# Commentary—Do Not Hold Your Breath: Student Loan Relief May Not Come

Gader Wren*

*"We are all textualist now."*
Justice Elena Kagan[1]

## Introduction

Over the past few decades, the cost of higher education has exploded. In 2019, then-presidential candidate Senator Elizabeth Warren introduced her plan to forgive $50,000 of student debt for each borrower.[2] Since then, student loan forgiveness has remained a key position within the Democratic Party platform.

As of February 2023, national student loan debt in the United States has skyrocketed to 1.75 trillion dollars.[3] In an effort to combat the financial effects of the COVID-19 pandemic, President Biden instructed Secretary Miguel Cardona to investigate the Department of Education's ability to forgive student loans.[4] After months of investigation, Secretary Cardona determined that under the HEROES Act (the Act), he, as the Secretary of Education, had the authority and power to discharge student loans.[5] The

* JD, University of Nevada, Las Vegas at the William S. Boyd School of Law, law clerk at Racine Olson in Pocatello, Idaho. Thank you to the staff at *Suffolk University Law Review*, especially Samuel Alen. And a special thank you Nazo Demirdjian, Leslie Griffin, Andrew Gossage, and Samuel Holt for their helpful comments and suggestions.

[1] Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015) https://www.youtube.com/watch?v=dpEtszFT0Tg [https://perma.cc/8EHC-RPLD].

[2] *See* Adam S. Minsky, *How "Cancel Student Debt" Went From a Fringe Idea to Mainstream*, FORBES (Sept. 21, 2020) https://www.forbes.com/sites/adamminsky/2020/09/21/how-cancel-student-debt-went-from-a-fringe-idea-to-mainstream/?sh=61bdeedf5489 [https://perma.cc/QM7M-U447].

[3] Alicia Hahn, *2023 Student Loan Debt Statistics: Average Student Loan Debt*, FORBES (Feb. 22, 2023), https://www.forbes.com/advisor/student-loans/average-student-loan-statistics/ [https://perma.cc/KQ54-2MDR]. This represents an increase of over 100 billion dollars from August 2022. *FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most*, THE WHITE HOUSE (Aug. 24, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/ [https://perma.cc/6CCP-TDDX].

[4] *See* Abigail Johnson Hess, *Education Secretary Cardona: The Biden Administration Is Still 'Examining Loan Forgiveness,'* CNBC (Oct. 26, 2021), https://www.cnbc.com/2021/10/26/ed-secretary-cardona-biden-administration-is-examining-loan-forgiveness.html [https://perma.cc/ULP6-2M9U].

[5] *See Statement from Secretary of Education Miguel Cardona on District Court Ruling on the Biden-Harris Administration Student Debt Relief Program*, U.S. DEPARTMENT OF EDUCATION (Nov. 11, 2022), https://www.ed.gov/news/press-releases/statement-

Act, which Congress passed after the 9/11 tragedy, authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" when "necessary in connection with a war or other military operation or national emergency."[6]

On October 17, 2022, the Biden Administration officially launched its student loan forgiveness program (the Program), forgiving up to $20,000 of student loans for each qualified borrower.[7] Unsurprisingly, many have opposed the Program and have sued to enjoin it. Although two cases involving the Program have made their way to the United States Supreme Court, this commentary will focus solely on one of those cases: *Biden v. Nebraska*.[8] Following oral arguments that occurred on February 28, 2023, many now believe the Program will be struck down by the Court.[9]

## The HEROES Act

Congress enacted the Act in the wake of 9/11 with a two-year sunset provision.[10] Five years after the U.S. invasion of Iraq, however, Congress removed the expiration provision of the Act to make it permanent.[11] The Act's original purpose was to enable the Secretary of Education to provide aid to military personnel who would be negatively impacted by war. This intent is evident from the Act's language that largely identifies "affected individuals" as those holding some military-related role.[12]

The Act permits the Secretary to waive or modify statutes or regulations related to student financial assistance programs when connected to national emergencies.[13] Since the passage of the Act, the Secretary has

secretary-education-miguel-cardona-district-court-ruling-biden-harris-administration-student-debt-relief-program [https://perma.cc/SC2H-Q48Z].

[6] 20 U.S.C. § 1098bb(a)(2).

[7] *See* Isabella Murray, *Biden Officially Launches Student Loan Forgiveness Application*, ABC NEWS (Oct. 17, 2022), https://abcnews.go.com/Politics/biden-officially-launches-student-loan-forgiveness-application/story?id=91635557 [https://perma.cc/ZPP5-J4YN].

