APPENDIX

Court of appeals order granting injunction pending appeal (8th Cir. Nov. 14, 2022) 1a

Court of appeals order granting administrative stay (8th Cir. Oct. 21, 2022) 7a

District court order denying injunction pending appeal and administrative stay (E.D. Mo. Oct. 21, 2022) 8a

District court opinion, memorandum and order dismissing case (E.D. Mo. Oct. 20, 2022) 9a

Memorandum re: Waivers Relating to Pandemic-Connected General Loan Discharge (Sept. 27, 2022) 28a

Notice of Debt Cancellation Legal Memorandum (Aug. 30, 2022) 29a

Memorandum re: Pandemic-Connected General Loan Discharge and Payment Pause (Aug. 24, 2022) 32a

Memorandum re: Pandemic-Connected Loan Cancellation (Aug. 24, 2022) 34a

United States Court of Appeals
For the Eighth Circuit

No. 22-3179

State of Nebraska; State of Missouri; State of Arkansas;
State of Iowa; State of Kansas; State of South Carolina

Plaintiffs - Appellants

v.

Joseph R. Biden, Jr., in his official capacity as the President of the United States of America; Miguel Cardona, in his official capacity as Secretary, United States Department of Education; United States Department of Education

Defendants - Appellees

Hamilton Lincoln Law Institute; Americans for Prosperity Foundation; New Civil Liberties Alliance

Amici on Behalf of Appellants

Appeal from United States District Court
for the Eastern District of Missouri

Submitted: October 24, 2022
Filed: November 14, 2022
[Published]

Before SHEPHERD, ERICKSON, and GRASZ, Circuit Judges.

PER CURIAM.

Whatever the eventual outcome of this case, it will affect the finances of millions of Americans with student loan debt as well as those Americans who pay taxes to finance the government and indeed everyone who is affected by such far-reaching fiscal decisions. As such, we approach the motion before us with great care.

This case centers on the plaintiff States' request to preliminarily enjoin the United States Secretary of Education ("Secretary") from implementing a plan to discharge student loan debt under the Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108-76, 117 Stat. 904 (codified at 20 U.S.C. §§ 1098aa–1098ee) ("HEROES Act"). *See* Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program), 87 Fed. Reg. 61,512, 61,514 (Oct. 12, 2022) (to be codified at 34 C.F.R. pts. 674, 682, 685). The States contend the student loan debt relief plan contravenes the separation of powers and violates the Administrative Procedure Act because it exceeds the Secretary's authority and is arbitrary and capricious.

The district court denied the States' motion for a preliminary injunction and dismissed the case for lack of jurisdiction after determining none of the States had standing to bring the lawsuit. Key to the district court's rationale was its conclusion that the State of Missouri could not rely on any harm the Missouri Higher Education Loan Authority ("MOHELA") might suffer on account of the Secretary's cancellation of debt. The States appealed and moved for a preliminary injunction pending appeal. We grant the motion for the following reasons.

"In ruling on a request for an injunction pending appeal, the court must engage in the same inquiry as when it reviews the grant or denial of a preliminary injunction." *Walker v. Lockhart*, 678 F.2d 68, 70 (8th Cir. 1982). This inquiry includes "balancing the equities between the parties." *Id.* We ask "whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 370 (8th Cir. 1991) (quoting *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc)). In circumstances "where the movant has raised a substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less." *Dataphase*, 640 F.3d at 113; *see also Fennell v. Butler*, 570 F.2d 263, 264 (8th Cir. 1978) ("If the balance tips decidedly towards the plaintiffs and the plaintiffs have raised questions serious enough to require litigation, ordinarily the injunction should issue.").

The district court's analysis began and ended with standing. Standing is a threshold issue since it is essential to our jurisdiction. *United States v. One Lincoln Navigator 1998*, 328 F.3d 1011, 1013 (8th Cir. 2003). We begin by examining the standing of the State of Missouri and, like the district court, focus on MOHELA. MOHELA's unique mix of legal attributes and authority have led to differing opinions as to whether it is an "arm of the state" of Missouri for purposes of being entitled to sovereign immunity. The core issue before this court, however, is whether the alleged harm from the Secretary's debt discharge plan, considering the role of MOHELA, is sufficient to meet the requirements for Article III standing for Missouri.

The relationship between MOHELA and the State of Missouri is relevant to the standing analysis. MOHELA was created by the General Assembly of Missouri. *See* Mo. Rev. Stat. § 173.360. It is governed by a seven-member board composed of five members appointed by the Governor of Missouri, as well as the Missouri State Commissioner of Higher Education and a member of the Missouri State Coordinating Board of Higher Education. *Id.* After its creation, the Missouri General Assembly expanded MOHELA's purpose to include "support[ing] the efforts of public colleges and universities to create and fund capital projects." *Id.* Relatedly, the General Assembly established the Lewis and Clark Discovery Fund ("LCD Fund") from which the General Assembly may annually appropriate moneys for certain purposes, including "funding of capital projects at public colleges and universities." *Id.* § 173.392. Most significantly, Missouri law, *id.* § 173.385.2, specifically directs MOHELA to distribute $350 million "into a fund in the State Treasury" for this program. MOHELA FY 2022 Financial Statements, at 20, available at https://tinyurl.com/4chp295x. MOHELA has met part of its obligation to the State treasury, but the "remaining unfunded amount . . . was $105.1 million as of June 30, 2022." *Id.*

Given this statutory framework, MOHELA may well be an arm of the State of Missouri under the reasoning of our precedent. *See Pub. Sch. Ret. Sys. of Mo. v. St. Bank & Trust Co.*, 640 F.3d 821, 826–27, 833 (8th Cir. 2011) (applying the test to determine whether sovereign immunity applies and holding Missouri public school employment retirement systems were arms of the state). In fact, a number of district courts have concluded that MOHELA is an arm of the state. *See, e.g.*, *Good v. U.S. Dep't of Educ.*, No. 21-CV-2539-JAR-ADM, 2022 WL 2191758, at *4 (D. Kan. June 16, 2022); *Gowens v. Capella Univ., Inc.*, No. 4:19-CV-362-CLM, 2020 WL 10180669, at *4 (N.D. Ala. June 1, 2020); *see also In re Stout*, 231 B.R. 313, 316–17 (Bankr. W.D. Mo. 1999). *But see Dykes v. Mo. Higher Educ. Loan Auth.*, No. 4:21-CV-00083-RWS, 2021 WL 3206691, at *4 (E.D. Mo. July 29, 2021); *Perkins v. Equifax Info. Servs., LLC*, No. SA-19-CA-1281-FB (HJB), 2020 WL 13120600, at *5 (W.D. Tex. May 1, 2020).

But even if MOHELA is not an arm of the State of Missouri, the financial impact on MOHELA due to the Secretary's debt discharge threatens to independently impact Missouri through the LCD Fund. It is alleged MOHELA obtains revenue from the accounts it services, and the total revenue MOHELA recovers will decrease if a substantial portion of its accounts are no longer active under the Secretary's plan. This unanticipated financial downturn will prevent or delay Missouri from funding higher education at its public colleges and universities. After all, MOHELA contributes to the LCD Fund but has not yet met its statutory obligation.

Due to MOHELA's financial obligations to the State treasury, the challenged student loan debt cancellation presents a threatened financial harm to the State of Missouri. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019); *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017). Consequently, we conclude Missouri has shown a likely injury in fact that is concrete and particularized, and which is actual or imminent, traceable to the challenged action of the Secretary, and redressable by a favorable decision. Missouri, therefore, likely has legal standing to bring its claim. And since at least one party likely has standing, we need not address the standing of the other States. *See Nat'l Wildlife Fed'n v. Agric. Stabilization & Conservation Serv.*, 955 F.2d 1199, 1203 (8th Cir. 1992). Likewise, we need not decide whether the Secretary's standing argument as to harm alleged to Arkansas and Nebraska is actually better viewed as a mootness argument. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022) (discussing the importance of the distinction and the heavy burden of establishing mootness once a live case has allegedly become moot due to voluntary cessation of conduct).

Having addressed the threshold standing issue, we turn to the balancing of the equities and the probability of success on the merits. Not only do the "merits of the appeal before this court involve substantial questions of law which remain to be resolved," *Walker*, 678 F.2d at 71, but the equities strongly favor an injunction considering the irreversible impact the Secretary's debt forgiveness action would have as compared to the lack of harm an injunction would presently impose. Among the considerations is the fact that collection of student loan payments as well as accrual of interest on student loans have both been suspended. We conclude "the equities of this case require the court to intervene to preserve the status quo pending the outcome" of the States' appeal, *id.*, and that the States have satisfied the standard for injunctive relief pending review, *see D.M. by Bao Xiong v. Minn. State High Sch. League*, 917 F.3d 994, 999–1001 (8th Cir. 2019) (discussing the standard for preliminary injunctive relief).

Finally, we have carefully considered the Secretary's request that we limit the scope of any temporary relief. "Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam). As the Supreme Court has explained, "one of the 'principles of equity jurisprudence' is that 'the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.'" *Rodgers v. Bryant*, 942 F.3d 451, 458 (8th Cir. 2019) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). Part of our consideration is whether the injunctive relief is "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994), and "workable," *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (per curiam).

We conclude that, at this stage of the litigation, an injunction limited to the plaintiff States, or even more broadly to student loans affecting the States, would be impractical and would fail to provide complete relief to the plaintiffs. MOHELA is purportedly one of the largest nonprofit student loan secondary markets in America. It services accounts nationwide and had $168.1 billion in student loan assets serviced as of June 30, 2022. *See Rodgers*, 942 F.3d at 458. Given MOHELA's national role in servicing accounts, we discern no workable path in this emergency posture for narrowing the scope of relief. And beyond Missouri, tailoring an injunction to address the alleged harms to the remaining States would entail delving into complex issues and contested facts that would make any limits uncertain in their application and effectiveness. Although such complexities may not counsel against limiting the scope of an injunction in other contexts, here the Secretary's universal suspension of both loan payments and interest on student loans weighs against delving into such uncertainty at this stage.

We GRANT the Emergency Motion for Injunction Pending Appeal. The injunction will remain in effect until further order of this court or the Supreme Court of the United States.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-3179

State of Nebraska, et al.

Appellants

v.

Joseph R. Biden, Jr., in his official capacity as the President of the United States of America, et al.

Appellees

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:22-cv-01040-HEA)

ORDER

Appellants' emergency motion for an administrative stay prohibiting the appellees from discharging any student loan debt under the Cancellation program until this Court rules on the appellants' motion for an injunction pending appeal is granted. The request for expedited briefing on the motion for an injunction pending appeal is granted as follows:

Appellees' response in opposition shall be due on or before 5:00 PM Central, Monday, October 24, 2022 and the Appellants' reply, if any, is due on or before 5:00 PM Central, Tuesday, October 25, 2022.

October 21, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

STATE OF NEBRASKA, et al.,	**)**	
	)	
Plaintiffs,	**)**	
	)	
v.	**)**	**Case No. 4:22CV1040 HEA**
	)	
JOSEPH R. BIDEN, JR., et al.,	**)**	
	)	
Defendants.	**)**	

ORDER

This matter is before the Court on Plaintiffs' Motion for Injunction Pending Appeal or Temporary Administrative Stay of Agency Action [Doc No. 48]. On October 20, 2022, this Court issued an Opinion, Order and Memorandum, with an accompanying Order of Dismissal, dismissing this case for a lack of standing. Plaintiffs' Motion will be denied.

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' Motion [Doc No. 48] is **DENIED.**

Dated this day 21st of October, 2022.

HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

STATE OF NEBRASKA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 4:22CV1040 HEA**
	)	
JOSEPH R. BIDEN, JR., et al.,	)	
	)	
Defendants.	)	

OPINION, MEMORANDUM AND ORDER

This matter is before the Court on Plaintiffs' Motion for Preliminary Injunction [Doc. No. 3]. Defendants have filed their response in opposition to the Motion. The parties appeared in person for a hearing on the Motion on October 12, 2022. The Court has thoroughly reviewed the pleadings, affidavits, exhibits, and memoranda of law submitted by the respective parties, and has considered the arguments presented at the hearing. For the reasons set forth below, the Court concludes Defendants' arguments are well-taken and this matter will be dismissed.

