No. 22-11115

# In the United States Court of Appeals for the Fifth Circuit

MYRA BROWN, *et al.*,
*Plaintiffs-Appellees,*
v.
U.S. DEPARTMENT OF EDUCATION, *et al.*,
*Defendants-Appellants.*

**BRIEF OF HAMILTON LINCOLN LAW INSTITUTE AS *AMICUS CURIAE* IN OPPOSITION TO DEFENDANTS-APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL**

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**Rule 28.2.1 Statement**

Case No. 22-11115

*Myra Brown, et al. v. U.S. Dep't of Educ., et al.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

| Person or Entity | Connection to Case |
|---|---|
| Theodore H. Frank | Counsel to *amicus* HLLI |
| Hamilton Lincoln Law Institute | *Amicus curiae* |
| Myra Brown | Plaintiff |
| Alexander Taylor | Plaintiff |
| J. Michael Connolly | Counsel to plaintiffs |
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| Consovoy McCarthy PLLC | Law firm representing plaintiffs |
| Miguel Cardona, United States Secretary of Education | Defendant |
| United States Department of Education | Defendant |

| | |
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November 25, 2022

*/s/ Theodore H. Frank*
Theodore H. Frank

Attorney of record for *amicus curiae*
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## Interest of *Amicus Curiae*

*Amicus curiae* Hamilton Lincoln Law Institute ("HLLI") files this brief with the consent of the parties. HLLI is a 501(c)(3) public-interest law firm committed to, among other things, defending the constitutional separation of powers and principles of limited government against executive-branch abuse. *E.g.*, *Competitive Enter. Inst. v. FCC*, 970 F.3d 372 (D.C. Cir. 2020). This case not only presents critical separation-of-powers issues, but has personal resonance for the many attorneys of HLLI who expect to pay tuition for children attending college. The government's illegal changes to federal student loan policy will create perverse incentives that will substantially raise tuition for future students. *E.g.*, David O. Lucca, *et al.*, *Credit Supply and the Rise in College Tuition: Evidence from the Expansion in Federal Student Aid Programs*, FED. RESERVE BANK OF N.Y. STAFF REP. #733 (rev. Feb. 2017); Alex Tabarrok, *The Student Loan Giveaway is Much Bigger Than You Think*, Marginal Revolution blog (Aug. 27, 2022). Regrettably, because this actuarially certain expectation of future economic harm is not "imminent," existing standing doctrine might preclude HLLI attorneys from bringing suit on behalf of themselves. Plaintiffs, on the other hand, have suffered cognizable injury. HLLI supports Brown's suit.

Under FRAP 29(a)(4)(E), *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a

monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

## Summary of the Argument

This brief seeks to aid the Court through adding important context through focusing on the legislative text and history of the HEROES Act that demonstrate the mastodon-in-the-mousehole problem here. *Cf. Whitman v. American Trucking Assoc., Inc.*, 531 U.S. 457, 468 (2001).

## Argument

### I. The text and legislative history of the HEROES Act demonstrate the absurdity and illegality of the executive branch's attempted violation of the major-questions doctrine.

The administration has relied on the HEROES Act to both execute the Debt Forgiveness Program—at a cost of hundreds of billions of dollars—and to evade the normal notice-and-comment protections of the Administrative Procedure Act. *Cf.* 20 U.S.C. §1098bb(b)(1)-(2). This approach violates the text and intent of the Act.

The HEROES Act was a wartime measure passed in the wake of the September 11 attacks and again shortly after the start of the Iraq War. *See* Pub. L. 107-122, 115 Stat. 2386 (Jan. 15, 2002); Pub. L. 108-76,

117 Stat. 904 (Aug. 18, 2003). At first the Act was to sunset in 2005, but Congress extended it for two additional years (Pub. L. 109-78, 119 Stat. 2043 (Sept. 30, 2005)), and in 2007, Congress made the Act permanent with no amendments. Pub. L. 110-93, 121 Stat. 999 (Sept. 30, 2007).