[8] U.S. No. 22-506 (2023 Term).

[9] *See Biden v. Nebraska*, FANTASY SCOTUS, https://fantasyscotus.net/case-prediction/biden-v-nebraska/ [https://perma.cc/L7G8-2Q3U].

[10] *See* Higher Education Relief Opportunities for Students (HEROES) Act of 2001, Pub. L. 107-122, 115 Stat. 2386 (2002); Higher Education Relief Opportunities for Students (HEROES) Act of 2003, Pub. L. 108-76, 117 Stat. 904 (2003) (codified as amended at 20 U.S.C. §§ 1098aa-1099).

[11] *See* Pub. L. 110-93, 121 Stat. 999 (2007) (striking sunset provision).

[12] *See* 20 U.S.C. § 1098ee (2). Under the statute, affected persons are those who are in "active service," performing National Guard duties, residing or employed in a "disaster area, or are "direct[ly]" impacted as a "direct" result of a "war or other military operation or national emergency." *Id.*

[13] *See* 20 U.S.C. § 1098bb(a)(2).

issued several waivers and modifications.[14] In 2003, the Secretary first waived and modified "the requirements for loan deferrals, extensions of the maximum period of loan forbearance for Perkins loans, and waivers of the requirement that students return overpayments of certain grant funds."[15] Most recently, the Secretary issued waivers and modifications to postpone the repayment of student debt during the early stages of the COVID-19 pandemic.[16] Despite these numerous actions, the Secretary has never issued waivers or modification that have included the permanent cancellation of class-wide student debt.[17]

Although some believe that the Secretary has unlimited discretion when issuing waivers or modifications, the language of the Act strongly suggests otherwise. Among other requirements, the Act requires that waivers and modifications (1) must have the purpose of ensuring that "affected individuals are not placed in a worse position financially" and (2) "are minimized, to the extent possible without impairing the integrity of the student financial assistance program."[18] These requirements make clear that the Secretary does not have unlimited authority to grant waivers or modifications, even when national emergencies arise.

## The Standing Issue

On December 1, 2022, the United States Supreme Court granted *certiorari* to determine (1) whether Nebraska and five other states had Article III standing to challenge the student loan forgiveness program and (2) whether the Secretary of Education exceeded his power under the Act by discharging student loans.[19] As many legal scholars and practitioners know, oral arguments can provide substantial insight on how the Justices may rule on a given case, but this insight is not always a guarantee.[20] In the

[14] *See, e.g.*, CHRISTOPHER H. SCHROEDER, USE OF THE HEROES ACT OF 2003 TO CANCEL THE PRINCIPAL AMOUNTS OF STUDENT LOANS 5 (Aug. 23, 2022), https://www.justice.gov/d9/2022-11/2022-08-23-heroes-act.pdf [https://perma.cc/73LP-N2FF].
[15] *Id.*
[16] *See id.* at 6 (noting Secretary used Act to pause repayments during COVID pandemic).
[17] *See id.* at 7 (discussing first query on novel issue of cancelling principal balance).
[18] *See* § 1098bb(a)(2).
[19] *See Biden v. Nebraska*, OYEZ, https://www.oyez.org/cases/2022/22-506 [https://perma.cc/Q9U9-T3GR].
[20] *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (holding for Catholic charities, despite oral arguments indicating other sentiments); Linda C. McClain, *Jurisprudence on Religious Liberty and LGBTQ Rights?*, BERKLEY CENTER FOR RELIGION, PEACE & WORLD AFFAIRS (July 26, 2021), https://berkleycenter.georgetown.edu/responses/is-there-a-center-to-hold-in-supreme-court-jurisprudence-on-religious-liberty-and-lgbtq-rights [https://perma.cc/4WPC-GLX4] (explaining "liberal" Justices may have signed onto majority strategically).

present case, oral arguments suggest that the Court will hold that Missouri has standing.

