THE ANTI-HEROES OF ADMINISTRATIVE LAW: WHY THE SECRETARY OF EDUCATION CANNOT CANCEL STUDENT LOAN DEBT UNDER THE HEROES ACT

ABSTRACT

On August 24, 2022, President Biden announced a plan to cancel outstanding student loan debt for qualified individuals. Under the plan, the Secretary of Education ("Secretary") invoked the Higher Education Relief Opportunities for Students Act of 2003 ("HEROES Act" or "Act") to provide limited debt relief to borrowers who fall within a specified income bracket and who have Direct, Perkins, or Federal Family Education Loans. Outstanding student loan debt accounts for trillions of dollars presents a great problem for public policymakers. However, the unilateral cancellation of student loan debt should not be permissible under the principles of administrative law. Accordingly, this note will analyze the issues presented by President Biden's student loan cancellation policy through the lens of administrative law. First, the legal arguments in favor of the Secretary's position, made on behalf of the Office of Legal Counsel, are unsound because the legislative history to the HEROES Act indicates the law's drafters intended for it to have a limited impact. Second, the Secretary's interpretation of a provision of the HEROES Act would not be entitled to *Chevron* deference because the Secretary's interpretation is unreasonable. Third, the major questions doctrine prohibits the executive branch from using its limited authority to resolve matters of great economic and political significance when there is no clear congressional authorization for the executive to do so—and cancelling student loan debt certainly meets this criterion.

I. INTRODUCTION

A. STUDENT LOANS: HISTORICAL BACKGROUND AND SOCIAL IMPLICATIONS

Higher education holds a unique position in the social and economic fabric of contemporary American life. Over the span of the twentieth century, a college degree has transformed from a luxury good to a practical necessity for one's entry into the middle class.[1] Indeed, it seems as if a bachelor's degree has acquired a greater weight than ever before. However, as higher education has become ever more necessary, the cost of college tuition has

1. Bradley L. Hardy & Dave E. Marcotte, *Education and the Dynamics of Middle-Class Status* BROOKINGS INST., (June 2020), https://www.brookings.edu/wp-content/uploads/2020/06/Final-Report_Education-Middle-Class-Status-1.pdf ("Access to the American middle class has been made possible by expanding educational attainment over the 20th Century . . . . Presently, access to post-secondary educational opportunities—especially a 4-year college degree—is increasingly seen as requisite for success in an economy . . . .") (citations omitted).

become ever more expensive.[2] This, in turn, has contributed to increasing aggregate levels of student loan debt.[3]

Student loan debt represents one of the biggest economic and social problems facing young college graduates and non-graduates in the present day. Over forty-three million borrowers owe $1.6 *trillion* in federal student loans,[4] and "[a]pproximately twenty-five percent of student loan borrowers are struggling to repay or [are] in default . . . ."[5] The massive quantity of delinquent borrowers is especially concerning, as "the volume of outstanding student loan debt outweighs the total volume of credit card and automobile debt *combined*."[6] The downstream effects of student loan debt are also considerable—student loan debt has deterred borrowers from purchasing homes, and it has delayed young borrowers from engaging in "key wealth-building activities such as saving for retirement and building equity in real property."[7] Moreover, student loans are classified as non-dischargeable debts under the Bankruptcy Code, meaning that a debtor cannot discharge their outstanding student loans through a bankruptcy proceeding, absent a showing that a denial of a discharge would "impose an undue hardship on the debtor and the debtor's dependents."[8] These long-term effects present a significant challenge for public policy experts and legislators alike.

B. THE BIDEN STUDENT LOAN DEBT RELIEF PLAN

On August 24, 2022, President Biden announced a plan to "offer[] targeted debt relief as part of a comprehensive effort to address the burden of growing college costs and make the student loan system more manageable for working families."[9] Under his proposed plan, a borrower could qualify

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2. *Id*.

3. *Id*.

4. *Federal Student Loan Portfolio*, U.S. DEP'T OF EDUC., https://data.ed.gov/dataset/federal-student-loan-portfolio/resources?resource=2596dd40-0d62-4ca1-bce7-ee3ecac13e06 (click on "Federal Student Aid Portfolio Summary" to download Excel file; then see Row 46, Column I) (last visited Jan. 15, 2022).

5. Colin Mark, Comment, *May the Executive Branch Forgive Student Loan Debt Without Further Congressional Action?*, 42 J. NAT'L ASS'N ADMIN. L. JUDICIARY 97, 98 (2022); *see also* Complaint at ¶ 29, Brown v. U.S. Dep't of Educ., 114 Fed. R. Serv. 3d (West) 89 (N.D. Tex. 2022) (No. 4:22-cv-0908-P) ("About 43 million individuals have debts arising under these three programs [Direct Loans, FFEL, and Perkins Loans] . . . . These individuals collectively have more than $1.61 trillion in outstanding debts.") (citations omitted), *cert. granted*, 143 S. Ct. 541 (2022).

6. Jeffrey P. Naimon et al., *School of Hard Knocks: Federal Student Loan Servicing and the Looming Federal Student Loan Crisis*, 72 ADMIN. L. REV. 259, 261 (2020) (emphasis added).

7. *Id*. at 262.

8. John Patrick Hunt, *Consent to Student Loan Bankruptcy Discharge*, 95 IND. L.J. 1137, 1144 (2020) (quoting 11 U.S.C. § 523(a)(8)).

