

Statutory Basis for Biden Administration Student Loan Forgiveness

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On August 24, 2022, President Joe Biden [announced](#) a plan to cancel or reduce federal student loan balances for borrowers with [annual income in 2020 or 2021](#) below \$125,000 or household income below \$250,000 (categorical cancellation). The program will [generally offer](#) cancellation of up to \$10,000 per eligible borrower, or up to \$20,000 of cancellation for eligible borrowers who are also prior [Pell Grant](#) recipients. According to the Department of Education (ED), categorical cancellation [seeks to address](#) “the financial harms of the pandemic” by helping borrowers transition back to repayment status following the end of the pandemic-related pause on loan repayment, interest accrual, and involuntary collections. The pause is scheduled to end on December 31, 2022.

Alongside this announcement, the Biden Administration revealed its legal justification for categorical cancellation. In an [opinion](#) dated August 23, 2022, the Department of Justice’s Office of Legal Counsel (OLC) concluded that the [Higher Education Relief Opportunities for Students \(HEROES\) Act of 2003](#), as amended, authorizes the Secretary of Education (Secretary) to relieve borrowers of the obligation to repay federal student loans. This relief, OLC explained, could in some cases be justified under the HEROES Act as a response to the COVID-19 pandemic. OLC’s opinion rejects a more limited reading of the statute articulated at the end of the Trump Administration, including in a [January 12, 2021, memorandum](#) written by ED’s then-Principal Deputy General Counsel Reed Rubinstein (the Rubinstein Memorandum).

Categorical cancellation appears poised to substantially reshape ED’s [federal student loan portfolio](#). The action reflects a use of ED’s HEROES Act authority that is unlike past invocations. For the first time, ED plans to use this authority to directly and permanently discharge at least a portion of borrowers’ student loan debt. Categorical cancellation would also result in the federal government forgoing collection rights as to tens of millions of borrowers. [According to the White House](#), roughly 20 million borrowers will be eligible to see their full remaining balance canceled, while another 23 million borrowers will be eligible to see their balance reduced. This Sidebar examines the asserted statutory basis for categorical cancellation and the legal debate surrounding ED’s action.

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Background

ED administers several student loan [forgiveness or repayment programs](#) authorized in the Higher Education Act of 1965 (HEA). These statutory authorities provide student loan debt relief, for example, to borrowers who are employed as [teachers](#) or are [totally and permanently disabled](#), or who could not complete an educational program because their institution of higher education [closed](#).

As statutory authority for categorical cancellation, though, OLC’s recent opinion cites not the HEA but the HEROES Act. Unlike some of the HEA authorities, the HEROES Act does not use the terms “forgiveness,” “discharge” or “cancellation” in connection with federal student loans. Rather, the HEROES Act [authorizes](#) the Secretary to “waive or modify any statutory or regulatory provision applicable to the student financial assistance programs” under Title IV of the HEA, which authorizes the primary federal student loan programs, “as the Secretary deems necessary” to ensure that [affected individuals](#) “are not placed in a worse position financially” in relation to that assistance. Affected individuals [include](#)

- persons on active duty or qualifying National Guard duty during a war, military operation, or national emergency;
- persons who reside or are employed in an area declared a disaster area in connection with a national emergency; or
- persons who suffered direct economic hardship as a result of a war, military operation, or national emergency.

ED has [invoked](#) the HEROES Act [several times](#) in the statute’s nearly 20-year history. Perhaps most prominently, since October 2020, ED has [continuously](#) employed the Act to [provide](#) COVID-19 relief by pausing, for most federal student loans, a borrower’s obligation to repay loan balances, interest accrual, and involuntary collections. However, ED has not previously used the HEROES Act to permanently discharge existing federal student loan balances.

While ED has not used the HEROES Act to provide categorical cancellation prior to August 24, 2022, it considered its authority in this regard in January 2021. At the end of the Trump Administration, the Rubinstein Memorandum [concluded](#) that the HEROES Act did not authorize blanket cancellation of loan balances.

