No. 22-535

In The
Supreme Court of the United States

UNITED STATES DEPARTMENT OF EDUCATION, et al.,

Petitioners,

v.

MYRA BROWN, et al.,

Respondents.

On Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Landmark Legal Foundation ("Landmark") is a national public-interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution, and defending individual rights and responsibilities. Landmark is particularly concerned with encroachments by the executive branch upon the legislative powers of Congress and the ever-increasing powers of the administrative state. Specializing in constitutional history and litigation, Landmark submits this brief in support of Respondents.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Secretary of Education's ("Secretary") Debt Forgiveness Program ("Program") is a colossal regulatory action affecting millions of individuals and costing the American taxpayers hundreds of billions of dollars. Yet the American people never authorized this action. Nor have the American people had the chance to participate in its development and implementation. Under any reasonable standard, it constitutes a "major question" and thus needs clear authorization from

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Congress to implement. Congress never gave this authorization.

Attempts by Petitioner to justify the Program's existence under the Higher Education Relief Opportunity for Students Act ("HEROES") fail. Because the HEROES Act does not authorize the Program, the Administrative Procedure Act ("APA") obligates the Secretary to follow normal rulemaking procedures. This means the Secretary needed to follow the prescribed notice-and-comment process, which in turn, means promulgating a proposed action, designating a period for the public comments, and consider and respond to those comments. The Secretary failed to follow this process.

Notice-and-comment serves an important and necessary purpose in the development and implementation of any substantive regulatory action. In this case, notice-and-comment would have given interested parties (and the public) the opportunity to shape an agency action that will affect millions and cost hundreds of billions of dollars. It would have provided Respondents Myra Brown and Alexander Taylor the opportunity to express their views on the Program and influence the government's actions. It would have obligated the Secretary to reconcile the Program with previous statements made by both the President and his staff expressing doubts about his authority to forgive student loans without clear congressional authorization. It would have given the Secretary (and the Biden Administration) a sense of the Program's political implications. But – in an apparent effort to accelerate its

implementation – the Secretary avoided subjecting the Program to notice-and-comment. And, by avoiding notice-and-comment, the Secretary finalized a regulation in violation of the APA. Such action should not be permitted by the Court.

Amicus Curiae therefore asks the Court to reverse the judgment of the district court in *Nebraska* and uphold the judgment of the district court in *Brown*.

ARGUMENT

A. The Debt Forgiveness Program is a rule subject to the APA's notice-and-comment process.

As Respondents note, the HEROES Act does not authorize the Program. Res. Brief at 41. The Secretary, therefore, cannot use the HEROES Act to justify bypassing the APA. Because the Program is a rule, it is subject to the APA's notice-and-comment requirements. And because the Secretary did not subject the Program to notice-and-comment, it must be declared invalid.

The Program creates a new scheme that implements President Biden's policy of eliminating or reducing debt obligations for certain individuals. 5 U.S.C. §551(4). It "grants rights" by eliminating an individual's debt if he or she meets certain requirements and "impose[s] obligations" on the Department to forgive debt to those who meet the requirements. *Batterton v.*

Marshall, 648 F.2d 694, 701-702 (D.C. Cir. 1980). The Program also amends or repeals the Department's existing regulations and thus triggers the APA's notice-and-comment provisions. *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005).

The APA, in turn, prescribes a three-step procedure for notice-and-comment rulemaking. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) first, the agency "must issue a '[g]eneral notice of proposed rule making . . . '" *Id.* (quoting 5 U.S.C. §553(b)). Next, the agency "must 'give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.'" *Id.* (quoting 5 U.S.C. §553(c)). At this step, "an agency must consider and respond to significant comments received during the period for public comment." *Id.* Third, "when the agency promulgates the final rule, it must include in the rule's text 'a concise general statement of [its] basis and purpose.'" *Id.* (quoting 5 U.S.C. §553(c)). Such rules "have the 'force and effect of law.'" *Id.*

B. Notice-and-Comment serves an important purpose by allowing interested parties and the public the opportunity to participate in the rulemaking process.