From the acronym title of the bill to the text of the HEROES Act itself, every aspect of the law is targeted primarily to military personnel. Section 1098aa(b) sets forth Congress's findings justifying the legislation; each finding speaks exclusively with respect to the armed forces and the men and women who serve in them. Congress recognized that "The men and women of the United States military put their lives on hold, leave their families, jobs, and postsecondary education in order to serve their country and do so with distinction." 20 U.S.C. §1098aa(b)(5). The final finding concludes "There is no more important cause for this Congress than to support the members of the United States military and provide assistance with their transition into and out of active duty and active service." 20 U.S.C. §10988aa(b)(6).

Other provisions of the HEROES Act similarly are exclusively devoted to members of the armed services. For instance, §1098cc deals exclusively with "Tuition refunds or credits for members of armed forces" and the definitions in §1098ee relate largely to terms such as "Military Operation," "Active Duty," and "Qualifying National Guard Duty."

Furthermore, the Act only authorizes the Secretary to waive or modify any provision relating to student financial assistance programs "to ensure that recipients of student financial assistance . . . who are affected individuals are not placed in a *worse* position financially in relation to that financial assistance because of their status as affected individuals." 20 U.S.C. §1098bb(a)(2)(A) (emphasis added). Any action the Secretary took must fulfill its objective "without impairing the integrity of the student financial assistance programs." 20 U.S.C. §1098bb(a)(2)(B). The point of actions were to "avoid inadvertent, technical violations or defaults." *Id*.

The bill defines "affected individual" in four subparts in 20 U.S.C. §1098ee(2). Subparts (A) and (B), like the rest of HEROES Act, exclusively refer to members of the armed forces. Subparts (C) and (D) are the only provisions of the HEROES Act that reach beyond members of the armed force, but only in limited circumstances. The borrower must reside or be employed in disaster area that has been declared in connection with a national emergency, or the borrower must have suffered an economic hardship as a direct result of a war, military operation, or national emergency (*e.g.*, spouses of service members called to active duty or deployed overseas; residents of a city hit by a disruptive terrorist attack). Subpart D also requires the Secretary to make a

determination that borrowers suffered a direct economic hardship because of the military operation or national emergency.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). "Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be 'shaped, at least in some measure, by the nature of the question presented'—whether Congress in fact meant to confer the power the agency has asserted." *W. Virginia v. EPA*, 142 S. Ct. 2587, 2607-08 (2022) (*quoting FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). In these "major questions" cases, "the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *Id.* at 2608 (*quoting Brown & Williamson Tobacco*, 529 U.S. at 159-60).

Congress's discussion of the bill showed, consistent with the text, that representatives thought they were simply relieving active-duty military from "making student loan payments … while they are away." 149 Cong. Rec. at H2522 (Apr. 1, 2003) (Rep. Garrett). *See also id.* at H2524 (Rep. Isakson) (the Act ensures that the "loan payments" of troops who "serve us in the Middle East and in Iraq" "are *deferred* until they

return" (emphasis added)); *id.* at H2524-25 (Rep. Boehner) ("None of us believe that our active duty soldiers should … have to make payments on their student loans while in fact they are not here."); *id.* at H2525 (Rep. Burns) ("The HEROES bill would excuse military personnel from their Federal student loan obligations while they are on active duty"). The 2007 discussion was no different. *See* 153 Cong. Rec. at H10790 (Sept. 30, 2007) ("This bill is specific in its intent to insure that, as a result of a war or military contingency operation or national emergency, our men and women in uniform are protected.") (Rep. Kline); *id.* ("What this bill does is allow the Secretary of Education to accommodate the unique needs of our student soldiers") (Rep. McKeon).

We hesitate to call these statements part of a "debate." The 2001 HEROES Act passed by unanimous voice vote weeks after 9/11. 147 Cong. Rec. H7155 (Oct. 23, 2001); 147 Cong. Rec. S13311 (Dec. 14, 2001). The 2003 Act passed the House 421-1 via a suspension of the rules, and the Senate passed it by unanimous consent. 149 Cong. Rec. S10866 (July 31, 2003); 149 Cong. Rec. H2553-54 (Apr. 1, 2003). The 2007 Act that made the HEROES Act permanent was a three-paragraph bill that Congress passed by voice vote. Pub. L. 110-93, 121 Stat. 999.

