No. 22A____

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES DEPARTMENT OF EDUCATION, ET AL.,
APPLICANTS

v.

MYRA BROWN, ET AL.

APPLICATION TO STAY THE JUDGMENT
ENTERED BY THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

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PARTIES TO THE PROCEEDING

Applicants (defendants-appellants below) are the U.S. Department of Education and Miguel Cardona, in his official capacity as Secretary of Education.

Respondents (plaintiffs-appellees below) are Myra Brown and Alexander Taylor.

RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

Brown v. Department of Educ., No. 22-cv-908 (Nov. 10, 2022)

United States Court of Appeals (5th Cir.):

Brown v. Department of Educ., No. 22-11115 (Nov. 30, 2022)

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Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of the applicants, respectfully applies to stay the judgment entered on November 10, 2022, by the United States District Court for the Northern District of Texas (App., infra, 28a).

This is the second of two cases in which lower courts have entered nationwide orders blocking the Secretary of Education's plan to use his statutory authority to provide debt relief to student-loan borrowers affected by the COVID-19 pandemic. Yesterday, this Court granted certiorari before judgment in the first case, Biden v. Nebraska, cert. granted, No. 22-506 (Dec. 1, 2022). In this case, the district court rejected the only claim in respondents' complaint but proceeded to vacate the plan based on a separate claim that respondents themselves never asserted -- and would not have had standing to assert in any event. The Fifth Circuit then denied the government's stay motion without explanation. This Court should stay the district court's judgment, which flouts fundamental principles of party presentation and Article III. If the Court is not prepared to grant that relief, it may wish to defer this application pending oral argument, treat the application as a petition for certiorari before judgment, grant the petition, and hear this case along with Nebraska.

Congress charged the Secretary with administering federal student-loan programs. Because borrowers who default on their student loans face severe financial consequences -- including wage garnishment, long-term credit damage, and ineligibility for federal benefits -- Congress specifically authorized the Secretary to waive or modify any applicable statutory or regulatory provision as he deems necessary to ensure that borrowers affected by a national emergency are not worse off in relation to their student loans. See Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act or Act), Pub L. No. 108-76, § 2, 117 Stat. 904-905 (20 U.S.C. 1098bb). Confronted with the deadliest pandemic in the Nation's history, which has wreaked global economic havoc, both the Trump and Biden Administrations invoked the HEROES Act to pause repayment obligations and suspend interest accrual on all federally held student loans since March 2020. That pause is estimated to have cost the government more than $100 billion.

In August 2022, the Secretary determined that the across-the-board pause on all payments for all borrowers should come to an end and directed the Department to restart loan payments. But the Secretary also found that when repayment obligations resume, lower-income borrowers will be at heightened risk of delinquency and default because of the continuing economic consequences of the COVID-19 pandemic. The Secretary thus directed the Department to issue up to $10,000 in student-loan relief to eligible borrowers with annual incomes under $125,000 ($250,000 for borrowers filing jointly). Qualifying Pell Grant recipients, who are at even greater risk of default, can receive up to $20,000 in relief. This relief, the Secretary found, is necessary to ensure that delinquency and default rates among these borrowers would not spike above pre-pandemic levels.

Respondents are two student-loan borrowers. Myra Brown is not eligible for relief under the plan, and Alexander Taylor is eligible for $10,000 rather than $20,000 in relief. Respondents alleged that they were improperly denied the opportunity to comment on the plan and represented that if the Secretary had proceeded through notice and comment, they would have urged him to adopt broader eligibility criteria and to provide greater debt relief. The district court rejected respondents' procedural claim, observing that the HEROES Act expressly exempts the Secretary's actions from notice-and-comment procedures. Yet even though respondents had raised only a procedural claim and had not argued that the Secretary's provision of debt relief to other borrowers inflicted any injury on them, the court went on to hold that, as a substantive matter, the plan exceeded the Secretary's statutory authority. Based on that holding, the court vacated the plan nationwide -- a result that afforded no redress to respondents, and actually cost Taylor $10,000. The court of appeals, in turn, issued an unreasoned order denying a stay pending appeal.

This Court should stay the district court's judgment pending appeal and, if necessary, the disposition of a petition for a writ of certiorari. The district court profoundly erred by raising and deciding a claim that respondents did not assert and could not have asserted consistent with Article III. And the Secretary's plan in any event falls squarely within the plain text of his statutory authority. Indeed, the entire purpose of the HEROES Act is to authorize the Secretary to grant student-loan-related relief to at-risk borrowers because of a national emergency -- precisely what the Secretary did here.

In Nebraska, the Court deferred ruling on the government's application to vacate the Eighth Circuit's injunction, treated the application as a petition for a writ of certiorari before judgment, granted certiorari, and ordered briefing on a schedule that will allow the case to be heard in the February 2023 argument session. Order, Nebraska, supra, No. 22-506 (Dec. 1, 2022). Here, the government submits that the district court's extraordinary departure from principles of party presentation and Article III warrants an immediate stay, without the need for further briefing. If, however, the Court is not prepared to grant that relief now, it may wish to defer a decision on the application pending oral argument, treat the application as a petition for a writ of certiorari before judgment, and grant certiorari so that this case can be heard along with Nebraska.[1]

STATEMENT

A. Background

1. The Department of Education administers various student-loan programs under Title IV of the Higher Education Act of 1965 (Education Act), 20 U.S.C. 1070 et seq. Those programs include the William D. Ford Federal Direct Loan Program (Direct Loans), 20 U.S.C. 1087a-1087j, under which the federal government lends money directly to students, and the Federal Family Education Loan Program (Family Education Loans), 20 U.S.C. 1071 to 1087-4, and Federal Perkins Loan Program (Perkins Loans), 20 U.S.C. 1087aa-1087ii, under which non-federal lenders issue loans to student borrowers using federally supported funds. Although authority to issue new loans under the latter two programs has expired, many loans remain outstanding. Borrowers generally may consolidate their federal

[1] Because respondents challenge the same plan at issue in Nebraska, the background section and Parts I.C and II of this brief substantially overlap with the background section and Parts I.B.1 and II of the government's application in that case.

student loans into loans held by the federal government. 34 C.F.R. 685.220. Nearly 43 million borrowers have outstanding loans under the three programs, and their debts total roughly $1.62 trillion. Office of Federal Student Aid, U.S. Dep't of Educ., Federal Student Aid Portfolio, https://studentaid.gov/data-center/student/portfolio (last visited Dec. 1, 2022).

The Education Act charges the Secretary of Education with carrying out federal student-loan programs. 20 U.S.C. 1070(b). The Act grants the Secretary substantial "powers and responsibilities," 20 U.S.C. 1082 (emphasis omitted); see 20 U.S.C. 3441, 3471, including authority to "compromise, waive, or release any right, title, claim, lien, or demand" acquired in the Secretary's performance of his "functions, powers, and duties" in administering the Department's portfolio of loans, 20 U.S.C. 1082(a)(6).

A few months after the September 11, 2001 terrorist attacks, Congress enacted the Higher Education Relief Opportunities for Students Act of 2001, Pub. L. No. 107-122, 115 Stat. 2386, to "provide the Secretary of Education with specific waiver authority to respond to conditions in the national emergency declared by the President on September 14, 2001," ibid. Congress authorized the Secretary to "waive or modify any statutory or regulatory provision applicable to" student aid programs under Title IV of the Education Act "as may be necessary to ensure that" borrowers affected by September 11 and later terrorist attacks are not in a worse position in relation to their student loans. § 2(a)(1) and (2), 115 Stat. 2386; see § 5, 115 Stat. 2388.

In 2003, Congress extended and expanded that authority by enacting the HEROES Act. Like its predecessor, the HEROES Act authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" under Title IV. 20 U.S.C. 1098bb(a)(1). But the HEROES Act does not limit relief to borrowers who suffered hardship as a result of terrorist attacks; rather, it authorizes waiver or modification "as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide the waivers or modifications authorized by paragraph (2)." Ibid. Paragraph 2, in turn, authorizes the Secretary "to waive or modify any provision described in paragraph (1) as may be necessary to ensure that" certain objectives are achieved. 20 U.S.C. 1098bb(a)(2). The first objective is that "recipients of student financial assistance under title IV of the [Education] 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." 20 U.S.C. 1098bb(a)(2)(A). An "affected individual" is defined to include any individual who "resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency." 20 U.S.C. 1098ee(2)(C).

Several provisions of the HEROES Act underscore Congress's intent to authorize the Secretary to respond quickly and fully to emergencies and other extraordinary circumstances. The Secretary need not act through notice and comment; instead, he need only publish a notice in the Federal Register setting forth "the waivers or modifications * * * the Secretary deems necessary to achieve the purposes of this section." 20 U.S.C. 1098bb(b)(1). Nor need the Secretary comply with other procedural requirements that would delay implementation of relief. 20 U.S.C. 1098bb(d). In addition, Congress explicitly provided that "[t]he Secretary is not required to exercise the waiver or modification authority * * * on a case-by-case basis." 20 U.S.C. 1098bb(b)(3).

The HEROES Act was originally set to expire in 2005. § 6, 117 Stat. 908. But Congress extended the Act by two years, Act of Sept. 30, 2005, Pub. L. No. 109-78, 119 Stat. 2043, and in 2007 made the Act permanent, Act of Sept. 30, 2007, Pub. L. No. 110-93, 121 Stat. 999. Since 2003, the Secretary has repeatedly invoked the Act to provide categorical relief to borrowers affected by emergencies, including by extending forbearance for Perkins loans and waiving the requirement that borrowers return overpayments of certain grant funds. See Office of Legal Counsel, U.S. Dep't of Justice, Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans, 2022 WL 3975075, at *5-*6 (Aug. 23, 2022) (OLC Op.); App., infra, 31a.

2. In March 2020, President Trump declared a national emergency in light of the COVID-19 pandemic. Proclamation 9994, 3 C.F.R. 56 (2020 Comp.). That declaration remains in effect, and the government has declared all 50 States, the District of Columbia, and the territories to be disaster areas. See FEMA, COVID-19 Disaster Declarations, https://perma.cc/B7KA-W4KD. COVID-19 has killed more than one million Americans and led to the hospitalization of millions more. Centers for Disease Control and Prevention, COVID Data Tracker (Nov. 30, 2022), https://perma.cc/ZH65-9PX3. COVID-19 continues to kill nearly 2,000 Americans a week. Ibid. The pandemic has also inflicted severe economic harms, including layoffs, spikes in inflation, rising delinquency rates on debt, and projected reductions in lifetime earnings for students who left school during the pandemic. See App., infra, 38a-40a, 46a. These harms have disproportionately affected lower-income households. Id. at 38a-39a, 42a-48a.

In response to the pandemic, the federal government provided substantial relief to borrowers with Department-held loans. In March 2020, then-Secretary of Education DeVos invoked the HEROES Act to pause repayment obligations and suspend interest accrual on all such loans. 85 Fed. Reg. 79,856, 79,857 (Dec. 11, 2020). Congress directed the Secretary to extend those policies through September 2020. COVID-19 Pandemic Education Relief Act of 2020, Pub. L. No. 116-136, Div. A, Tit. III, Subtit. B, § 3513, 134 Stat. 404. Both the Trump and Biden Administrations then further extended these protections under the HEROES Act. See, e.g., 85 Fed. Reg. at 79,857; App., infra, 33a-34a.

In August 2022, Secretary Cardona determined that, despite those measures, any resumption of repayment obligations would put many lower-income borrowers "at heightened risk of loan delinquency and default" due to the pandemic. App., infra, 33a. The Secretary thus adopted a two-pronged approach. He announced that he would extend the pause a final time, through December 31, 2022. Id. at 34a. And to ensure that "borrowers are not in a worse position financially due to the pandemic with regard to their ability to repay their loans" when payment obligations resume, the Secretary invoked the HEROES Act and directed the Department to issue up to $10,000 in student-loan relief to eligible borrowers with annual incomes under $125,000 ($250,000 for borrowers filing jointly). Id. at 33a. Qualifying Pell Grant recipients, who tend to have fewer resources and are at greater risk of default, can receive up to $20,000. Ibid.

As explained in the supporting analysis on which the Secretary relied, this relief will mitigate the pandemic's adverse economic effects and significantly reduce delinquency and default rates among those borrowers most affected by the pandemic. App., infra, 37a, 40a-41a. The Department analyzed its past experience with borrowers who transitioned back to repayment after long periods of forbearance, including after emergencies, and concluded that such borrowers are typically at "elevated risk of delinquency and default." Id. at 38a. Indeed, default rates increase twentyfold after the period of non-payment ends, and Pell Grant recipients affected by such events experience even "larger increases in default." Ibid. The Department reviewed borrower surveys, economic studies, and credit analyses conducted by the Consumer Financial Protection Bureau and Federal Reserve Banks that documented current economic conditions borrowers face due to the pandemic, including rising delinquency rates on non-student-loan debt; stark increases in the number of borrowers that anticipate difficulty making loan payments; and acute inflationary pressures on household budgets for "basic necessities, including energy, food, and shelter costs." Id. at 39a; see id. at 38a-40a. The Department also emphasized the substantial penalties imposed on borrowers who default on student-loan payments, including 50-to-90-point drops in credit scores that make insurance, rent, and other financial products more expensive and limit employment opportunities; exposure to involuntary collection methods; and lost access to affordable or flexible repayment options. Id. at 40a.

