Nos. 22-506 and 22-535

In the Supreme Court of the United States

JOSEPH R. BIDEN, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

STATE OF NEBRASKA, ET AL.

DEPARTMENT OF EDUCATION, ET AL., PETITIONERS

v.

MYRA BROWN, ET AL.

ON WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND FIFTH CIRCUITS

JOINT APPENDIX

ELIZABETH B. PRELOGAR
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217
Counsel of Record for Petitioners

JAMES A. CAMPBELL
Nebraska Attorney General's Office
2115 State Capitol
Lincoln, NE, 68509
jim.campbell@nebraska.gov
(402) 471-2682
Counsel of Record for Nebraska et al.

J. MICHAEL CONNOLLY
Consovoy McCarthy PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
mike@consovoymccarthy.com
(703) 243-9423
Counsel of Record for Myra Brown et al.

PETITIONS FILED: NOV. 18, 2022 AND DEC. 2, 2022
CERTIORARI GRANTED: DEC. 1, 2022 AND DEC. 12, 2022

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

4:22-cv-01040

STATE OF NEBRASKA; STATE OF MISSOURI;
STATE OF ARKANSAS; STATE OF IOWA;
STATE OF KANSAS; AND STATE OF SOUTH CAROLINA,
PLAINTIFFS

v.

JOSEPH R. BIDEN, JR.,
IN HIS OFFICIAL CAPACITY AS THE PRESIDENT OF THE
UNITED STATES OF AMERICA;
MIGUEL CARDONA, IN HIS OFFICIAL CAPACITY AS
SECRETARY, UNITED STATES DEPARTMENT OF
EDUCATION; AND UNITED STATES DEPARTMENT OF
EDUCATION, DEFENDANTS

Filed: Sep. 29, 2022

COMPLAINT

1. The economy is not well. Per the last report from the Bureau of Labor Statistics, inflation has eroded the livelihood of the working class, with real average hourly earnings (*i.e.*, the purchasing power of those wages) down 3.4 percent from last year. *Real Earning Summary*, U.S. Bureau of Labor Statistics (Sept. 13, 2022), https://tinyurl.com/bddwnj6d. Drilling into the numbers illustrates how bad it is. From August 2021 to August 2022—the latest numbers available—the cost of food has gone up 11.4 percent, with the

price of groceries increasing 13.5 percent. *Consumer Price Index Summary*, U.S. Bureau of Labor Statistics (Sept. 13, 2022), https://tinyurl.com/yxcdu3dd. Likewise, gas is up 25.6 percent, and electricity is up 15.8 percent. *Id*.

2. And there is no sign of relief. On September 21, 2022, the Federal Reserve Board and Bank presidents projected that the unemployment rate would increase over the next year. *See Summary of Economic Projections*, Federal Reserve Bank, at 2 tlb.1 (Sept. 21, 2022), https://tinyurl.com/ycxkvn52. And inflation, the Federal Reserve projects, is likely to be above 5 percent for this year while the economy struggles along with barely a pulse. *See id.* (looking at PCE inflation and projected real GDP growth of 0.2 percent).

3. The burden of the economic loss and price increases will hit those who can least afford it—the working class and the poor. *See, e.g.*, Jack Kelly, *Inflation Will Wreak Havoc on the Working Class*, Forbes (July 24, 2022), https://tinyurl.com/y83v6xwu. The well-off, however, can handle the hardship. For example, "Jordan Trevino, 28, who recently took a better paying job in advertising in Los Angeles with a $100,000 salary, is economizing in little ways—ordering a cheaper entree when out to dinner, for example. But he is still planning a wedding next year and a honeymoon in Italy." Jeanna Smialek & Ben Casselman, *In an Unequal Economy, the Poor Face Inflation Now and Job Loss Later*, N.Y. Times (Aug. 11, 2022), https://tinyurl. com/yhfp9tdy.

4. In the face of out-of-control inflation, job loss, and recession, the Biden Administration's response is to give Mr. Trevino, and those like him, up to $20,000.

5. The Administration will do that by cancelling $10,000 to $20,000 of student loan debt for individuals who make less than $125,000 annually, or $250,000 annually for a married person filing jointly. The Administration announced this Mass Debt Cancellation on August 24, 2022.

6. The majority of the Mass Debt Cancellation will "accrue[ ] to the debt borrowers in the top 60 percent of the income distribution." *Forgiving Student Loans: Budgetary Costs and Distributional Impact*, Penn Wharton University of Pennsylvania (Aug. 23, 2022), https://tinyurl.com/vpwkes2n. And none of the benefit will accrue to those who worked and paid their debt.

7. In addition to being economically unwise and downright unfair, the Biden Administration's Mass Debt Cancellation is yet another example in a long line of unlawful regulatory actions. No statute permits President Biden to unilaterally relieve millions of individuals from their obligation to pay loans they voluntarily assumed. Just months ago, the Supreme Court warned federal agencies against "asserting highly consequential power beyond what Congress could reasonably be understood to have granted" by statute. *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2609 (2022). Yet the Administration's Mass Debt Cancellation does precisely that. Determined to pursue across-the-board debt cancellation and stymied by repeated failures to achieve that goal through legislation, the Administration resorted to a federal law whose purpose is to provide relief to individuals who have suffered from an emergency like the 9/11 terrorist attacks or who must serve their country overseas in the military.

8. That law—known as the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act)—had previously been used by the Department of Education (ED) to relieve active-duty personnel from nettlesome bureaucratic constraints by waiving various administrative requirements such as grace periods and documentation requirements that might complicate service in active operations. It is inconceivable, when it passed the HEROES Act, that Congress thought it was authorizing anything like the Administration's across-the-board debt cancellation, which will result in around half a trillion dollars or more in losses to the federal treasury. *See The Biden Student Loan Forgiveness Plan: Budgetary Costs and Distributional Impact*, Penn Wharton University of Pennsylvania (Aug. 26, 2022), https://tinyurl.com/4y9rz8w5 [Penn Report].

9. In fact, until now, no one thought that such a power lurked within the HEROES Act, or any other existing federal law. House Speaker Nancy Pelosi declared categorically: "People think that the President of the United States has the power for debt forgiveness. He does not . . . That has to be an act of Congress. . . . The President can't do it. So that's not even a discussion." Lauren Camera, *Pelosi: Biden Lacks Authority to Cancel Student Debt*, U.S. News & World Report (July 28, 2021), https://tinyurl.com/33ex63de. And ED previously concluded that the HEROES Act is not a hidden source of authority to cancel student debt. *See* Memorandum from Reed Rubinstein, Principal Deputy General Counsel, Department of Education, to Betsy DeVos, Secretary of Education 6 (Jan. 12, 2021), https://tinyurl.com/3kp29ys6 [2021 DeVos Memo].

10. Speaker Pelosi and the 2021 DeVos Memo are right. The HEROES Act allows the Secretary of Education "to waive or modify any statutory or regulatory provision applicable to" certain student financial assistance programs "in connection with a war or other military operation or national emergency" to protect those negatively affected by the operation or emergency. Pub. L. No. 108-76, 117 Stat. 904 (codified at 20 U.S.C. § 1098bb(a)(1)). It is not an across-the-board get-out-of-debt provision that an administration can invoke at will.

11. Even if the HEROES Act could permit *some* discharge of student loan debt, the Administration itself recognized in an Office of Legal Counsel (OLC) opinion that any waiver or modification under the Act must be (1) "structured to put loan recipients back into the financial position they would be in were it not for the national emergency" and (2) limited only to the harm that has a relation to the borrower's federal loans, "no matter how much financial harm a borrower may have suffered because of a national emergency." OLC August 23, 2022 Memorandum Opinion at 21, https://tinyurl.com/2s3k238w [2022 OLC Memo]. The Biden Administration's Mass Debt Cancellation does not even attempt to meet these requirements. It instead justifies relief for all borrowers whose debt the Administration holds based on talismanic reference to the COVID-19 pandemic. It makes no difference to the Administration's cancellation whether the pandemic rendered a borrower better or worse off or how much financial harm the borrower suffered in relation to her loans. Thus, the Mass Debt Cancellation is not remotely tailored to address the effects of the pandemic on federal student loan borrowers, as required by the HEROES Act. The Mass Debt Cancellation in-

stead disregards the Act's objectives and express requirements and distorts the Act beyond recognition in the service of the Administration's political agenda on student loans. It is the epitome of unlawful and arbitrary agency action, and it should be set aside.

THE PARTIES

12. Plaintiff State of Nebraska is a sovereign State of the United States of America. Nebraska sues to vindicate its sovereign, quasi-sovereign, financial, and proprietary interests.

13. Douglas J. Peterson is the Attorney General of Nebraska. Attorney General Peterson is authorized to bring legal actions on behalf of the State of Nebraska and its citizens.

14. Plaintiff State of Missouri is a sovereign State of the United States of America. Missouri sues to vindicate its sovereign, quasi-sovereign, financial, and proprietary interests.

15. Eric S. Schmitt is the 43rd Attorney General of the State of Missouri. Attorney General Schmitt is authorized to bring actions on behalf of Missouri that are "necessary to protect the rights and interests of the state, and enforce any and all rights, interests, or claims any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary." Mo. Rev. Stat. § 27.060.

16. Plaintiff State of Arkansas is a sovereign State of the United States of America. Arkansas sues to vindicate its sovereign, quasi-sovereign, financial, and proprietary interests.

17. Leslie Rutledge is the Attorney General of Arkansas. General Rutledge is authorized to "maintain and defend the interests of the state in matters before the United States Supreme Court and all other federal courts." Ark. Code Ann. 25-16-703.

18. Plaintiff State of Iowa is a sovereign State of the United States of America. Iowa sues to vindicate its sovereign, quasi-sovereign, financial, and proprietary interests.

19. The Attorney General of Iowa of Iowa is authorized and required to prosecute legal actions on behalf of the State of Iowa and its citizens when requested to do so by the Governor. *See* Iowa Code § 13.2(1)(b).

20. Plaintiff State of Kansas is a sovereign State of the United States of America. Kansas sues to vindicate its sovereign, quasi-sovereign, proprietary, and *parens patriae* interests.

21. Derek Schmidt is the Attorney General of Kansas. Attorney General Schmidt is authorized to bring legal actions on behalf of the State of Kansas and its citizens.

22. Plaintiff State of South Carolina is a sovereign State of the United States of America. South Carolina sues to vindicate its sovereign, quasi-sovereign, financial, and proprietary interests.

23. Alan Wilson is the Attorney General of South Carolina. Attorney General Wilson is authorized to bring legal actions on behalf of the State of South Carolina and its citizens.

24. Defendants are officials of the United States government and United States governmental agencies

responsible for implementing the Mass Debt Cancellation.

25. Defendant Joseph R. Biden, Jr. is the President of the United States of America. He is sued in his official capacity.

26. Defendant Miguel Cardona is the Secretary of Education. He is sued in his official capacity.

27. Defendant United States Department of Education (ED) is an agency of the United States government, located at 400 Maryland Avenue, S.W., Washington, D.C. 20202.

28. This Court has jurisdiction pursuant to 5 U.S.C. §§ 702-703 and 28 U.S.C. §§ 1331, 1361, and 2201.

29. This Court is authorized to award the requested declaratory and injunctive relief under 5 U.S.C. §§ 702 and 706, 28 U.S.C. §§ 1361 and 2201-2202, and its inherent equitable powers.

30. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b)(2) and 1391(e). Defendants are United States agencies or officers sued in their official capacities. Plaintiff State of Missouri is a resident of this judicial district, and a substantial part of the events or omissions giving rise to the Complaint occur within this district.

31. The Plaintiff States bring this action to redress harms to their sovereign, quasi- sovereign, financial, and proprietary interests, including their interests under 5 U.S.C. § 702 and 41 U.S.C. § 1707.

FACTUAL ALLEGATIONS

The Decade-Long Political Push For Student-Loan Debt Cancellation

32. In September 2011, the Occupy Wall Street movement began. Out of that movement grew the Occupy Student Debt Campaign, which encouraged borrowers to default on student-loan payments as a form of protest. Amanda M. Fairbanks, *Occupy Student Debt Campaign Announces Nationwide Loan Refusal Pledge*, Huffington Post (Nov. 11, 2011), https://tinyurl.com/sm9upf56. In November 2015, inspired by statements made by Senator Bernie Sanders, students at over one hundred college campuses staged a walk-out to protest the cost of college in the "Million Student March." Danielle Douglas-Gabriel, *Million Student March Fights for Debt-Free College*, Wash. Post (Nov. 12, 2015), https://tinyurl.com/bdutx2ns. The students "demand[ed] . . . the cancellation of all student debt." *Id.* The next year, ED established a pathway to cancel loans for students defrauded by for-profit colleges. Anya Kamenetz & Kirk Carapezza, *A Path 'To Debt Relief' For Defrauded Corinthian Students*, NPR (Mar. 25, 2016), https://tinyurl.com/2p8y9ycf.

33. In 2018, one commentator predicted that "come 2020, at least one major Democratic candidate for president is going to campaign on outright canceling a boatload of student debt" because "student debt forgiveness is really, really popular among Democrats." Jordan Weissmann, *Student Debt Forgiveness Is Really, Really Popular Among Democrats*, Slate (Nov. 18, 2018), https://tinyurl.com/yyvss2ba (capitalization altered). In April 2019, Senator Elizabeth Warren announced a proposal for student-debt cancellation, stating that her

"plan for broad student debt cancellation" would "[c]ancel debt for more than 95% of the nearly 45 million Americans with student loan debt" and "[w]ipe out student loan debt entirely for more than 75% of the Americans with that debt." Elizabeth Warren, *I'm Calling For Something Truly Transformational: Universal Free Public College And Cancellation Of Student Loan Debt*, Medium (Apr. 22, 2019), https://tinyurl.com/mrxy3arr.

34. In June 2019, Senator Sanders announced his own proposal to "[c]ancel all student loan debt for the [approximately] 45 million Americans who owe about $1.6 trillion and place a cap on student loan interest rates going forward at 1.88 percent." Bernie Sanders, *College for All and Cancel All Student Debt*, https://tinyurl.com/yu8r4avy (last visited Sept. 28, 2022).

35. In April 2020, then-candidate Biden announced a proposal 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, with appropriate phase-outs to avoid a cliff." Joe Biden, *Joe Biden Outlines New Steps to Ease Economic Burden on Working People*, Medium (Apr. 9, 2020), https://tinyurl.com/3cbw4zh2 [Biden Medium Article]. He did not suggest that his proposal had anything to do with the COVID-19 pandemic, which was well underway by April 2020.

Background of Relevant Student Loan Programs

36. The Higher Education Act (HEA) establishes several student-loan programs. The two that are the most relevant to this lawsuit are the Direct Loan Program (DLP) and Federal Family Education Loan Program (FFELP). 20 U.S.C. §§ 1071 *et seq.*, 1087a *et seq.*

37. The origination of new FFELP loans stopped on July 1, 2010. But many FFELP loans still exist and are subject to ongoing repayment.

38. There are entities, some of which are state instrumentalities, that service FFELP loans and generate revenue from that servicing work. There are also entities, some of which are state instrumentalities, that hold FFELP loans and earn income from the interest payments on those loans. And there are investors, some of which are state agencies, that invest in student-loan asset-backed securities (SLABS) secured by FFELP loans. SLABS are FFELP loans bundled, rated, and sold in tranches to institutional investors as bonds.

39. All student loans originating under the HEA beginning on July 1, 2010, have been, and in the future will be, originated under the DLP.

40. There are entities, some of which are state instrumentalities, that service DLP loans and generate revenue from that servicing work.

41. Student-loan borrowers may consolidate FFELP loans into DLP loans. *See* 34 C.F.R. § 685.220 (providing the criteria for consolidation). Such a direct consolidation loan comes "at no cost" to the borrower. *Direct Consolidation Loan Application*, Federal Student Aid, https://tinyurl.com/bdfhxser (last visited Sept. 28, 2022).

42. The HEA and its implementing federal regulations provide a comprehensive legal framework governing federal student loan assistance and borrowers' obligations to repay their loans, including how and when

certain loan statuses qualify for income-driven repayment (IDR) and Public Service Loan Forgiveness (PSLF).

43. The HEA sets forth the "[t]erms and conditions" of DLP loans, including the "[r]epayment plan for public service employees" and "income-based repayment plan." 20 U.S.C. § 1087e.

44. Federal regulation also specifies the conditions under which "[a] borrower may obtain loan forgiveness under [the FFELP] program," 34 C.F.R. § 685.219(c), and under which a borrower "qualif[ies] for loan forgiveness" under the IDR program, *id.* § 685.221(f).

45. While the HEA includes a variety of provisions allowing the Secretary to promulgate regulations for income-driven repayment and other repayment programs, no provision of the HEA authorizes the Secretary to implement a mass cancellation of student-loan debt.

ED's, The Biden Administration's, And Speaker Pelosi's Recognition That Student Debt Cancellation Via Unilateral Executive Action is Unlawful

46. On January 12, 2021, ED published a memorandum concluding that mass student- loan debt cancellation could not be accomplished through executive action. *See* 2021 DeVos Memo, *supra*, at 4, 6. ED noted that it "has never 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." *Id.* at 6.

47. In July 2021, Speaker Pelosi stated at a press conference: "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 an act of Congress. . . . The President can't do it. So that's not even a discussion." Camera, *supra*.

48. Though President (then-candidate) Biden expressed support for cancelling federal student-loan debt in April 2020, *see* Biden Medium Article, *supra*, it appears that he eventually came to agree with Speaker Pelosi. When asked about student-loan cancellation in November 2020, President-elect Biden responded by citing proposed legislation that would cancel student debt rather than discussing executive action. Adam Looney, *Biden Shouldn't Listen to Schumer and Warren on Student Debt*, Brookings (Nov. 18, 2020), https://tinyurl.com/bdew8ufr. In October 2021, White House Press Secretary Jen Psaki reiterated that "[i]f Congress wanted to pass and send the president a bill to cancel $10,000 in student debt, he'd happily sign it." Zack Friedman, *Biden Ready To Sign Student Loan Forgiveness, But Congress Hasn't Passed Any Legislation*, Forbes (Oct. 5, 2021), https://tinyurl.com/bdfxkyfp. These comments indicate that President Biden thought mass student loan cancellation must come through Congress.