Debt Cancellation as Waiver or Modification of Statutory or Regulatory Requirements

The recent OLC opinion invoking the HEROES Act as authority for categorical cancellation mainly focused on the extent of the HEROES Act’s central waiver-or-modification language. Under this language, the Act [authorizes](#) the Secretary to “waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under Title IV” of the HEA. OLC considered what it might mean to “waive” or “modify” legal provisions, and whether a borrower’s obligation to pay a loan’s principal and interest stem from a “statutory or regulatory provision.”

The opinion [construed](#) the term “modify” to mean “to make somewhat different” or “to reduce in degree or extent.” The Rubinstein Memorandum, by contrast, [argued](#) that “modify” should be read to allow only changing Title IV loan terms “moderately or in minor fashion,” citing a 1994 Supreme Court [decision](#) construing the same term in a telecommunications statute. Noting that the 1994 decision had arisen in a different statutory context, however, OLC [read](#) “modify,” in the framework of the HEROES Act’s emergency education relief provisions, to provide a broader authority.

In support of its conclusion, OLC noted that the HEROES Act's use of "waive" alongside "modify" suggested a broader connotation of "modify" than making minor or incremental changes only. OLC **construed** "waive" to mean to "refrain from insisting upon." In the context of a legal obligation, the waiver of that legal obligation **would** exempt "an individual from the duty to comply with that obligation." In OLC's opinion, given the arrangement of "waive" alongside "modify," it would be "**peculiar**" if the HEROES Act authorized the Secretary of Education to either completely refrain from insisting on fulfillment of a legal obligation (i.e., "waive") or to make only minor or incremental changes to it (i.e., the Rubinstein Memorandum's **construction** of "modify"). Rather, OLC concluded that in context "modify" allows the Secretary to reduce legal obligations "**to any extent short of waiver.**"

OLC also addressed an argument premised on an approach to reading statutes that is sometimes known as the "**major questions doctrine.**" Most recently, in the 2022 decision in *West Virginia v. Environmental Protection Agency*, the Supreme Court applied a principle of statutory construction under which courts are "**reluctant to read into ambiguous statutory text**" a delegation of authority to an agency to address, in a manner that is "**unprecedented**" for that agency, issues with major economic or political significance. OLC **distinguished** the HEROES Act from this line of cases by arguing that the Act's "sweeping" waiver or modification language is unlike the "vague" or "ancillary" statutory text to which the Court has applied the major questions doctrine.

OLC next **concluded** that a borrower's obligation to pay a loan's principal and interest arises from a "statutory or regulatory provision" that applies to Title IV loans. For example, regulations **state** that a "borrower is obligated to repay the full amount of a Direct Loan, including the principal balance, fees, any collection costs" and "any interest not subsidized by the Secretary." Because a borrower's payment obligation derives from statute and regulation, OLC concluded that the obligation **was subject to** waiver or modification under the HEROES Act.

The HEROES Act **authorizes** a waiver or modification that the Secretary "deems necessary" to pursue several objectives. OLC mainly focused on the objective of ensuring that affected individuals are not placed in a worse financial position with respect to their federal student loans as a result of their status as an affected individual. The elimination or reduction of a borrower's obligation to repay student loan debt, OLC **reasoned**, might help achieve this objective. As an **example**, OLC argued that cancellation might be used to ensure that a soldier who becomes permanently disabled because of a military operation is not placed in worse financial position with respect to her student loan debt because of her military service.

OLC thus read the HEROES Act as empowering the Secretary to relieve borrowers of legal obligations, in whole or in part, that arise from a statute or rule. OLC determined that a borrower's obligation to pay principal and interest on relevant loans can be waived or modified under the HEROES Act because this payment obligation arises from statute or rule. Waiving or modifying payment obligations, OLC reasoned, could serve the HEROES Act objective of ensuring that affected individuals are not placed in a worse financial position with respect to their loans because of the effects of war, a military operation, or a national emergency.

Debt Cancellation in Response to COVID-19

Having concluded that the HEROES Act could generally be used to waive or modify student loan debt, OLC **next considered** whether categorical cancellation in the context of the COVID-19 pandemic could meet three "remaining requirements of the Act."