Facts and Background

On September 29, 2022, six states – Nebraska, Missouri, Arkansas, Iowa, Kansas and South Carolina (Plaintiff States) – brought this action for declaratory and injunctive relief against Defendants President Joseph R. Biden, Jr., Secretary of Education Miguel Cardona, and the United States Department of Education, alleging the Department's student debt relief plan contravenes the separation of powers and violates the Administrative Procedure Act (APA) because it exceeds the Secretary's statutory authority and is arbitrary and capricious.

Higher Education Act of 1965

Title IV of the Higher Education Act of 1965, as enacted and amended (HEA), by Congress provides the Secretary of Education (Secretary) authorization to "assist in making available the benefits of postsecondary education to eligible students" through the provision of federal financial aid. 20 U.S.C. § 1070 *et seq*. The HEA establishes several student loan programs, like the William D. Ford Direct Loan Program and the Federal Family Education Loan Program (FFELP). New FFELP loans stopped being issued on July 1, 2010. HEA loans that originated after July 1, 2010 have been issued under the Direct Loan Program (Direct Loans). FFELP borrowers still in repayment can generally consolidate their FFELP loans into Direct Loans at no cost. *See* 34 C.F.R. § 685.220. The HEA also provides how and when loans can be paid, including repayment options, like income-based repayment plan, and forgiveness, like public service loan forgiveness. *See, e.g.,* 34 C.F.R. § 685.219; 20 U.S.C. §§ 1098e; 1087e(d)(1); 1078(b)(9)(A)(v).

The Higher Education Relief Opportunities for Students Act of 2003

In 2003, Congress enacted the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act). Pub. L. 108-76, 117 Stat. 904 (2003) (codified at 20 U.S.C. §§ 1098aa-1098ee). The HEROES Act allows the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the Act as the Secretary deems necessary in connection with a war or other military operation or national emergency …" 20 U.S.C. § 1098bb(a)(1). "The term 'national emergency' means a national emergency declared by the President of the United States." *Id.* at § 1098ee(4). The Secretary's waiver or modification must be "necessary to ensure that" one of certain statutory objectives is achieved, including to ensure that "recipients of student financial assistance ... who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals" and that administrative requirements placed on those are "minimized, to the extent possible without impairing the integrity of the student financial assistance programs, to ease the burden on such students and avoid inadvertent, technical violations or defaults." *Id.* at § 1098bb(a)(2). The HEROES Act explicitly states that the Secretary is "not required to exercise this waiver or modification authority…on a case-by-case basis." *Id.* at § 1098bb(b)(3). The HEROES Act defines "affected individuals" to include people who reside or are employed "in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency" or who "suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary." *Id.* at § 1098ee(2)(C)–(D).

COVID-19 Pandemic

Most recently, the Secretary has used the HEROES act to provide relief in response to the COVID-19 pandemic, which was declared by former President Trump as a national emergency in March 2020. Accordingly, on March 20, 2020, the Secretary relied on the HEROES Act to pause the accrual of interest and repayment for all federally held student loans from March 13, 2020 until March 27, 2020. On March 27, 2020, Congress directed the Secretary to extend these policies until October 1, 2020 under the Coronavirus Aid, Relief, and Economic Security Act. Pub. L. No. 116-136, § 3513, 134 Stat. 281, 404 (2020) ("CARES Act"). When the CARES Act authorization expired, the Secretary, Defendant Cardona, invoked the HEROES Act again to continue the student loan payment and interest pause through December 31, 2022.

Student Loan Debt Relief Plan

On August 24, 2022, President Biden announced the Department's student debt relief plan to address the financial harms caused by the COVID-19 pandemic and ensure a smooth transition back to repayment status. The Secretary announced that the HEROES Act authorizes him to provide a "one-time" debt relief to federal student loan borrowers affected by the COVID-19 pandemic. The Department plans to provide up to $20,000 in debt relief to Pell Grant recipients with loans held by the Department and up to $10,000 in debt relief to non-Pell Grant recipients. Borrowers are eligible for this relief if their individual income was less than $125,000 or $250,000 for households in 2020 or 2021. Direct Loans qualify for the debt relief. Relief for FFELP loans only qualify to those borrowers who consolidated their FFELP loans into Direct Loans as of September 29, 2022.

The Instant Motion

In addition to filing this lawsuit, on September 29, 2022, Plaintiffs moved for preliminary injunction, pursuant to Federal Rule of Civil Procedure 65, seeking to enjoin Defendants from implementing or enforcing their debt relief for student loans and to enjoin Defendants from publishing a waiver or modification under the HEROES Act to effectuate the student loan debt cancellation.[1]

At the hearing, the parties argued in support of their respective positions. Defendants confirmed that no student debt relief would occur before October 23, 2022.

[1] On September 30, 2022, the parties filed a stipulation, proposing an expedited schedule for resolving the instant motion. Plaintiffs also agreed to withdraw their Motion for Temporary Restraining Order if the Court granted their stipulation to allow the parties to file their briefs and schedule a hearing on the preliminary injunction. On October 17, 2022, the Court granted Plaintiffs' formal notice of withdrawal for their Motion for Temporary Restraining Order.

Legal Standards

Preliminary Injunction

It is axiomatic that the standard for issuance of the "extraordinary and drastic remedy" of a temporary restraining order or a preliminary injunction is very high, *see Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997), and by now very well established. "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 24 (2008), quoting *Munaf v. Green*, 553 U.S. 674, 689-90 (2008). "Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant, (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant, (3) the probability that movant will succeed on the merits, and (4) the public interest." *Dataphase Sys., Inc. v. C.L. Sys., Inc.,* 640 F.2d 109, 113 (8th Cir. 1981). "At the base, the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." *Id*.

Article III Standing

Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const., Art. III, § 2. "One element of the case-or-controversy requirement" is that Plaintiffs "must establish that they have standing to sue." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). Article III standing is a threshold inquiry in every federal case that determines whether the Court has the power to decide the case. *See, e.g., United States v. One Lincoln Navigator 1998*, 328 F.3d 1011, 1013 (8th Cir. 2003); *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

"The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). The "standing inquiry has been especially rigorous when reaching the merits of the dispute would force [a court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Id*., quoting *Raines*, 521 U.S. at 819–20. "Relaxation of standing requirements is directly related to the expansion of judicial power." *United States v. Richardson*, 418 U.S. 166, 188 (1974).

"The party invoking federal jurisdiction bears the burden of establishing standing." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). The "irreducible constitutional minimum" of standing consists of three elements. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 332 (2016), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "To satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant[s]; and 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Env't. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000), quoting *Lujan,* 504 U.S. at 560–561. "For an injury to be particularized, it must affect the plaintiff in a personal and individual way." *Spokeo*, 578 U.S. at 332 (internal quotation marks omitted). Further, a "concrete" injury requires a "'de facto' injury, that is, to actually exist." *Id.* "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Clapper*, 568 U.S. at 409.

Discussion

As articulated above, most fundamental to the Court's determination is the issue of standing. "[S]tanding is to be determined as of the commencement of the suit." *Lujan*, 504 U.S. at 570 n. 5. If a Plaintiff lacks Article III standing to bring its claim, the Court has no subject matter jurisdiction over the suit. *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 934 (8th Cir. 2012). "[W]here one plaintiff establishes standing to sue, the standing of other plaintiffs is immaterial." *Nat'l Wildlife Fed'n v. Agric. Stabilization and Conservation Serv.*, 955 F.2d 1199, 1203 (8th Cir. 1992) (quoting *Bowen v. Kendrick*, 487 U.S. 589, 620 n. 15 (1988).

"[T]he question whether a particular state agency ... is ... an arm of the State, and therefore 'one of the United States' within the meaning of the Eleventh Amendment, is a question of federal law." *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 n. 5 (1997). In answering that federal question, however, courts must "consider[ ] the provisions of state law that define the agency's character." *Id*. Specifically, courts assess the agency's degree of autonomy and control over its own affairs and, more importantly, whether a money judgment against the agency will be paid with state funds. *See Regents*, 519 U.S. at 430; *Hadley v. N. Ark. Cmty. Technical Coll*., 76 F.3d 1437, 1439 (8th Cir. 1996), cert. denied, 519 U.S. 1148 (1997).

Plaintiff State of Missouri and MOHELA

The Higher Education Loan Authority of the State of Missouri (MOHELA) is authorized to act as a servicer for federally held student loans, including Direct Loans and FFELP loans. MOHELA, a non-profit entity, was established by statute in 1981 as "a public instrumentality and body corporate" and deemed exercises of the powers conferred in the legislation to be "the performance of an essential public function." Mo. Rev. Stat. § 173.360. The statute also gave MOHELA the authority "to sue and be sued" and "to acquire, hold and dispose of personal property." Mo. Rev. Stat. § 173.385.

Missouri contends MOHELA is suffering from several ongoing financial harms because of the Department's student debt relief plan, mainly focusing on the harms caused by consolidating FFELP loans into Direct Loans. For instance, because MOHELA will lose a vital established source of income when FFELP loans are consolidated into Direct Loans, it deprives MOHELA of an asset it currently owns and the ongoing interest payments and revenue the FFELP loans would have generated. Missouri argues this will harm MOHELA's ability to issue bonds and access debt markets because the entity uses the income it receives from the student loans as security for bond payments. Missouri claims MOHELA is also enduring injury in the form of compliance costs by undertaking significant efforts to comply with the student debt relief plan.

Missouri, the only Plaintiff state with a relationship to MOHELA, alleges its sovereign and quasi-sovereign interest is harmed because MOHELA's loss of revenue, limited access to debt markets and lesser borrowing capacity from the student debt relief will impair MOHELA's ability to provide student loans and financial aid assistance to its residents.

Missouri, however, fails to connect the alleged harms to MOHELA as harms to the State of Missouri, *i.e.*, does Missouri establish it has standing to sue on MOHELA's behalf? Missouri maintains it can sue for MOHELA because MOHELA is a state entity that performs "essential public function[s]" that includes ensuring "post-secondary education students have access to student loans" and providing financial support to Missouri's public colleges and universities. Mo. Rev. Stat. § 173.360.

Missouri does impose some control over MOHELA, which is assigned by statute to its Department of Education, like authorization for the Governor to appoint five members of the seven-member board and requiring a yearly report on its income, expenditures, bonds, and other forms of indebtedness issued. Mo. Rev. Stat §§ 173.445, 173.360. However, when it was established, MOHELA's revenues and liabilities were specifically and completely independent of the State of Missouri. The enabling legislations stated in relevant part that "[t]he proceeds of all bonds or other forms of indebtedness issued by the authority and of all fees permitted to be charged by the authority and of other revenues derived shall not be considered part of the revenue of the state…shall not be required to be deposited into the state treasury, and shall not be subject to appropriation by the general assembly." Mo. Rev. Stat. § 173.425. The statute also states that "[t] he state shall not be liable in any event for the payment of the principal of or interest on any bonds of the authority or for the performance of any pledge, mortgage, obligation, or agreement of any kind whatsoever which may be undertaken by the authority." Mo. Rev. Stat § 173.410. Additionally, "[n]o breach of any such pledge, mortgage, obligation, or agreement may impose any pecuniary liability upon the state or any charge upon the general credit or taxing power of the state." Mo. Rev. Stat. § 173.410. These provisions make clear that the legislature intended to create a self-sustaining and financially independent agency. The express financial separation of MOHELA established by Missouri law and the lack of any obligation for Missouri to pay MOHELA's debts, strongly militates against finding MOHELA to be an "arm of the State."

Missouri has not met its burden to show that it can rely on harms allegedly suffered by MOHELA. MOHELA, *not the State*, is legally liable for judgments against it. MOHELA cannot pay any debt of the state, and the State is in no way obligated to pay any debt that it incurs. Mo. Rev. Stat. § 173.386. "The vast majority of MOHELA's funds are segregated from state funds and controlled exclusively by MOHELA." *Dykes v. MOHELA*, 2021 WL 3206691, at *4 (E.D. Mo. July 29, 2021) (finding that MOHELA was not an "arm of the state" for purposes of Eleventh Amendment sovereign immunity). There is no legal obligation or evidence that Missouri has paid or would pay any judgment on behalf of MOHELA. Further, the Court has found no cases where Missouri affirmatively sued on behalf of MOHELA or stepped in to shield MOHELA from its legal or financial obligations with its immunity. MOHELA is a "self-sustaining and financially independent agency." *Id.* MOHELA can sue and be sued in its own name and retains financial independence from the state. Indeed, Missouri appears to recognize this distinctiveness. In preparation for this action, Missouri made a Missouri Sunshine Law request to obtain documents from MOHELA.[2] Therefore, its claimed financial harms are not attributable to the state in which it operates, and Missouri cannot establish standing to bring its claims[3] or establish standing through any arguments relating to MOHELA.