The Department explained that the contemplated debt relief would ameliorate these harms. App., infra, 40a-48a. The Department surveyed economic data establishing that borrowers with incomes under $125,000, especially Pell Grant recipients, are more likely to experience financial hardship in repaying their loans when payments resume. Id. at 42a-48a. Among other things, such borrowers were disproportionately likely to become unemployed and experience material hardship due to the pandemic, including food insecurity and difficulty making utility, rent, and mortgage payments. Id. at 39a, 46a-48a. As to the amount of debt to be discharged, the Department observed that "it should discharge an amount of debt necessary to significantly decrease the rates of delinquency and default." Id. at 41a. After considering borrower loan balances and the effectiveness of various monthly payment reductions in reducing delinquency rates, the Department determined that the $10,000 threshold (and $20,000 for Pell Grant recipients) would "mitigate the risk that delinquency and default rates will rise above pre-pandemic levels." Ibid.

B. Proceedings Below

1. Respondents Myra Brown and Alexander Taylor are individuals with outstanding student loans. App., infra, 6a. Brown is ineligible for relief under the plan because her loans are held by commercial entities rather than the Department. Ibid. Taylor is eligible for $10,000 in relief, but not for $20,000, because he did not receive a Pell Grant. Ibid.

Respondents sued the Department and the Secretary. Their complaint asserted a single claim alleging that the Department and the Secretary improperly promulgated the plan without notice-and-comment rulemaking. Compl. ¶¶ 62-73. Respondents asserted that they were deprived of an opportunity to argue "that their student loan debt should be forgiven too." Id. ¶ 10; see id. ¶¶ 58-61. Respondents further asserted that the Secretary improperly adopted the plan without engaging in the negotiated-rulemaking process required by the Education Act, 20 U.S.C. 1098a(b)(2). Compl. ¶¶ 71-72.

2. On November 10, 2022, the district court granted summary judgment in favor of respondents. App., infra, 2a-27a. The court concluded that respondents have Article III standing to raise their notice-and-comment claim, explaining that Brown had been injured because she had received no relief at all under the plan, and that Taylor had been injured because he had received only $10,000 rather than $20,000. Id. at 11a-16a.

Turning to the merits, the district court rejected respondents' claim that the plan was procedurally defective. App., infra, 18a-19a. The court observed that the HEROES Act expressly provides that the Secretary need not act through notice and comment; instead, he need only publish a notice in the Federal Register setting forth "the waivers or modifications * * * the Secretary deems necessary to achieve the purposes of this section." Id. at 19a (quoting 20 U.S.C. 1098bb(b)(1)). The court rejected the contention that respondents could establish that the plan fell outside the Act's notice-and-comment exemption by showing that the plan exceeded the Secretary's statutory authority. Ibid.

Although respondents had raised only a procedural claim, and although the district court had analyzed their standing only as to that claim, the court proceeded to hold that the plan is substantively unlawful. App., infra, 19a-25a. The court first concluded that, "because the [plan] is an agency action of vast economic and political significance, the major-questions doctrine applies." Id. at 22a. The court then concluded that the HEROES Act did not authorize the plan with sufficient clarity to satisfy that doctrine. Id. at 22a-24a. The court declared the plan unlawful and vacated it nationwide. Id. at 24a-25a.

3. The government appealed. After seeking a stay from the district court, see D. Ct. Doc. 40 (Nov. 15, 2022), the government sought a stay pending appeal from the Fifth Circuit. On November 30, 2022, the Fifth Circuit denied the motion in an unreasoned, per curiam order. App., infra, 1a.

4. In the meantime, a group of six States challenged the plan in federal district court in Missouri. See Nebraska v. Biden, No. 22-cv-1040, 2022 WL 11728905, at *1 (E.D. Mo. Oct. 20, 2022). The district court dismissed that suit for lack of standing, see id. at *7, but the Eighth Circuit enjoined the plan nationwide pending appeal, see Nebraska v. Biden, 52 F.4th 1044 (2022). The government applied to this Court for vacatur of that injunction. See Appl. at 1, Biden v. Nebraska (No. 22A444). This Court deferred consideration of the application pending oral argument, treated the application as a petition for a writ of certiorari before judgment, granted the petition, and set the case to be argued in the February 2023 session. See Order, Biden v. Nebraska, No. 22-506 (Dec. 1, 2022).

5. On November 22, 2022, in response to the orders in Nebraska and this case preventing implementation of the plan, the Secretary of Education extended the payment pause and suspension of interest accrual. Press Release, U.S. Dep't of Educ., Biden-Harris Administration Continues Fight for Student Debt Relief for Millions of Borrowers, Extends Student Loan Repayment Pause (Nov. 22, 2022), https://perma.cc/6T7Y-2YK9. "[E]fforts to block student debt relief in the courts," the Department explained, "have caused tremendous financial uncertainty for millions of borrowers who cannot set their family budgets or even plan for the holidays without a clear picture of their student debt obligations." Ibid. The extension will "alleviate uncertainty for borrowers" while this Court "review[s] the lower-court orders." Ibid. Payment obligations will resume "60 days after the Department is permitted to implement the program or the litigation is resolved," but no later than 60 days after June 30, 2023. Ibid.

ARGUMENT

In considering interim equitable relief such as a stay pending appeal and certiorari, this Court considers the "likelihood of success on the merits" and the "equities." Alabama Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2488-2489 (2021) (per curiam). The government is likely to succeed on the merits and the equities favor staying the judgment.

I. THE GOVERNMENT IS LIKELY TO SUCCEED ON THE MERITS

If the court of appeals finds the plan unlawful, this Court would likely review that decision invalidating a national program affecting millions of Americans. See pp. 37-39, infra. Indeed, this Court has already granted certiorari before judgment in response to the Eighth Circuit's nationwide injunction against the plan. And this Court would likely reverse a decision upholding the district court's vacatur for multiple independent reasons: The court erred in considering a claim that respondents never raised; respondents lack standing to challenge the substantive lawfulness of the plan; the plan is in any event lawful; and the court erred in vacating the plan nationwide.

A. The District Court Erred In Considering A Claim Respondents Neither Pleaded Nor Argued

Throughout the proceedings in the district court, respondents presented only the claim that the plan was procedurally defective. Their complaint asserted a single count: "failure to follow proper rulemaking procedures" under the Administrative Procedure Act, 5 U.S.C. 701 et seq. Compl. 13 (capitalization and emphasis omitted). Their brief likewise raised only one merits argument: "The Department violated the APA by adopting the [plan] without following the proper rulemaking procedures." D. Ct. Doc. 4, at 20 (Oct. 10, 2022) (emphasis omitted). And although respondents argued that the plan was substantively unlawful, they did so only in service of their claim that it fell outside the HEROES Act's exception from notice-and-comment procedures. See, e.g., id. at 29 ("Because the HEROES Act does not authorize the Debt Forgiveness Program, the Department could not adopt the Program without following the proper rulemaking procedures.").

The district court correctly rejected that claim. The HEROES Act expressly exempts the Secretary from complying with "section 553 of title 5" -- i.e., the APA's notice-and-comment provisions -- when "publish[ing] the waivers or modifications of statutory and regulatory provisions the Secretary deems necessary to achieve the purposes of this section." 20 U.S.C. 1098bb(b)(1). As the district court recognized, that exemption does not depend on whether, as a substantive matter, the HEROES Act actually authorizes the Secretary's action. App., infra, 19a.

Insofar as respondents further challenged (Compl. ¶¶ 71-72) the Secretary's compliance with Education Act procedural requirements requiring the Department to engage in negotiated rulemaking in developing certain proposed rules, see 20 U.S.C. 1098a, the HEROES Act likewise states that Section 1098a "shall not apply to the waivers and modifications authorized or required by [the Act]." 20 U.S.C. 1098bb(d). Because the Secretary issued the challenged plan pursuant to the HEROES Act, respondents' procedural objections are meritless.

That should have been the end of the case, but the district court went on to resolve an additional claim that respondents had never raised: that the plan was substantively unlawful because it exceeded the Secretary's statutory authority. App., infra, 19a-25a. Respondents themselves had not attempted to raise that claim, presumably because they recognized that they plainly lack standing to assert it. See pp. 18-20, infra. In deciding that claim sua sponte, the court violated the bedrock "principle of party presentation." United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020). Under that settled principle, courts ordinarily must "rely on the parties to frame the issues for decision" and confine themselves to "the role of neutral arbiter[s] of matters the parties present." Greenlaw v. United States, 554 U.S. 237, 243 (2008). In raising and resolving a claim that respondents had never pressed, the court went "well beyond the pale." Sineneng-Smith, 140 S. Ct. at 1582.

B. Respondents Lack Standing To Challenge The Substantive Lawfulness Of The Plan

Article III empowers the federal courts to decide only "Cases" and "Controversies." U.S. Const. Art. III, § 2, Cl. 1. An Article III case or controversy exists only if the plaintiff has standing -- that is, only if the plaintiff has suffered a concrete, particularized, and actual or imminent injury, the injury was likely caused by the defendant, and the injury would likely be redressed by judicial relief. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021). And as this Court has repeatedly admonished, "standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek." Id. at 2208; see, e.g., Davis v. FEC, 554 U.S. 724, 733-734 (2008).

Even if respondents had standing to raise their notice-and-comment claim, they lack standing to raise (or to have the district court raise for them) a claim of substantive unlawfulness. Respondents assert that the plan injures them by denying them a benefit: Brown is not eligible for any relief at all, and Taylor is eligible only for $10,000 rather than $20,000. App., infra, 11a-16a. But a judgment that the plan exceeds the Secretary's substantive authority would not redress either of those injuries. It would leave Brown's financial position unchanged; she would still receive no relief. And it would leave Taylor worse off than before; he would receive neither the $10,000 the plan provides nor the $20,000 he seeks, but instead nothing at all.

To be sure, the district court found that a judgment on respondents' procedural challenge would redress respondents' asserted injury. App., infra, 15a-16a. The court perceived "at least some possibility" that, if the plan were vacated as procedurally defective, the Secretary would redo the plan through notice-and-comment rulemaking, consider respondents' comments, and, in light of those comments, make debt relief available to borrowers like Brown and make the full $20,000 of debt relief available to borrowers like Taylor. Id. at 15a. But that rationale, whatever its merits, simply does not apply to a claim of substantive unlawfulness. Indeed, the district court explicitly confirmed that, in its view, "the agency's misstep is not correctible on remand." Id. at 24a. A judgment that the plan exceeds the Secretary's statutory power would not redress the claimed injury; to the contrary, it would carve the injury in stone by ensuring that neither respondent receives any debt relief at all.

C. The HEROES Act Authorizes The Plan

The district court did not deny that the HEROES Act, read most naturally and in light of ordinary principles of statutory construction, authorizes the Secretary's plan. Indeed, the court recognized that "the Secretary's action falls within the Act's plain text." App., infra, 16a. But the court nonetheless vacated the plan, holding that that the major questions doctrine applies and "the Secretary lacks 'clear Congressional authorization' to implement the program." Id. at 22a (capitalization and emphasis omitted). Both of those conclusions were incorrect. The major questions doctrine has no application here and, even if it did, the Act clearly authorizes the challenged plan.

1. The plan is authorized by the Act's plain text

The HEROES Act provides that, "[n]otwithstanding any other provision of law," the Secretary may respond to a "national emergency" by waiving or modifying "any statutory or regulatory provision" governing federal student loans "as the Secretary deems necessary" to "ensure" that loan recipients who are "affected individuals" are not "placed in a worse position financially" because of the emergency. 20 U.S.C. 1098bb(a)(1) and (2). The Secretary's action falls squarely within that specific grant of authority.

The COVID-19 pandemic is a "national emergency declared by the President of the United States." 20 U.S.C. 1098ee(4); see 87 Fed. Reg. 10,289, 10,289 (Feb. 23, 2022). Both the Trump and Biden Administrations previously invoked the HEROES Act to categorically suspend payments and interest accrual on all Department-held loans in light of the pandemic. See pp. 9-10, supra. Neither the district court nor respondents have suggested that those actions were unlawful.

Similarly, all student-loan borrowers are "affected individuals" under the HEROES Act. 20 U.S.C. 1098bb(a)(2)(A). The vast majority qualify based on where they "reside[]" or are "employed," 20 U.S.C. 1098ee(2): The 50 States, the District of Columbia, and all five permanently populated United States territories have been designated as COVID-19 disaster areas. See p. 9, supra. And because the pandemic has inflicted global economic harms, with particularly severe effects on lower-income borrowers, the Secretary reasonably "determined" that the small fraction of eligible borrowers living and working abroad qualify because they have suffered "direct economic hardship" due to the pandemic. 20 U.S.C. 1098ee(2)(D). Again, the payment pauses adopted by both the Trump and Biden Administrations rested on the same understanding of "affected individual."

The Secretary reasonably "deem[ed]" relief "necessary to ensure" that a subset of these affected individuals -- namely, those with lower incomes -- "are not placed in a worse position" in relation to their student-loan obligations "because of their status as affected individuals," i.e., because of the effects of the COVID-19 pandemic. 20 U.S.C. 1098bb(a)(1) and (2). That determination was supported by analysis and evidence showing that, because of the pandemic, such borrowers were at particularly high risk of delinquency and default once payment obligations restart. See pp. 10-12, supra.

Finally, the Act authorizes the type of relief that the Secretary granted. The provisions governing student-loan repayment obligations, cancellation, and discharge are "statutory or regulatory provision[s] applicable to the student financial assistance programs under title IV." 20 U.S.C. 1098bb(a)(1); see, e.g., 20 U.S.C. 1087 (2018 & Supp. I 2019), 1087dd(g); 34 C.F.R. 682.402, 685.212. The Secretary thus properly "waiv[ed] or modif[ied]" those provisions to reduce the scope of vulnerable borrowers' payment obligations to ensure that they are not worse off in relation to their student-loan obligations because of the pandemic. 20 U.S.C. 1098bb(a)(1); App., infra, 29a, 33a.

