," into
15 the statute.

16 Why not just read that as written?

17 MR. CAMPBELL: Your Honor, I -- I
18 believe we are reading it as written. "Waive"
19 means to excuse compliance with an existing
20 obligation. And what the Secretary is
21 purporting to do here is to change existing loan
22 discharge program. The Secretary is not waiving
23 anything in those provisions. And so we think,
24 as I explained earlier, that the word "waiver"
25 simply doesn't apply here.

1 Now, to the extent the Court looks at
2 the term "waiver" and finds that that's cause to
3 read the phrase "waive or modify" a little more
4 broadly, it still doesn't reach this program,
5 because the Secretary is not dealing with any of
6 these existing provisions that he purports to
7 cite. He's not changing anything within them.
8 He's frankly ignoring what's there and creating
9 a brand-new program. And that's not within the
10 language of this statute.

11 JUSTICE KAVANAUGH: You don't think
12 that fits within "waiver"?

13 MR. CAMPBELL: I -- I don't believe it
14 does, no. A waiver is to take something away,
15 and the Secretary is not taking anything away
16 from the cited loan discharge provisions.

17 JUSTICE KAVANAUGH: And then on the
18 body of precedent we've developed within the
19 pandemic on emergency powers and -- and major
20 executive actions, we have the eviction
21 moratorium case, we have the national OSHA
22 mandate case, but, on the other hand, we have
23 the healthcare mandate case. And I think the
24 distinction -- one of the distinctions drawn
25 there was that was more in the -- in the

1 wheelhouse of the agency in question.

2 And I think the Solicitor general has
3 argued, and I'll just get your response, on this
4 is right in the wheelhouse -- and Justice
5 Sotomayor was just saying this -- right in the
6 wheelhouse of what the Secretary of Education
7 would normally be expected to do, unlike CDC
8 doing an eviction moratorium.

9 I know you've addressed this a little
10 bit, but just to get your response on that.

11 MR. CAMPBELL: Your Honor, I don't
12 think it's in the wheelhouse because it's
13 creating a brand-new program. The only entity
14 that has created new loan discharge programs is
15 Congress. There's a number of them in the
16 Higher Education Act. But the Secretary has
17 never before created a brand-new loan
18 cancellation program, particularly under the
19 HEROES Act.

20 As I mentioned at the outset, the
21 HEROES Act has never even been used to forgive a
22 single loan in the past. That's telling because
23 one of the things the Court looks at in its
24 major questions jurisprudence is if it's
25 unprecedented. And we certainly have an

1 unprecedented use of the statute here.

2 JUSTICE KAVANAUGH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett?

5 JUSTICE BARRETT: Two questions, one
6 on merits, one on standing. First on the
7 merits, do you agree that this administration
8 and the prior administration had authorization
9 under the HEROES Act to pause loan -- loan
10 repayment obligations?

11 MR. CAMPBELL: Your Honor, it's a --
12 we're not challenging it in this case --

13 JUSTICE BARRETT: I know, but --

14 MR. CAMPBELL: -- but I think it's a
15 --

16 JUSTICE BARRETT: -- the question is,
17 do you think it's within it? This kind of goes
18 to the --

19 MR. CAMPBELL: Sure.

20 JUSTICE BARRETT: -- scope of "waive
21 or modify," right?

22 MR. CAMPBELL: Yes. I -- I think that
23 the -- so if I can go through the timeline to
24 explain, so the first seven days on March 20th,
25 2020, Secretary DeVos waived but didn't indicate

1 what legal authority she was using. I have no
2 way to assess that because I just don't know
3 what -- what authority she was using.

4 Then Congress came in seven days later
5 and enacted the CARES Act. The CARES Act put a
6 payment pause in place for six months. At the
7 end of that six-month period, Secretary DeVos
8 extended it for three months.

9 I think arguably that was a legitimate
10 use of the HEROES Act because taking a
11 congressionally created six-month program and
12 extending it for three months seems like it
13 might be a modification.