First, the Secretary's waiver or modification authority **exists largely to benefit** "affected individuals." This term **includes** persons who reside or are employed in an area declared a disaster area in connection with a national emergency and persons who suffered direct economic hardship as a result of a war, military operation, or national emergency. A **national emergency** for COVID-19 has been in effect in the United

States since March 13, 2020, and President Donald Trump [declared](#) major disasters for COVID-19 under the Robert T. Stafford Disaster Relief and Emergency Assistance Act for every state, the District of Columbia, and five territories. Thus, [according to OLC](#), borrowers may qualify as “affected individuals” by having lived or worked in the United States or the five territories during COVID-19-related major disaster declarations. Borrowers not fitting this residency-or-work category might nonetheless be “affected individuals” if they suffered direct economic hardship as a result of the pandemic.

Second, the Secretary’s waivers or modifications [are to ensure that](#), among other things, a borrower is not placed in a worse position financially “because of” their status as an affected individual. OLC [concluded](#) that the phrase “because of” is a causation requirement known as “but-for causation.” As the Supreme Court has explained in other contexts, an event is a but-for cause of a particular harm if the harm [would not have occurred without that event](#). Thus, as OLC [explained](#), “to invoke the HEROES Act in the context of COVID-19,” the Secretary must determine that the financial harm to be addressed by a waiver or modification would not have occurred in the absence of the pandemic.

Third, the Secretary [may use](#) a HEROES Act waiver or modification as necessary to ensure that affected individuals “are not placed in a worse position financially in relation” to their student loans because of their status as affected individuals. OLC [construed the third requirement to say](#) that no matter how much financial harm a borrower may have suffered during the pandemic, the only harm that the Secretary may remediate under a HEROES Act waiver is the harm that has a “relation to” the borrower’s loans.

Debating Categorical Cancellation

The White House’s announcement has evoked differing opinions on whether the HEROES Act authorizes categorical cancellation. Proponents of the OLC view find legal support for categorical cancellation in prior uses of HEROES Act waiver or modification authority during the COVID-19 pandemic.

Administrations of [both](#) parties [agreed](#) that the HEROES Act authorized relief in response to the pandemic, including suspension of student loan repayments, interest accrual, and involuntary collections. ED provided this prior relief on a nationwide basis and without regard to borrower income. Though not extending to permanent cancellation, this prior relief had substantial costs. According to the Government Accountability Office, these HEROES Act waivers and modifications cost the federal government an [estimated \\$77.8 billion between October 2020 and May 2022](#). Proponents argue that even if categorical cancellation is different in degree from prior HEROES Act uses, [it is “not different in kind.”](#)

Opponents have [disagreed](#) with the OLC opinion’s conclusions about the major questions doctrine. The HEROES Act lacks express reference to “cancellation,” “discharge,” “forgiveness,” or similar terms that Congress has used in portions of statutes, such as the [Public Service Loan Forgiveness program](#), that allow or require ED to “cancel” student loan balances. The HEROES Act [uses](#) more general references to the waiver or modification of “any statutory or regulatory provision.” Given the political and economic stakes of a cancellation event that could affect [up to 43 million borrowers](#), opponents say these statutory terms do not provide a [sufficiently clear delegation](#) from Congress to ED.

[Other commentators](#) argue that the purpose for which Congress enacted the HEROES Act makes its use in connection with the COVID-19 pandemic “[problematic](#).” Congress enacted a precursor to the HEROES Act [three months after the September 11, 2001, terrorist attacks](#). When the HEROES Act itself was first enacted, many of the [remarks](#) in the House of Representatives about the bill focused on providing relief to those [deployed in support](#) of Operation Iraqi Freedom and other military commitments. (The Senate passed the HEROES Act [by unanimous consent](#) and without floor debate.) The contention of these commentators is that the COVID-19 pandemic differs too greatly from the types of exigencies that they claim motivated adoption of the HEROES Act.

Some state attorneys general and advocacy groups are [reportedly](#) considering litigation to challenge categorical cancellation. Although it is not known what form such litigation might take, potential litigation likely would raise procedural issues, such as whether any potential plaintiffs have suffered a legal injury sufficient to satisfy [constitutional standing requirements](#). Potential litigation could also raise substantive questions such as whether the Biden Administration has correctly construed its authority under the HEROES Act to encompass categorical cancellation.

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