The Failure of Proposed Legislation to Enact Student-Debt Cancellation

49. Despite the Biden Administration's invitation, attempts to enact legislation cancelling student-loan debt have repeatedly failed.

50. In July 2019, Senator Warren introduced the Student Loan Debt Relief Act of 2019, a bill that would have automatically canceled $50,000 of student loan debt

for those who make under $100,000. The bill failed. *See* Student Loan Debt Relief Act of 2019, S. 2235, 116th Cong. (2019).

51. In March 2021, Representative Al Lawson introduced the Income-Driven Student Loan Forgiveness Act, which would have cancelled the outstanding balance on loans for all borrowers under a certain income cap. *See* Income-Driven Student Loan Forgiveness Act, H.R. 2034, 117th Cong. (2021). The bill failed.

52. In February 2021, Senators Warren and Chuck Schumer and Representatives Alma Adams, Ilhan Omar, and Mondaire Jones introduced a resolution asserting that the Biden Administration has statutory power to cancel student debt immediately. Elizabeth Warren, *Warren, Schumer, Pressley, Colleagues: President Biden Can and Should Use Executive Action to Cancel up to $50,000 in Federal Student Loan Debt Immediately* (Feb. 4, 2021), https://tinyurl.com/8wpkedd9.

ED's Multiple Efforts To Prevent COVID-19 From Placing Borrowers In A Worse Position Financially

53. On March 20, 2020, in light of the COVID-19 pandemic, ED waived student-loan interest for three months and gave borrowers the option to suspend principal payments for two months for federally held student loan debt. *Delivering on President Trump's Promise, Secretary DeVos Suspends Federal Student Loan Payments, Waives Interest During National Emergency*, U.S. Department of Education (Mar. 20, 2020), https://tinyurl.com/yc3yxs4y. Secretary Betsy DeVos stated that "[r]ight now, everyone should be focused on staying safe and healthy, not worrying about their student loan balance growing." *Id.*

54. On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which extended the student-loan pause through September 30, 2020. *See CARES Act Student Loan Fact Sheet*, NCSL (Mar. 30, 2020), https://tinyurl.com/yprmp39d. The Trump and Biden Administrations then repeatedly extended the student-loan pause, which is currently scheduled to conclude on December 31, 2022. *See, e.g.*, Donald J. Trump, *Memorandum on Continued Student Loan Payment Relief During the COVID- 19 Pandemic* (Aug. 8, 2020), https://tinyurl.com/2p8sjrs4. President Trump stated that the pause "has helped many students and parents retain financial stability." *Id.*

55. In October 2021, ED announced "transformational changes" to the PSLF program. *Department of Education Announces Transformational Changes to the Public Service Loan Forgiveness Program, Will Put Over 550,000 Public Service Workers Closer to Loan Forgiveness*, U.S. Department of Education (Oct. 6, 2021), https://tinyurl.com/63y4x2ux; *PSLF Waiver Offers Way to Get Closer to Loan Forgiveness*, FEDERAL STUDENT AID, https://tinyurl.com/ 38tbtxcm (last visited Sept. 28, 2022) [October 2021 PSLF Announcement]. ED later stated that this "[r]evamping" of the PSLF program resulted in loan relief for approximately 100,000 borrowers. *Biden-Harris Administration Extends Student Loan Pause Through August 31*, U.S. Department of Education (Apr. 6, 2022), https://tinyurl.com/mr4b7udf [ED April 6 Press Release]. ED acknowledged that it "change[d]" the "[n]ormal . . . [r]equirements" and invoked purported "flexibilities provided by the HEROES Act" to justify this departure

from the HEA's framework. October 2021 PSLF Announcement, *supra*.

56. In April 2022, ED announced additional actions to provide loan cancellation to borrowers through the PSLF program and IDR plans, which it estimated would result in debt cancellation for more than 40,000 borrowers and credit toward IDR cancellation for millions more. *Department of Education Announces Actions to Fix Longstanding Failures in the Student Loan Programs*, U.S. Department of Education (Apr. 19, 2022), https://tinyurl.com/pju4nmxf [April 2022 Press Release]. On information and belief, because of those changes, service providers already have seen a dramatic increase in applications and inquiries for DLP consolidations in recent months.

The Administration's Pretextual Reliance On The Fading Pandemic to Justify Mass Debt Collection

57. In April 2022, the Biden Administration terminated an earlier order that had suspended the introduction of migrants into the United States based on concerns related to the COVID-19 pandemic. *CDC Public Health Determination and Termination of Title 42 Order*, Centers for Disease Control and Prevention (Apr. 1, 2022), https://tinyurl.com/23cp257r. "After considering current public health conditions and an increased availability of tools to fight COVID-19," the Administration wrote, it had determined that the limitation on migration was "no longer necessary." *Id.* The Administration cited "the current public health landscape where 97.1% of the U.S. population lives in a county identified as having 'low' COVID- 19 Community Level." *Id.* The Administration asserted in court that "after peaking on January 15, 2022, COVID-19 case numbers in the

United States fell by 95% as of March 28, 2022," and "[d]eath and hospitalization rates also underwent a 'swift descent.'" Mem. Opp'n Pls' Mot. Prelim Inj. at 8, *Arizona* v. *CDC*, No. 6:22-cv-00885 (W.D. La. Apr. 29, 2022), ECF No. 40. In short, the Administration observed, "the pandemic 'ha[d] shifted to a new phase.'" *Id.*

58. More recently, in a September 18, 2022 interview with 60 Minutes, President Biden was more definitive about the state of the pandemic, declaring that "[t]he pandemic is over." 60 Minutes (@60Minutes), Twitter (Sept. 18, 2022), https://tinyurl.com/2s35maau.

59. In between those two events declaring the COVID pandemic over—that is, in August 2022—ED invoked the pandemic to justify its Mass Debt Cancellation.

60. On August 24, 2022, the Administration announced that it will cancel $10,000 to $20,000 in student debt for all borrowers who have loans owned by ED and whose annual income during the pandemic was less than $125,000 (or $250,000 for married borrowers who file jointly). *FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most*, The White House (Aug. 24, 2022), https://tinyurl.com/2p8zmh2b. Borrowers who received a Pell Grant are eligible for $20,000 in loan cancellation, and borrowers who did not receive a Pell Grant are eligible for $10,000 in cancellation. *Id.*

61. The Administration estimates that "over 40 million borrowers are eligible" for the Mass Debt Cancellation. *FACT SHEET: The Biden-Harris Administration's Plan for Student Debt Relief Could Benefit Tens*

of Millions of Borrowers in All Fifty States, The White House (Sept. 20, 2022), https://tinyurl.com/ekrbnvn4.

62. DLP loans qualify for loan cancellation. *One-Time Student Loan Debt Relief*, FEDERAL STUDENT AID, https://tinyurl.com/yc7bban8 (last visited Sept. 28, 2022) [Cancellation Program Webpage]. So do FFELP "loans held by ED." *Id.*

63. In addition, FFELP borrowers who consolidate their privately held loans into DLP loans are also eligible for loan cancellation. Cancellation Program Webpage, *supra*. In fact, the Department is explicitly instructing "borrowers with privately held federal student loans" including FFELP loans that they "can receive this relief [cancellation] by consolidating these loans into the Direct Loan program [DLP]." *Id.*

64. ED has announced that many DLP borrowers—an estimated eight million of them—will receive cancellation "automatically because relevant income data is already available" to ED. *The Biden-Harris Administration's Student Debt Relief Plan Explained*, Federal Student Aid, https://tinyurl.com/msj29rdx (last visited Sept. 28, 2022) [Cancellation FAQs] ("[T]here are 8 million people for whom we have data and who will get the relief automatically."). For borrowers whose income data is not available to ED, the Administration will release a loan cancellation application in early October. *Id.*

65. Under the Mass Debt Cancellation, eligible borrowers who made payments on their debt during the pandemic will automatically have those payments refunded to them. Cancellation Program Webpage, *supra* ("You will automatically receive a refund of your

payments during the payment pause if: you successfully apply for and receive debt relief under the Administration's debt relief plan, AND your voluntary payments during the payment pause brought your balance below the maximum debt relief amount you're eligible to receive but did not pay off your loan in full."). ED has advised its loan servicers that borrowers do not have to state that their refund request is specifically due to COVID-19. The number of refunds requested and processed since ED announced the Mass Debt Cancellation has risen precipitously.

66. The Wharton School of the University of Pennsylvania released a study concluding that ED's Mass Debt Cancellation alone will cost up to $519 billion over ten years, and the overall cost could rise to more than $1 trillion when factoring in the other components of ED's announcement. *See* Penn Report, *supra.*

67. In a legal memorandum accompanying the Mass Debt Cancellation, ED revoked its previous legal analysis of the issue and asserted that the HEROES Act allows it to effectuate a program of "loan cancellation directed at addressing the financial harms of the COVID-19 pandemic." *Notice of Debt Cancellation Legal Memorandum*, 87 Fed. Reg. 52,943, 52,944 (Aug. 30, 2022). ED further claimed that it is "not required to . . . show that any individual borrower is entitled to a specific amount of relief" and "instead may provide relief on a categorical basis." *Id.*

68. The HEROES Act provides that ED, acting through the Secretary, may "waive or modify any statutory or regulatory provision applicable to [certain] student financial assistance programs" when "necessary in

connection with a war or other military operation or national emergency." 20 U.S.C. § 1098bb(a)(1). The Act further specifies, as relevant here, that this waiver or modification must be "necessary to ensure that" one of certain statutory objectives is achieved, including to ensure that "recipients of student financial assistance . . . who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." § 1098bb(a)(2)(A). The Act defines "affected individuals" as including people who (1) "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 (2) "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).

69. The HEROES Act, which was passed during the Iraq War and military operations in Afghanistan, codifies its purpose in its preamble: "To provide the Secretary of Education with *specific* waiver authority to respond to a war or other military operation or national emergency." Pub. L. No. 108-76, 117 Stat. 904 (emphasis added). Its purpose is further reflected in its "Findings" section:

> The Congress finds the following:
>
> (1) There is no more important cause than that of our nation's defense.
>
> (2) The United States will protect the freedom and secure the safety of its citizens.
>
> (3) The United States military is the finest in

> the world and its personnel are determined to lead the world in pursuit of peace.
>
> (4) Hundreds of thousands of Army, Air Force, Marine Corps, Navy, and Coast Guard reservists and members of the National Guard have been called to active duty or active service.
>
> (5) The men and women of the United States military put their lives on hold, leave their families, jobs, and postsecondary education in order to serve their country and do so with distinction.
>
> (6) There is no more important cause for this Congress than to support the members of the United States military and provide assistance with their transition into and out of active duty and active service.

20 U.S.C. § 1098aa(b). The sole focus of these findings is ensuring relief for "members of the United States military."

70. The day of the White House announcement, OLC released a memo asserting that the HEROES Act grants the Secretary authority to "reduce or eliminate the obligation to repay the principal balance of federal student loan debt, including on a class-wide basis in response to the COVID-19 pandemic." 2022 OLC Memo, *supra*, at 1.

71. OLC observed that, under the Act, a waiver or modification "would be permissible only as may be necessary to ensure the individuals are not placed in a 'worse position financially . . . *because of*'" their status as affected individuals. 2022 OLC Memo, *supra*, at 20 (citing 20 U.S.C. § 1098bb(a)(2)(A)). According to OLC, this requires ED to "determine that the COVID-

19 pandemic was a but-for cause of the financial harm" to be addressed by any mass debt cancellation. *Id.* at 21.

72. On information and belief, the Biden Administration has not made a determination that the pandemic was a but-for cause of any financial harm addressed by the Mass Debt Cancellation.

73. OLC also considered the Act's requirement that any waiver and modification "be necessary" to "ensure" that 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) (emphasis added). OLC read this requirement to mean that any waiver or modification should "put loan recipients back into the financial position" they would have held in relation to their loans "were it not for the national emergency." 2022 OLC Memo, *supra*, at 21.

74. On information and belief, the Biden Administration has not made a determination that the Mass Debt Cancellation will put borrowers back in the financial position they would have been in if not for the COVID-19 pandemic.

75. Having defined the Act's criteria for waiver or modification, OLC analyzed whether "within these parameters" ED is authorized to implement mass debt cancellation. 2022 OLC Memo, *supra*, at 21. OLC concluded that ED need not proceed "case-by-case" under the Act and is allowed to "minimize 'administrative requirements.'" *Id.* at 23. But OLC did not reach a firm conclusion about the legality of mass debt cancellation, stating only that affording "broad, categorical" debt cancellation "*could be* an appropriate invocation of the Act." *Id.* at 21 (emphasis added).

The White House Announces the Mass Debt Cancellation Without Referencing The Pandemic

76. The White House's public messaging left no doubt that the Mass Debt Cancellation reflected policy goals that had no real connection to the pandemic. A senior administration official explained during a press briefing after ED announced its Mass Debt Cancellation that President Biden had "promised to provide targeted student debt relief" "[d]uring the [2020 presidential] campaign" and was now "following through on that promise." *Background Press Call by Senior Administration Officials on Student Loan Relief*, The White House (Aug. 24, 2022), https://tinyurl.com/9a85ehn5 [Cancellation Backgrounder].

77. Later in the briefing, the same official emphasized that ED's Mass Debt Cancellation is intended to "narrow the racial wealth gap," "promot[e] equity," allow more Americans to obtain "a ticket to a middle-class life" through "post-high school education," and address education costs that have been rising "[o]ver the last 40 years." Cancellation Backgrounder, *supra*. The official did not mention the COVID-19 pandemic. *Id.*

78. These statements are in line with ED's earlier pronouncements related to student-debt cancellation during the pandemic. In its April 19 press release, for example, ED explained that its actions are designed to "address[] historical failures in the administration of the federal student loan programs," and that its actions "will begin to remedy years of administrative failures that effectively denied the promise of loan forgiveness to certain borrowers." April 2022 Press Release, *supra*.

The HEROES Act Does Not Authorize the Mass Debt Cancellation

79. ED's Mass Debt Cancellation does not accord with the HEROES Act's express requirements for waivers or modifications. The Act requires ED to tailor any waiver or modification as necessary to address the actual financial harm suffered by a borrower due to the relevant military operation or emergency. But under ED's Mass Debt Cancellation, every borrower with annual income under $125,000 (or $250,000 for married borrowers filing jointly) during the pandemic gets the same $10,000 in student-loan debt cancelled (or $20,000 if the borrower received a Pell Grant). This relief comes to every borrower regardless of whether her income rose or fell during the pandemic or whether she is in a better position today as to her student loans than before the pandemic.

80. The disconnect between ED's Mass Debt Cancellation and the HEROES Act is even greater because ED has already provided substantial relief to pandemic-affected borrowers. In March 2020, ED suspended most borrowers' obligations to make loan payments and stopped interest from accruing on their loans, and that waiver remains in place through the end of 2022. As a result, most borrowers are better off today than before the pandemic with respect to their student loans because they have paid nothing for nearly three years, no interest has accrued on their loans, and rampant inflation has reduced the real-dollar value of their debts. Since most borrowers during the pandemic missed no payments (because none were due), and most borrowers during the pandemic accrued no interest (because the interest rate has been 0%), and credit reporting bureaus

during the pandemic have been reporting student loans as being on time and the underlying loans as being current (acting to increase an individual's credit score), there is no pandemic-caused harm in relation to most borrowers' student loans. *See* 2022 OLC Memo, *supra*, at 21 (ED can "only. . . . offset that portion of the harm that has a 'relation to' the borrower's [federal] assistance").

81. In fact, 80 percent of all student-loan borrowers saw their credit scores *increase* during the pandemic, with the largest increases among borrowers with delinquent loans at the beginning of the pandemic. Daniel Mangrum, et al., *Liberty Street Economics: Three Key Facts from the Center for Microeconomic Data's 2022 Student Loan Update*, Federal Reserve Bank of New York (Aug. 9, 2022), https://tinyurl.com/59d9j8bp.

82. ED's failure to tie its Mass Debt Cancellation to the HEROES Act's requirements cannot be justified as a matter of administrative convenience. The OLC memo suggests that ED can avoid individualized determinations of economic hardship to minimize "administrative requirements." 2022 OLC Memo, *supra*, at 23–24. But this observation ignores that, even under ED's Mass Debt Cancellation, millions of borrowers will have to submit tax information to the Department to support their individual eligibility for cancellation. In any event, that it is *easier* to give debt cancellation to everyone cannot justify ignoring the express requirements of the HEROES Act.

83. Even if the HEROES Act's text could plausibly be read to accord with ED's Mass Debt Cancellation (and it cannot), the major-questions doctrine precludes ED's invocation of the Act. ED's invocation of the Act

is a quintessential effort to discover "an unheralded power" representing a "transformative expansion in [its] regulatory authority." *West Virginia*, 142 S. Ct. at 2610.

84. Until now, ED has "generally invoked the HEROES Act relatively narrowly to grant relief to limited subsets of borrowers, such as deployed military service members or victims of certain natural disasters." Kevin M. Lewis & Edward C. Liu, *The Biden Administration Extends the Pause on Federal Student Loan Payments: Legal Considerations for Congress*, Congressional Research Service, at 2–3 (Jan. 27, 2021), https://tinyurl.com/yxwm4eyj. ED "has never 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." 2021 DeVos Memo, *supra*, at 6.

85. It is evident from ED's own recent statements that the COVID-19 pandemic is mere pretext and a post hoc rationalization for the political goal of mass debt cancellation.

ED's Mass Debt Cancellation Harms Plaintiff States

86. ED's Mass Debt Cancellation harms Plaintiff States' sovereign, quasi-sovereign, financial, and proprietary interests.

87. These harms, which are explained in detail below, are irreparable.

88. But for the Mass Debt Cancellation, the harms that are ongoing would not have occurred, and the harms that are imminent will not occur.