14 But now that we're two years down the
15 road, we're beyond a modification. And not only
16 that, the connection to the national emergency
17 has become even more tenuous.

18 JUSTICE BARRETT: So your argument is
19 that even assuming that Secretary DeVos
20 initially had the authority to -- and you're --
21 you're -- you're kind of just whipping on the
22 question about before the CARES Act was passed,
23 right?

24 But you're talking about after the
25 CARES Act was passed, she arguably had authority

1 under the HEROES Act to extend the pause, but
2 that at some point as that time dragged on post
3 the CARES Act when the new administration came
4 in, and it exceeded the authority to waive or
5 modify?

6 MR. CAMPBELL: Your Honor, it could
7 have been the -- Secretary DeVos had two
8 extensions. It could have been her second
9 extension. I don't think it hinges on who the
10 administration was.

11 At some point, I think it goes beyond
12 a modification and the connection to the
13 national emergency became too tenuous to
14 maintain it.

15 JUSTICE BARRETT: So it's not that a
16 pause is different in your mind than canceling
17 the obligation to repay the principle, it's that
18 -- or -- or I guess it's a combination of the
19 distinction between a pause and a cancellation
20 and then the temporal --

21 MR. CAMPBELL: Correct --

22 JUSTICE BARRETT: -- reach?

23 MR. CAMPBELL: -- correct. Because I
24 do think there are significant distinctions
25 between a pause and cancellation. I'll give you

1 a few.

2 The first is a pause maintains the
3 status quo. Cancellation puts people in a -- in
4 a far better -- this cancellation puts people in
5 a far better position.

6 A pause keeps indebtedness from
7 rising, versus cancellation erases indebtedness.
8 In addition, as I mentioned before, the
9 connection to the national emergency, when you
10 put a pause in place, when the nation is still
11 dealing with lockdown conditions, that is a --
12 there's a pretty close connection between that
13 and a national emergency.

14 When two-and-a-half years down the
15 road the Secretary, having much time to
16 contemplate this -- this -- the situation, comes
17 in and creates a debt forgiveness program for
18 95 percent of borrowers, the connection to the
19 -- to the national emergency is too tenuous.

20 JUSTICE BARRETT: Okay. I understand.

21 Second question is on standing. Could
22 Missouri file suit to vindicate the interests of
23 the City of St. Louis?

24 MR. CAMPBELL: No, Your Honor,
25 because, when we look at the factors that we've

1 cited for why MOHELA is a state-created and
2 state-controlled entity, the leadership of the
3 city of Missouri is not selected by the governor
4 or by the state. They're selected at the local
5 level.

6 JUSTICE BARRETT: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Jackson?

9 JUSTICE JACKSON: So can I just
10 understand your view on waiver or modification
11 with respect to sort of the initial applications
12 of this authority?

13 You know, we're sort of in a certain
14 species of it now, but I had understood from the
15 SG and from the briefs that originally we're
16 talking about wartime, and -- and so I'm just
17 trying to understand, are you saying that those
18 were not legitimate waivers or modifications
19 under this kind of power?

20 MR. CAMPBELL: Your Honor, we don't
21 question any of the uses of the HEROES Act prior
22 to 2020. So --

23 JUSTICE JACKSON: Right. But I -- I
24 --

25 MR. CAMPBELL: -- I don't know if I'm

1 understanding the question.

2 JUSTICE JACKSON: -- what -- what
3 is -- what is your view -- again, I'm just
4 trying to clarify your exchange with -- with
5 Justice Kavanaugh on what waiver means. So are
6 you saying that the Secretary would have had to
7 change something about the regulations but not
8 about their application with respect to the
9 obligations that they require of people?

10 MR. CAMPBELL: Your -- Your Honor, if
11 I can try to illustrate it with an example, I
12 think this might get to it.

13 There is an existing loan discharge
14 program for permanent disability that requires
15 an individual to expect to be permanently
16 disabled for at least 60 months.