2. The major questions doctrine provides no reason to depart from the Act's plain text

The district court held that the major questions doctrine compels a different result, App., infra, 19a-23a, but that doctrine provides no sound reason to depart from a straightforward application of the statutory text. In "extraordinary cases," this Court has required that an agency "point to 'clear congressional authorization'" -- rather than a more ordinary "textual basis" -- "for the power it claims." West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (citation omitted); see id. at 2607-2609. This case lacks the hallmarks of those extraordinary cases, and clear authorization exists in any event.

a. The district court believed that the major questions doctrine applies "because the Program is an agency action of vast economic and political significance." App., infra, 22a. But this Court has never treated the major questions doctrine as a license for courts to override statutory text simply because an agency's action is controversial or has substantial economic effects. Instead, the doctrine applies when an agency claims an "[e]xtraordinary grant[] of regulatory authority" based on "'modest words,' 'vague terms,' or 'subtle device[s]'" and the "'history and the breadth'" of that asserted power provide "'reason to hesitate before concluding that Congress'" meant to confer such authority. West Virginia, 142 S. Ct. at 2608-2609 (citations omitted; third set of brackets in original).

No such reason exists here. This is not a case where the agency has "'no comparative expertise' in making [the relevant] policy judgments," West Virginia, 142 S. Ct. at 2613 (citation omitted); relied on "'ancillary'" provisions to locate "newfound power," id. at 2610 (citation omitted); or asserted authority that falls outside the agency's "particular domain," Alabama Ass'n of Realtors, 141 S. Ct. at 2489. Rather, the Department of Education -- i.e., the federal agency primarily responsible for administering federal student loans -- has modified the scope of those loan obligations because of a national emergency, pursuant to the central provision of the HEROES Act, which expressly authorizes the Secretary to do just that. The plan "fits neatly within the language of the statute," Biden v. Missouri, 142 S. Ct. 647, 652 (2022) (per curiam), because the entire point of the HEROES Act is to authorize the Secretary to grant student-loan debt relief to mitigate economic harms borrowers face from national emergencies.

Nor is the asserted agency power here "'transformative'" or "sweeping." West Virginia, 142 S. Ct. at 2608, 2610 (citation omitted). Although the HEROES Act gives the Secretary powerful tools to address the situations encompassed by the Act, it applies only in a limited set of circumstances (including a "national emergency," 20 U.S.C. 1098bb(a)(1)); authorizes relief only for a defined class of individuals, 20 U.S.C. 1098ee(2) (defining "affected individual"); to accomplish limited objectives (such as "ensur[ing]" that these individuals are not "placed in a worse position financially" in relation to their loans, 20 U.S.C. 1098bb(a)(2)(A)); through specific measures (waiving or modifying applicable student-loan requirements, 20 U.S.C. 1098bb(a)(1)). In keeping with that authority, the Secretary issued relief to ensure that vulnerable borrowers would not be worse off in relation to their student loans due to the pandemic. This case is thus far afield from cases like West Virginia, where the Court found that the agency action at issue would have required a complete reorganization of American energy infrastructure. 142 S. Ct. at 2604.

Indeed, unlike every case where this Court has invoked the major questions doctrine, this case does not involve any assertion of regulatory authority at all. Instead, it involves the exercise of authority over a government benefit program to lift otherwise applicable requirements on beneficiaries. The district court believed the major questions doctrine applies even to "the disbursement of a federal benefit," App., infra, 22a, but offered no sound basis for expanding that doctrine -- which the Court has applied only to claims of an "[e]xtraordinary grant[] of regulatory authority," West Virginia, 142 S. Ct. at 2609 -- to this novel context.

The district court suggested that "Congress's extensive consideration of various bills attempting to forgive student loans and failure to pass such bills" further justified applying the major questions doctrine. App., infra, 21a. But each bill the court cited meaningfully differed from the relief the Secretary authorized.[2] The far more relevant congressional action is a

[2] See, e.g., H.R. 2034, 117th Cong., 1st Sess. (2021) (proposing discharge of entire loan balances); H.R. 6800, 116th Cong., 2d Sess. § 150117(h) (2020) (omnibus $3 trillion relief package that included many other contested provisions); S. 2235,

measure included in pandemic-relief legislation enacted in 2021. At that time, when the possibility of forgiveness under the HEROES Act was already being publicly debated, Congress anticipated the possibility of such relief by adopting a "Special Rule for Discharges in 2021 Through 2025" that makes student-loan discharges during that period tax-free. See American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9675(a), 135 Stat. 185-186.

b. Even if the major questions doctrine applied, it would not support vacatur of the plan. Section 1098bb(a) of the HEROES Act is not a "vague statutory grant," West Virginia, 142 S. Ct. at 2614; rather, Congress clearly authorized the Secretary to ensure that student-loan borrowers are not placed in a worse financial position because of a national emergency, and the Secretary complied with the Act's plain terms in affording a limited measure of relief to borrowers at risk because of COVID-19. See pp. 20-22, supra.

The district court disagreed for three reasons: (1) the Act does not use the term "loan forgiveness"; (2) the pandemic does not justify the proposed relief; and (3) the asserted power is "'unheralded.'" App., infra, 22a-24a (citation omitted). Each contention lacks merit.

First, the HEROES Act does not enumerate any of the specific forms of relief the Secretary has long issued under the Act --

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116th Cong., 1st Sess. (2019) (proposing discharge of up to $50,000 before the pandemic).

including extending forbearance, suspending interest accrual, waiving the requirement that borrowers return overpayments of certain grant funds, and altering the requirements for loan deferrals. See OLC Op., 2022 WL 3975075, at *5-*6. Rather, the Act ensures that the Secretary can act quickly and effectively to afford relief to student-loan borrowers affected by national emergencies by authorizing the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV." 20 U.S.C. 1098bb(a)(1) (emphasis added); see United States v. Gonzales, 520 U.S. 1, 5 (1997) ("[T]he word 'any' has an expansive meaning.") (citation omitted). To waive is "[t]o abandon, renounce, or surrender (a claim, privilege, right, etc.)" or "to give up (a right or claim) voluntarily," Black's Law Dictionary 1894 (11th ed. 2019); to modify is "[t]o make somewhat different" or "to reduce in degree or extent," id. at 1203. The Act thus authorizes the Secretary to eliminate or to reduce by some degree a borrower's obligation to comply with any Title IV student-aid provision so long as the other requirements of the statute are satisfied. Among the Title IV provisions eligible for waiver or modification are those that establish the obligation to repay loans and the circumstances in which such obligations can be cancelled or discharged. See p. 22, supra.

Congress, moreover, expressly contemplated the Secretary's exercise of discretion in fashioning appropriate relief, authorizing the Secretary to waive or modify "any" applicable Title IV statutory or regulatory provision “as the Secretary deems necessary.” 20 U.S.C. 1098bb(a)(1); see Webster v. Doe, 486 U.S. 592, 600 (1988) (statutory authority to take actions an official “‘deem[ed] * * * necessary or advisable’” conveyed “deference”) (emphasis omitted). Congress underscored the point in the following paragraph, authorizing the Secretary to waive or modify any such provision “as may be necessary” to “ensure” the Act’s objectives. 20 U.S.C. 1098bb(a)(2) (emphasis added); see City of New York v. FCC, 486 U.S. 57, 67 (1988) (holding that the phrase “‘may be necessary’” confers “legitimate discretionary power” on the agency) (citation omitted).

Second, the proposed relief directly targets those borrowers facing “a worse position financially” in relation to their student loans “because of” the invoked national emergency, 20 U.S.C. 1098bb(a)(2)(A) -- here, the COVID-19 pandemic. The evidence before the Secretary showed that borrowers with individual incomes below $125,000 or household incomes below $250,000 were most likely to have experienced job loss, non-student-loan debt delinquency, and other material hardships as a result of the pandemic, and thus faced the highest risk of delinquency and default when student-loan obligations resume. See App., infra, 39a, 42a, 46a-48a; pp. 10-11, supra. And the evidence further showed that reducing the principal owed by such borrowers by the proposed amounts, and reducing their monthly payments accordingly, would ameliorate the "risk that delinquency and default rates will rise above pre-pandemic levels." App., infra, 41a; pp. 11-12, supra.

The district court's suggestion that "it is unclear if COVID-19 is still a 'national emergency' under the Act," App., infra, 23a, is baseless. The Act defines that term as "a national emergency declared by the President of the United States," 20 U.S.C. 1098ee(4), and the presidential declaration identifying the COVID-19 pandemic as a national emergency remains in effect. See p. 9, supra. Moreover, the Secretary is not asserting the power to "use the HEROES Act to forgive student-loan debt" "in ten years * * * because of the COVID-19 pandemic." App., infra, 23a. Rather, the plan reflects the Secretary's determination that a one-time discharge of a limited measure of debt for a subset of affected borrowers is necessary to ensure that those borrowers are not placed in a worse position as they and the country work to recover from the immediate and devastating effects of COVID-19. Other emergencies may be different in kind, scope, or scale, and may require different relief -- but always subject to the terms of the HEROES Act, which limit (1) the circumstances in which the Secretary can act; (2) the class of individuals eligible for relief; (3) the objectives any relief must aim to accomplish; and (4) the measures the Secretary may implement. See pp. 20-22, supra.

Third, the Secretary has not relied on a "rarely invoked statutory provision" to claim "'unheralded power.'" App., infra, 24a (quoting West Virginia, 142 S. Ct. at 2625 (Gorsuch, J., concurring)). Since its enactment in 2003, the Department has repeatedly invoked the HEROES Act to provide class-wide relief to certain borrowers, see p. 8, supra, and since March 2020, both the Trump and Biden Administrations have invoked the Act to issue relief to all borrowers, see pp. 9-10, supra.

These previous invocations of the HEROES Act -- by both the Trump and Biden Administrations -- likewise had permanent and substantial economic effects. Most significantly, the previous COVID-19 relief measures, including the suspension of loan payments and interest accrual, are estimated to have cost the federal government $102 billion. See U.S. Gov't Accountability Office, Student Loans: Education Has Increased Federal Cost Estimates of Direct Loans by Billions due to Programmatic and Other Changes 14 (July 2022). The Department has estimated that these measures saved the average borrower approximately $233 a month -- comparable to the $200 to $300 reduction in monthly payments that the Department estimates will be achieved by the challenged plan. See App., infra, 41a-42a. Moreover, because the months during which these measures were in effect count toward the income-driven repayment and public service loan forgiveness programs, these measures resulted in additional debt cancellation for borrowers eligible for those programs. See Office of Federal Student Aid, U.S. Dep't of Educ., COVID-19 Relief: Income-Driven Repayment (IDR) Plans, https://perma.cc/Q9WK-5YDE (last visited Dec. 2, 2022); Office of Federal Student Aid, U.S. Dep't of Educ., COVID-19 Relief: Public

Service Loan Forgiveness (PSLF), https://perma.cc/M6NV-ENSU (last visited Dec. 2, 2022). Likewise, the Secretary in December 2020 expanded eligibility for defenses to repayment by allowing certain borrowers to have their claims evaluated under more beneficial standards due to pandemic-related difficulties, 85 Fed. Reg. at 79,862, which "will almost certainly reduce the amount of principal repaid by borrowers," OLC Op., 2022 WL 3975075, at *12.

Pre-2020 invocations of the Act similarly resulted in forgiveness of affected borrowers' debt obligations. For example, the Secretary in 2003 waived the requirement that affected borrowers return overpayments of certain grant funds. 68 Fed. Reg. 69,312, 69,314 (Dec. 12, 2003). To the extent the Secretary's pre-pandemic actions under the Act were narrower in certain respects, that reflects the pandemic's unprecedented scope, not any established understanding of the Act's limits. It is only natural that the Secretary's response to an unprecedented pandemic will go "further than what the Secretary has done in the past" in response to less severe or less widespread exigencies. Missouri, 142 S. Ct. at 653.

D. The District Court Erred By Vacating The Plan On A Universal Basis

Even if respondents had standing and even if the plan exceeded the Secretary's statutory authority, the district court erred in "vacat[ing]" the plan on a universal basis. App., infra, 28a (capitalization and emphasis omitted). As Members of this Court have recognized, such universal remedies are "inconsistent with longstanding limits on equitable relief and the power of Article III courts" and impose a severe "toll on the federal court system." Trump v. Hawaii, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring); see DHS v. New York, 140 S. Ct. 599, 599-601 (2020) (Gorsuch, J., concurring in the grant of stay).

The district court concluded that universal vacatur was authorized by 5 U.S.C. 706(2), which provides that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions" found to be unlawful. App., infra, 25a. Many lower court decisions have applied the same understanding of Section 706(2). But this Court has never squarely considered the issue. And as the government has long argued, the "unremarkable language" in Section 706(2) should not be interpreted to "upset the bedrock practice of case-by-case judgments with respect to the parties in each case or create a new and far-reaching power" to grant universal vacatur. Arizona v. Biden, 40 F.4th 375, 396 (6th Cir. 2022) (Sutton, C.J., concurring). Instead, Section 706(2) simply directs a court to disregard unlawful "agency action, findings, and conclusions" in resolving the case before it. 5 U.S.C. 706(2); see U.S. Br. at 40-44, United States v. Texas, No. 22-58 (argued Nov. 29, 2022).[3]

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[3] See also, e.g., Gov't Reply Br. at 23-24, Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020) (No. 19-454); Gov't Br. at 40-43 & n.15, Summers v. Earth Island Inst., 555 U.S. 488 (2009) (No. 07-463); Memorandum from Attorney General Jefferson B. Sessions to Heads of Civil Litigating

That understanding is consistent with the ordinary meaning of "set aside," which can "refer to a court's decision to regard a purportedly valid juridical act as ineffective." John Harrison, Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies, 37 Yale J. on Reg. Bull. 37, 43 (2020) (Harrison). Treating Section 706(2) as an instruction to disregard unlawful agency action is the only interpretation consistent with the statutory context. That provision applies in all forms of action governed by the APA, including actions for writs of "habeas corpus" and "in civil or criminal proceedings for judicial enforcement." 5 U.S.C. 703. Courts hearing such actions thus must "set aside" unlawful agency action under Section 706(2), yet no one would suggest that a court hearing a habeas petition or a criminal or civil enforcement action could vacate a regulation. In contrast, Section 706(2) fits naturally in those contexts if it is understood as an instruction to disregard unlawful agency actions, conclusions, and findings.

