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[Preliminary draft to expand upon the arguments in Amicus Brief for Respondents, *Biden v. Nebraska* and *Dept. of Education v. Brown*, Oral Argument on Feb. 28, 2023]

Major Questions and an Emergency Question Doctrine: The Biden Student Debt Case Study in the Pretextual Abuse of Emergency Powers

Jed Handelsman Shugerman

Feb. 2, 2023

Abstract

The major question doctrine tries to address one problem, the Imperial Executive, by escalating another, the Imperial Judiciary. This article proposes a solution, with the Biden Student Debt Waiver as a case study: An "emergency question" doctrine.

This emergency questions doctrine would apply when the executive relies on a statutory emergency clause or invokes an emergency in its application of a statutory provision. As a matter of statutory interpretation, the emergency question doctrine would follow the two most important steps of the major question approach: 1) relying on purpose and context to clarify and limit the scope of open-ended emergency texts; 2) no *Chevron* deference. However, MQD's step 3, the "clear statement" rule, is generally a problematic new substantive canon "loading the dice," in Scalia's terms. A "clear statement" rule for emergency responses is especially inappropriate – and even dangerous – given the unpredictability of emergencies and the necessarily open-ended texts in emergency clauses. Instead, as a check on pretextual uses or overbroad abuses, courts should focus on whether the means fit the emergency ends.

This approach addresses two problems: First, a narrow textual argument based on the word "emergency" gives too much latitude to the executive branch; a purposive approach (focusing on context and means-ends matching, with no Chevron deference) is sufficient to cabin the word "emergency" and limit executive power. Second, it would provide a meaningful category of cases where the logic of the major questions doctrine should apply, as a meaningful way to cabin the major questions doctrine.

This solution is a coherent middle stage of the Major Question cases:
MQD 1.0, the Good Purposive MQD (2000-2015), a common-sense emphasis purposivism over narrow textualism in major cases; and a wise exception to *Chevron* deference;
MQD 2.0, a Good Emergency MQD (2021-active) can be understood best as an emergency question doctrine, a check against the overbroad use, the pretextual use, or abuse of the Covid emergency;
MQD 3.0, the Bad Anti-Major Canon MQD (2022-active), the requirement of a super-clear-statement rule for any "major" policy, a substantive canon of a presumption against significant executive actions.

The emergency question doctrine makes sense MQD 1.0 and 2.0, and it limits (and even appropriately sidelines) MQD 3.0's danger of imperial judicial expansion and its danger of weakening the executive's capacity to address emergencies.

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Major Questions and an Emergency Question Doctrine: The Biden Student Debt Case Study in the Pretextual Abuse of Emergency Powers

The "major question doctrine" attempts to address one problem, the Imperial Executive,[1] by escalating another, the Imperial Judiciary.[2] This article proposes a solution, with the Biden Student Debt Waiver as a case study: An "emergency question" doctrine.

The clause at the heart of this case is a quintessential example of a wide-open emergency clause, and it highlights overlapping problems of textualism, emergency powers, and the major questions doctrine. The Department of Education in the Biden administration relied on this emergency clause:

> The Secretary of Education may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the Act [20 U.S.C. 1070 et seq.] as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide the waivers or modifications authorized by paragraph (2).[3]

Many emergency clauses are written as open-ended texts, as are many clauses delegating "necessary" powers to the executive. The Biden administration based its broad interpretation of the clause on a narrow textual reading – a narrow reading with respect to isolating this clause and the phrase "national emergency" from the rest of the statute. Even if this particular case on student debt does not create a clear and present danger of imperial executive abuses – and even if this policy is wise and warranted – the precedent for interpreting other emergency clauses or the word "necessary" in other clauses is dangerous. This approach invites unbounded executive powers whenever presidents and agencies cite an emergency, especially if courts defer to the executive's statutory interpretation. The invocation of emergencies for overbroad and unchecked policies is a persistent bipartisan problem, and a significant factor in the long-term executive creep.

On the other hand, if judges apply the increasingly extreme version of the major question doctrine, they would look for a "clear statement" delegating this specific power or policy, and of course, they would not find it. Emergency statutes usually lack clear statements for specific measures, because that is the nature of emergencies: They are unpredictable problems requiring flexible responses. The recent form of the major question doctrine, especially after *West Virginia v. EPA*, would disable the executive from relying on many emergency clauses for many necessary responses.

This article proposes a solution that adopts applies the two wisest and most established steps of the major question doctrine, but replaces the third part, the extreme new "clear statement" rule, with a more common-sense test for pretextual abuses.

Step 1) Rely on purpose and context to clarify and limit open-ended emergency texts.
Step 2) Do not apply *Chevron* deference to the executive branch's interpretation.
Step 3) Instead of applying a loaded "clear statement" rule, courts should focus on whether the means fit the emergency ends as a check on pretextual uses or overbroad abuses.

The major question's "clear statement" rule is a novel canon of statutory interpretation, an example of constitutional avoidance (in the shadow of the renewed non-delegation doctrine). Justice Scalia criticized such approaches as "loading the dice." A "clear statement"

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[1] ARTHUR SCHLESINGER, JR., THE IMPERIAL EXECUTIVE (1973).
[2] Mark Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97 (2022).
[3] HEROES Act, 20 U.S.C. 1098bb(a)(1).

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rule is especially inappropriate for emergencies – and even dangerous. Steps 1 (purpose and context) and 2 (no *Chevron*) are sufficient for limiting the scope of the emergency clause.

I suggest that this solution is already emerging from the recent major questions cases, the middle of three stages:

MQD 1.0, the Good Purposive MQD (2000-2015): common-sense purposivism over narrow textualism; and a common-sense exception to *Chevron* deference.[4] See Steps 1 and 2.

MQD 2.0, a Good Emergency MQD (2021-22): an emergency question doctrine, a check against the overbroad use, the pretextual use, or abuse of the Covid emergency, primarily for excessive substance ("elephants from mouseholes" or "elephants from giraffeholes," as I will explain below), but also as pretexts to circumvent process. These cases focus on the means-ends match between policy and the invoked emergency as a strong indicator of a good-faith use or pretextual uses.[5]

MQD 3.0, the Bad Anti-Major Canon MQD (2022-active), the requirement of a super-clear-statement rule for any "major" policy, a substantive canon of a presumption against significant executive actions. This selective approach allows "finding friends at a party," cherry-picking post-ratification evidence like "anti-novelty" and tradition, opening a backdoor a sloppy kind of paleo-*Chevron* deference to *old* agency interpretations (but not the recently elected, current administration's agency). As Justice Gorsuch indicated in his *Gundy* dissent in 2019, this approach is non-delegation "by different names." It is a canon of constitutional avoidance, Non-Delegation-Lite, most clearly in *West Virginia v. EPA* in 2022.