9. *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/.

for relief, provided they (1) make less than $125,000 (or $250,000 if married), and (2) have Direct, Perkins, or Federal Family Education Loans ("FFEL").[10] A borrower who met these two requirements would receive up to $10,000 in debt cancellation or, if the borrower was a Pell Grant recipient, up to $20,000.[11] Practically speaking, if all qualified borrowers claimed their relief under this proposed program, this debt relief plan would "[p]rovide relief to up to 43 million borrowers, including cancelling the full remaining balance for roughly 20 million borrowers."[12] It should be of no small consequence that the debt relief plan has the potential to impact a vast number of student loan borrowers.

Although the plan has the potential to benefit student loan borrowers, there are three reasons to doubt that this plan will actually survive a judicial challenge. First, the legal arguments made by the Justice Department's Office of Legal Counsel misstate the true purpose of the enabling legislation that the Secretary has invoked. Second, the Secretary's interpretation of key provisions of the enabling legislation does not merit *Chevron* deference. Third, the program likely implicates the "major-questions doctrine," because the costs vary from a low of $430 billion to a high of $519 billion.[13] Any one of these legal issues could effectively destroy the debt relief plan.

Before analyzing these three legal issues, this note will first delve into the history and purpose of the HEROES Act to provide an understanding of this piece of legislation and how it fits into the larger debt relief plan.

II. THE HEROES ACT: HISTORY AND PURPOSE

In 2003, Congress passed the Higher Education Relief Opportunities for Students Act.[14] The HEROES Act authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Higher Education] Act as the Secretary deems necessary *in connection with a war or other military operation or national emergency* . . . ."[15] A "national emergency" refers to

10. *See* Brown v. U.S. Dep't of Educ., 114 Fed. R. Serv. 3d (West) 89 at *7 (explaining qualifications for loan forgiveness), *cert. granted*, 143 S. Ct. 541 (2022).

11. *Fact Sheet*, *supra* note 9.

12. *Id.*

13. *Compare* Letter from Phillip L. Swagel, Dir., Cong. Budget Off., to Members of Congress at 3 (Sept. 26, 2022), https://www.cbo.gov/system/files/2022-09/58494-Student-Loans.pdf (estimating debt cancellation will cost $430 billion), *with The Biden Student Loan Forgiveness Plan: Budgetary Costs and Distributional Impact*, PENN WHARTON, UNIV. PA. BUDGET MODEL (Aug. 26, 2022), https://budgetmodel.wharton.upenn.edu/issues/2022/8/26/biden-student-loan-forgiveness (estimating debt cancellation will cost between $469 billion and $519 billion).

14. Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108-76, 117 Stat. 904 (codified at 20 U.S.C. §§ 1098aa—1098ee).

15. 20 U.S.C. § 1098bb(a)(1) (emphasis added).

"a national emergency declared by the President of the United States."[16] The Secretary's waiver or modification must be "necessary to ensure that" one of the statutory objectives of the Higher Education Act is met, such as 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" and that "administrative requirements placed on affected individuals . . . are minimized . . . to ease the burden on such students and avoid inadvertent, technical violations or defaults."[17] A person qualifies as an "affected individual" if he or she:

> (A) is serving on active duty during a war or other military operation or national emergency;
> (B) is performing qualifying National Guard duty during a war or other military operation or national emergency;
> (C) resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency; or
> (D) suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary.[18]

The HEROES Act was passed in the aftermath of the September 11 attacks, at a time when military operations in Iraq were ramping up.[19] Representative John Kline, representing Minnesota's second congressional district, was one of the main architects of the original bill, and he drafted it with the purpose of "provid[ing] assurance to [the] men and women in uniform that they will not face education-related financial or administrative difficulties while they defend our Nation."[20] This interpretation was shared by President George W. Bush, who construed the Act as "permit[ting] the Secretary of Education to waive or modify Federal student financial assistance program requirements to help students and their families or academic institutions affected by a war, other military operation, or national emergency."[21] These statements indicate that the overriding purpose of the Act was to provide financial aid to students and their families who were

16. § 1098ee(4).
17. § 1098bb(a)(2)(A)-(B).
18. § 1098ee(2).
19. 149 CONG. REC. H2524 (daily ed. Apr. 1, 2003).
20. *Id*. (statement of Rep. Kline).
21. *Statement on Signing the Higher Education Relief Opportunities for Students Act of 2003*, AM. PRESIDENCY PROJECT (Aug. 18, 2003), https://www.presidency.ucsb.edu/documents/statement-signing-the-higher-education-relief-opportunities-for-students-act-2003.

affected by the September 11 attacks and the ongoing military operations in Iraq.

In the Act's twenty-year history, it has been invoked several times by the Department of Education, most recently as a means of "provid[ing] COVID-19 relief by pausing, for most federal student loans, a borrower's obligation to repay loan balances, interest accrual, and involuntary collections."[22] Essentially, this history reveals that the federal government has previously used the Act to provide *limited* economic relief to borrowers by pausing payments, but it has never before been used to provide *near-total* economic relief, as it would here by cancelling the existing balances of federal student loan borrowers.[23]

III. THE OLC MEMO & THE HEROES ACT

Although this brief and consistent history of limited action under the HEROES Act should have conclusively answered the question of the legality of the student loan cancellation program, the Justice Department's Office of Legal Counsel ("OLC") ignored this history in lieu of an explanation that defies the historical record. This ignorance of both the historical record and the purpose of the HEROS Act presents a solid reason to doubt that the Secretary's actions are lawful.