Of course, when a court declines to give effect to an agency action in the case before it on the ground that the action is unlawful, it may issue appropriate relief. In some circumstances, the Hobbs Act or another special statutory review provision authorizes a reviewing court -- often, a court of appeals -- to act

Components & United States Attorneys, Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions at 7 (Sept. 13, 2018) ("Universal vacatur is not contemplated by the APA.") (capitalization altered and emphasis omitted).

directly upon the challenged agency action in the way an appellate court acts upon a lower court's judgment. See 28 U.S.C. 2342. But absent such a "special statutory review proceeding," 5 U.S.C. 703 points outside the APA for the available remedies, specifying that "[t]he form of proceeding" is a traditional "form of legal action," such as "actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus." Here, if respondents had standing and were entitled to prevail on the merits, the district court should have granted appropriately tailored injunctive relief -- not a universal vacatur that blocked the application of the plan to millions of other borrowers who are not parties to this suit.

II. THE EQUITIES FAVOR A STAY

The harm to the government and the public from vacating the Secretary's action is significant. The HEROES Act reflects Congress's judgment that the Secretary must be able to act quickly and effectively to afford relief to student-loan borrowers affected by national emergencies. See pp. 8, 20-22, supra. Here, the Secretary has crafted relief to protect vulnerable borrowers from delinquency and default (and thus from wage garnishment, credit-report damage, and seizure of federal benefits, see Office of Federal Student Aid, U.S. Dep't of Educ., Student Loan Delinquency and Default, https://perma.cc/4A6N-DA5Z; D. Ct. Doc. 42, at ¶ 6 (Kvaal Decl.) (Nov. 15, 2022)). The record includes ample evidence of the severity of the problem and the consequences of failing to act. See pp. 10-12, supra. The injunction thus frustrates the government's ability to respond to the harmful economic consequences of a devastating pandemic with the policies it has determined are necessary. See Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (barring a sovereign from "employ[ing] a duly enacted statute to help prevent * * * injuries constitutes irreparable harm"); INS v. Legalization Assistance Project of L.A. County Fed'n of Labor, 510 U.S. 1301, 1305-1306 (1993) (O'Connor, J., in chambers) (emphasizing harm from "improper intrusion by a federal court into the workings of a coordinate branch of the Government").

Indeed, the district court's vacatur (along with the Eighth Circuit's injunction) has already frustrated -- and continues to frustrate -- the Secretary's previously announced plan to resume student-loan payment obligations more broadly. The debt-relief measure was an integral component of the Secretary's simultaneous decision to restart such obligations after a lengthy period of forbearance during a devastating global pandemic. App., infra, 33a-34a; p. 10, supra. The injunction and vacatur thus placed the Secretary in an unwarranted dilemma: Restart payments as previously planned -- and thereby invite the cascade of delinquencies and defaults that prompted the Secretary to adopt the debt-relief measure in the first place -- or continue forbearance, at significant cost to the government. The Secretary ultimately determined that the latter course was preferable, announcing on November 22 his decision to extend the payment pause and suspension of interest accrual in light of the court orders blocking implementation of the plan. See p. 15, supra. So long as they remain in effect, the district court's vacatur and the Eighth Circuit's injunction undermine the government's ability to effectuate its chosen policy.

At the same time, the vacatur and injunction leave vulnerable borrowers in untenable limbo. Eligible borrowers have been told that they will be able to obtain meaningful debt relief: for the average borrower, the relief contemplated by the plan would result in \$200 to \$300 reductions in monthly payments. Kvaal Decl. ¶ 6. Those amounts are substantial to anyone attempting to responsibly manage his finances -- and all the more so for lower-income borrowers eligible for relief under the plan. App., infra, 40a-42a. Yet because of the vacatur and injunction, the borrowers most likely to default if payment obligations resume without some relief face prolonged uncertainty about the scope of their payment obligations and when those obligations will resume. So long as that uncertainty continues, many borrowers will lack information they need to decide whether they can afford to change jobs, buy a home or a car, or assume other long-term financial obligations.

On the other side of the ledger, respondents would not face any injury -- much less irreparable harm if the district court's judgment were stayed. Respondents have not even established the injury necessary for standing, see pp. 18-20, supra. And, more fundamentally, they have never explained how they have any interest whatsoever in denying debt relief to millions of other borrowers. Indeed, the only practical consequence of the vacatur for respondents has been to deny respondent Taylor $10,000 in debt relief that he otherwise would have received. Allowing such uninjured plaintiffs to block a nationwide program based on a claim they never brought is profoundly inequitable.

III. IN THE ALTERNATIVE, THE COURT MAY WISH TO TREAT THIS APPLICATION AS A PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

For the foregoing reasons, this Court should stay the judgment entered by the Northern District of Texas. The Court deferred consideration of the government's application to vacate the injunction entered by the Eighth Circuit in Biden v. Nebraska, No. 22-506, instead granting certiorari before judgment and setting the case for expedited briefing and argument during the Court's February 2023 sitting, presumably because the Court believes the issues presented in that case warrant "full briefing and oral argument," Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting). Here, however, the defects in the district court's judgment are obvious and insurmountable: respondents plainly lack standing to assert -- and never in fact asserted -- the only claim on which the district court based its judgment. See pp. 16-20, supra. An immediate stay of the district court's unjustified vacatur thus is warranted here.

If, however, the Court is not prepared to grant that relief, it may wish to follow the same course it took in Nebraska by deferring consideration of the application pending oral argument, treating this application as a petition for a writ of certiorari before judgment, granting the petition, and setting this case for oral argument along with Nebraska. The government would be prepared to brief this case on a schedule that would allow it to be argued together with Nebraska during the Court's February 2023 sitting. If the Court follows that course, the government suggests that the appropriate questions presented would be (1) whether respondents have Article III standing to challenge the Secretary's statutory authority to adopt the plan, and (2) whether the plan exceeds the Secretary's statutory authority.

A writ of certiorari before judgment under 28 U.S.C. 2101(e) is an extraordinary remedy, but -- as in Nebraska -- the issues presented by the district court's vacatur of the Secretary's plan are "of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. And considering this case along with Nebraska would allow the Court to consider the full range of challenges to the plan at once.

CONCLUSION

This Court should stay the judgment of the district court pending appeal and pending the filing and disposition of any petition for a writ of certiorari. If, however, the Court is not prepared to grant an immediate stay, it may wish to defer consideration of this application pending oral argument, construe the application as a petition for a writ of certiorari before judgment, grant the petition, and hear this case along with Biden v. Nebraska, cert. granted, No. 22-506 (Dec. 1, 2022).

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

DECEMBER 2022

APPENDIX

United States Court of Appeals for the Fifth Circuit

No. 22-11115

Myra Brown; Alexander Taylor,

Plaintiffs—Appellees,

versus

United States Department of Education; Miguel Cardona, *Secretary, U.S. Department of Education, in his official capacity as the Secretary of Education*,

Defendants—Appellants.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:22-CV-908

Before Elrod, Graves, and Ho, *Circuit Judges*.

Per Curiam:

IT IS ORDERED that appellants' opposed motion for stay pending appeal is DENIED.

IT IS FURTHER ORDERED that this matter is expedited to the next available randomly designated regular oral argument panel. The Clerk is directed to issue a schedule for expedited briefing thereafter.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MYRA BROWN, ET AL.,

Plaintiffs,

v. **No. 4:22-cv-0908-P**

U.S. DEPARTMENT OF EDUCATION, ET AL.,

Defendants.

ORDER

The Constitution vests "all legislative powers" in Congress. This power, however, can be delegated to the executive branch. But if the executive branch seeks to use that delegated power to create a law of vast economic and political significance, it must have clear congressional authorization. If not, the executive branch unconstitutionally exercises "legislative powers" vested in Congress. In this case, the HEROES Act—a law to provide loan assistance to military personnel defending our nation—does not provide the executive branch clear congressional authorization to create a $400 billion student loan forgiveness program. The Program is thus an unconstitutional exercise of Congress's legislative power and must be vacated.[1]

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[1] The Court expresses no opinion on whether the Program constitutes sound or unsound public policy—a consideration inappropriate for the Court to contemplate—as it falls outside the Court's task of merely interpreting the law. *See Harris v. Harris*, 72 Va. (31 Gratt.) 13, 32 (1878) ("'Compassion,' said an eminent Virginia chancellor, 'ought not to influence a judge, in whom, acting officially, apathy is less a vice than sympathy.'" (quoting Chancellor George Wythe, Commentary on *Field's Ex'x v. Harrison & Wife*, Wythe's Reports 282 (Minor's Ed. 1794))); *see also Letter from Thomas Jefferson to Edmund Pendelton* (Aug. 26, 1776), *reprinted in* 1 THE PAPERS OF THOMAS JEFFERSON 505 (Julian P. Boyd, ed. 1950) ("Let mercy be the character of the law-giver, but let the judge be a mere machine. The mercies of the law will be dispensed equally and impartially to every description of men; those of the judge, or of the executive power, will be the eccentric impulses of whimsical, capricious designing men.").

BACKGROUND

A. Title IV of the Higher Education Act

The Department of Education ("Department") offers two types of financial aid to help students pay for their college education—grants and loans.[2] Grants do not have to be repaid. *Id.* But loans do. *Id.* Title IV of the Higher Education Act of 1965 ("HEA") covers the administration of three types of federal student loans: (1) Direct Loans; (2) Federal Family Education Loans ("FFEL"); and (3) Perkins Loans. *See* 20 U.S.C. § 1070.

With Direct Loans, the federal government provides loans directly to borrowers, who are responsible for repaying the government. *See* 20 U.S.C. § 1087a. With FFEL, the federal government pays lenders to offer student loans, and the federal government guarantees their repayment. 20 U.S.C. § 1071. With Perkins Loans, colleges loan money to students, and the federal government guarantees their repayment. § 1087aa. The HEA also provides how to pay these loans, repayment options, and loan forgiveness. *See, e.g.*, 34 C.F.R. § 685.219; 20 U.S.C. §§ 1098e; 1087e(d)(1); 1078(b)(9)(A)(v).

B. Prior Attempts to Provide Loan Forgiveness

With rising college costs, federal student-loan debt has skyrocketed to more than $1.61 trillion with 43 million borrowers.[3] As a result, there have been multiple attempts to enact legislation to help alleviate student-loan debt. For example, in 2019, Senator Elizabeth Warren introduced a bill to provide $50,000 in debt forgiveness for those who make under $100,000. *See* S. 2235, 116th Cong. (2019). Similarly, Representative Al Lawson introduced a bill to forgive the outstanding loan balance of all borrowers who make under $100,000 individually or $200,000 if married and filing taxes jointly. *See* H.R. 2034, 117th Cong. (2021). But both bills failed.

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[2] *See Types of Aid*, U.S. DEP'T OF EDUC., https://bit.ly/3S51Heu (last visited Nov. 7, 2022).

[3] *Federal Student Loan Portfolio*, U.S. DEP'T OF EDUC., https://bit.ly/3qYd5Nm (last visited Nov. 7, 2022).

The executive branch has also recently explored its ability to forgive student loans. Specifically, the Trump administration considered its statutory authority under the Higher Education Relief Opportunities for Students Act of 2003 ("HEROES Act") to forgive student loans due to the COVID-19 pandemic. But the Department concluded that it lacked such authority.[4] House speaker Nancy Pelosi agreed with the Department's conclusion: "People think that the president of the United States has the power for debt forgiveness. . . He does not. He can postpone, he can delay, but he does not have that power. That has to be [accomplished through] an act of Congress."[5]

President Biden, however, promised to "forgive all undergraduate tuition-related federal student debt from two- and four-year public colleges and universities for debt-holders earning up to $125,000" while campaigning for the presidency.[6] After becoming president, Biden instructed the Department to prepare a memorandum exploring possible legal avenues to justify a loan forgiveness program.[7]

The Department did so but changed its tune—concluding that the HEROES Act allows the executive branch to create a loan-forgiveness program to address the financial harms of the COVID-19 pandemic.[8] The next day, the White House announced that the President would "fulfill [his] campaign commitment" by providing debt forgiveness to millions of borrowers.[9]

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[4] *See* Reed Rubinstein, *Memorandum to Betsy DeVos Secretary of Education*, U.S. DEP'T OF EDUC. OFF. OF THE GEN. COUNS. (Jan. 12, 2021, 5:46 PM), https://bit.ly/3LBA36n.

[5] Lauren Camera, *Pelosi: Biden Lacks Authority to Cancel Student Debt*, U.S. NEWS. & WORLD REPORT (July 28, 2021, 3:16 PM), https://tinyurl.com/33ex63de.

[6] Joe Biden, *Joe Biden Outlines New Steps to Ease Economic Burden on Working People*, MEDIUM (Apr. 9, 2020), https://tinyurl.com/3cbw4zh2.

[7] *See* L. Egan, *Biden to Review Executive Authority to Cancel Student Debt*, NBC NEWS (Apr. 1, 2021, 1:36 PM), https://nbcnews.to/3dD85dV.

[8] *See Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans*, 2022 WL 3975075 (O.L.C.), at *1 (Aug. 23, 2022).