The Biden Student Debt case fits as MQD 2.0, to limit the pretextual use and overbroad use of emergencies. This case represents an opportunity to turn back from the extremism of MQD 3.0, in favor of a more legitimate, more limited, more coherent approach, closer to the best reasons for the major question doctrine as a common-sense exception to thin textualism and as a check against the abuse of executive power.

As a subset of the major question doctrine for statutory interpretation, emerging from the MQD 2.0 cases, the emergency questions doctrine would apply when the executive relies on a statutory emergency clause or invokes an emergency in its application of a statutory provision. This approach addresses two problems: First, a narrow textual argument based on the word "emergency" gives too much latitude to the executive branch; a purposive approach (focusing on context and means-ends matching, with no *Chevron* deference) is sufficient to cabin the word "emergency" and limit executive power. Second, it would provide a meaningful category of cases where the logic of the major questions doctrine should apply, as a meaningful way to cabin the major questions doctrine.

In this case, the Higher Education Act of 1965 was the appropriate fit for the publicly stated purposes of long-term education access and for the broad policy. The statute required a long and challenging process – a choice by Congress to balance the interests and to value public notice and comment. The Government wanted to move faster, so it cited the Covid emergency as a pretext to circumvent the negotiated regulation under the HEA Act of 1965.

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[4] *See FDA v. Brown & Williamson*, 529 U.S. 120 (2000); *King v. Burwell*, 576 U.S. 473 (2015); See also Utility Air Regulatory Group v. EPA (2014).

[5] *Alabama Association of Realtors v. HHS*, 141 S.Ct. 2485 (2021); *NFIB v. OSHA,* 142 S.Ct. 661 (2022).

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If the government's student debt waiver were a Covid emergency measure, it is both arbitrarily overbroad *and* capriciously over-narrowed. As the Government conceded, the statute requires a causal nexus to the emergency, but this policy lacks even a basic step to show mere Covid correlation. Textualism also limits the scope of the emergency power: *ejusdem generis* and *noscitur a sociis* provide guidance for the associated list "connection with a war or other military operation or national emergency"; and the "whole act" canon leads one to read the congressional findings focused on "active duty" and "active service" as an emphasis on active emergencies and a concrete impact on any applicant.[6] These findings are also part of a more important inquiry into purpose and context.

Considering this ends-means mismatch and President Biden's public statements, the true motivation is to address long-term structural problems with education finance. The emergency is a pretext, likely to circumvent the regular administrative process required by Congress in a statute with a better fit. The policy does not fit as a HEROES Act "emergency," it is arbitrary and capricious, and it is not "faithful execution" of the laws. This case is an important moment for this Court to set limits to the abuse of executive power, while also clarifying and limiting the scope of the major question doctrine.

I. The Emergency Problem and the Imperial Executive

History teaches us to be wary of open-ended invitations to executive power, either as excessive responses to real emergencies or a pretextual basis for pre-existing policy goal or political agenda. As political scientists Steven Levitsky and Daniel Ziblatt wrote, "National emergencies can threaten the constitutional balance… they can be fatal under would-be autocrats, for they provide a seemingly legitimate (and often popular) justification for concentrating power and eviscerating rights." They note the problem of judicial deference to the executive, "[f]earful of putting national security at risk."[7]

One can identify two categories of abuses: over-reaction abuses, and pretextual abuses of the executive seizing on "emergencies" to pursue a pre-existing policy goal or to consolidate power. While emergencies require immediate and often imprecise reactions, they also create the risk of both over-reactions and pretextual manipulations. "Never let a crisis go to waste" has become a motto during modern emergencies. See Section V.C.3.

This case arises from the executive's exercise of an emergency power based on a broad interpretation of an open-ended emergency clause in an act of Congress with an apparently more limited context and purpose. This case is unfortunately not an isolated legal problem. Many statutes delegate emergency powers to the President or the Executive Branch with little guidance about the scope of those powers. Presidents from both parties exercise emergency powers in increasingly aggressive ways, with less clarity that Congress delegated such powers. On one hand, congressionally delegated emergency powers are vital to allow decisive executive action with speed and flexibility in the face of sudden crises.[8] On the other hand, open-ended delegations create a risk of abuse of executive power.

[6] 20 U.S.C. § 1098aa(b)(1)-(6) (listing four references to active service or "active duty," as well as reference to members of the military "put[ting] their lives on hold)

[7] Steven Levitsky & Daniel Ziblatt, *Why Autocrats Love Emergencies*, N.Y. TIMES (Jan. 12, 2019).

[8] *Federalist* No. 70 (Hamilton) ("necessity of an energetic executive"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

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Statutes authorizing the executive to act in emergencies are often more open-ended and lack textual constraints on the scope and nature of the emergency relative to other types of statutory delegations.[9]

This open-endedness is in the nature of emergencies and emergency delegations. Congress cannot anticipate specifics of future emergencies, their effects, and their remedies. As such, these statutes and emergency clauses present a greater potential for abuse relative to more conventional statutes focused on more specific problems, where Congress can more easily anticipate circumstances and address them in the text. The emergency clause in the post-9/11 HEROES Act is open-ended, if one reads the clause in isolation.

However, applying the whole act canon, the congressional findings offer a clarifying context and scope for the emergency clause. In this case, the HEROES Act, in the aftermath of 9/11, provided a revealing "findings" section, with repeated references to military "active service" or "active duty." The emergency delegation is arguably broader than a military context, but these textual findings and contexts indicate scope limited to an active emergency and applicable only to claimants concretely affected by the emergency. See infra Section IV.C.