The OLC justifies the Secretary's use of the HEROES Act to cancel the student loan debts for a large class of borrowers on a very broad interpretation of the Act. The memo admits just as much, claiming the HEROES Act "vests the Secretary . . . with *expansive* authority to alleviate the hardship that federal student loan recipients may suffer as a result of national emergencies."[24] On the basis of this interpretation, the memo states that the Secretary can invoke the Act to "address the financial hardship arising out of the COVID-19 pandemic by reducing or canceling the principal balances of student loans for a broad class of borrowers."[25] The memo asserts that under the HEROES Act, the Secretary can "'waive or modify *any* statutory or regulatory provision applicable to' the federal student loan program, an authority that encompasses provisions applicable to the repayment of the principal balances of loans, provided certain conditions are met."[26] It

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22. EDWARD C. LIU & SEAN M. STIFF, CONG. RSCH. SERV., LSB10818, STATUTORY BASIS FOR BIDEN ADMINISTRATION STUDENT LOAN FORGIVENESS 2 (2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10818.

23. *Id*. ("ED [the Department of Education] has not previously used the HEROES Act to permanently discharge existing federal student loan balances.").

24. Memorandum from Christopher H. Schroeder, Assistant Att'y Gen. Off. of Legal Couns. to the General Counsel of the Dep't of Ed. (Aug. 23, 2022) https://www.justice.gov/olc/file/1528451/download (emphasis added).

25. *Id*. at 2.

26. *Id*. (citation omitted) (quoting 20 U.S.C. § 1098bb(a)(1)).

necessarily follows that a reduction or cancellation of student loan balances for certain individuals financially affected by the COVID-19 pandemic would "accord[] with the [HEROES] Act's requirement that the waiver or modification 'be necessary to ensure that' student loan recipients who are 'affected' by a national emergency 'are not placed in a worse position financially' with respect to their loans as a result."[27] Under this line of reasoning, the Secretary's action would necessarily comport with the requirements of the HEROES Act, most notably, § 1098bb(a)(2).

No matter how plausible the OLC's argument may be, the OLC memo is fundamentally flawed because it misstates the purpose of the drafters of the Act. For instance, the OLC concludes that an absence of floor statements rejecting the contention that the Secretary has the power to cancel student loan debts under the Act "do[es] not demonstrate that these Members [of Congress] viewed the HEROES Act as *preventing* debt cancellation as an exercise of the Secretary's discretion."[28] While it is true the legislative history does not discuss this possibility, this possibility does not present a compelling argument in favor of the Secretary's position for the simple reason that it neglects the context and the purpose of the Act.[29] As mentioned earlier, the HEROES Act was passed in the aftermath of September 11 and the Iraq War, so a worldwide pandemic was likely not on the minds of any legislators who voted in favor of the Act.[30] The floor statement of Representative Johnny Isakson, representing Georgia's sixth congressional district, is particularly instructive:

> I support the HEROES Act of 2003, which gives the Secretary the authority under title IV of the Higher Education Act to make those waivers and deferrals that are necessary to ensure that our troops whose lives have been disrupted suddenly, and now serve us in the Middle East and in Iraq, to make sure that their families are not harassed by collectors and that their loan payments are deferred until they return . . . .[31]

This floor statement is noteworthy because it concentrates wholly upon the impact of the Iraq War on the student loan payments of servicemembers and their families.[32] In sum, it appears likely that the drafters had war and

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27. *Id*. (quoting § 1098bb(a)(2)).

28. *Id*. at 17.

29. *See* Thomas A. Berry, *The Illegality of Biden's Debt Cancellation Plan*, CATO. BRIEFING PAPER, Nov. 22, 2022, at 2-3, https://www.cato.org/sites/cato.org/files/2022-11/BP143.pdf.

30. *See id*. ("As implied by the name and year of the HEROES Act, the law was enacted as a reaction to the Iraq War."); *see also* 149 CONG. REC. H2524 (daily ed. Apr. 1, 2003); *Statement on Signing the Higher Education Relief Opportunities for Students Act of 2003*, *supra* note 21.

31. 149 CONG. REC. H2524 (daily ed. Apr. 1, 2003) (statement of Rep. Isakson).

32. *Id*.

terrorism on their minds when they drafted the bill, in which case they likely envisioned a war or an event akin to 9/11 as comporting with the "national emergency" requirement.

Without any regard to the historical context, the OLC takes creative leaps to expand the reach of the Act far beyond its original intention. To demonstrate, some attention should be paid to the line of reasoning that the OLC draws from the Act's "national emergency" condition. Here, the OLC reasons that since President Trump declared the COVID-19 pandemic a "national emergency" in early 2020,[33] the statutory definition of a "national emergency" was met under the HEROES Act.[34] Therefore, "every state, the District of Columbia, and all five permanently populated U.S. territories [are] disaster areas because COVID-19 has spread or is at risk of spreading there."[35] Meaning that since COVID-19 had effects across the United States, "*any person* who resided or worked in the United States . . . during the pandemic could benefit from waivers or modifications issued under the Act . . . as could *any person* the Secretary determines suffered direct economic hardship as a direct result of the pandemic."[36] Plausibility aside, the OLC's line of reasoning is taken to its logical extreme, where *any person* whose finances were negatively impacted by the COVID-19 pandemic would qualify for relief.[37]

In addition to finding that the national emergency condition has been met, the OLC found that President Biden's nationwide debt cancellation fulfilled the goals of the HEROES Act.[38] Under the HEROES Act, the Secretary can "waive or modify any provision" as is necessary to achieve any of the objectives of the HEROES Act.[39] One of these objectives is to "'ensure' that recipients of financial assistance 'are not placed in a worse position financially in relation to that financial assistance' because of a military operation or other national emergency."[40] The OLC construes these two provisions as restricting the Secretary's authority because the Secretary is only able to issue waivers or modifications that "put loan recipients back into the financial position they would be in were it not for the national emergency—that is, to offset the borrower's harm by providing the relief that

33. *See* Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 13, 2020).