Again, Respondents and other *amici* aptly explain how the HEROES Act does not provide the statutory authority for the Program. A detailed explanation need not be repeated here, but briefly, the people – through Congress and via the legislative process –

have never authorized a debt forgiveness program of this scale. The Act – passed by overwhelming numbers in both the Senate and the House of Representatives – applied to active-duty members of the military deployed overseas. 149 Cong. Rec. S10866-01 (July 31, 2003); 149 Cong. Rec. H2522-05, H2523-24 (Apr. 1, 2003). It was never intended or designed to apply to millions of individuals who never served in the armed forces. Indeed, Petitioners cannot point to any part of the statute that shows Congress authorized the HEROES Act to apply to millions of individuals who never served in an active-duty capacity. Nor can Petitioners show that Congress explicitly authorized the Secretary to unilaterally cancel the debts of 40 million borrowers at a cost of more than 400 billion dollars. *Costs of Suspending Student Loan Payments and Canceling Debt*, Cong. Budget Off. (Sept. 26, 2022). And the Secretary has never used the HEROES Act for mass cancellation of student debt until now.

In fact, Congress has already declined to act on proposed legislation that would forgive student loan debt. A bill introduced by Congressman Alfred James Lawson to provide student loan forgiveness to borrowers making less than $100,000 per year was referred to the Committee on Education and Labor and the Committee on Ways and Means but has yet to be voted out of that committee. H.R. 2034, 117 Cong. (2021). Another effort (which would forgive up to $50,000 in federal student loans for any borrower) also failed to be voted out of its committee. H.R. 4797, 117 Cong. (2021).

Had there been sufficient public support for these bills, the will of the people would have prevailed and Congress would have enacted applicable legislation. The people, through their representatives in Congress have spoken. But the Secretary defied this will by finalizing the Program. The Secretary also denied the public the opportunity to express its will and to participate in the development and implementation of the Program when it rammed through the regulatory action without following the notice-and-comment process. As stated previously, the Program affects millions of individuals and leads to hundreds of billions in lost revenue. *Costs of Suspending Student Loan Payments and Canceling Debt*, Cong. Budget Off. (Sept. 26, 2022). The Program will significantly alter the lives of millions of Americans. If upheld, millions will have up to $20,000 of loan debt forgiven. If struck down, millions of working-class individuals – who never attended college and never incurred student loans – will not bear the brunt of subsidizing (through taxation) the higher education costs of their fellow citizens. Individuals with significant interests such as those holding only private loans have been denied their say. In short, the Secretary – at the behest of the Biden Administration – dodged his legal obligations to seek public input for its enormously consequential regulatory action.[2]

[2] The Department has at least one regulatory program pending involving student loans that it has released for notice-and-comment. It has proposed amending regulations governing income-contingent repayments and to restructure and rename the repayment plan regulations under the William D. Ford Federal Direct Loan (Direct Loan) Program. *Improving Income-Driven*

The notice-and-comment process avoided by the Department provides a crucial step in implementing substantive rules. Administrative agencies are not representative bodies subject to accountability like elected officials. Unlike legislatures, their functions are not to "ascertain and register [the agency's] will." *Final Report of the Attorney General's Committee on Administrative Procedure*, 101 (1941) ("Attorney General's Report"). Agencies' "deliberations" are not "carried on in public and its members are not subject to direct political controls as are legislators." *Id.* An agency's "knowledge is rarely complete" and "it must always learn the frequently clashing viewpoints of those whom its regulations will affect." *Id.* at 102. Public participation "in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests." *Id.* at 103. Thus, for a court to determine whether an agency has engaged in reasoned decision-making, an agency must disclose materials relevant to the rule; allow interested parties the opportunity to comment; and respond meaningfully to material comments.

Notice-and-comment also helps in ensuring an agency's action is within its statutory mandate. The process "helps ensure that the agency allows meaningful participation by the public in the process of formulating the proper interpretation of statutes." Thomas W. Merrill, *The Chevron Doctrine: Its Rise and Fall,*

Repayment for the William D. Ford Federal Direct Loan Program, 34 C.F.R. §685.

and the Future of the Administrative State 248 (2022). Disclosure of a proposed regulatory action followed by public comment and subsequent agency response "establishes a dialogic process in which the agency and concerned citizens interact and share their divergent interests and perspectives." *Id.* at 249. In turn, "[t]his back-and-forth process fosters better understanding and mutual respect and can lead to better interpretations, in the sense that they ultimately reflect a consensus view of the public interest." *Id.*