89. Immediate injunctive relief is necessary to stop these injuries.

90. The balance of the equities favors issuing immediate injunctive relief.

91. The public interest supports entering an injunction.

Harms to financial and proprietary interests

92. The Mass Debt Cancellation harms the States' financial and proprietary interests.

93. The Higher Education Loan Authority of the State of Missouri (MOHELA) is "a body politic and corporate" that is "a public instrumentality and body corporate" of the State of Missouri that performs "an essential public function." Mo. Rev. Stat. § 173.360.

94. MOHELA's purpose is to ensure that all eligible post-secondary education students in Missouri have access to guaranteed student loans. Since 2010, MOHELA has provided roughly $100 million in funding for college scholarships in the State of Missouri.

95. MOHELA is authorized to act as a servicer for student loan debt, *see* Mo. Rev. Stat. § 173.385.1(18), and it may use fees and charges from that activity "to pay the costs of the authority," § 173.385.1(12).

96. MOHELA is a servicer for federally held student debt, including DLP loans, under contracts with ED. The amount of federally held student debt MOHELA services is substantial. The entity services roughly $59 billion in federal direct loans representing over 2.7 million accounts, which are primarily DLP loans.

97. MOHELA is also a servicer of FFELP loans.

98. MOHELA services loans for borrowers across the nation.

99. MOHELA is also a holder of FFELP loans. The entity generates revenue from those outstanding FFELP loans.

100. The borrowers of the FFELP loans that MOHELA holds live across the U.S.

101. MOHELA uses the FFELP loans that it holds as security on bond offerings.

102. The Mass Debt Cancellation is inflicting a number of ongoing financial harms on MOHELA.

103. As a servicer of DLP loans, MOHELA is enduring injury in the form of compliance costs by undertaking significant efforts to comply with the unlawful Mass Debt Cancellation.

104. The Mass Debt Cancellation has created an enormous incentive to consolidate FFELP loans not held by ED (which are not currently eligible for cancellation) into DLP loans (which are eligible for cancellation). The inevitable result is that FFELP loan borrowers will likely consolidate into DLP loans en masse.

105. The consolidation of MOHELA's FFELP loans harms the entity by depriving it of an asset (the FFELP loans themselves) that it currently owns.

106. The consolidation of MOHELA's FFELP loans harms the entity by depriving it of the ongoing interest payments that those loans generate.

107. To the extent MOHELA must invest in other fixed-income assets, *see* Mo. Rev. Stat. §173.385.1(13),

using funds that were previously invested in student loan debt, it will be investing in a rising interest rate environment. As a result, any investments it purchases in the near term will drop in value.

108. The widespread consolidation of FFELP loans into DLP loans decreases the number of FFELP loans on the secondary markets, which—on information and belief—will lower prices for those loans. The drop in value of those loans harms those who hold them, like MOHELA.

109. The consolidation of MOHELA's FFELP loans harms the entity by depriving them of the ongoing revenue it earns from servicing those loans.

110. The consolidation of MOHELA's FFELP loans diminishes its ability to issue bonds and access debt markets because the entity uses the income it receives from student loans as security for bond payments.

111. The Mass Debt Cancellation will also inflict imminent financial harms on MOHELA.

112. MOHELA faces the imminent loss of revenue in its role as a servicer of DLP loans. MOHELA's revenue as a servicer of DLP loans is a function of the number of accounts it services. So when student loan balances go to zero, as they will en masse under the Mass Debt Cancellation, MOHELA will lose the revenue from servicing those loans.

113. Depriving MOHELA of the FFELP loans it holds will (1) limit its access to debt markets—by eliminating assets MOHELA may use to secure those bonds, *see* Mo. Rev. Stat. §§ 173.385.1(6), 173.390—or (2) force the entity to issue a bond resolution providing for repayment of the bonds from some other source, *see id.*

114. On information and belief, depriving MOHELA of assets like student loan debt and limiting MOHELA's ability to access debt markets limits the entity's ability to ensure that all "postsecondary education students" in the State "have access to student loans that are guaranteed or insured, or both," and its ability to support the State's universities. Mo. Rev. Stat. § 173.360.

115. The Arkansas Student Loan Authority (ASLA) is a division of the Arkansas Development Finance Authority. *See* Ark. Code Ann. 15-5-1902(a)(1). ASLA is "the instrumentality of the state charged with a portion of the responsibility of the state to provide educational opportunities in keeping with all applicable state and federal laws." Ark. Code Ann. 15-5- 1902(a)(2). As part of that mission, ASLA provides student loans.

116. Prior to the Administration's Mass Debt Cancellation, ASLA held approximately $100 million dollars in FFELP loans. ASLA financed those loans through the issuance of bonds. Interest payments received from borrowers are used to satisfy ASLA's obligations to those bondholders. ASLA receives a percentage of the outstanding FFELP loan balance each month as an administrative fee. Revenue from that administrative fee is then used for administrative and servicing costs.

117. Excess revenue (the administrative fee minus administrative and servicing costs) is used for a number of purposes that further ASLA's mission. These include: "(1) Making loans; (2) Purchasing loans and security interests in loan participations as authorized; (3) Paying incidental expenses in connection with loans; (4) Paying expenses of authorizing and issuing bonds; (5) Paying interest on bonds until revenues are available in

sufficient amounts from the bonds; and (6) Funding reserves as necessary." Ark. Code Ann. 15-5-1904(c).

118. The Mass Debt Cancellation is already causing ongoing harm to ASLA's financial interests. The FFELP loans currently held by ASLA do not qualify for cancellation under the program announced by the Administration. However, borrowers may consolidate those loans into DLP loans.

119. ASLA estimates that, since the administration's announcement of the Mass Debt Cancellation, approximately $5-6 million of its FFELP loan holdings have been consolidated by borrowers into DLP loans. If FFELP loans held by ASLA remain outside of the Mass Debt Cancellation, ASLA expects a continuing and massive reduction in its FFELP loan balance. Because ASLA's administrative fee is calculated based on the total outstanding balance of its FFELP loans, the Mass Debt Cancellation will result in a significant reduction in the revenue ASLA receives from its FFELP loans.

120. If the Administration were to change its program and declare FFELP loans eligible for cancellation (such as through direct payments to loan holders like ASLA), ASLA estimates that the vast majority of its borrowers will be eligible for cancellation. If those borrowers were to receive any such cancellation of their FFELP loans, the revenue ASLA receives through administering the FFELP loans will reduce significantly. ASLA estimates a reduction of between $11-16 million, depending on future interest rates, in the expected yield of its FFELP loan balances.

121. The reduction in ASLA revenue caused by the Mass Debt Cancellation will limit its ability to provide

education opportunities to Arkansans through financing further student loans.

122. The Nebraska Investment Council (NIC) is responsible for investing various assets held by the State of Nebraska, including the State's pension fund.

123. NIC has multiple accounts with money invested in student loan asset-backed securities (SLABS).

124. The Mass Debt Cancellation is inflicting ongoing financial harm on NIC.

125. The widespread consolidation of FFELP loans into DLP loans will cause investors in SLABS to receive money back earlier than anticipated, ending the interest income flow that SLABS generate.

126. On information and belief, this consolidation will likely cut in half the existing FFELP SLABS market and cause financial injury to NIC. *See* Carmen Arroyo, *Biden's Student- Loan Relief Plan Stirs a $100 Billion Plus Debt Market*, Bloomberg (Sept. 2, 2022), https://tinyurl.com/43sc7ec4.

127. Furthermore, when the FFELP loans are prepaid, the SLABS market declines, which lowers the value of NIC's investments and harms the State of Nebraska, including pensioners throughout the State.

128. The States of Nebraska, Iowa, Kansas, and South Carolina will also suffer direct pocketbook harms from the Mass Debt Cancellation.

129. To determine an individual's taxable state income, Nebraska uses the individual's federal adjusted gross income as a baseline. *See* Neb. Rev. Stat. § 77-2714.01(1). The same is true of Iowa, Kansas, and South Carolina. *See* Iowa Code § 422.7; Kan. Stat. Ann.

§ 79-32,117(a); S.C. Code § 12-6-40; South Carolina Dep't of Revenue Information Letter 22-14 (Sept. 1, 2022), https://tinyurl.com/3vzwrva2.

130. Normally, federal adjusted gross income includes student loan discharge. *See* 26 U.S.C. § 61(a)(11). Under the American Rescue Plan Act of 2021, however, the discharge of student loan debt is not included in federal adjusted gross income if the discharge occurs between December 31, 2020, and January 1, 2026. *See* 26 U.S.C. § 108(f)(5). Thus, student loan debt is currently not considered taxable state income in Nebraska, Iowa, Kansas, or South Carolina but will be in the future.

131. There will undoubtedly be student loan debt discharge in the future. Under federal Income-Driven Repayment (IDR), borrowers receive cancellation after repaying the loans for a certain period of years (20 to 25, depending on the loan). The Government Accountability Office (GAO) estimates that by 2030, "about 1.5 million loans held by about 600,000 borrowers" will be eligible for loan cancellation. U.S. Gov't Accountability Office, GAO-22-103720, Federal Student Aid: Education Needs to Take Steps to Ensure Eligible Loans Receive Income-Driven Repayment Forgiveness 15 (2022), https://tinyurl.com/bdhzca8z. Of those loans, roughly 1.2 million will be forgiven between 2026 and 2030. *See id.* at 16 fig. 3. And data from 2021 shows that the average amount of loan cancellation under the program so far has been about "$34,000 per borrower." *Id.* at 10. Thus, significant amounts of federal loan cancellation will occur after 2026—including for residents in Ne-

braska, Iowa, Kansas, and South Carolina. By operation of law, then, substantial income tax revenue will be coming to Nebraska.

132. The Mass Debt Cancellation, however, will reduce that tax revenue by decreasing the amount of outstanding student loan debt. As a result, the Mass Debt Cancellation costs Nebraska, Iowa, Kansas, and South Carolina tax revenue.

Harms to sovereign and quasi-sovereign interests

133. The Mass Debt Cancellation also harms the States' sovereign and quasi-sovereign interests.

134. For Missouri, because the Mass Debt Cancellation impairs MOHELA's ability to provide student loans to Missouri residents, the Mass Debt Cancellation harms Missouri's sovereign and quasi-sovereign interests in ensuring its citizens receive an education, *see* Mo. Const. art. IX, § 9(b) ("The general assembly shall adequately maintain the state university and such other educational institutions as it may deem necessary."), and the educational well-being of its residents.

135. Because MOHELA performs "an essential public function," Mo. Rev. Stat. § 173.360, interference with the entity's performance of its function impairs its ability to perform an essential public function for the State of Missouri, which impairs the State's sovereign interest in allocating its authority and its sovereign and quasi-sovereign interests in the education of its populace.

136. For Nebraska, because student loan cancellation impairs NIC's ability to provide returns on investments vital to the State, including the State's pension-

ers, the Mass Debt Cancellation harms Nebraska's sovereign and quasi-sovereign interests in the financial well-being of its residents.

137. For Nebraska, Iowa, Kansas, and South Carolina, the loss of tax revenue impairs their sovereign and quasi-sovereign interests in setting tax policy and, more broadly, in creating and enforcing a legal code. The Mass Debt Cancellation requires Nebraska, Iowa, Kansas, and South Carolina to either forgo future tax revenue or change its tax code to capture the unlawful discharge of student loans.

Need for Immediate Injunctive Relief

138. ED has announced a definitive and detailed Mass Debt Cancellation program, and it is currently working with student-loan servicers—some of which are state entities such as MOHELA—to set up the infrastructure for the cancellation. These actions are inflicting ongoing irreparable harms on Plaintiff States, as detailed above. Immediate relief is needed to stop these injuries.

139. The Secretary will imminently issue a waiver or modification under the HEROES Act, and that waiver or modification will exacerbate those injuries and add others.

140. ED has instructed its loan servicers to have their "initial discharge capability fully operational" by October 1, 2022, just days from now, and the agency announced that its applications for loan cancellation "will be available online by early October 2022," Cancellation Program Webpage, *supra*. It is likely that the waiver or modification will be published around that time.

141. Plaintiff States cannot wait to seek relief until after the Secretary publishes the waiver or modification. The need to act now is exemplified by ED's stated plan to "automatically" cancel loans for the eight million borrowers whose income information the agency already possesses. *See* Cancellation Program Webpage, *supra*. ED appears poised to process these automatic cancellations as soon as the waiver or modification is published, effectively denying challengers of its power-grab any chance to obtain injunctive relief before eight million loans are erased. To prevent this from happening, Plaintiff States must pursue legal recourse now.

CLAIMS FOR RELIEF
COUNT ONE—Separation of Powers

142. Plaintiffs re-allege and incorporate the allegations in the preceding paragraphs of this Complaint.

143. The Mass Debt Cancellation is a major agency action that could not lawfully be conducted without proper legal authority.

144. The U.S. Constitution creates a federal government of limited and enumerated powers, and this limitation applies to the Executive Branch.

145. Any action of the Executive Branch must come from one of two sources of authority: (1) a valid delegation of authority from a statute enacted by Congress, or (2) a direct exercise of one of the President's enumerated powers in Article II. "The President's power, if any, to issue [an] order must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585 (1952).

146. Defendants have not identified a statute that gives them the authority to establish and implement the

Mass Debt Cancellation. Despite Defendants' reliance on the HEROES Act, that statute does not provide them any such authority.

147. To the extent the HEROES Act permits the Mass Debt Cancellation, that statute is unconstitutional.

148. Accordingly, the Mass Debt Cancellation is an *ultra vires* action and violates the separation of powers.

COUNT TWO—Violation of the Administrative Procedure Act Exceeding Statutory Authority and Violating the Constitution

149. Plaintiffs re-allege and incorporate the allegations in the preceding paragraphs of this Complaint.

150. ED is a federal agency subject to the requirements of the APA.

151. The Mass Debt Cancellation is final agency action for purposes of the APA.

152. ED's August 24, 2022 announcement of the Mass Debt Cancellation is final agency action. *See Calvillo Manriquez* v. *DeVos*, 345 F. Supp. 3d 1077, 1095 (N.D. Cal. 2018) (ED memo and press release "show[ing] that the Secretary made a final decision about how to evaluate claims for borrowers" constituted final agency action).

153. The Mass Debt Cancellation is a major agency action that could not lawfully be conducted without compliance with the APA.

154. Under the APA, a reviewing court shall "hold unlawful and set aside agency action" that is "not in accordance with law," "contrary to constitutional right, power, privilege, or immunity," or "in excess of statutory

. . . authority[,] . . . limitations, or short of statutory right." 5 U.S.C. § 706(2)(A)–(C).

155. Defendants have not identified a statute that gives them the authority to establish and implement the Mass Debt Cancellation. Despite Defendants' reliance on the HEROES Act, that statute does not provide them any such authority.

156. By exceeding their statutory authority, Defendants have also violated the constitutional separation of powers.

157. To the extent the HEROES Act permits the Mass Debt Cancellation, that statute is unconstitutional.

158. Therefore, the Mass Debt Cancellation is in excess of ED's authority and in violation of the Constitution.

COUNT THREE—Violation of the Administrative Procedure Act Arbitrary and Capricious Agency Action

159. Plaintiffs re-allege and incorporate the allegations in the preceding paragraphs of this Complaint.

160. ED is a federal agency subject to the requirements of the APA.

161. The Mass Debt Cancellation is final agency action for purposes of the APA.

162. ED's August 24, 2022 announcement of the Mass Debt Cancellation is final agency action. *See Calvillo Manriquez*, 345 F. Supp. 3d at 1095 (ED memo and press release "show[ing] that the Secretary made a final decision about how to evaluate claims for borrowers" constituted final agency action).

163. The Mass Debt Cancellation is a major agency action that could not lawfully be conducted without compliance with the APA.

164. Under the APA, a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

165. Agency action is arbitrary and capricious if the agency fails to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (cleaned up). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

166. The Mass Debt Cancellation's reliance on the HEROES Act is not the product of reasoned decision-making. ED had already addressed the potential impact of the COVID-19 pandemic on student loans by pausing loan payments and zeroing interest accrual. Given that, the agency has not explained why the Mass Debt Cancellation is also needed.

167. The Mass Debt Cancellation is arbitrary and capricious because ED relied on factors that Congress has not intended it to consider under the HEROES Act.

A senior administration official explained that ED's Mass Debt Cancellation intended to "narrow the racial wealth gap," "promot[e] equity," allow more Americans to obtain "a ticket to a middle-class life" through "post-high school education," and address education costs that have been rising "[o]ver the last 40 years." Cancellation Backgrounder, *supra*. None of these are factors that Congress intended the Secretary to consider under the HEROES Act.

168. The Mass Debt Cancellation is also arbitrary and capricious because ED's reliance on the pandemic is disingenuous—a mere pretext and *post hoc* rationalization. Shortly before announcing the Mass Debt Cancellation, the Administration had argued in court that the pandemic's impact was now relatively modest. And soon after announcing the Mass Debt Cancellation, President Biden admitted that the pandemic is over. Defendants' reliance on the COVID-19 is plainly and simply a pretext, not the reasoned decision-making required by the APA.

169. The exceedingly broad scope of the Mass Debt Cancellation illustrates its arbitrariness. Betraying its unjustifiably vast scope, the Cancellation is not confined to people who are in "a worse position financially," 20 U.S.C. §1098bb(a)(2)(A), or those whose student loans have been adversely affected by the COVID-19 pandemic.

170. ED failed to address the States' reliance interests, including, but not limited to, States' reliance on stability and volume in the existing FFELP loan market, States' reliance on their income tax structures, and States' reliance in setting up systems to engage in the

student loan market, including by providing loans to States' residents for their postsecondary education.

171. For all these reasons and more, the Mass Debt Cancellation is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law and must be set aside.

