No. 22-506

In the

Supreme Court of the United States

JOSEPH R. BIDEN JR.,
PRESIDENT OF THE UNITED STATES, ET AL.,
Applicants and Petitioners,

v.

STATE OF NEBRASKA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
AND APPLICATION TO VACATE THE INJUNCTION
ISSUED BY THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF STUDENT LOAN EXPERTS AS *AMICI CURIAE* IN SUPPORT OF APPLICANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 3

A. The Pandemic Will Have a Continuing Negative Impact on Student-Loan Borrowers. 4

B. The Pandemic-Connected Student Loan Discharge Program is Reasonably Designed to Mitigate the Pandemic's Impact on Borrowers. 10

CONCLUSION 15

APPENDIX 1a

TABLE OF AUTHORITIES

Statues

20 U.S.C. §§ 1098bb(a)(1), (a)(2)(A) 2

Other References

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are experts on student loan issues. All are associated with a university or policy institute, and most have written on student loan issues. *Amici* have closely examined the issues presented to the Court and have concluded that the decision of the Secretary of Education at issue here is a prudent response to the harm to student borrowers caused by the pandemic. This brief will assist the Court because it explains in detail why the Secretary's rationale for partially discharging student debt exemplifies reasoned decision-making, contrary to the arguments of the six States challenging the decision. A list of *Amici* is included in the appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

There is no merit to the States' argument that the Secretary failed to engage in reasoned decision-making as required by the Administrative Procedure Act in adopting the Pandemic-Connected Student Loan Discharge Program. To the contrary, the Secretary made a prudent economic decision to target relief at those most in need by deciding to cancel up to $10,000 of student debt per borrower earning less

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

than $125,000 and an additional $10,000 for borrowers who received a Pell Grant.

The Secretary's action was warranted because Congress explicitly authorized the Secretary "to waive or modify any provision" relating to "student financial assistance programs" to help ensure that borrowers affected by a "national emergency" will not be "in a worse position financially in relation to" their student debt because of the emergency. 20 U.S.C. §§ 1098bb(a)(1), (a)(2)(A). The pandemic is a national emergency that has harmed and will continue to harm borrowers. In addition, the lines the Secretary drew—adopting the income cap and providing additional relief for Pell Grant recipients—were reasonably designed to aid those most in need.

The negative long-term consequences of difficult economic conditions on new and recent college graduates are well-established in the economic literature. *See*, *e.g.*, Lisa B. Kahn, *The Long-Term Labor Market Consequences of Graduating from College in a Bad Economy*, 17 Labour Economics 303, 303–16 (2010) ("Kahn Labour Economics"). The COVID-19 pandemic was a severe national disaster, unprecedented in this century, that has negatively affected recent college graduates, and its effects on those graduates are likely to persist for many years.

In addition, a student-loan debt crisis was brewing before the pandemic began, and a study by the Office of Research of the Consumer Financial Protection Bureau ("CFPB Study") showed that the pandemic is likely to exacerbate that crisis, especially for older borrowers and low-income borrowers. Thomas Conklin et al., Consumer Fin. Prot. Bureau, *Student*

Loan Borrowers Potentially At-Risk When Payment Suspension Ends (Apr. 2022) ("CFPB Study"). For example, although federal student-loan payments were suspended during the pandemic, most other loan payments were not. The CFPB study showed that many borrowers with student debt are already having trouble meeting their other debt obligations and that low-income borrowers aged 30-49 are especially likely to be unable to make all of their debt payments once the suspension ends. *Id*. at 16–17.

Thus, the economic literature shows that both recent college graduates and those who graduated many years ago are now in a worse position financially on account of the pandemic, so they are likely to have more difficulty paying off their student loans than if the pandemic had not occurred. These negative effects of the pandemic are most likely to affect borrowers who have lower income and fewer assets, such as Pell Grant recipients. Núria Rodríguez-Planas, *Hitting Where It Hurts Most: COVID-19 and Low-Income Urban College Students*, 87 Economics of Education Review 1, at 10 (2022). The Secretary's decision to provide additional relief to Pell Grant recipients thus targets relief to those most in need, while the income cap denies relief to those least likely to need it.