Standing is rooted in Article III of the U.S. Constitution and consists of three "irreducible constitutional minimum[s]" that must be met by every federal plaintiff.[21] The first of these minimums is "injury in fact."[22] Second, there must exist a causal connection between the injury and the conduct complained of: the injury must be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court."[23] Third, it must be likely that judicial intervention will "redress" the injury.[24]

In their brief, the Federal Government (Petitioner) argued that Nebraska, Missouri, Arkansas, Iowa, Kansas, and South Carolina (Respondents) failed to demonstrate Article III standing, largely due to a lack of concrete injury.[25] Respondents asserted that an injury exists because the Program negatively impacts the Respondents' tax and Federal Family Education Loans (FFEL) revenues.[26] Petitioner contended that under *Pennsylvania v. New Jersey*,[27] Respondents cannot claim standing based on a "self-generated basis," such as tax revenue, nor on FFEL revenue grounds because FFELs encourage the consolidation of loans.[28]

Respondents further asserted that Missouri suffers additional injury because the Missouri Higher Education Loan Authority (MOHELA), which services student loans, will lose 40% of its operating revenue because of the Program. Unlike Respondents' other theories of standing, Petitioner did not dispute that MOHELA will suffer injury if the Program takes effect; rather, the Petitioner argued that Missouri cannot bring suit on MOHELA's behalf because MOHELA is an entity separate from the state of Missouri.[29] Respondents claimed that because "MOHELA is a state-created and state-

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[21] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992); *see* Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016) ("Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy").
[22] *Spokeo*, 578 U.S. at 338.
[23] Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 41-42 (1976).
[24] *Id.*
[25] *See* Reply Brief for Petitioners at 3, 14, Biden v. Nebraska, No. 22-506 (U.S. Feb. 15, 2023).
[26] *See* Brief for Respondents at 23-29, Biden v. Nebraska, No. 22-506 (U.S. Jan. 27, 2023). Respondents specifically asserted that "Nebraska, Iowa, Kansas, and South Carolina have standing because they will suffer a "direct injury in the form of a loss of specific tax revenues" and that "Arkansas, Missouri, and Nebraska are injured because the forgiveness of student loans have caused "widespread consolidation of non-federally held FFEL Loans into Direct Loans." *Id.*
[27] 426 U.S. 660 (1976) (per curiam).
[28] *See* Reply Brief for Petitioners, *supra* note 25, at 22, 25.
[29] *See id.* at 26.

controlled public entity that performs essential public functions for the State," the Court should consider MOHELA and Missouri as one and the same for purposes of standing.[30] However, Petitioner claimed that because MOHELA is a corporation, it is distinct and separate, regardless of whether it was created by Missouri.[31]

During oral arguments, the Court heavily focused on whether Missouri could assert a claim on behalf of MOHELA. With the Court's attention centered on MOHELA, some may speculate that a majority of the Court, perhaps even before oral arguments, concluded that Nebraska, Arkansas, Iowa, Kansas, and South Carolina do not have standing. As for MOHELA, the Court appeared split, though, not along the so-called "partisan divide."[32]

Unsurprising to many, Justices Sotomayor, Kagan, and Jackson pressed Respondents' argument that Missouri has standing via MOHELA, while Justice Alito provided support to Respondents from the bench.[33] In one exchange, Justice Jackson asked Petitioner whether recognizing that Missouri had standing would require the Court to "break[] new ground" on its standing doctrine.[34] After a brief response to this non-threating question, Justice Alito asked, "[w]ell, would we be breaking new ground if we found that there was standing since we've never been presented, as you admitted earlier, with a case that presents precisely the issue that's here?"[35] This exchange signals that however the case is decided, groundbreaking precedent will be set regarding the Court's standing doctrine.[36]

Perhaps the most unexpected part of oral arguments was Justice Barrett's standing questions. One of Justice Barrett's most poignant observations was that "statutorily MOHELA has the right to sue and be sued, the state doesn't have responsibility for its liabilities, and the state has disclaimed any—any claim to the assets."[37] This observation supports what Justice Barrett had previously recognized in oral argument as three distinct tests, one test for "state action, another test for purposes of sovereign

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[30] *See* Brief for Respondents, *supra* note 26, at 12.
[31] *See* Reply Brief for Petitioners, *supra* note 25, at 3-4.
[32] Amelia Thomson-DeVeaux & Laura Bronner, *The Supreme Court's Partisan Divide Hasn't Been This Sharp in Generations*, FIVETHIRTYEIGHT (Jul. 5, 2022), https://fivethirtyeight.com/features/the-supreme-courts-partisan-divide-hasnt-been-this-sharp-in-generations/ [https://perma.cc/KFF3-CV3F].
[33] *See* Transcript of Oral Argument at 25, Biden v. Nebraska (U.S. No. 22-506, 2023).
[34] *See id.*
[35] *Id.*
[36] *See id.* Although the Justices who hold that Respondents have standing may lean on *Massachusetts v. E.P.A. See generally* 549 U.S. 497 (2007) (holding states have lower threshold than other litigants).
[37] Transcript of Oral Argument, *supra* note 33, at 92.

immunity, and another test for purposes of standing."[38] Justice Barrett appears to believe that while Respondents can show that MOHELA passes the state action test, it may not be able to show Article III standing. Thus, it is likely that Justice Barrett will likely find herself with Justices Sotomayor, Kagan, and Jackson on the issue of standing.