PRAYER FOR RELIEF

Plaintiffs respectfully ask this Court to:

a. issue an order and judgment declaring that the Mass Debt Cancellation violates the separation of powers established by the U.S. Constitution;

b. issue an order and judgment declaring that the Mass Debt Cancellation violates the APA because it is in excess of statutory authority, is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, and is without observance of procedure required by law;

c. temporarily restrain and preliminarily and permanently enjoin implementation and enforcement of the Mass Debt Cancellation;

d. temporarily restrain and preliminarily and permanently enjoin the Secretary from publishing the Mass Debt Cancellation's waiver or modification under the HEROES Act;

e. set aside the Mass Debt Cancellation;

f. award Plaintiffs costs and reasonable attorneys' fees, as appropriate; and

g. grant any other relief the Court deems just and appropriate.

Respectfully submitted this 29th day of Sept. 2022.

DOUGLAS J. PETERSON
Attorney General of Nebraska

/s/ JAMES A. CAMPBELL
JAMES A. CAMPBELL
Solicitor General of Nebraska
Office of the Nebraska Attorney General
2115 State Capitol
Lincoln, NE 68509
(402) 471-2686
Jim.Campbell@nebraska.gov
Counsel for Plaintiffs

LESLIE R. RUTLEDGE
Attorney General of Arkansas
/s/ DYLAN L. JACOBS
DYLAN L. JACOBS
Deputy Solicitor General of Arkansas
Nicholas J. Bronni
Solicitor General of Arkansas
Office of the Arkansas Attorney General
328 Center Street, Suite 200
Little Rock, AR 72201
(501) 682-2007
Dylan.Jacobs@arkansasag.gov
Counsel for State of Arkansas

DEREK SCHMIDT
Attorney General of Kansas
/s/ SHANNON GRAMMEL
SHANNON GRAMMEL
Deputy Solicitor General
Office of the Kansas Attorney General
120 SW 10th Avenue, 2nd Floor

Topeka, Kansas 66612
(785) 296-2215
shannon.grammel@ag.ks.gov
Counsel for State of Kansas

ERIK S. SCHMITT
Attorney General of Missouri
/s/ MICHAEL E. TALENT
MICHAEL E. TALENT, #73339MO
Deputy Solicitor General of Missouri
Missouri Attorney General's Office
Post Office Box 899
Jefferson City, MO 65102
(314) 340-4869
Michael.Talent@ago.mo.gov
Counsel for Plaintiffs

JEFFREY S. THOMPSON
Solicitor General of Iowa
/s/ SAMUEL P. LANGHOLZ
SAMUEL P. LANGHOLZ
Assistant Solicitor General
Office of the Iowa Attorney General
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 281-5164
jeffrey.thompson@ag.iowa.gov
sam.langholz@ag.iowa.gov
Counsel for State of Iowa

ALAN WILSON
Attorney General of South Carolina
/s/ J. EMORY SMITH, JR.
J. EMORY SMITH JR.

Deputy Solicitor General
Office of the Attorney General of South Carolina
P.O. Box 11549
Columbia, SC 29211
(803) 734-3680
ESmith@scag.gov
Counsel for State of South Carolina

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERAN DIVISION

No. 4:22-cv-01040

THE STATE OF NEBRASKA, PLAINTIFFS

v.

JOSEPH R. BIDEN, JR., ET AL., DEFENDANTS

DECLARATION OF MICHAEL E. TALENT

I, Michael E. Talent, declare and state as follows:

1. I am an attorney licensed to practice law before this Court and a Deputy Solicitor General for the State of Missouri in the Office of the Attorney General for the State of Missouri, a plaintiff in this case. I have personal knowledge of the facts stated herein and if called upon to do so, I will testify thereto.

2. Attached as **Exhibit A** is a true and correct copy of an offering statement for bonds issued in 2021 by the Missouri Higher Education Loan Authority downloaded from https://emma.msrb.org/IssueView/Details/P14 13589

3. The Office of the Attorney General served Sunshine Law Requests on MOHELA on August 26, 2022, and September 2, 2022.

4. As required by law, MOHELA provided the Office of the Attorney General responsive records. *See* Mo. Rev. Stat. § 610.026.1.

5. The following documents were received in response to the August 26, 2022, Sunshine Law Requests, which requested "All existing contracts for servicing student loans held by the federal government, including but not limited to the loans described at https:// fsapartners.ed.gov/knowledge-enter/library/electronic-announcements/2022-07-29/teacher-education-college-and-higher-education-grant-program-transitioning-fedloan-servicingmohela-updated-aug-22-2022 and https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2022-06-03/public-service-loan-forgiveness-program-transitioning-fedloanservicing-mohela-updated-aug-22-2022."

6. Attached as **Exhibit B** is a true and correct copy of Contract No. ED-FSA-11-D-0012 between MOHELA and the U.S. Department of Education, Federal Student Aid/Mission Support Group, effective date September 27, 2011.

7. Attached as **Exhibit C** is a true and correct copy of Contract No. 91003120D0002 between MOHELA and the U.S. Department of Education, FSA-Acquisitions, effective date June 23, 2020.

8. The following documents were received in response to the September 2, 2022, Sunshine Law Requests, which requested "Any emails from any individual working at, or affiliated with, the Department of Education involving the student loan forgiveness program described at the following website: https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/."

9. Attached as **Exhibit D** is a true and correct copy of a document entitled "Overview of how the Pandemic-connected Discharge process will work." The document was attached to an email from the Department of Education to MOHELA.

10. Attached as **Exhibit E** is a true and correct copy of a document entitled "Business Operations Change Request Form," dated September 2, 2022. The document was attached to an email from the Department of Education to MOHELA.

11. Attached as **Exhibit F** is a true and correct copy of a document entitled "Federal Servicing Examples of GD01 discharges." The document was attached to an email from the Department of Education to MOHELA.

12. Attached as **Exhibit G** is a true and correct copy of a spreadsheet entitled "Change Request 6391 (Pandemic-connected Discharge)—Q & A." The document was attached to an email from the Department of Education to MOHELA.

13. Attached as **Exhibit H** is a true and correct of a spreadsheet with data referring to "Borrower Refund Volume." The spreadsheet was attached to an email from MOHELA to the Department of Education.

14. Attached as **Exhibit I** is a true and correct of an email sent September 1, 2022, with the subject line "RE: CR 6391 IA & CP."

Dated: Sept. 28, 2021 Respectfully submitted,

/s/ MICHAEL E. TALENT
MICHAEL E. TALENT

EXHIBIT A

NEW ISSUE—BOOK-ENTRY-ONLY

MOHELA

$197,500,000
Higher Education Loan Authority of the State of Missouri
Taxable Student Loan Asset-Backed Notes, Series 2021-3

The Higher Education Loan Authority of the State of Missouri (the "Issuer"), a public instrumentality and body politic and corporate of the State of Missouri (the "State") is issuing $197,500,000 aggregate principal amount of its Taxable Student Loan Asset-Backed Notes, Series 2021-3 (the "Notes") in three classes as set forth below:

*   *   *   *   *

SUMMARY OF TERMS

This summary highlights selected information from this document and does not contain all of the information you need to make your investment decision. To understand all of the terms of this offering, read this entire document.

References in this Offering Memorandum to the "Issuer" refer to the Higher Education Loan Authority of the State of Missouri. This Offering Memorandum contains forward-looking statements that involve risks and uncertainties. See the caption "SPECIAL NOTE REGARDING FORWARD-LOOKING STATEMENTS" herein. Certain terms used in this Offering Memorandum are defined under the caption "GLOSSARY OF TERMS" herein.

Principal Parties and Dates

Issuer. Higher Education Loan Authority of the State of Missouri (the "Issuer").

Servicer. The Issuer (the "Servicer").

Backup Servicer. Pennsylvania Higher Education Assistance Agency ("PHEAA").

Guaranty Agencies. Missouri Department of Higher Education and Workforce Development (the "State Guaranty Agency"), Pennsylvania Higher Education Assistance Agency, Ascendium Education Solutions, Inc. (f/k/a Great Lakes Higher Education Guaranty Corporation) or any other entity authorized to guarantee student loans under the Higher Education Act identified under the caption "THE GUARANTY AGENCIES" herein (each, a "Guaranty Agency" and collectively, the "Guaranty Agencies").

Trustee. U.S. Bank National Association, as trustee (in such capacity, the "Trustee").

Monthly Distribution Dates. The monthly distribution dates for the Notes will be the twenty-fifth day of each calendar month, or, if not a Business Day, the next Business Day, commencing November 26, 2021. These dates are sometimes referred to herein as "Monthly Distribution Dates." Certain fees and expenses of the Trust Estate established under the hereinafter described Indenture (such as the Administration Fee, the Servicing Fee and the Trustee Fee) will also be paid on the Monthly Distribution Dates. The calculation date for each Monthly Distribution Date generally will be the second Business Day before such Monthly Distribution Date.

Collection Periods. The Collection Period with respect to a Monthly Distribution Date will be the calendar month preceding such Monthly Distribution Date (each, a "Collection Period"). However, the Collection Period for the initial Monthly Distribution Date of November 26, 2021 will begin on the Date of Issuance and end on October 31, 2021. With respect to any other Monthly Distribution Date, the "related" or the "preceding" Collection Period shall be the Collection Period ending on the last day of the month immediately preceding the month in which such Monthly Distribution Date occurs.

Interest Accrual Periods. The initial Interest Accrual Period for the Class A-1A Notes begins on the Date of Issuance and ends on November 24, 2021 and the initial Interest Accrual Period for the Class A-1B Notes and the Class B Notes begins on the Date of Issuance and ends on November 25, 2021. For all other Monthly Distribution Dates, (a) the Interest Accrual Period for the Class A-1A Notes, will begin on (and include) the twenty-fifth day of a month, whether or not a Business Day, and end on (and include) the twenty- fourth day of the following month (notwithstanding that the actual Monthly Distribution Date may occur after the twenty-fifth day of either such month); and (b) the Interest Accrual Period for the Class A-1B Notes and Class B Notes will begin on the prior Monthly Distribution Date and end on the day before such Monthly Distribution Date (each, an "Interest Accrual Period").

Financed Eligible Loans. The loans made to finance post-secondary education that are made under the Higher Education Act (each, an "Eligible Loan") that are pledged by the Issuer to the Trustee under the Indenture and not released from the lien thereof are sometimes referred to herein as the "Financed Eligible Loans." The information presented in this Offering Memorandum under the caption "CHARACTERISTICS OF THE FINANCED ELIGIBLE LOANS" herein relating to the Eligible Loans the Issuer expects to pledge to the Trustee on the Date of Issuance is as of June 30, 2021, which is referred to as the "Statistical Cut-Off Date." The Issuer believes that the information set forth in this Offering Memorandum with respect to the Eligible Loans as of the Statistical Cut-Off Date is representative of the characteristics of the Financed Eligible Loans as they will exist on the Date of Issuance for the Notes.

* * * * *

The rate of payments on the Financed Eligible Loans may affect the maturity and yield of the Notes

Financed Eligible Loans may be prepaid at any time without penalty. If the Issuer receives prepayments on the Financed Eligible Loans, those amounts will be used to make principal payments as described below under the caption "SECURITY AND SOURCES OF PAYMENT FOR THE NOTES—Collection Fund; Flow of Funds" herein, which could shorten the average life of the Notes. Factors affecting prepayment of loans include general economic conditions, legislative, executive orders and administrative initiatives, prevailing interest rates and changes in the borrower's job, including transfers and unemployment. Refinancing opportunities that may provide more favorable repayment terms, including those that may be offered under potential government initiatives to consolidate or otherwise refinance existing FFELP Loans to the Federal Direct Loan Program (the "Direct Loan Program"), also affect prepayment rates. For example, legislation has been proposed periodically that would allow eligible student loan borrowers with FFELP Loans or private loans to refinance those student loans at lower interest rates currently offered to new borrowers, with refinanced FFELP Loans to be fully paid and reissued as loans under the Direct Loan Program, and with borrower eligibility requirements to be established by the Department of Education based on income or debt-to-income financial need metrics. Also, the President of the United States has indicated his support for legislation or a potential executive order providing for the cancellation or prepayment of up to $50,000 per student in student debt. In addition, defaults on Financed Eligible Loans owned by the Issuer and pledged under the Indenture result in guarantee payments being made on such Financed Eligible Loans, which will accelerate the prepayment of the Notes.

Scheduled payments with respect to the Financed Eligible Loans may be reduced and the maturities of Financed Eligible Loans may be extended as authorized by the Higher Education Act. Also, periods of deferment and forbearance may lengthen the remaining term of the Financed Eligible Loans and the average life of the Notes.

The rate of principal payments to investors on the Notes will be directly related to the rate of payments of principal on the Financed Eligible Loans. Changes in the rate of prepayments may significantly affect investors' actual yield to maturity, even if the average rate of principal prepayments is consistent with investors' expectations. In general, the earlier a prepayment of principal of a loan, the greater the effect may be on an investor's yield to maturity. The effect on an investor's yield as a result of principal payments occurring at a rate higher or lower than the rate anticipated by an investor during the period immediately following the issuance of the Notes may not be offset by a subsequent like reduction, or increase, in the rate of principal payments on the Notes. Investors will bear entirely any reinvestment risks resulting from a faster or slower incidence of prepayment of the Financed Eligible Loans.

As of the Statistical Cut-Off Date, $9,496,737 of the principal amount of the Financed Eligible Loans (representing approximately 4.71% of the Financed Eligible Loans by principal amount) are "rehabilitation loans," which are Eligible Loans that have previously defaulted, but for which the borrower thereunder has made a specified number of on-time payments as described in "APPENDIX A—DESCRIPTION OF THE FEDERAL FAMILY EDUCATION LOAN PROGRAM—Insurance and Guarantees—*Rehabilitation of Defaulted Loans*" hereto. Although rehabilitation loans benefit from the same guarantees as other FFELP student loans, rehabilitation loans have generally experienced re-default rates that are higher than default rates for FFELP student loans that have not previously defaulted.

* * * * *

Changes to the Higher Education Act, including the enactment of the Health Care and Education Reconciliation Act of 2010, changes to other applicable law and other Congressional action may affect investors' Notes and the Financed Eligible Loans

On March 30, 2010, the Health Care and Education Reconciliation Act of 2010 ("HCERA" or the "Reconciliation Act") was enacted into law. Effective July 1, 2010, the Reconciliation Act eliminated the origination of new FFELP Loans. All loans made under the Higher Education Act beginning on July 1, 2010 have been, and in the future will be, originated under the Direct Loan Program. The terms of FFELP Loans originated prior to July 1, 2010 are not materially affected by the Reconciliation Act and continue to be subject to the terms of the FFEL Program.

The curtailment of the FFEL Program could have a material adverse impact on the Issuer, the Servicer, the Backup Servicer and the Guaranty Agencies. For example, the Servicers (including the Issuer and the Backup Servicer) may experience increased costs due to reduced economies of scale to the extent the volume of loans serviced by such Servicers is reduced. Those cost increases could affect the ability of the Servicers to satisfy their obligations to service the Financed Eligible Loans held in the Trust Estate securing the Notes. FFELP Loan volume reductions could further reduce revenues received by the Guaranty Agencies available to pay claims on defaulted FFELP Loans. In addition, the level of competition currently in existence in the secondary market for FFELP Loans could be reduced, resulting in fewer potential buyers of FFELP Loans and lower prices available in the secondary market for those FFELP Loans.

In addition to the passage of the Reconciliation Act, Title IV of the Higher Education Act and the regulations promulgated by the Department of Education thereunder have been the subject of frequent and extensive amendments and reauthorizations. See "APPENDIX A—DESCRIPTION OF THE FEDERAL FAMILY EDUCATION LOAN PROGRAM" hereto for more information on the Higher Education Act and various amendments thereto. There can be no assurance that the Higher Education Act or other relevant federal or state laws, rules and regulations may not be further amended or modified in the future in a manner that could adversely affect the Issuer or its student loan programs, the Trust Estate created under the Indenture, the Financed Eligible Loans, or the financial condition of or ability of the Issuer, the Servicer, the Backup Servicer or the Guaranty Agencies to comply with their obligations under the various transaction documents or the Notes. Future changes could also have a material adverse effect on the revenues received by the Guaranty Agencies that are available to pay claims on defaulted Financed Eligible Loans in a timely manner. In addition, if legislation were to be passed in the future requiring the sale of the Financed Eligible Loans held in the Trust Estate to the federal government, proceeds from such sale would be deposited to the Collection Fund and used to pay the Notes in advance of their current expected Maturity Date. No assurance can be given as to the amount that would be received from such sale or whether such amount would be sufficient to pay all principal and accrued interest due on the Notes, as there is no way to know what purchase price would be paid by the federal government for the Financed Eligible Loans.

Funds for payment of Interest Benefit Payments, Special Allowance Payments and other payments under the FFEL Program are subject to annual budgetary appropriations by Congress. Federal budget legislation has contained provisions that restricted payments made under the FFEL Program to achieve reductions in federal spending. For example, federal budget provisions that became effective on July 1, 2014 reduced payments by the Department of Education to Guaranty Agencies for assisting student loan borrowers with the rehabilitation of defaulted loans under the FFEL Program. As a result, the revenue earned by the Issuer from rehabilitating defaulted FFEL Program loans (collection services) on behalf of Guaranty Agencies decreased, and the Issuer anticipates such revenue will continue to be negatively impacted by these federal budget provisions. Future federal budget legislation may adversely affect expenditures by the Department of Education, and the financial condition of the Issuer, the Servicer, the Backup Servicer and Guaranty Agencies.

Bills have been proposed which would forgive all or part of existing federal student loans. If such bills were to pass, if FFELP Loans are included in such loan forgiveness, or if such legislation creates an incentive for FFELP Loan borrowers to consolidate their loans into Federal Direct Consolidation loans, repayment rates on the Eligible Loans could increase, thereby increasing monthly distributions of principal on the Notes.

The Issuer cannot predict whether any other changes will be made to the Higher Education Act or other relevant federal laws, and rules and regulations promulgated by the Secretary of Education in future legislation, or the effect of such legislation or executive orders on the Issuer, the Servicer, the Backup Servicer, the Guaranty Agencies, the Financed Eligible Loans or the Issuer's loan programs.

