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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MYRA BROWN AND) CASE NO. 4:22-CV-00908-P
ALEXANDER TAYLOR)
)
) FORT WORTH, TEXAS
vs.)
) OCTOBER 25, 2022
U.S. DEPARTMENT OF)
EDUCATION, ET AL) 9:03 A.M.

VOLUME 1
TRANSCRIPT OF TEMPORARY INJUNCTION
BEFORE THE HONORABLE MARK T. PITTMAN
UNITED STATES DISTRICT COURT JUDGE

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P R O C E E D I N G S

(October 25, 2022, 9:03 a.m.)

THE COURT: We're here in Civil Action Number 4:22-CV-908, Myra Brown and Alexander Taylor vs. the United States Department of Education and Miguel Cardona as Secretary of Education.

This matter comes today on a couple of different things. We have a motion for preliminary injunction that the plaintiffs have filed. We also have a motion to dismiss for lack of jurisdiction filed on behalf of the United States entities.

I know that my order did not specify that we are going to be hearing the jurisdictional motion, but I think it would be very helpful to me if we could hear argument on the standing issue.

Does anyone have an objection with going forward on that?

MR. CONNOLLY: No, Your Honor.

THE COURT: All right.

Is the Government prepared?

MR. NETTER: Yes.

THE COURT: Okay. Then let's make some appearances on the record, and then we'll go from there. Beginning with counsel for the plaintiffs, who do we have?

MR. CONNOLLY: Good morning, Your Honor. Michael

1 Connolly for the plaintiffs. With me is Matt Pociask and
2 Steven Begakis.

3 *THE COURT:* Thank you, gentlemen.

4 And for the Government?

5 *MR. NETTER:* Good morning, Your Honor. Brian Netter
6 for the defendant. I'm joined by Kate Talmor and Samuel Rebo.

7 *THE COURT:* One more time, I was writing.

8 Mr. Netter, who are the other attorneys?

9 *MR. NETTER:* This is Kate Talmor.

10 *THE COURT:* Okay.

11 *MR. NETTER:* And Samuel Rebo.

12 *THE COURT:* Is this going to be all legal argument
13 today or are we expecting any witnesses?

14 *MR. NETTER:* No witnesses from the United States.

15 *MR. CONNOLLY:* No witnesses from us either.

16 *THE COURT:* Okay. And that's good, because I
17 probably didn't have time to hear a lot from witnesses today.
18 And I do apologize for sending out the order, not only
19 requiring the quick responses from the United States, but also
20 issuing time deadlines. We are extremely busy. I don't think
21 I have a date where I'm not in court between now and
22 Christmas, between trials and hearings.

23 We have the -- at least anecdotally, we have the
24 busiest division in the entire country with only two active
25 judges, based on population. And it's only getting busier and

1 busier, unfortunately. And it's very hard sometimes to keep
2 up. So, I do have to enforce strict time deadlines. But I'm
3 assuming that we're not going to be here for five hours today.

4 *MR. NETTER:* (Shakes head)

5 *THE COURT:* Well, that's good.

6 Some questions that I want you to bear in mind while
7 we make our argument today. Some of the things that I'm
8 concerned about as a judge are, number one, what's the status
9 of some of the other cases that are out there challenging the
10 student loan forgiveness program. Obviously I'm familiar with
11 the Eighth Circuit case. I'd like for you-all to address that
12 and tell me what the status is. At least, from what I've been
13 able to determine, briefing has been submitted.

14 I know there are a few other cases out there, I
15 don't know what the status of those are. It's my
16 understanding that this may be the only case that doesn't
17 involve some governmental entity suing a Federal Government
18 entity. I'd like for you-all to be able to enlighten me on
19 that.

20 And finally, I think one of the things that I do
21 have a lot of questions with that would be helpful for me, I
22 know you have your arguments organized, but the -- the
23 standing issue and whether the two individuals we have here,
24 Ms. Brown and Mr. Taylor, with regards to obtaining a loan
25 from a private entity, in the case of Ms. Brown, is enough to

1 get you there, as far as standing and whether or not
2 qualifying for the Pell Grant gets you there, in the case of
3 Mr. Taylor. I may have those confused. But that's going to
4 be an area that I would like for you to pay some particular
5 focus on.

6 And then, obviously, we have the legal issues
7 related to the HEROES Act and the factors under the
8 preliminary injunction. But those are some of the things that
9 are bouncing around in my head.

10 Finally, I think I would like to know what sort of
11 time crunch or time deadline that I am on to get out a
12 decision one way or another. My understanding, and I don't
13 know this to be true, this is also purely anecdotal, is that
14 although the time deadline has passed to sign up for the loan
15 forgiveness program, the United States does not intend on
16 acting on any of those applications until sometime in
17 November, or maybe December, but I don't know. This is just
18 me trying to do my own research and that's never very good.

19 How would you-all like to organize it? Should I
20 begin with plaintiffs or should I begin with the United States
21 to address the jurisdictional motion that it filed?

22 In my mind, I sort of think that it's best for the
23 plaintiffs to go first to address both of those, but I'll --
24 if you-all are able to talk and get along, we can separate it.
25 We have plenty of time today, and you can address it how you

1 want.

2 Counsel, I know you want to speak. Go ahead,
3 Mr. Connolly.

4 *MR. CONNOLLY:* That is fine with us, for the
5 plaintiffs to go first.

6 *THE COURT:* What's the thoughts of the United
7 States?

8 *MR. NETTER:* We're fine with that, Your Honor.

9 *THE COURT:* Okay. Well, then, I'll begin with you,
10 Mr. Connolly. And I will do my best not to interrupt with too
11 many questions.

12 *MR. CONNOLLY:* And I'm happy -- happy to answer
13 anything, any questions you may have.

14 *THE COURT:* And I'll just warn you, this is a very,
15 very old courtroom and we have terrible acoustics. If you
16 can't hear me, just waive. And Monica will be sure and
17 admonish you if she can't hear. So, be sure to speak into
18 your microphone.

19 *MR. CONNOLLY:* Thank you. I'll make sure to do
20 that.

21 *THE COURT:* All right. Go ahead.

22 *MR. CONNOLLY:* And I'll make sure to address, during
23 this argument, the four -- the four points that you raised.

24 *THE COURT:* All right.

25 And you can weave it in and out of your argument in

1 no particular order. But those -- it behooves me to give you
2 some of the things that I'm thinking of and trying to work out
3 in my mind.

4 *MR. CONNOLLY:* Excellent.

5 *THE COURT:* Go ahead.

6 *MR. CONNOLLY:* Thank you.

7 May it please the Court. Michael Connolly for the
8 plaintiffs, Myra Brown and Alexander Taylor.

9 The Department of Education is asking this Court to
10 make two truly extraordinary findings. First, the Department
11 wants this Court to believe that Congress authorized the
12 Secretary of Education to cancel \$400 billion in student loan
13 debt through the HEROES Act, which was a tiny and
14 uncontroversial piece of legislation that was designed
15 primarily to help soldiers defer their loan payments while
16 fighting abroad.

17 Second, the Department tells this Court that
18 Congress not only gave the Department this extraordinary
19 power, but it wanted one person, the Secretary of Education,
20 to create this debt forgiveness program with no public
21 involvement at all.

22 These two arguments contradict everything the
23 Supreme Court has told us about the separation of powers and
24 about agency authority. Under the major questions doctrine,
25 agencies can take these types of extraordinary actions --

1 cannot take these types of extraordinary actions without clear
2 Congressional authorization. Moreover, the baseline
3 presumption is that agency action, especially those with
4 enormous significance, must go through the notice and comment
5 process so that the public can be involved in these important
6 decisions.

7 The Court should grant our motion for a preliminary
8 injunction and stop this enormous abuse of executive
9 authority.

10 Now, I'd like to start first with standing. What
11 Fifth Circuit and Supreme Court precedent tells us is that
12 there are two requirements here. First, when the plaintiff is
13 alleging a procedural violation, it has to show that it has --
14 that the plaintiff has concrete interest at stake. And
15 second, the plaintiff needs to show that if he receives the
16 relief from the Court that he is asking for, that there is
17 some possibility that the agency will change its decision.

18 The Fifth Circuit, in *Texas vs. EEOC*, explicitly
19 called these, lighter requirements, in the standing context,
20 when it comes to procedural injuries. Here we meet both of
21 those requirements.

22 First, on the concrete interest. The Department of
23 Education is pursuing a program of debt forgiveness. My
24 clients both have student loans and they are being -- their
25 student debt is not being forgiven under the program. So they

1 have concrete interests at stake. These are not individuals,
2 you know, a random person from the public who is upset with
3 what the Department is doing. These are individuals who have
4 student loans, and so they have concrete interests at stake.

5 This is no different from, for example, the Fifth
6 Circuit's decision in *Ecosystem*, where a company was denied,
7 because of procedural violation, the opportunity to pursue a
8 benefit. It's very similar to *Paulsen* in the Ninth Circuit,
9 which is when -- because of a procedural violation, prisoners
10 were ineligible to receive early release. So, in both of
11 those cases, just like here, the plaintiffs had concrete
12 interests and they were made ineligible because of the --
13 because of the -- because of the agency's actions.

14 And what the Supreme Court also tells us, is the
15 fact that lots of others have this err -- or sorry, have this
16 injury, because there are millions of others like Ms. Brown,
17 for example, who has private loans that are not being
18 forgiven. That is not a relevant inquiry for standing,
19 because, as the Supreme Court said in *Massachusetts* and it
20 said in *Spokeo*, if that were the case, the fact that others
21 have this injury, then that would mean that Government actions
22 that are unlawful could never be challenged in court because
23 it affects lots of other people.

24 So, on the first part, the concrete interest, we
25 have standing. My clients have student debt relief -- or have

1 student debts that are not being forgiven.

2 Second, on the second inquiry. Is there some
3 possibility, and it's -- that's a super low standard, as the
4 Fifth Circuit would say, is there some possibility that the
5 Department of Education will change its decision if this -- if
6 they go through notice and comment. And there unquestionably
7 is. And, in fact, in their opposition, the Department of
8 Education does not even make an argument that there is not any
9 possibility that they will change their decision. And they --
10 they don't make that argument for good reason.

11 **THE COURT:** There seems to be a line of cases, and
12 an *EEOC* case out of the Fifth Circuit, you mentioned this,
13 seems to suggest that when it comes to standing analysis for
14 preliminary injunctive relief, like we have here, it's
15 incumbent on the Court to assume that it has jurisdiction and
16 assume that the claim that the plaintiff is bringing on the
17 merits is correct. Is that -- am I correctly stating the law?

18 **MR. CONNOLLY:** That is correct. The Court -- the
19 Court should assume that we are correct on the merits that our
20 procedural rights were violated.

21 **THE COURT:** All right. Go ahead.

22 **MR. CONNOLLY:** So, there is, unquestionably, some
23 possibility that if this goes through notice and comment, that
24 the Department will change its decision and adopt a program
25 that actually helps my clients.

1 **THE COURT:** Well, let me ask you a question. And
2 please don't state anything that you think might -- I don't
3 know, are you-all representing any of the other groups?

4 **MR. CONNOLLY:** No.

5 **THE COURT:** Okay. What would be the difference in
6 your clients versus, let's say, a state attorney general. And
7 we've seen a plethora of cases coming out recently saying that
8 state actors don't have standing to bring these types of
9 claims. What makes your clients unique?

10 Wouldn't the argument be, they don't have Federal
11 student loans, therefore, they don't have a dog in the hunt?

12 **MR. CONNOLLY:** Yeah. What you would have to look
13 at, is you'd have to look at the case that the states brought
14 and see if they have any concrete interests at stake. And,
15 you know, my understanding from the states' opinion -- the
16 states' action that was filed in the Eastern District of
17 Missouri and is on appeal in the Eighth Circuit, is that they
18 found that they have no standing, the states have no injury.

19 This is different. Our plaintiffs have concrete
20 interests at stake. They are individuals who are being left
21 out of the loan forgiveness process. And so, they clearly
22 have concrete interests at stake. And you don't have -- this
23 Court doesn't have to reach all of the complicated issues that
24 were going on in *Nebraska vs. Biden*, those are -- those are
25 different. Here we have -- we have -- we do have concrete

1 interests at stake, because they have student loans that are
2 not being forgiven under -- under the program the Department
3 has adopted.

4 And on -- on whether there's some possibility that
5 the Department will change its mind, there's -- not only is
6 there some possibility, there's a strong possibility. First,
7 the Department clearly believes, and it says this in its
8 brief, that it has the authority under the Higher Education
9 Act to do this program.

10 The only reason it didn't rely on that authority is
11 because it didn't want to go through negotiated rulemaking and
12 it didn't want to go through the notice and comment process.
13 So, if this Court finds that they don't have the authority
14 under the HEROES Act, there is a strong, strong possibility
15 that they are going to use their authority under the Higher
16 Education Act to -- to start the debt forgiveness program
17 through that authority.

18 And not only do they believe it, but there are
19 multiple commentators that we filed, law review articles, that
20 said that they have this authority as well. The only reason
21 they didn't do it, they didn't rely on that authority, was
22 because they wanted to avoid their rulemaking obligations.

23 So, there's -- if we receive the relief we want,
24 they will do this, they will almost certainly go through the
25 rulemaking process to start over the debt forgiveness program.

1 And there is some possibility that my clients will have --
2 that their decision will change.

3 On the private loan, for more than a month, the
4 Department of Education was telling individuals with private
5 loans that you can obtain debt relief simply by consolidating
6 the loans. And it appears that -- and they changed that
7 requirement on the eve of when the state filed. And it
8 appears that the only reason they did that was to make sure
9 that the states didn't have standing in their challenge as to
10 the loan forgiveness program.

11 So, under a different scenario, where this goes
12 through notice and comment, there is clearly a chance that
13 they could bring that program back and cover my client's,
14 Ms. Brown's, private loans through a debt forgiveness program.

15 For Mr. Taylor, he -- he has been left out of the
16 \$20,000 in forgiveness. And that is based -- their
17 eligibility requirements are based on the most arbitrary
18 reasons. They have held -- or they are doing this based on
19 the fact that when Mr. Taylor was in high school, his parents'
20 family income did not qualify him for a Pell Grant.

21 As we talked about in other briefs, you know,
22 Mr. Taylor makes less than \$25,000 a year. You could easily,
23 easily envision a program, if that goes through notice and
24 comment and where the Department says, All right, we're going
25 to decide debt forgiveness based on, for example, the amount

1 of income you make. And so, you could easily envision a
2 program where Mr. Taylor's debt is being forgiven, where it
3 isn't now.