A recurring problem, evident in the Covid cases but long preceding them, is administrations invoking emergencies to evade or truncate regular administrative process. The APA provides for a "good cause" exception to Section 553's notice-and-comment requirements. 5 U.S.C. § 553(b)(3)(B). Courts have expressed concerns about straining the good cause exception for weak claims of emergencies.[10]

II. A Parallel Major Problem: The "Clear-Statement" Major Question Doctrine

The longstanding approach for "questions of vast economic and political importance" began as a narrow common-sense exception to *Chevron* deference. The early "major questions" cases had two important steps. *First*, *context over text*: Purposes are relevant in making sense of isolated clauses when the statute and the policy were "major." A major policy justifies the challenging work of examining the legislative history and political context of the statutory basis; and a narrow textual reading should not frustrate congressional intent and major policy, *if and only if* there had been a purposeful delegation. *Second, no* Chevron *deference*: If there had been a major delegation, the underlying statute should have been sufficiently significant and salient for judges to evaluate the statute, without relying on agency experience and expertise. A major question is an appropriate case to use judicial resources to examine congressional purposes, because the specialized expertise gap between courts and agencies is *de minimis*.[11]

However, the Court should be wary of a third step of the major question doctrine that the Court has increasingly relied on: *a clear-statement rule for major actions, a new substantive canon*. Unless clarified, the doctrine becomes a novel substantive canon of anti-major policy, "loading the dice," in Justice Scalia's terms, for preferred outcomes.[12] Every time the Court finds an agency action of "vast political or economic significance," *i.e.*, most salient administrative law cases, the Court has a tool to

[9] *See* Congressional Research Service, *Emergency Authorities Under the National Emergencies Act, Stafford Act, and Public Health Service Act*,
https://crsreports.congress.gov/product/pdf/R/R46379 (July 14, 2020).

[10] *See*, *e.g.*, *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706–07 (D.C. Cir. 2014).

[11] *See FDA v. Brown & Williamson*, 529 U.S. 120 (2000); *King v. Burwell*, 576 U.S. 473 (2015); *Alabama Association of Realtors v. HHS*, 141 S.Ct. 2485 (2021); *NFIB v. OSHA,* 142 S.Ct. 661 (2022).

[12] JUSTICE ANTONIN SCALIA, A MATTER OF INTERPRETATION 27 (1997).

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strike it down. It is the non-delegation doctrine by another name. In Justice Gorsuch's *Gundy* dissent, he linked non-delegation to the major question doctrine, and observed coyly, "we just call what we're doing by different names."[13] This third step risks ballooning into an open invitation for the federal judiciary to substitute its own policy preferences for the executive branch.[14] While the major question doctrine can be used to check executive overreach, it also invites judicial overreach,[15] unless it is focused on special areas of overbroad delegations and executive abuses.

III. A Double Solution: An Emergency Questions Doctrine

A. By properly construing emergency statutes in light of context and purposes, and without deference, courts can provide an important check against executive abuse of emergency powers.

Auspiciously, a recent subset of "major questions" cases forms a coherent, limited, and crucial body of precedents: an emergency questions doctrine, where courts heretofore had been too deferential. These cases fit the first two steps of the major question doctrine.

First, context over text: Emergency clauses (or similar "necessity" or "good cause" clauses invoked for emergencies) are too open-ended textually, as in the HEROES Act. Context and purposes provide scope and limits against excessive delegation (the "active duty" and concrete effect context in the HEROES Act).

Second, no Chevron *deference to executive statutory interpretation*: These emergency questions serve as common sense exceptions to both of *Chevron*'s rationales: 1) the purposes during emergencies are more salient to the public and generalist judges, reducing the need to rely on agency comparative expertise and experience in the domain of statutory interpretation (as opposed to complex policies to address emergencies); and 2) emergency cases are a manageable number of cases, so there is far less need for judicial economy and case management to triage by deference. Emergency questions with vast significance -- and distinguishable dangers of too much and too little executive power -- are an appropriate use of additional judicial resources to investigate context and purposes.

But the third step of the major questions doctrine, a "clear statement" rule, a substantive canon against major policy, is inappropriate in emergency cases. Emergencies are generally the realm of the unknown and the unpredictable. The open-ended emergency clauses reflect this reality. Just as there is a danger in open-ended emergency clauses, so too is there a danger in striking down emergency measures if there is no "clear statement." The first two steps, turning to context/purposes and giving no deference, are sufficient to cabin emergency powers, without "loading the dice" against the executive branch's capacity to confront emergencies.

This solution treats "major questions" as a question (or conceptual category) rather than a broad doctrine: when to emphasize context over narrow texts; when to defer; and when to require clear statements. One answer: In emergencies, emphasize statutory purposes and context; do not defer; but do not require clear statements. Instead, as an extension of focusing on context and purposes to give intelligible meaning to the clause, courts should scrutinize whether the policy's means fit those purposive ends. An "emergency question" doctrine would apply when the Executive Branch

[13] *Gundy v. U.S.*, 139 S.Ct. 2116, 2141-42 (Gorsuch, J., dissenting).

[14] Shugerman, "Major Questions and an Emergency Question Doctrine: The Biden Student Debt Case Study of Pretextual Abuse of Emergency Powers," at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4345019

[15] Mark Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97 (2022).

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relies on a statutory emergency clause or invokes an emergency in its application of a statutory provision.

An "emergency question doctrine" provides a meaningful category of cases where the logic of the major questions doctrine should apply, and it would provide a way to cabin the major questions doctrine. Otherwise, if a key rationale for the major questions doctrine is to check executive aggrandizement, the major questions doctrine also risks judicial aggrandizement.

The HEROES Act did not grant unlimited emergency powers over student debt; it had a specific context with paradigmatic cases of "active duty" and "active service" military, during active emergencies. The "emergency" in the text was an invitation for extensions from those specific purposes beyond military emergencies, but still based on reasoning from analogy. When the executive invokes vague emergency clauses, the President often acts in the "zone of twilight." According to Justice Jackson, judges should consider the "imperatives of events and contemporary imponderables." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 647 (1952). But when pondering whether Congress had delegated measures for the imponderable, congressional context and purpose shed light on that twilight of ambiguity. Purposivism is more appropriately flexible than a "clear statement" rule, while providing more limits than superficial open-ended textualism.

B. Recent COVID decisions form a coherent "emergency question doctrine"

On this foundation of administrative law and statutory interpretation principles, recent Supreme Court cases reflect a coherent approach to emergencies by focusing on the match between congressional purposes for the delegation of an emergency power and the executive branch's invocation and application of the emergency power.