Competition from the Federal Direct Student Loan Program

The Direct Loan Program was established under the Student Loan Reform Act of 1993. Under the Direct Loan Program, approved institutions of higher education, or alternative loan originators approved by the Department of Education, make loans to students or parents without application to or funding from outside lenders or guaranty agencies. The Department of Education provides the funds for such loans, and the program provides for a variety of flexible repayment plans, including consolidations under the Direct Loan Program of existing FFEL Program student loans. Such consolidation permits borrowers to prepay existing student loans and consolidate them into a Federal Direct Consolidation Loan under the Direct Loan Program. As a result of the enactment of the Reconciliation Act, no FFELP Loans have been, or in the future will be, originated after June 30, 2010, and all loans made under the Higher Education Act will be originated under the Direct Loan Program. The Direct Loan Program may result in prepayments of Financed Eligible Loans if such Financed Eligible Loans are consolidated under the Direct Loan Program.

Because of the limited recourse nature of the Trust Estate created under the Indenture for the Notes, competition from the Direct Loan Program should not impact the payment of the Notes unless it causes (a) erosion in the finances of the Issuer to such an extent that it cannot honor any administration or similar obligations under the Indenture; or (b) prepayments of Financed Eligible Loans if such Financed Eligible Loans are consolidated under the Direct Loan Program. See the caption "—The rate of payments on the Financed Eligible Loans may affect the maturity and yield of the Notes" above.

* * * * *

HIGHER EDUCATION LOAN AUTHORITY OF THE STATE OF MISSOURI

General

The Issuer was established in 1981 pursuant to the Missouri Higher Education Loan Authority Act, Title XI, Chapter 173, Sections 173.350 to 173.445 of the Missouri Revised Statues, inclusive, as amended (the "Authorizing Act") for the purpose of assuring that all eligible post-secondary education students have access to guaranteed student loans. The Authorizing Act has been amended over the years to provide the Issuer with generally expanded powers, including the power to finance, acquire and service student loans including, but not limited to, those guaranteed or insured pursuant to the Higher Education Act, and in certain other respects.

The headquarters of the Issuer is 633 Spirit Drive, Chesterfield, Missouri 63005-1243 (at which approximately 272 employees are located). The Issuer also has facilities in Columbia, Missouri (at which approximately 72 employees are located) and Washington, D.C. (at which approximately 4 employees are located). The telephone number of the Issuer is (636) 733-3700. The Issuer's website address is http://www.mohela.com, where its financial statements and additional information can be found in the "About Us" section. The Issuer's website is not incorporated into and shall not be deemed to be a part of this Offering Memorandum.

The Issuer provides full-service loan servicing for private student loans and FFELP Loans owned by the Issuer and by third parties. The Issuer also services Direct Loans for the Department of Education, having been awarded a servicing contract as a not-for-profit servicer (an "NFP Servicer") in September 2011. As of June 30, 2021, MOHELA was servicing $1.1 billion in FFELP loans representing 59,181 accounts, $18.6 billion in third-party lender owned private loans representing 320,566 accounts, $132.8 million in MOHELA-owned private loans representing 6,202 accounts and $59.1 billion in Direct Loans representing 2,726,179 accounts.

As described herein, the Issuer has significant private loan experience, including the third-party lender-owned private loans referred to above. It also originated and services loans for its own private loan program which it began in 1995. The Issuer originated and serviced over $370 million in private loans for over 30,000 borrowers before ending the program in 2008. Through an affiliate and since 2013, the Issuer also services the Missouri Family Education Loan Program ("MOFELP"), an interest-free loan program for Missouri students meeting certain financial need and academic achievement standards. As of June 30, 2021, MOFELP had approximately $23.5 million outstanding with 4,465 borrowers in repayment.

The Issuer licenses COMPASS, the servicing system used by PHEAA.

The Issuer's present contract to service Federal Direct Loans runs to March 31, 2022. However, the Issuer was one of five bidders awarded a contract on June 24, 2020 by the Department of Education pursuant to its Business Process Operations Solicitation (the "BPO Contract") to service all Federal Direct Loans. The Department of Education procedures for the BPO Contract may not be operational for some time. In a related development, the Department of Education on October 28, 2020 issued a Solicitation to acquire an "Interim Servicing Solution" ("ISS") impacting the servicing of student loans and the BPO Contract. The Issuer filed a Pre-Award Protest with the U.S. Government Accountability Office (the "GAO") as to the terms of this ISS Solicitation. The Department of Education recently advised the GAO that it would be taking corrective action by either amending or cancelling the ISS Solicitation. In response thereto, the GAO dismissed the Issuer's protest on January 12, 2021.

* * * * *

Lewis and Clark Discovery Initiative; Scholarship Funding

In 2007, state legislation was enacted relative to the then Missouri Governor's Lewis and Clark Discovery Initiative (the "Initiative") providing for the Issuer to fund designated capital projects at Missouri's public higher education institutions (the "Projects"). Pursuant to the legislation, the Issuer was to distribute $350 million for the Projects into a fund in the State treasury known as the "Lewis and Clark Discovery Fund" (the

"Fund"). The payments were scheduled to begin with $230 million in Fall of 2007 and $5 million quarterly thereafter. The Issuer distributed $245 million into the Fund by early 2008 but further distributions were then delayed due to Issuer determinations made pursuant to the terms of the legislation. The determinations were based on dramatic changes in the federal student loan program and the credit market crisis and related great recession. Shortly thereafter, in early 2009, the new Governor suspended the Projects and the Initiative became dormant. Accordingly, with no Projects to fund and changes in the student loan program continuing, no further contributions to the Fund have been made by the Issuer pursuant to the terms of the legislation. Related to the foregoing, successive Governors have made scholarship funding requests of the Issuer which are more consistent with its historical mission. In response to those Governors' requests, since 2010, the Issuer has provided nearly $100 million in funding for college scholarships in the State of Missouri. The Issuer has also established another vehicle for providing significant scholarship and grant funding to students at Missouri colleges and universities through its nonprofit Missouri Scholarship and Loan Foundation established in 2010.

Direct Loan Servicing

Prior to July 1, 2010, the Issuer primarily originated, acquired and serviced FFELP Loans. The Issuer has not originated FFELP Loans since July 1, 2010. This is due to the enactment of the Reconciliation Act, including the Student Aid and Fiscal Responsibility Act ("SAFRA"), which prohibited the origination of new FFELP Loans after June 30, 2010. As of July 1, 2010, all loans made under the Higher Education Act are originated under the Direct Loan Program. The terms of existing FFELP Loans are not materially affected by the Reconciliation Act.

The Issuer obtained a contract with the Department of Education to service Direct Loans in accordance with the HCERA, which requires the Department of Education to contract with each eligible and qualified NFP Servicer to service loans. On April 29, 2010, the Department of Education began the process to identify eligible NFP Servicers by issuing a Sources Sought Notice (Solicitation Number: NFP-SS-2010) (the "Sources Sought Notice") requesting that interested entities submit information to the Department of Education demonstrating eligibility as an eligible NFP servicer under the criteria set forth in the Reconciliation Act.

The Issuer responded to the Sources Sought Notice and was among the first twelve NFP Servicers that the Department of Education determined met the NFP Servicer eligibility criteria under the Reconciliation Act. The Issuer applied to the Department of Education on November 24, 2010, to be permitted to proceed to develop a Memorandum of Understanding. On February 2, 2011, the Department of Education published a determination that the Issuer was permitted to enter into a Memorandum of Understanding to pursue an Authorization to Operate ("ATO") and a contract award as an NFP Servicer. The Pennsylvania Higher Education Assistance Agency ("PHEAA") was identified as a key subcontractor for this arrangement. On March 30, 2011, the Issuer entered into a Memorandum of Understanding with the Department of Education. The Issuer was awarded an ATO on September 22, 2011 and a servicing contract to become an NFP Servicer to service federal assets including Direct Loans on September 27, 2011. As of June 30, 2021, the Issuer had entered into "teaming arrangements" with 18 other NFP Servicers and was servicing approximately 2.7 million federal asset accounts, which are primarily Direct Loans, representing approximately $59.1 billion in student loans.

In addition to a federal loan servicing contract, the Issuer services approximately $1.1 billion of its own FFELP Loans which secure the bonds issued by the Issuer and will provide the Issuer ongoing revenue streams for many years to come. This legacy portfolio and its related revenue have assisted and will continue to assist the Issuer in a gradual and smooth transition to a federal asset servicing business model. See the further discussion of the Issuer's Direct Loan Program servicing under the caption "HIGHER EDUCATION LOAN AUTHORITY OF THE STATE OF MISSOURI—General" herein.

* * * * *

Composition of the Financed Eligible Loan Portfolio
(as of the Statistical Cut-Off Date)

Aggregate Outstanding Principal Balance*	$201,530,098
Accrued Interest to be Capitalized	$9,664,923
Accrued Interest to be Capitalized Upon Commencement of Repayment	$3,219,625
Accrued Interest to be Capitalized for Loans in Income Based Repayment	$6,445,298
Accrued Interest not to be Capitalized	$618,190
Aggregate Outstanding Principal Balance—Treasury Bill SAP	$3,831,917
Percentage of Aggregate Outstanding Principal Balance—Treasury Bill SAP	1.90%
Aggregate Outstanding Principal Balance—One-Month LIBOR SAP	$197,698,181
Percentage of Aggregate Outstanding Principal Balance—One-Month LIBOR SAP	98.10%
Total Number of Borrowers	15,387
Average Principal Balance per Borrower	$13,097
Total Number of Loans	29,132
Weighted Average Borrower Age	48
Weighted Average Remaining Term (months)	169
Weighted Average Annual Interest Rate	5.14%
Weighted Average Annual Interest Rate after Borrower Benefits	5.05%
Aggregate Outstanding Principal Balance of Rehabilitated Loans	$9,496,737
Percentage of Aggregate Outstanding Principal Balance of Rehabilitated Loans	4.71%

*Includes accrued interest to be capitalized.

Distribution of the Financed Eligible Loans by
Loan Type
(as of the Statistical Cut-Off Date)

Loan Type	Number of Loans	Aggregate Outstanding Principal Balance	Percent of Aggregate Outstanding Principal Balance
Consolidation Loans - Unsubsidized	5,000	$ 71,733,005	35.6%
Stafford Loans - Unsubsidized	8,985	47,281,282	23.5
Stafford Loans - Subsidized	11,194	39,826,026	19.8
Consolidation Loans - Subsidized	3,449	36,378,428	18.1
PLUS Loans	504	6,311,357	3.1
Totals	29,132	$201,530,098	100.0%

Distribution of the Financed Eligible Loans by
Borrower Payment Status
(as of the Statistical Cut-Off Date)

Borrower Payment Status	Number of Loans	Aggregate Outstanding Principal Balance	Percent by Aggregate Outstanding Principal Balance
Deferment	1,559	$ 9,490,558	4.7%
Forbearance	1,360	11,510,515	5.7
Disaster Forbearance (including COVID-19)	6,003	44,571,557	22.1
Grace	12	113,047	0.1
In-School	52	267,825	0.1
Repayment (First Year)	8	47,101	0.0*
Repayment (Second Year)	9	52,122	0.0*
Repayment (Third Year)	11	42,149	0.0*
Repayment (More than 3 Years)	20,118	135,435,224	67.2
Totals	29,132	$201,530,098	100.0%

*Less than 0.05%, but greater than 0.00%.

Distribution of the Financed Eligible Loans by
Geographic Location
(as of the Statistical Cut-Off Date)

Geographic Location	Number of Loans	Aggregate Outstanding Principal Balance	Percent by Aggregate Outstanding Principal Balance
Missouri	13,733	$ 90,411,934	44.9%
Mississippi	3,121	19,467,282	9.7
Arkansas	1,712	10,760,777	5.3
California	1,351	9,380,274	4.7
Texas	1,184	8,489,347	4.2
Illinois	1,110	8,361,005	4.1
Georgia	627	4,954,273	2.5
Kansas	649	4,503,883	2.2
Florida	566	4,155,813	2.1
New York	396	3,474,257	1.7
Tennessee	419	2,857,366	1.4
North Carolina	339	2,170,062	1.1
Massachusetts	150	2,014,674	1.0
New Jersey	133	1,932,177	1.0
Arizona	250	1,872,579	0.9
South Carolina	122	1,745,642	0.9

Geographic Location	Number of Loans	Aggregate Outstanding Principal Balance	Percent by Aggregate Outstanding Principal Balance
Virginia	240	1,652,380	0.8
Colorado	261	1,593,022	0.8
Washington	226	1,536,495	0.8
Pennsylvania	133	1,402,844	0.7
Oklahoma	210	1,359,746	0.7
Alabama	245	1,323,297	0.7
Maryland	141	1,253,474	0.6
Michigan	97	1,227,892	0.6
Minnesota	132	1,175,867	0.6
Indiana	119	1,170,261	0.6
Ohio	159	1,087,382	0.5
Nevada	98	1,048,829	0.5
Kentucky	98	957,001	0.5
Iowa	118	925,728	0.5
Oregon	191	881,628	0.4
Connecticut	59	620,759	0.3
Louisiana	116	618,041	0.3
Nebraska	100	613,468	0.3
Wisconsin	80	578,601	0.3
Hawaii	56	526,423	0.3
Foreign Country	48	438,457	0.2
District of Columbia	34	339,854	0.2
Maine	15	328,874	0.2
New Hampshire	33	325,759	0.2
New Mexico	25	322,119	0.2
North Dakota	25	246,658	0.1
Idaho	31	219,215	0.1
Utah	35	215,652	0.1
Rhode Island	25	190,781	0.1
West Virginia	13	151,180	0.1
Delaware	13	145,587	0.1
Wyoming	11	144,579	0.1
Montana	25	85,202	0.0*
South Dakota	16	79,720	0.0*
Alaska	15	59,765	0.0*
Vermont	6	56,361	0.0*
Armed Forces Europe	14	39,586	0.0*
Armed Forces Pacific	3	25,982	0.0*
Puerto Rico	3	9,310	0.0*
Virgin Islands	1	974	0.0*
Totals	29,132	$201,530,098	100.0%

*Less than 0.05%, but greater than 0.00%.

EXHIBIT B

PAGES 69-72 (FOLDOUTS)

PAGES 69-72 (FOLDOUTS)

PAGES 69-72 (FOLDOUTS)

PAGES 69-72 (FOLDOUTS)

EXHIBIT C

PAGES 74-75 (FOLDOUTS)

PAGES 74-75 (FOLDOUTS)

Title: FSA Next Gen BPO Multiple-Award IDIQ Contract
Contract No. 91003120D0002

SECTION B—SUPPLIES OR SERVICES AND PRICES/COSTS

1.0 CONSIDERATION AND PAYMENT

This is an Indefinite Delivery/Indefinite Quantity (IDIQ) contract that will be used to provide commercial services for the U.S. Department of Education (ED), Office of Federal Student Aid (FSA).

Firm-Fixed Price: Individual Task Orders against this IDIQ Contract shall be awarded on a Firm-Fixed Price basis.

Initial Task Order: The first Task Order to be awarded against this IDIQ contract shall be an "Initial Task Order" for implementation support. The Contractor shall use the Initial Task Order to complete all tasks necessary to "Go-Live" and become performance-ready to include, but not limited to, personnel security clearances, achieving the Authorization to Operate (ATO), capacity planning, training, Inter-System Testing (IST), etc.

Minimum Contract Guarantee: During the contract period, the Government shall place orders totaling a minimum of $1,500,000.00. This reflects the contract minimum for the entire period of performance, including any options.

Maximum Contract Guarantee: The contract maximum for the entire period of performance, including any options, shall be for the placement of orders totaling a maximum of $1,700,000,000.00. This reflects the contract maximum for the entire period of performance, including any options.

2.0 COMMON PRICING

The following tables reflect the Common Pricing that shall apply to all individual Task Orders issued against this IDIQ contract.

Special Note to BPO Providers:

1. Common Pricing shall be fixed regardless of the duration of any individual task performed by a BPO Provider within each operating element identified under Contact Center Support or Back-Office Processing (e.g. Inbound/ Outbound Calls, Chat Sessions, SMS/Text Exchanges, Manual Email Exchanges, Eligibility Processing tasks, Origination and Disbursement Processing tasks, etc.).