[9] *See FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most*, THE WHITE HOUSE (Aug. 24, 2022), https://bit.ly/3dATj7p.

C. The HEROES Act

The HEROES Act grants the Secretary of Education ("Secretary") the authority to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the Act [20 U.S.C. 1070 et seq.] as the Secretary deems necessary in connection with a war or other military operation or national emergency." § 1098bb(a)(1) (alteration in original). "The term 'national emergency' means a national emergency declared by the President of the United States." § 1098ee(4).

The waiver or modification must also "be necessary to ensure that" certain objectives are achieved. § 1098bb(a)(2). The first of those objectives is "to ensure that . . . recipients of student financial assistance under title IV of the [HEA] 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." § 1098bb(a)(2)(A). 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." § 1098ee(2)(C)–(D).

The second objective provides that "administrative requirements placed on affected individuals . . . 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." § 1098bb(a)(2).[10] If the objectives of § 1098bb(a)(2) are met, "[n]otwithstanding section 1232 of this title and section 553 of title 5, the Secretary shall, by notice in the Federal Register, publish the waivers or modification." § 1098bb(b)(1).

[10] The HEROES Act provides three additional objectives. § 1098bb(a)(2)(C)–(E). None of which are at issue or relevant to the Court's analysis.

D. Student-Loan Program

The Secretary invoked its authority under the HEROES Act to create a loan-forgiveness program ("Program") that would address the financial harms of the COVID-19 pandemic.[11] The Secretary contends that COVID-19 pandemic was declared a national emergency by President Trump in 2020 and thus a "national emergency" under the HEROES Act. *Id.* And according to the Secretary, every portion of the country is a "disaster area due to COVID-19," and "every person with a federal student loan under title IV of the HEA" is an affected individual. *Id.*

Because the Secretary deemed the objectives of § 1098bb(a)(2) met, the Secretary provided notice of the waivers and modifications in the Federal Register. *Id.* The notice provided that the Secretary modifies "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, and 34 CFR 682.402 and 685.212" to provide the debt relief for certain borrowers who qualify. *Id.* A borrower qualifies if he (1) individually makes under $125,000 or $250,000 if married and filing taxes jointly and (2) has Direct, Perkins, or FFEL loans that are not commercially held. *Id.* If a borrower qualifies, the Program provides $20,000 in debt forgiveness to those who have received a Pell Grant and $10,000 to those who did not. *Id.*

E. Procedural History

1. <u>Plaintiffs' Lawsuit</u>

Plaintiffs Myra Brown and Alexander Taylor both have student loans. ECF No. 1 at 3–4. Brown is ineligible for any debt forgiveness under the Program because her loans are commercially held. *Id.* at 3. And Taylor is ineligible for the full $20,000 in debt forgiveness under the Program because he did not receive a Pell Grant. *Id.* at 3–4. Because Brown loses out on $20,000 in debt forgiveness and Taylor loses out on

[11] No. 2022-22205, 87 Fed. Reg. 61512 (Oct. 12, 2022), https://www.federalregister.gov/documents/2022/10/12/2022-22205/federal-student-aid-programs-federal-perkins-loan-program-federal-family-education-loan-program-and.

$10,000, they disagree with the lines drawn for the Program's eligibility criteria. *Id.* at 2–3.

Brown and Taylor, however, could not voice their disagreement because the Program did not undergo notice-and-comment rulemaking procedures under the Administrative Procedure Act ("APA").[12] As a result, Plaintiffs sued the Department and Secretary, seeking vacatur of the Program or nationwide injunctive relief for two reasons. *First*, they allege that the Program violates the APA's notice-and-comment requirements. ECF No. 1 at 13–14. *Second*, they also contend that the Secretary lacks the authority to implement the Program under the HEROES Act. *Id.* at 4–5.

The same day Plaintiffs sued, they moved to enjoin the Department "from enforcing, applying, or implementing the Program." ECF No. 4 at 14. Shortly after, Defendants filed their opposition to Plaintiffs' motion. ECF No. 24.

2. Defendants' Motion to Dismiss for Lack of Jurisdiction

Along with opposing Plaintiffs' Motion for Preliminary Injunction, Defendants moved to dismiss for lack of jurisdiction, contending that Plaintiffs lack standing. *See* ECF Nos. 24 at 8–12; 25. And while not mentioned in their motion, Defendants at the preliminary-injunction hearing insinuated that not only do Plaintiffs lack standing, but nobody has standing to challenge the Program. ECF No. 32 at 57–58.

3. Notice of the Court's Intent to Rule on the Merits

Because of the prejudice Plaintiffs would experience if the Court delays ruling on the merits,[13] no material facts are in dispute, and the issues here are pure questions of law, the Court—out of an abundance of caution—provided the Parties notice of the Court's intent to advance

[12] No. 2022-22205, 87 Fed. Reg. 61512 (Oct. 12, 2022), https://www.federalregister.gov/documents/2022/10/12/2022-22205/federal-student-aid-programs-federal-perkins-loan-program-federal-family-education-loan-program-and.

[13] *See* Aila Slisco, *Student Loan Debt Relief Checks Could Be Mailed in "Two Weeks," Biden Says*, NEWSWEEK (Oct. 27, 2022, 8:52 PM), https://www.newsweek.com/student-loan-debt-relief-checks-could-mailed-two-weeks-biden-says-1755288 (stating that on November 3, 2022, President Biden proclaimed that checks could be sent to those who applied for the Program within "two weeks").

Plaintiffs' Motion for Preliminary Injunction to a determination on the merits under Federal Rule of Civil Procedure 65. *See* ECF No. 33. The notice provided the Parties an opportunity to object to this advancement. *Id*. Plaintiffs did not object. *See* ECF No. 34. But Defendants did and contend that proceeding to the merits is improper. *See* ECF No. 35.

Thus, this case presents three issues. *First*, whether proceeding to the merits is appropriate. *Second*, whether the Court has jurisdiction. And *third*, whether Plaintiffs are entitled to relief. The Court addresses each in turn.

LEGAL STANDARD

A preliminary injunction is an "extraordinary remedy" and will be granted only if the movants carry their burden on four requirements. *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008). The movants must show: "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) the threatened injury to the movant outweighs the threatened harm to the party sought to be enjoined; and (4) granting the injunctive relief will not disserve the public interest." *City of Dall. v. Delta Airlines, Inc.*, 847 F.3d 279, 285 (5th Cir. 2017) (quotation omitted). "The decision to grant or deny a preliminary injunction is discretionary with the district court." *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985).

Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A fact is "material" if it could change the outcome of the litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And a dispute about a material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The Court views the evidence in the light most favorable to the nonmovant but need not comb through the record in search of evidence creating a genuine issue of material fact. *See Malacara v. Garber*, 353 F.3d 393, 405 (5th Cir. 2003).

ANALYSIS

A. Proceeding to the Merits is Appropriate

Under Federal Rule of Civil Procedure 65, "[b]efore or after beginning the hearing on a motion for a preliminary injunction, the court *may* advance the trial on the merits and consolidate it with the hearing." FED. R. CIV. P. 65(a)(2) (emphasis added). But if "the eventual outcome on the merits is plain at the preliminary injunction stage, the judge *should*, after due notice to the parties, merge the stages and enter a final judgment." *Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 945 (7th Cir. 1994) (emphasis added). Courts typically require that the parties "receive clear and unambiguous notice [of the court's intent to consolidate the trial and the hearing] either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (quoting *Pughsley v. 3750 Lake Shore Drive Coop. Bldg.*, 463 F.2d 1055, 1057 (7th Cir. 1972)) (alteration in original). Courts may also consolidate without giving the parties notice if the lack of notice is not prejudicial to either party. *See Wohlfahrt v. Mem'l Med. Ctr.*, 658 F.2d 416, 418 (5th Cir. 1981).

If consolidation is appropriate, a district court may convert a plaintiff's preliminary-injunction motion into a motion for summary judgment. *H & W Indus., Inc. v. Formosa Plastics Corp., USA*, 860 F.2d 172, 177 (5th Cir. 1988). "Summary judgment serves as 'the mechanism for deciding, as a matter of law, whether the agency action is . . . consistent with the APA.'" *O.A. v. Trump*, 404 F. Supp. 3d 109, 125 (D.D.C. 2019).

Here, the Court provided the parties notice and an opportunity to object. ECF No. 33. Defendants objected, contending that advancing to a determination on the merits is improper for three reasons. ECF No. 35.

First, Defendants contend that Plaintiffs fail to meet the burden of proof at the summary-judgment stage to establish standing. *Id.* at 1–2. But if this were true, Defendants would not be prejudiced by proceeding to the merits because the Court would rule in Defendants favor and dismiss the case for lack of standing. This argument thus fails.

Second, Defendants have not had an opportunity to conduct jurisdictional discovery to examine Plaintiffs' intent to participate in any comment process and the substance of their comments. But assuming discovery revealed a fact issue as to Plaintiffs' intent to participate in any comment process and the substance of their comments, those issues are not material to standing or the merits. Thus, because these facts—even if resolved in Defendants' favor—would not "change the outcome of the lawsuit," this objection is similarly meritless. *Sweetin v. City of Tex. City*, 48 F.4th 387, 391 (5th Cir. 2022).

Third, Defendants have not yet produced the data underlying the Secretary's decision. ECF No. 35 at 3–4. Like Defendants' second objection, the data underlying the Secretary's decision is not material. Plaintiffs' central arguments are whether the Secretary lacks the authority for the Program and whether the Program had to go through notice-and-comment procedures before the Secretary implemented the Program. The data underlying the Secretary's decision—while part of the administrative record—is not material to either issue. *See Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 441 (5th Cir. 2001) (stating that an issue of statutory construction is "a task which we are competent to perform without the administrative record"); *Alphapointe v. Dep't of Veterans Affs.*, 475 F. Supp. 3d 1, 12 (D.D.C. 2020) (stating that resolving the plaintiffs' notice-and-comment challenge "requires no obvious need for the administrative record").

The cases on which Defendants rely are not to the contrary. In each case, the issue was whether the agency's actions were "arbitrary and capricious," which concerns the reasonability of an agency's decision-making process. *See* ECF No. 35 at 3–4; *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971), *abrogated by Califano v. Sanders*, 430 U.S. 99, 105 (1977); *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2564 (2019). Plaintiffs bring no such claim. *See* ECF No. 3. Nor does the data underlying the Secretary's decision have any bearing on any of Plaintiffs' claims. So even if the data underlying the Secretary's decision created a fact issue, that fact issue would not be material as it would not "change the outcome of the lawsuit." *Sweetin*, 48 F.4th at 391. Defendants' third argument thus fails.

Thus, because Defendants identify no reason for delaying a judgment in this case, the prejudice resulting to Plaintiffs if the Court delays ruling on the merits, no material facts are in dispute, and the issues here are pure questions of law, the Court converts Plaintiffs' preliminary-injunction motion to a determination on the merits.

B. Jurisdiction

For the Court to reach the merits, Plaintiffs must establish the Court's jurisdiction. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Article III of the Constitution limits federal-court jurisdiction to "cases" and "controversies." U.S. CONST. art. III, § 2. To satisfy this requirement, a plaintiff must establish that he has standing—a "personal stake" in the lawsuit. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 732–33 (2008). At the summary-judgment stage, a plaintiff must provide evidence of "specific facts" to establish standing. *Id.* Mere allegations will not suffice. *Lujan*, 504 U.S. at 560

1. Standing

Standing contains three requirements. *Lujan*, 504 U.S. at 560. *First*, there must be a concrete injury in fact that is not conjectural or hypothetical. *Whitmore v. Arkansas*, 495 U.S. 149, 149 (1990). *Second*, there must be causation—a fairly traceable connection between a plaintiff's injury and the complained-of conduct of the defendant. *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41–42 (1976). *Third*, there must be redressability—a likelihood that the requested relief will redress the alleged injury. *See Lujan*, 504 U.S. at 562. These three requirements constitute the core of Article III's case-or-controversy requirement. *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). But these requirements are relaxed when a plaintiff asserts a deprivation of a procedural right coupled with an associated concrete interest. *See Texas v. United States*, 809 F.3d 134, 150–51 (5th Cir. 2015).

Defendants insinuate that nobody has standing to challenge the Program—stating, "Article III of the Constitution imposes limitations on the judiciary. And sometimes the result is that there is executive or legislative action for which there isn't an appropriate plaintiff." ECF No. 32 at 57. Defendants' main contention, however, is that Plaintiffs lack standing. ECF No. 24 at 8. Thus, the Court first addresses whether anybody has standing to challenge the Program. And if so, whether Plaintiffs have standing.

a. Defendants' Contention that No One Has Standing to Challenge the Program is Incorrect

Defendants seem to argue that no one has standing to challenge the Program because where the government is providing a benefit, nobody is harmed by the existence of that benefit. ECF No. 32 at 57–58. And according to Defendants, "sometimes the result is that there is executive or legislative action for which *there isn't an appropriate plaintiff*." *Id.* at 57 (emphasis added). The Court must disagree. The Supreme Court has recognized that a plaintiff has standing to challenge a government benefit in many cases. *See, e.g.*, *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (holding that plaintiffs who did not qualify for government benefits had standing); *Bowsher v. Synar*, 478 U.S. 714, 721, (1986) (holding that the failure to receive benefits is enough to confer Article III standing). Because Defendants' contention that no one has standing to challenge the Program because it confers a benefit is incorrect, the Court next turns to whether Plaintiffs have standing.

b. Plaintiffs Have Standing

i. Injury in fact

Plaintiffs allege that their concrete injury is the deprivation of their procedural right under the APA to provide meaningful input on any proposal from the Department to forgive student-loan debt and their accompanying economic interest in debt forgiveness. ECF No. 4 at 12.