17 If the Secretary came in and said,
18 because of the national emergency, if someone
19 was affected because of that, they can reduce
20 that 60-month requirement down to, say, 36
21 months, that to me is a modification of an
22 existing program. That would be an example.

23 In terms of waiver, waiver is when the
24 Secretary goes in and would take out an
25 entire -- one of the existing requirements. And

1 that's not what the Secretary is doing here.

2 That --

3 JUSTICE JACKSON: I understand.

4 But -- but -- but you're -- I guess my question
5 is, do you dispute that under the prior
6 circumstances, people owed a certain amount and
7 what the Secretary did was modified the amount
8 that they would owe as a result of this loan?

9 MR. CAMPBELL: Your Honor, I think
10 that's exactly what he was trying to do. And I
11 think that highlights why there's a problem
12 here. Let me point --

13 JUSTICE JACKSON: Okay.

14 MR. CAMPBELL: -- the Court
15 specifically to the statute that we cite on
16 pages 46 through 47 of our brief. Congress
17 knows how to authorize the Secretary to waive or
18 modify an amount owed. We cite provisions in
19 the Higher Education Act that specifically say
20 the Secretary shall waive the amount owed.

21 Here, the Secretary wasn't given that
22 language. If the Secretary instead was given
23 the power to waive or modify provisions, and so
24 that's why the analysis here have --

25 JUSTICE JACKSON: But why doesn't it

1 all -- why doesn't it all reduce to the same
2 thing? And this is where I go back to the sort
3 of original application.

4 I mean, so, fine, we have wartime
5 people who are away and you say you have no
6 problem with the Secretary modifying the
7 regulations insofar as it would help them, but
8 doesn't it reduce to just them not having to pay
9 as much? I don't understand why there's really
10 a distinction --

11 MR. CAMPBELL: Well --

12 JUSTICE JACKSON: -- between waiving
13 the -- the regulations in the way that you're
14 reading this and waiving the amount a person
15 owes under a regulation that relates to a loan.

16 MR. CAMPBELL: Your Honor, there's
17 never been a past use of the HEROES Act that
18 would eliminate the amount that someone owes.
19 So I don't think there's a prior comparator to
20 look to.

21 JUSTICE JACKSON: Okay. Let me just
22 ask you one final question on my big-picture
23 concern.

24 So I was listening carefully to your
25 opening statement, and you started by indicating

1 that this is one of today's most debated policy
2 questions, and you ended by saying that we, the
3 courts, should essentially answer it by
4 invalidating this program.

5 And what concerns me is that to the
6 extent you're talking about separation of powers
7 and major questions, the judiciary is part of
8 the same constitutional separation of powers
9 dynamic that compels us to think about questions
10 like the Major Questions Doctrine.

11 And I feel like we really do have to
12 be concerned about jumping into the political
13 fray, unless we are prompted to do so by a
14 lawsuit that is brought by someone who has an
15 actual interest. So this is why I'm sort of
16 pressing really hard on the standing point.

17 And so do -- do you dispute that the
18 ordinary standing rule would be that a plaintiff
19 cannot establish standing by asserting the
20 interests of an independent actor or by saying
21 that an independent actor not before the Court
22 will respond to the defendant's actions in a
23 certain way?

24 I mean, isn't the ordinary rule one
25 that really doesn't cover you and what you're

1 asking for in a way is an extension of our
2 standing principles to allow for the state to
3 proceed with this action?

4 MR. CAMPBELL: Your Honor, I don't
5 believe so. I think what we're asking for is
6 the same treatment that the federal government
7 got in Cherry Cotton Mills and Erickson.

8 We're asking for the ability to assert
9 the interests of the public corporation that the
10 State of Missouri created, that it controls and
11 that it charged with performing nothing but
12 essential government actions.