2. The Common Pricing established for all Inbound and Outbound Calls under Contact Center Support is predicated on a tiered approach based on a "Monthly Volume/Tier Range". The price per Call, in any given month, shall decrease once the BPO Provider has reached the ceiling for any given "Monthly Volume/Tier Range". Thereafter, the price per Call shall be invoiced at the next highest "Monthly Volume/ Tier Range" common price, up to the established ceiling for that tier. Once the established ceiling for that tier is reached, any individual Calls above that tier ceiling shall be invoiced at the common price

applicable to the highest tier range, for the remainder of that month. Please see below for an illustration:

<u>Example 1 (Inbound Calls)</u>: If the BPO Provider receives 850,000 Inbound Calls in a given month, this would be the calculation applied for invoicing purposes under the tiered model approach:

Monthly Volume/Tier Range – Inbound Calls	Common Price Calculation	Invoice Amount
1 – 266,667	266,667 x $4.99*	$1,330,668.33
266,668 – 666,667	400,000 x $4.89*	$1,956,000.00
666,668+	183,333 x $4.79*	$878,165.07

<u>Total Monthly Volume for Inbound Calls</u>: 850,000.00

<u>Total Monthly Invoice Amount for Inbound Calls</u>: $4,164,833.40

<u>Example 2 (Outbound Calls—with Customer)</u>: If the BPO Provider receives 850,000 Outbound Calls—with Customer in a given month, this would be the calculation applied for invoicing purposes under the tiered model:

Monthly Volume/ Tier Range – Outbound Calls—with Customer	Common Price Calculation	Invoice Amount
1 – 60,250	60,250 x $4.99*	$300,647.50
60,251 – 150,000	89,750 x $4.89*	$438,877.50

150,001+	700,000 x $4.79*	$3,353,000.00

Total Monthly Volume for Outbound Calls—with Customer: 850,000.00

Total Monthly Invoice Amount for Outbound Calls—with Customer: $4,092,525.00

***The pricing used is for illustration purposes only and does not reflect the actual common price for each Inbound or Outbound—with Customer Call.**

PAGES 80-82 (FOLDOUTS)

PAGES 80-82 (FOLDOUTS)

PAGES 80-82 (FOLDOUTS)

2.1 COMMON PRICING TASK DESCRIPTIONS

Task	Description
CONTACT CENTER SUPPORT	
Contact Center Support (6AM-11PM/7)	
Inbound Calls	Phone calls initiated by a customer, partner, or 3rd party that is fielded by a BPO.
Outbound Calls - with Customer	Initiated and connected calls as part of an outbound campaign that result in contact with the borrower.
Outbound Calls - with 3rd Party or Entity	Initiated and connected calls as part of an outbound campaign that result in a call with a third party/entity.
Inbound Calls - Default	Phone calls related to default recovery initiated by a customer, partner, or 3rd party that is fielded by a BPO.
Outbound Calls - Default - with Customer	Initiated and connected calls related to default recovery as part of an outbound campaign that result in contact with the borrower.
Outbound Calls - Default - with 3rd Party or Entity	Initiated and connected calls related to default recovery as part of an outbound campaign that result in a call with a third party/entity.
Chat Sessions	Live Agent Chats initiated by customers, partners, or 3rd parties that are routed to and fielded by a BPO.
Inbound Social Media Inquiries	Customer, Partner, and 3rd party comments or questions on social media that are routed to and fielded by a BPO.
SMS/Texts Exchanges	Customer, Partner, and 3rd party comments or questions initiated via SMS that are routed to and fielded by a BPO.
Manual Email Exchanges	Email correspondence completed by BPOs in response to a customer or partner inquiry.
Outbound Mail Responses	Manual mail correspondence completed by BPOs in response to a customer or partner inquiry.
Other Contact Center Support	This includes other Contact Center Support activities not included in the above list.
BACK-OFFICE PROCESSING	
Eligibility Processing	
Processing FAFSA Applications	Processing applications received. This includes reviewing for completeness, ensuring data is entered in a valid format, and submitting the application for transmission or rejection.
Processing FAFSA Corrections	Processing applications corrections. This includes reviewing for completeness, ensuring data is entered in a valid format, and submitting the application for transmission or rejection.
Student Aid Report (SAR) Correction Forms	Processing changes and/or corrections to SAR data. This includes reviewing for completeness, ensuring data is entered in a valid format, and submitting the application for transmission or rejection.
Processing Signature Pages	Processing signature pages received. This includes reviewing documents (applications, correction applications, SARs, and signature pages) to ensure signatures are valid and meet FSA's requirements.

Other eligibility tasks	This includes other Eligibility task activities not included in the above list.
Origination and Disbursement Processing	
Applicant Support Services	
PLUS Loan Adverse Credit Determination Appeals	Perform processing in support of the credit appeal process for reconsideration and due to extenuating circumstances. • PLUS Reconsideration Appeal • PLUS Appeal due to Extenuating Circumstance
School Support Services	
Comingled Account Research and Resolution	Performing comingled research and resolving account issues.
Ancillary Services Support -Paper MPN and Endorser Addenda Processing	Paper MPN and Endorser Addenda processing (Review, inspection, and acceptance or rejection).
Reconciliation and Close-Out Activities	Support of reconciliation activities for each program between school records and the information on the origination and disbursement system to include school monitoring, school account statement, and assistance in resolving discrepancies. Year-end completion of reconciliation activities and processing for each program with a goal of zero ending cash balance for the year.
Fiscal Operations Report and Application to Participate (FISAP) Support	Assisting schools in completing and submitting the FISAP funding for the upcoming year and reporting expenditures from the prior year. Support for Money Flow and Changes of Affiliation outreach.
Subsidized Usage Limit Applies Inquiry Research	Assist and respond to schools with SULA related issues involving both the origination and disbursement system reporting and NSLDS reporting.
Return of Title IV (R2T4) Support	Support to schools of the R2T4 process, to include but not limited to, technical and operational support.
Campus Based Support	Campus-Based Pre-and Post-Funds Closeout Outreach. Campus-Based Canceling Award Years and Available Balances Outreach.
Campus Based Pre- and Post-Funds Closeout Outreach	<u>Pre-Funds Closeout Outreach</u>: FSA generates a report comparing the G5 drawdown amount to reported school FISAP data. Schools that have a "potential" Unprocessed Deobligation (UD) will receive 3 outreaches from Customer Service for schools to review their reported expenditures and make adjustments as needed before Close-out which is generated in February. <u>Post-Funds Closeout Outreach</u>: FSA generates a UD report for schools that need outreach based on balances owed to the department (UD). Customer Service conducts 3 outreaches as well.

Campus Based Canceling Award Years and Available Balances Outreach	FSA generates a report for schools that have available balances in the canceling award year. Four (4) outreaches are conducted throughout the year starting in December, March, July, and September. For example: AY2014-2015 is canceling for Campus-Based on September 30, 2020. Schools are requested to reconcile and if determined valid; schools should draw down the funds in G5 or if not then confirm if funds should be reduced.
Other origination and disbursement tasks	This includes other Origination and Disbursement Task activities not included in the above list.
Life of Loan & Grant Processing	
Repayment Plan and Recertifications Processing	
Repayment Plan Processing (non-IDR)	Processing a manual request to change the borrower repayment plan from one plan to a non-IDR plan (e.g. standard, consolidated standard, graduated, alternative, etc.).
Income-Driven Repayment (IDR) Plan Processing	Processing a manual application for IDR (e.g. ICR, IBR, PAYE, REPAYE, NEW IBR, ISR, etc.).
Income-Driven Repayment (IDR) Plan Annual Recertifications	Processing a manual application for IDR Recertification.
Other Repayment Plan and Recertification Processing	This includes other Repayment Plan and Recertification Processing activities not included in the above list.
Military Benefits Review and Application Processing	Manually reviewing an application, servicing history, recipient records, supporting documentation, and other available data to apply Servicemembers Civil Relief Act (SCRA) Interest Rate Cap, 0% interest caps, HEROES Act waivers and other associated benefits. **NOTE:** Military related deferments are to be captured under "Deferment Processing." Moreover, discharge due to a service-connected disability is captured under "Total & Permanent Disability Discharge."
Conducting Account Review and Application of Benefit	Reviewing an application, recipient records, supporting documentation, available date and/or service-related documents to determine qualifications for military-related benefits. Applying benefits (e.g. interest rate change) to the account.
TEACH Grant Processing	
TEACH Grant Manual Adjustments	Manually reviewing servicing histories, recipient records, and other available data to adjustments TEACH Grant service obligations and/or years of qualifying service.
TEACH Certification Applications-Reviewed/Approved	Reviewing a TEACH Grant certification of service application that is approved.
TEACH Certification Applications-Reviewed/Denied	Reviewing a TEACH Grant certification of service application that is denied.
Other TEACH Grant Processing	This includes other TEACH Grant Processing activities not included in the above list.
Public Service Loan Forgiveness and Temporary Expanded Public Service Loan Forgiveness (PSLF/TEPSLF) Processing	
Employment Certification Form Processing	Reviewing an application and other supporting information to decide on qualifying employment. May require escalation to FSA as needed.

Application Processing -Approved	Reviewing an application, recipient records, supporting documentation, reviewing qualifying payments and employment, escalating to FSA for final decision and applying determination.
Application Processing - Denied/Ineligible	Reviewing an application, recipient records, supporting documentation, reviewing qualifying payments and employment, and escalating to FSA as needed or applying determination.
PSLF/TEPSLF Reconsideration	Reviewing requests for reconsideration, drafting dispute summary as needed, and/or escalating to FSA as needed.
Manual Payment Counting	Reviewing past borrower payments and financial histories, and other supporting information, to determine whether a payment is qualifying for PSLF purposes.
Other PSLF/TEPSLF Processing Tasks	This includes other PSLF/TEPSLF Processing activities not included in the above list.
Deferment Processing	
Deferments Processing	Reviewing an application, recipient records, supporting documentation, and other available data to make a deferment determination for one of the available deferment types authorized under the Higher Education Act and regulations thereof.
Forbearance Processing	
Forbearances Processing	Reviewing an application, recipient records, supporting documentation, and other available data to make a deferment determination for one of the available forbearance types authorized under the Higher Education Act and regulations thereof.
Discharge Processing (Intake, review, follow-up, and post-determination processing)	
Discharge Processing	Reviewing an application, recipient records, supporting documentation, and other available data (e.g. servicing histories, school records, non-ED data, etc.) to perform a pre-determination and apply FSA's final determination for any of the discharge categories authorized under the Higher Education Act and regulations thereof.
Bankruptcy Processing Support	Supporting bankruptcy processing by timely filing proof of claims and reviewing court-ordered repayment plans.
Timely filing proof of claims	Completing a bankruptcy proof of claim form and submitting to federal court for filing.
Timely review of repayment plans and escalating to FSA	Reviewing bankruptcy repayment plans/orders to identify the objectionable language and/or applying details of an order. Escalating to FSA as needed.
Other Bankruptcy Support Processing	This includes other Bankruptcy Support Processing activities not included in the above list.
Total & Permanent Disability Discharge Processing	Reviewing an application for Discharge due to Total and Permanent Disability, performing a pre-determination, applying FSA's final determination, and performing on-going monitoring as needed.
TPD Application Processing - Approved	Processing a manual application/matched application for TPD Discharge – Approved
TPD Application Processing - Denied	Processing a manual application/matched application for TPD Discharge – Denied

TPD Annual Monitoring - Approved	Manually reviewing annual income documentation from TPD applicants who are undergoing their 3-year monitoring and approving.
TPD Annual Monitoring - Denied	Manually reviewing annual income documentation from TPD applicants who are undergoing their 3-year monitoring and denying.
Other TPD Processing	This includes other TPD Processing activities not included in the above list.
Borrower Defense Processing	
Borrower Defense Application Processing (Intake, review, and follow-up)	All activities necessary to ensure the case creation, reviewing case details, following up with parties as needed, applying forbearance, and assigning the case to the appropriate party. **Note:** After a borrower defense claim is submitted or created; the Contractor will review the claim for completeness and accuracy prior to sending to FSA for review of the borrower defense claim.
Borrower Defense Requests for Reconsideration Processing (Intake, review, and follow-up)	All activities necessary to ensure the case creation, reviewing case details, following up with parties as needed, applying forbearance, and assigning the case to the appropriate party. **Note:** In addition to reviewing this can include, drafting summary of issue as needed, and/or escalating to FSA as needed.
Discharge Request (Post-determination Processing)	Post-determination processing is the phase of the lifecycle when a determination or decision is made on the application or a "Request for Reconsideration" and then the decision needs to be processed. This includes processing a stop forbearance, processing of interest credit requests, refund requests, and providing school notification. <u>Interest Credit Request</u>: Review each loan and calculate the interest credit amount based on calculation from FSA. Apply the interest adjustment transaction on the servicing system. Annotate the borrower account with information on why the interest credit was applied. Update the system with the interest credit request status and interest amount, date, and calculation information. Upload notices/documentation related to the interest credit to the system. <u>Refund Request</u>: Review each loan and determine if a refund must be applied to the loan based on the information in the system. Apply for the refund (if applicable) to the loan on the servicing system and annotate the servicing system on why the refund has occurred. Update the system with the refund request status, amount, date, and all notices sent to the borrower.
Other Borrower Defense Processing Tasks	This includes other Borrower Defense Processing Task activities not included in the above list.
Cohort Default Rate (CDR) Appeals Processing	
CDR Appeal Review/Research and escalation	Review CDR appeals received, research issues presented and data, summarize findings, and escalate to FSA as needed.
CDR Appeal Response	Drafting CDR response as needed.

Other Cohort Default Rate Processing	This includes other Cohort Default Rate Processing activities not included in the above list.
Fair Credit Reporting Act (FCRA) Credit Dispute Processing	
Responding to Disputes (E-Oscar, Trade, and Direct)	Reviewing, researching, and responding to disputes submitted by borrowers to Credit Reporting Agencies (CRA's), ACDV's, Trade block lifts, and direct disputes received under applicable FCRA regulations and submitting manual adjustments.
Office of Inspector General (OIG) Fraud Referral Case Management and Resolution Processing	
Complete intake referrals	Complete intake of referrals received from the OIG.
Research Fraud referrals	Research fraud referrals received from the OIG, including collecting additional data from FSA stakeholder offices, systems, or schools.
Initial Risk Tier Determination	Analyze referrals to determine initial risk tier designation.
Initiate and execute final referral disposition	Initiate and execute final disposition of referrals in coordination with FSA stakeholder offices.
Other OIG Fraud Referral Processing	Analyze fraud referrals to identify process and control improvements to prevent or detect fraud.
Feedback Center & Ombudsman Group Case Management and Resolution Processing	
Feedback/Dispute Non-Call Case Intake, Screening, and Assignment	All activities necessary to ensure the case creation and assignment to the appropriate parties.
Feedback/Dispute Case Research and Escalation	All activities necessary to contact appropriate parties; compile and evaluate information relevant to the case; execute contacts to complainants; negotiate acceptable resolutions; craft and send outgoing messages; determine whether subsequent contacts require case re-work.
Feedback/Dispute Case Closure	All activities necessary to properly document steps taken to resolve the matter; update the case record in the system with accurate data concerning case topic, resolution type, and outcome, and closing date.
Other Feedback Center & Ombudsman Processing	This includes other Feedback Center & Ombudsman Processing activities not included in the above list.
Collection/Default Activities Processing	
Administrative Wage Garnishment (AWG)	Identify candidates for garnishment (non-payers, not working toward resolution), locate employer and verify employment, process employer certification forms, initiate due process notice (cause DMCS system to send notice), establish voluntary repayment agreements with borrowers who respond to notice, draft hearing responses to borrowers who request a hearing in response to notice, monitor accounts for events that require suspension of AWG (bankruptcy, etc.), respond to inquiries from employers and borrowers, notify employers when payment in full is imminent, send stop garnishment notices (fax), and issue refunds.
Treasury Offset/Federal Salary Offset	Establish voluntary repayment agreements with borrowers who respond to notice, draft hearing responses to borrowers who request a hearing in response to notice, respond to calls from borrowers who have been offset, respond to hardship claims, and issue refunds.

Litigation Referrals	Identify candidates for litigation, prepare litigation package, support reconciliation with DOJ, update accounts to conform with terms of judgment, prepare release and satisfaction of judgment packages, and notify DOJ of discharge requests.
Loan Rehabilitation	Counsel borrowers on benefits and requirements of the program, review borrower financial docs and calculate monthly payment amount, send rehabilitation agreement letter to borrower, and review signed rehabilitation agreement for acceptability.
Title IV Reinstatement	Counsel borrowers on TIV requirements, monitor accounts for reinstatement eligibility, send reinstatement letter, and update NSLDS status.
Other Collection/Default Activities	Establish reasonable and affordable repayment agreements, incarceration verifications, and manual CAIVRS updates.
Miscellaneous Life of Loan & Grant Processing	
Account Research and Response for Disputes/Escalations	Reviewing escalated inquiries, drafting correspondence as needed.
Account Research and Escalations	Reviewing escalated inquiries and escalating to FSA as needed.
Reviewing and Responding to Control Mail	Reviewing, preparing, and responding to control correspondence. Control correspondence includes items sent to Federal Student Aid from the White House, Members of Congress, State Attorneys General, the Department of Education's Office of Inspector General, and other high Government officials. In addition, FSA may at its discretion designate other items as a control mail item.
Responding to General Correspondence/Requests for Information	Manual responses to customer correspondence/requests when needed (e.g. sending documents, histories, addressing questions, etc.)
NSLDS/Enrollment Reporting Updates and Changes	Manually reviewing and adjusting NSLDS and/or enrollment reporting as needed.
Payment Exception and Refund Processing	Payment research and Reapplication of payments and/or refund processing.
Account Status Change and Manual Adjustments	Reviewing accounts to perform manual adjustments as needed (e.g. repayment and billing adjustments, conversion to repayment, adjusting account status, removing and/or reapplying borrower benefits, name change/SSN merge, et cetera).
Manual Skip Tracing	Performing skip tracing activities to locate and verify a customer's address, telephone number, or other contact details.
Other Life of Loan & Grant Processing	This includes other Life of Loan & Grant Processing activities not included in the above list.

SECTION C—DESCRIPTION/SPECIFICATIONS/ STATEMENT OF WORK

1.0 PURPOSE

The purpose of this Common Performance Work Statement (PWS) is to define the scope of work to be performed and the Common Performance Standards to be achieved by contractors as part of the U.S. Department of Education, Office of Federal Student Aid (FSA), Next Generation Financial Services Environment, Business Process Operations Program (Next Gen BPO).

2.0 BACKGROUND

Next Gen BPO is a component of the Next Gen initiative and supports FSA's overall strategic goal to provide a more efficient and effective customer experience to the students, parents, and borrowers FSA serves.

FSA intends to accomplish its goal by contracting with vendors who will execute contact center operations and back-office processing activities encompassing the full student aid lifecycle, from disbursement to payoff, in a manner consistent with leading financial services providers and other industry leaders recognized for their customer service to:

- Deliver efficient and effective customer and partner experiences;
- Improve customer outcomes, overall portfolio performance, and compliance with consumer protection standards; and
- Establish greater operational flexibility and reduce operational complexity.

Next Gen BPO Providers will provide personnel to operate under FSA's single brand, provide an enhanced level of service beyond today's environment, and support operations across the entire lifecycle of student aid.

Description of Services

The services contemplated under this NexGen BPO multiple award Indefinite Delivery Indefinite Quantity (IDIQ) Contract include the personnel and equipment, utilizing the provided environment and tools required to execute the following support services: **Contact Center Support** and **Back-Office Processing**.

Contact Center Support includes but is not limited to: Inbound/Outbound Calls, Chat Sessions, Inbound Social Media Inquiries, SMS/Texts Exchanges, Manual Email Exchanges, Outbound Mail Responses, and Other Contact Center Support.