As for Plaintiffs' alleged deprivation of their procedural right, the APA requires agencies administering their delegated authority to follow certain procedures. *See* 5 U.S.C. § 553. These procedures obligate agencies to subject their substantive rules to a notice-and-comment period unless an exception applies. *Id.* A plaintiff is deprived of "a procedural right to protect its concrete interests" if an agency violates the APA's procedural requirements. *Texas v. EEOC*, 933 F.3d 433, 447 (5th Cir. 2019) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009)). But a bare assertion of a procedural right violation is not enough to confer Article III standing. *See Shrimpers & Fishermen of RGV v. Tex. Comm'n on Env't Quality*, 968 F.3d 419, 426 (5th Cir. 2020). A plaintiff must instead show a concrete injury stemming from that procedural violation. *Id.*

Defendants dispute Plaintiffs' alleged injuries for two reasons. *First*, they argue that Plaintiffs could not have suffered a procedural deprivation based on the lack of a notice-and-comment period because the HEROES Act expressly exempts the APA's notice-and-comment requirement. ECF No. 24 at 8–9. Plaintiffs dispute this and argue that because the HEROES Act does not authorize the Program, the Program was promulgated in violation of the APA's notice-and-comment requirement. ECF No. 26 at 6–7. Because the Court must "assume, for purposes of the standing analysis, that [Plaintiffs are] correct on the merits of [their] claim that the [Program] was promulgated in violation of the APA," Plaintiffs have successfully alleged the deprivation of a procedural right. *EEOC*, 933 F.3d at 447.

Second, Defendants assert, even if Plaintiffs have established the violation of a procedural right, there is no accompanying concrete interest stemming from that violation. ECF No. 24 at 9–11. They contend that Plaintiffs' "unhappiness that some other borrowers are receiving a greater benefit than they are" is not a concrete interest. *Id.* But this is untrue. Plaintiffs do not argue that they are injured because other people are receiving loan forgiveness. Their injury—no matter how many people are receiving loan forgiveness—is that they personally did not receive forgiveness and were denied a procedural right to comment on the Program's eligibility requirements. Plaintiffs need to prove only the existence of an associated "concrete interest," not a guarantee of concrete harm due to the procedural violation. *EEOC*, 933 F.3d at 447. A benefit or legal-entitlement guarantee is not a prerequisite to successfully establishing standing in the event of a procedural-right violation. *See, e.g., Teton Historic Aviation Found. v. U.S. Dep't of Def.*, 785 F.3d 719, 724 (D.C. Cir. 2015). A "plaintiff suffers a constitutionally cognizable injury by the loss of an opportunity to pursue a benefit even though the plaintiff may not be able to show that it was certain to receive that benefit had it been accorded the lost opportunity." *Id.*

Plaintiffs have a concrete interest in having their debts forgiven to a greater degree. Brown is ineligible for the Program because her loans are commercially held. And Taylor is ineligible for the full $20,000 in debt forgiveness under the Program because he did not receive a Pell Grant in college. Brown and Taylor's inability to obtain the full benefit of debt forgiveness under the Program flows directly from the Program's eligibility requirements. Thus, Defendants' procedural error of not providing for a notice-and-comment period—which the Court must assume as true for standing—deprived Plaintiffs of "a non-illusory opportunity to pursue [the] benefit" of greater debt forgiveness and an opportunity to advocate for the expansion of the eligibility criteria of the Program. *Ecosystem Inv. Partners v. Crosby Dredging, LLC*, 729 F. App'x 287, 292 (5th Cir. 2018).

The first requirement of Article III standing is thus met.

ii. Causation

Second, Plaintiffs argue that their injury is traceable to Defendants' actions because Plaintiffs lost the chance to obtain more debt forgiveness, which flows directly from Defendants' promulgation of the Program's eligibility requirements that failed to undergo a notice-and-comment period. ECF No. 4 at 11–13. Defendants do not contest this argument. And the Court agrees with Plaintiffs.

A plaintiff only has standing if he can assert a "personal injury fairly traceable to the defendant's allegedly unlawful conduct." *California. v. Texas*, 141 S. Ct. 2104, 2117 (2021). An injury is fairly traceable if a plaintiff's "lost chance" to pursue a benefit flows directly from the procedural violation. *Ecosystem Inv. Partners*, 729 F. App'x at 293. Plaintiffs contend that they lost their chance to pursue debt forgiveness by Defendants' failure to offer a chance to comment on the Program's eligibility requirements. "This injury—denial of the opportunity to participate—is more than fairly traceable to [the agency's] alleged inaction (failure to publish for notice and comment).” *Nat’l Treasury Emps. Union v. Newman*, 768 F. Supp. 8, 10 (D.D.C. 1991).

Thus, the second requirement of Article III standing is met.

iii. Redressability

Third, Plaintiffs contend that there is at least some possibility that Defendants would reconsider the eligibility requirements of the Program if it were enjoined or vacated, which fulfills the lighter redressability requirement that applies when a procedural injury is alleged. ECF No. 26 at 3–4. The Court agrees. To establish standing, a plaintiff must normally prove that a favorable ruling would redress its entire injury at the hands of a defendant. *See Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 409 (2013). But “when a litigant is vested with a procedural right, that litigant has standing if there is *some possibility* that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.” *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (emphasis added). Even if this lighter standard applies, a plaintiff must still show that it is “likely, as opposed to merely speculative, that a favorable decision will redress the [injury].” *S. Christian Leadership Conf. v. Sup. Ct. of State of La.*, 252 F.3d 781, 788 (5th Cir. 2001).

In response, Defendants argue that Plaintiffs’ alleged injury will not be redressed by a favorable decision of the Court because enjoining or vacating the Program will not provide Plaintiffs any loan forgiveness. ECF No. 24 at 11. But Defendants misread the redressability requirement in the context of procedural injuries. Plaintiffs need only prove that there is some possibility that Defendants will reconsider the confines of the Program if it is struck down in its current form. *See Tex. v. United States*, 787 F.3d 733, 754 (5th Cir. 2015). And “enjoining the implementation of [the Program] until it undergoes notice and comment could prompt [the Secretary] to reconsider its decision, which is all a litigant must show when asserting a procedural right.” *Id.* at 753–54.

Because Plaintiffs satisfy all three Article III standing requirements, they may challenge Defendants’ conduct on the merits. As a result, the

Court denies Defendants' Motion to Dismiss for Lack of Jurisdiction (ECF No. 25).

2. Judicial Review

When a party challenges the legality of agency action, the Court must also ensure that the agency action at issue is reviewable under the APA. *Data Mktg. P'ship, LP v. U.S. Dep't of Lab.*, 45 F.4th 846, 853 (5th Cir. 2022). An agency action is reviewable if (1) there has been a final agency action and (2) the plaintiff's injury is within the zone of interests of the statute allegedly violated. *See* 5 U.S.C. § 704; *Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012). Neither party disputes that the Program is reviewable under the APA. Still, judicial review implicates jurisdiction. *Data Mktg. P'ship*, 45 F.4th at 853. As a result, the Court must consider whether the Program is reviewable under the APA to ensure that it does "not exceed the scope of [its] jurisdiction." *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011).

a. Final Agency Action

Finality is a "jurisdictional prerequisite of judicial review." *Data Mktg. P'ship*, 45 F.4th at 853 (quotation omitted). The APA provides a right to judicial review of "final agency action" unless the statute precludes judicial review or the action falls under agency discretion. 5 U.S.C. § 701(a). To meet the limited agency exception, there must be "no meaningful standard against which to judge the agency's exercise of discretion." *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (quotation omitted). Actions that fall under agency discretion are rare and only apply when the standard of review is unclear.[14]

The text of the HEROES Act does not preclude judicial review, and the Secretary's action falls within the Act's plain text, which authorizes waivers or modifications of various student-loan provisions. 20 U.S.C.

[14] *See, e.g.*, *Lincoln*, 508 U.S. at 191 (1993) (holding that an agency's use of lump-sum appropriation funds with no designation fell within the agency's discretion); *Franklin v. Massachusetts,* 505 U.S. 788, 817, (1992) (holding that an agency's decision to fire employee fell within the agency's discretion); *Heckler v. Chaney,* 470 U.S. 821, 830, (1985) (holding that an agency's decision not to enforce their own policy fell within the agency's discretion).

§ 1098bb(a)(1). This provides a clear standard of review. Thus, neither exception in § 701(a) applies here.

Finality requires two things: (1) the action must be the ending result or "consummation" of the entire agency decision-making process—not a tentative or intermediate step in the process—and (2) the action must determine rights or obligations that produce legal consequences. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597, 599 (2016).

Both conditions of finality are present. *First*, in the Secretary's notice, the Department spells out its decision-making process, legal basis for the decision, and intent to proceed with the Program. Nothing in the waiver's text reflects that the decision to implement the Program is provisional or still under review. *Second*, the action—the Program—forgives around eight million individuals a portion of their legally-binding student loan obligations, costing over $400 billion. This action affects the rights and obligations of millions of loan recipients and carries sweeping legal consequences for federal student-loan programs by changing the terms of the HEA.

The Agency's action is thus final.

b. Zone of Interests

Along with the finality requirement, the Court may review an agency action only if a plaintiff's interests are "arguably within the zone of interests to be protected or regulated by the statute that he says was violated." *Patchak*, 567 U.S. at 224. A plaintiff with Article III standing satisfies the requirement unless their "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 177 (2011) (quotation omitted). But doing so is not "especially demanding," and "the benefit of any doubt goes to the plaintiff." *Patchak*, 567 U.S. at 225.

Here, Plaintiffs have Article III standing. And because the Secretary considers Plaintiffs "affected individuals" under the HEROES Act and are federal loan recipients excluded from the Program, they satisfy the zone-of-interest test. The Court may thus review the agency's implementation of the Program.

C. Summary Judgment

Article I of the Constitution allows Congress to "delegate" some of its legislative powers to administrative agencies. U.S. CONST. art. I, § 8, cl. 3; *see Mistretta v. United States*, 488 U.S. 361, 372 (1989). When administering their delegated authority, agencies must comply with the APA's procedural and substantive requirements. *See* 5 U.S.C. § 553. The procedural requirements obligate agencies to subject their substantive rules to notice and comment unless an exception applies. *See* 5 U.S.C. § 553. The substantive requirements "'requires courts to hold unlawful and set aside agency action' that is 'in excess of statutory jurisdiction, authority, or limitations.'" *See Texas v. United States,* 50 F.4th 498, 525 (5th Cir. 2022) (quoting 5 U.S.C. § 706(2)(C)).

Plaintiffs argue that the Program violates the APA's procedural and substantive requirements. The Court addresses each in turn.

1. APA's Procedural Requirements

Plaintiffs argue that the Program violates the APA's procedural requirements because it did not go through notice and comment before implementation. ECF No. 4 at 13.

The APA requires agencies to subject their substantive rules to notice and comment. *See* 5 U.S.C. § 553. Substantive rules "grant rights, impose obligations, or produce other significant effects on private interests." *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 908 (5th Cir. 1983) (quoting *Batterton v. Marshall*, 648 F.2d 694, 701–02 (D.C. Cir. 1980)). A substantive rule is usually unenforceable if it does not undergo notice and comment. *Id.* But if the agency's authorizing statute expressly exempts the agency's rules from notice and comment, the rule is enforceable. 5 U.S.C. § 559.

Plaintiffs argue that the Program is a substantive rule because it "'grants rights' by promising to eliminate individuals' debt if they meet certain requirements and 'imposes obligations' on the Department to forgive debt for those who meet the requirements." *See* ECF No. 4 at 14 (quoting *W & T Offshore, Inc. v. Bernhardt*, 946 F.3d 227, 237 (5th Cir. 2019)). They rely on *Bernhardt* to support their argument. But this reliance is misplaced. In *Bernhardt*, the agency's statutory authority did not exempt the agency from notice-and-comment requirements of the APA. 946 F.3d at 237. The statutory authority here does: "Notwithstanding section 1232 of this title and section 553 of Title 5, the Secretary shall by notice in the Federal Register, publish the waivers or modifications of statutory and regulatory provisions the Secretary deems necessary to achieve the purposes of this section." § 1098bb(b)(1).[15]

Plaintiffs, however, argue that § 1098bb(b)(1) "applies only when the waiver or modifications are 'authorized' under Section 1098bb(a)" and that the Program is not "authorized" by § 1098bb(a). ECF No. 26 at 7. Whether the HEROES Act authorizes the Program pertains to the APA's substantive requirements. But as a procedural matter, the Secretary may waive or modify any provision without notice and comment under the HEROES Act. All the APA requires is that the Secretary publish the modifications of title IV of the HEA, which the Secretary has done here.

Thus, because the Program was issued under the HEROES Act, which exempts notice and comment, the Program did not violate the APA's procedural requirements. Whether the HEROES Act authorized the Program is a different story.

2. <u>APA's Substantive Requirements</u>

Plaintiffs contend that the Secretary lacks the authority to implement the Program under the HEROES Act. ECF Nos. 4 at 16; 34 at 4. When reviewing an agency's interpretation of its statutory authority, courts have generally applied the framework established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S.

[15] Whether § 1098bb(b)(1) exempts notice and comment turns on the word "notwithstanding." But a dictionary definition of "notwithstanding" does not answer that question as "[d]rafters often use *nothwithstanding* in a catchall provision, where its supposed referent is unclear." *See* A. SCALIA & B. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 126 (2012) (emphasis in original). "A dependent phrase that begins with notwithstanding indicates that the main clause that it introduces or follows derogates from the provision to which it refers." *Id.* Thus, "*notwithstanding* is a fail-safe way of ensuring that the clause it introduces will absolutely, positively prevail." *Id.* at 127. Here, "notwithstanding" in § 1098bb(b)(1) means without obstruction from the notice and comment requirements. Plaintiffs do not dispute this meaning.