In contrast, several Justices—Chief Justice Roberts and Justices Gorsuch and Kavanaugh—completely, or in large part, stayed clear of any standing questions.[39] Rather, these Justices focused on the merits of the case, asking questions related to the Act and the Major Questions Doctrine.[40] Often, when Justices refrain from standing questions at oral argument, it indicates that those Justices view standing is a nonissue.[41]

Considering the questions asked and unasked, it appears that the Court will hold that Missouri has standing to sue. Whether the Court will hold that the other states have standing is less clear. Nevertheless, whatever the Court holds, it is likely to have a narrow majority, including only Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh.

The Merits

On the merits, Respondents' position is three-fold. First, because "[t]he HEROES Act [only] permits the Secretary to keep borrowers from a 'worse position,'" the Secretary exceeded his statutory authority by issuing waivers and modifications that actively put borrowers in a *better* position.[42] Second, because of the nature of the Secretary's actions, coupled with the ambiguity of the Act, the Court's Major Questions Doctrine must be invoked.[43] Third, even if the Program is permissible under the Act, the Program is arbitrary and capricious because (1) the Secretary failed to consider alternatives and (2) the timing of the Program, in relation to the pandemic, is too attenuated.[44]

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[38] *See id.* at 67-68.
[39] *See generally id.* Chief Justice Roberts did, however, ask a number of standing questions in the companion case of *Department of Education v. Brown*. *See generally* Transcript of Oral Argument, Department of Education v. Brown (U.S. No. 22-535, 2023).
[40] *See generally* Transcript of Oral Argument, *supra* note 33.
[41] *See e.g.*, Transcript of Oral Argument at 33, Hollingsworth v. Perry, 570 U.S. 693 (2013) (No. 12-144). Justice Alito, who dissented with Justices Kennedy, Thomas, and Sotomayor, mentions standing in just one context: "So start from the proposition that a State has standing to defend the constitutionality of a state law—beyond dispute." *Id.*
[42] Brief for Respondents, *supra* note 26, at 14. Borrowers, though, may arguably be in a worse position post-COVID, and cancellation of debt certainly puts borrowers in a better position.
[43] *See id.* at 30-38.
[44] *See* Brief for Respondents, *supra* note 26 at 50-53.

In their reply brief, Petitioner claimed that the Act does not restrict the Secretary from putting borrowers in a better position; rather, the Act merely requires "that the Secretary ensure that borrowers are not left in a worse position financially because of a national emergency."[45] Petitioner further indicated that the Major Questions Doctrine is inapplicable because the language of the Act is clear and the Court need not look beyond the text of the statute.[46] Lastly, Petitioner argued that nothing about the Program is arbitrary or capricious because the Secretary drew reasonable parameters and to question the Program would thwart Congress's intention in authorizing the Secretary to issue waivers and modifications.[47]

Though it is probable that a narrow majority will hold that Missouri has standing, it is less clear whether that same majority will rule in unison on the merits. Nevertheless, one could reasonably speculate that the same five justices will form a majority, or at least a plurality, on the merits of the case.

At the very outset of oral arguments, Justice Thomas and Chief Justice Roberts focused on the text of the Act, the most appropriate place to begin statutory analysis.[48] The most textually driven questions concentrated on the meaning of modify and waiver.[49] Both the Chief's and Justice Thomas's questions indicate discomfort with equating either waiver or modify to total cancellation, as cancellation, at least in their view, is broader than a waiver or modification.[50]

To the same end, Justice Gorsuch focused on § 1098bb(a)(2)(A), which states that the Secretary may issue such waivers or modifications to ensure that borrowers are "not placed in a worse position financially" as a result of a national emergency.[51] In his exchange with Respondents, Justice Gorsuch mentioned that even the Federal Government's Office of Legal Counsel indicated that the Act limited the Secretary to maintain the status quo.[52] If true, this means that the cancelation of debt, which puts borrowers in an objectively better position, would render the Program unlawful. This may indicate that Justice Gorsuch believes that the Secretary acted beyond his statutory authority.