Back-Office Processing includes but is not limited to: Eligibility Processing, Origination and Disbursement Processing, Applicant Support Services, School Support Services, Campus Based Support, Life of Loan & Grant Processing, Repayment Plan and Recertifications Processing, Military Benefits Review and Application Processing, Teacher Education Assistance for College and Higher Education (TEACH) Grant Processing, Public Service Loan Forgiveness and Temporary Expanded Public Service Loan Forgiveness (PSLF/TEPSLF) Processing, Deferment Processing, Forbearance Processing, Discharge Processing (Intake, review, follow-up, and post-determination processing), Bankruptcy Processing Support, Total & Permanent Disability Discharge Processing, Borrower Defense Processing, Cohort Default Rate (CDR) Appeals Processing, Fair

Credit Reporting Agency (FCRA) Credit Dispute Processing, Office of Inspector General (OIG) Fraud Referral Case Management and Resolution Processing, Feedback Center & Ombudsman Group Case Management and Resolution Processing, Collection/Default Activities Processing, and Miscellaneous Life of Loan & Grant Processing.

3.0 CONTRACT INFORMATION

Contract Type: Firm-Fixed Price IDIQ Contract.

Period of Performance: Performance of this contract shall be for a Base Ordering Period of three years and an Optional Ordering Period of three years.

Table 1—Next Gen BPO Period of Performance

Period of Performance	Duration
Base Ordering Period: June 23, 2020 through June 22, 2023	3 years (36 Months)
Optional Ordering Period: June 23, 2023 through June 22, 2026	3 years (36 Months)
Total (if Optional Ordering Period is exercised)	**6 years (72 months)**

Place of Performance: Performance shall be performed at Contractor managed facilities within 48 contiguous states or the District of Columbia unless specifically authorized by FSA.

Observance of Federal Holidays: Deliverables due on a Saturday, Sunday, or the following Federal holidays shall be due on the following business day.

Federal Holidays		
1	New Year's Day	January 1
2	Martin Luther King's Birthday	3rd Monday in January
3	President's Day	3rd Monday in February
4	Memorial Day	Last Monday in May
5	Independence Day	July 4
6	Labor Day	1st Monday in September
7	Columbus Day	2nd Monday in October
8	Veterans Day	November 11
9	Thanksgiving Day	4th Thursday in November
10	Christmas Day	December 25

4.0 SCOPE OF WORK, REQUIREMENTS, AND MILESTONES

4.1 CUSTOMER EXPERIENCE FOCUS

Next Gen BPO Providers shall prioritize customer and partner needs and preferences by meeting or exceeding FSA's Common Performance Standards to deliver an improved experience throughout the lifecycle of student aid. Next Gen BPO Providers shall use the Training and * * *

EXHIBIT F

Federal Servicing Examples of GD01 discharges

Example #1: Full discharge of all loans

Servicer has 3 loans (A, B, and C) for borrower 123123123:

- Loan A = $3500 prin, $100 int
- Loan B = $2000 prin, $50 int
- Loan C = $1250 prin, $40 int

FSA sends a discharge request (GD01) on 08/01/2022 for borrower 123123123 and provides a total discharge amount of $10,000 and loan listing 3 loans in this order: Loan B, Loan A, Loan C

Servicer first applies the discharge to Loan B (first in list from FSA). Servicer applies first to interest ($50) then to principal ($2000).

The total discharge remaining after that is $7,950 ($10,000 - $2050) so the servicer then applies to the next loan in the list—Loan A. Applies first to interest ($100) then to principal ($3500).

The total discharge remaining after that is $4,350 ($7950 - $3600) so the servicer then applied to the next loan in the list—Loan C. Applies first to interest ($40) then to principal ($1250).

No other loans are in the list to be discharge so this discharge is complete. Total discharge amount is $6,940.00.

Servicer would respond in response file with:

Change Indicator = Y

Borrower SSN = 123123123

Status of discharge = DC

Total Discharge Amount = $6,940.00 (00694000 when formatted for file)

Date of most recent discharge request = 08/01/2022 (08012022)

Example #2: Less than full discharge of all loans

Servicer has 3 loans (A, B, and C) for borrower 987987987:

- Loan A = $3500 prin, $100 int
- Loan B = $2000 prin, $50 int
- Loan C = $8000 prin, $200 int

FSA sends a discharge request (GD01) on 08/01/2022 for borrower 987987987 and provides a total discharge amount of $10,000 and loan listing 3 loans in this order: Loan B, Loan A, Loan C

Servicer first applies the discharge to Loan B (first in list from FSA). Servicer applies first to interest ($50) then to principal ($2000).

The total discharge remaining after that is $7,950 ($10,000 - $2050) so the servicer then applies to the next loan in the list—Loan A. Applies first to interest ($100) then to principal ($3500).

The total discharge remaining after that is $4,350 ($7950 - $3600) so the servicer then applied to the next loan in the list—Loan C. Applies first to interest ($200) then to principal ($4150). Only $4150 is applied to principal because that is all that remains of the total discharge amount. Therefore, Loan C is not completely paid off.

The total amount of discharge has been applied, so this discharge is complete.

Total discharge amount is $10,000.00.

Servicer would respond in response file with:

Change Indicator = Y

Borrower SSN = 987987987

Status of discharge = DC

Total Discharge Amount = $10,000.00 (01000000 when formatted for file)

Date of most recent discharge request = 08/01/2022 (08012022)

Example #3: Servicer has loans NOT on the list sent by FSA

Servicer has 3 loans (A, B, and C) for borrower 654654654:

- Loan A = $3500 prin, $100 int
- Loan B = $2000 prin, $50 int
- Loan C = $1250 prin, $40 int
- Loan D = $3000 prin, $120 int

FSA sends a discharge request (GD01) on 08/01/2022 for borrower 654654654 and provides a total discharge amount of $10,000 and loan listing 3 loans in this order: Loan B, Loan A, Loan C [Note: Loan D is NOT included in the file sent by FSA]

Servicer first applies the discharge to Loan B (first in list from FSA). Servicer applies first to interest ($50) then to principal ($2000).

The total discharge remaining after that is $7,950 ($10,000 - $2050) so the servicer then applies to the next loan in the list—Loan A. Applies first to interest ($100) then to principal ($3500).

The total discharge remaining after that is $4,350 ($7950 - $3600) so the servicer then applied to the next loan in the list—Loan C. Applies first to interest ($40) then to principal ($1250).

No other loans are in the list to be discharge so this discharge is complete. Total discharge amount is $6,940.00. Loan D was NOT included in the discharge request file, so the servicer would NOT apply any discharge to that loan.

Servicer would respond in response file with:

Change Indicator = Y

Borrower SSN = 654654654

Status of discharge = DC

Total Discharge Amount = $6,940.00 (00694000 when formatted for file)

Date of most recent discharge request = 08/01/2022 (08012022)

Example #4: Full discharge of all loans, but later another discharge type approved on one of the loans

Servicer has 3 loans (A, B, and C) for borrower 123123123:

- Loan A = $3500 prin, $100 int
- Loan B = $2000 prin, $50 int
- Loan C = $1250 prin, $40 int

FSA sends a discharge request (GD01) on 08/01/2022 for borrower 123123123 and provides a total discharge amount of $10,000 and loan listing 3 loans in this order: Loan B, Loan A, Loan C

Servicer first applies the discharge to Loan B (first in list from FSA). Servicer applies first to interest ($50) then to principal ($2000).

The total discharge remaining after that is $7,950 ($10,000 - $2050) so the servicer then applies to the next loan in the list—Loan A. Applies first to interest ($100) then to principal ($3500).

The total discharge remaining after that is $4,350 ($7950 - $3600) so the servicer then applied to the next loan in the list—Loan C. Applies first to interest ($40) then to principal ($1250).

No other loans are in the list to be discharge so this discharge is complete. Total discharge amount is $6,940.00.

Servicer would respond in response file with:

Change Indicator = Y

Borrower SSN = 123123123

Status of discharge = DC

Total Discharge Amount = $6,940.00 (00694000 when formatted for file)

Date of most recent discharge request = 08/01/2022 (08012022)

Note everything to this point is the same as example #1.

On 9/1/2022 FSA provides the servicer with a Closed School Discharge request on Loan B.

The servicer would reverse off the GD01 discharge from Loan B and then apply the Closed School discharge to Loan B. The total discharged for GD01 is now reduced to $4,890.00.

Servicer would respond in response file with:

Change Indicator = Y

Borrower SSN = 123123123

Status of discharge = DC

Total Discharge Amount = $4,890.00 (00489000 when formatted for file)

Date of most recent discharge request = 08/01/2022 (08012022)—remains 8/1/22 as that is the most recent Pandemic-connected discharge request

Example #5: No loans to be discharged at the servicer

Servicer has 3 loans (A, B, and C) for borrower 321321321 but none of them currently have balances (were recently discharged):

- Loan A = $0 prin, $0 int
- Loan B = $0 prin, $0 int
- Loan C = $0 prin, $0 int

FSA sends a discharge request (GD01) on 08/01/2022 for borrower 321321321 and provides a total discharge amount of $10,000 and loan listing 3 loans in this order: Loan B, Loan A, Loan C

Servicer reviews the loans provided by FSA and finds no balance remain to be discharged (prior discharges are no reversed to apply GD01 discharges).

Since no loans provided have balances to be discharged the total discharge amount is $0.00.

Servicer would respond in response file with:

Change Indicator = Y

Borrower SSN = 321321321

Status of discharge = DX (if no loans discharged use DX status and $0 amount)

Total Discharge Amount = $0.00 (00000000 when formatted for file)

Date of most recent discharge request = 08/01/2022 (08012022)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:22-cv-01040

STATE OF NEBRASKA, ET AL., PLAINTIFFS

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS THE PRESIDENT OF THE UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF MICHAEL WALDEN-NEWMAN

I, Michael Walden-Newman, hereby declare and state as follows:

1. I am over the age of 21 and make this declaration based on my own personal knowledge.

2. I am the State Investment Officer of the State of Nebraska. I was appointed to my position by, and I work closely with, the Nebraska Investment Council (NIC).

3. NIC is charged by state law with the responsibility for the investment management of various assets held by the State of Nebraska. These include the assets of the retirement systems administered by the Public Employees Retirement Board, the Nebraska educational savings plan trust, the achieving a better life experience program, and each retirement system provided for under the Class V School Employees Retirement Act. *See* Neb. Rev. Stat. § 72-1239.01.

4. As of September 20, 2022, NIC had approximately 2.6% (which is a market value of $24.8 million) of the NIC FI US Core Plus separate account portfolio invested in privately held Federal Family Education Loan Program (FFELP) student-loan asset-backed securities (SLABS) through BlackRock.

5. As of September 19, 2022, Nebraska's pension fund had $345,804.21 invested in FFELP SLABS through PIMCO Investment Management. On that same day, Nebraska's endowment fund had $129,676.58 invested in FFELP SLABS through PIMCO Investment Management.

6. As of September 19, 2022, NIC's various accounts with Loomis Sayles held multiple investments in private SLABS. Specifically, NIC's endowment account held $92,725 in SLABS, and its pension account owned SLABS with a market value of $99,713.

7. As of September 20, 2022, NIC's portfolio managed by Baird also included investments in private SLABS.

8. Our investment managers at BlackRock informed me on September 20, 2022, that they expect the Biden Administration's student debt cancellation will increase prepays for FFELP SLABS even though FFELP loans are not currently included in the Biden Administration's student debt cancellation plan.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on Sept. 28, 2022.

/s/ <u>MICHAEL WALDEN-NEWMAN</u>
MICHAEL WALDEN-NEWMAN
State Investment Officer
State of Nebraska

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
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DECLARATION OF JAMES A. CAMPBELL

I, James A. Campbell, hereby declare and state as follows:

1. I am an attorney for the State of Nebraska, a plaintiff in this case. I am over the age of 21 and make this declaration based on my own personal knowledge.

2. Attached as **Exhibit A** is a true and correct copy of a website published by Federal Student Aid, an Office of the U.S. Department of Education, outlining the Biden Administration's mass student loan cancellation program. It was downloaded from https://studentaid.gov/debt-relief-announcement/one-time-cancellation.

3. Attached as **Exhibit B** is a true and correct copy of a website published by Federal Student Aid, an Office of the U.S. Department of Education, explaining the Biden Administration's mass student loan cancellation program and answering frequently asked questions. It

was downloaded from https://studentaid.gov/ debt-relief-announcement/.

4. Attached as **Exhibit C** is a true and correct copy of a budget model published by Penn Wharton, University of Pennsylvania, entitled *The Biden Student Loan Forgiveness Plan: Budgetary Costs and Distributional Impact*. It was downloaded from https://budgetmodel.wharton.upenn.edu/issues/2022/8/26/biden-student-loan-forgiveness.

5. Attached as **Exhibit D** is a true and correct copy of the transcript of an August 24, 2022 White House press briefing by senior administration officials addressing the student loan cancellation. It was downloaded from https://www.whitehouse.gov/briefing-room/press-briefings/2022/08/24/background-press-call-by-senior-administration-officials-on-student-loan-relief/.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on Sept. 28, 2022

/s/ JAMES A. CAMPBELL
JAMES A. CAMPBELL

EXHIBIT C

PENN WHARTON
UNIVERSITY *of* PENNSYLVANIA
Budget Model

The Biden Student Loan Forgiveness Plan: Budgetary Costs and Distributional Impact

Summary: President Biden's new student loan forgiveness plan includes three major components. We estimate that *debt cancellation* alone will cost up to $519 billion, with about 75% of the benefit accruing to households making $88,000 or less. Loan *forbearance* will cost another $16 billion. The new *income-driven repayment* (IDR) program would cost another $70 billion, increasing the total plan cost to $605 billion under strict "static" assumptions. However, depending on future IDR program details to be released and potential behavioral (i.e., "non-static") changes, total plan costs could exceed $1 trillion.

Key Points

- We estimate that President Biden's proposed student loan debt cancellation alone will cost between $469 billion to $519 billion over the 10-year budget window, depending on whether existing and new students are included. About 75% of the benefit falls to households making $88,000 or less per year.
- Loan forbearance for 2022 will cost an additional $16 billion.
- Under strict "static" assumptions about student borrowing behavior and using take-up rates within existing income-based repayment programs, the proposed new IDR program will cost

an additional $70 billion, increasing total package costs to $605 billion.

- However, depending on future details of the actual IDR program and concomitant behavioral changes, the IDR program could add another $450 billion or more, thereby raising total plan costs to over $1 trillion. These details require future study.

Introduction

President Biden has recently announced a fact sheet for a student loan relief proposal that includes:

- *Debt cancellation*: Individuals earning less than $125,000 (or $250,000 for families) a year will be eligible for up to $10,000 in debt cancellation. Pell Grant recipients earning less than $125,000 (or $250,000 for families) a year are eligible for up to $20,000 in debt reduction.
- *Forbearance*: Student loan forbearance extended through December 31, 2022.
- *New Income-Driven Repayment (IDR)*: This plan proposes:
    - o Capping monthly payments to 5% (relative to the current rate of 10% or more) of the discretionary income for undergraduate loan borrowers;[1]

[1] Graduate student debt would also qualify, but at a 10% income cap, like existing programs although with more generous terms discussed below.

- o Covering the borrower's unpaid monthly interest so that debt balances will not grow even when monthly payments are zero;
- o Raising the amount excluded from the calculation of discretionary income from 150% to 225% of the poverty line; and,
- o Forgiving loan balances after 10 years of payments, instead of 20 years, for borrowers with original loan balances of $12,000 or less.

The estimation methods herein largely follow our previous brief on student loan debt forgiveness, along with some updates to accommodate the new details released by the Biden Administration. Our previous brief also provides additional background into existing income-based repayment programs.

Loan Forgiveness ("Debt Cancellation")

Table 1 reports the 10-year budgetary cost estimates for the student loan forgiveness portion of the Biden proposal. The $468.6 billion cost in 2022 corresponds to loans only for students who have separated from eligible post-secondary education and no longer have their debt payments deferred. The $519.1 cost over the 10-year budget window includes students currently enrolled in college with loan deferral status as well as future students during the budget window. As discussed in our previous brief, our loan forgiveness calculations include cost savings to existing income-based repayment programs with partial take-up rates.

Table 1. Conventional Budget Estimates of the Broad Student Debt Forgiveness, FY2022 - 2031

Billions of Dollars

DOWNLOAD DATA

Provision	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	Budget Window
Loan forgiveness (*)	468.6	5.5	5.0	5.0	5.4	5.2	5.9	5.9	6.1	6.4	519.1
Loan forbearance	16.0	0	0	0	0	0	0	0	0	0	16.0
New IDR program (*, **)	41.6	2.8	2.8	2.7	2.6	2.9	3.4	3.6	3.8	4.0	70.3
Total	**526.3**	**8.3**	**7.8**	**7.7**	**8.1**	**8.1**	**9.3**	**9.5**	**9.9**	**10.4**	**605.4**

* For clarity, costs are recorded in the shown year based on outstanding loan vintage. For IDR, Congress can determine a different cost path of subsidy rates by year.

** New IDR program costs are fully "static" by assuming takeup rates of existing IBR programs. A "conventional" score would include an increase in takeup rates, as discussed below.

Table 2A reports the distributional impact of loan forgiveness in 2022 across all ages while Table 2B restricts the ages to 25-35, an age range that is arguably a bit more consistent with lifecycle effects. About 74 percent (Table 2A) to 76 percent (Table 2B) of forgiveness accrues to households making less than $82,400 (Table 2A) or $88,043 (Table 2B). Relative to our previous brief, the extra Pell grant trigger bonus of an additional $10,000 in forgiveness—for a total forgiveness of up to $20,000 for Pell grant recipients—skews the distribution more toward lower-income households.

Table 2. Student Debt Forgiveness Benefit Distribution, FY2022

DOWNLOAD DATA

☒ 2A: All Ages

☐ 2B: Age 25-35

2A: All Ages

Income Group	Debt forgiven benefit distribution
Bottom quintile	14.32%
Second quintile	23.46%
Middle quintile	36.02%
Fourth quintile	20.52%
80-90%	4.70%
90-95%	0.99%
95-99%	0.00%
99-99.9%	0.00%
Top 0.1%	0.00%

Notes: Estimate household income percentile thresholds for 2022 all age: 20%: $28,784; 40%: $50,795;

60%: $82,400; 80%: $141,096; 90% $212,209; 95%: $321,699; 99%: $961,711; 99.9%: $3,668,499.