34. Memorandum from Christopher H. Schroeder, *supra* note 24, at 20; *see also* 20 U.S.C. § 1098ee(4) ("The term 'national emergency' means a national emergency declared by the President of the United States.").

35. Memorandum from Christopher H. Schroeder, *supra* note 24, at 20.

36. *Id*. (emphasis added).

37. *See id*.

38. *Id*. at 23-24.

39. 20 U.S.C. § 1098bb(a)(2); *see also* Memorandum from Christopher H. Schroeder, *supra* note 24, at 10.

40. Memorandum from Christopher H. Schroeder, *supra* note 24, at 13 (quoting 20 U.S.C. §1098bb(a)(1)-(2)).

may be necessary to ensure the borrower is no 'worse' off because of the emergency."[41] This means the Secretary can only waive or modify student loans to offset "that portion of the harm that has a 'relation to' the borrower's [financial] assistance."[42] Accordingly, the OLC posits that "reducing or canceling the principal balances of student loans, including for a broad class of borrowers who the Secretary determines suffered financial harm because of COVID-19, could be a permissible response to the COVID-19 pandemic" because it would put those borrowers back in the financial position they would be in were it not for the COVID-19 pandemic.[43]

One final point worth emphasizing is that law makers intended the HEROES Act to have a limited range of uses, making it difficult to fathom that *any* type of student loan borrower would qualify under the program. To demonstrate, the Act is very specific about the classes of individuals it targeted, which is primarily service members and their families.[44] Notably absent from floor discussions in the U.S. House of Representatives are mentions of non-military student loan borrowers.[45] The Act was drafted with military members and their families in mind, so it is quite hard to fathom that the drafters intended the Act to apply to any student loan borrower who currently makes less than $125,000.[46] Given this strong focus on service members, it is difficult to accept the OLC's conclusion that debt cancellation for non-service members fits within the parameters of the Act.

Since the OLC's argument is unsupported by the legislative history and the greater historical context, the contention that the Secretary has the authority to pursue debt cancellation should be taken with a grain of salt. If, however, one is to challenge the Secretary's argument in the courts, there are two options: *Chevron* and the major questions doctrine.

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41. *Id*. at 21.

42. *Id*.

43. *Id*. at 24-25; *see also* LIU & STIFF, *supra* note 22, at 3 ("The elimination or reduction of a borrower's obligation to repay student loan debt, OLC reasoned, might help achieve this objective.").

44. *See* Berry, *supra* note 29, at 2-3 ("As the OLC memo acknowledges, the discussion of the HEROES Act in Congress consistently focused on giving the secretary the power to forbear loans and defer payments for *service members*, and to ensure that *service members* did not lose eligibility for any loan forgiveness programs that might otherwise require making consecutive minimum payments.") (emphasis added); *see also* Memorandum from Christopher H. Schroeder, *supra* note 24, at 17.

45. *See, e.g.*, 149 CONG. REC. H2524 (daily ed. Apr. 1, 2003) ("[T]he HEROES Act will protect recipients of student financial assistance from further financial difficulty generated *when they are called to serve* . . . .") (statement of Rep. Kline) (emphasis added).

46. *See, e.g.*, 149 CONG. REC. H2524 (daily ed. April 1, 2003) ("None of us believe that our *active duty soldiers* should be in a position where they are going to have to make payments on their student loans while in fact they are not here.") (statement of Rep. Boehner) (emphasis added).

IV. THE SECRETARY OF EDUCATION'S INTERPRETATION OF THE HEROES ACT UNDER CHEVRON

In the landmark case of *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*,[47] the Supreme Court laid down the framework under which the statutory construction of administrative agencies is given deference.[48] This form of deference is aptly named "*Chevron* deference."[49] The following section will accordingly analyze whether the Secretary of Education's interpretation of the HEROES Act is entitled to *Chevron* deference.

A. REQUIREMENTS FOR *CHEVRON* DEFERENCE

The *Chevron* doctrine applies when a court reviews an administrative agency's interpretation of a statute that the agency administers.[50] There must be a direct conflict between an administrative agency and a third party over the proper interpretation of an ambiguous statute that the agency operates under.[51] An agency is only entitled to *Chevron* deference "when [(1)] it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and [(2)] that the agency interpretation claiming deference was promulgated in the exercise of that authority."[52] In sum, under *Chevron*, the court will employ a two-step process when a court is confronted with a statutory ambiguity concerning an administrative agency's authority.[53]

At step one, the reviewing court must determine "whether Congress has directly spoken to the precise question at issue."[54] In other words, the court must determine whether Congress intended to delegate lawmaking authority to the agency.[55] A court can ascertain Congress' intent by "employing [the] traditional tools of statutory interpretation" to the statute in question.[56] At this

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47. 467 U.S. 837 (1984).

48. *Chevron*, 467 U.S. at 844.

49. *See* United States v. Mead Corp., 533 U.S. 218, 226 (2001) (discussing the limits of *Chevron* deference).

50. *Chevron*, 467 U.S. at 842.

51. Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 609 (2014) ("Chevron instructs courts how to resolve statutory ambiguity . . . .").

52. *Mead Corp.*, 533 U.S. at 226-27.

53. *Chevron*, 467 U.S. at 842 ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions.").

54. *Id.*

55. *Id.* at 843-44.