13 JUSTICE JACKSON: All right. So we'll
14 go back and look at that case, and if we find
15 that the federal government had some sort of a
16 separate interest that it was asserting, do you
17 lose? I mean, is that your only case that is
18 going to make it be the case that we can find
19 standing for you?

20 MR. CAMPBELL: No, Your Honor. I
21 think that those cases are certainly helpful. I
22 would direct the Court, if the Court wants to
23 look under either federal law to see what it
24 takes to be a part of the government, I would
25 direct the Court to Lebron and Department of

1 Transportation that we cite.

2 If the Court wants to look --

3 JUSTICE JACKSON: So you reject the
4 distinction that the -- that the SG pointed to
5 with respect to what those cases were about?
6 Those were not standing cases. We have
7 different doctrines that apply when we're
8 looking at different issues.

9 And the issue of whether or not you
10 are injured by, you know, an injury to another
11 entity, an independent corporation, seems to me
12 to be a separate thing.

13 So do you have a case that would help
14 us to understand whether an entity like MOHELA
15 that has totally been isolated through state law
16 from liability, that can sue for itself, et
17 cetera, do you have a case where we've said that
18 same kind of entity you can sue as a state in --
19 because you're injured for standing purposes?

20 MR. CAMPBELL: Your Honor, I think the
21 closest cases we have are the ones I referenced
22 before: Cherry Cotton Mills and Erickson.

23 But I will say that part of the
24 inquiry has to look to state law to see if
25 Missouri is charged with speaking -- has the

1 ability to speak on behalf of MOHELA.

2 And on that front, I would point the
3 Court to two things. One is Missouri statute
4 27.06 -- .060, which gives the attorney general
5 the right to determine whether to litigate in
6 the name of the state to protect any interest of
7 the state. And because MOHELA is a --

8 JUSTICE JACKSON: But, of course,
9 that's the question here, right?

10 MR. CAMPBELL: -- because MOHELA --

11 JUSTICE JACKSON: Yeah.

12 MR. CAMPBELL: -- is a part of the
13 state --

14 JUSTICE JACKSON: I see.

15 MR. CAMPBELL: -- and the second point
16 that I would direct the Court to is the Casualty
17 Reciprocal Exchange case. That's the case that
18 specifically identified what it means to be a
19 public corporation under Missouri state law.

20 And it identifies the same factors
21 that Lebron looked to. It's whether it was
22 created by the government, controlled by the
23 government, and whether it's performing
24 essential public purposes.

25 JUSTICE JACKSON: Thank you.

1 MR. CAMPBELL: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Rebuttal, General?

5 REBUTTAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR
6 ON BEHALF OF THE PETITIONERS

7 GENERAL PRELOGAR: Thank you, Mr.
8 Chief Justice.

9 I'll pick up with standing and focus
10 on the MOHELA-related arguments.

11 Justice Barrett, you asked about the
12 provision of state law 173.420. This is a
13 provision that refers generally to Missouri
14 reserving rights over the assets of MOHELA.

15 I think if you look at that in
16 context, it clearly functions as a savings
17 clause. It's making clear that, notwithstanding
18 all of the other provisions we've pointed to,
19 like 173.425, .410, these are the provisions
20 that create the strict financial separation,
21 that Missouri is reserving its rights under
22 other sources of law, like eminent domain or
23 search and seizure, and it's not actually
24 limiting its ability to obtain assets in that
25 way.

1 I understand my friend to have
2 conceded that actually Missouri would have to
3 change its law and change the structure of
4 MOHELA if it wanted to have any direct access to
5 MOHELA's assets. And that makes sense because
6 these other provisions that I just pointed you
7 to are very clear, that there is absolute
8 financial separation between the state and
9 MOHELA.