In the eviction moratorium case, *Alabama Assoc. of Realtors v. HHS*, the Court also identified the core concern of unbounded textualist emergency interpretations: "Indeed, the Government's read of §361(a) would give the CDC a breathtaking amount of authority. It is hard to see what measures this interpretation would place outside the CDC's reach."[16]

The vaccine-or-test mandate, *NFIB v. OSHA*, was similar, based on a more explicit "emergency" provision: OSHA relied on a statutory exception to ordinary notice-and-comment procedures for "emergency temporary standards" with immediate effect. §655(c)(1). The Court discussed the textual limits, but also went beyond textualism to discuss the context, purposes, and the post-enactment application of these exceptions.[17] The Court also raised a concern that open-ended textual interpretations create a risk of using the emergency for a policy goal beyond the statute's purpose: "OSHA's indiscriminate approach fails to account for this crucial distinction— between occupational risk and risk more generally—and accordingly the mandate takes on the character of a general public health measure, rather than an 'occupational safety or health standard.'"[18]

The decisions on Covid religious gatherings reflect a similar balance on emergency powers. Initially, the courts deferred and allowed broad applications of emergency powers in the face of uncertain danger.[19] But as the emergency was more understood and as judges were in a position to assess the specific risks against individual liberties, the courts required more narrow tailoring, a closer fit between means and ends, and more balancing to protect those rights.[20] Some Justices have also

[16] 141 S.Ct. 2485, 2489 (2021).
[17] 142 S.Ct. 661, 663 (2022).
[18] *Id.* at 666.
[19] *South Bay Pentecostal Church v. Newsom,* 140 S.Ct. 1613 (2020).
[20] *Roman Catholic Diocese v. Cuomo*, 141 S.Ct. 63 (2020); *Tandon v. Newsom*, 141 S.Ct. 1294 (2021).

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raised questions about fit in cases about border policy. *Arizona v. Mayorkas*, 598 U.S. __, No. 22A544 (22–592) (Dec. 27, 2022) (Gorsuch, J., dissenting, slip op. at p. 3) ("But the current border crisis is not a COVID crisis.")

IV. Pretext: The Means-Ends Mismatch, Statutory Misfit, and Public Missteps

A. Requirements of Good Faith Reasons and "Faithful Execution."

Pretexts and bad faith to circumvent the law have been suspect and invalid since the early years of this Court's jurisprudence. As Chief Justice Marshall wrote in *McCollough v. Maryland* on pretexts: "[S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government[,] it would become the painful duty of this tribunal ...to say that such an act was not the law of the land.").[21] All the more is true of the President, who must "take Care that the laws be faithfully executed" and who takes an oath to faithfully execute the office. "Faithful execution" of the laws requires giving good-faith reasons when invoking statutory powers, not pretexts. Here, under the pretext of an emergency, the Biden administration enacted a policy not entrusted or delegated to it by the HEROES Act.

Consistent with Article II of the Constitution, the Administrative Procedure Act and major administrative law precedents also require the executive branch to give its real basis for its actions, not the "arbitrary and capricious" *post hoc* and *ad hoc* reasons. APA § 706.

This Court in *Commerce Clause v. New York* (the Census case) recently set forth a foundation of "settled propositions": "First, in order to permit meaningful judicial review, an agency must 'disclose the basis' of its action."[22] "[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."[23] "Considering only contemporaneous explanations for agency action … instills confidence that the reasons given are not simply 'convenient litigating position[s].'"[24]

In *Department of Commerce v. New York*, this Court struck down a citizenship question on the census because the Court assessed that the Trump administration's publicly stated reason was pretext for partisan advantage. Even though there is a world of difference between the Trump administration's motives and the motives of this policy, nevertheless administrative law requires that an agency's policy not be "arbitrary and capricious."

This Court found an "incongruence" and a "disconnect" between "the decision made and the explanation given. …" "The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise."[25] "Our review is deferential, but we are 'not required to exhibit a naiveté from

[21] *McCollough v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).
[22] *Department of Commerce v. New York*, 139 S.Ct. 2551, 2573; *Burlington Truck Lines, Inc. v. United States*, 371 U. S. 156, 167–169 (1962).
[23] *SEC v. Chenery Corp.*, 318 U. S. 80, 94 (1943).
[24] *DHS v. Regents*, 140 S.Ct. 1891, 1909 (2020).

[25] *Department of Commerce*, 139 S.Ct. 2551, 2575-76. *See also Overton Park*, 401 U. S., at 420.

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which ordinary citizens are free.'"[26] "If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case."[27]

In their recent book *Law and Leviathan*, Cass Sunstein and Adrian Vermeule focus on the Census case and emphasize Lon Fuller's example of "failing legality": "a failure of congruence between the rules as announced and their actual administration."[28]

Justice Gorsuch, dissenting the initial "lightning docket" Title 42 case *Arizona v. Mayorkas*, raised a similar concern about invoking an unrelated crisis when addressing another: "But the current border crisis is not a COVID crisis. And courts should not be in the business of perpetuating administrative edicts designed for one emergency only because elected officials have failed to address a different emergency."[29] When the executive branch relies on an emergency clause, it is a proper judicial role to make sure the administration's policy means fit the claimed ends of addressing an emergency.[30]

B. The Eviction and Vaccine "Emergency" Cases on Means-Ends Mismatch

NFIB v. OSHA identified this problem one year ago on a mismatch between the problem (the Covid emergency) and an overbroad solution (a vaccine-or-test mandate even for lower risk workplaces), indicating a broader unstated policy goal of greater political and economic significance. After noting that the vaccine-or-test mandate would apply to outdoor employees, such as landscapers, groundskeepers, and outdoor lifeguards, the Court observed:

> Where the virus poses a special danger because of the particular features of an employee's job or workplace, *targeted regulations are plainly permissible*. We do not doubt, for example, that OSHA could regulate researchers who work with the COVID–19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments. But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID–19 that all face. OSHA's *indiscriminate approach* fails to account for this crucial distinction—between occupational risk and risk more generally—and accordingly the mandate *takes on the character of a general public health measure*, rather than an "*occupational* safety or health standard."[31]

The Biden announcement of the vaccine mandate was one point of a five-point plan for increasing a national vaccination rate, unrelated to workplace safety.[32]

The vaccine requirement's breadth and absence of tailoring to workplace risk was a mismatch to the ostensible purpose. The Government's goal was to use employment as a lever to increase

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[26] *Id.* (citing *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.).

[27] *Id.* at 2575

[28] CASS SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN 140 (2020); Evan Criddle, *Fiduciary Foundations of Administrative Law*, 54 U.C.L.A. L. Rev. 117 (2006).

[29] 598 U.S. __, No. 22A544 (22–592) (Dec. 27, 2022) (slip op. at p. 3),

[30] In the Title 42 case, the Protect Democracy amicus brief raises parallel concerns about emergency powers, and it proposes a similar solution for reining in their abuse. Brief amicus curiae of Protect Democracy in *Arizona v. Mayorkas*, Feb. 2, 2023.

[31] 142 S.Ct. 661, 665-66 (2022) (emphasis added).