56. *Id.* at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."); *Mead*, 533 U.S. at 227 ("Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.").

step, the court can use legislative history,[57] but more often than not, courts use "normative canons" to interpret the statute.[58] If the court, using these tools, finds that "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[59] This means that the agency's interpretation of the statute must be discarded if it is inconsistent with Congress' intent.[60] "If, however, the court determines that Congress has not directly addressed the precise question at issue," then the court proceeds to the second step.[61]

A court proceeds to step two only when "the statute is silent or ambiguous with respect to the specific issue," and at this step, the reviewing court must determine "whether the agency's answer is based on a *permissible* construction of the statute."[62] An agency's construction of a statute qualifies as a "permissible construction" if the interpretation of the statute in the context of the statutory scheme is "a reasonable policy choice for the agency to make."[63] To simplify, an agency's construction of a statute will be entitled to *Chevron* deference if it manages to fit within the reasonable bounds of the statutory scheme.[64]

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57. The Eighth Circuit uses legislative history as one tool of statutory interpretation. Other circuits, however, advise against using legislative history as a guide, or they give the legislative history considerably little weight in their analysis. *Compare* Mayo Clinic v. United States, 997 F.3d 789, 794 (8th Cir. 2021) ("To determine whether the statute the agency interpreted is unambiguous, we turn to the statutory history and other 'traditional tools' of statutory construction."), *with* United States v. Geiser, 527 F.3d 288, 294 (3d Cir. 2008) ("[L]egislative history should not be considered at *Chevron* step one."), *and* Nat'l Elec. Mfrs. Ass'n v. U.S. Dep't of Energy, 654 F.3d 496, 505 (4th Cir. 2011) ("[I]n consulting legislative history at step one of *Chevron,* we have utilized such history only for limited purposes, and only after exhausting more reliable tools of construction.").

58. *See* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 66 (2008) ("[C]ourts recognize that they are often institutionally ill suited to balance policy goals against extrastatutory norms. They have thus developed 'normative' canons of construction, like those against reading statutes to raise constitutional issues, or to preempt state tort protections, or to affect tribal power detrimentally.").

59. *Chevron*, 467 U.S. at 842-43.

60. *Id.* at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

61. *Id.* at 843 ("If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.") (footnote omitted).

62. *Id.* (emphasis added).

63. *Id.* at 845.

64. *See, e.g.,* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985) (entitling the agency construction to deference because it was reasonable and not in conflict with expressed intent of Congress). *But see* MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 229 (1994) (denying deference because the interpretation "goes beyond the meaning that the statute can bear").

B. DOES THE SECRETARY'S INTERPRETATION MERIT DEFERENCE UNDER *CHEVRON*?

Using the two-step analytical framework from *Chevron*, this note will now examine whether the Secretary's interpretation of the HEROES Act is entitled to deference.

1. Chevron Step One: Did Congress Intend to Delegate the Secretary with Authority to Cancel Student Loan Debt?

Proceeding to step one of *Chevron*, it appears Congress intended to delegate substantial authority to the Secretary of Education over student loan management during a national emergency, although the extent of the Secretary's power to do so is limited. The text of the primary provision in controversy provides that:

> the Secretary of Education . . . may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the Act as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide the waivers or modifications authorized by paragraph (2).[65]

The following subsection, "paragraph (2)," provides that the Secretary's waiver or modification must also be "necessary to ensure that" several objectives are met.[66] One primary objective is to ensure that affected students receiving financial aid "are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals."[67] As previously stated, "affected individuals" are (1) those "serving on active duty during a war" or national emergency; (2) "performing qualifying National Guard duty during a war" or national emergency; (3) are residing in or "employed in an area declared a disaster area . . . in connection with a national emergency;" or (4) have "suffered direct economic hardship as a direct result of a war" or national emergency.[68] The sheer number of statutory requirements plainly shows that Congress did not intend to give the Secretary of Education a blank check to alleviate the hardships on all existing student loan borrowers.

Aside from these statutory provisions, these definitions also provide insight into Congress' intent to delegate authority to the Secretary to manage student loans. Under the HEROES Act, a "national emergency" is a condition

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65. 20 U.S.C. § 1098bb(a)(1) (emphasis added).
66. § 1098bb(a)(2).
67. § 1098bb(a)(2)(A).
68. § 1098ee(2)(A)—(D).

triggered by "a national emergency declar[ation] by the President of the United States."[69] This condition was triggered on March 13, 2020, when then-President Trump issued a proclamation declaring that "the COVID-19 outbreak in the United States constitute[d] a national emergency."[70] While it is unlikely that the drafters of the HEROES Act envisioned a worldwide pandemic as a qualifying "national emergency," the broad statutory language does not foreclose that possibility, either.[71]

In sum, it appears that Congress intended to delegate to the Secretary of Education the authority to make changes to the student loan program during national emergencies. However, this does not end the *Chevron* inquiry because it is ambiguous as to whether Congress intended to delegate the Secretary the authority to cancel student loan debt. Since this question remains open, it is worthwhile to proceed to the second step in *Chevron*.

2. Chevron Step Two: Is the Secretary's Construction of the HEROES Act a "Permissible" Construction?

Applying step two of *Chevron*, whether the Secretary of Education's construction of the HEROES Act is a permissible construction must be determined. As mentioned earlier, a "permissible" construction is entitled to *Chevron* deference if it is a reasonable interpretation under the statutory scheme and consistent with Congress' intent.[72] Looking at the statutory language and the legislative history, the Secretary's interpretation is not a reasonable interpretation.