4 And if you look at cases like *Ecosystem* and the
5 Texas case, the courts talk about what a low, low standard
6 this is. And I believe in *Ecosystem* the Fifth Circuit said,
7 you know, it's not even likely that the Court -- that the
8 agency will change its mind, but it's still possible. And the
9 Fifth Circuit said that's enough for standing in the
10 procedural context.

11 So -- so, you know, I know standing has been an
12 issue in other cases. We have a very straightforward and easy
13 to resolve way of proving -- of proving our standing.

14 So, if there aren't any other questions on standing,
15 I'll move to the -- to our APA claim.

16 **THE COURT:** That's fine. Go ahead.

17 **MR. CONNOLLY:** There are a few things that are
18 undisputed here. But for the HEROES Act, the Department never
19 disputes that the program that they have adopted is a rule,
20 it's a legislative rule. And that's because it grants rights,
21 it imposes legal obligations, it's obviously a legislative
22 rule. It also plainly conflicts with their current
23 regulations. And that's another reason why, under case law,
24 it's a legislative rule.

25 The Department also doesn't dispute that, but for

1 the HEROES Act, they would have been required to go through
2 negotiated rulemaking. And that is because the -- the
3 substance of what they were doing pertains --

4 **THE COURT:** Let's go ahead and talk about the
5 elephant in the room, and that's the HEROES Act. I mean, I
6 don't -- at least I don't expect the United States to come up
7 to the podium and try to argue that the HEROES Act, based on
8 its plain language and intent, was anything other than an act
9 that was directed at service people during the time of war and
10 national emergencies.

11 I'm not sure that the language in the HEROES Act or
12 the intent behind it gets you there when it comes to any and
13 every American. So, that's one of the things that I'd like
14 for you-all to concentrate on when we make the argument today.

15 I mean, am I correct? Is that your understanding,
16 the reason why Congress passed the HEROES Act, in light of the
17 September 11th and the Iraq and Afghanistan wars?

18 Specifically, we had situations where we had servicemen and
19 women that were reserve-type situations who were called upon
20 to do their duty for their country and may have been in
21 situations where they needed some economic relief. Am I
22 correctly stating, in general, what a layman would say the Act
23 was passed for?

24 **MR. CONNOLLY:** That is absolutely correct, Your
25 Honor. The legislative history we cite, that's all over the

1 legislative history. It's what Congressmen -- it's what
2 legislatures were thinking.

3 **THE COURT:** And, obviously, legislative history is
4 not always the best indicator as to why the Act was passed.

5 But just, if I was to ask someone in a high school
6 civics class the purpose of the HEROES Act, I'm thinking they
7 would give a definition along the lines that I just gave.

8 **MR. CONNOLLY:** I think that's right, Your Honor.

9 And not only the legislative history, which confirms
10 it, but if you just -- if you read the findings. The findings
11 in the statute of why they're doing it.

12 **THE COURT:** Yeah.

13 **MR. CONNOLLY:** Congress says our men and women are
14 fighting overseas, we'll do everything we can for our
15 military, and they're -- they're put in straits when they're
16 asked to -- to continue -- they've left their jobs, they've
17 left their homes and they're put in dire straits when they're
18 off fighting abroad and they're asked to continue paying --
19 making loan payments; and therefore, we're going -- we're
20 doing something to make sure that they can have their -- their
21 loan payments deferred while they're off fighting abroad. So,
22 you're 100% accurate, correct, about the purpose behind the
23 HEROES Act.

24 And before I quite get to the meaning of the HEROES
25 Act and why it doesn't apply, I want to make sure to knock out

1 one argument that I think that they make, and it's really a
2 curious argument. The way I read their brief, I read them to
3 be saying, even if the HEROES Act does not apply, as long as
4 we say that we are acting under the HEROES Act, then we can
5 waive notice and comment and we can waive negotiated
6 rulemaking. And that makes absolutely no sense at all.
7 Congress never would have drafted such a loophole to the
8 negotiated rulemaking process and the notice and comment.

9 There are a litany of cases --

10 **THE COURT:** If that's true, that certainly would
11 seem to give the executive branch unfettered legislative
12 authority that I'm not sure the Constitution contemplates.

13 But anyway, go ahead.

14 **MR. CONNOLLY:** Yes, I agree.

15 And -- and there are cases that say, over and over,
16 from the Fifth Circuit and elsewhere, that say, we -- you
17 know, we are very hesitant to trust the agency's assertions
18 that it can avoid notice and comment. The case *Azar vs.*
19 *Allina Health* from the Supreme Court, it says you don't look
20 at the labels of what an agency says to avoid notice and
21 comment, you look at the substance.

22 And not only that, just as a matter of common sense,
23 there's nothing in the text of the HEROES Act that allows them
24 just to say that they're acting under the HEROES Act, and then
25 to avoid their rulemaking obligations. So, for example, 1098,

1 paragraph D, it says, The negotiated rulemaking process does
2 not apply for waivers and modifications that are authorized or
3 required by the HEROES Act. And so, if the program is not
4 authorized or required by the HEROES Act, then they,
5 obviously, can't move or they can't avoid their rulemaking
6 obligations.

7 And so -- and negotiated rulemaking necessarily
8 requires notice and comment. And so, really, when this comes
9 down to it, is the main question here is sort of the one we
10 began with. The Department has adopted a broad program of
11 debt forgiveness. And they didn't go through rulemaking --
12 they didn't go through notice and comment, they didn't go
13 through the negotiated rulemaking process.

14 **THE COURT:** Let's go off the record momentarily. I
15 need to look at this order. I apologize for interrupting.

16 *(Brief pause)*

17 **THE COURT:** Go ahead, Mr. Connolly. You were
18 telling us about the HEROES Act and what authority this gives
19 the Secretary of Education.

20 **MR. CONNOLLY:** Yes. So, what we have here is the
21 Department has adopted a program of loan forgiveness. It's
22 clearly a rule and they clearly did not follow the negotiated
23 rulemaking process. So, what it comes down to, the real
24 question here is, Can they fit this program within their
25 authority under the HEROES Act?

1 **THE COURT:** All right.

2 So, the HEROES Act gives the Secretary of Education
3 the authority to modify any provision of Title 7; is that
4 correct?

5 **MR. CONNOLLY:** It gives --

6 **THE COURT:** I'm sorry. Title 4, right?

7 **MR. CONNOLLY:** Yes. To issue waivers and
8 modifications.

9 **THE COURT:** To issue waivers, modifications, go
10 without notice and comment. What -- what provision in this
11 case is the Government contending that the Secretary is
12 modifying under Title 4?

13 That was something that I had a question about. I
14 guess that's probably a better question for the Government.

15 **MR. CONNOLLY:** Yes. I -- I believe that what they
16 are saying, there are regulations that make it clear that --
17 that individuals have to pay back their loans.

18 **THE COURT:** Yeah.

19 **MR. CONNOLLY:** And so, I believe the Government's
20 argument is --

21 **THE COURT:** Okay. So, here's a question for you,
22 How does the Federal Claims Collection Act come into play?

23 **MR. CONNOLLY:** I'm sorry?

24 **THE COURT:** How does the Federal Claims Collection
25 Act come into play? Does that have any role in this decision

1 by the Administration?

2 **MR. CONNOLLY:** Yeah. So, in the -- in the
3 Department of Education's regulations, they adopted -- they
4 incorporated those -- they incorporated those standards into
5 their regulations right now. So, under our reading, they
6 cannot -- they cannot engage in a -- a program of debt relief
7 until they adopt a new regulation to get rid of those -- of
8 those regulations. So, that incorporates the FCC Act there.

9 So, and I think -- I think the big -- the big
10 picture here that we have -- that we have to think of first,
11 is -- and this is how the Supreme Court instructed us recently
12 to look at it in *West Virginia*, is, Does the major questions
13 doctrine apply? And the Supreme Court has said this is a
14 critical method of statutory interpretation, because it
15 preserves the separation of powers. And what it says is that
16 it is the legislature's job, it's the people's job, to come up
17 with these types of really important bills or agency actions
18 or programs. That role relies -- under our system of
19 Government, lies with Congress.

20 And so, the Department -- the Department of
21 Education -- the Department tries to say that the major
22 questions doctrine does not apply, and it's really not even a
23 close call for a number of reasons. First, this is a program
24 of unbelievable economic significance. It will cost nearly
25 half a trillion dollars. That is an enormous amount of money

1 for one agency to be -- to be dealing with.

2 Second, this is a case of enormous political
3 significance. If you pick up any paper in the country or
4 watch -- or any hotly contested election, this is an issue
5 right now that is hotly debated all over the country. And
6 what the Supreme Court says is that these issues of political
7 significance should be resolved by Congress, not by an agency.

8 **THE COURT:** So, being the devil's advocate, why
9 wouldn't you also argue that you shouldn't come to the guy in
10 the black robe and -- because this is a political issue in
11 election time and, you know, judges are all too often used to
12 resolve political debates. It's a shame that we've gotten to
13 this situation in our country. I don't know who to blame,
14 whether it's the guys in the black robe, whether it's social
15 media, whether it's media, whether it's the contentiousness
16 that we have in our country in general.

17 Could you make an argument that maybe the Judge
18 shouldn't get involved here?

19 **MR. CONNOLLY:** What the Supreme Court has told us in
20 cases like *West Virginia* and some of the vaccine mandates and
21 what were really -- really thoughtfully and eloquently put in
22 some of the concurrences by Justice Gorsuch, is the major
23 questions doctrine is a way of preserving this. It is a way
24 of preserving the separation of powers and making sure that it
25 does lie with the people.

1 So, the Supreme Court has made it very clear that
2 this, for better for worse, is a role of the courts. The
3 courts have to get involved when the unelected agencies try to
4 capture what rightfully belongs to Congress and do these
5 agency actions of enormous political and economic
6 significance. The Supreme Court in *West Virginia* this summer
7 made that absolutely clear that -- that courts cannot shy away
8 from this -- this duty.

9 My third point is for why the major questions
10 doctrine applies. Congress failed -- has failed to do this.
11 COVID 19 has been going on for more than 2 1/2 years. This is
12 an issue everybody is aware about. Multiple bills have
13 passed -- have failed to pass. Which the Supreme Court, in
14 the major questions doctrine cases, says is a relevant factor
15 in deciding whether to apply the major questions doctrine.

16 So, Congress knows that this is an issue and it has
17 decided not to act. And so the agency cannot now take it upon
18 itself to do what Congress has decided not to do.

19 Fourth, in the history -- in the entire history of
20 the HEROES Act, there is not a single instance, not one, of
21 the Department of Education using its power to cancel student
22 loan debt. Again, the Supreme Court has said you look to the
23 history of agency actions here when deciding whether the major
24 questions doctrine applies.

25 Fifth, again, what I would say is the legislative

1 history again is -- is entirely on -- on point here. They
2 don't have a single legislator saying that -- even remotely
3 suggesting that this type of thing would be possible under the
4 HEROES Act.

5 And finally, the context. I -- we could not think
6 of one, the Department has not cited one. There's not a
7 single rule of such unbelievable importance where -- of
8 similar unbelievable importance where Congress said, Yeah, one
9 person, without any public involvement, can go ahead and pass
10 a program this size. It's -- it's -- it doesn't happen.

11 So, when you look at all six of those factors, it's
12 clear that the major questions doctrine applies. And when the
13 major questions doctrine applies, this Court's role or task
14 becomes pretty simple. It looks at the HEROES Act and says,
15 Do I see clear Congressional authorization for this -- for the
16 debt forgiveness program? And there is, without a doubt, not
17 clear Congressional authorization.

18 But even if the major questions doctrine didn't
19 apply, and we obviously believe it did, there's still nothing
20 in the HEROES Act that justifies the debt forgiveness program.

21 **THE COURT:** All right. Let me prod you a little
22 bit. We have President Trump declare COVID-19 to be an
23 emergency. So, if we have a presidential declaration saying
24 that we're in an emergency, why can that not be used as a
25 prong under the HEROES Act to do -- forgive the debt?

1 **MR. CONNOLLY:** So --

2 **THE COURT:** Does the emergency declaration have to
3 be rescinded?

4 **MR. CONNOLLY:** No. So, you know, that is -- that
5 is -- it's sort of a -- that's more of a tricky argument, to
6 be sure. Because the HEROES Act does say -- does reflect
7 the -- you know, whether a presidential -- when the President
8 has declared a national emergency.

9 The point we would make is that you look, again, at
10 the context of this statute. That in the nature of the
11 September 11th attacks, when they're referring to a disaster,
12 Congress clearly had in mind --

13 **THE COURT:** No, I get it.

14 **MR. CONNOLLY:** Yeah.

15 **THE COURT:** But let's say that the HEROES Act does
16 apply. I know you're saying that it doesn't, it only applies
17 to servicemen and women. Let's say that it -- I make a
18 finding that it does apply and it does govern this situation
19 and we have at least a declaration from three years ago that
20 COVID-19 was a national emergency. I think it's worth adding
21 that we also have President Biden saying that the pandemic has
22 ended, several months ago.

23 Tell me why -- if I make a finding that the HEROES
24 Act does apply and we have a declaration saying COVID-19 is a
25 national emergency, how come you still win?

1 **MR. CONNOLLY:** The reason we still win is that that
2 is only one of a host of other -- of multiple factors that the
3 Department has to satisfy. So, on that national -- on that
4 disaster area point, they haven't limited this to just the
5 disaster area, to just the United States. They've included
6 every single person with student loans.

7 **THE COURT:** So, if you're a foreign national with a
8 student loan from the United States, you don't have to pay
9 that back.

10 **MR. CONNOLLY:** I'm -- I'm -- I'm not sure.

11 **THE COURT:** I don't know enough about how the
12 student loan program works. It's been a long time since I've
13 had one.

14 **MR. CONNOLLY:** Yeah, I'm not sure about that. What
15 I would say is, if there were individuals who had student
16 loans and then went abroad during the pandemic -- and we cited
17 in our papers there were about nine million individuals who
18 were living -- who were living abroad -- they were not in a
19 disaster area under the statute. And yet the Department of
20 Education is forgiving their loans.

21 And that just -- it shows a broader point of what's
22 happening. What's happening is they -- they're reverse
23 engineering this. They created the debt forgiveness program
24 that they wanted to do. It applies to 95% of the country.
25 The -- only the top 5% of income represented in this country.