ARGUMENT

The Department of Education's "Rationale for Pandemic-Connected Student Loan Discharge Program," J.A. 228–238, shows that the Secretary carefully reviewed the relevant literature and crafted a program designed to further the relevant statutory goals.

A. The Pandemic Will Have a Continuing Negative Impact on Student-Loan Borrowers.

Approximately 100 million Americans have contracted COVID-19 and more than one million Americans have died from the disease. Center for Disease Control and Prevention, *COVID Data Tracker*, https://perma.cc/64SG-ZCL4 (last visited Nov. 16, 2022). The pandemic has also had dramatic negative effects on the economy, with multiple harms posed to student loan borrowers.

One of the pandemic's swiftest effects manifested through unemployment. "The recession associated with the COVID-19 pandemic announced itself in spring 2020 with head-spinning job losses: 22 million lost jobs within two months, a shock that is hard to overstate." Nicole Bateman and Martha Ross, *The Pandemic Hurt Low-Wage Workers the Most—and So Far, the Recovery Has Helped Them the Least*, Brookings Institution (July 28, 2021), https://www.brookings.edu/research/the-pandemic-hurt-low-wage-workers-the-most-and-so-far-the-recovery-has-helped-them-the-least/. In fact, "unemployment rates reached the highest level since the Great Depression" in April 2020. Mathieu Despard et al., *COVID-19 Job and Income Loss Leading to More Hunger and Financial Hardship*, Brookings Institution (July 13, 2020), https://www.brookings.edu/blog/up-front/2020/07/13/covid-19-job-and-income-loss-leading-to-more-hunger-and-financial-hardship/. Young workers —who are more likely to be affected by the student loan relief—experienced higher rates of job loss during the pandemic. Rakesh Kocchar, *Hispanic Women, Immigrants, Young Adults, Those with Less*

Education Hit Hardest by COVID-19 Job Losses, Pew Research Center (June 9, 2020), https://www.pewresearch.org/fact-tank/2020/06/09/hispanic-women-immigrants-young-adults-those-with-less-education-hit-hardest-by-covid-19-job-losses/. Low-income borrowers (who are more likely to be Pell recipients and less likely to have received a degree and the accompanying economic benefit of higher education) were also more likely to experience job loss. *See id.*; *see also* Rakesh Kocchar, *Unemployment Rose Higher in Three Months of COVID-19 Than It Did in Two Years of the Great Recession*, Pew Research Center (June 11, 2020), https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/.

The Department's Rationale cited these facts and relied on "[a] rich economic literature indicat[ing] that such unemployment can have long-term scarring effects." J.A. 249–250. A pioneering 2010 study examined the long-term effects of the 1982 recession on recent college graduates and found "persistent, negative wage effects" lasting a decade or more. Kahn, Labour Economics at 304, 308. Other economists have made similar findings. *See*, *e.g.*, Hannes Schwandt and Till von Wachter, *Unlucky Cohorts: Estimating the Long-Term Effect of Entering the Labor Market in a Recession in Large Cross-Sectional Data Sets*, 37 Journal of Labor Economics S161, at S195 (2019) ("We confirm that all labor market entrants experience persistent reductions in earnings, employment, and wages from entering the labor market in a recession that last at least ten years"). In light of the severe effects of the pandemic

on the economy, the Department's Rationale reasonably concluded that "[s]tudents who left school in 2020 and 2021 are also projected to experience significant reductions in lifetime earnings." J.A. 250.

It is likely that diminished earnings among students who graduated during the pandemic will make it difficult for them to begin making student loan payments. A pre-pandemic study of nearly 400,000 student loan borrowers in Texas showed that 24% of those borrowers defaulted within the first five years. The PEW Charitable Trusts, *Student Loan System Presents Repayment Challenges* (Nov. 16, 2019), https://www.pewtrusts.org/en/research-and-analysis/reports/2019/11/student-loan-system-presents-repayment-challenges ("PEW Trust Study"). It is reasonable to expect that with diminished earnings due to COVID, this default rate will be considerably higher. Another indicator of distress is that only 45% of Texas borrowers had decreased the principal balance on their loans, meaning that over half made no progress in repaying loans due to default and heavy use of deferment and forbearance. *Id.*

In addition, student loan borrowers who did not complete college are financially worse off, even when compared to individuals who never went to college. These borrowers are in double jeopardy—not only do they lack a degree that could help them earn more, they are experiencing generally diminished earnings due to the pandemic.