Consolidation

Plaintiff States Arkansas and Nebraska[4] claim several harms from the Department's student debt relief plan's incentive to consolidate FFELP loans into Direct loans. However, on the same date the instant motion was filed, the Department announced that as of September 29, 2022, borrowers with federal student loans not held by the Department cannot obtain the one-time student debt relief by consolidating those loans into Direct Loans. Following the announcement, the consolidation cut-off decision was published in the Federal Register. Plaintiffs

[2] Curiously, the State of Missouri's "dot.gov" website fails to include MOHELA as an agency/department of the state, whereas, the Department of Health and Senior Services, which was the subject of Judge Noce's Opinion in *Missouri v. Biden*, 576 F.Supp.3d 622 (E.D. Mo December 20, 2021), is specifically included. Likewise, MOHELA's "dot.com" website contains no reference to its status as a division/department/agency of the State of Missouri. *See* https://www.mo.gov/ and https://www.mohela.com/ (Last visited October 20, 2022).

[3] Since MOHELA is not a party to this lawsuit, the Court will not address the issue raised by Defendants that exclusive jurisdiction lies in the Court of Federal Claims pursuant to the Contract Disputes Act.

[4] Missouri's claims that MOHELA will be harmed by the incentive to consolidate will not be addressed since the Court has already determined Missouri does not have standing to bring claims on behalf of MOHELA. As to the sole claim alleged by Iowa, Kansas, and South Carolina, it will be addressed separately.

argues the consolidation cut-off does not impact their claims because the Department may change their mind about the consolidation cut-off. Plaintiff also contends because consolidation takes time, the preliminary injunction could stop the consolidation of those FFELP that have not yet completed the process. However, the student debt relief plan at issue here is separate from a borrower's ability to consolidate. Borrowers are still able to consolidate FFELP loans into Direct Loans pursuant to the conditions listed in 34 C.F.R. § 685.220, but those FFELP loans consolidated after September 29, 2022, will no longer be eligible for the one-time student debt relief. Because Plaintiffs seek only prospective relief, they must articulate an ongoing injury. The lack of the ongoing incentive to consolidate defeats the claims of Arkansas and Nebraska as set forth below.

Arkansas and ASLA

The Arkansas Student Loan Authority (ASLA), a division of the Arkansas Development Finance Authority, is "the instrumentality of the state charged with a portion of the responsibility of the state to provide educational opportunities in keeping with all applicable state and federal laws." Ark. Code Ann. § 15-5-1902(a)(2). ASLA's mission includes: "(1) Making loans; (2) Purchasing loans and security interests in loan participations as authorized; (3) Paying incidental expenses in connection with loans; (4) Paying expenses of authorizing and issuing bonds; (5) Paying interest on bonds until revenues are available in sufficient amounts from the bonds; and (6) Funding reserves as necessary." *Id.* § 15-5-1904(c). ASLA is authorized to act as a servicer for federally held student loans under the FFELP. *See* Plaintiffs' Exhibit 5, Williams Decl., ¶¶ 3, 5. ASLA generates revenue through collecting an administrative fee, which is calculated based on a percentage of the total outstanding FFELP loan balance. *Id*. ¶ 6. A portion of that administrative fee is paid out by ASLA for administrative and serving costs, and the excess is retained as revenue. *Id.* The revenue primarily goes to ASLA's operating expenses, but could be used to finance additional student loans. *Id.*

Arkansas, the only Plaintiff with a relationship to ASLA, alleges its financial and proprietary interest is harmed because the reduction in ASLA's revenue caused by the incentive to consolidate FFELP loans into Direct Loans could limit its ability to provide education opportunities to Arkansans through financing further student loans. However, ASLA only holds FFELP loans, which are not subject to relief under the Department's plan. As discussed, *supra*, FFELP loans consolidated into Direct Loans after September 29, 2022 will no longer be eligible for the relief at issue. Therefore, the lack of the ongoing incentive to consolidate FFELP loans into Direct Loans defeats standing; there is no longer an ongoing injury to ASLA's revenue stream that could be a consequence of the Department's student debt relief plan. Arkansas's only remaining claim is that the Department *could* decide to declare FFELP loans eligible for cancellation, which *could* reduce ASLA's revenue and *could* limit its student loan financing. This position is too attenuated to show a concrete and particularized injury for the purposes of standing. A "concrete" injury is a "de facto" injury that actually exists. *Spokeo*, 578 U.S. at 332. Arkansas has presented no other basis outside of claims connected to its alleged harms from consolidation. Therefore, Arkansas has not met its burden of establishing standing in this case.

Nebraska and NIC

The Nebraska Investment Council (NIC) is responsible for investing various assets held by the State of Nebraska, including the State's pension fund. Neb. Rev. Stat. § 72-1239.01. The NIC has multiple accounts with Nebraska's state funds invested in privately held FFELP student loan asset-backed securities (SLABS). *See* Plaintiffs' Exhibit 2, Walden-Newman Decl., ¶ 3. NIC's investment firm has advised NIC that it expects the Department's student debt relief plan will increase prepays for FFELP SLABS. *Id.* ¶ 8.

Nebraska argues that the consolidation of FFELP loans into Direct Loans will cause investors in SLABS to receive money back earlier than anticipated, ending the interest income flow that SLABS generate, which will likely cause financial injury to NIC. Further, when the FFELP loans are pre-paid, the SLABS market declines, which Nebraska contends will lower the value of NIC's investments. Because of the harm to its investments, Nebraska claims the student debt relief plan harms its quasi-sovereign interest in protecting the well-being of its public employees, including pensioners of the state. This claimed injury to the NIC's investments would only exist if the incentive to consolidate the FFELP loans into Direct Loans remained. Because the FFELP loans consolidated into Direct Loans after September 29, 2022 will not be included in the student debt relief under the Department's plan, Nebraska's speculative chain of possibilities does not establish that potential financial injuries are ongoing or certainly impending. Nebraska has not met its burden; Nebraska lacks standing to bring this claim.

<u>The States of Nebraska, Iowa, Kansas, and South Carolina</u>

Plaintiff States Nebraska Iowa, Kansas, and South Carolina attempt to assert a threat of imminent harm in the form of lost tax revenue in the future. Currently, federal student loan discharges are not taxable under federal law between December 31, 2020 and January 1, 2026. Nebraska, Iowa, Kansas, and South Carolina have chosen to adopt this definition of taxable income in their own state tax codes. They likewise plan to tax federal student loan discharges that occur after January 1, 2026. Nebraska, Iowa, Kansas, and South Carolina argue that they will lose tax revenue to the extent that the total amount of loan discharges they currently project to occur after January 1, 2026, is reduced because of the Department's student debt relief plan.

These future lost tax revenues are merely speculative. Moreover, there is nothing imminent about what may happen several years in the future. The Department's student loan debt relief plan does not prohibit the States from proposing, enacting or implementing legislation. These States' sovereign power to set its own tax policy is not implicated by the student debt relief plan, and their legislatures are free to propose and pass tax revenue plans as they see fit.

The effect upon future taxation is uncertain. [T]hreatened injury must be certainly impending to constitute injury in fact… allegations of possible future injury" are not sufficient." *Clapper*, 568 U.S. at 409. The tenuous nature of future income tax revenue is insufficient to establish a cognizable injury to support standing to bring this action.

Conclusion

Because Plaintiff States – Nebraska, Missouri, Arkansas, Iowa, Kansas, and South Carolina – have failed to establish Article III standing, the Court lacks jurisdiction to hear this case. It should be emphasized that "standing in no way depends upon the merits of the Plaintiff[s'] contention that the particular conduct is illegal." *Warth*, 422 U.S. at 500. While Plaintiffs present important and significant challenges to the debt relief plan, the current Plaintiffs are unable to proceed to the resolution of these challenges. "Standing is a threshold inquiry; it requires focus on the part[ies] seeking to have [their] complaint heard in a federal court, and it eschews evaluation of the merits. The court is not to consider the weight or significance of the alleged injury, *only whether it exists*." *Coalition for the Environment v. Volpe*, 504 F.2d 156, 168 (8th Cir. 1974) (emphasis added).

Therefore, the case will be dismissed for lack of jurisdiction.

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this action is **DISMISSED.**

A separate Order of Dismissal in accordance with this Opinion, Memorandum and Order is entered this same date.

Dated this 20th day of October, 2022.

HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE

THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

DATE: September 27, 2022

MEMORANDUM TO: Dr. Nasser Paydar
Assistant Secretary for Postsecondary Education

Richard Cordray
Chief Operating Officer
Federal Student Aid

FROM: Miguel A. Cardona, Ed.D.
Secretary of Education

SUBJECT: Waivers Relating to Pandemic-Connected General Loan Discharge

On August 24, 2022, I notified Richard Cordray, Chief Operating Officer of Federal Student Aid, that I had determined to exercise my discretion under the HEROES Act to issue waivers and modifications necessary to (1) discharge up to $20,000 in federal student loan balances for borrowers who meet certain conditions and (2) take all administrative steps necessary to implement that determination.

In the interim, the Department has developed a comprehensive strategy to implement that determination. As such, today I am issuing waivers and modifications to the provisions of 20 U.S.C. 1087, which applies to the Direct Loan Program under 20 U.S.C. 1087a and 1087e; 20 U.S.C. 1087dd(g); and 34 CFR part 674, subpart D, §§ 682.402 and 685.212 to provide that, notwithstanding any other statutory or regulatory provision, the Department will discharge the balance of a borrower's loans up to a maximum of: (a) $20,000 for borrowers who qualified for Pell Grants at the time they received the loans and had an Adjusted Gross Income ("AGI") below $125,000 for an individual taxpayer or $250,000 for borrowers filing jointly or as a Head of Household for the 2020 or 2021 Federal tax years; or (b) up to a maximum of $10,000 for borrowers who are eligible under those income thresholds but did not qualify for a Pell Grant at the time they received the loans. This waiver is applicable to borrowers with outstanding Direct Loans, FFEL loans held by the Department or subject to collection by a guaranty agency, and Perkins Loans held by the Department prior to July 1, 2022, and who are determined to be eligible by the Department.

Please take all necessary actions to implement these waivers and modifications and to provide notice of these waivers and modifications in the Federal Register.

information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed ICR that is described below. The Department is especially interested in public comments addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public record.

Title of Collection: Health Education Assistance Loan (HEAL) Program Regs.

OMB Control Number: 1845–0125.

Type of Review: Extension without change of a currently approved collection.

Respondents/Affected Public: Individuals and Households; State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 129,945.

Total Estimated Number of Annual Burden Hours: 24,120.

Abstract: This is a request for an extension of OMB approval of information collection requirements associated with the Health Education Assistance Loan (HEAL) Program regulations for reporting, recordkeeping and notifications, currently approved under OMB No. 1845–0125. There has been no change to the regulatory language. The previous filing totals were incorrectly summed and the correct totals are presented here.

Dated: August 24, 2022.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2022–18591 Filed 8–29–22; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice Inviting Publishers To Submit Tests for a Determination of Suitability for Use in the National Reporting System for Adult Education

AGENCY: Office of Career, Technical, and Adult Education, Department of Education.

ACTION: Notice.

SUMMARY: The Secretary of Education invites publishers to submit tests for review and approval for use in the National Reporting System for Adult Education (NRS) and announces the date by which publishers must submit these tests. This notice relates to the approved information collection under OMB control number 1830–0567.

DATES: *Deadline for transmittal of applications:* October 1, 2022.

ADDRESSES: Submit your application by email to *NRS@air.org.*

FOR FURTHER INFORMATION CONTACT: John LeMaster, U.S. Department of Education, 400 Maryland Avenue SW, Room 11152, Potomac Center Plaza, Washington, DC 20202–7240. Telephone: (202) 245–6218. Email: *John.LeMaster@ed.gov.*

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7–1–1.

SUPPLEMENTARY INFORMATION: The Department's regulations for Measuring Educational Gain in the National Reporting System for Adult Education, 34 CFR part 462 (NRS regulations), include the procedures for determining the suitability of tests for use in the NRS.