1 And so it applies to everybody. It applies whether or not you
2 are living in the country at the time. And now they are
3 trying to fit it within their HEROES Act authority. And it
4 just doesn't work.

5 And so, the parameters, even if you assume that they
6 have the power to cancel debt, the parameters of what they
7 have done is so broad and it's so untailored that it doesn't
8 fit within their authority in the HEROES Act. But I would go
9 a step further and say, they don't even have the power to
10 cancel student loan debt. And under the --

11 **THE COURT:** Well, couldn't I use the argument and
12 the justification the Government is making, for instance, if
13 the Administration woke up tomorrow and said, We want to
14 forgive all loans given pursuant to the various Federal
15 agricultural programs to American farmers, we can do that
16 under the HEROES Act because there was a national emergency,
17 without notice and comment?

18 **MR. CONNOLLY:** I don't believe they could do that,
19 because it would not fall --

20 **THE COURT:** No, I'm saying, could you use the same
21 justification the Government is using to do that?

22 **MR. CONNOLLY:** I might not be following your
23 question.

24 **THE COURT:** I'm concerned about some of the same
25 things that you brought up.

1 **MR. CONNOLLY:** Okay.

2 **THE COURT:** You can stretch the HEROES Act to where
3 it's such a rubber band that it either breaks or it stretches
4 so far it's meaningless.

5 **MR. CONNOLLY:** Yes.

6 **THE COURT:** And could I extrapolate using the
7 Government's reasoning and justification under the HEROES Act
8 or Student Loan Forgiveness Program to apply to other
9 government loan systems, such as the various programs that we
10 have for farmers under the Department of Agriculture? Because
11 there was a national emergency, any loan received by a farmer
12 during the period of the COVID-19 pandemic can be forgiven
13 under -- using the HEROES Act as justification.

14 **MR. CONNOLLY:** Right, right.

15 **THE COURT:** And that's just an example.

16 **MR. CONNOLLY:** Yeah, and I agree.

17 What they have done is they have -- their argument
18 is that as long as -- as long as they can pick out, you know,
19 some people here and there, where maybe they would have
20 authority under the HEROES Act, to -- to do something to help
21 them, then they can be as broad as they want. And they can --
22 they can pass this debt forgiveness program for 95% of the
23 country. And that -- that just -- you cannot square that with
24 how the HEROES Act is drafted and how it's defined.

25 And the last point I'll make on this is, you know,

1 we cited provisions in -- various provisions of the Higher
2 Education Act in our brief where Congress explicitly gave the
3 Department the power to cancel debt. And when they do it,
4 they're explicit, they don't hide the ball. They use words
5 like, forgive debt and cancel debt. And Congress did not do
6 that here. And that silence really speaks volumes here.

7 So, you know, in sum, I think we're -- I think
8 there's a strong, strong likelihood that we're going to
9 prevail on the merits here. It's because they were obligated
10 to go through the negotiated rulemaking process, to go through
11 notice and comment and they failed to do that and their only
12 justification, the HEROES Act, gives them absolutely no leg to
13 stand on to avoid their long, long-standing of rulemaking
14 obligations.

15 On irreparable harm, we -- the case law is rock
16 solid for us. We prevail for two reasons. First, the case
17 law is clear that when you are denied your procedural rights
18 to participate in a rulemaking for notice and comment, for
19 example, that is irreparable harm when they go ahead --

20 **THE COURT:** So, when you're denied the meaningful
21 opportunity to give notice and comment under the APA, that
22 qualifies under the case law as irreparable harm; is that
23 correct?

24 **MR. CONNOLLY:** Correct.

25 **THE COURT:** What's your best case for that

1 provision?

2 **MR. CONNOLLY:** The cases I would refer you to are:
3 *Eli Lilly vs. Cochran*, 526 F.3d 393 (*sic*), says, That many
4 courts have found that a preliminary injunction may be issued
5 solely on the grounds that a regulation was promulgated in a
6 procedurally defective manner. And that lists -- that lists a
7 number of cases. And that says, That is because the purpose
8 of the notice and comment requirement is to permit regulated
9 entities to influence rulemaking at the beginning of the
10 process and not simply after rules are already in place, at
11 which point the agency is far less likely to be receptive to
12 comment.

13 So, we have *Eli Lilly, Northern Mariana Islands*,
14 that's 686 F.Supp.2d 7, out of the D.D.C. And the other case
15 that is great for us on this is *Association of Community*
16 *Cancer*, 509 F.3d (*sic*) at 501. All of those cases, what they
17 say is that -- it's a common-sense inquiry -- is that if you
18 allow -- the Court allows this program to go forward and to be
19 already in operation, we will never have an equivalent
20 opportunity to comment and provide our comments at the
21 decision point, at the early stage when -- when the agency is
22 actually deciding whether or not to do something.

23 And so, those -- those procedural rights will be
24 forever lost. And the way the D.C. Circuit put it is, the egg
25 is scrambled.

1 **THE COURT:** All right. Let me try to unscramble it
2 momentarily.

3 So, if -- and I'm sorry, I'm just giving you some
4 hypotheticals. Don't take this as an indication that I'm
5 thinking one thing or another. You're making the argument
6 there's no authority to do this, period, at least under the
7 HEROES Act; is that correct? So, if there is no authority to
8 do so, how are you damaged by not having notice and comment?

9 **MR. CONNOLLY:** Because they believe they have the
10 authority to do it under the Higher Education Act. So,
11 they -- they have another source of authority that they
12 believe they can do this under.

13 **THE COURT:** Okay.

14 **MR. CONNOLLY:** And so, when this Court makes a
15 ruling that the agency does not have the authority to pass the
16 program under the HEROES Act, there's not a doubt in the world
17 they're going to start up a negotiated rulemaking process
18 under their authority under the Higher Education Act.

19 **THE COURT:** So, if I understand you correctly, there
20 is no clear Congressional authorization, period, under any act
21 by Congress that would give the Administration the authority
22 to do what they're doing?

23 **MR. CONNOLLY:** My argument is not that broad. My
24 argument is that the -- there is no authority under the HEROES
25 Act for them to do what they are doing, and that's the source

1 of authority that they rely on. And so, that's where we say
2 their justification for ignoring notice and comment and
3 ignoring negotiated rulemaking is the HEROES Act, which does
4 not apply.

5 But, you know, kind of going back to the standing
6 inquiry, what we need to prove, both for standing and for
7 irreparable harm, is there some possibility that the agency
8 will change its decision? And the reason there is some
9 possibility is this is not the only provision they are relying
10 on. They have cited the Higher Education Act. And I have
11 the -- the statute somewhere I can cite to you, but they have
12 cited a provision of the Higher Education Act that they
13 believe, they said, "It gives us broad authority to do this
14 type of program."

15 And so, that is how our procedural injuries will be
16 remedied, is because they will go -- they will -- there is
17 some possibility, in fact, it's strongly likely, that they
18 will go and do what they should have done in the first place
19 and go through the negotiated rulemaking process and through
20 notice and comment.

21 On the second reason why we prevail or why we have
22 shown irreparable harm, is that this is not just any -- any
23 normal rule. I mean, the cases I cited to you, they found
24 irreparable harm just when a rule is going to be out there and
25 in practice and in effect. This is a program that is time

1 limited. They're going to -- they're going to give -- cancel
2 debts as quickly as possible. And they have -- in their own
3 words, they have said, This is happening one time.

4 And so, if we wait for, you know, for summary
5 judgment and we go through the merits on this case and we
6 ultimately prevail on the merits, this case is over, because
7 we'll never get our procedural rights back. Because they will
8 finish the program, they will have handed out \$400 billion
9 dollars in student loan forgiveness and that will be that.
10 They'll never actually go back through the process and do what
11 they are supposed to do, because why would they? They will
12 have finished the process.

13 So, this case is even a stronger showing than the
14 other cases I cited for why we have irreparable harm.

15 **THE COURT:** Can I put aside the agency action and
16 not issue the injunction?

17 **MR. CONNOLLY:** I'm sorry?

18 **THE COURT:** Can I set aside the agency action and
19 not issue the preliminary injunction?

20 What if I find that there was no authority here and
21 I set aside the agency action? Can I do that at this stage
22 without issuing a preliminary injunction?

23 **MR. CONNOLLY:** I think you probably could. You have
24 the right -- you have the inherit authority to grant summary
25 judgment sua sponte.

1 **THE COURT:** I would have to give notice, I'm
2 assuming, before I did that.

3 **MR. CONNOLLY:** I believe so. I'd have to check the
4 case law. But, yes, you -- you have the authority to enter
5 summary judgment sua sponte, these are legal issues and you
6 could grant the relief there as well.

7 My -- my concern -- and I guess I'll get to one of
8 your points here as well, is that there is -- there is extreme
9 emergency here. Because as of last Friday, the President
10 announced that 22 million individuals have signed up for loan
11 forgiveness. That's more than half of what the Department has
12 said -- has estimated are eligible. On top of that, there's
13 another 8 million individuals where the Department said they
14 are going to forgive their debts automatically.

15 Finally, the Secretary of Education has publicly
16 said, and we quote this in our briefs, that we're going to
17 forgive debts as quickly as possible. And so, there is a
18 strong, strong chance that the second the Eighth Circuit's
19 stay is lifted, that they're going to push a button and all of
20 these debts are going to be forgiven. And so, that is why we
21 need injunctive relief as quickly as possible. Because, as I
22 mentioned before, once this program is completed, the
23 irreparable harm is done. And that's why we need -- we need
24 an injunction stopping this from happening right now.

25 **THE COURT:** A nationwide injunction, correct?

1 **MR. CONNOLLY:** Correct.

2 Because the way that would work is -- and I can get
3 to this, I can -- I can skip ahead as well.

4 **THE COURT:** We'll go off the record momentarily.

5 *(Brief pause)*

6 **THE COURT:** All right. Go ahead, sir.

7 **MR. CONNOLLY:** Sure. Yes, and I'll skip ahead to
8 that because I think it's important.

9 **THE COURT:** No, I want you to make your record. And
10 again, to the extent I ask these questions, please don't think
11 it's indicative of what my ruling may be. I just -- I think
12 these are important issues to probe and to have on the record,
13 because I'm assuming, no matter which way I rule on this, it's
14 going to go to someone else, the group of lawyers and judges
15 that are much more competent than I am, to make these types of
16 decisions. So, let's -- let's give them a full and robust
17 record.

18 So, don't let me preclude you from making any type
19 of argument. Same thing goes for the Government, I want you
20 to get everything that you think you need to get it past this
21 poor country lawyer in Fort Worth.

22 So, go ahead, counsel.

23 **MR. CONNOLLY:** I appreciate that, Your Honor.

24 Well, I will -- then I'll -- I'll stay focused on
25 irreparable harm and just -- and just mention that -- just

1 conclude by saying that that is -- the irreparable harm that
2 will happen for my clients will be forever left -- they will
3 be forever denied their procedural rights.

4 And they have -- they have Federal student loan
5 debt. Ms. Brown has \$17,000 in Federal student debt and
6 Mr. Taylor has \$35,000 in Federal student debt. And if the
7 Government is going to be pursuing a program of debt
8 forgiveness, they will be left out of the program process, and
9 it's because they were denied their procedural rights to -- to
10 comment on this incredibly important program.

11 On the balance of harms, I think this is pretty
12 straightforward. There's an enormous, enormous public
13 interest in allowing the public to comment on this incredibly
14 important program. I mean, and think about the people that
15 are involved. It's -- it's taxpayers who might -- who will
16 ultimately have to pay for this. It's the individuals, like
17 my clients, who are being left out of the process. It's
18 Universities. It's student -- it's loan servicers, it's
19 companies, it's Government. The list goes on and on and on.
20 And so many people across this country, so many people and so
21 many entities have a right -- have a right to, under the APA
22 and the negotiated rulemaking requirements, to tell their
23 Government what they think about this. And that's an enormous
24 public interest.

25 The only -- the only countervailing interest they

1 can come up with is getting loan forgiveness out the door
2 fast. But that pales in comparison to the interests -- well,
3 it doesn't even pale, it cannot overcome illegal agency
4 action. The Fifth Circuit has said there is absolutely no
5 public interest in allowing illegal agency action to stand.
6 And so, I think we prevail on the balance of the harms as
7 well.

8 Finally, on the scope of the injunction. They --
9 the Department asks this Court to narrow its injunction to
10 only our two plaintiffs. And that just makes -- it makes no
11 sense at all. Because it doesn't afford us any relief
12 whatsoever, because there's no chance that the Department
13 would actually go back and conduct notice and comment
14 rulemaking to see if two individuals should have their debts
15 forgiven.

16 What -- and I know there's debate back and forth
17 about nationwide injunctions. But what's undisputed, even for
18 those who have raised concerns, is that the Court's obligation
19 is to afford complete relief to the plaintiffs that are before
20 this Court. Those are my clients. And the only way to afford
21 them relief is to enjoin the Department from carrying out the
22 debt forgiveness program. Because when you enjoin the Court
23 -- the Department for carrying out the debt forgiveness
24 program, that is the only way to force them to go back to the
25 table to do negotiated rulemaking, to do the notice and

1 comment, to comply with all of their procedural obligations.
2 So, that is the only way to afford my clients the relief that
3 they are entitled to.

4 *THE COURT:* I hope that there's not a judge in the
5 United States that desires to enter nationwide injunctions.

6 They really -- let me tell you a story, something
7 that happened here in this courthouse in 1948. Downstairs in
8 the second floor courtroom was a famous challenge. You-all
9 read the Robert Caro books about Lyndon Johnson, I bet.

10 Well, the famous 1948 election fight for the United
11 States Senate between Coke Stevenson and Lyndon Johnson played
12 out downstairs. And you can go down there and you can see a
13 photo of Lyndon and Lady Bird walking through the
14 leather-bound doors down there coming into the courtroom.
15 President Johnson is smiling, so I'm assuming he just found
16 out something good. But he ultimately did lose at this level,
17 but ultimately won.

18 And he went on to become one of the greatest
19 presidents for being able to pass legislation and getting
20 consensus. Obviously, Mr. Caro sold millions and millions of
21 books describing Johnson's prowess at getting fellow members
22 of Congress, when he was president and also when he was in the
23 Senate, to agree and to come together. His famous quote was,
24 Come now, let us reason together.

25 For whatever reason, we're not in that part of our

1 history anymore. I question sometimes whether one side or the
2 other can agree that the sun is shining today. Boy, do I long
3 for the days of President Johnson. I hope we get back to that
4 situation, because I'm sure if President Johnson was to come
5 to the court today and see the way the courts across the
6 country are issuing nationwide injunctions in almost every
7 type of case, he would be as equally disturbed as I am.