The Secretary of Education's interpretation of "modify" does not merit *Chevron* deference because it exceeds statutory limits. The Secretary's announcement of the debt cancellation in the Federal Register states:

> Pursuant to the HEROES Act, . . . the Secretary *modifies* the provisions of: 20 U.S.C. 1087, which applies to the Direct Loan Program . . . to provide that, . . . the Department will *discharge* the balance of a borrower's eligible loans up to a maximum of: (a) $20,000 for borrowers who received a Pell Grant and had an Adjusted Gross Income (AGI) below $125,000 for an individual taxpayer . . . or (b) $10,000 for borrowers who did not receive a Pell

69. § 1098ee(4).

70. Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 18, 2020).

71. The historical context indicates that the drafters considered a "national emergency" to be an event caused by terrorism or overseas military operations. *See* 149 CONG. REC. H2524 (daily ed. Apr. 1, 2003).

72. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 845 (1984) (stating a court should not discard an agency interpretation that accommodates conflicting policies "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.").

> Grant and had an AGI on a Federal tax return below $125,000 if filed as an individual . . . in either the 2020 or 2021 Federal tax year.[73]

One of Merriam-Webster Dictionary's definitions of "modify" is "to make minor changes in."[74] Here, the Secretary "modified" the student loan programs by "discharging" student loan debt for qualifying individuals. The use of the term "modify" cannot support the action to "discharge" student loan debt, however, because the degree of change exceeds reasonable bounds.[75] To demonstrate, "discharge" means "to release from an obligation."[76] It is impossible "to make a minor change" in the student loan programs by releasing student loan borrowers from their obligation to pay back those loans. Releasing these borrowers from their obligation to repay their loans is tantamount to a *major* change in policy, meaning that the Secretary's use of the term "modify" is not reasonable. This conclusion is also supported by Supreme Court caselaw.

In *MCI Telecommunications. Corp. v. AT&T Co.*,[77] the Court established the rule that an agency's interpretation of a statute is not reasonable when the interpretation "goes beyond the meaning that the statute can bear."[78] Under § 203 of the Communications Act,[79] communications common carriers are required to file tariffs with the FCC, and the FCC has the authority to "modify" any requirement of § 203.[80] The Communications Act's tariff-filing requirement was established to prevent common carriers from setting unreasonable and discriminatory charges.[81] The FCC then "modified" § 203 by *eliminating* the tariff-filing requirement for all nondominant carriers.[82] The Court held that the FCC's interpretation of "modify" was unreasonable.[83] The Court reasoned that "modify" "connotes moderate

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73. Federal Student Aid Programs, 87 Fed. Reg. 61512, 61514 (Oct. 12, 2022) (emphasis added).

74. *Modify*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/modify (last visited Feb. 4, 2023).

75. This was the conclusion that former Secretary of Education Betsy DeVos arrived at when she was considering invoking the HEROES Act to cancel student loan debt during the COVID-19 pandemic. *See* Memorandum from Reed Rubinstein, Gen. Couns., U.S. Dep't of Educ., to Betsy DeVos, Sec'y of Educ. 6 (Jan. 12, 2021), https://bit.ly/3LBA36n ("[T]he term 'modify' does not authorize the Department to make major changes to the repayment provisions of loans made pursuant to Title IV.").

76. *Discharge*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/discharge (last visited Feb. 4, 2023).

77. 512 U.S. 218 (1994).

78. *MCI Telecomms.*, 512 U.S. at 229.

79. Communications Act of 1934, 47 U.S.C. § 203.

80. *Id.* § 203(a)-(b)*; see also MCI*, 512 U.S. at 221.

81. *MCI*, 512 U.S. at 229-30.

82. *Id.* at 221.

83. *Id.* at 234.

change," meaning the FCC could only make moderate changes to the tariff-filing requirement.[84] Pursuing this line of reasoning, the Court determined the FCC could not "modify" the tariff-filing requirements by eliminating them because the elimination of a significant requirement meant to protect consumers is far more excessive than a mere "moderate change."[85] Therefore, the Court held that FCC's interpretation was unreasonable because the elimination of tariff-filing requirements exceeded the bounds of a "moderate change."[86]

Similarly here, the Secretary's interpretation of "modify" under the HEROES Act exceeds the bounds of a "moderate change" to the statute. Like the FCC, which has the authority to "modify" provisions of § 203 of the Communications Act, the Secretary has the authority to "modify" the statutory provisions of the student financial aid programs under the HEROES Act.[87] Also similar to the FCC, which exceeded its authority to "modify" § 203 by eliminating the tariff-filing requirements for non-dominant common carriers, the Secretary exceeded his authority to "modify" the student financial aid programs because, like the FCC's elimination of the tariff-filing requirements, the Secretary's discharge of student loan debt amounts to far more than a "moderate change" in the statutory program.[88] Because the Court in *MCI* found the FCC's elimination of tariff-filing requirements to amount to far more than a mere "modification" of the statute, a reviewing court should also find that the Secretary's discharge of student loan debt amounts to far more than a mere "modification" of the student loan programs.[89]

Since the Court held the FCC's interpretation amounted to far more than a mere "modification" of the statute, and thereby did not merit *Chevron* deference, a reviewing court should also find the Secretary's interpretation amounts to far more than a mere "modification" of the student loan programs, and thereby does not merit *Chevron* deference, either.

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84. *Id*. at 228-29.

85. *Id*. at 228-30.

86. *Id*. at 231-34.

87. *Compare* 47 U.S.C. § 203(b)(2) ("The Commission may . . . *modify* any requirement made by or under the authority of this section . . . .") (emphasis added), *with* 20 U.S.C. § 1098bb(a)(1) ("[T]he Secretary . . . may waive or *modify* any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the Act . . . .") (emphasis added).