There is a review process that will begin on October 1, 2022. Only tests submitted by the due date will be reviewed in that review cycle. If a publisher submits a test after October 1, 2022, the test will not be reviewed until the review cycle that begins on October 1, 2023.

Criteria the Secretary Uses: In order for the Secretary to consider a test suitable for use in the NRS, the test must meet the criteria and requirements established in 34 CFR 462.13.

Submission Requirements:

(a) In preparing your application, you must comply with the requirements in 34 CFR 462.11.

(b) In accordance with 34 CFR 462.10, the deadline for transmittal of applications in this fiscal year is October 1, 2022.

(c) You must retain a copy of your sent email message and the email attachments as proof that you submitted your application by 11:59 p.m. local time on October 1, 2022.

(d) We do not consider applications submitted after the application deadline date to be timely for the October 1, 2022, review cycle. If an application is submitted after the October 1, 2022, deadline date, the application will be considered timely for the October 1, 2023, deadline date.

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and an application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register***,* in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Authority: 29 U.S.C. 3292.

Amy Loyd,

Assistant Secretary for Career, Technical, and Adult Education.

[FR Doc. 2022–18624 Filed 8–29–22; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Debt Cancellation Legal Memorandum

AGENCY: Office of the General Counsel, Department of Education.

ACTION: Notice.

SUMMARY: The Department publishes this memorandum on the Secretary's legal authority to cancel student debt on a categorical basis.

FOR FURTHER INFORMATION CONTACT: Brian Siegel, U.S. Department of Education, Office of the General Counsel, 400 Maryland Avenue SW, room 6E–105, Washington, DC 20202. Telephone: (202) 987–1508. Email: *brian.siegel@ed.gov.*

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7–1–1.

SUPPLEMENTARY INFORMATION: The Department publishes this memorandum on the Secretary's legal authority to cancel student debt on a categorical basis. The debt relief memorandum is in Appendix A of this notice.

Accessible Format: On request to the program contact person listed above under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Miguel A. Cardona,
Secretary of Education.

Appendix A—Debt Cancellation Legal Memorandum

TO: Miguel A. Cardona Secretary of Education
FROM: Lisa Brown General Counsel
DATE: August 23, 2022
SUBJECT: The Secretary's Legal Authority for Debt Cancellation

Introduction

For the past year and a half, the Office of General Counsel ("OGC"), in consultation with our colleagues at the Department of Justice Office of Legal Counsel, has conducted a review of the Secretary's legal authority to cancel student debt on a categorical basis. This review has included assessing the analysis outlined in a publicly disseminated January 2021 memorandum signed by a former Principal Deputy General Counsel. As detailed below, we have determined that the Higher Education Relief Opportunities for Students ("HEROES") Act of 2003 grants the Secretary authority that could be used to effectuate a program of targeted loan cancellation directed at addressing the financial harms of the COVID–19 pandemic. We have thus determined that the January 2021 memorandum was substantively incorrect in its conclusions.

Given the significant public interest in this issue, and the potential for public confusion caused by the public availability of the January 2021 memorandum, I recommend making this memorandum publicly available and publishing it in the **Federal Register**, so as to provide the general public with notice of the Department's interpretation of the HEROES Act, consistent with statutory requirements. *See* 5 U.S.C. 552(a).[1]

I. The Secretary's HEROES Act Authority

The HEROES Act, first enacted in the wake of the September 11 attacks, provides the Secretary broad authority to grant relief from student loan requirements during specific periods (a war, other military operation, or national emergency, such as the present COVID–19 pandemic) and for specific purposes (including to address the financial harms of such a war, other military operation, or emergency). The Secretary of Education has used this authority, under both this and every prior administration since the Act's passage, to provide relief to borrowers in connection with a war, other military operation, or national emergency, including the ongoing moratorium on student loan payments and interest.[2]

Specifically, the HEROES Act authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" if the Secretary "deems" such waivers or modifications "necessary to ensure" at least one of several enumerated purposes, including that borrowers are "not placed in a worse position financially" because of a national emergency. 20 U.S.C. 1098bb(a)(1), (2)(A).

Several provisions of the HEROES Act indicate that Congress intended the Act to confer broad authority under the circumstances, and for the purposes, specified by the Act. First, the Act grants authority "[n]otwithstanding any other provision of law, unless enacted with specific reference to this section." *Id.* § 1098bb(a)(1). Second, the Act authorizes the Secretary to waive or modify "any" statutory or regulatory provision applicable to the student financial assistance programs. *Id.* § 1098bb(a)(1), (a)(2). Third, the Act expressly authorizes the Secretary to issue such waivers and modifications as he "deems necessary in connection with a war or other military operation or national emergency." *Id.* § 1098bb(a)(1). The Supreme Court has recognized that, in empowering a federal official to act as that official "deems necessary" in circumstances specified by a statute, Congress has granted the official broad discretion to take such action.[3] This authority is not, however, boundless: it is limited, *inter alia,* to periods of a war, other military operation, or national emergency (*id.* § 1098bb(a)(1)), to certain categories of eligible individuals or institutions (*id.* § 1098ee(2)), and to a defined set of purposes (*id.* § 1098bb(a)(2)(A)–(E)).

In present circumstances, this authority could be used to effectuate a program of categorical debt cancellation directed at addressing the financial harms caused by the COVID–19 pandemic. The Secretary could waive or modify statutory and regulatory provisions to effectuate a certain amount of cancellation for borrowers who have been financially harmed because of the COVID–19 pandemic. 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. But the Secretary's authority 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). That is, he is not required to determine or show that any individual borrower is entitled to a specific amount of relief, and he instead may provide relief on a categorical basis as necessary to address the financial harms of the pandemic.

II. The January 2021 Memorandum

On January 7, 2021, Secretary DeVos resigned from her position as Secretary of Education, effective January 8, 2021. On January 13, a news outlet published a memorandum signed January 12 by the then-Principal Deputy General Counsel, addressed to "Betsy DeVos[,] Secretary of Education."[4]

[1] The Office of Legal Counsel has made its own analysis of the Secretary's authority, which will be published in tandem with this memorandum's recommended publication.

[2] *See* Federal Student Aid Programs (Student Assistance General Provisions, Federal Perkins Loan Program, William D. Ford Federal Direct Loan Program, and Federal-Work Study Programs), 85 FR 79,856, 79,856 (Dec. 11, 2020) ("Secretary [DeVos] is issuing these waivers and modifications under the authority of the HEROES Act[.]"); Federal Student Aid Programs (Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and the Federal Direct Loan Program), 77 FR 59,311, 59,312 (Sept. 27, 2012) ("In accordance with the HEROES Act, . . . Secretary [Duncan] is providing the waivers and modifications of statutory and regulatory provisions applicable to the student financial assistance programs[.]"); Federal Student Aid Programs (Student Assistance General Provisions, Federal Perkins Loan Program, Federal Direct Loan Program, Federal Family Education Loan Program and the Federal Pell Grant Program), 68 FR 69,312, 69,312 (Dec. 12, 2003) ("Secretary [Paige] is issuing these waivers and modifications under the authority of section 2(a) of the Higher Education Relief Opportunities for Students (HEROES) Act of 2003[.]").

[3] *Webster* v. *Doe,* 486 U.S. 592, 600 (1988) (statute authorizing action when an agency head "shall *deem* such [action] *necessary* or advisable" "fairly exudes deference" to agency head and "strongly suggests that its implementation was 'committed to agency discretion by law' " (second emphasis added) (some quotation marks omitted)).

[4] Michael Stratford, Trump Administration Tries to Hamstring Biden on Student Loan Forgiveness, Politico (Jan. 13, 2021).

Two substantively identical versions of that memorandum were posted to the website of the Office of Postsecondary Education, dated January 12 and January 18 (collectively, the ''January 2021 memorandum''). Having reviewed the memorandum in consultation with the Office of Legal Counsel, we have determined that although it accurately describes the core features of the HEROES Act, its ultimate conclusions are unsupported and incorrect.[5] As such, it should be rescinded.

As an initial matter, the bulk of the January 2021 memorandum's discussion of HEROES Act authority describes and quotes the key provisions of the HEROES Act. The memorandum explains that the HEROES Act provides the Secretary ''authority to provide specified [[6]] waivers or modifications to Title IV federal financial student aid program statutory and regulatory requirements because of the declared National Emergency,'' identifies that declared emergency as the COVID–19 national emergency declared on March 18, 2020, and characterizes this authority as ''narrowly cabined'' to achieving five enumerated purposes, including ''ensur[ing] that . . . recipients of student financial assistance under title IV of the Act who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals.'' Jan. 2021 Mem. at 5–6.

The memorandum goes on to read in purported limitations on the scope of relief that may be afforded that are contrary to the clear text of the Act. The memorandum advances three primary arguments in support of a conclusion that ''Congress never intended the HEROES Act as authority for mass cancellation, compromise, discharge, or forgiveness of student loan principal balances, and/or to materially modify repayment amounts or terms.'' Jan. 2021 Mem. at 6.

First, the memorandum recites certain statutory limits on the Secretary's authority, including the HEROES Act's statutory definition of individuals eligible for relief, 20 U.S.C. 1098ee(2), and the enumerated purposes for which waivers or modifications may be issued, *id.* § 1098bb(a)(2).

The memorandum is correct that such statutory provisions exist but provides no support for the suggestion that these provisions impose limitations beyond their clear terms. *See* Jan. 2021 Mem. at 6.

Second, the memorandum points to the HEROES Act's references to avoiding ''defaults'' and a ''cross-cite'' to a separate provision of the Higher Education Act relating to the ''return'' of student loan funds, concluding that these provisions ''provide a strong textual basis for concluding Congress intended loans to be repaid.'' *Id.* But these provisions—which identify as allowable purposes issuing waivers or modifications to avoid defaults and granting relief from certain requirements that borrowers return certain payments—in no way impose a requirement that any exercise of HEROES Act authority must ensure that every borrower is left with a remaining balance on their loan. The reference to ''defaults'' authorizes the Secretary to ''avoid'' defaults; it does not require that he preserve their possibility. And the Higher Education Act provisions regarding the ''return'' of overpayments relate only to specific processes and calculations under which students are required to return grant and loan assistance if they withdraw from their school, *see* 20 U.S.C. 1091b; there is no conceivable reading of this provision that reflects a congressional intent that all borrowers, including those not covered by the section 1091b overpayment provisions, are required to repay their loans in full.

Third, the memorandum concludes that the authority to ''waive or modify any statutory or regulatory provision'' is limited to the definition of ''modify'' that was adopted for an unrelated telecommunications statute, and ''does not authorize major changes.'' Jan. 2021 Mem. at 6. The memorandum draws its definition of modify from *MCI Telecomms. Corp.* v. *Am. Telephone & Telegraph Co.,* 512 U.S. 218, 225 (1994). In that case, the statutory provisions under review applied no clear limiting principle to a grant of modification authority to the FCC; the statute allowed modifications ''in [the FCC's] discretion and for good cause shown.'' *Id.* at 224 (quoting 47 U.S.C. 203 (1988 ed. and Supp. IV)). Here, the HEROES Act itself clearly speaks to the scope of modification authority: the Secretary may make those modifications as may be ''necessary to ensure'' specific enumerated purposes. 20 U.S.C. 1098bb. The Secretary may not make modifications going beyond that limit, but nor is he restricted to a degree of modifications that would fall short of ''ensur[ing]'' the enumerated purposes are achieved. Moreover, the HEROES Act broadly authorizes the Secretary to act as he ''deems necessary'' to ''waive or modify'' any statutory or regulatory provision applicable to the student aid program. The January 2021 memorandum's interpretation of ''modify'' would read the Act to authorize the Secretary to waive entirely or to make non-major changes in the relevant statutory or regulatory provisions, but not authorize the Secretary to do anything in between. That interpretation is illogical, and nothing in the HEROES Act's broad grant of authority supports such a reading.

We have discussed these and other aspects of the January 2021 memorandum with the Office of Legal Counsel, and we further find persuasive the discussion of the January 2021 memorandum offered in the Office of Legal Counsel's memorandum, which will be published in tandem with this memorandum's recommended publication.

Conclusion

For the reasons detailed above, I recommend that you (1) determine that the January 2021 memorandum is formally rescinded as substantively incorrect and (2) authorize publication in the **Federal Register** and public posting of this memorandum as the Department's interpretation of the HEROES Act.