[32] "Remarks by President Biden on the COVID-19 Response and Vaccination Program," Sept. 9, 2021 at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/06/02/remarks-by-president-biden-on-the-covid-19-response-and-vaccination-program/

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vaccination, more than a goal of using vaccination to increase workplace safety. The *per curiam* focused on this mismatch: "President Biden announced 'a new plan to require more Americans to be vaccinated'" – as opposed to a plan to make workplaces safer, the purpose of the statute.[33] Of course, the priorities had a significant overlap, but the overbreadth of the policy for outdoor employees indicated that the broader public health goal was the real purpose.

So too in this case, where the Covid emergency had created a specific harm to many student debt-holders, a targeted waiver would have been more permissible. But the Department of Education's "indiscriminate approach" fails to focus on these specific harms and a causal nexus to the emergency, and accordingly the waiver program takes on the character of a general debt waiver based on means-testing and long-term structural problems, rather than the short-term emergency (a likely pretext).

C. The Covid Emergency Pretext: Text & Purposive Misfit, Means-Ends Mismatch, and Contradictory Public Missteps

1. The text and purposes of the post-9/11 HEROES Act – and the Government's own lawyers – indicate that concrete impact and causation are necessary.

As discussed above, a key question for whether agency action was properly delegated or was ultra vires: How close is the nexus between the emergency and the action assuredly taken pursuant to the emergency? If the nexus is close to claimed ends in the statute, then it is more likely that this action was Congress authorized; if the nexus is strained – and if the policy is broader in scope than the emergency -- then the agency has gone beyond the congressional delegation from that statute.

A second key question here, as posed by the emergency questions doctrine, is whether other parts of the statute and its purposes give legally intelligible context and contours to an otherwise open-ended emergency clause. The HEROES Act helpfully contains a "findings" section to provide some limiting principles and constraints. The HEROES Act of 2003 allows the Secretary of Education to make major changes to policy if "a national emergency" caused student borrowers to be "placed in a worse position financially." The HEROES Act provided its own textual basis for its context and purposes with a consistent section on "findings." The list of six findings were entirely focused on military contexts, with multiple references to "active service." 20 U.S. Code § 1098aa(b)(1)-(6) (listing four references to active service or "active duty," as well as reference to members of the military "put[ting] their lives on hold). Even if one can extend the purposes from a military context to a pandemic, the context suggests the emergency powers would be analogous from "active service" to the active pandemic, and a more direct causal impact on the individual, with the emergency having a concrete impact on their education or economic circumstances.

The Office of Legal Counsel and the Department of Education's own lawyers agreed with the bottom line that a causal nexus was necessary, but the Department of Education promulgated a program that did not even follow its own lawyers' interpretation. In their August memoranda validating the legality of the proposed policy, both the Office of Legal Counsel and the Department of Education conceded that the program would have to be tailored to the COVID emergency in order to fit the statute. The OLC memo concludes, "Thus, to invoke the HEROES Act in the context of

[33] *NFIB v. OSHA*, 142 S.Ct. at 663.

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COVID-19, the Secretary would need to determine that the COVID-19 pandemic *was a but-for cause of the financial harm to be addressed by the waiver or modification*."[34]

The Department of Education memo suggests the same limitation: The HEROES Act emergency authority is not "boundless" but it is "limited *inter alia*… to certain categories of eligible individuals or institutions (*id.* § 1098ee(2)), and to a defined set of purposes (*id.* § 1098bb(a)(2)(A)–(E))."[35] The memo acknowledges a causation requirement: "The Secretary's determinations regarding the amount of relief, and the categories of borrowers for whom relief is necessary, should be informed by evidence regarding the financial harms that borrowers have experienced, or will likely experience, *because of* the COVID-19 pandemic."[36]

The Department of Education noted that the authority under the statute "can be exercised categorically to address the situation at hand; it does not need to be exercised 'on a case-by-case basis.'" *Id.* § 1098bb(b)(3). The program "may provide relief on a categorical basis as necessary to address the financial harms of the pandemic."

However, when the program was announced, there was no hint of creating categories related to Covid. The category of a means-tested income threshold does not indicate Covid's negative impact on the class of claimants' financial position. These problems of causation were immediately apparent, and there was ample time to tailor the program to Covid causation or to switch to a statute that matched the breadth and purpose of this program.[37]

The regulatory process here is a case study for how the Executive Branch abuses emergency powers: the government lawyers seized onto the word "emergency" in the statute, and interpreted it as a broad delegation, without examining the rest of the statutory text or putting it in context. It is also worth noting that both the OLC and the Department of Education did not engage with recent precedents on Covid emergencies or major questions. They assumed the word "emergency" was an open-ended delegation. The OLC memo failed to cite any of the recent major question doctrine cases: not *Brown & Williamson*; not *King v. Burwell*; not even the Covid cases *Alabama Assoc. of Realtors* (the eviction moratorium); nor *NFIB v. OSHA* (the vaccine-or-test mandate). Instead, the OLC assumed that the word "emergency" and narrow textual arguments would be sufficient. In a 25-page memo, it included less than one page focusing on the HEROES Act's purpose and legislative history.

The OLC did not acknowledge the statute's findings section indicating a narrower purpose related to active emergencies and direct impacts. The obvious context of the 2003 law was the September 11 terrorist attacks and the subsequent wars in Afghanistan and Iraq, consistent with the preamble of statutory findings emphasizing military "active duty," "active" emergencies, and active direct impact on claimants. (And as noted above, the textual or common-sense linguistic canons *ejusdem generis* and *noscitur a sociis* provide guidance from the associated list "connection with a war or other military operation or national emergency."[38] Even if "emergency" generalizes beyond the

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[34] OLC memorandum, "Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans," at 18 (emphasis added) ahttps://www.justice.gov/olc/file/1528451/download

[35] Lisa Brown, General Counsel, Department of Education, "The Secretary's Legal Authority for Debt Cancellation" (August 23, 2022), at p. 2-3, at https://www2.ed.gov/policy/gen/leg/foia/secretarys-legal-authority-for-debt-cancellation.pdf

[36] *Id.*

[37] Elizabeth Gotein, "Biden used 'emergency powers' to forgive student debt? That's a slippery slope," *Wash. Post*, Sept. 1, 2022; Jed Shugerman, "The Biden Student Debt Policy is a Legal Mess. But There is Still Time to Fix It," *The Atlantic*, Sept. 4, 2022.

[38] 20 U.S.C. § 1098aa(b)(1)-(6) (listing four references to active service or "active duty," as well as reference to members of the military "put[ting] their lives on hold)

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military contexts, the list is consistent with the finding's emphasis on "active duty," "active service," i.e., active emergency).

