IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

MYRA BROWN AND ALEXANDER TAYLOR	)	CASE NO. 4:22-CV-00908-P
	)	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

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

THE COURT: Thank you, gentlemen.

And for the Government?

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

THE COURT: One more time, I was writing.

Mr. Netter, who are the other attorneys?

MR. NETTER: This is Kate Talmor.

THE COURT: Okay.

MR. NETTER: And Samuel Rebo.

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

MR. NETTER: No witnesses from the United States.

MR. CONNOLLY: No witnesses from us either.

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

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

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

MR. NETTER: *(Shakes head)*

THE COURT: Well, that's good.

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

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

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

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

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

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

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

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

want.

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

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

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

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

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

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

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

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

THE COURT: All right. Go ahead.

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

THE COURT: All right.

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

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

MR. CONNOLLY: Excellent.

THE COURT: Go ahead.

MR. CONNOLLY: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

student debts that are not being forgiven.

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

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

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

THE COURT: All right. Go ahead.

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

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

MR. CONNOLLY: No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: That's fine. Go ahead.

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

The Department also doesn't dispute that, but for

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

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

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

I mean, am I correct? Is that your understanding, the reason why Congress passed the HEROES Act, in light of the September 11th and the Iraq and Afghanistan wars? Specifically, we had situations where we had servicemen and women that were reserve-type situations who were called upon to do their duty for their country and may have been in situations where they needed some economic relief. Am I correctly stating, in general, what a layman would say the Act was passed for?

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

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

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

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

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

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

THE COURT: Yeah.

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

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

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

There are a litany of cases --

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

But anyway, go ahead.

MR. CONNOLLY: Yes, I agree.

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

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

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

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

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

(Brief pause)

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

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

THE COURT: All right.

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

MR. CONNOLLY: It gives --

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

MR. CONNOLLY: Yes. To issue waivers and modifications.

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

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

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

THE COURT: Yeah.

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

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

MR. CONNOLLY: I'm sorry?

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

by the Administration?

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

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

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

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

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

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

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

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

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

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

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

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

Fifth, again, what I would say is the legislative

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

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

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

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

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

MR. CONNOLLY: So --

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

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

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

THE COURT: No, I get it.

MR. CONNOLLY: Yeah.

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. CONNOLLY: I might not be following your question.

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

MR. CONNOLLY: Okay.

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

MR. CONNOLLY: Yes.

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

MR. CONNOLLY: Right, right.

THE COURT: And that's just an example.

MR. CONNOLLY: Yeah, and I agree.

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

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

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

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

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

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

MR. CONNOLLY: Correct.

THE COURT: What's your best case for that

provision?

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

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

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

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

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

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

MR. CONNOLLY: I'm sorry?

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

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

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

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

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

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

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

THE COURT: A nationwide injunction, correct?

MR. CONNOLLY: Correct.

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

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

(Brief pause)

THE COURT: All right. Go ahead, sir.

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

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

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

So, go ahead, counsel.

MR. CONNOLLY: I appreciate that, Your Honor.

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

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

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

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

The only -- the only countervailing interest they

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. CONNOLLY: I do, Your Honor.

Your Court, their Court, their Federal courts,

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

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

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

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

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

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

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

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

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

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

THE COURT: Probably a better question for the Government?

MR. CONNOLLY: Yeah.

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

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

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

MR. CONNOLLY: I believe I --

THE COURT: And I was an appellate judge for about

three years, I ought to be better than that.

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

THE COURT: Yeah.

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

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

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

But what matters now --

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

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

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

THE COURT: All right.

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

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

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

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

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

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

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

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

THE COURT: All right.

I'd like to hear from the Government.

MR. CONNOLLY: Thank you.

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

MR. NETTER: My name, Your Honor?

THE COURT: Yes, sir.

MR. NETTER: Brian Netter.

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

One second.

(Brief pause)

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

THE COURT: Yes, sir.