[FR Doc. 2022–18731 Filed 8–29–22; 8:45 am]

BILLING CODE 4000–01–P

[5] In addition to determining that the conclusions contained in the January 2021 memorandum were substantively incorrect, we have determined that the memorandum was issued in contravention of then-effective Department processes for issuing significant guidance. An Interim Final Rule issued by the Department on October 5, 2020, pursuant to Executive Order 13,891, established additional procedures for the issuance of guidance documents. *See* Rulemaking and Guidance Procedures, 85 FR 62,597 (Oct. 5, 2020); *see also* Exec. Order No. 13,891, 84 FR 55,235 (Oct. 9, 2019). That rule established new requirements for the issuance of guidance and ''significant guidance,'' defining the latter term to include guidance documents that ''[r]aise novel, legal, or policy issues arising out of legal mandates [or] the President's priorities.'' 85 FR at 62,608. The public dissemination of the January 2021 memorandum violated a number of provisions of this rule, including that guidance must be ''accessible through the Department's guidance portal,'' and that, barring compelling cause, all significant guidance may be published only after a 30-day public comment period and review by the Office of Management and Budget under Executive Order 12,866 of September 30, 1993. *Id.* That rule was rescinded in September 2021, 86 FR 53,863 (Sept. 29, 2021), but it was in effect at the time of the January 2021 memorandum's publication. Thus, OGC has determined that the January 2021 memorandum was not properly promulgated.

[6] We read the term ''specified'' as acknowledging statutory limits on HEROES Act authority, including the enumerated purposes of 20 U.S.C. 1098bb(b)(1), and not as suggesting any atextual limitations on the Act's clear grant of authority to waive or modify ''any'' statutory or regulatory provision applicable to student aid programs, provided other HEROES Act requirements are met.

DEPARTMENT OF ENERGY

Proposed Agency Information Collection

AGENCY: Bonneville Power Administration, Department of Energy.

ACTION: Submission for Office of Management and Budget (OMB) review; comment request.

SUMMARY: The Department of Energy (DOE), Bonneville Power Administration (BPA), invites public comment on a collection of information that BPA is developing for submission to OMB pursuant to the Paperwork Reduction Act of 1995. The proposed collection, Contractor Safety, will be used to manage portions of the Safety program that are related to contractors. These collection instruments allow for compliance with Occupational Safety and Health Administration (OSHA) requirements.

DATES: Comments regarding this proposed information collection must be received on or before October 31, 2022. If you anticipate any difficulty in submitting comments within that period, contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section as soon as possible.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent

CONFIDENTIAL

THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

DATE: August 24, 2022

MEMORANDUM TO: Richard Cordray
Chief Operating Officer
Federal Student Aid

FROM: Miguel A. Cardona, Ed.D.
Secretary of Education

SUBJECT: Pandemic-Connected General Loan Discharge and Payment Pause

In March 2020, Congress determined that, in light of the COVID-19 pandemic, it was necessary to provide relief to student loan borrowers by suspending certain payments and collections activity, and temporarily setting certain interest rates to zero percent. Under the authority granted to the Secretary of Education by the Higher Education Relief Opportunities for Students Act of 2003 ("HEROES Act"), I previously extended this relief through August 31, 2022.

This payment pause has delivered substantial relief to millions of loan borrowers, seeking to ensure that they are not in a worse position financially due to the pandemic. However, when loan payments resume, many borrowers will be at heightened risk of loan delinquency and default that could offset the benefits provided by the pause and leave borrowers worse off than they were before the pandemic. Many borrowers will experience challenges in the transition back to repayment. Additional steps are needed to address these challenges and reduce the likelihood of delinquency and default to ensure that borrowers are not in a worse position financially due to the pandemic with regard to their ability to repay their loans.

In order to ensure that borrowers subject to the payment pause are not placed in a worse position financially by the COVID-19 national emergency as they restart payments, I have determined to exercise my discretion under the HEROES Act to issue waivers and modifications necessary to effectuate the following actions:

- Discharge $10,000 of federal student loan balances for borrowers with individual incomes of under $125,000 or household incomes of under $250,000 during tax years 2020 or 2021. These discharges would be limited to loans that were originally outstanding as of June 30, 2022, and that are currently subject to the payment pause, including Direct Loans, Federal Family Education Loans held by the Department or by guaranty agencies, and Federal Perkins Loans held by the Department.

- Discharge an additional $10,000 in federal student debt for borrowers who meet these requirements and who also received a Pell Grant at some point in the past.

- Take the administrative steps needed to implement this discharge initiative, including the collection, maintenance, use, and dissemination of borrower information necessary to establish eligibility for the discharge under the relevant criteria and provide benefits under the initiative automatically to as many borrowers as possible utilizing income information available to the Department in compliance with applicable law.

- Develop a simple process for borrowers to attest to their incomes and for FSA to verify the income of a sample of those borrowers.

Based on current economic and public health conditions, and to provide time to successfully implement these measures needed to ensure that borrowers are not placed in a worse position financially due to the pandemic, I have also determined to extend those waivers and modifications specified in the December 11, 2020, *Federal Register* notice (85 Fed. Reg. 79856), that relate to the payment and collection of, and accumulation of interest on, federal student loans, and also extend the corresponding pause for Federal Family Education Loan Program loans held by guaranty agencies, as discussed in Dear Colleague Letter GEN-21-03 through December 31, 2022. Because I expect this extension to be the final extension of the payment pause, I further direct FSA to take all necessary steps to restart loan payments after December 31, 2022.

Miguel A. Cardona
U.S. Secretary of Education

8/24/22 9:25am
Date & Time

DELIBERATIVE / PRE-DECISIONAL / CONFIDENTIAL

UNITED STATES DEPARTMENT OF EDUCATION

THE UNDER SECRETARY

DATE: August 24, 2022

TO: Miguel A. Cardona, Ed.D.
Secretary of Education

FROM: James Kvaal
Under Secretary of Education

SUBJECT: Pandemic-Connected Loan Cancellation

In March 2020, Congress determined that, in light of the COVID-19 pandemic, it was necessary to provide relief to student loan borrowers by suspending certain payments and collections activity, and temporarily setting certain interest rates to zero percent. Under the authority granted to the Secretary of Education by the Higher Education Relief Opportunities for Students Act of 2003 ("HEROES Act"), you previously extended this relief through August 31, 2022.

This payment pause has delivered substantial relief to millions of loan borrowers, seeking to ensure that they are not in a worse position financially due to the pandemic. However, when loan payments resume, many borrowers will be at heightened risk of loan delinquency and default that could offset the benefits provided by the pause and leave borrowers worse off than they were before the pandemic. As outlined in the attached analysis prepared by your advisors, many borrowers will experience challenges in the transition back to repayment. Additional steps are needed to address these challenges and reduce the likelihood of delinquency and default to ensure that borrowers are not in a worse position financially due to the pandemic with regard to their ability to repay their loans.

In order to ensure that borrowers subject to the payment pause are not placed in a worse position financially by the COVID-19 national emergency as they restart payments, I recommend that you exercise your discretion under the HEROES Act to issue waivers and modifications necessary to effectuate the following actions:

- Discharge $10,000 of federal student loan balances for borrowers with individual incomes of under $125,000 or household incomes of under $250,000 during tax years 2020 or 2021. These discharges would be limited to loans that were originally outstanding as of June 30, 2022, and that are currently subject to the payment pause, including Direct Loans, Federal Family Education Loans held by the Department or by guaranty agencies, and Federal Perkins Loans held by the Department.

- Discharge an additional $10,000 in federal student debt for borrowers who meet these requirements and who also received a Pell Grant at some point in the past.

- Take the administrative steps needed to implement this discharge initiative, including the collection, maintenance, use, and dissemination of borrower information necessary to establish eligibility for the discharge under the relevant criteria and provide benefits under the initiative automatically to as many borrowers as possible utilizing income information available to the Department in compliance with applicable law.

- Develop a simple process for borrowers to attest to their incomes and for FSA to verify the income of a sample of those borrowers.

Based on current economic and public health conditions, and to provide time to successfully implement these measures needed to ensure that borrowers are not placed in a worse position financially due to the pandemic, I also recommend that you extend those waivers and modifications specified in the December 11, 2020*, Federal Register* notice (85 Fed. Reg. 79856), that relate to the payment and collection of, and accumulation of interest on, federal student loans, and also extend the corresponding pause for Federal Family Education Loan Program loans held by guaranty agencies, as discussed in Dear Colleague Letter GEN-21-03 through December 31, 2022. Because this extension is expected to be the final extension of the payment pause, I further recommend that you direct FSA to take all necessary steps to restart loan payments after December 31, 2022.

If you approve these recommendations, please sign the attached memorandum to the Chief Operating Officer of Federal Student Aid.

Attachments:

1. Rationale for Pandemic-Connected Loan Cancellation Program

2. Memorandum to Chief Operating Officer Cordray prepared for your signature

Rationale for Pandemic-Connected Loan Discharge Program
August 24, 2022

I. Background

In March 2020, Congress determined that, in light of the COVID-19 pandemic, it was necessary to provide relief to student loan borrowers by suspending certain payments and collections activity, and temporarily setting certain interest rates to zero percent. Under the authority granted to the Secretary of Education by the Higher Education Relief Opportunities for Students Act of 2003 ("HEROES Act"), the Secretary previously extended this relief through August 31, 2022.

This payment pause has delivered substantial relief to millions of loan borrowers, seeking to ensure that they are not in a worse position financially due to the pandemic. However, when loan payments resume, many borrowers will be at heightened risk of loan delinquency and default that could offset the benefits provided by the pause and leave borrowers worse off than they were before the pandemic. Many borrowers will experience challenges in the transition back to repayment. Additional steps are needed to address these challenges and reduce the likelihood of delinquency and default to ensure that borrowers are not in a worse position financially due to the pandemic regarding their ability to repay their loans. As detailed below, the Department of Education could mitigate these consequences by taking the following steps:

- Discharging $10,000 of federal student loan balances for borrowers with individual incomes of under $125,000 or household incomes of under $250,000 during tax years 2020 or 2021. These discharges would be limited to loans that were originally outstanding as of June 30, 2022, and that are currently subject to the payment pause, including Direct Loans, Federal Family Education Loans held by the Department or by guaranty agencies, and Federal Perkins Loans held by the Department.

- Discharging an additional $10,000 in federal student debt for borrowers who meet these requirements and who also received a Pell Grant at some point in the past.

This paper summarizes the basis for and key design elements of this proposal and presents relevant considerations and evidence. It is not an exhaustive list of all the decisions required to operationalize a pandemic-connected loan discharge program, nor is it a complete inventory of all pieces of supporting evidence the Department considered.

II. Analysis

A. Potential Harm to Borrowers from the Pandemic as Payments Restart

The student loan payment pause, initiated at the outset of the pandemic, protected borrowers from financial harm by allowing them to forgo payments, preventing any interest accrual on their debts, and halting all collections on student loans. Despite these measures, many student loan borrowers remain at risk of being placed in a worse position financially as a result of the COVID-19 pandemic and its associated economic effects. Historical evidence suggests that loans are at heightened risk of delinquency and default as they exit forbearance. Economic conditions and surveys of borrowers suggest that, absent additional relief, the harmful effects of the pandemic may make repayment more difficult for student loan borrowers than it was before the pandemic, especially for lower income borrowers.