Of course, COVID was a national emergency in March 2020 or March 2021. However, it was already doubtful that August 2022, when the program was announced, was still a national emergency comparable to post-9/11 and the military action that followed. The HEROES Act findings section repeatedly referred to "active duty" and "active service," providing a context and purpose of active emergencies. 20 U.S.C. § 1098aa(b)(1)-(6) (listing four references to active service or "active duty," as well as reference to members of the military "put[ting] their lives on hold). The COVID emergency at such a late stage, after many rounds of vaccines, the stabilization of the economy, and a return to social normalcy, does not fit the context and purpose of "active" emergencies.

During this period of normalcy, the Government also cannot excuse its overbroad policy on the urgency of the emergency, to skip the statutory requirements of establishing causality. The final debt relief program required no basic indicia of causation or even correlation with the Covid emergency. A one-time income threshold does not indicate being "in worse financial position" because of the emergency. Surely many middle-class Americans with student loans are worse off, but many are not. Some sectors of the economy improved during COVID, and *some improved because of* COVID (e.g., many in the pharmaceutical industry, remote communications technology, information technology, or food and grocery delivery services fared well). It would have been feasible to create categories along these lines or, even simpler, to ask for a single pre-Covid tax return to compare to the already-required mid-Covid tax return.

Thus, the program's overbreadth and its reliance on categories unrelated to Covid indicate a Covid pretext. The Biden administration could have tailored the program to COVID causation on the basis of this statutory provision, or if it wanted a policy broader than COVID, it could have relied on a broader structural non-emergency statutory provision in the Higher Education Act of 1965.

2. A pretext timeline

This timeline of public statements is further evidence of the pretext and further corroborates the need for a new approach to emergency powers:

August 25, 2022: Soon after the administration announced it would start the administrative process for a waiver program, President Biden gave a speech emphasizing the waiver would serve non-emergency long-term purposes, mentioning the Covid emergency just once.[39]

September 19, 2022: Biden stated on "60 Minutes": "The pandemic is over."[40]

Oct. 12, 2022: The Department of Education finalizes and publishes the program, less than a month before Election Day. See 87 Fed. Reg. 61512, 61514.

January 31, 2023: A day after an announcement that the administration would extend the emergency declarations to May 15 and end them thereafter, President Biden answered a press question

[39] The White House, "Remarks by President Biden Announcing Student Loan Debt Relief Plan," Aug. 25, 2022 at https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/08/25/remarks-by-president-biden-announcing-student-loan-debt-relief-plan/

[40] "Biden says Covid-19 pandemic is over in U.S.," CBS News, Sept. 19, 2022. https://www.cbsnews.com/news/biden-covid-pandemic-over/

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about the reason for this timing: "We've extended it to May the 15th to make sure we get everything done. That's all."[41]

This is backwards: The existence of an emergency should be the reason for emergency policy. Getting policy done should not be the reason for saying whether or not there is an emergency. Again, if the emergency is over, there is no good excuse for ignoring causation.

On the one hand, Covid-19 was clearly an emergency, and there is good reason to think that Covid-19 played a role in the Biden campaign endorsing the cancellation of student debt in March 2020. Many candidates for the 2020 Democratic nomination campaigned on this proposal.[42] However, it appears from public records that President Biden did not until March 13, 2020, several days after five states had declared a state of emergency, two days after the World Health Organization declared Covid-19 a pandemic, and the same day President Trump issued the Proclamation on Declaring a National Emergency. Biden expanded on this proposal in late March and early April 2020.

On the other hand, there is a pattern of emergency pretexts and overbreadth, for circumventing process and stretching substance.

3. The emergency pretext to evade process

In the Vaccine-or-Test Mandate cases, the Government cited the Covid emergency to bypass regular process.[43] In this case, the Government again invoked emergency powers to bypass administrative process: Section 432(a) of the Higher Education Act of 1965, (*see* 20 U.S.C. § 1082(a)), had a textual basis for issuing waivers, but it also required a longer process for rescinding regulations from the Obama administration and a year of notice-and-comment process to issue new regulations. Instead of relying on the statute with the better fit and a longer process, the Government invoked an emergency for the misfit statute and an emergency track.

This is a key reason for this Court to grant relief to the petitioners: The executive branch should not be able to cite emergency powers as a pretext for evading regular administrative process. Because the emergency was a pretext to bypass the appropriate administrative process, and because this program is broader and beyond the scope of the HEROES Act, this Court should invalidate the program.

4. The emergency pretext for broader policy.

As this Court observed, President Biden's announcement of plans for the vaccine mandate in September 2021 revealed a broader policy purpose (leveraging a higher national vaccination rate) beyond the statutory basis (workplace safety). The public record in the Student Debt case of contradictions and pretexts is even more stark. From the official announcement in August 2022 through the finalization of the program, the Biden administration never hinted that it was considering questions to establish a causal link between Covid and their "financial position," that the basic statutory requirement was discussed but set aside for pragmatic reasons. There is no sign that the Department of Education took seriously its own lawyers' memo or the OLC opinion that the HEROES statute required Covid causation.

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[41] The White House, "Remarks by President Biden Before Marine One Departure," Jan 31, 2023, https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/01/31/remarks-by-president-biden-before-marine-one-departure-28/

[42] Press Release, Sen. Warren (July 23, 2019), perma.cc/L9D4-ASRY; Nova, *Where the 2020 Democratic Candidates Stand on Student Debt*, CNBC (Sept. 21, 2019), perma.cc/AF47-JRNY

[43] *NFIB v. OSHA*, 142 S.Ct. 661, 663 (2022) (an emergency exception to "ordinary notice-and-comment procedures"); cf. *Alabama Assoc. of Realtors v. HHS*, 141 S.Ct. 2485, 2487 (2021).

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The administration's advocates often have invoked the phrase, "Never let a crisis go to waste." This quotation has been misattributed to historical figures on the left and the right, but the administration's surrogates have used it often in the context of Covid.[44] The phrase has been used repeatedly in other Covid contexts. A crisis can sharpen, clarify, highlight, and exacerbate a pre-existing social problem, and it can mobilize support for a solution. But sometimes the crisis is merely a pretext for achieving a pre-existing policy goal, after the crisis has shifted power to a new administration. When it is the latter, the pretext is an administrative law problem.

When one is in power, the political logic of leveraging a crisis for a longstanding policy agenda makes sense, but the legal logic from administrative law requires that the executive must give the real reasons, and the policy must fit the real reasons. If the crisis is the real reason, the policy must be tailored to fit the crisis.