8 But I think he also would be disturbed at the way
9 that we have unilateral, in many cases, executive action,
10 Government by executive fiat, not Government by agreement by
11 the peoples' representatives, and then ultimately decisions to
12 be executed and laws to be executed by the executive branch.

13 I'm not sure where we are now in our history is
14 where any of our founding fathers would have envisioned any of
15 the three branches of government to be, here almost 250 years
16 after we were founded.

17 So, let me ask you this question with regards to
18 nationwide injunctions, here recently it was the *Louisiana vs.*
19 *Becerra* case out of the Fifth Circuit. The Fifth Circuit
20 reversed a nationwide injunction that came out of that
21 decision, stating that nationwide injunctions should be
22 reversed -- or reverse should not be issued while the ultimate
23 resolution will benefit from the airing of competing views in
24 the sister circuit.

25 So, there's a school of thought there that says -- I

1 believe Justice Thomas has talked about this, these decisions
2 need to percolate through the system. Just as the President
3 doesn't rule by fiat, neither does the judge.

4 The Court in that case also relied on a quote by
5 Justice Gorsuch warning against nationwide injunctions, and
6 held in that case that the injunction should only be applied
7 to the states who brought the case.

8 Doesn't the Government have a good argument that the
9 injunctive relief, if any, that I decide to grant or not to
10 grant in this case, should only be applied to those two
11 individuals who brought the case?

12 **MR. CONNOLLY:** So I disagree, respectfully, for a
13 few reasons.

14 First, the *Louisiana vs. Becerra* case, the Fifth
15 Circuit case, the Court did not say that nationwide
16 injunctions are never appropriate. It said it depends on the
17 circumstances.

18 And if you look at other cases from the Fifth
19 Circuit, *Texas vs. United States* was a nationwide injunction
20 based on a notice and comment violation. And you had -- you
21 had the two things that are exactly at issue here. One, there
22 was no way to provide full and complete relief to the
23 plaintiffs without a nationwide injunction. And two, you
24 needed -- they wanted uniformity or they cite -- they cited
25 uniformity of the Immigration Code. And it's the same thing

1 here, we've cited -- there's a Congressional command that
2 education regulations should be uniform throughout the states.

3 So, I say all that to say, there are plenty and
4 plenty of examples of nationwide injunctions. And the Fifth
5 Circuit's recent decision was not to say they're never
6 appropriate, it was just to say, Hey, you know, be careful
7 before you do it. And there's -- there's a big difference
8 between cases like *Louisiana* and the concerns that Justice
9 Thomas raised in his concurrence.

10 I think Justice Thomas would agree with us on this
11 point. Because in Justice Thomas's concurrence, what he talks
12 about in the *Trump v. Hawaii* case, what he talks about the
13 problem is -- is when somebody comes into the courthouse and
14 says, for example, you know -- I'm just doing a
15 hypothetical -- I want to carry a firearm and I don't want the
16 agency applying this rule to me. And then the individual
17 says, Oh, and you know what, you -- you should make sure that
18 everyone across the whole country has the same protection that
19 I do. That is totally different from what we have here.

20 In the hypothetical I gave, that individual can
21 receive complete relief without a nationwide injunction.
22 Here, if you crafted a nation -- if you tried to craft an
23 injunction that somehow applied only to my two clients, it
24 wouldn't provide any relief at all. Because the whole point
25 of what we need to happen in order for my clients to be made

1 whole, is the -- the agency needs to go back to square one and
2 it needs to redo this whole program through negotiated
3 rulemaking and notice and comment.

4 And in Justice Thomas's concurrence, he cites an
5 example of -- of how -- how injunctions can be appropriate.
6 And what -- he used the example of the public nuisance
7 example. And what he said is, Listen, sometimes you can have
8 injunctions that benefit lots of people, for example, an
9 injunction about a public nuisance. That does not make the
10 injunction wrong, because what you're doing is you are
11 enjoining a public nuisance because that's the only way to
12 afford relief to the individual who brought -- who brought the
13 claim.

14 And so, I think Justice Gorsuch, Justice Thomas, I
15 think they would be on all -- would be right in line with what
16 we're doing here and what we're asking for. Because they
17 would say -- they would say is -- they would say, The Court
18 needs to remedy the injuries of the plaintiffs before it. And
19 the only way to do that is to provide this sort of -- this
20 injunction that we are asking for.

21 And the other thing I'll mention, is that this is --
22 it's not -- the type of injunction we're asking for is also
23 not like the hypothetical I gave, where you're instructing an
24 agency not to apply -- not to do this for all these
25 individuals. This is -- this is more like a -- the typical

1 remedy for when you -- if this case went to the merits, where
2 you vacate the rule. You vacate the rule and it -- it doesn't
3 apply to everyone.

4 So, what we need is a -- an injunction that stops
5 the Department from implementing the debt forgiveness program,
6 because that is the only way to force them to go back to the
7 table, go through the negotiated rulemaking, go through notice
8 and comment, so that my clients that have student debt can put
9 forth -- can participate in the process and give their reasons
10 for why their debt should be forgiven, just like every other
11 person who is being wrapped up in this program. And that's
12 the only way to make sure that they get -- that they get
13 effective relief.

14 And so -- and I guess looking at your last
15 questions, I think -- I think the -- or the issues you raised
16 at the beginning, I think the Government would probably be in
17 a better position than I am to -- to talk about some of the
18 various cases that they're involved in.

19 **THE COURT:** Let me ask you, in general, there's --
20 you can make an argument that judicial restraint would be
21 incumbent on the Court to find out what the Eighth Circuit
22 decides to do before I make a ruling. I'm assuming you
23 disagree with that.

24 **MR. CONNOLLY:** I do, Your Honor.

25 Your Court, their Court, their Federal courts,

1 they -- the concern here is, they have -- all they've put in
2 is an administrative stay, which --

3 **THE COURT:** Am I correct, that even if they lifted
4 the stay, it would still go back to the trial court to make
5 the appropriate findings with regards to whether an injunction
6 would be appropriate? The lower courts never even considered
7 any of the injunctive prongs; is that right?

8 It has to go back. The Eighth Circuit is only
9 looking at the standing issue; is that correct?

10 **MR. CONNOLLY:** I don't believe so. So --

11 **THE COURT:** Okay. I don't -- I don't know.

12 **MR. CONNOLLY:** Yeah. So, the District Court in
13 Missouri dismissed the states' case for lack of standing.
14 When the states went up to the Eighth Circuit, they asked for
15 two things. They asked, one, for an injunction pending
16 appeal. And two, they asked for an administrative stay. The
17 -- I'm sorry, an administrative stay while the Court -- while
18 the Eighth Circuit reviewed their motion for an injunction
19 pending appeal.

20 The Eighth Circuit granted their administrative
21 stay, so that they can review -- so that the Eighth Circuit
22 has time to decide whether to grant an injunction pending
23 appeal. The administrative stay -- they ordered the
24 Government and they ordered -- they ordered extremely fast
25 briefing. So, they ordered the Government to respond

1 yesterday, they ordered the states to respond, I believe,
2 today by the end of the day.

3 *THE COURT:* Any indication the Court is going to
4 have oral argument or do we think they'll rule on the papers?

5 *MR. CONNOLLY:* I don't believe they've given any
6 indication one way or the other.

7 *THE COURT:* Probably a better question for the
8 Government?

9 *MR. CONNOLLY:* Yeah.

10 *THE COURT:* Let me take you back to the irreparable
11 harm prong. And I hate to continue beating a dead horse, I
12 just want to make something clear for the record and for
13 whatever decision that I ultimately come to in this case.

14 So, if -- does the Court have to make a ruling that
15 the Secretary has clear Congressional authorizations, for
16 somewhere other than the HEROES Act, to be able to find that
17 you were denied a procedural right? Does that make sense?
18 That's terribly articulated.

19 In other words, can you make the argument that you
20 suffered irreparable harm under the current case law, because
21 you didn't have notice and comment, and at the same time say
22 that there was no Congressional authorization to do what we
23 have in this case? Boy, that's a terrible question.

24 *MR. CONNOLLY:* I believe I --

25 *THE COURT:* And I was an appellate judge for about

1 three years, I ought to be better than that.

2 **MR. CONNOLLY:** I -- I believe I know what you're
3 getting at.

4 **THE COURT:** Yeah.

5 **MR. CONNOLLY:** And the answer is, no. Because for
6 this inquiry, what matters is there's some possibility that
7 the -- that the -- that the Department of Education will
8 change its mind and issue a decision that helps our clients.

9 The fact that they believe they have this authority,
10 and that it's colorable, is all you need to -- is all you need
11 to cite. Because there is some possibility, under the Fifth
12 Circuit case law, that they will go back and -- and do this
13 properly.

14 So, you don't need to affirmatively decide that,
15 yes, they have the authority to do this under the Higher
16 Education Act. Because what's going to happen is, they're
17 going to go back, they're going to do it how they should have
18 done it in the first place. And then once that rule is in
19 effect, I imagine there'll be various individuals who
20 challenge it, and the legality of that will be decided, you
21 know, in the future.

22 But what matters now --

23 **THE COURT:** If that happens, please don't file
24 anything in Fort Worth. We have enough to do.

25 **MR. CONNOLLY:** What matters now is whether there's

1 some possibility that they will -- that they will go that
2 route, that's all that matters.

3 *THE COURT:* All right.

4 *MR. CONNOLLY:* And just to wrap up, for the Eighth
5 Circuit, they're -- once -- once -- the Eighth Circuit is
6 reviewing right now, they have a stay in place, they're
7 reviewing the motion for an injunction pending appeal. And
8 presumably they're not going to issue a ruling before 5:00
9 tonight, when the states' brief is due.

10 But at any moment after that, an issue could pop
11 up -- or an order could pop up from the Eighth Circuit that
12 says, Your motion for an injunction pending appeal is denied,
13 the administrative stay is lifted and now the appeal
14 process -- the states' appeal will go through the normal
15 process where they -- they will try to argue that, you know,
16 that they had standing. At that moment, there's nothing in
17 place, and the Department will be able to push the button and
18 all this loan -- all of these loans are forgiven and
19 irreparable harm will happen.

20 And the Court has -- so -- and my last final point
21 is, even though there's an administrative stay in place, that
22 doesn't stop the Court from issuing an injunction on top of
23 that. There are lots and lots of cases and examples of courts
24 sort of issuing overlapping injunctions. And it's for the
25 exact reasons that we have here, which is that it doesn't make

1 any sense for -- the Eighth Circuit's injunction is temporary,
2 and it could go away like that, and then the Court would be
3 scrambling.

4 *THE COURT:* Here's a good question. If this is such
5 an emergency, such a dire emergency, why didn't y'all move for
6 a TRO?

7 *MR. CONNOLLY:* So, in hindsight, maybe we should
8 have. But it wasn't clear to us at the time how fast this was
9 happening and how fast they were going to start processing
10 these.

11 They have -- they've got 22 million applications and
12 the Secretary said we're going to be doing this as quickly as
13 possible and they're going to be -- they will be doing this
14 with 8 million individuals automatically. And so, you know,
15 in hindsight maybe we should have filed the TRO.

16 But this is briefed right now and the irreparable
17 harm based on their public statements of what's happening,
18 it's clear what's going to happen as soon as the
19 administrative stay is lifted by the Eighth Circuit.

20 *THE COURT:* All right.

21 I'd like to hear from the Government.

22 *MR. CONNOLLY:* Thank you.

23 *THE COURT:* Tell me your name one more time, sir.

24 *MR. NETTER:* My name, Your Honor?

25 *THE COURT:* Yes, sir.

1 **MR. NETTER:** Brian Netter.

2 **THE COURT:** Netter, okay. That's what I had in my
3 notes. I just wanted to be sure.

4 One second.

5 *(Brief pause)*

6 **MR. NETTER:** No worries, Your Honor. Thank you and
7 may it please the Court.

8 **THE COURT:** Yes, sir.

9 **MR. NETTER:** I'm happy to start with some of the
10 logistical points on where the other cases stand before we --

11 **THE COURT:** Yeah, use your discretion.

12 **MR. NETTER:** Thank you, Your Honor.

13 With respect to the *Nebraska* case in the Eastern
14 District of Missouri, that Mr. Connolly and the Court were
15 just discussing, the six state plaintiffs in that case did
16 file a motion for preliminary injunction, which Judge Autrey
17 denied on the basis of lack of standing and therefore
18 dismissed the case.

19 The plaintiff states then filed -- noticed an appeal
20 to the Eighth Circuit and filed their motions for emergency
21 relief. As Mr. Connolly indicated, the briefing deadline for
22 the states' reply is today, it's actually today at 5:00 p.m.
23 central time. The Court has entered an administrative stay,
24 which is really an administrative injunction, that's
25 affirmatively prohibiting --

1 **THE COURT:** Sure.

2 **MR. NETTER:** -- the agency from acting.

3 **THE COURT:** Do I have the case involving individual
4 plaintiffs?

5 **MR. NETTER:** No, Your Honor.

6 **THE COURT:** Tell me what else is out there. I don't
7 even know.

8 **MR. NETTER:** So, there was -- the case that's
9 furthest along is called *Brown County Taxpayers Association*,
10 which was filed in the Eastern District of Wisconsin. That is
11 a case where, again, there was a motion for a TRO and a
12 preliminary injunction, the case was dismissed for lack of
13 standing.

14 **THE COURT:** Sure. Go ahead, sir. And that's in ED
15 Wisconsin?

16 **MR. NETTER:** Correct.

17 **THE COURT:** Okay. Go ahead.

18 **MR. NETTER:** The plaintiff appealed to the Seventh
19 Circuit and cited emergency relief. The Seventh Circuit
20 denied that relief. The plaintiffs then applied to Justice
21 Barrett at the Circuit Justice --

22 **THE COURT:** Right.

23 **MR. NETTER:** -- and she denied the application for
24 emergency relief in that case.

25 There's another case that's also pending in the

1 Seventh Circuit, it's called *Garrison*, that was filed in the
2 Southern District of Indiana. In the *Garrison* case, there was
3 a motion for preliminary injunction, it was denied and the
4 case was dismissed without prejudice.

5 **THE COURT:** And just, really briefly, in *Garrison*,
6 plaintiffs, what -- tell me about the individual plaintiffs.
7 Are they similar to the plaintiffs we have here?