10 You asked as well about control over
11 MOHELA, which my friend had emphasized several
12 times. That's actually one of the relevant
13 questions under the arm-of-the-state doctrine,
14 whether you could direct the authority in any
15 way. I'd point to Justice Kavanaugh's decision
16 in the D.C. Circuit in the Puerto Rico Ports
17 Authority case. There, it was significant that
18 you could direct the -- the authority to sue.
19 And here that's obviously lacking, and the state
20 hasn't attempted to do that.

21 My friend several times brought up the
22 Cherry Cotton Mill and Erikson cases. In Cherry
23 Cotton Mill, there was an express statutory
24 right of the United States to tax offsets. And
25 the Court was interpreting that statutory

1 language and determined that the United States
2 had its own interest in the statutory right and
3 further emphasized that, with respect to that
4 particular public corporation -- and I'm reading
5 from the language of the Court's opinion -- that
6 for the public corporation, "its profits, if
7 any, go to the Government; its losses the
8 Government must bear."

9 There wasn't the financial separation
10 in that case that exists here. And there was a
11 distinct statutory right on behalf of the United
12 States.

13 Erikson is even further afield. It
14 wasn't a case about standing at all. And there,
15 the United States had a contract right that the
16 instrumentality had entered into as an agent of
17 the federal government. The instrumentality was
18 itself a plaintiff in that case, and there was
19 no Article III issue in the case.

20 Finally, I'll focus on the
21 contributions to the Lewis and Clark Discovery
22 Fund. This is the secondary argument as it
23 relates to MOHELA. There are huge factual
24 deficiencies in trying to premise standing on
25 that basis. As we've explained, they haven't

1 been able to bring forward allegations that
2 would substantiate the asserted financial
3 impacts on MOHELA and certainly haven't
4 established that that will be the likely cause
5 of any default to a fund that hasn't been paid
6 for the last 15 years.

7 But there's also a more fundamental
8 legal problem with their theory. It has no
9 logical stopping point. There's nothing, for
10 example, that would prevent anyone who's owed a
11 debt to say that suddenly they can have standing
12 to challenge a regulation that doesn't affect
13 them in any way because it might affect the
14 debtor, who then will be unable to make good on
15 that -- on that liability. And there is no
16 precedent in this Court's Article III doctrine
17 to support that kind of broad expansion of
18 Article III standing here.

19 Turning to the merits, I want to pick
20 up on the colloquies that my friend was having
21 about the meaning of the term "waive or modify."
22 And if I understand the gloss that he's putting
23 on that language, I don't think that there would
24 be any room to grant any kind of HEROES Act
25 relief whatsoever.

1 He says that there was no waiver or
2 modification here, but there was. The Secretary
3 took the provisions that deal with discharge and
4 cancellation and he waived the existing
5 eligibility requirements and modified those
6 provisions to add an additional basis for
7 relief.

8 This is how Secretaries across
9 administrations have implemented the HEROES Act.
10 For example, with deferment, the Secretary, in
11 prior uses of the HEROES Act, took the
12 provisions that exist for deferment and waived
13 the existing eligibility requirements and then
14 granted additional deferment in line with the
15 national emergency.

16 That fits with the plain language of
17 the statute, and to suggest that that
18 automatically creates a brand-new program would
19 leave very little room for the HEROES Act to
20 operate at all.

21 My friend is getting it exactly
22 backwards. The fact that there are already
23 statutory provisions for things like deferment
24 and forbearance and discharge demonstrates that
25 Congress could foresee that all of those are

1 ways that you grant financial relief to
2 student-loan borrowers.

3 And in the context of a statute like
4 this one that is centrally focused on ensuring
5 that the Secretary can act in unforeseen
6 circumstances outside the existing scope of
7 those provisions, Congress directed that the
8 Secretary has the authority to waive or modify
9 in order to expand eligibility for those forms
10 of relief.

11 So we'd ask the Court to reject the
12 states' arguments here.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 The case is submitted.

16 (Whereupon, at 12:15 p.m., the case
17 was submitted.)

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Official - Subject to Final Review

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