1. Risk of Delinquency and Default Following Long Periods of Forbearance

Past experience with student loan borrowers transitioning back into repayment after long periods of forbearance raise concerns about the potential for elevated risk of delinquency and default. Although there is no exact analogue for the circumstances surrounding the current payment pause, the Department has previously provided borrowers experiencing local and regional natural disasters, such as hurricanes, earthquakes, or wildfires, with access to forbearances with similar provisions. When borrowers accessing natural disaster forbearances transitioned back into repayment, there were documented spikes in student loan defaults.[1]

Analysis of the outcomes of borrowers placed in mandatory administrative forbearances triggered by Hurricanes Maria, Harvey, and Irma and the northern California wildfires in late 2017 show that, compared to the calendar year before the disaster declaration, the incidence of default increases substantially six quarters later. Specifically, only 0.3 percent of borrowers entered default in the calendar year before the declaration, while 6.5 percent of borrowers entered default in the calendar year after they exited mandatory administrative forbearance.[2]

Furthermore, Pell Grant recipients affected by these events experienced larger increases in default compared to non-recipients after exiting mandatory administrative forbearance. While Pell Grant recipients and non-recipients had similar probabilities of entering default in the calendar year prior to the disaster declaration, 7 percent of Pell borrowers enter default in the calendar year after exiting mandatory administrative forbearance compared to 5 percent of non-recipients.[3]

2. Current Economic Conditions Facing Borrowers

Borrowers themselves report that they will be less likely to keep up with repayments on their student loan debt when payments resume, despite benefiting from the repayment pause and stimulus support during the course of the pandemic. Among borrowers with income below $125,000 who had also been making payments in 2019, a substantially higher number anticipate having trouble making full payments in the future than reported not making regular payments before the pandemic. For example, of those with income under $40,000. only 26 percent reported never or occasionally making full payments in 2019, but 51 percent in this group expect to have difficulty making full or even any payments in the future. Of those with income between $40,000 and $75,000, 18 percent were unable to make full payments in 2019, but 36 percent expect to be unable to cover their monthly payments in the future. Similarly, for borrowers with income between $75,000 and $125,000, 18 percent reported making occasional or no payments prior to the pandemic, but 24 percent expect to make less than full payment when the pandemic forbearance ends.[4]

Because borrowers expect increased payment difficulties, even after accounting for the benefits they received from the repayment pause and stimulus, it is likely that the net effect of the pandemic—absent

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[1] Kaufman, Ben. "New Data Show Student Loan Defaults Spiked in 2019-A Warning to Industry and DeVos Amid Economic Fallout," Student Borrower Prot. Ctr., Mar. 13, 2020.
[2] Department of Education analysis of administrative data. These analyses are based on borrowers who had at least one active Department of Education-held loan, were placed in mandatory administrative forbearance for at least one day in the period spanning a week prior to the disaster start date and 90 days after this date, and who had an address in a state (and county, when relevant) that was a federally declared disaster area.
[3] Ibid. Information on income is not available for most borrowers placed in mandatory administrative forbearance following these federally declared major disasters, thus a similar analysis exploring default rates among borrowers with different incomes was not feasible.
[4] Akana, Tom, and Dubravka Ritter. "Expectations of Student Loan Repayment, Forbearance, and Cancellation: Insights from Recent Survey Data." Federal Reserve Bank of Philadelphia, 2022, Table 1.

other compensatory actions—would be to increase delinquency rates further. If borrowers' recollections of past repayment success and expectations for future repayment capacity translate directly into their future repayment success, borrowers' delinquency rates will be higher than pre-pandemic levels when those compensatory actions end, absent additional relief.

Research by the Consumer Financial Protection Bureau using credit bureau data provides evidence from the balance sheets of student loan borrowers that substantiates the concerns reported by borrowers in the above survey. While delinquencies on non-student debt among student loan borrowers dipped during 2020, delinquencies rose in the second half of 2021, and have since returned to pre-pandemic levels, despite the fact that most student loans remained in forbearance.[5] The authors suggest that non-student debt delinquencies rose as pandemic interventions were retired. Borrowers who have defaulted on their student loans are also more likely to be under water on other types of debt.[6]

For lower-income student loan borrowers, delinquency rates on non-student loan debt were higher in February 2022 than in March 2020 before the start of the pandemic.[7] These rising delinquency rates suggests that these borrowers' student loan delinquency rates also would have risen, had repayments not been paused. In fact, we would expect difficulties keeping up with debt payments to be even higher if individuals had not received the benefit of the repayment pause and other stimulus support. These findings also suggest that, absent additional relief, when the student loan repayment pause ends, student loan delinquency rates will follow a similar trajectory as other debt delinquency rates and increase.

Analyses of credit report data by the Federal Reserve Bank of New York comparing federally owned loans (which benefitted from the pause) to federally guaranteed loans and private student loans (which did not) concluded that borrowers with commercially held FFEL loans who were not protected by the payment pause saw their delinquency rates return to pre-pandemic levels, despite other forms of economic support.[8] These borrowers' delinquency rates would likely have been higher if not for this support. The study concluded that, absent further relief, when payments resume, borrowers will likely experience increased delinquencies on federal student loans and other types of debt beyond pre-pandemic levels.[9]

The rise of inflation to levels not seen in 40 years also creates significant pressures on family budgets and thus raises the risk of delinquency and default. Initially, COVID-induced supply-chain disruptions in tandem with strong demand for consumer goods led inflation to begin to accelerate in the spring of 2021, although other factors (such as Russia's invasion of Ukraine) have also contributed recently.[10] Research also suggests that inflationary pressures are most acute for those with lower incomes, particularly as prices are rising quickly for basic necessities, including energy, food, and shelter costs.[11]

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[5] Conkling, Thomas S., Christa Gibbs, and Vanessa Jimenez-Read. "Student Loan Borrowers Potentially At-Risk When Payment Suspension Ends." Consumer Financial Protection Bureau Office of Research, forthcoming.
[6] Blagg, Kristin. "Underwater on Student Debt: Understanding Consumer Credit and Student Loan Default." Urban Institute, 2018.
[7] Conkling, Thomas S., Christa Gibbs, and Vanessa Jimenez-Read. "Student Loan Borrowers Potentially At-Risk When Payment Suspension Ends." Consumer Financial Protection Bureau Office of Research, forthcoming.
[8] Goss, Jacob, Daniel Mangrum, and Joelle Scally. "Student Loan Repayment during the Pandemic Forbearance," No. 20220322. Federal Reserve Bank of New York, 2022.
[9] Ibid.
[10] LaBelle, Jesse, and Ana Maria Santacreu. "Global supply chain disruptions and inflation during the COVID-19 pandemic." *Federal Reserve Bank of St. Louis Review* (2022).
[11] Argente, David, and Munseob Lee. "Cost of Living Inequality During the Great Recession." *Journal of the European Economic Association*, 19.2, 2021, pp. 913-952. Also see, Larsen, Daryl, and Raven S. Molloy. "Differences in Rent Growth by Income 1985-2019 and Implications for Real Income Inequality." No. 2021-11-05-3, Board of Governors of the Federal Reserve System (US), 2021.

Borrowers who go delinquent or default on their student loans suffer substantial negative penalties. The Department reports loans more than 90 days delinquent or in default to the major national credit bureaus, which has been shown to be correlated with a 50-to-90-point drop in borrowers' credit scores.[12] These notations can remain on borrowers reports for up to seven years, making insurance, rent, and other financial products less affordable and hinder borrowers' ability to get a job.[13] Borrowers who default lose access to affordable repayment options and flexibilities at the same time their balances become due immediately. Additionally, their accounts are subject to collection feeds and involuntary collections like wage garnishment, Treasury offset, and litigation.

B. Pandemic-Connected Loan Discharge Will Reduce These Harms

1. Discharges Are Likely to Reduce Delinquency and Default Rates

An immediate discharge of loan balances would mitigate the financial harm caused by the pandemic for millions of borrowers by eliminating debt entirely or reducing the monthly payment burden. Balance elimination or reduction is likely to reduce delinquency and default and increase short- and long-term repayment success.

Reducing student loan balances can improve borrowers' ability to repay remaining debts. In a study of the effects of private student loan discharges provided to borrowers in default, researchers found that following debt discharges of approximately $8,000, borrowers reduced their total liabilities (excluding student loans) by more than $4,500.[14] Additionally, borrowers were less likely to be delinquent on other accounts, file for bankruptcy, be subject to foreclosure, or default on mortgages or medical bills following debt relief.[15]

Studies of mortgage modifications have shown that reducing monthly payments can have a significant ameliorative effect on delinquency and foreclosure: lenders have found that payment reductions of between about 20 percent and 30 percent were effective in reducing defaults.[16] A study of the JPMorgan Chase Institute's short-term payment reduction program found that every 1 percent of payment reduction reduced default rates by about 1 percent.[17]

Loan discharges can reduce delinquency and default risks even though borrowers have other options to reduce monthly payments, like income-driven repayment (IDR) plans. Many borrowers who are eligible for IDR plans are not yet enrolled. Recent research from the JPMorgan Chase Institute, for instance, showed that 22 percent of their sample were eligible for IDR but not enrolled.[18] The Federal Reserve Bank of Philadelphia's survey study notes that lower-income individuals were much less likely to expect

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[12] Blagg, Kristin. "Underwater on Student Debt: Understanding Consumer Credit and Student Loan Default." Urban Institute, 2018.
[13] Elliott, Diana and Ricki Granetz Lowitz. "What Is the Cost of Poor Credit?." Urban Institute, 2018; Corbae, Dean, Andrew Glover, and Daphne Chen. "Can Employer Credit Checks Create Poverty Traps?" *2013 Meeting Papers*, No. 875, Society for Economic Dynamics, 2013.
[14] Di Maggio, Marco, Ankit Kalda, and Vincent Yao. "Second Chance: Life Without Student Debt." No. w25810, National Bureau of Economic Research, 2019.
[15] Ibid.
[16] An, Xudong, et al. "Inequality in the Time of COVID-19: Evidence from Mortgage Delinquency and Forbearance." No. 21-09, Federal Reserve Bank of Philadelphia, 2021.
[17] Ganong, Peter, and Pascal Noel. "Liquidity versus wealth in household debt obligations: Evidence from housing policy in the great recession." *American Economic Review*, 110.10, 2020, pp. 3100-3138.
[18] Greig, Fiona and Daniel M. Sullivan. "Income Driven Repayment: Who Needs Student Loan Payment Relief?", JP Morgan Chace Institute, June 2022.

to make full payments notwithstanding the existence of IDR plans.[19] The visibility of a student loan discharge program, combined with the clear benefit to borrowers, will likely attract these borrowers to apply in numbers that FSA's efforts to increase enrollment in IDR have not.

Loan discharge may also indirectly reduce delinquency and default rates. The Department intends to use the attention generated by loan discharges, and the likely applications filed by millions of borrowers, to encourage borrowers to take advantage of other federal repayment benefits and protections like IDR. Borrowers using income-driven repayment plans have significantly lower rates of default and delinquency than borrowers who do not use those plans.[20] The loan cancellation process will also require borrowers to provide updated contact information that will improve targeted communications and interventions toward borrowers at risk delinquency and default. An Urban Institute scholar recently recommended a similar approach, making loan cancellation contingent on borrowers restarting payments, for similar reasons.[21]

2. Amount of Debt to Discharge

Given the Department's goals, it should discharge an amount of debt necessary to significantly decrease the rates of delinquency and default. Although discharging the entire loan amount would permanently avoid this harm, lesser discharge amounts will mitigate the risk that delinquency and default rates will rise above pre-pandemic levels.

If the Department forgave up to $20,000 in debt, the Department estimates that if all borrowers claimed the relief they were entitled to, approximately 20 million borrowers would have their loan eliminated entirely.[22] Borrowers with low balances tend to have lower incomes and higher default rates.[23] Thus, low-balance borrowers are at particular risk of being in a worse financial position because of the pandemic absent further relief.

Department estimates suggest that, if all borrowers claimed the benefits to which they are entitled, an additional 23 million borrowers would see their balances reduced, with median debt falling from $29,400 to $13,600.[24] The Department would reamortize borrowers' remaining balances to reduce monthly payments after applying the discharge.