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

THE COURT: Yeah, use your discretion.

MR. NETTER: Thank you, Your Honor.

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

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

THE COURT: Sure.

MR. NETTER: -- the agency from acting.

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

MR. NETTER: No, Your Honor.

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

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

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

MR. NETTER: Correct.

THE COURT: Okay. Go ahead.

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

THE COURT: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

Do you understand the difference?

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

The *Cato Institute* case is not about taxes.

THE COURT: Yeah.

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

THE COURT: Sure.

MR. NETTER: -- in which they could have availed themself of the PSLF.

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

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

THE COURT: Yeah.

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

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

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

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

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

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

THE COURT: Okay.

MR. NETTER: -- that preceded his dismissal of that case.

THE COURT: All right. Go ahead, counsel.

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

THE COURT: No, that's very helpful.

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

addressed by judicial action.

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

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

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

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

invocation were to be invalidated.

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

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

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

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

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

MR. NETTER: No, I think --

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

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

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

Is that the only person that can challenge this?

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

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

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

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

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

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

Can you think of one?

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

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

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

So, I did want that talk --

THE COURT: I get it.

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

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

MR. NETTER: Yeah.

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

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

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

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

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

MR. NETTER: I appreciate that, Your Honor.

THE COURT: All right. Go ahead.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Oh, sure.

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

THE COURT: Yes, yes.

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

THE COURT: Right.

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

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

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

THE COURT: The administration has no backup plan?

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

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

That's what you're saying?

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

THE COURT: Well, what description would you use?

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

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

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

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

MR. NETTER: No, Your Honor.

So, the HEROES Act --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And when Secretary DeVos invoked the HEROES Act two

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. NETTER: I don't --

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

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

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

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

I do want to point out --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: All right.

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

MR. CONNOLLY: Oh, sure.

THE COURT: Thank you.

Go ahead, counsel.

MR. NETTER: Thank you, Your Honor.

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

MR. NETTER: Sure, Your Honor.

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

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

THE COURT: Go ahead.

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

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

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

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

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

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

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

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

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

(Court Reporter interrupts)

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

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

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

necessary administrative staff.

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

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

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

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

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

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

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

MR. NETTER: Yes, Your Honor.

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

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

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

MR. NETTER: Right. So --

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

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

MR. NETTER: I appreciate that, Your Honor.

THE COURT: Go ahead.

MR. NETTER: Apology to the court reporter.

THE COURT: Yeah.

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

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

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

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

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

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

Is that what I just heard you say?

MR. NETTER: Yes.

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

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

So, go ahead.

MR. NETTER: Yes, Your Honor.

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

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

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

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

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

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

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

In that case, could the Secretary of Education

invoke the HEROES Act and forgive their debt?

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

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

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

THE COURT: Navy corpsmen.

MR. CONNOLLY: -- closer --

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

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

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

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

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

THE COURT: All right.

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

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

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

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

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

MR. NETTER: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. NETTER: Well, Your Honor --

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

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

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

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

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

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

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

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

All right. Anything else?

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

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

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

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

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

the Secretary of Education.

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

THE COURT: All right. Thank you.

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

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

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

MR. CONNOLLY: Sure.

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

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

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

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

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

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

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

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

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

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

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

MR. CONNOLLY: No?

MR. NETTER: That is not true.

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

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

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

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

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

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

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

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

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

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

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

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

Do you agree with that analysis?

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

And so, you know --

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

MR. CONNOLLY: Right.

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

THE COURT: Yeah.

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

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

THE COURT: Pro choice.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Proceedings adjourned)

REPORTER'S CERTIFICATE

I, Monica Willenburg Guzman, CSR, RPR, certify that the foregoing is a true and correct transcript from the record of proceedings in the foregoing entitled matter.

I further certify that the transcript fees format comply with those prescribed by the Court and the Judicial Conference of the United States.

Signed this 31st day of October, 2022.

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