88. *Compare MCI*, 512 U.S. at 231 ("[W]e think an elimination of the crucial provision of the statute for 40% of a major sector of the industry is much too extensive to be considered a 'modification.'"), *with* Brown v. U.S. Dep't of Educ., 114 Fed. R. Serv. 3d (West) 89 at *13 (N.D. Tex. 2022) ("[T]he HEROES Act does not mention loan forgiveness . . . . The Act allows the Secretary only to 'waive or modify' provisions of title IV. The Secretary then uses that provision to rewrite title IV portions to provide for loan forgiveness."), *cert. granted*, 143 S. Ct. 541 (2022). *See also* Memorandum from Reed Rubinstein to Betsy DeVos, *supra* note 75, at 6 ("Modifying or waiving repayment amounts or materially altering loan terms would hardly be changing Title IV 'moderately or in minor fashion.'").

89. *Compare MCI*, 512 U.S. at 231, *with Brown*, 114 Fed. R. Serv. 3d (West) at *13.

V. THE MAJOR-QUESTIONS DOCTRINE

The sheer size of student loan debt should clearly implicate the major-questions doctrine. The major-questions doctrine is a long-gestating body of caselaw that applies the separation of powers principle to rein in administrative agencies "asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[90] At its core, the major-questions doctrine rests on an understanding that questions of national significance are best resolved through the legislative process, as opposed to the administrative process.[91] Accordingly, the doctrine presumes that "Congress intends to make major policy decisions itself, not leave those decisions to agencies,"[92] because, unlike administrative agencies, Congress is directly accountable to the people.[93] It necessarily follows that the major questions doctrine becomes a consideration in the most "'extraordinary cases' . . . in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[94]

The major-questions doctrine applies when an agency makes decisions of "vast economic and political significance."[95] An agency's action is of vast economic significance when the "agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy.'"[96] Additionally, an agency's action can be of vast economic significance if the agency action requires "billions of dollars in spending."[97] An agency action can be politically significant if Congress has "'engaged in robust debates' over bills authorizing something like the agency's action."[98] Moreover, an agency's action can be politically significant if Congress has "considered and rejected" bills that would have authorized the agency's

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90. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

91. *See* Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2048 (2018) ("Interpreted in its best light, the doctrine aims to protect and to strengthen the connection between the people and governmental action by presuming that a popular and deliberative process settles major questions of policy.").

92. *West Virginia*, 142 S. Ct. at 2609 (quoting United States Telecomm. Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting)).

93. Emerson, *supra* note 91, at 2046 ("The major questions doctrine aims to protect this legislative jurisdiction over the choice of political values. It does so by assuming Congress does not leave important value choices to agencies.").

94. *West Virginia*, 142 S. Ct. at 2608 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-60 (2000)).

95. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (citations omitted).

96. *Id*. (quoting *Brown & Williamson Tobacco Corp*., 529 U.S. at 159).

97. Brown v. U.S. Dep't of Educ., 114 Fed. R. Serv. 3d (West) 89 at *11 (N.D. Tex. 2022) (quoting King v. Burwell, 576 U.S. 473, 485 (2015)), *cert. granted*, 143 S. Ct. 541 (2022).

98. *Id*. at *12 (quoting *West Virginia*, 142 S. Ct. at 2620-21 (Gorsuch, J., concurring)).

action, because that "may be a sign that an agency is attempting to work around the legislative process to resolve for itself a question of great political significance."[99] These features are readily apparent in the student loan relief plan.

The student loan relief plan easily qualifies as an agency action of vast economic and political significance because of the program's massive economic toll and the many prior failed attempts at passing similar legislation. In *Alabama Ass'n of Realtors v. Department of Health & Human Services*,[100] the Supreme Court reasoned that a nationwide eviction moratorium imposed by the Centers for Disease Control & Prevention, which had an economic impact of $50 billion, amounted to a cost of vast economic significance.[101] By comparison, the student loan debt relief plan is estimated to cost more than $400 billion; since this figure dwarfs the $50 billion cost in *Alabama Ass'n of Realtors*, the plan is clearly of vast economic significance.[102] Additionally, the student loan debt relief plan is politically significant. Congress previously considered and rejected numerous bills cancelling student loan debts. In 2019, Senator Elizabeth Warren introduced a bill that would forgive $50,000 in student loan debt to individuals who make less than $100,000.[103] Likewise, in 2021, "Representative Al Lawson introduced a bill to forgive the outstanding loan balance of all borrowers who make under $100,000 individually or $200,000 if married and filing taxes jointly."[104] Both bills, however, failed to pass.[105] Given that Congress considered and rejected both of these bills that would have cancelled student loan debts for millions of borrowers, the student loan debt relief plan amounts to a politically significant action.

Agency actions of vast economic and political significance present difficult questions for the courts, in part because these types of actions implicate the separation of powers doctrine. The courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[106] The courts are generally hesitant to determine

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99. *Id.* (quoting *West Virginia*, 142 S. Ct. at 2620-21 (Gorsuch, J., concurring)).

100. 141 S. Ct. 2485 (2021).

101. *Id.* at 2489 ("We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.' That is exactly the kind of power that the CDC claims here.") (citations omitted); *Brown*, 114 Fed. R. Serv. 3d (West) at *11.

102. *Brown*, 114 Fed. R. Serv. 3d (West) at *11 ("Because the Program will cost more than $400 billion—over . . . 20 times more than the amount in *Alabama Ass'n of Realtors*—it has vast economic significance.").