The Department estimates the payment pause has saved the average borrower in repayment approximately $233 a month.[25] Among vulnerable borrowers, a similar $200 to $300 reduction in monthly payments could be achieved by the proposal. As a result, for many borrowers, the balance reduction provided by discharge would reduce monthly payments at similar levels to the relief provided during the pause. For example, for a hypothetical borrower midway through loan repayment, the

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[19] Akana, Tom, and Dubravka, Ritter. "Expectations of Student Loan Repayment, Forbearance, and Cancellation: Insights from Recent Survey Data." Federal Reserve Bank of Philadelphia, 2022, Table 1.
[20] Conkling, Thomas S., and Christa Gibbs. "Borrower experiences on income-driven repayment." *Consumer Financial Protection Bureau Office of Research Reports Series,* 19-10, 2019.
[21] Chingos, Matthew. "How Forgiveness Could Support the Student Loan Restart." Urban Institute, 2022.
[22] Department of Education estimates using administrative federal student aid data and imputed income from Census data.
[23] Scott-Clayton, Judith. "The looming student loan default crisis is worse than we thought*." Brookings Institution Evidence Speaks Reports*, Vol. 2, #34, 2018; Looney, Adam, and Constantine Yannelis. "A crisis in student loans?: How changes in the characteristics of borrowers and in the institutions they attended contributed to rising loan defaults." *Brookings Papers on Economic Activity*, 2015, no. 2, 2015, pp. 1-89.
[24] Department of Education estimates using administrative federal student aid data and imputed income from Census data.
[25] Department of Education estimates using administrative federal student aid data.

estimated reduction in median balances from $29,400 to $13,600 would result in an approximately $300 reduction in monthly payments.[26]

Studies of mortgage modification programs have shown that payment reductions of between 20 and 30 percent are effective at reducing the rate of delinquency.[27] Using administrative data, the Department estimates that if all borrowers claimed the benefits to which they were entitled, among borrowers who do not receive full forgiveness, a maximum benefit of $10,000 in cancellation would lead to a median reduction in payments of 31 percent, while a maximum benefit of $20,000 in cancellation (where the additional relief is only available to Pell recipients) would lead to a median reduction in payments of 38 percent.[28]

C. Borrower and Loan Eligibility

3. Borrower Income Threshold

Many borrowers have been harmed by the pandemic and may be at greater risk of delinquency or default than they were before the pandemic. However, not all borrowers are equally at risk of these outcomes. Research shows that student loan repayment is correlated with income, and lower income borrowers are more likely to experience delinquency and default.[29]

Borrowers who are either individuals with incomes under $125,000 or belong to households with incomes under $250,000 are more likely than individuals above those thresholds to experience financial hardship in making payments on their loans when payments resume.

[26] Specifically, a borrower on the standard 10-year plan with an original balance of $29,400, a 5 percent interest rate, and five years of payments remaining would see these benefits

[27] An, Xudong, et al. "Inequality in the Time of COVID-19: Evidence from Mortgage Delinquency and Forbearance." No. 21-09, Federal Reserve Bank of Philadelphia, 2021; Ganong, Peter, and Pascal Noel. "Liquidity versus wealth in household debt obligations: Evidence from housing policy in the great recession." *American Economic Review*, 110.10, 2020, pp. 3100-3138.

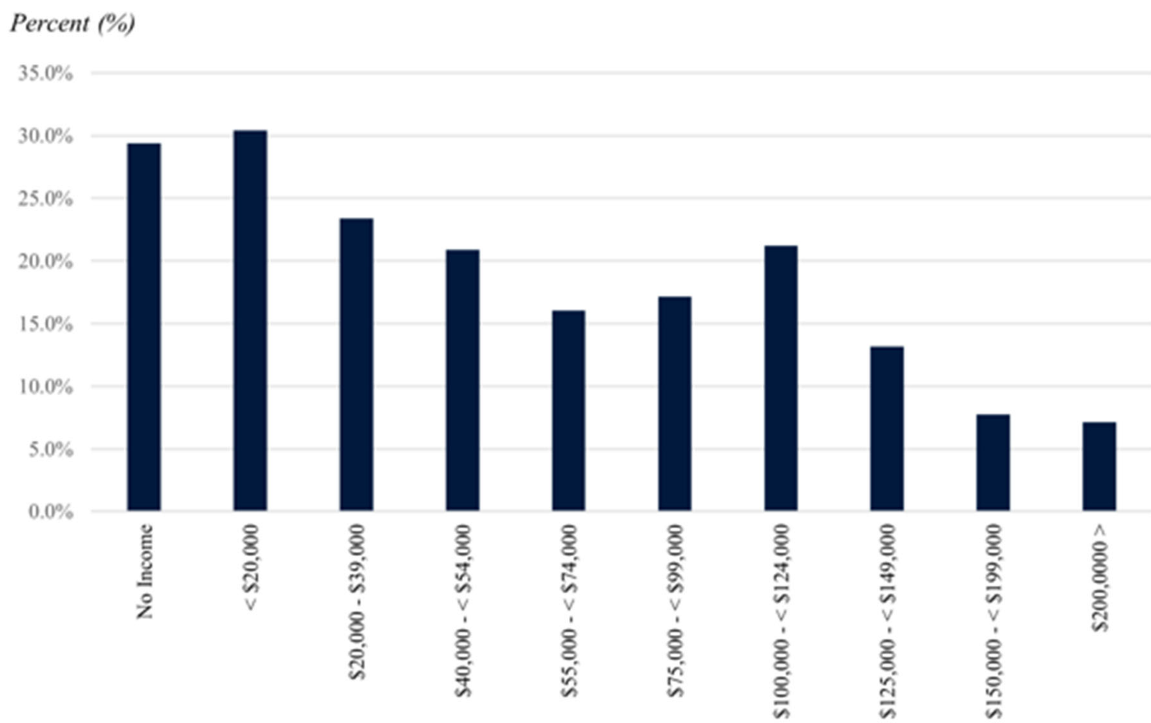
[28] These estimates would apply to a borrower who receives forgiveness but does not have their balance fully discharged and who has made their scheduled payments on the 10-year standard repayment plan since entering repayment.

[29] Looney, Adam, and Constantine Yannelis. "A crisis in student loans?: How changes in the characteristics of borrowers and in the institutions they attended contributed to rising loan defaults." *Brookings Papers on Economic Activity*, 2015, no. 2, 2015, pp. 1-89.

Inconsistent Payments

Evidence from the Federal Reserve Bank of Philadelphia's *Consumer Finance Institute COVID-19 Survey of Consumers* establishes the $125,000 income mark as a reasonable ceiling for discharge eligibility. As would be expected, borrowers with lower incomes have a lesser ability to make consistent payments on their loans. The survey shows that borrowers with incomes between $100,000 and $124,000 have rates of payment inconsistency – that is, the percentage of respondents who reported making no or "occasional" payments for their loans in 2019 – that are nearly double what they are for those with incomes between $125,000 and $149,000 (see Figure 1).

Figure 1. Inconsistent Payment Rates (Occasional or No Payments Made in 2019), By Income



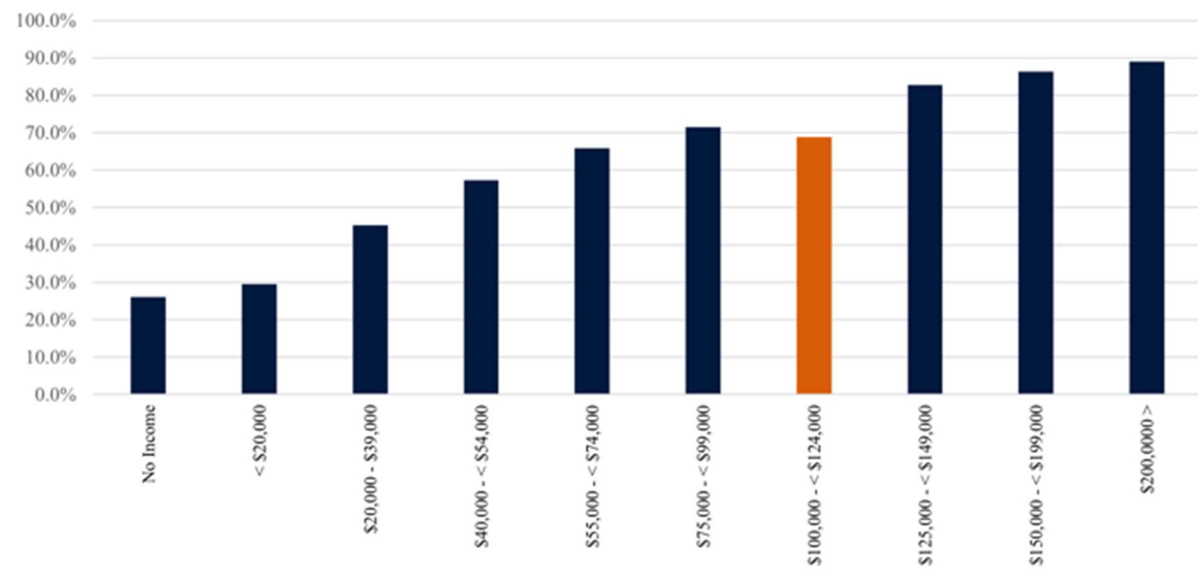
Source: Federal Reserve Bank of Philadelphia CFI COVID-19 Survey of Consumers

Rates of regular repayment for borrowers earning $125,000 or above are roughly 14 percentage points (or 20%) above what they are for those earning between $100,000-$124,000.[30] This suggests that the average borrower earning above $125,000 entered the pandemic on firmer financial footing with regards to loan payments, relative to those earning below the eligibility ceiling (see Figure 2).

[30] Analyses based on unpublished data provided by the Federal Reserve Bank of Philadelphia.

Figure 2. Regular Payment Consistency in 2019, By Income

Percent (%)

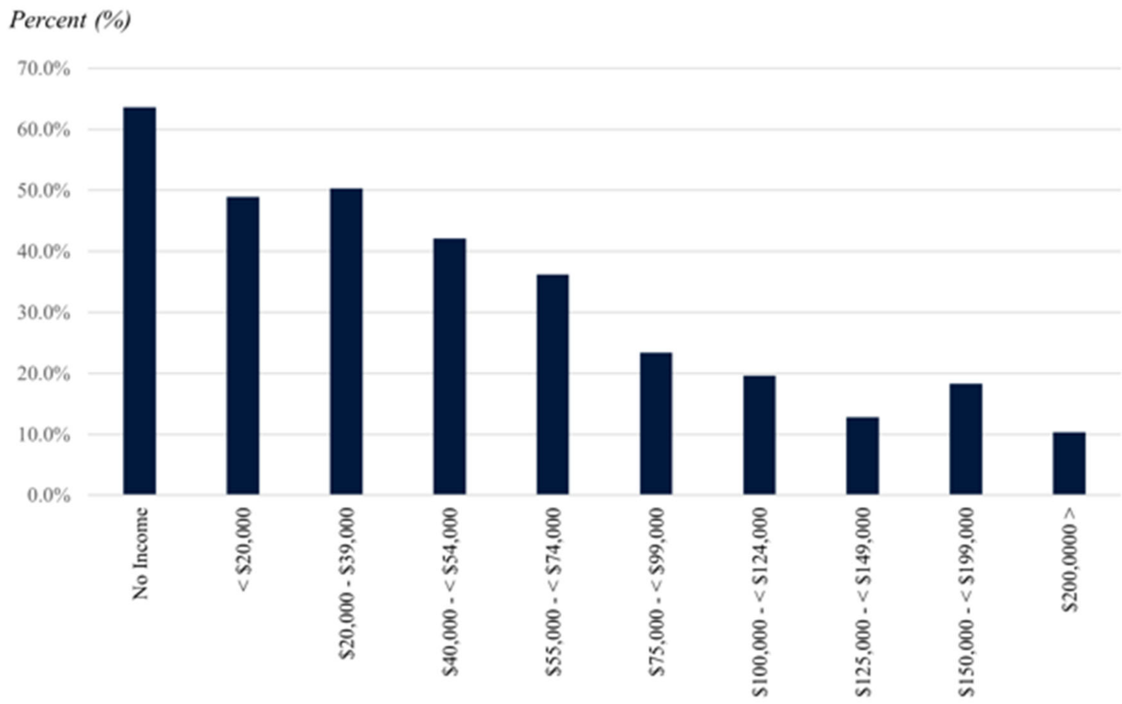


Source: Federal Reserve Bank of Philadelphia CFI COVID-19 Survey of Consumers

Future Payment Capacity

Lower-income borrowers are less likely to report being able to repay future loans, an indicator of risk of delinquency or default. There is a break in repayment capacity at around $125,000. After forbearance, nearly 20 percent of borrowers earning between $100,000 and$124,000 expect to experience difficulty repaying loans, compared to 14 percent of those earning above $125,000 (see Figure 3).