Consistent with these principles, the APA mandates a process obligating agencies to receive and be accountable to public input. 5 U.S.C. §553. The APA, in turn, requires courts to "hold unlawful and set aside agency action[s]" that are adopted "without observance of procedures required by law." 5 U.S.C. §706(2). The process "encourages public participation in the administrative process and educates the agency, thereby helping to ensure informed agency decisionmaking." *Chocolate Manufacturers Assoc. v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985) (citing *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314, 321 (4th Cir. 1980)). Providing notice of a major change gives "the public the opportunity to participate in the rule-making process. It also enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated." *Texaco, Inc. v. Federal Power Comm'n*, 412 F.2d 740, 744 (3d Cir. 1969). When an agency fails to follow the APA's notice-and-comment procedures "interested parties will not be able to comment meaningfully upon

the agency's proposals." *Connecticut Light & Power, Co. v. Nuclear Regul. Com.* 673 F.2d 525, 530 (D.C. Cir. 1982). Further, "the agency may operate with a one-sided or mistaken picture of the issues at stake in a rule-making." *Id.*

The rulemaking process obligates the Department to provide a notice to the public that it intends to engage in a regulatory action. Notice has three purposes: (1) it ensures "that agency regulations are tested via exposure to diverse public comment"; (2) it ensures "fairness to affected parties"; and (3) it gives "affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Intl. Union, UMW v. MSHA*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). Next, the comment period allows "interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process." *Connecticut Light and Power, Co.* at 530. And participation by interested parties "is essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests." *Attorney General's Report* at 103.

Along with accepting comments from the public, agencies have a duty to "consider and respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015). The right to comment "belongs to the public regardless of whether they are savvy lawyers for a chemical products company or individual laypeople

with no particular technical expertise." Mariano-Florentino Cuellar, *Rethinking Regulatory Democracy*, 57 Admin. L. Rev. 411, 420 (2005). And generally "regulators cannot ignore all the comments they receive." *Id.* at 421. Thus, "[t]he right for public to comment, coupled with legal requirements that the agency must give reasons for what it does, implies that the agency has some legal responsibility to consider reasonable alternative and significant issues raised in public comments." *Id.*

Indeed, the importance of a complete notice and robust comment process cannot be debated. This process subjects "the agency decisionmaking to public input and to obligate the agency to consider and respond to the material comments and concerns that are voiced." *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612, 634 (D.C. Cir. 2020). The fundamental purpose of the process therefore is "to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is likely to give real consideration to alternative ideas." *New Jersey, Dep't of Env't Protections v. EPA*, 626 F.2d 1038, 1049 (D.C. Cir. 1980). While not "an ideal means for advancing representative democracy" the notice-and-comment process represents a "reasonable compromise for an imperfect world." *Rethinking Regulatory Democracy*, 57 Admin. L. Rev. at 425. And agencies respond to comments they receive by "making changes in their proposed rule." *Id.* at 460. Finally, the notice-and-comment process "lead[s] to outcomes that strike a better balance between interest group preferences

and minimize the risk that the deal struck by the agency will be upset by higher-level political intervention or judicial review." *The Chevron Doctrine* at 250.

By violating the procedural requirements of the APA, the Secretary denied the public the opportunity to participate in the rulemaking process. Interested parties (i.e., individuals who may have been excluded from the loan-forgiveness plan despite holding student loans) could not provide input on the efficacy of the loan forgiveness program. Failure to abide by the notice-and-comment process also denied interested parties the opportunity to express alternate proposals for loan forgiveness. And it prevented the Secretary from considering those alternatives.

C. Public comments submitted through the notice-and-comment process would have been beneficial in exposing legal weaknesses of the Program.

Presumably, public participation in a regulatory action of this size would be dramatic. The widespread media coverage and the fact that millions are affected would prompt thousands of comments. *Rethinking Regulatory Democracy*, 57 Admin. L. Rev. at 469 (discussing the factors leading to rates of participation in rulemaking proceedings). And those comments would have raised "issues legally relevant [to the Secretary's] statutory mandate." *Id.* at 460.

For example, submitted comments could have shown:

- How the Secretary's decision to exclude individuals like Myra Brown and Alexander Taylor from the Program adversely affected them.

- How finalization of the Program represents a dramatic shift in the original position of the President who originally conceded that the Executive Branch lacked the authority to unilaterally forgive billions in student loans. In December 2020, he stated, "That's different than my saying, and I'm going to get in trouble for saying this . . . for example, it's arguable that the president may have the executive power to forgive up to $50,000 in student debt." Mark Kantrowitz, *Joe Biden Will Limit Student Loan Forgiveness*, Forbes, Dec. 24, 2020, https://www.forbes.com/sites/markkantrowitz/2020/12/24/joe-biden-will-limit-student-loan-forgiveness/?sh=31554dc91ce6. He continued, "Well, I think [forgiving debt] is pretty questionable. I'm unsure of that. I'd be unlikely to do that." *Id.*

- Placed in context the size and scope of the Program. For example, the Program's cost exceeds the GDP of Argentina or that the Program's cost exceeds the annual GDP of more than 30 states. *GDP (current US$) – Argentina*, World bank, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=AR, *GDP by State*, Bureau of Economic Analysis, https://www.bea.gov/data/gdp/gdp-state.