V. Standing: Understanding Checks on Emergency Powers and Abuse of Power

A. The rule of law depends upon rules allowing individuals "to claim the protection of laws"

The Biden student debt cases are also a case study in the dangers of an artificially high standing standard and the artificial manipulation of policy to dodge standing. The Biden administration started on the HEROES Act fast-track, aware that it had problems with the statutory fit, but assuming no one would have standing to challenge waivers of federal debt. Immediately, outside experts and the media explained that assumption was wrong, because private entities and state entities processed debt payments and would have a concrete loss of significant fees when billions of dollars of debts would be waived. Instead of shifting to a more appropriate statute or tailoring the program to fit the HEROES Act's emergency clause, the Department of Education added an arbitrary exclusion of debt outsourced to commercial entities, denying or reducing the waivers of over 20 million people. The rule of law is undermined by policies capriciously reverse-engineered to prevent standing.

The Government could have relied on a better fit, the Higher Education Act of 1965, which required a process to give notice and comment to stakeholders like the states, MOHELA, Myra Brown, and Alexander Taylor. Instead, the Government used Covid as a pretext to use the post-9/11 Higher Education Relief Opportunities for Students (HEROES) Act, to evade the process that Congress chose for such policies. At first, when it appeared that the waiver would be limited to the Government's assets and taxpayer dollars, many argued that no one would have standing to question the misuse of the HEROES Act, but once it became clear that private commercial entities would also bear concrete losses, the Government excluded those entities – and that arbitrary line excluded over 2 million Americans from debt relief. Should a new arbitrary line, a directness rule for standing proposed here by the Government, again exclude such Americans with injuries-in-fact and important legal claims about the abuse of executive power?

Let's go back to first principles and *Marbury v. Madison*: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection… [I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at

[44] Rahm Emanuel, "Let's make sure this crisis doesn't go to waste," *Washington Post*, March 25, 2020.

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law whenever that right is invaded."[45] Constitutional rights and the protections of the laws become a dead letter if standing law raises artificially high parchment barriers to the courts. If the executive branch can shield itself from legal challenges by arguing for high thresholds for standing after reverse-engineering and gerrymandering its policies to make sure no one has standing, it would be above the law. Here, the Biden administration is attempting to simultaneously circumvent both administrative law and standing law.

B. Causal Connection: From "fairly traceable" to "immediacy"?

The Government argues for a new directness rule for standing. The Government cited *Lujan*'s "fairly traceable" standard for the causation element of standing *See* Government Brief at 26-30. But then it digs deep into *Lujan*'s footnotes to extract the *dicta* of "redressability and immediacy," and it frames this footnoted commentary – a summary description as part of an observation -- as a rule.[46] Compare the Government brief text to the original footnote in Lujan:

> The Government brief:
>
> [M]any substantive challenges could be reconceptualized as procedural claims, providing a ready end-run around the "normal standards for redressability and immediacy." Defenders of Wildlife, 504 U.S. at 572 n.7.[47]
>
> *Lujan* footnote 7:
>
> There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.[48]

There is no footnote to this reference to "immediacy" to indicate that it has precedential support as a "normal standard." The *standard* standard is "fairly traceable," not immediate. Overall, throughout the Government's standing analysis, its brief applies and analyzes the causation element with a directness standard much closer to immediacy than to "traceability," so that it is fair to suggest that the Government is treating the *Lujan* footnote as a new rule or, in the very least, that it is adding "immediacy" to the interpretation of the old rule (even though the phrase "fairly traceable" as a matter of common sense is broader than "immediate," and it seems from the precedents to be deliberately broader.

In citing "immediacy" and analyzing this case through that lens, the Biden administration asks for a new barrier against the public's access to justice, with unpredictable negative effects on other areas of law, including civil rights, civil liberties, regulatory and environmental claims, and anti-corruption litigation. It is worth noting that, during the Trump administration, its opponents (and indeed, the allies of this administration) litigated the abuse of executive power based on standing from indirect injuries and indirect causation.[49] It is all too convenient for those recent opponents of the last administration's abuses to argue for a new directness rule against standing now that they are in power.

The parties here each show an injury-in-fact, a causal connection, and a remedy to redress the injury, as required by long-standing precedent.[50] Standing law requires more than remote, attenuated

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[45] *Marbury v. Madison*, 5 U.S. 137, 163 (1803).
[46] See Government Brief at 64.
[47] Id.
[48] Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7 (1992).
[49] *See, e.g.*, *Trump v. Hawaii*, 138 S.Ct. 2392 (2020); *DHS v. Regents*, 140 S.Ct. 1891 (2020); the Emoluments Clause litigations; and *Sierra Club v. Trump*, 963 F.3d 874 (2020) (Border Wall litigation).
[50] *Nebraska v. Biden*, 52 F.4th 1044, 1046-47 (8th Cir. 2022).

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harms, but the Government proposes a far higher threshold: an immediacy or directness rule. It is unclear why immediately direct injuries would be necessary to show a "case" or "controversy," when such an immediacy rule would be foreign to common law notions of causation and liability. A rule against remoteness and attenuation is sufficient. An immediacy rule often would put the executive branch above the law.

C. MOHELA: The "special solicitude" of states is a vital check on executive power

Missouri has sufficient standing under traditional standing doctrine and is a proper party to sue. However, if there are questions about the connection between MOHELA and Missouri, the "special solicitude" of state standing should resolve those questions in favor of Missouri.[51] Amicus raised concerns about "extravagant theories" of state standing.[52] However, this case would be no extravagant extension. In fact, allowing slightly more latitude for states to have standing to raise constitutional questions and to challenge the abuse of executive power strikes an appropriate balance through federalism: states can seek access to justice and enforce the rule of law on behalf of their constituents, without the problems of many more attenuated and unmanageable cases. Given the concerns about the abuses of federal executive power, it is important to reject the Government's selective and self-serving directness argument, and it is important to confirm the "special solicitude" towards states in our federal system.

D. *Brown*: The late exclusion of private debt was an arbitrary and capricious standing-dodge

Brown and Taylor are correct that they were denied procedural rights, because the Biden administration first relied on an emergency pretext to avoid the statutorily required negotiated rulemaking under the Higher Education Act of 1965, and instead, to use the HEROES Act emergency path devoid of those legal protections. Then, late in the process, it reverse-engineered an arbitrary exclusion denying or decreasing relief to over 2 million waiver applicants in an attempt to deny standing to private commercial entities to challenge the program.