Figure 3. Payment Capacity After Forbearance - "Partial" and "No Payments", By Income



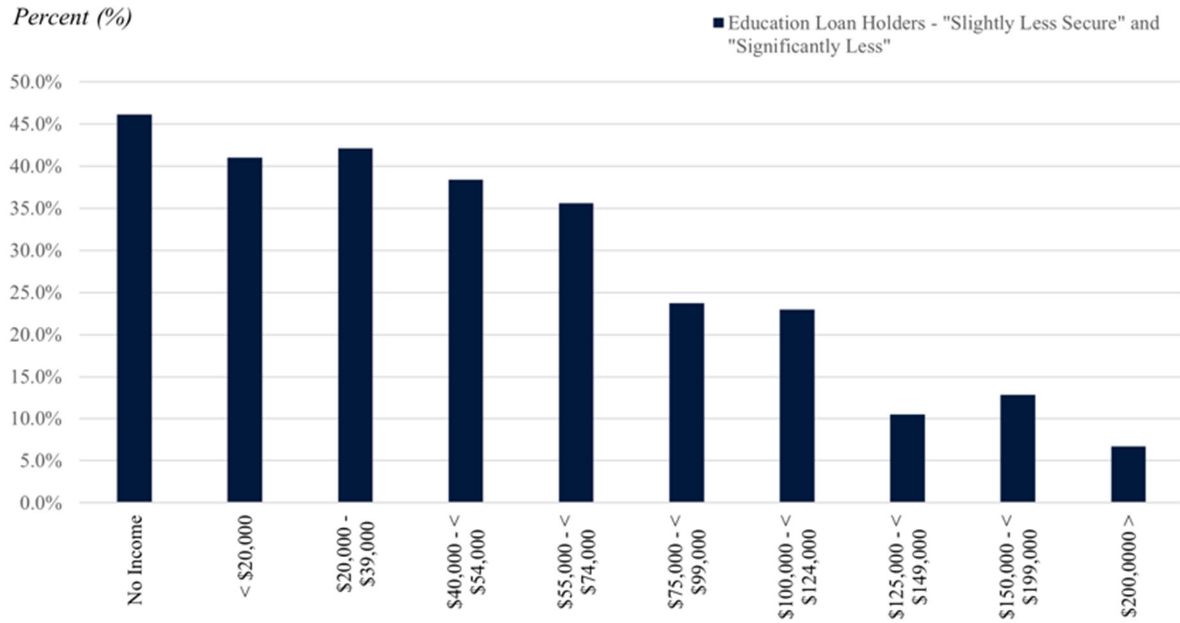
Source: Federal Reserve Bank of Philadelphia CFI COVID-19 Survey of Consumers

Financial Security

The financial insecurity of those with student loans falls as income rises, declining particularly steeply above $125,000. Financial insecurity rates for borrowers with incomes between $100,000 and $124,000 are more than double those for borrowers with incomes between $125,000 and $149,000. Education loan holders with incomes exceeding the discharge eligibility ceiling report more positive sentiments concerning their financial security: only about 10 percent of borrowers with incomes greater than $125,000 report financial insecurity (see Figure 4).[31]

[31] Ibid.

Figure 4. Financial Insecurity Relative to Pre-Pandemic Education, By Income



Source: Federal Reserve Bank of Philadelphia CFI COVID-19 Survey of Consumers

Income and the Pandemic

Survey data indicates that lower-income workers were disproportionately likely to become unemployed in the beginning of the pandemic.[32] In the summer of 2021, a Brookings analysis found that low-wage earners were overrepresented among "displaced" workers (workers on "permanent" layoff, meaning they lost their jobs and were not called back).[33] A rich economic literature indicates that such unemployment can have long-term scarring effects.[34] Students who left school in 2020 and 2021 are also projected to experience significant reductions in lifetime earnings.[35]

Because of this pattern of job loss, lower-income households also experienced greater material hardship due to the pandemic.[36] Compared with adults whose family employment was unaffected by the pandemic, they were twice as likely to report food insecurity, nearly three times as likely to report problems paying utility bills, and nearly four times as likely to report problems paying the rent or mortgage.

[32] Adams-Prassl, Abi, et al. "Inequality in the Impact of the Coronavirus Shock: Evidence from Real Time Surveys." *Journal of Public Economics*, 189, 104245, 2020; Despard, Mathieu, et al. "Covid-19 Job and Income Loss Leading to More Hunger and Financial Hardship." Brookings, 9 Mar. 2022.
[33] Bateman, Nicole, and Martha Ross. "The pandemic hurt low-wage workers the most and so far, the recovery has helped them the least." Brookings, 2021.
[34] Mroz, Thomas A., and Timothy H. Savage. "The Long-term Effects of Youth Unemployment." *Journal of Human Resources*, 41.2, 2006, pp. 259-293; Kahn, Lisa B. "The long-term labor market consequences of graduating from college in a bad economy." *Labour economics*, 17.2, 2010, pp. 303-316; Schwandt, Hannes, and Till Von Wachter. "Unlucky cohorts: Estimating the long-term effects of entering the labor market in a recession in large cross-sectional data sets." *Journal of Labor Economics*, 37.S1, 2019, pp. S161-S198.
[35] Friedman, John. "Lifetime Earnings Effects of the COVID-19 Recession for Students." Opportunity Insights Economic Tracker (2021).
[36] Karpman, Michael, and Stephen Zuckerman. "Average Decline in Material Hardship During the Pandemic Conceals Unequal Circumstances." Urban Institute, 2021.

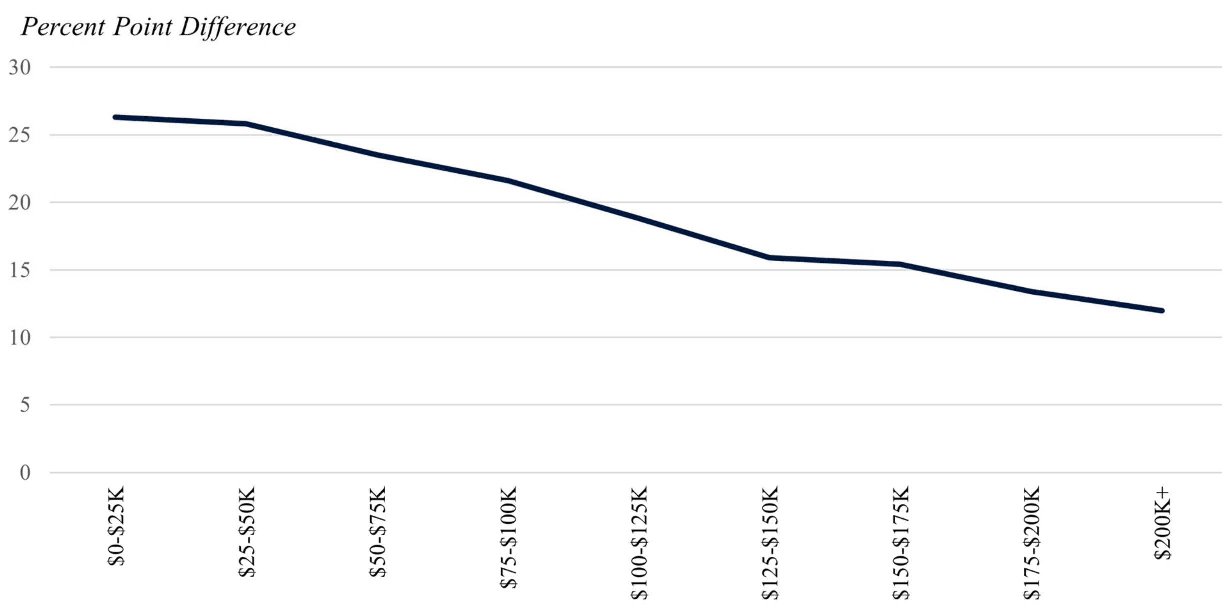
A literature review from the Department of Health and Human Services highlighted the disproportionate job losses for low-wage workers and the wide-reaching impacts of job loss on material hardship and food insecurity.[37] The review emphasizes that among low-wage workers, women and people of color were disproportionately impacted. The review notes that many COVID-19 relief measures initially missed, or were insufficient for, low-income families.

4. Past Pell Receipt

A disproportionate number of Pell Grant borrowers are low-income. An analysis of Pell Grant borrowers for whom the Department has income information (from a FAFSA application or an IDR application) suggests that 99 percent of Pell Grant recipients have incomes below $125,000.[38]

Borrowers' status as former Pell recipients provides independent and valuable measures of their risk of delinquency and default, even in addition to current income. Rather than evaluating a borrower's current income, Pell Grant eligibility is based upon a broader set of data intended to be a more complete measure of family financial resources at the time of application. Because Pell Grant eligibility is determined on the basis of financial need, recipients typically have lower wealth and familial monetary resources at the time of receiving the grant.

Figure 5: Difference in Default Rates Between Pell Grant Recipients and Non-Pell Grant Recipients as of 12/2021, by Imputed Income among borrowers who have been in repayment between 6-10 years



Source: Department of Education

[37] US Department of Health and Human Services, "The Impact of the First Year of the COVID-19 Pandemic and Recession on Families with Low Incomes." 2021.
[38] Department estimates using administrative data on Pell Grant borrowers who submitted a FAFSA or IDR application with 2020 or 2021 income information.

Borrowers who received a Pell Grant in the past are at greater risk of delinquency and default, regardless of current income. Forty-two percent of Pell recipients default on their loans at least once, compared to just 18 percent of borrowers who never received a Pell Grant – a 24 percentage point difference. The relationship holds even when controlling for a borrower's imputed income. Indeed, at every band of imputed income, Pell Grant recipients are roughly *twice* as likely to default on their loans as non-Pell students.[39]

Moreover, the default rates for Pell Grant recipients with lower imputed income are especially high, with at least one in three Pell recipients in every imputed income band below $125,000 defaulting at least once. For borrowers with imputed incomes between $100,000 and $125,000, 32 percent of Pell Grant recipients default at least once, compared to 13 percent of non-Pell Grant recipients.[40]

Among enrolled students, Pell Grant recipients were disproportionately likely to be financially harmed by the pandemic. One recent study found that enrolled Pell Grant recipients were 20 percent more likely to lose a job during the pandemic, 17 percent more likely to see a drop in earnings, and 65 percent more likely to report facing food and housing insecurity than students who never received a Pell grant.[41]

Past experience suggests that past Pell recipients also struggle with their student loans at higher rates than their peers. A study that focused on borrowers who entered repayment before and after the Great Recession showed that Pell Grant recipients saw larger declines in repayment rates than non-Pell recipients.[42] As noted above, Pell Grant recipients also saw larger increases in default rates following recent natural disaster forbearances.

5. Parental Income for Dependent Students

The federal government has long considered parents' resources in allocating financial aid for enrolled dependent students. For example, under the Higher Education Act, parental income is a factor in dependent student borrowers' eligibility for financial aid, including student loans. Congress has long varied the origination terms of certain loans based upon families' ability to repay by providing subsidized student loans.

While current income is an effective indicator of former students' capacity to repay, it is not adequate to assess current students' ability to repay because most current students have low incomes. In this context, the Higher Education Act has long recognized that family income is a better indicator of capacity to repay because it is strongly correlated with children's expected income.

Each year, between 4 and 5 million borrowers enter repayment for the first time.[43] The pandemic has also caused additional borrowers to separate from school and enter repayment.[44] In fact, hundreds of thousands of borrowers leave mid-way through the semester or do not re-enroll the next semester. Additionally, around 300,000 borrowers make payments on their loans while they are in school.[45] Altogether, there is a

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[39] Department of Education estimates using administrative federal student aid data and imputed income from Census data.
[40] Ibid.
[41] Rodríguez-Planas, Núria. "Hitting Where It Hurts Most: COVID-19 and Low-Income Urban College Students." *Economics of Education Review*, 87, 102233, 2022.
[42] Blagg, Kristin and Erica Blom. "Student debt repayment fell during the Great Recession. Borrowers from low-income backgrounds saw the steepest decline." Urban Institute, 2018.
[43] US Department of Education, "Digest of Education Statistics 2021." 2021, Table 332.50.
[44] Saul, Stephanie. "College Enrollment Drops, Even as the Pandemic's Effects Ebb." *The New York Times*, 26 May 2022.
[45] Based on analysis of 2019 FSA student loan data.

significant population of borrowers who were enrolled last year but will nonetheless be impacted by resumption of payments.

6. Limitation to Existing Loans

The proposal would apply to loans that were outstanding on June 30, 2022, the end of the 2022-23 academic year. The terms of financial aid policies – such as the interest rate on new student loans and the maximum Pell grant – typically change each July 1. Moreover, extending eligibility into the new academic year risks generating incentives to borrow additional loans in anticipation of cancellation. It would also create arbitrary results based upon a school's academic schedule, the efficiency of its financial aid office, and the order in which it processed a particular student's financial aid awards.