- How the Program's cost is 50 times greater than the estimated coasts for the Clean Power

Plan. *Fact Sheet: Clean Power Plan by the Numbers*, https://archive.epa.gov/epa/cleanpowerplan/fact-sheet-clean-power-plan-numbers.html.

- How the Program functions as a regressive program that disproportionately benefits wealthy debtors.

D. The HEROES Act does not justify the Department's decision to avoid notice-and-comment.

Petitioners mistakenly assert that authorization to bypass notice-and-comment amounts to a procedural exemption and that the Secretary only needs to determine that HEROES Act applies. This is not true. Petitioners rely on the HEROES Act to justify their failure to follow the APA's notice-and-comments requirements. Because the Act "expressly exempts the Secretary from complying with 'section 553 of title 5'" they were under no obligation to follow the Act's procedural requirements. Pet'rs' Brief at 62.

Under Petitioners' theory, it does not matter whether the substantive provisions of the HEROES act apply. All that is necessary is that the Secretary determine "that the HEROES Act applies and that waivers or modifications are necessary – not on the substantive merits of the Secretary's plan." Pet'rs' Brief at 63.

The Department of Education cannot avoid the APA's notice-and-comment requirements by simply asserting that its decision amounts to a procedural

action. "Agencies have never been able to avoid notice-and-comment simply by mislabeling their substantive pronouncements." *Azar v. Allina Health Servs.*, 139 S.Ct. 1804, 1812 (2019). Courts, "have long looked to the contents of the agency's action, not the agency's self-serving label, when deciding whether statutory notice-and-comment demands apply." *Id.* While relevant, an agency's "own label" "is not dispositive." *Id.* (quoting *Guardian Fed. Sav & Loan Assn. v. Federal Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666-667 (D.C. Cir. 1978)).

Petitioners' efforts to avoid the APA's rulemaking obligations by asserting the application of the Act fail because the Act's substantive provisions do not apply. "Notwithstanding [the] APA's notice-and-comment provisions, the Secretary shall, by notice in the Federal Register, publish the waivers or modifications of statutory and regulatory provisions the Secretary deems necessary to achieve the purposes of this section." 20 U.S.C. §1098bb(b)(1). If the "purposes" of the HEROES Act do not apply, then the Secretary cannot rely on the rest of the Act to circumvent the rulemaking process.

E. The APA's exemption to notice-and-comment pertaining to loans does not apply.

Although not raised by Petitioners, any effort to exempt the Program from notice-and-comment by asserting the APA's loan exemption provisions also fails. While the APA exempts rules involving "a matter relating . . . to loans, grants, benefits or contracts" (5

U.S.C. §553(a)(2)), the Department of Education (and the Secretary) must still follow its own rules. And the Department followed the notice-and-comment process when it promulgated its current regulations pertaining to the discharging of student loans which prohibit blanket loan forgiveness. 34 C.F.R. §30.70(e)(1). Because of this, any alterations to the current rules must again comply with the APA's notice-and-comment process. *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017).

Under the current regulatory framework, the Department may "compromise, suspend[d] or terminat[e] a student loan" only if it complies with the Federal Claims Collection Standards ("FCCS"). 34 C.F.R. §30.70(e)(1). The FCCS requires agencies to "aggressively collect all debts." 31 C.F.R. §902.2(a). Those debts can be compromised or discharged when: (1) the debtor cannot pay; (2) the agency cannot collect; (3) the costs of collection are too onerous; or (4) the government faces litigation risk. The Loan Forgiveness Program amends these current rules and thus must conform to the APA's notice-and-comment requirements. As the Department followed the notice-and-comment process when finalizing 34 C.F.R. §30.70(e)(1), it cannot amend or repeal this rule without again following the notice-and-comment process. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015).

CONCLUSION

For these reasons, the Court should reverse the judgment of the district court in *Nebraska* and affirm the judgment of the district court in *Brown*.

Respectfully submitted,

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