After announcing a broader program applying to both publicly and privately held debt, the Department of Education modified the program so that a borrower qualifies if he or she "(1) individually makes under $125,000 or $250,000 if married and filing taxes jointly and (2) *has Direct, Perkins, or FFEL loans that are not commercially held."* No. 2022-22205, 87 Fed.Reg. 61512 (Oct. 12, 2022) (emphasis added).

After many legal experts observed that private entities would have standing to challenge the initially proposed program, the media reported that the Government added this distinction to dodge standing.[53] As NPR reported, and as was widely understood, "Multiple legal experts tell NPR the reversal in policy was likely made out of concern that the private banks that manage old FFEL loans could potentially file lawsuits to stop the debt relief…"[54]

The change was a litigation strategy without a public policy basis but with the effect of excluding student-debt-holders like Brown. An administration official told NPR that the change would exclude approximately 800,000 borrowers who would have qualified for the original program, and in

[51] *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).
[52] Amicus Curiae Brief of Samuel L. Bray and William Baude in Support of the Petitioner, *Biden v. Nebraska*, at p. 9-15.
[53] *E.g.*, Cory Turner, "In a reversal, the Education Dept. is excluding many from student loan relief," *National Public Radio*, Sept. 30, 2022).
[54] Id.

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addition, approximately 1.5 million borrowers would have significantly less relief (only for their Direct Loans, but no longer for their FFEL loans).[55] Brown never had an opportunity to question this exclusion, because the Government relied on a HEROES Act emergency pretext and circumvented the HEA mandated notice-and-comment process.

This late-stage limitation highlights many significant legal problems: First, and most importantly for the most serious pretextual problem with the program, the change reflected a new mismatch with the emergency rationale. The program remains too broad relative to the emergency, as it makes no attempt to establish categories related to Covid causation or indicia of Covid correlation; and instead of adding such indicia to focus the program on the ostensible emergency purpose, the Government later narrowed the program along public/private lines unrelated to the emergency. The Program is now capriciously broad and arbitrarily narrow. This is corroborating evidence that the emergency is a pretext.

Second, under the rule against "arbitrary" and "capricious" action, 5 U.S.C. § 706(2)(A), the Government must "articulate a satisfactory explanation for its action," offer "reasoned analysis" for its policies and changes in policy, and consider all "relevant factors" and "alternative[s]."[56] Under the "hard look" doctrine, the courts do not need to take a hard look at the policy choice, but they do need to make sure that the government has taken a hard look at significant policy considerations. *Id.* This public/private change is itself a major question, denying or reducing relief to over 2 million people, excluding about $20 billion in debt. The Government has offered no explanation for this policy change and significant exclusion. The Government has not conceded that it was motivated as a way to dodge standing, and even if it did, this explanation would still be "arbitrary," in that it is a litigation strategy – a procedural dodge – to avoid having to answer for the underlying substantive problems. It would not be a satisfactory explanation for a major policy decision. It would be a cynical legal move that would exclude many debtors who are in the class of individuals that the program purportedly is supposed to serve. If the Government had claimed that it wanted to reduce the expense of the program, it could have lowered the means-testing income limits, or even more appropriately, it could have focused on the ostensible purpose, the Covid emergency, to focus on debtors (or categories of debtors) harmed by Covid. It is revealing that the Government did not make those changes or indicate that it even considered those changes to rescue its Program from legal challenges by tailoring the program to its statutory basis.

Third, agency action motivated by manipulating or narrowing standing, dodging legal process, and avoiding legal accountability in itself raises questions about the faithful execution of the laws (as required by Article II).[57]

Lastly, student debt activists and reformers should be disappointed by these haphazard exclusions. Instead of re-starting the program on the basis of the Higher Education Act of 1965 to

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[55] *Id.*

[56] *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 42-43 (1983); *see also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *DHS v. Regents*, 140 S.Ct. 1891, 1909 (2020).

[57] *See* Evan Criddle, *Fiduciary Foundations of Administrative Law*, 54 U.C.L.A. L. REV. 117, 122, 172-78 (2006); *cf.* GARY LAWSON & GUY SEIDMAN, A GREAT POWER OF ATTORNEY: UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017); Evan Bernick, *Faithful Execution: Where Administrative Law Meets the Constitution*, 108 GEO. L.J. 1, 22 (2019); Andrew Kent, Ethan Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019); Ethan Leib & Andrew Kent, *Fiduciary Law and the Law of Public Office*, 62 WM. & MARY L. REV. 1297 (2021); David Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885 (2016); Samuel Buell, *Good Faith and Law Evasion*, 58 UCLA L. REV. 611 (2011); Brannon Denning & Michael Kent, Jr., *Anti-Evasion Doctrines in Constitutional Law*, 2012 UTAH L. REV. 1773, 1779-93.

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cover more Americans, the Government tried to save its weak emergency claim by arbitrarily reversing relief to 2 million debtors.

Conclusion

"The pandemic is over."

"We've extended it to May the 15th to make sure we get everything done. That's all."

"Never let an emergency go to waste."

The Government offered the Covid emergency as a pretext for a broader pre-existing policy agenda, as reflected in President Biden's own public statements; and it offered the Covid emergency as a pretext to evade the appropriate statute's procedural requirements. The Waiver program lacks a basic causal nexus to the ostensible emergency purpose under the statute. Longstanding precedents bar *post hoc* rationales as litigation strategy, limiting judicial review to the reasons given for a policy when those decisions were made. Recent Supreme Court decisions also scrutinize and reject *ad hoc* rationales and mismatches between the statutory basis (and the stated goals) and a broader policy. This is such a case.

The student loan policy violates Article II's requirement for faithful execution; the Administrative Procedure Act's prohibition on arbitrary and capricious action based on pretexts and not real reasons; and the prohibition against giving no reasons for an arbitrary line. The waiver program does not match the Covid emergency and the HEROES Statute's emergency clause.

Steps 1, 2, and 3 of the emergency questions doctrine are enough to cabin the emergency powers in this case, as well as the other Covid cases on the eviction moratorium, the vaccine-or-test mandate, and the church in-person restrictions: 1) purposivism, 2) no *Chevron* deference, and especially 3) the tailoring of means to emergency ends. A super-clear-statement rule was not necessary.

The triad of Covid cases on the eviction moratorium (*Alabama Realtors Association v. HHS*), the vaccine-or-test mandate (*NFIB v. OSHA*), and now the Biden Student Debt cases are cautionary tales about emergency powers and pretexts. They may not have gone into effect for very long, but like a vaccine, they were small doses that may be more effective in the long term in developing doctrinal inoculation and legal immunities against in the next emergencies and the next pretextual abuses of emergency powers.

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