8 **MR. NETTER:** So, as amended, the -- it was either
9 the first or second amended complaint in *Garrison*, it's two
10 individuals on behalf of a class, similarly situated
11 individuals, who claim that they have standing because they
12 will be subject to state taxes if their student loans are
13 discharged.

14 The *Garrison* case has been dismissed by the district
15 court, an appeal has been taken to the Seventh Circuit. And I
16 believe, just yesterday, there was a motion for emergency
17 relief in the Seventh Circuit which is still pending.

18 There are a couple of other cases that are not as
19 far along. The State of Arizona filed its own complaint in
20 the District of Arizona. That was filed on October 30th.
21 There has been no additional action, beyond the filing of the
22 complaint in that case, at least when I last checked the
23 docket.

24 There was a case filed by the Cato Institute in the
25 District of Kansas. They filed a preliminary injunction

1 motion on Friday. The theory of that case is that the Cato
2 Institute, as an employer, has standing to challenge this
3 relief because --

4 **THE COURT:** So, I guess, really what I'm getting at,
5 as far as you know, counsel, is the case here in Fort Worth,
6 are we the only case where the taxpayer standing is not an
7 issue?

8 **MR. NETTER:** Oh, no, no. The taxpayer standing was
9 not an issue in the *Garrison* case, not an issue in the *Cato*
10 *Institute* case, the Arizona case. The only case that had
11 taxpayer standing was the *Brown County* case in the Eastern
12 District of Wisconsin.

13 **THE COURT:** Okay. But I guess in the *Cato* case,
14 paying taxes for its employees, et cetera, et cetera. That
15 seems different from a case where we have two individual
16 plaintiffs who are arguing that one, which has a private
17 student loan, and the other is arguing that they would have
18 been entitled to additional money under the Pell Grant, which
19 they didn't get.

20 In other words, we have -- the argument would be
21 here, we have people that are particularly aggrieved, because
22 they were the people who were actually harmed in this case.
23 In other words, you have students, I guess is a better way to
24 put it. Am I the only case that has students with student
25 debt?

1 Do you understand the difference?

2 **MR. NETTER:** I do understand the difference, Your
3 Honor. The *Garrison* case involves students, those are
4 students who would potentially have debt that would be
5 discharged automatically.

6 The *Cato Institute* case is not about taxes.

7 **THE COURT:** Yeah.

8 **MR. NETTER:** It does arise in a different posture.
9 The theory there is, that as an employer, the employer can
10 recruit employees through the Public Service Loan Forgiveness
11 Program, and would, allegedly, have a more difficult time
12 doing so if there were student loans that were discharged and
13 those individuals no longer have debts --

14 **THE COURT:** Sure.

15 **MR. NETTER:** -- in which they could have availed
16 themselves of the PSLF.

17 **THE COURT:** And all of these cases are in various
18 stages procedurally and the United States is, I'm assuming,
19 defending this program in all of them, standings in issue in
20 every one; is that a fair assumption?

21 **MR. NETTER:** That's correct, Your Honor. Insofar as
22 the Government has appeared.

23 **THE COURT:** Yeah.

24 **MR. NETTER:** There are some cases that are not far
25 enough along.

1 **THE COURT:** Perhaps the Government has been sued but
2 not served yet?

3 **MR. NETTER:** There is a pro se case in Oregon, for
4 example, where the Government hasn't appeared, hasn't
5 answered. That deadline is still a ways, Your Honor.

6 **THE COURT:** Am I the first court to hear a
7 preliminary injunction hearing, to actually hold a preliminary
8 injunction?

9 Like, did the -- in the Eighth Circuit case, for
10 instance, did the Court just make a ruling on the papers there
11 was no standing?

12 **MR. NETTER:** No, no. Judge Autrey conducted a
13 hearing in St. Louis probably a week and a half ago --

14 **THE COURT:** Okay.

15 **MR. NETTER:** -- that preceded his dismissal of that
16 case.

17 **THE COURT:** All right. Go ahead, counsel.

18 **MR. NETTER:** I think that completes our survey of
19 the other cases that --

20 **THE COURT:** No, that's very helpful.

21 **MR. NETTER:** Let me move on then to the sum and
22 substance of this case. So, as the Court is well aware,
23 Article 3 of the Constitution limits Federal courts to hearing
24 cases or controversies brought by an individual with injury in
25 fact that's traceable to a challenged conduct that can be

1 addressed by judicial action.

2 This case should be dismissed for lack of standing,
3 because the plaintiffs here lack a cognizable injury in fact.
4 Their supposed injury is not traceable to the invocation of
5 the HEROES Act that they're challenging. And this Court
6 cannot take action to provide their requested redress.

7 To start with injury in fact, although the
8 plaintiffs filed this action to take down the debt forgiveness
9 program as it stands under the HEROES Act, their purported
10 injury as to the program isn't generous enough in providing
11 debt relief. So, I think it's important for us to start with
12 the theories of standing that one would ordinarily think would
13 be associated with that sort of injury that aren't present
14 here and that don't work here.

15 First, the plaintiffs are not asserting that they
16 have any substantive right to loan forgiveness, nor do they
17 have standing because benefits have been provided to others.
18 That's the sort of generalized grievance taxpayer standing
19 theory that the Court just alluded to. Nor do the plaintiffs
20 assert that they have procedural rights under the HEROES Act
21 itself, which would, in any event, require some tangible
22 manifestation under *Spokeo* and other related standing cases.

23 Rather, the plaintiffs' theory was they were denied
24 a right to comment on the rule that the Department of
25 Education has not pursued, but might pursue if the HEROES

1 invocation were to be invalidated.

2 Now, that's a quite remarkable theory of standing,
3 that I must say, is exceedingly broad and not supported by
4 precedent. We haven't been able to identify other
5 circumstances in which there is a procedural right as to a
6 course not taken that supplies the basis for standing.
7 Indeed, were that an available pathway to standing, one could
8 rewrite all of the Supreme Court's standing cases and come up
9 with a different theory for why the Court --

10 **THE COURT:** Who would be a plaintiff that would have
11 standing to challenge the agency action? Who -- in your mind,
12 who does have standing? Someone that really wants to pay
13 their student loans back, they would have standing to
14 challenge it? There has to be somebody that can challenge
15 this.

16 So, who -- who does the Government think would be a
17 proper party to challenge this?

18 **MR. NETTER:** So, Your Honor, I would fight the
19 nature of the hypothetical. Because we don't approach
20 standing from the standpoint of --

21 **THE COURT:** No, don't fight. So, you don't have an
22 answer? You don't need to spar with me, I'm just asking.

23 **MR. NETTER:** No, I think --

24 **THE COURT:** And so, is there anyone, in your
25 opinion, that can challenge this action? Who has standing?

1 **MR. NETTER:** Right. So, it is theoretically --

2 **THE COURT:** Is it -- if I understand what you're
3 saying, it would be a student out there that really, really
4 wants to pay the United States back their student loans.

5 Is that the only person that can challenge this?

6 **MR. NETTER:** No, I don't think so.

7 I mean, just the way procedurally that we're
8 processing this is that, you know, complaints are coming in
9 and we're assessing them. We have yet to identify one of the
10 complaints that satisfied the --

11 **THE COURT:** I don't want you to concede to anything
12 that would hurt you in a future case. I think you can at
13 least concede that there has to be someone, some entity
14 somewhere that has standing to challenge the administration's
15 actions at this point, right or wrong; right?

16 **MR. NETTER:** So, I'm not sure that that's true, Your
17 Honor.

18 You know, Article III of the Constitution imposes
19 limitations on the judiciary. And sometimes the result of
20 that is that there is executive or legislative action that
21 takes place for which there isn't an appropriate plaintiff.

22 **THE COURT:** Give me another example. Give me an
23 example that comes to your mind, where there's not one
24 individual in the entire United States that can challenge an
25 agency action, an executive action.

1 Can you think of one?

2 **MR. NETTER:** Your Honor, I'm sure that examples
3 exist. None comes -- none springs to mind immediately.

4 But, you know, typically in the context where the
5 Government is providing a benefit, it is difficult to imagine
6 who is harmed by the existence of that benefit, right? So,
7 the reason why there have been attempts to -- to create a
8 theory of taxpayer standing, is because individuals have
9 objected to Congress appropriating funds and the Executive
10 implementing that Congressional appropriation.

11 In that context, the Court has said, even though
12 Federal tax dollars are being spent for this purpose, it
13 doesn't mean that there is, necessarily, a standing for
14 individuals whose grievance is only of a generalized nature.

15 So, I did want that talk --

16 **THE COURT:** I get it.

17 But who is of a particularized nature that they
18 might be able to challenge this? Do you even want to throw
19 out a guess, or are you afraid it's going to prejudice the
20 United States if you do so?

21 Who would be their perfect client? There has --
22 there has to be somebody.

23 **MR. NETTER:** Yeah.

24 **THE COURT:** And based on what you're arguing, the
25 only person that I can think of that would qualify for

1 standing under your argument would be the person that gets a
2 large amount of Federal student loans and just really, really
3 has a hankering to pay them back, it's their patriotic duty.

4 **MR. NETTER:** Although, Your Honor, in those
5 circumstances, the individual can opt out of receiving any
6 student loan debt. So, there wouldn't even be an injury in
7 that context.

8 I would note also that, you know, there's no
9 standing, as my colleague points out here, to -- to challenge
10 grant of food stamps to other people. So, in this context of
11 the Government providing benefits --

12 **THE COURT:** I get it. I'm just probing your mind.

13 **MR. NETTER:** I appreciate that, Your Honor.

14 **THE COURT:** All right. Go ahead.

15 **MR. NETTER:** And, you know, the hypotheticals that I
16 was thinking through in preparing for this argument, was how
17 the plaintiffs' theory in this case would affect some of the
18 Supreme Court's precedents.

19 So, the Court is surely aware, with Justice Scalia's
20 opinion of the Court in *Lujan*, that's a case finding that
21 there was no standing to challenge the Department of
22 Interior's regulation limiting the application of the
23 Endangered Species Act to actions taken limiting -- to actions
24 taken inside the United States around the high seas. The
25 Court in that case found that there was no standing, based on

1 a future desire to observe wildlife in potentially a foreign
2 country.

3 But if we were to apply the plaintiffs' theory here,
4 you could say, Well, if the Department of Interior's rule were
5 taken down because it's unlawful, in the theory of the
6 plaintiffs, the Department could have pursued an alternative
7 course. And maybe that alternative course would have involved
8 the use of consultants, and the defenders of the wildlife
9 could have been one of those consultants, so therefore there's
10 standing.

11 As we're thinking this through, it is difficult to
12 imagine a circumstance in which one cannot manufacture an
13 alternative in which the plaintiff could, you know,
14 potentially, theoretically, have some sort of stake. So, if
15 there's a procedural right as to a course not taken that
16 supplies the basis for standing, then the doctrine of
17 standing, in a sense, becomes far less relevant when a party
18 seeks to challenge Government action.

19 We aren't aware of examples of other circumstances
20 in which a party is asserting, as its basis for standing, a
21 procedural right that doesn't apply under the statute, under
22 the actual administrative act that is being taken.

23 Here, the plaintiffs say, you know, It's a
24 procedural right, so the Court shouldn't look too hard. There
25 should be standards that are not quite as assertive.

1 **THE COURT:** Well, that's the -- not just the
2 plaintiffs, that's the -- it's the D.C. Circuit. I can't
3 remember what the name of the case is, but there's also a
4 Fifth Circuit case, the *EEOC* case, where the Fifth Circuit
5 adopted that same language when it comes to standing in these
6 administrative challenges. So, it's not just them.

7 How do you -- how does this not fit in with that --
8 those decisions?

9 **MR. NETTER:** Well, that's right, Your Honor.

10 But in every one of those cases, the procedural
11 right arises within the statutory regime or the administrative
12 regime that's being challenged.

13 So, if we start by looking at the Fifth Circuit
14 decision in *Texas vs. EEOC*, that's a case in which the State
15 of Texas is challenging EEOC guidance as to the hiring of
16 individuals with criminal records, specifically individuals
17 who had previously committed felonies. And the Fifth Circuit
18 in that case said that there were multiple injuries.

19 First, this was guidance that explicitly applied to
20 state employers, and the object of the guidance was to target
21 employers like Texas. Texas had a different policy as to the
22 hiring of former felons than the EEOC was approaching. So,
23 the Court acknowledged that there were at least two injuries.
24 There was an increased regulatory burden on the State, and
25 there was also a sovereign interest as to enforcing the

1 restrictions that appeared in Texas law as opposed to under
2 Federal law.

3 With respect to the separate procedural injury, and
4 I want to quote the Fifth Circuit here, the Court said, When a
5 litigant is vested with a procedural right, that litigant has
6 standing if there is some possibility that the requested
7 relief will prompt the injury-causing party to reconsider the
8 decision that allegedly harmed the litigant when a litigant is
9 vested with a procedural right.

10 So, that was a case in which the procedural right
11 that the State of Texas was asserting was as to the process
12 that the EEOC had actually followed, not as to an alternative
13 policy that the EEOC could have pursued under a different
14 statutory authority.

15 The same problem arises with respect to the
16 *Ecosystem Investment Partners* case that the plaintiffs
17 described as being on all fours with this case in their reply.

18 **THE COURT:** That the D.C. Circuit case?

19 **MR. NETTER:** No. That's the unpublished Fifth
20 Circuit case.

21 **THE COURT:** Oh, sure.

22 **MR. NETTER:** That's to NEPA challenge to --

23 **THE COURT:** Yes, yes.

24 **MR. NETTER:** -- failing to consider the use of the
25 mitigation bank --

1 **THE COURT:** Right.

2 **MR. NETTER:** -- by the petitioner who had the only
3 supply of mitigation credits. That, again, is a challenge to
4 assert rights under MEPA to challenge whether the NEPA policy
5 had been complied with. And the plaintiff's theory was, if
6 NEPA had been followed, their injuries would have been
7 averted.

8 That's, you know, a pretty unextraordinary holding,
9 because the procedural injury in that case was associated with
10 the action being challenged, not with a process that could
11 have been required if the agency had decided to pursue a
12 theoretical alternative.

13 And while I'm describing this, now might be an
14 opportunity to respond to Mr. Connolly's confidence that the
15 agency would, if the HEROES Act indication were deemed
16 invalid, would pursue this settlement and compromise authority
17 approach. I have not seen anything in the record to suggest
18 that there's any indication that the Department would pursue
19 that course. I don't know where Mr. Connolly's confidence
20 comes from. I think he's taking that from news reporting or
21 from assumptions. But there's surely nothing in the record
22 here to suggest that the Department of Education has some
23 backup plan if the HEROES Act invocation were to be
24 invalidated.