Student loan borrowers will also encounter additional burdens from the recent sharp increases in cost-of-living expenses, from food to housing costs. Rebecca Leppert, *10 facts about U.S. renters during*

the pandemic, Pew Research Center (Dec. 19, 2022), https://www.pewresearch.org/fact-tank/2022/12/19/10-facts-about-u-s-renters-during-the-pandemic/; Rob Vos et al., *COVID-19 and rising global food prices: What's really happening?*, International Food Policy Research Institute (Feb. 11, 2022), https://www.ifpri.org/blog/covid-19-and-rising-global-food-prices-whats-really-happening#:~:text=The%202021%20surge%20in%20food,disruptions%20or%20continued%20trade%20restrictions.; *see also* Fenaba Addo & Adam Hollowell, *The Pandemic Divide* (Gwendolyn L. Wright et al. eds. 2022) (Chapter titled "Housing, Student Debt, and Labor Market Inequality: Covid-19, Black Families /Households, and Financial Security") ("The Pandemic Divide"). Housing costs are a particular concern for student borrowers, whether mortgage holders or renters, and across the age spectrum. To begin with, student borrowers are more likely to be renters than homeowners: borrowers making under $100,000 had a 1% homeownership rate or less between 2009 and 2019. Eddie Nilaj, *Homeownership & the Student Debt Crisis*, Jain Family Institute (Dec. 18, 2021), https://www.phenomenalworld.org/analysis/homeownership-student-debt/. Renters, who generally benefitted less than homeowners from pandemic-era support, The Pandemic Divide at 113–114, were more likely to be cost-burdened even before the pandemic, Emily Benfer et al., *The COVID-19 Eviction Crisis: An Estimated 30-40 Million People in America Are at Risk*, The Aspen Institute (Aug. 7, 2020), https://www.aspeninstitute.org/blog-posts/the-covid-19-eviction-crisis-an-estimated-30-40-million-people-in-america-are-at-risk/, and are more vulnerable to rental cost hikes and evictions, while also being least

likely to benefit from housing price increases. Current students are also negatively affected by pandemic-induced additional housing costs, with many taking out student loans to pay for housing, further driving up student loan obligations. *See* CJ Libassi & Zachary Mabel, *A Closer Look at College Affordability: The Link Between Living Allowances and Student Debt*, Urban Institute (July 8, 2022), https://www.urban.org/research/publication/closer-look-college-affordability-link-between-living-allowances-and-student; *see also* Jessica Dickler, *From Tuition Hikes to Higher Student Loan Borrowing Costs, Inflation Is Making College Even More Expensive*, CNBC (July 15, 2022), https://www.cnbc.com/2022/07/15/inflation-is-suddenly-making-college-more-expensive-than-ever.html. Again, these increased costs will affect low-income student borrowers worst of all.

An additional problem faced by student loan borrowers relates to *non-student* debt that compounded during the pandemic. This vector of harm is particularly onerous for older borrowers, especially those between 30 and 49 years old, many of whom have other debt in addition to their remaining student loan debt. *See* Katie Lobosco & Tami Luhby, *'I Am More Than Grateful:' Millions of Americans over 50 May Benefit from Biden's Student Loan Forgiveness Plan*, CNN (Sept. 4, 2022), https://www.cnn.com/2022/09/04/politics/older-borrowers-biden-student-loan-debt (Nearly 20% of student loan borrowers are over 50 years old.). While federal student loan debt payments were suspended during the pandemic, many other debt payments were not. The CFPB Study showed that scheduled, non-student loan debt payments increased by more than 10%

during the pandemic among 39% of student loan borrowers. CFPB Study at 15, Table 4. An update by the CFPB on November 2, 2022, showed in Table 1 that the percentage of student loan borrowers whose non-student loan debt payments had increased by more than 10% rose from 39% to 46% since April 2022. Thus, the pandemic has increased the total amount of debt that most student loan borrowers owe, even though the interest rate on student loan debt was set at zero while payments were suspended.