And the first decades of use of the HEROES Act reflects those limited uncontroversial goals of avoiding "plac[ing affected individuals] in a worse position." 20 U.S.C. §1098bb(a)(2)(A). Despite the

September 11 attacks and multiple wars and the devastation of Hurricanes Katrina and Harvey, the Department never used the HEROES Act to cancel a single soldier's—much less a civilian's—loan debt. Not one legislator suggested in the runup to its passage that the HEROES Act authorized the Department to do so.

Little wonder: the statute permits the Department only to "waive" or "modify" certain provisions. 20 U.S.C. §1098bb(a)(1). But these "modest words" cannot bear the weight the Department places on them. *W. Virginia*, 142 S. Ct. at 2609. The Department's waivers or modifications can do no more than ensure that borrowers "are not place[d] in a *worse* position financially in relation to that financial assistance because of their status as affected individuals." 20 U.S.C. §1098bb(a)(2)(A) (emphasis added). Canceling debt puts debtors in a *better* position, rather than the same position in relation to their debt as before the "war or other military operation or national emergency." 20 U.S.C. §1098bb(a)(1). And as discussed above, the legislative discussion assumed that the Secretary would defer, rather than cancel, obligations. Little wonder: mass cancelation would "impair[] the integrity of the student financial assistance programs." 20 U.S.C. §1098bb(a)(2)(B).

Congress has "conspicuously and repeatedly declined to enact" explicit legislation seeking to do what the administration claims the HEROES Act does here. *W. Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022);

*see, e.g.*, S. 2235, 116th Cong. §101 (2019) (cancelling up to $50,000 of student loan debt for those who make under $100,000) (died without vote after being referred to committee); H.R. 2034, 117th Cong. §2 (2021) (cancelling the outstanding balance on loans for all borrowers under a certain income cap) (died without vote after being referred to committee). Even after the HEROES Act first passed, Congress made it harder, rather than easier, to cancel student-loan debt in general—for example, making it tougher to discharge federally guaranteed loans in bankruptcy. 11 U.S.C. §523(a)(8); Pub. L. 109-8 § 220, 119 Stat. 23, 59 (Apr. 20, 2005).

When Congress did want to provide relief for student debt—including during the COVID crisis—it did so with specificity and modulation reflecting legislative compromise, rejecting proposals that went only a fraction as far as the administration is attempting here. *See, e.g.*, 20 U.S.C. §§1087e(d)(1)(D) & (E) and 1098e (income repayment plans); 20 U.S.C. §1087e(e)(1) (income-contingent repayment plans); 20 U.S.C. §1087e(h) (relief where borrower can demonstrate fraud); *compare also* CARES Act, Pub. L. 116-136 § 3513, 134 Stat. 281, 404 (Mar. 27, 2020) (mandating forbearance, but not forgiveness, on swath of federal student loans) *and id.* §2206, 134 Stat. at 346-47 (providing tax benefits to employers who pay employee student loans) *with* H.R. 6800, 116th Cong. §150117 (2020) (cancelling up to $10,000 of student loan debt for

economically distressed borrowers) (passed House 208-199 and died in Senate after July 2020 committee hearings).

And Congress has never tasked the Department of Education with identifying broad classes of borrowers entitled to loan forgiveness. Rather, when Congress wants the Secretary to cancel debt for a class of borrowers, it explicitly describes those groups. *E.g.*, 20 U.S.C. §1078-10 (teachers); 20 U.S.C. §1078-10(c)(3) (teachers in mathematics, science, or special education); 20 U.S.C. §1078-11 (service in areas of national need); 20 U.S.C. §1087ee (certain public service); 20 U.S.C. §1098(d) (disabled veterans). By attempting to do so itself, the Department is seeking to expand and "transform" its statutorily prescribed role. *W. Virginia*, 142 S. Ct. at 2610. These facts alone justify applying the major-questions doctrine because courts "presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies." *W. Virginia*, 142 S. Ct. at 2613 (cleaned up); *see also Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2490 (2021) (rejecting Biden administration attempt to use COVID to rationalize gigantic unrelated wealth transfer through agency action).