25 **THE COURT:** The administration has no backup plan?

1 If the Court makes a finding that the HEROES Act
2 doesn't apply here, there is no backup plan to do notice and
3 comment and go through the APA administrative process to enact
4 administratively the Federal Student Loan Forgiveness Program?
5 There is no backup plan?

6 That wasn't even considered by the United States?
7 We just said, We've got the HEROES Act, President Trump said
8 there was an emergency three years ago, by golly, let's ram it
9 through.

10 That's what you're saying?

11 **MR. NETTER:** I certainly wouldn't use that -- that
12 description, Your Honor.

13 **THE COURT:** Well, what description would you use?

14 **MR. NETTER:** I would say that the Secretary of
15 Education was vested with authority under the HEROES Act to
16 respond to declared national emergencies. And this was
17 authority that was deployed by Secretary DeVos two days after
18 President Trump declared a national emergency, in March of
19 2020.

20 **THE COURT:** Okay. That was three years ago. When
21 does the national emergency end?

22 President Biden has said a couple of times, in the
23 60-Minute interview that I watched, that said the pandemic is
24 over with. So, at what point -- I mean, if we never have a
25 rescinding action of President Trump's definition of an

1 emergency -- so from now until the end of time, even though
2 this administration says this is a one-time only thing, can we
3 have administration come back, use the HEROES Act to,
4 basically, forgive any type of student loans for anybody?

5 **MR. NETTER:** No, Your Honor.

6 So, the HEROES Act --

7 **THE COURT:** At what -- at what point does something
8 not become a national emergency, is my question.

9 **MR. NETTER:** Well, the national emergency is
10 declared by the president. And the statute defines when there
11 is a national emergency to be --

12 **THE COURT:** I understand that, but I would like you
13 to answer my question.

14 **MR. NETTER:** I understand, Your Honor. The --

15 **THE COURT:** And I'm sorry to be frustrated.

16 But, you know, you read the plain text, the history
17 of the HEROES Act, you look at the context that it was enacted
18 in. Unless I need to turn in my law license, it seems to me
19 that the HEROES Act was passed in light of 9-11, and in light
20 of the Iraq and Afghanistan wars that we were involved in for
21 20 years. You know, the commonsensical definition that any
22 kid in civics would give you or any teacher describing the
23 HEROES Act would be, this was meant to help servicemen and
24 women who are volunteering to serve their country in times of,
25 not only war, but national emergencies, such as one would

1 think, earthquakes, hurricanes, tornadoes, et cetera, et
2 cetera, that because they are serving, they are unable to pay
3 their loan.

4 We have a situation where we have maybe, maybe not,
5 a national emergency applying this to civilians. So, you just
6 can't throw the language and throw the HEROES Act at me and
7 state that, Well, this applies, therefore, we can do what
8 we're doing. You have to show me how you get there under the
9 HEROES Act. And I just have a hard time seeing it.

10 Now, standing is one thing. Whether these folks
11 have standing to bring this case is one thing. But whether
12 the HEROES Act truly applies to the situation that we have
13 here, the argument, under that reasoning, I could expand the
14 HEROES Act to apply to just about anything.

15 **MR. NETTER:** I don't think you could, Your Honor.
16 And I'm happy to walk through --

17 **THE COURT:** Tell me -- tell me why not.

18 **MR. NETTER:** -- how the HEROES Act applies here.

19 To start, as the Court acknowledged, a triggering
20 event of the HEROES Act is the requirement that the president
21 declares a national emergency, but that's not the only
22 requirement. The substantive requirement of the HEROES Act is
23 that the Secretary of Education, upon the declaration of a
24 national emergency by the president, has the authority to
25 waive or modify statutory, regulatory requirements under the

1 Higher Education Act, and wouldn't cover loans from the USDA,
2 for example, as to affected individuals, so as to ensure that
3 an affected individual is not placed in a worse position
4 financially in relation to their financial assistance because
5 of their status as an affected individual.

6 So, there is, at the end of the day, an empirical
7 standard that Congress imposed on the Secretary of Education
8 in relation to the consequences resulting from a war or
9 national emergency.

10 Although, I appreciate the references to the
11 legislative history and the findings and in the context of
12 9-11 and the reauthorization of the Iraq war, there certainly
13 was an interest in helping military families who might be
14 called to deploy. But the history of the statute, in its
15 plain text, demonstrates that it's surely not limited to
16 service members in the context of a national emergency. An
17 affected individual is any individual who resides or works in
18 an area that has been declared a national emergency zone by
19 the president, by a governor, even by a local official. And
20 from the very outset --

21 **THE COURT:** So, effectively, that could be every
22 single American; is that correct?

23 **MR. NETTER:** If there is a national emergency that
24 affects every American, you know, it could be.

25 And when Secretary DeVos invoked the HEROES Act two

1 days after President Trump's assertion of a national
2 emergency, her first action was to pause payments on Federal
3 student loans. And she determined that every loan holder
4 constituted an affected individual under the HEROES Act under
5 that context. Both because the national emergency -- perhaps
6 not the mind run of national emergencies, but the COVID
7 national emergency covers every county of the United States
8 and all the permanently occupied foreign territories abroad.

9 But even for individuals that don't live or work in
10 an area that's been declared a national emergency zone,
11 individuals who have suffered economic effects from the
12 national emergency, even if they're abroad, they qualify as
13 affected individuals. And it's difficult to identify anybody
14 who holds Federal student loans who hasn't been economically
15 affected at this juncture by the national emergency that
16 persisted in this country for the past 2 1/2 years.

17 I do want to go back to the Court's point that the
18 President has made some public statements as to the current
19 state of the pandemic. And what I think is important to
20 recognize here, is that the HEROES Act speaks not to actions
21 taken during the pandemic, but to actions that are necessary
22 to avert economic injuries resulting from a national
23 emergency.

24 So, an example that I gave at the preliminary
25 injunction hearing in St. Louis was that, you know, if you

1 take an example of a hurricane that causes damage in a
2 particular region of the country. Just because the hurricane
3 has stopped rotating and the storm has passed, doesn't mean
4 that the authority of the President and the Secretary of
5 Education to declare a national emergency and provide relief
6 for the economic injuries in relation to student loans that
7 stem from that storm, it doesn't mean that authority has come
8 to an end.

9 So, the Secretary of Education has acknowledged here
10 that part of the reason why we believe the HEROES Act is
11 necessary and warranted here is because of the --

12 **THE COURT:** I guess you have to know what I'm
13 getting at. So, ten years from now, can we use the
14 declaration that people are still suffering because we went
15 through this two- to three-year period where there was
16 COVID-19 and people had to stay at home? Could the president
17 ten years from now still invoke the HEROES Act and do what
18 we're doing now?

19 **MR. NETTER:** So, just to make sure I understand the
20 hypothetical --

21 **THE COURT:** It's not hard to understand, okay.
22 These are not trick questions. You need to help me out here.

23 Ten years from now, could the HEROES Act still be
24 invoked because of the COVID-19 pandemic to forgive student
25 loan debt?

1 **MR. NETTER:** Yes, to the extent that there is still
2 unresolved injury in relation to student loans resulting from
3 the national emergency.

4 Now, one would hope that that is a difficult factual
5 premise -- difficult empirical premise to fathom ten years
6 out. But the statutory standard entitles the Secretary of
7 Education to provide this relief in relation to a national
8 emergency, so as to ensure that individuals who are affected
9 individuals under the statute are not worse off in relation to
10 their student loans because of the national emergency.

11 So, in the hypothetical circumstance in which there
12 is a national emergency that drags on for another decade and
13 there is unresolved economic injury with respect to student
14 loans --

15 **THE COURT:** I think if President Johnson were here,
16 he would say, Why not just let Congress vote on it? Wouldn't
17 that be the safest route?

18 **MR. NETTER:** I don't --

19 **THE COURT:** Better yet, why not just get notice and
20 comments and enact the -- giving it full vetting and see what
21 you come back with and the Secretary can go ahead and do what
22 they wanted to do, right?

23 Under Title IV, can't the Secretary make a finding
24 that the student loans be forgiven, even without the HEROES
25 Act?

1 **MR. NETTER:** I don't think so, Your Honor.

2 So, the -- the Secretary has the authority to settle
3 or compromise, the settlement and compromise authority, which
4 is different from a discharge of loans.

5 I do want to point out --

6 **THE COURT:** They can settle it and say you owe zero,
7 couldn't they? They say, Well, here's the settlement, 22
8 million people don't owe anything, we hereby settle and
9 compromise this case.

10 **MR. NETTER:** So, that's the context in which the
11 Federal Claims Collection standards apply. Mr. Connolly
12 mentioned a conflict with Federal regulations. And I think
13 the regulation he was referencing was 34 CFR, Section 30.70.
14 And that is the regulation implementing the settlement and
15 compromised authority that appears in the general powers of
16 the Secretary of Education.

17 That is not, however, a restriction or limitation on
18 the indication of the Secretary's HEROES Act authority,
19 because that's not a settlement or compromise. It is a
20 discharge of debt and a waiver of other statutory provisions.
21 So, that -- that's the distinction that would apply there.

22 I feel like in order to keep our discussion
23 structured, maybe I should go back to standing and hit some of
24 these merits points once we --

25 **THE COURT:** No, I think we're fine.

1 Why don't you go into your merits points. I
2 understand the argument on standing.

3 **MR. NETTER:** Well, there's one point on standing,
4 though, that hasn't come up that I think is critical, and
5 that's with respect to traceability. One would think that in
6 a circumstance in which the plaintiffs are seeking a
7 procedural right under an invocation of authority that the
8 Secretary hasn't purported to exercise, that they would have
9 to exhaust all the other procedures that could provide that
10 process. And that's the case here.

11 We noted it in our opposition brief, and the
12 plaintiffs didn't respond in their reply brief and didn't
13 mention and didn't bring this up today, that there's an
14 opportunity for any citizen to file a citizen petition with
15 the Department of Education asking the Department to issue,
16 amend or repeal a rule. And the Department even has
17 regulations on this point, it's 34 CFR, Section 9.9(c).

18 The plaintiffs aren't seeking relief that's mutually
19 exclusive with the invocation of the HEROES Act. They say
20 they want additional relief. And if they want additional
21 relief, there's no reason why their interests and process
22 can't be vindicated by them following the procedures set forth
23 in 34 CFR, 9.9(c).

24 Which, were they to file a petition under -- at
25 regulations.gov, the Department then takes 60 days to review

1 the petition and the head of the principal operating component
2 then recommends how to proceed from there. So, to the extent
3 this really is about the procedural injury to these
4 plaintiffs, they have recourse. They have recourse that
5 doesn't require the Court to enjoin or to affect, in any way,
6 the indication of the HEROES Act.

7 Now, their response to this, as I understand it, not
8 specifically as to regulations, but in general, is that the
9 Secretary -- or they believe the Department has said that
10 they're only going to do this once. But that's -- that's not
11 factually accurate. To be sure, this is one-time relief, in
12 that it's not an ongoing program.

13 But at the same time, the Department has a message
14 posted on its website right now that says, The Department is
15 assessing whether there are alternative pathways to provide
16 relief to borrowers with Federal student loans not held by A,
17 a category that describes plaintiff Ms. Brown, including Pell
18 program loans and Perkins loans, and is discussing this with
19 private lenders. So, the Department surely has not foreclosed
20 the possibility of providing additional relief, should it be
21 warranted.

22 Now, the fact that this pathway exists demonstrates,
23 you know, that Ms. Brown's rights, her procedural rights, as
24 she views them to exist, they would be satisfied if she filed
25 the citizen petition.

1 **THE COURT:** All right.

2 I'd like for the -- you-all to address that in your
3 reply, please.

4 **MR. CONNOLLY:** Oh, sure.

5 **THE COURT:** Thank you.

6 Go ahead, counsel.

7 **MR. NETTER:** Thank you, Your Honor.

8 **THE COURT:** Take me to the merits. Let's talk about
9 the major questions doctrine, and why don't you tell me how
10 that fits into this framework.

11 **MR. NETTER:** Sure, Your Honor.

12 So, the major questions doctrine, I think it's
13 important for us to situate this in a Supreme Court
14 jurisprudence as to how the major questions doctrine fits in
15 with concepts of delegation to administrative agencies.

16 So, the principle underlying the major questions
17 doctrine is that, you know, Congress has the power and
18 authority to delegate powers to agencies. But there are some
19 circumstances where the apparent delegation of authority is so
20 mismatched to the exercise of power by the agency that the
21 courts ought to be especially skeptical.

22 **THE COURT:** Go ahead.

23 **MR. NETTER:** That's -- that's effectively the
24 definition of a major question. So, the way that we have
25 encapsulated this in our papers, is to try to describe the

1 disconnect between what Congress thought it was doing and how
2 the agency is exercising its authority.

3 Now, here there are at least six different reasons
4 why we don't think that there is a disconnect between what
5 Congress, you know, purported to be doing to the plain text of
6 the statute and how the Secretary of Education is exercising
7 its authority.

8 **THE COURT:** And I guess, while you're weaving me
9 through your argument, tell me if the *Chevron* standard applies
10 to any of my analysis.

11 Any deference I have to give the agency in this
12 regard or not?

13 **MR. NETTER:** So, Your Honor, I think that the Court
14 has understood the major questions doctrine to be,
15 effectively, an exception to *Chevron*. That because the theory
16 that the Court is pursuing is that Congress has not delegated
17 the authority in a major questions case, that means you don't
18 get to the point of deferring to the agency if a major
19 question exists.

20 Now, we don't believe that a major question does
21 exist. And the first reason for this is, this is a statute
22 that is specifically about wars and national emergencies.
23 Congress knew it was legislating in a space where the harms
24 could be large. And on its face, the statute reflects an
25 intent to delegate authority to the Secretary of Education to

1 act swiftly and decisively, in a manner that is proportional
2 to the harm. So, the very nature of a statute that has
3 addressed the economic harm stemming from a national emergency
4 is that the authority that is being vested in the Secretary of
5 Education grows as the magnitude of a national emergency
6 grows.

7 There are also, you know, particular choices of
8 words in the statute that indicate the intended breadth. In
9 1098bb(a) (1) and (a) (2), Congress says the Secretary may waive
10 or modify any provision. Now, any is a word choice that is --

11 *(Court Reporter interrupts)*

12 **MR. NETTER:** -- that is typically used to connote
13 breadth.