This increase in debt has been matched by increasing debt delinquencies. About 23% of student loan borrowers are delinquent on other, non-student debt such as auto loans, and delinquencies for non-student debt are most common for low-income borrowers. CFPB Study at 12. Plainly, borrowers who cannot pay their non-student debt are going to have trouble resuming payment on their student loans. In addition, adding student debt to other debt will likely push some borrowers who currently are not delinquent on any loans into delinquency. The Department's Rationale also noted that "[f]or 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." J.A. 237. The Rationale reasonably concluded, after reviewing these data, 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." *Id.* In addition, as the Department's Rationale also explained, such delinquency leads to lower credit scores, leading to a spiral in which borrowing becomes more expensive, if available. J.A. 239.

In short, the economic literature shows that the pandemic has had and will continue to have negative effects on many student loan borrowers, young and old. Not surprisingly, the negative effects will hit low-income borrowers the hardest. Accordingly, the Secretary reasonably concluded that additional relief is warranted to ensure that student loan borrowers will not be in a worse position financially in relation to their student debt because of the pandemic.

B. The Pandemic-Connected Student Loan Discharge Program is Reasonably Designed to Mitigate the Pandemic's Impact on Borrowers.

The Secretary reasonably decided to discharge $10,000 of student debt for all borrowers below the $125,000 income cap and $10,000 more for Pell Grant recipients. As shown above, the pandemic will undoubtedly continue to impose negative effects on many student loan recipients. Moreover, low-income borrowers are likely to continue suffering the most negative effects. Thus, the Secretary's action will help to ensure that they will not be "in a worse position financially in relation to" their student debt because of the pandemic. Therefore, the relief the Secretary provided is warranted under Section 1098bb(a)(2)(A).

The States effectively conceded below that some further relief is warranted by contending that the Secretary should have continued the suspension rather than choosing to discharge debt. Emergency Mot. for Inj. Pending Appeal at 22, *Nebraska v. Biden*, No. 22-3179, (8th Cir. Oct. 21, 2022) ("8th Cir. Mot."). That is, a further suspension would not be warranted absent reason to think that many borrowers are worse off because of the pandemic. Therefore, the fact that a

further suspension is warranted shows that a partial discharge is warranted too.

The States mistakenly assume that a partial discharge necessarily provides "major" relief, while a suspension does not. 8th Cir. Mot. at 17–19. That is incorrect as a matter of economics. Whether a discharge is better than a suspension, from a borrower's perspective, depends on the length of the suspension and the amount of the discharge, among other variables. For example, a borrower who owes $100,000 with a 4% interest rate should prefer a four-year suspension of interest, which would save more than $16,000, to a $10,000 discharge. Similarly, from the federal Treasury's perspective, the impact of a discharge rather than a suspension is entirely a matter of the terms of the action taken. Moreover, the Solicitor General reports that the suspension has cost the federal government more than $100 billion. Appl. at 22. Accordingly, there is no merit to Petitioners' argument that a suspension would satisfy the statutory requirements, while a partial discharge does not.

In addition, the suspension benefited low-income borrowers the least because, as the Department's Rationale explained, low-income borrowers tend to have lower loan balances than high-income borrowers. J.A. 243. For example, the suspension of interest for a borrower with a $100,000 debt is worth five times as much as the suspension of interest for a borrower with a $20,000 debt, if their interest rates are the same. The Secretary's discharge decision, in contrast, would eliminate the debt of a low-income borrower with a $20,000 debt that included a Pell Grant, while

reducing the $100,000 debt of a borrower from a wealthier background by only ten percent. That approach is supported by the PEW Trust Study which explained, “perhaps counterintuitively, borrowers who owe the least—often less than $10,000—and may not have completed their programs of study default at rates higher than those with larger balances.” PEW Trust Study. Thus, the Secretary reasonably decided to target relief to borrowers who are most likely to have lower income and therefore most likely to default without further relief.