837, 843–44 (1984). Under *Chevron*, if a statute is ambiguous about the issue, courts defer to the agency's interpretation of the statute if it is "reasonable." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009)). In recent years, however, the Supreme Court has chipped away at *Chevron*—giving back "the benefit of doubt about the meaning of an ambiguous law to the individual" instead of the government. *Buffington v. McDonough*, No. 21-972, 2022 WL 16726027, at *5 (U.S. Nov. 7, 2022) (cleaned up).

The most recent example of *Chevron's* fall is the crystallization of the long-developing major-questions doctrine in *West Virginia. v. EPA*, 142 S. Ct. 2587 (2022).[16] The doctrine provides that when an agency seeks to resolve a major question, a "merely plausible textual basis for the agency action" is not enough. *Id.* at 2609. "The agency instead must point to 'clear congressional authorization' for the power it claims. *Id.* (quoting *Utility Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

Plaintiffs contend that the Program fails under the major-questions doctrine. The Court thus addresses whether the doctrine applies. And if so, whether there is "clear congressional authorization" for the Program.[17]

a. The Major-Questions Doctrine Applies

The major-questions doctrine applies if an agency claims the power to make decisions of vast "economic and political significance." *Id.* at 2607–14. It is unclear what exactly constitutes "vast economic significance." But courts have generally considered an agency action to be of vast economic significance if it requires "billions of dollars in spending." *King v. Burwell*, 576 U.S. 473, 485 (2015). For example, the Supreme Court in *Alabama Association of Realtors v. Department of*

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[16] The major-questions doctrine's precise relationship to the *Chevron* framework is unclear, as the Court did not mention *Chevron* in that case. Defendants stated at the preliminary-injunction hearing that *Chevron* does not apply if the major-questions doctrine applies. *See* ECF No. 32. Nor does either party mention *Chevron* in their briefs. For those reasons, the Court reasons that *Chevron* is not applicable here. But even if it were applicable, the major questions doctrine compels the same result—the Secretary lacks "clear congressional authorization" to implement the Program—regardless of how the major-questions doctrine fits into the *Chevron* framework.

Health & Human Services reasoned that an economic impact of $50 billion was of vast economic significance. 141 S. Ct. 2485, 2489 (2021). Similarly, the Fifth Circuit in *BST Holdings, L.L.C v. OSHA* held that $3 billion in compliance costs was enough to trigger the major-questions doctrine. 17 F. 4th 604, 617 (5th Cir. 2021). Because the Program will cost more than $400 billion—over 100 times more than the amount in *BST Holdings* and 20 times more than the amount in *Alabama Association of Realtors*—it has vast economic significance.

An agency action is politically significant if Congress has been "engaged in robust debates" over bills authorizing something like the agency's action. *West Virginia.*, 142 S. Ct. at 2620–21 (Gorsuch, J., concurring). And if Congress "considered and rejected" such bills, "that too may be a sign that an agency is attempting to work around the legislative process to resolve for itself a question of great political significance." *Id.* (cleaned up). For example, in *NFIB v. OSHA*, the Supreme Court held that the major-questions doctrine applied when various vaccine mandate bills considered by Congress had failed, and an agency sought to mandate COVID-19 vaccines for millions of Americans. 142 S. Ct. 661, 662–66 (2022).

Similarly, Congress has introduced multiple bills to provide student loan relief to those who make under a certain amount. *See* S. 2235, 116th Cong. (2019); H.R. 2034, 117th Cong. (2021). And all have failed. A bill was also introduced—to respond to the economic impact of COVID-19—that provided the Secretary the authority to "cancel or repay" federal student loans up to "$10,000 [of] the outstanding balance" for certain borrowers. *See* H.R. 6800, 116th Cong. § 150117(h). But this bill also failed. Thus, considering Congress's extensive consideration of various bills attempting to forgive student loans and failure to pass such bills, the Program is of vast political significance.

Oddly enough, Defendants do "not deny that this is a case of economic and political significance." ECF No. 24 at 22. Instead, they argue that the doctrine does not apply because "this case involves the disbursement of a federal benefit to individuals, not the kind of expansive regulation of private parties that have previously triggered the doctrine." *Id.* at

23.[18] But this statement is untrue. *See Kentucky v. Biden*, 23 F.4th 585, 606–08 (6th Cir. 2022) (applying the major-questions doctrine to vaccine mandate for federal employees); *Georgia v. President of the U.S.*, 46 F.4th 1283, 1295–96 (11th Cir. 2022) (same). And even if this were true, the Court would not presume that the doctrine does not apply to an agency decision of vast economic and political significance because it involves the disbursement of a federal benefit. Instead, the Court must "presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'" *West Virginia*, 142 S. Ct. at 2609 (quoting *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017)).

Thus, because the Program is an agency action of vast economic and political significance, the major-questions doctrine applies.

b. The Secretary Lacks "Clear Congressional Authorization" to Implement the Program

Because the major-questions doctrine applies, the Government's assertion of authority is treated with "skepticism." *West Virginia*, 142 S. Ct. at 2614. "To overcome that skepticism, the Government must . . . point to clear congressional authorization" permitting its action. *Id.* (cleaned up). To do so, Defendants point to the HEROES Act. But the text of the Act points the other way for at least three reasons. *See Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845) ("The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used.").

First, the HEROES Act does not mention loan forgiveness. If Congress provided *clear* congressional authorization for $400 billion in student loan forgiveness via the HEROES Act, it would have mentioned loan forgiveness. The Act allows the Secretary only to "waive or modify" provisions of title IV. The Secretary then uses that provision to rewrite

[18] The Court finds it telling that Defendants—rather than addressing Plaintiffs' arguments that the major-questions doctrine applies—copied and pasted their entire major-questions doctrine section from another lawsuit challenging the Program. *Compare* ECF No. 24 at 22–26, *with Nebraska v. Biden*, No. 4:22-CV-1040-HEA, ECF No. 27 at 29–35.

title IV portions to provide for loan forgiveness.[19] But "enabling legislation" like the HEROES Act is not an "open book to which the agency may add pages and change the plot line." *West Virginia*, 142 S. Ct. at 2609 (2022); *U.S. Fleet Servs. Inc. v. City of Fort Worth*, 141 F. Supp. 2d 631, 644 (N.D. Tex. 2001) (Mahon, J.) (refusing to engage in an exercise of "legal jingoism" requiring the court to insert words into a law or rule to arrive at a particular party's interpretation). Agencies may "not seek to hide elephants in mouseholes." *West Virginia*, 142 S. at 2622 (Gorsuch, J., concurring) (quoting *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)).

Second, the portions of the HEROES Act Defendants rely on fail to provide clear congressional authorization for the Program. Defendants rely on the COVID-19 pandemic as their justification for the Program. They contend that the HEROES Act allows the Secretary the authority to address the financial hardship of the COVID-19 pandemic. Indeed, the COVID-19 pandemic falls within the HEROES Act's definition of an emergency. § 1098ee(4). But it is unclear whether the Program is "necessary in connection with [that] national emergency." § 1098bb(a)(1). The COVID-19 pandemic was declared a national emergency almost three years ago and declared weeks before the Program by the President as "over."[20] Thus, it is unclear if COVID-19 is still a "national emergency" under the Act.

Defendants contend that in ten years, they could still use the HEROES Act to forgive student loan debt because of the COVID-19 pandemic if the Secretary deems it "necessary." ECF No. 32, at 69–70. But a legislative provision with "broad or general language" will not

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[19] As the Texas Supreme Court recognized 130 years ago:

> When the purpose of a legislative enactment is obvious from the language of the law itself, there is nothing left to construction. In such case it is vain to ask the courts to attempt to liberate an invisible spirit, supposed to live concealed within the body of the law, and thus interpret away the manifest legislative intention by embracing subjects not fairly within the scope of the statute.

Dodson v. Bunton, 17 S.W. 507, 508 (Tex. 1891).

[20] 60 Minutes (@60Minutes), TWITTER (Sept. 18, 2022, 7:09 PM), https://tinyurl.com/2s35maau.

supply a clear statement. *Id.* at 2623. The Department's reliance on its ability to modify provisions of title IV "as the Secretary deems necessary in connection with a . . . national emergency" is the very language that does not supply a clear statement. *See, e.g.*, *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 ("It is hard to see what measures [the Government's] interpretation would place outside the CDC's reach, and the Government has identified no limit in [42 U.S.C.] § 361(a) beyond the requirement that the *CDC deem a measure 'necessary.*'") (emphasis added).

Third, "the agency's past interpretations of the relevant statute" is another clue that the Secretary lacks clear congressional authorization for the Program. *West Virginia.*, 142 S. Ct. at 2625 (Gorsuch, J., concurring). "When an agency claims to have found a previously 'unheralded power' in a rarely invoked statutory provision, its assertion generally warrants "a measure of skepticism." *Id.* (quoting *Utility Air*, 573 U. S., at 324). The Department has not "relied on the HEROES Act or any other statutory, regulatory, or interpretative authority for the blanket or mass cancellation. . . of student loan principal balances, and/or the material change of repayment amounts or terms." *See* Memorandum to Betsy DeVos Secretary of Education at 6.

Thus, because the Department lacks "clear congressional authorization" for the Program under the HEROES Act, the Court grants summary judgment in favor of Plaintiffs.

c. *Vacatur is the Appropriate Remedy*

Next, the appropriate remedy. Plaintiffs seek two types of relief—vacatur of the Program and nationwide injunctive relief. "Vacatur [of an agency action] retroactively undoes or expunges a past [agency] action . . . . Unlike an injunction, which merely blocks enforcement, vacatur unwinds the challenged agency action." *Data Mktg. P'ship*, 45 F.4th at 859 (quoting *Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 522 (7th Cir. 2021)) (alterations and ellipsis in original). While "[i]t is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction," these circumstances do not justify such a remedy. *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015).

Instead, "the ordinary practice is to vacate unlawful agency action." *Data Mktg. P'ship*, 45 F.4th at 859 (quoting *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019)). Vacatur is authorized by 5 U.S.C. § 706, which requires the Court to decide "all relevant questions of law [and] interpret constitutional and statutory provisions" and "hold unlawful and set aside" agency action "not in accordance with law," "in excess of statutory jurisdiction," or "short of statutory right." Because "under our Constitution, the people's elected representatives in Congress are the decisionmakers here—and they have not clearly granted the agency the authority it claims for itself," the Program is unlawful. *West Virginia*, 142 S. Ct. at 2626 (2022) (Gorsuch, J., concurring). The Court thus applies the "default rule" and vacates the Program. *See Data Mktg. P'ship*, 45 F.4th at 859–60.

Sometimes courts—though authorized by the APA to vacate an agency action—exercise their discretion to remand the action for adjustments or another agency review. *See, e.g.*, *Texas v. United States*, 50 F.4th at 529. In deciding whether to sidestep complete vacatur, courts consider "(1) the seriousness of the deficiencies of the action, that is, how likely the agency will be able to justify its decision on remand; and (2) the disruptive consequences of the vacatur." *Id.* If there is a small defect or deficiency that is quickly curable or an existing complex agency program that requires major winddown efforts, a court may remand without vacating the entire action. *See, e.g.*, *Lion Health Servs., Inc. v. Sebelius*, 635 F.3d 693, 703 (5th Cir. 2011) (remanding to the agency to recalculate amounts owed in a manner consistent with the statute).

Both factors weigh against remand. *First*, the agency's misstep is not correctible on remand—it is a complete usurpation of congressional authorization implicating the separation of powers required by the Constitution. *Second*, the Program does not require a significant administrative winddown period, as loan forgiveness has not started. Thus, remand is not the appropriate remedy.

For those reasons, vacatur of the Program is the appropriate remedy.

CONCLUSION

This case involves the question of whether Congress—through the HEROES Act—gave the Secretary authority to implement a Program that provides debt forgiveness to millions of student-loan borrowers, totaling over $400 billion. Whether the Program constitutes good public policy is not the role of this Court to determine.[21] Still, no one can plausibly deny that it is either one of the largest delegations of legislative power to the executive branch, or one of the largest exercises of legislative power without congressional authority in the history of the United States.

In this country, we are not ruled by an all-powerful executive with a pen and a phone. Instead, we are ruled by a Constitution that provides for three distinct and independent branches of government. As President James Madison warned, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47.

The Court is not blind to the current political division in our country. But it is fundamental to the survival of our Republic that the separation of powers as outlined in our Constitution be preserved. And having interpreted the HEROES Act, the Court holds that it does not provide "clear congressional authorization" for the Program proposed by the Secretary.

Thus, Plaintiffs' Motion for Summary Judgment (ECF No. 3) is **GRANTED** and Defendants' Motion to Dismiss (ECF No. 25) is

[21] Under our system of government, public policy is typically made by the Congress through a negotiated-and-reasoned process among the members, with input from the President, and based on how Congress *legislated*, those members would then be held accountable by their constituents each election cycle. *See Speaker Sam Rayburn, quoted in* D.B. Hardeman & Donald C. Bacon, RAYBURN: A BIOGRAPHY 429 (1987) ("A [politician] who is not willing to get out and defend what he has done will ultimately find himself in poor shape politically."). As President Lyndon Johnson was found of admonishing Congress, "Come now, let us reason together." JOHN BARTLETT, FAMILIAR QUOTATIONS 872 (15th ed. 1980).

DENIED. And the Court **DECLARES UNLAWFUL** and **VACATES** the Program.

SO ORDERED on this **10th day** of **November 2022**.

Mark T. Pittman
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MYRA BROWN, ET AL.,

Plaintiffs,

v. **No. 4:22-cv-0908-P**

U.S. DEPARTMENT OF EDUCATION, ET AL.,

Defendants.