14 Likewise, in 1098bb(a) (1) and (b) (1), Congress
15 authorized the Secretary to provide such relief as the
16 Secretary deems necessary. The use of the word deems is, as
17 courts have generally understood it, that is intended to
18 suggest that the decision maker, in this case the Secretary of
19 Education, has broader than usual discretion to devise the
20 appropriate response.

21 Likewise, in 1098bb(b) (2), Congress specified that
22 the standard is what the Secretary of Education deems
23 necessary to ensure that the statute's objectives are
24 satisfied. So, this is not a circumstance in which Congress
25 was trying to cabin the Secretary's authority to the minimum

1 necessary administrative staff.

2 Instead, ensuring that the statutory objective --
3 the objective of averting the economic harm to individuals who
4 have been adversely affected by a national emergency, the
5 Secretary is directed to ensure that those harms are averted.

6 Next, in 1098bb, Subsection (b) (3), Congress
7 specified that the Secretary is not required to exercise the
8 waiver of modification authority on a case-by-case basis.
9 Again, supporting the whole thrust of this statute, which is
10 the Secretary is supposed to be acting swiftly and
11 categorically in response to a national emergency.

12 And finally, 1098bb(b) (1), that there is no notice
13 and comment or negotiated rulemaking required when the
14 Secretary invokes the HEROES Act.

15 Now, you know, the Court mentioned that when there
16 are major issues that sometimes, perhaps, notice and comment,
17 it would be a good idea. But whether or not notice and
18 comment is appropriate or is required, that's a question for
19 Congress. Congress has determined, under the Administrative
20 Procedure Act, that ordinarily when there's a legislative
21 rule, there is going to be a requirement to conduct notice and
22 comment, unless some exception to notice and comment applies.

23 But it is up to Congress to determine where those
24 exceptions apply. And Congress determined in this
25 circumstance that, you know, when you have a national

1 emergency and the Secretary of Education needs to act to
2 provide economic relief with respect to the student loan
3 portfolio, that is managed by the Secretary of Education, that
4 the notice and comment is not warranted. It's not hard to
5 see, you know, why our Congress would have settled on such a
6 policy.

7 **THE COURT:** Does the entire analysis rest on the
8 word notwithstanding? Notwithstanding?

9 **MR. NETTER:** Yes, Your Honor.

10 Yes, the word notwithstanding is what indicates that
11 the negotiated rulemaking and notice and comment procedures
12 are not required in this context. I don't understand there to
13 be a dispute on that point.

14 **THE COURT:** And what the word notwithstanding means.
15 I think drafting -- drafters often use that word as a
16 catchall.

17 It has to have some sort of meaning, doesn't it?

18 **MR. NETTER:** Right. So --

19 **THE COURT:** So, why couldn't you -- you talk really
20 fast. Monica -- we don't talk that fast in Texas, Monica is
21 having a tough time.

22 Go ahead, start over. And believe me, I will give
23 you all the time that you need. Go ahead.

24 **MR. NETTER:** I appreciate that, Your Honor.

25 **THE COURT:** Go ahead.

1 **MR. NETTER:** Apology to the court reporter.

2 **THE COURT:** Yeah.

3 **MR. NETTER:** So, I think in this context that the
4 word notwithstanding connotes despite. So, despite the
5 ordinary rules that apply, the only obligation here is for the
6 Secretary to publish the notice indicating what provisions are
7 being waived or modified in the Federal register. And that
8 notice has, in this case, already been filed.

9 I don't understand there to be any dispute here,
10 that an assertion of the HEROES Act does not necessitate
11 notice and comment. The disputes that the plaintiffs have
12 raised here is as to whether the HEROES Act applies at all.

13 Now, there is some overlap here as between the
14 merits argument on the HEROES Act and the standing argument,
15 and that's because of the -- the somewhat odd posture of the
16 plaintiffs here. You know, their theory is that -- that they
17 want to participate in the notice and comment process so as to
18 guarantee that they obtain relief.

19 So, Your Honor, you asked Mr. Connolly, you know,
20 whether he believes that the Court needs to determine that
21 there actually is an alternative course -- an alternative
22 avenue where relief is available in order for them to prevail
23 here.

24 **THE COURT:** So, are you saying that notice and
25 comment is not only not an irreparable injury for everything

1 that we've previously said, but it would be useless anyway;
2 therefore, how can the plaintiffs really they're irreparably
3 harmed when the notice and comment doesn't matter?

4 Is that what I just heard you say?

5 **MR. NETTER:** Yes.

6 So, all of these arguments are -- they're knotted
7 together in a sense. If the plaintiffs' theory is that
8 because of the major questions doctrine only Congress can act
9 here, then they don't have an injury that this Court can
10 redress.

11 **THE COURT:** But this was the subject of a lot of my
12 questions to Mr. Connolly. Is if the HEROES Act doesn't
13 apply, can we still get to irreparable harm? And I think that
14 if you can just state it very succinctly why you believe we
15 don't, I think that would be helpful to me.

16 So, go ahead.

17 **MR. NETTER:** Yes, Your Honor.

18 So, in order for the plaintiffs to articulate an
19 injury that can be redressed by this Court, they would need to
20 be able to identify the alternative pathway to get them the
21 substantive relief that they claim that they're entitled to.

22 Here, Ms. Brown says that she should be entitled to,
23 you know, some loan forgiveness, even though her loans aren't
24 federally held. Mr. Taylor says that he should be entitled to
25 additional relief. But if their whole theory takes down any

1 opportunity for relief to be provided, then -- then their
2 procedural right doesn't amount to anything.

3 So under *Spokeo*, the existence of a procedural right
4 is not sufficient to confer standing unless the plaintiff has
5 a substantive interest. Here, I think the plaintiffs
6 acknowledge that, which is why they say that they have a
7 substantive interest and, you know, potentially increasing --
8 or being a participant in the Student Loan Forgiveness
9 Program.

10 But that whole arrangement collapses if their theory
11 of the major questions doctrine takes down any avenue that the
12 plaintiffs would have to actually get that loan forgiveness.
13 So, they don't have standing to, you know, take down the
14 HEROES Act program in a manner that would make it impossible
15 for anybody to get student loan relief.

16 And their theory of the major questions doctrine
17 seems to head there in a very direct line.

18 **THE COURT:** That's a good question for the
19 plaintiffs. Would -- and you can go ahead and respond. What
20 if we had servicemen and women who had been called, for
21 instance, to serve on the hospital shifts that they had in
22 various ports of the United States. Those were, I believe,
23 staffed by Navy and military personnel that had been called
24 out of their jobs, they had student loans.

25 In that case, could the Secretary of Education

1 invoke the HEROES Act and forgive their debt?

2 **MR. CONNOLLY:** Our position is that under the HEROES
3 Act the Secretary does not have the power to cancel debt,
4 because that would be putting the individuals in a better
5 position.

6 **THE COURT:** Doesn't matter who the individual is?
7 The example I gave with the service person.

8 **MR. CONNOLLY:** I mean, that's certainly --

9 **THE COURT:** Navy corpsmen.

10 **MR. CONNOLLY:** -- closer --

11 **THE COURT:** In fact, I had a law clerk's brother
12 that got called up, a navy reservist, during COVID to serve on
13 a hospital ship that was parked in New York.

14 **MR. CONNOLLY:** Our position is that under the HEROES
15 Act, what the Secretary do are things that keeps them in the
16 same position as beforehand. So, that does not amount to
17 canceling debt.

18 **THE COURT:** Well, let's talk in layman's terms
19 again. I'm just an Aggie lawyer and it takes me awhile.

20 You're saying under the Act, the Secretary, in the
21 situation that I just gave you, could pause loan payments, but
22 could not completely forgive the loan; is that correct?

23 **MR. CONNOLLY:** That's -- that's our argument, yes.

24 **THE COURT:** All right.

25 Taking you back to the example that I just gave you,

1 could the Federal Government with a Navy corpsman serving on
2 the ship outside of Manhattan, that had to leave his practice
3 here in Fort Worth as a pediatrician, gets called up to serve
4 on the marine corp navy ship, would there have to be notice
5 and comment before the Secretary of Education said that their
6 loans were tossed, under your argument?

7 **MR. CONNOLLY:** No. Because under the HEROES Act, if
8 this individual is an affected individual under the HEROES
9 Act, the Secretary could pause the payments that this
10 individual was -- needed to do while this individual was
11 serving abroad.

12 So -- but that would fit within the authority of the
13 HEROES Act. If it doesn't fit within the authority of the
14 HEROES Act, then the traditional negotiated rulemaking and
15 notice and comment rules apply.

16 **THE COURT:** Okay. Counsel, go ahead, Mr. Netter.

17 **MR. NETTER:** Thank you, Your Honor.

18 So, I think that's a useful segue to the Court's
19 earlier question about what is being waived or modified here.
20 So, there are statutes and regulations that require the
21 repayment of loans. I refer the Court to 20 U.S.C., Section
22 1087dd, Subsection C, which requires the loan agreements to
23 provide for repayment of the principal amount.

24 Now, if I understood what Mr. Connolly was just
25 saying, he's saying that there's like a statutory categorical

1 prohibition on discharge of debts under the HEROES Act. Now,
2 there certainly isn't anything in the language of the statute
3 that says that. The statute says the Secretary has the
4 authority to waive or modify statutory or regulatory
5 requirements. And I just cited a statutory requirement that
6 the Secretary can waive that has the effect of discharging
7 debt.

8 So, what I think the disagreement might be at the
9 end of the day, is not really about the statute, but about
10 the -- the follow-on empirical question of what is actually
11 necessary in order to ensure that affected individuals are
12 not -- are not worse off financially in respect to their
13 student debt as a result of the war or national emergency.

14 We haven't discussed the data that the Secretary
15 relied upon, which are provided in the decision memo that's in
16 the record before this Court. But it is ultimately an
17 empirical question, and the plaintiffs haven't challenged the
18 reliance on this data.

19 In order to answer the question of what -- what form
20 of relief is warranted under the circumstances. So, here the
21 Secretary of Education reviewed data showing that borrowers
22 are considerably less able to keep up with loan repayments now
23 compared to pre-pandemic times, supporting the inference of
24 their remained economic effect that have not abated and have
25 not been resolved.

1 Data from the CFPB corroborates that survey data, in
2 that delinquencies of nonstudent loan debt held by student
3 loan borrowers have returned to pre-pandemic levels, even
4 while those borrowers have not had to make payments on their
5 student debt. And that supports the inference that if and
6 when student loan payments resume, this is supposed to happen
7 at the beginning of next year, there will be additional
8 delinquencies that will result and will exceed pre-pandemic
9 levels.

10 Likewise, the Department relied on data indicating
11 that recent circumstances in which payments were paused
12 because of other national emergencies, like hurricanes and
13 wildfires, the default rates skyrocketed when comparing
14 pre-disaster to post-disaster when the payment pause ended.
15 Going from 0.3% to 6.5%, that's a 21-times increase.

16 The Secretary also considered the sensitivity of
17 payment rates to borrower income, the relationship between
18 Pell eligibility, which is a proxy for family wealth and
19 delinquency rates, historical evidence as to how much
20 principal reduction is needed to meaningful reduce default
21 risks and the effects of COVID-induced inflation on the
22 ability of borrowers to repay student loans.

23 So, when it comes to the ultimate empirical question
24 of whether the relief -- where the Secretary had evidence
25 before him to support the relief that he deemed to be

1 necessary under the circumstances, there's -- there's quite a
2 robust record that the plaintiffs haven't engaged with here.
3 And that's the basis for the Secretary exercising the
4 authority that has been granted by Congress, authority to
5 respond in the context of a national emergency, to provide
6 whatever relief is required to ensure that those affected
7 individuals are not worse off in respect to their student
8 loans as a result of the emergency.

9 Now, on the equitable factors here, Your Honor. I,
10 again, think that because of the way all the issues here are
11 knotted, there's a lot of overlap. With respect to
12 irreparable injury, it does need to be the case that there
13 exists some valid Congressional authorization that the
14 Department, you know, could pursue and would pursue, for the
15 plaintiffs to vindicate their supposed interest. And we don't
16 believe they've satisfied that point here.

17 Again, nothing about the HEROES Act is preclusive of
18 the relief the plaintiffs are seeking. So they can pursue
19 other courses, including a citizen petition, in order to
20 obtain that relief. And none of that requires the Court to
21 enter an injunction of any scope, in order to permit these
22 plaintiffs an opportunity to pursue their relief.

23 I would note that the first case that Mr. Connolly
24 noted as supporting their theory of irreparable injury was the
25 *Eli Lilly* case. But that's notably a case in which the Court

1 halted implementation of a rule as to one plaintiff, not on a
2 nationwide basis, suggesting that there are other
3 opportunities for -- for a single plaintiff to -- to assert
4 and follow through with a notice and comment rulemaking
5 process and to defend procedural rights that may exist.

6 Because plaintiffs have pathways to obtain the
7 procedural rights that they, you know, purport to seek and
8 that are independent of the indication of HEROES, that
9 necessarily means that there's no irreparable injury here.

10 So, even to the extent that there are cases in which
11 a procedural right could, under some circumstances, support
12 the existence of irreparable injury, on the particular facts
13 that exist here there's no irreparable injury, because there
14 are alternative courses of relief. And, you know,
15 prohibiting -- preventing other individuals from receiving
16 debt relief under the HEROES Act doesn't vindicate and advance
17 the interests of the plaintiffs here.

18 And I know that Mr. Connolly doubted whether the
19 equities here -- or doubted our position with respect to the
20 equitable principles. But I think it's important to keep in
21 mind that -- that Congress made a decision here. And, you
22 know, perhaps some of the concerns about the breadth of
23 Congressional action should be addressed to Congress, because
24 the alternative interpretation of the major questions
25 doctrine, an interpretation under which if an issue becomes

1 too meaningful that, you know, suddenly the authority that
2 Congress delegated, the actions that Congress wanted to take
3 place can no longer take place absent additional Congressional
4 action. But this here is a statute that is about emergencies.

5 **THE COURT:** You know, you could also make the
6 argument that so was the authority given to Hitler after the
7 Reichstag fire.

8 What is the Court's role if Congress has given away
9 too much of the authority that is supposed to be deemed in
10 that branch under the Constitution? There has to be some sort
11 of recourse, doesn't there?

12 **MR. NETTER:** Well, Your Honor --

13 **THE COURT:** Just because -- if Congress says, You
14 know what, we don't want to do our job anymore, we'll give it
15 all to the executive branch, that wouldn't be constitutional,
16 would it?