Similarly, providing more relief for Pell Grant recipients targeted relief at those likely to need it most. A 2018 report found that, even before the pandemic, Pell Grant recipients, most of whom had family incomes under $40,000, were five times more likely to default than other borrowers. The Institute for College Access & Success, *Students at Greatest Risk of Loan Default* (Apr. 2018), https://ticas.org/files/pub_files/students_at_the_greatest_risk_of_default.pdf. Their default rate climbed from 28% to 52% if they had attended a for-profit institution. *Id.* Accordingly, the Secretary focused relief on those most in need by providing extra relief for Pell Grant recipients. A continuation of the suspension, in contrast, would have provided relief without focusing on those most in need.

Trends in the non-student lending sector also provide a relevant comparison case for understanding the merits of payment pauses relative to cancellation. The Federal Deposit Insurance Corporation (“FDIC”) reports that bank supervisors recommended implementing or expanding forbearance policies in

the spring and summer of 2020 beyond those mandated by prior legislation. FDIC, *Consumer Lending Through the Pandemic and the Recovery*, 16-1 FDIC Quarterly 33, 34 (2022), available at https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2022-vol16-1/article1.pdf. The FDIC concluded that these forbearance policies combined with income support from federal stimulus packages accounted for improved loan performance and reduced loan balances in the first and second pandemic years (2020 and 2021). *Id.* at 40. Consistent with the FDIC's conclusion, a report from the Peter G. Peterson Foundation, analyzing July 2020 data from the Census Bureau's Household Pulse survey, found that lower income households especially used their stimulus income to increase savings, pay down loan balances, and return to payment currency on a variety of loan products. Peter G. Peterson Foundation, *How Did Americans Spend Their Stimulus Checks and How Did It Effect the Economy?* (May 14, 2021), https://www.pgpf.org/blog/2021/05/how-did-americans-spend-their-stimulus-checks-and-how-did-it-affect-the-economy. Similarly, the Congressional Research Service found that in 2021 consumer savings increased sharply, in marked contrast to previous crises. Lida R. Weinstock, Cong. Rsch. Serv., IF10963, *Introduction to U.S. Economy: Personal Saving* (July 13, 2022).

These trends initially seemed to support the value of payment pauses as a pandemic harm remedy, at least in the short term. Trends beyond 2021, however, indicate that these measures were not sufficient to reduce harms to borrowers in the medium term. Despite good loan performances for non-student loans

in 2020 and 2021, data from the New York Federal Reserve show that, starting in early 2022, aggregate loan balances resumed their upward climb. Andrew Haughwout et al., *Balances Are on the Rise—So Who Is Taking on More Credit Card Debt?*, Liberty Street Economics (Nov. 15, 2022), https://libertystreeteconomics.newyorkfed.org/2022/11/balances-are-on-the-rise-so-who-is-taking-on-more-credit-card-debt/. Total household debt balances saw their largest nominal quarterly increase on record since 2007. *Id.* As a result, borrowers as a whole tend to be in worse financial positions than prior to the pandemic. Reflecting this, delinquency rates have begun to increase again. Low-income borrowers and borrowers under 30 are experiencing the worst outcomes. These borrowers experienced smaller balance reductions in 2020 and 2021, and now hold balances well above pre-pandemic levels. *Id.* These trends suggest that for low-income borrowers especially: (1) payment pauses in the form of forbearance only provided temporary relief that has now been wiped out as loan balances now surpass pre-pandemic levels, and (2) given that balances on non-student loans now surpass pre-pandemic levels, resuming student debt payments would likely put student borrowers in a considerably more precarious situation than they were in prior to the pause.

*   *   *   *   *

For these reasons, there is no basis on which to conclude that the Secretary failed to engage in reasoned decision-making. To the contrary, the Department's abundantly referenced Rationale carefully and persuasively explained why further

relief is needed and why a partial discharge targeted at lower-income borrowers is warranted.

CONCLUSION

The Court should vacate the injunction entered by the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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