103. Student Loan Debt Relief Act of 2019, S. 2235, 116th Cong. (2019).

104. *Brown*, 114 Fed. R. Serv. 3d (West) at *1 (citing Income-Driven Student Loan Forgiveness Act, H.R. 2034, 117th Cong. (2021)).

105. *Id.* at *1.

106. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

that Congress has intended to implicitly delegate to an agency the powers to make decisions of vast economic and political significance. Courts generally hesitate to find that agencies have this far-reaching regulatory authority because "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'"[107] Accordingly, a court will carefully examine the agency's actions under statute, and an agency cannot explain away such a decision on a "merely plausible textual basis," but "the agency instead must point to 'clear congressional authorization' for the power it claims."[108]

In the case of student loan debt relief, the Secretary of Education lacks clear congressional authorization for its action. In *Brown v. U.S. Department of Education*,[109] the district court rejected the Secretary's contention that the HEROES Act provided clear congressional authorization for student loan cancellation on three grounds.[110]

First, the Department of Education's enabling statute does not confer the unfettered degree of discretion that the Secretary claims to possess.[111] To this point, the court mentions that the HEROES Act does not contain any mention of loan forgiveness.[112] Under the HEROES Act, the Secretary can only "waive or modify" certain provisions of the Higher Education Act, to provide a limited degree of loan forgiveness.[113] Accordingly, the HEROES Act cannot be used by the Secretary as an "open book to which the agency may add pages and change the plot line."[114] The court reasoned that Congress cannot have provided clear congressional authorization for the student loan cancellation program under the HEROES Act because, were it to do so, it would have specifically said so.[115]

Second, the Department of Education's "national emergency" lacks a connection with the student loan cancellation program.[116] The district court took issue with the use of the COVID-19 pandemic as the justification for invoking the HEROES Act because the Secretary did not demonstrate that

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107. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (quoting Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 468 (2001)).

108. *Id.* (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

109. 114 Fed. R. Serv. 3d (West) 89, at *13 (N.D. Tex. 2022).

110. *Brown*, 114 Fed. R. Serv. 3d (West) at *12.

111. *See id.* at *32.

112. *Id.* at *31.

113. *Id.*

114. *Id.* at *31-32 (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022)).

115. *Id.* at *31; *see also* Memorandum from Reed Rubinstein to Betsy DeVos, *supra* note 75, at 7 ("Congress of course is free to amend the HEA and grant the Secretary this authority at any time. But for now, Congress has made explicit statutory requirements for the cancellation, compromise, discharge, or forgiveness of student loan principal balances . . . and they must be observed.").

116. *Brown*, 114 Fed. R. Serv. 3d (West) at *32-33.

the program was "*necessary* in connection with" the COVID-19 pandemic.[117] The district court specifically was concerned with the use of the COVID-19 pandemic as a justification because of the time lapse: COVID-19 was declared a national emergency in early 2020 and it was later declared to be "over" weeks before the student loan cancellation program was announced.[118]

Third, the district court pointed to Department of Education's past interpretations of the HEROES Act to provide evidence to contradict the Secretary's claim of clear congressional authorization.[119] During the Trump Administration, the Department of Education also considered using the HEROES Act to cancel student loan debt but determined the agency lacked the clear congressional authorization to do so.[120] The general counsel to then-Secretary Betsy DeVos determined that, while the Department of Education had previously used the HEROES Act to "alter or extend certain HEA provisions in certain circumstances, including a National Emergency," the Department of Education has *never* previously relied upon the HEROES Act "for the blanket or mass cancellation, compromise, discharge, or forgiveness of student loan principal balances, and/or the material change of repayment amounts or terms."[121] Finding the agency's past use of the HEROES Act to be highly relevant to the matter at hand, the district court reasoned that the limited manner in which the HEROES Act was used by the Department of Education in the past provided a strong reason to suspect that Congress did not provide clear congressional authorization for the program.[122]

VI. CONCLUSION

Although the legal status of the debt cancellation program remains unresolved,[123] the program is unlikely to be upheld by the Supreme Court, for at least three reasons. First, the historical context behind the HEROES Act casts doubt on the Secretary's legal arguments.[124] Second, the Secretary's interpretation of a provision of the HEROES Act is unreasonable, and therefore not entitled to *Chevron* deference.[125] Third, the enormous scale

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117. *Id*. (quoting 20 U.S.C. § 1098bb(a)(1)) (emphasis added).

118. *Id*. at *33.

119. *See id*. at *33-34.

120. *See* Memorandum from Reed Rubinstein to Betsy DeVos, *supra* note 75, at 8.

121. *Id*. at 6.

122. *Brown*, 114 Fed. R. Serv. 3d (West) at *34.

123. *See* U.S. Dep't of Educ. v. Brown, 143 S. Ct. 541 (2022) (granting cert). A final decision is likely to be rendered sometime in 2023.

124. *See supra* Parts II. THE HEROES ACT: HISTORY AND PURPOSE and III. THE OLC MEMO & THE HEROES ACT.

125. *See supra* Part IV.B.2. CHEVRON STEP TWO: IS THE SECRETARY'S CONSTRUCTION OF THE HEROES ACT A "PERMISSIBLE" CONSTRUCTION?

of the debt cancellation program implicates the major questions doctrine, and there is no indication that Congress provided clear authorization for the program.[126] Any one of these reasons alone should cast doubt on the future viability of the program, and each of them provides a compelling reason to set the program aside.

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126. *See supra* Part V. THE MAJOR-QUESTIONS DOCTRINE.

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