17 **MR. NETTER:** There's the non-delegation doctrine.
18 The plaintiffs here don't raise a claim under the
19 non-delegation doctrine.

20 **THE COURT:** No, I'm just talking. These are some
21 thoughts that are going through my head.

22 That, you know, you're kicking everything back to
23 Congress. Well, Congress is the one that's telling us to do
24 this in this case. Am I correctly stating the Government's
25 position, the administration's position?

1 **MR. NETTER:** Yes. So, Congress provided a pathway
2 to relief that the Secretary then exercised.

3 And if there is a disagreement now as to the scope
4 of relief that Congress authorized, then objections as to the
5 scope of that statutory authority should be directed to
6 Congress. And if Congress, in the future, wants to limit
7 relief, the political processes should play out and let the
8 political branches determine how they want this operation to
9 exist.

10 Now, there are constitutional limitations, what
11 authority Congress can exercise and what can be delegated, and
12 there's a role for the courts in that context. But the fact
13 that there may be -- we may be living through an era of
14 political divisiveness, doesn't mean that the authority of the
15 courts to intervene and require additional legislation, even
16 though there's legislation on the books already exists.

17 **THE COURT:** No, I think you -- you've heard my story
18 that I said earlier, that's why I told you the Lyndon Johnson
19 story. It is a shame that the political branches don't seem
20 to be functioning, and that's the way it is.

21 All right. Anything else?

22 **MR. NETTER:** So, I would note, Your Honor, that on
23 the question of whether issues are economically sensitive,
24 that in the context of a national emergency affecting a
25 student loan portfolio that has more than 1 1/2 trillion

1 dollars in it, actions that the Department of Education takes
2 are necessarily going to be large.

3 The student loan pause that was started by Secretary
4 DeVos has had an estimated economic effect of \$150 billion
5 with respect to the Federal Government. Now, that hasn't been
6 challenged, either by these plaintiffs here or more broadly.
7 But I think it's indicative of the fact that if you exist in a
8 world in which you think that your decisions have a large
9 dollar signs attached to them that necessarily create major
10 questions, then it inhibits the ability of Congress to decide
11 when to delegate authority to an agency. And there is harm
12 associated with that in the context of an emergency.

13 So, Your Honor, I think we've addressed the whole
14 panoply of issues here. But the bottom line position of the
15 United States is there's no standing here. That these are not
16 plaintiffs who are appropriately situated to present a claim;
17 therefore, the first act that we're asking for from the Court
18 is to dismiss the complaint, and therefore to deny the
19 preliminary injunction as moot.

20 Short of that, if the Court were to disagree with us
21 on standing, we do believe that the HEROES Act is
22 appropriately invoked here, such that the plaintiffs don't
23 have any procedural right under the HEROES Act or under any
24 other statute that the HEROES Act specifically carves out the
25 need for notice and comment when it's going to be asserted by

1 the Secretary of Education.

2 We thank the Court for its time. And absent further
3 questions, I'll sit down.

4 **THE COURT:** All right. Thank you.

5 Mr. Connolly, one of the things that I'd like for
6 you to briefly address, and if you can try to keep your reply
7 brief. Actually while I've been up here I had to schedule
8 another hearing at 11:15. If you need to come back after the
9 hearing or after lunch, that's fine.

10 What I would like for you to address would be these
11 alternative remedies that the Government has pointed out that
12 would seem to argue that there is no need in this case for the
13 extreme remedy and extreme relief that you get from the
14 preliminary injunction, particularly a nationwide injunction.

15 What are the other methods of redress that you have
16 and why aren't those acceptable?

17 **MR. CONNOLLY:** Sure.

18 So, I'll start -- I'll start with that point. And
19 just a few -- I don't have much, just a few quick points in
20 response to what the Department said.

21 So, the argument they appear to be making is that
22 you should keep this program in place, and then -- because
23 there are other alternatives for the plaintiffs to be involved
24 in the process. And that is not what the case law requires.

25 So, if you look at a case like *U.S. Steel vs. EPA*,

1 out of the Fifth Circuit, 595 F.2d 207. In that case, the EPA
2 violated the notice and comment requirements of the APA, and
3 the EPA said, Hey, we can cure this because we accepted
4 comments later. And what the Fifth Circuit said is, If you
5 accept this rationale you would -- you would gut the APA. And
6 the reason you would gut the APA is because an agency could
7 always go, do whatever it wants, public -- go ahead and enact
8 its rule without notice and comment, and then say, Hey, you
9 know, we're accepting comments or, hey, you have these other
10 options to seek relief, and keep this -- keep the rule that
11 we've already adopted in place.

12 And the Fifth Circuit and numerous other courts say
13 that relief -- if that argument were accepted, it would gut
14 the APA. Because what the APA requires is that individuals,
15 at the point where the decisions are being made, that is when
16 the individuals have procedural rights to talk to the
17 Government and influence the program. But what this would do
18 is this would -- what the Government is asking you to do is
19 keep the program in place, even though it received absolutely
20 no comments from the public at all, it didn't go through the
21 negotiated rulemaking process. And that would gut the APA.

22 The second program, as a practical matter, is that
23 by keeping that process in place, the plaintiffs are
24 already -- my clients are already at a disadvantage. Because
25 as -- practically speaking, once you've forgiven half a

1 trillion dollars in student debt, there has to be some limit
2 of what the Department can do. And in the words of the D.C.
3 Circuit, the egg has been scrambled.

4 So, instead of our -- my clients being able at the
5 very beginning to say, Here's how you should go about doing
6 this process, now we're going to be in the position of saying,
7 Hey, I know you've already handed out \$400 billion in loans,
8 how about us. And that is a far different process than what
9 the APA and the negotiated rulemaking require, which is at the
10 point of decision making, right at the beginning, that's when
11 the plaintiffs need to be involved, that's when we need to be
12 involved so we can say our piece.

13 So, saying we're going to keep this program in place
14 and go off and try to do a citizen petition affords us
15 absolutely none of the procedural rights, because we had a
16 procedural right to comment and be involved when this program
17 is being adopted.

18 Quickly, some of the other points. About the other
19 cases that are percolating. Every -- unless -- I believe I
20 got this right, and this is confirmed in my notes, every
21 single case has been dismissed at this point except this one.
22 And, frankly, some of the ones were fairly farfetched.

23 **THE COURT:** The Government is smiling and shaking
24 their heads.

25 **MR. CONNOLLY:** No?

1 **MR. NETTER:** That is not true.

2 **MR. CONNOLLY:** Okay. Oh, I'm sorry, the *Cato* case.

3 **MR. NETTER:** The *Cato*, *Arizona* and the *Oregon*.

4 **MR. CONNOLLY:** So, I'll go through each.

5 **THE COURT:** You got the pro se out in Oregon.

6 **MR. CONNOLLY:** Right. So, I'll go through all three
7 of those.

8 The pro se one is pro se, I've read it. The second
9 one, *Arizona*, all they've done is they filed a complaint.
10 They haven't done -- they haven't moved to do anything. The
11 third one, *Cato* was just filed last week and, you know, they
12 have -- they have a unique form of standing, if I remember
13 right.

14 But the key -- the key case here is the states case,
15 that one was dismissed. The one that went up to the Supreme
16 Court --

17 **THE COURT:** Putting aside the pro se, I don't know
18 the situation of the pro se. Is it fair to say that this is
19 the only case where we have two folks -- two individual folks
20 who have some type of student loan?

21 **MR. CONNOLLY:** Yes. This is the only case bringing
22 this --

23 **THE COURT:** So, I'll ask you the same question that
24 I asked Government's counsel, there has to be somebody that
25 has standing. Let's say it's not your clients.

1 In your world, who would be the perfect client?
2 Would it be the taxpayer out there that just doesn't want --
3 or the student loan holder who just doesn't want the benefit,
4 is that -- would that person have standing?

5 The Government seemed to indicate that they
6 wouldn't, it would be akin to somebody refusing Federal food
7 stamps, and then suing so nobody else could get the food
8 stamps.

9 Do you agree with that analysis?

10 **MR. CONNOLLY:** I believe that it's my clients that
11 have the perfect standing. They have concrete interests and
12 they're being affected by what the student -- what the
13 Department has done here.

14 And so, you know --

15 **THE COURT:** They weren't allowed to take -- they
16 weren't even given the option to take the food stamps or I
17 guess they applied for the food stamps and didn't get them.

18 **MR. CONNOLLY:** Right.

19 So, you know, in the -- you know, like the case that
20 they cite in the Fifth Circuit, I believe it's called
21 *Henderson*.

22 **THE COURT:** Yeah.

23 **MR. CONNOLLY:** There -- in that case, someone was
24 complaining that Louisiana had created license plates in which
25 the license plate said Choose Life. And they said, Well, you

1 know, we want our own license plate that has our --

2 **THE COURT:** Pro choice.

3 **MR. CONNOLLY:** Pro choice, that's our message. And
4 what the Fifth Circuit says, if we -- you can't get any relief
5 by the fact -- you're not injured by the fact that other
6 people are having this license plate. But the critical
7 difference is that there was no procedural injuries involved
8 with the *Henderson* case. And so that -- that obviously is the
9 distinction here.

10 And if I can focus on standing, the Department's
11 argument is really with the Supreme Court precedent and the
12 Fifth Circuit precedent here. We are not trying to extend any
13 of the doctrine into, you know, unchartered territory. The
14 Fifth Circuit case law we cited is relying on cases like
15 *Massachusetts vs. EPA*, from the Supreme Court. This doctrine
16 about procedural injury is well -- it's well settled and it's
17 been applied in a number of cases. And we, obviously, cite a
18 bunch in our -- in our briefs.

19 The Department makes this point a few times saying
20 we don't have a procedural right under the HEROES Act. I
21 mean, they're mixing apples and oranges here. They're relying
22 on a statute that we say doesn't apply at all. We have
23 procedural rights under the APA to notice and comment and
24 under the HEA to engage in negotiated rulemaking. That is
25 where our procedural injuries come from.

1 They can't cite the statute that we say doesn't even
2 apply and say that we need to allege we have procedural
3 injuries under the HEROES Act. No case, that I'm aware of,
4 stands for the proposition that -- that they can avoid notice
5 and comment rulemaking and avoid negotiated rulemaking for
6 that.

7 The Department said a couple of times that we have
8 no evidence that they will do this under -- under their
9 authority under the AGA. Again, that is not the standard.
10 The standard is, is there some possibility that after this
11 Court rules, the Department will change its mind. And, in
12 fact, in the *Ecosystem* case, they say it's not even likely
13 that that agency there would change its mind. And they still
14 -- the Fifth Circuit still found the plaintiffs had standing.

15 And here the -- the provision under which they would
16 have standing -- they believe they have standing is 20 U.S.C.,
17 1092. And that gives the Department of Education the
18 authority to compromise, waive or release any right, title,
19 claim, lien or demand. And there it is. And that's -- they
20 say in their own brief multiple times, on page 24, 25, 1, 3,
21 that they have this authority to do this type of program.

22 And so, all we have to prove -- we don't have to --
23 I don't have to -- we don't have to prove that there is a, you
24 know, a memo at the Department, Here's our backup plan;
25 though, there probably is. But all we have to prove is that

1 there's some possibility that if their -- if this Court finds
2 that they lack authority under the HEROES Act, that they will
3 invoke this other authority to -- to pursue their debt relief
4 program.

5 And the -- they point to the data that was attached
6 to their -- in their appendix. And in my opinion, this sort
7 of shows the -- sort of how, you know, how far afield we've
8 come from -- from the proper way that rulemaking should be
9 done. In the evidence they provide you in the appendix, the
10 Secretary of Education, on the morning of August 24th,
11 received a 13-page memo. At 9:25 a.m., he apparently read
12 that memo and signed off and said, Yes, we're good to go.

13 This is a 13-page, untested memo, many of which on
14 the footnotes are just citing their own internal data. It's
15 inconceivable that Congress would have given the Secretary of
16 Education the power to adopt a program involving half a
17 trillion dollars of loans based on a 13-page memo with -- that
18 has never been presented to the public.

19 And finally, the -- you know, the Court has
20 mentioned a few times the role of the Court. And I -- you
21 know, I agree that this is -- the agency should not,
22 obviously, have adopted this program. This is something that
23 Congress should have done.

24 But the Supreme Court, in the recent major questions
25 case -- cases that we mentioned, and especially *West Virginia*

1 and some of the concurrences really lay this out nicely, it is
2 the Court's role to preserve the separation of powers. And
3 that is how -- that is -- it is -- this is where the Court is
4 most needed to preserve the separation of powers by saying
5 Congress did not give the Secretary of Education the power to
6 pass a half a trillion dollar debt relief program.

7 And so, it is -- it is incredibly important for this
8 Court to act. And the only way that my clients can receive
9 the relief is by this Court issuing the injunction that --
10 that we've requested.

11 And I'm happy to answer any other questions. But I
12 would urge the Court to issue a preliminary injunction as
13 expeditiously as it can.

14 **THE COURT:** I appreciate everyone's arguments here
15 today. Both of you guys have done an extremely good example,
16 competent example of good advocacy on behalf of your clients.
17 I have enjoyed it immensely. Thank you for indulging my many
18 questions and many hypotheticals.

19 As with anything else when it comes to my job, a lot
20 of this is going to be going back to my office, taking the
21 record of the cases and closing the door and doing my best to
22 come up with the right decision. And I need some time to do
23 that.

24 And I do understand that plaintiffs are of the
25 mindset that this needs to happen as soon as possible. I

1 can't guarantee you when I will get a decision. But I will
2 endeavor to get one as soon as possible, but I will also
3 endeavor to make the decision that's right on the law, at
4 least as I understand it.

5 But I have enjoyed the argument. I know that
6 you-all have traveled from out of town. I hope you take
7 advantage of some of our good barbecue restaurants here in
8 town.

9 Perhaps you can go downstairs and see the famous
10 courtroom from the 1948 election. That's a good example of
11 the influence of courts. But for President Johnson winning
12 that case, we might not have had a man go on to be, not only
13 be Senator, but Senate Majority Leader and a very influential
14 President.

15 So, I get the magnitude of the things that we're
16 asked to do. I also get the admonishment of President James
17 Madison in the Federalist papers that when the legislature,
18 executive and judiciary are all under one authority, that's
19 the definition of tyranny.

20 So, I agree with what you're saying when it comes to
21 separation of powers and the Court's role. And whether that's
22 required in this case remains to be seen.

23 *(Proceedings adjourned)*

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