Because the major-questions doctrine applies, the Department needed "clear congressional authorization" for the Program. *W. Virginia*, 142 S. Ct. at 2609. It is unimaginable that Congress gave the executive branch that authority in uncontroversial bills passed by voice vote. Thus,

the Rubenstein Memo correctly concluded that the HEROES Act was never intended to provide the Secretary broad discretion to execute a mass cancellation of federal student debt. Reed Rubenstein, *Memorandum for Betsy DeVos, Secretary of Education, re: Student Loan Principal Balance Cancellation, Compromise, Discharge, and Forgiveness Authority* 6 (Jan. 12, 2021) (available at https://tinyurl.com/a4n326cw). The HEROES Act does not provide the Secretary the statutory authority to perform a "blanket or mass cancellation, compromise, discharge, or forgiveness of student loan principal balances, and/or to materially modify the repayment amounts or terms thereof, whether due to the Covid-19 pandemic or for any other reason." *Id.* at 8. As Speaker Nancy Pelosi stated,

> People think that the president of the United States has the power for debt forgiveness … He does not. He can postpone, he can delay, but he does not have that power. That has to be [accomplished through] an act of Congress.

Lauren Camera, *Pelosi: Biden Lacks Authority to Cancel Student Debt*, U.S. NEWS & WORLD REP. (Jul. 28, 2021).

The Biden Administration's flip is thinly reasoned. The administrative record is limited to a 13-page memorandum marked "Confidential" prepared by Undersecretary of Education James Kvaal dated August 24, 2022. The Kvaal Memo references internal Department

of Education analysis and outside sources as evidence of the negative impact of the pandemic on student loan borrowers as well as the justifications for the income thresholds and amounts of relief granted. Accompanying the Kvaal Memo was a memorandum from the Chief Operating Officer for Federal Student Aid, Richard Cordray, to Secretary Cardona. That memo is also dated August 24 and Secretary Cardona signed it 9:25 a.m. that same day. This thin "administrative record" surfaced only after states filed litigation challenging the plan. ECF No. 27-1, *Nebraska v. Biden*, No. 22-cv-01040 (E.D. Mo. Oct. 7, 2022).

The Kvaal and Cordray Memos are dated one day after two legal memorandums that assert that the HEROES Act does grant authority to perform mass debt cancellation. *See* Notice of Debt Cancellation Legal Memorandum, 87 Fed. Reg. 52943, 52944 (Aug. 30, 2022) (originally dated Aug. 23, 2022); Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loan, 46 O.L.C. __ (Aug. 23, 2022).

Of course, the Program did not simply come to fruition within 24 hours in August 2022. Rather, it was the culmination of months of behind-the-scenes legal maneuvering and political lobbying that avoided the legislative process for the cynical purpose of pretending to fulfill a campaign promise before a challenging election cycle, and then blaming courts when the administration would inevitably be held to account. *Cf.*

Michael Stratford & Eugene Daniels, *How Biden Finally Got to 'Yes' on Cancelling Student Debt*, POLITICO (Aug. 25, 2022).

No presidential administration has ever lawfully adopted a program of similar size, scale, and importance without notice and comment. The baseline presumption is that important and consequential agency actions should be "tested via exposure to diverse public comment." *Int'l Union v. MSHA*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). So too here. The Debt Forgiveness Program is *ultra vires*.

## Conclusion

For these reasons, this Court should deny the government's motion.

Dated: November 25, 2022

Respectfully submitted,

*/s/ Theodore H. Frank*

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**Proof of Service**

I hereby certify that, on November 25, 2022, I electronically filed this brief with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

November 25, 2022 *s/ Theodore H. Frank*
Theodore H. Frank

## Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 27, 29(a)(5), and 32(a)(7)(B) because:

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*/s/ Theodore H. Frank*
Theodore H. Frank