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[45] *See* Reply Brief for Petitioners, *supra* note 25, at15-16; *see also* 20 U.S.C. §§ 1098bb(a)(1), 1098bb(a)(2)(A).
[46] *See* Reply Brief for Petitioners, *supra* note 25, at 18-26.
[47] *See id.* at 32-34.
[48] *See* Transcript of Oral Argument, *supra* note 33, at 5-10.
[49] *See id.*
[50] *See id.*
[51] *See* 20 U.S.C. § 1098bb(a)(2)(A).
[52] *See* Transcript of Oral Argument, *supra* note 33, at 113.

The questions related to the applicability of the Major Questions Doctrine were directed to both Petitioner and Respondent.[53] This Court-created doctrine is applied when administrative agencies act in a manner that has a significant "economic and political" impact.[54] In such cases, the agency seeking to act must point to "clear congressional authorization."[55]

When questioned, Petitioner first argued that Major Questions Doctrine is inapplicable to benefits programs; however, this argument was not rooted in any existing caselaw but was an attempt to break new ground on the issue.[56] In response to this argument, Justice Alito proffered, "I don't understand why... [we should] draw[] a distinction between benefits programs and other programs" when applying the Major Questions Doctrine.[57]

With Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch apparently poised to rule for the Respondent, the only remaining question is how Justice Kavanaugh will rule. Unlike the aforementioned members of the Court, Justice Kavanaugh demonstrated concerns with both Petitioner's and Respondents' arguments.[58] Justice Kavanaugh "pushed back" at Petitioner's argument that the Major Questions Doctrine was inapplicable and noted that "[s]ome of the biggest mistakes in the Court's history were deferring to assertions of executive emergency power" such as the power outlined in the Act.[59] With respect to Respondents' arguments, Justice Kavanaugh suggested that "waiver" is broad and may very well include the cancelation of student debt.[60]

Considering all of Justice Kavanaugh's questions, it is difficult to predict his vote. There are, however, three reasonably possible outcomes. First, Justice Kavanaugh could align with Justice Gorsuch's textual interpretation, meaning that even if waiver has a broad meaning, the Secretary exceeded his authority by doing more than maintaining the status quo. Second, Justice Kavanaugh may rule that the Program as administered is arbitrary and capricious. Such a ruling would be much narrower and would avoid major precedent on statutory interpretation. This is much less

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[53] *See, e.g.*, *id.* at 11-13, 31-35, 97-99.
[54] West Virginia v. E.P.A., 142 S. Ct. 2587, 2605 (2022).
[55] *Id.* at 2614.
[56] *See* Transcript of Oral Argument, *supra* note 33, at 13-15
[57] *Id.* at 15.
[58] *See, e.g.*, *id.* at 60, 115-17. This is of little surprise, given that Justice Kavanaugh now fills the Court's swing vote. *See* Kalvis Golde, *On a New, Conservative Court, Kavanaugh Sits at the Center*, SCOTUSBLOG (May 13, 2021), https://www.scotusblog.com/2021/05/on-a-new-conservative-court-kavanaugh-sits-at-the-center/ [https://perma.cc/8TFY-XSN6].
[59] Transcript of Oral Argument, *supra* note 33, at 60.
[60] *See id.* at 115-17.

likely, however, given that only Justices Kagan and Barrett were concerned with arbitrary and capricious arguments.

A third possibility is that Justice Kavanaugh will rule that the Program is lawful. This would not be the first case in which Justice Kavanaugh would side with the more liberal Justices.[61] Nevertheless, all things considered, wagers on the outcome of student loans appear to be stacked in favor of the Respondents.

## Conclusion

Though no person can predict the future of any case, oral arguments in this case strongly indicate that the Court will find that Missouri has standing. Less clear is whether a majority of the Court will find that the Secretary exceeded his statutory authority. While nebulous, one could reasonably suggest that a narrow majority will find in favor of the Respondents and block the Program.

[61] *See, e.g.*, Salinas v. United States R.R. Ret. Bd., 141 S. Ct. 691, 691 (2021) (containing Justice Kavanaugh within majority opinion); Torres v. Madrid,141 S. Ct. 989, 993 (2021).