FINAL JUDGMENT

This Final Judgment is issued pursuant to Federal Rule of Civil Procedure 58. Per the Order entered on November 10, 2022:

It is **ORDERED AND ADJUDGED** that Final Judgment is entered in favor of the Plaintiffs.

Plaintiffs' Motion for Summary Judgment (ECF No. 3) is **GRANTED** and Defendants' Motion to Dismiss (ECF No. 25) is **DENIED**.

The Court **DECLARES UNLAWFUL** and **VACATES** the Program.

The Clerk is **DIRECTED** to transmit a true copy of this Final Judgment to the Parties.

SO ORDERED on this **10th day** of **November 2022**.

Mark T. Pittman
Mark T. Pittman
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]

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[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.

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[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.

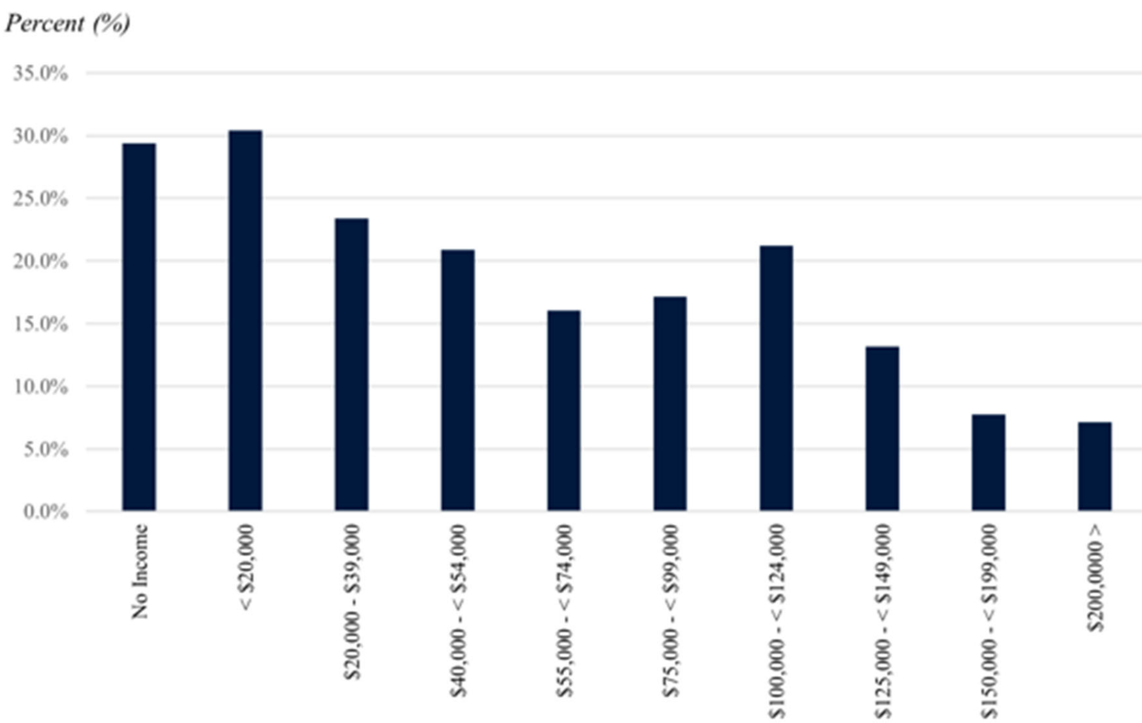
[28] These estimates would apply to a borrower who receives forgiveness but does not have their balance fully discharged and who has made their scheduled payments on the 10-year standard repayment plan since entering repayment.

[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



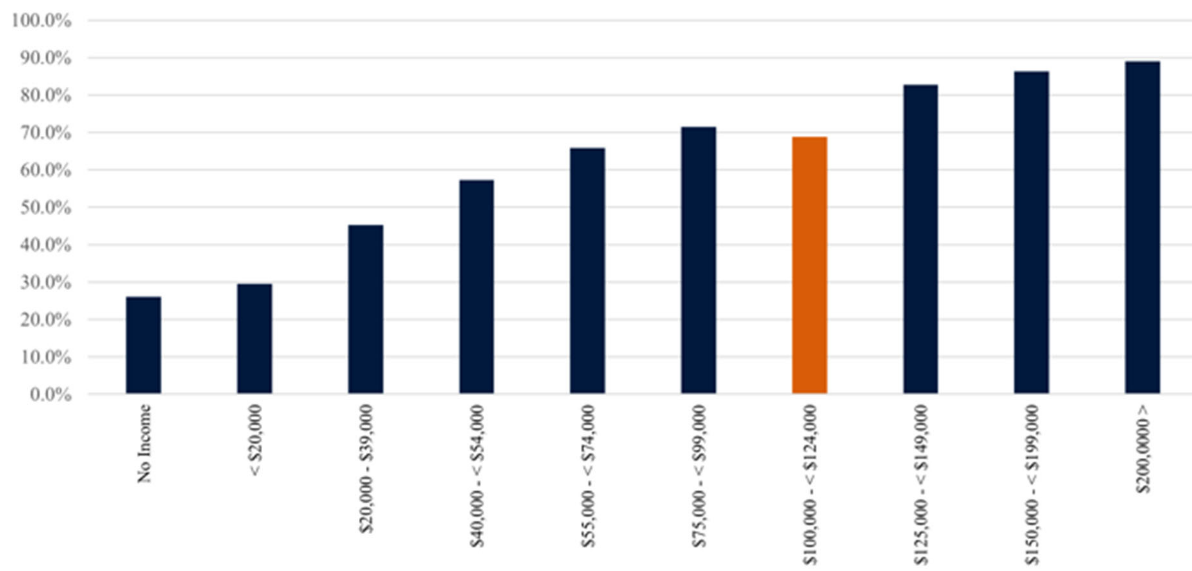
Source: Federal Reserve Bank of Philadelphia CFI COVID-19 Survey of Consumers

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 (%)

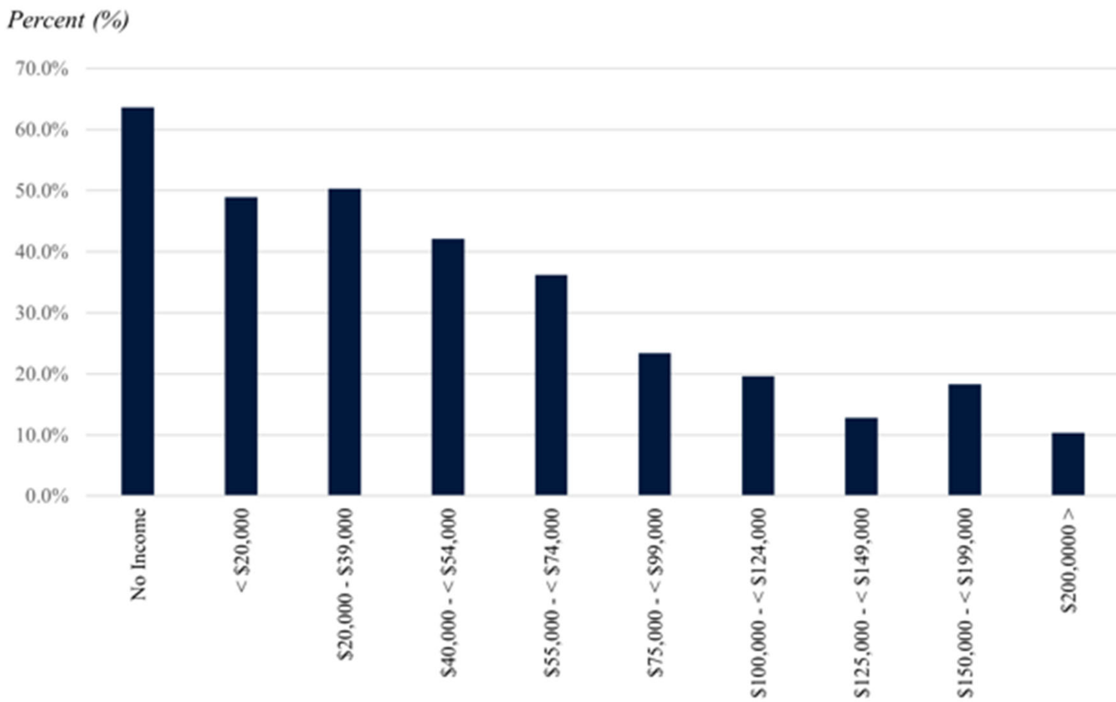


Source: Federal Reserve Bank of Philadelphia CFI COVID-19 Survey of Consumers

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



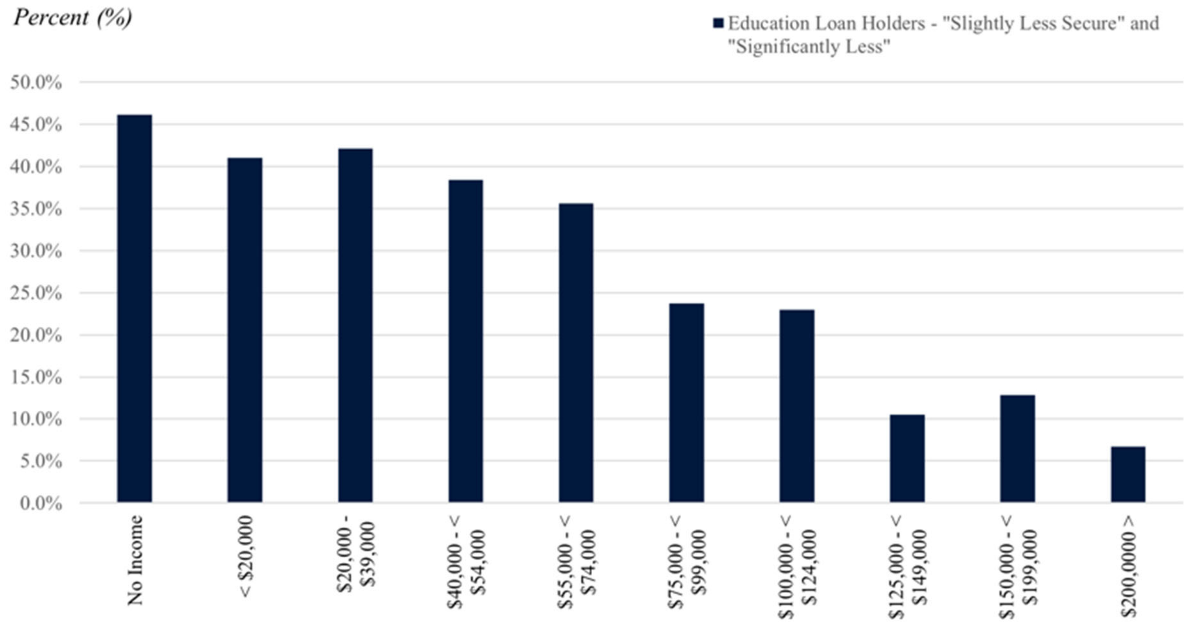
Source: Federal Reserve Bank of Philadelphia CFI COVID-19 Survey of Consumers

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.

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[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.

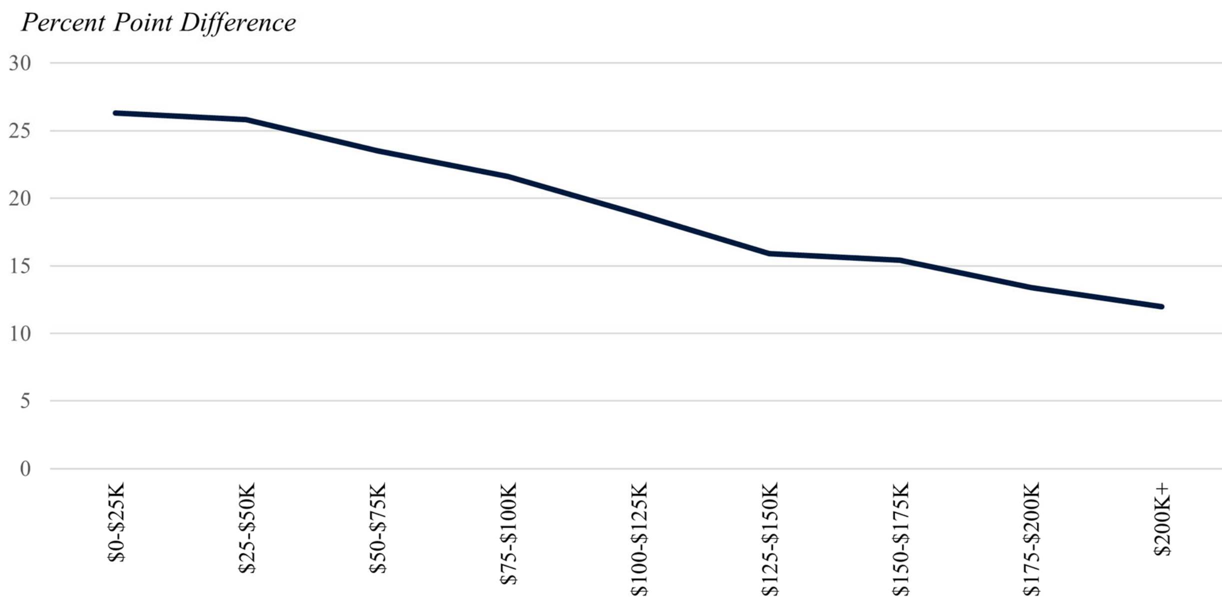
A literature review from the Department of Health and Human Services highlighted the disproportionate job losses for low-wage workers and the wide-reaching impacts of job loss on material hardship and food insecurity.[37] The review emphasizes that among low-wage workers, women and people of color were 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.