2B: Age 25-35

Income Group	Debt forgiven benefit distribution
Bottom quintile	13.46%
Second quintile	25.09%
Middle quintile	37.00%
Fourth quintile	18.22%
80-90%	5.98%
90-95%	0.25%
95-99%	0.00%
99-99.9%	0.00%
Top 0.1%	0.00%

Notes: Estimate household income percentile thresholds for 2022 age 25-35: 20%: $29,348; 40%: $53,052; 60%: $88,043; 80%: $153,513; 90% $233,655; 95%: $363,464; 99%: $1,090,391; 99.9%: $4,503,788.

Loan Forbearance

Table 1 reports that loan forbearance will cost an additional $16 billion. This amount is "stacked" after loan forgiveness. The presence of loan forgiveness reduces the *additional* cost associated with forbearance. Given its size, the distributional impact is not reported, but it is more evenly distributed throughout the income distribution relative to loan forgiveness.

Income Driven Repayment

Table 1 also reports that the new IDR plan will cost an additional $70.3 billion over the 10-year window when "stacked" after the loan forgiveness and forbearance.

This new program will likely target lower income households even more than loan forgiveness noted above. However, assigning the new IDR gains to specific income groups with reasonable accuracy requires the use of confidential data and an associated mandatory external review period. We will revisit this issue in coming weeks.

This calculation also assumes that take-up rates in the new IDR proposal are the same as in existing income repayment plans. As we document in our previous brief, a majority of qualified borrowers do not enroll in existing programs.

Future Analysis is Needed

The new features in the new IDR proposal, however, could sharply increase take-up rates. Even many borrowers who anticipate not being qualified in future years would typically be better off enrolling in the intermediate years in which they are qualified. There would also be financial incentives for future borrowers to shift education financing toward more borrowing to take advantage of the 5% repayment threshold. If the Department of Education simply auto-enrolled borrowers for which it had sufficient information (i.e., switched from "opt in" to "opt out"), the additional costs of the IDR program alone could reasonably exceed $450 billion.

The actual net distributional effects (the "incidence") of the new IDR program will also depend on future program details yet to be released. Part of the benefit might be captured by colleges and universities in the form of higher net prices, either higher tuition prices or reduced needs-based tuition offsets.

We plan to examine these issues in future work, especially as new program details emerge.

This analysis was produced by Junlei Chen under the guidance of Kent Smetters. Prepared for the website by Mariko Paulson.

EXHIBIT D

BRIEFING ROOM

Background Press Call by Senior Administration Officials on Student Loan Relief

AUGUST 24, 2022 • PRESS BRIEFINGS

Via Teleconference

MR. HASAN: Hi, everyone, this is Abdullah from the White House. Thanks for joining today's background briefing on the student loans announcement. As you may have seen just before this call, the President will have more to say on this at 2:15 p.m. today.

As a reminder, this call is on background and attributable to a senior administration official. There is no embargo.

For your awareness but not for reporting purposes, joining us for the call today are [senior administration official] and [senior administration official].

With that, I will turn it over to [senior administration official].

SENIOR ADMINISTRATION OFFICIAL: Hi. Good morning, everyone. Thanks for joining us today. We wanted to provide some background and walk you through the plan that the President recently announced.

President Biden believes that a post-high school education should be a ticket to a middle-class life. But for too many, the cost of borrowing for college is a lifelong burden that deprives them of that opportunity.

During the campaign, the President promised to provide targeted student debt relief. And today, the Biden administration is following through on that promise with a plan that will benefit tens of millions of middle-class Americans, their families, and the economy as a whole.

Over the last 40 years, the total cost of both four-year public and four-year private colleges have nearly tripled, even after accounting for inflation. At the same time, federal support has not kept up. Pell Grants once covered nearly 80 percent of the cost of a four-year public college degree, but now they only cover a third.

All of this has left many students from low- and middle-income families with no choice but to borrow if they want to get a degree.

This skyrocketing federal student loan debt burden—$1.6 trillion and rising—for more than 45 million borrowers is a financial weight on America's middle class. Middle-class borrowers struggle with high monthly payments and ballooning balances that make it harder for them to build wealth. Larger student debt burdens make it harder for people to buy homes or put money away for retirement. It also makes it harder for borrowers to start small businesses because many entrepreneurs rely on their personal wealth to get their businesses off the ground.

And for the most vulnerable borrowers, the effect of debt are even more crushing, with one in six borrowers in default and many unable to complete their degree because the cost of attendance was too high.

The burden falls disproportionately on Black borrowers. According to one analysis, Black borrowers 20 years after taking on the debt still owe 95 percent of their original student loan debt.

Today, President Biden is taking action to lift a large weight off of tens of millions of Americans by relieving student loan debt and reforming our student loan system as a whole.

This announcement has three major parts, and it offers targeted debt relief to lower- and middle-income families as part of a comprehensive effort to address growing college costs.

I will describe the first two parts and then turn it over to my colleague to describe the third.

First is debt cancellation. The administration will provide $20,000 in debt relief to borrowers who received Pell Grants while they were in college. To qualify, a borrower must make less than $125,000, or $250,000 if they are part of a household. Borrowers who are not Pell Grant recipients but who meet those income thresholds will be eligible to receive $10,000 in relief.

It is really hard to overstate how significant this is for America's middle class and for our economy. This announcement will help people who, by and large, came from working families and are working class now.

If all borrowers claim the relief that they're entitled to, 43 million federal student loan borrowers will benefit. And of those, 20 million will have their debt completely canceled.

This plan distributes relief highly progressively. Among borrowers who are no longer in school, nearly 90 percent of relief dollars will go to those earning less than $75,000 a year, and no one in the top 5 percent of incomes in America will get a single dollar of relief.

Also, by targeting relief to borrowers with the highest economic need, this plan helps narrow the racial wealth gap. That's in part because Black students are more likely to have to borrow for school, more likely to take out larger loans, and more likely to have received Pell Grants.

Even before applying the additional $10,000 for Pell Grant recipients, the typical Black borrower will see their balance cut nearly in half, and more than one in four Black borrowers will see their balance forgiven altogether.

And then, on top, adding relief for Pell Grant recipients will go a long way to promoting equity because Black borrowers are twice as likely to be Pell Grant recipients as their white peers.

Current students with loans are eligible for this debt relief. Dependent students will be eligible for relief based on their parental income rather than their own income.

And to ensure a smooth transition to repayment and prevent unnecessary defaults, the administration will be extending the pause on federal student loan payments one final time through December 31, 2022.

By combining targeted relief with a restart in payments, the President is taking one step that has a negative fiscal impulse—collecting more payments from borrowers—and one step that has a positive fiscal impulse—offering debt relief to borrowers most in need.

In terms of an impact on inflation relative to today, our view is that those steps largely offset. There are certain conditions and assumptions under which they could well be neutral or deflationary.

With that, I'm going to turn it over to [senior administration official] to talk about the other components of the plan.

SENIOR ADMINISTRATION OFFICIAL: Thank so much. As [senior administration official] said, in addition to providing immediate cancellation, the administration is making the student loan system more manageable for current but also future borrowers.

Fist, the department will reform something called the income-driven repayment system. The Department of Education has authority to create income-driven repayment plans, which cap what borrowers pay each month based on a percentage of their discretionary or disposable income. Most of these plans cancel a borrower's remaining debt once they make 20 years of monthly payments.

But the existing versions of these plans are too complex and too limited. And as a result, millions of borrowers who might benefit from them do not sign up, and the millions who do sign up are still often left with unmanageable monthly payments.

So that's why the President will announce proposed reforms to income-driven repayment so that both current and future low- and middle-income borrowers will have smaller monthly payments.

The proposed rule for undergraduate loans would cut in half the amount that borrowers have to pay each month from 10 percent to 5 percent of discretionary income. They'll also raise the amount of income that is considered non-discretionary and therefore protected from repayment, guaranteeing that no borrower earning under 225 percent of the federal poverty level, which is about the annual equivalent of a $15 minimum wage for a single borrower, will have to make a monthly payment.

Further, for borrowers with loan balances of $12,000 or less, the proposed rule will forgive loan balances after 10 years of payments instead of 20 years.

And unlike existing income-driven repayment plans, this plan would cover the borrower's unpaid monthly interest so that borrowers' loan balance won't grow as long as they make their monthly payments.

These reforms will deliver significant savings to low- and middle-income borrowers. For example, a typical single construction worker making $38,000 a year with a construction management credential would pay only $31 a month compared to the $147 they pay now under the most recent income-driven repayment plan. That would give them an annual savings of nearly $1,400.

And starting in the summer of 2023, borrowers will be able to allow the Department of Education to automatically pull their income information year after year, avoiding the hassle of needing to rectify their income annually. Once a borrower is enrolled, it will be much easier to stay enrolled and receive credit that they're due.

Second, the Department of Education is also making changes to the Public Service Loan Forgiveness—or the "PSLF"—program that builds off of shorter-term changes that make it easier for borrowers working in public service to gain progress towards loan forgiveness.

Borrowers working in public service are entitled to earn credit towards loan forgiveness under PSLF, but because of complex eligibility restrictions, historic implementation failures, and poor counseling given to borrowers, many public service servants have not received the credit they deserve for their public service.

The Department of Education also proposed regulatory changes to ensure more effective implementation of the PSLF program moving forward. Specifically, the Department of Education has proposed allowing more payments to qualify for PSLF, including partial lump sum and late payments.

The proposed rule also allows certain kinds of deferments and forbearances—such as those for Peace Corps and AmeriCorps service, National Guard duty, and military service—to count towards PSLF. And it proposes to change the program so that it works better for nontenured instructors whose colleges need to calculate their full-time employment.

In the short term, the Department of Education has announced time-limited changes to PSLF that provide an easier path to forgiveness. Those who serve less than 10 years can now more easily get credit for their service to date towards eventual forgiveness.

These changes allow eligible borrowers to gain additional credit towards forgiveness even if they've been previously denied.

To ensure borrowers are aware of the temporary changes, the White House has launched four PSLF days of action dedicated to borrowers in specific sectors: government employees, educators, healthcare workers, first responders, and nonprofit employees. Today is the first day of action.

Additionally, the Department of Education has already taken significant steps to strengthen accountability so that students are not left with mountains of debt with little payoff. The agency has reestablished the enforcement unit in the Office of Federal Student Aid, and it is holding accreditors' feet to the fire. In fact, the department just withdrew authorization for the accreditor that oversaw schools responsible for some of the worst for-profit scandals.

The agency will also propose a rule to hold career programs accountable for leaving the graduates with mountains of debt that they cannot pay—a rule the previous administration repealed.

Building off of these efforts, the department is announcing new actions to hold accountable colleges that have contributed to the student debt crisis, including publishing an annual watch list of the programs with the worst debt levels in the country, so that students registering for programs in the next academic year can steer clear of programs with poor outcomes.

It is also requesting institutional improvement plans from the worst actors that outline how the colleges with the most concerning debt outcomes intend to bring down debt levels.

The President believes that when we strengthen the middle class of the country, everyone benefits. And that's what these policies do. It provides a little bit more financial security for millions of lower- and middle-income Americans.

And with that, I'll turn it back to Abdullah. Thanks so much.

MR. HASAN: Thank you. We'll go ahead to Chris Megerian for the first question.

Chris, you should be unmuted now.

Q Okay, here I am. So, a question about future college students. What impact will this have on students who are currently in high school and are going to be starting—you know, taking out lots of debt to be starting college soon? And also, can you specify the impact on Parent PLUS loans—basically, loans that parents are still paying off for their college graduates?

SENIOR ADMINISTRATION OFFICIAL: So, Parent PLUS loans held by the Department of Education are included in the cancellation policy that [senior administration official] described.

In terms of future students, two things. As I laid out at the end there, there's policies that are designed to help reduce the cost of college, including increasing Pell, and the President has proposed moving forward to double the maximum Pell Grant.

And the—all of—the proposal related to income-driven repayment would apply to future loans. So it will reduce the amount a borrower must pay on undergraduate loans from 10 to 5 percent of their monthly income. And again, if they're low income, it protects—under the definition of discretionary income, it protects a higher level of income. So some borrowers could have a zero payment, depending on what their income is.

MR. HASAN: Great. Thank you. For the next question, we'll go to Jeremy Diamond.

Q Hey, thanks for doing this. First of all, on the inflation concerns, I know that you guys said that you believe that these steps will largely offset each other, but do you just dismiss, out of hand, concerns from several Democratic economists like Larry Summers and Jason Furman? And is there any circumstance under which you think that this will increase inflation?

And then, secondly, just on the decision-making front, you know, this is something that the President has been considering for a really long time now, it seems. And so I'm wondering, you know, why it took so long.

And there also seems to have been a significant 11th-hour push to get the President to go further, and I wonder if you guys could take us into that process over the last week.

Thanks.

SENIOR ADMINISTRATION OFFICIAL: Sure. So, on the inflation question, our view is that the combination—so if we—relative to where we sit today, which is that federal student loans are paused and that—and 45 million borrowers are under no obligation to make any payments to the government, the combination of restarting those loans—those loan payments— and providing targeted debt relief per the President's plan at roughly the same time will largely offset each other. That's our view.

And also, frankly, with certain fairly reasonable assumptions—because there's a lot of assumptions that go into this kind of analysis—the joint impact of those two actions could well be neutral or deflationary.

And I would just note that a number of independent experts have echoed this point. As you noted, there's some people who take the opposite view, but Moody's, Roosevelt, EPI, Center for American Progress, others who have discussed, you know, a plan with this sort of general outline—a combination of restarting student loan payments and providing targeted debt relief— have come to the same conclusion.

MR. HASAN: Great. And then, for the next question, we can go to Cheyenne Haslett.

Q Hi, thank you. Can you clarify which tax year for income—whether it's 2021 or 2022? And can you also clarify how exactly, going forward, the monthly income payments will be—you know, whether that will be taken on by taxpayers or how cutting down on that will affect the cost of this plan?

SENIOR ADMINISTRATION OFFICIAL: I can take the first. And, [senior administration official], maybe you can take the second?

For the purposes of the immediate debt relief, a borrower's income in either the 2020 or 2021 tax year is what's relevant. So, in other words, if in either 2021 or 2020 their income was below the income caps that have been described, they would be eligible for relief.

SENIOR ADMINISTRATION OFFICIAL: Sorry, I had a little—audio.

So, on the IDR, the costs of that program are spread out over time. It depends on how much outstanding debt is forgiven at the end of the repayment period, but borrowers will be making reduced payments on an annual basis. And in the—if they have outstanding loans at the end of the 20-year period and 10-year period for under $12,000, that amount of fund—debt will be forgiven. Some of those debts may not have been recuperated because people have gone into default. So it's a fairly complicated process for determining the cost implications.

MR. HASAN: Thanks, [senior administration official]. And then for the next question, let's go to Asma.

Q Hi, guys. It's Asma from NPR. Thank you all so much. I think this was a question that actually Jeremy had asked earlier—I don't believe it was answered—which is that there were certainly—there was certainly a desire from some Democrats to go larger. And can you help us understand the process of how the President settled on this 10k threshold for most borrowers —20k, obviously, for Pell Grant recipients? But how was this settled upon—given that I know there was a desire, certainly even this week—to go larger than that?

SENIOR ADMINISTRATION OFFICIAL: So I just want to clarify something, Asma: that 60 percent of borrowers have Pell Grants. So actually, the majority of borrowers are eligible for 20k in relief, and the remainder are eligible for the $10,000 in relief. So I think that's an—that's an important clarifying point.

And it honestly reflects—if you look at who Pell Grant recipients are, about half of them come from families that make under $30,000 a year and roughly the other half of them come from families that make between $30- and $60,000 a year. And collectively, those Pell Grant recipients make up about 60 percent of student loan borrowers.

So that just emphasizes, to me at least, how, you know, the vast majority of borrowers—or a strong majority of borrowers are folks who come from lower-income, middle-income families.

In terms of the process: Look, the President made a commitment during the campaign. He said, you know, he was going to provide $10,000 in relief. And over the past months, we've been going through the process that the President asked us to go through—examining the legal authority, looking at different permutations of this proposal—all with the goal of figuring out how do we provide relief to the people who really need it. And that's—this is a product of the plan that we arrived at.

We think it does a very good job of, number one, targeting relief to lower-income, middle-income borrowers. As I said, nearly 87—nearly 90 percent of the relief dollars here go to people making under $75,000 a year, while not a single dollar goes to anybody in the top 5 percent of incomes. And by targeting additional money to Pell Grant recipients, we are recognizing that not just income, but wealth plays a really important role in the capacity of borrowers to repay. And because Pell Grant recipients tend to come from lower-wealth families, providing them with additional relief is a way of really targeting relief at those who need it.

So that's the basic decision-making process.

MR. HASAN: Thanks, [senior administration official]. For the last question, let's go to Andrew Restuccia.

Q I'm sorry about that. Can you just to get into the legal justification for this cancellation a little bit more? It sounds like the administration released a memo laying it out, and it's based on pandemic authority. Can you explain how—you know, why it's based on pandemic authority when, you know, the conditions in the economy and other—and also health conditions of the country have been improving?

SENIOR ADMINISTRATION OFFICIAL: Yeah, look, my—I'm not a lawyer. So I'm—my instinct is to defer—for you guys to take a look at the written document that goes through this and to follow up with either the Education Department or DOJ if you have any questions on that.

MR. HASAN: All right, we'll take one final question. And we'll go to Lauren Egan.

Q Hi. Could you clarify the income cap? Do you qualify if you make as much as $125,000 a year or do you have to be under that? And then can you speak a little bit to what borrowers have to do, if anything, to get this cancellation and when people can start to see this reflected in their balances?

SENIOR ADMINISTRATION OFFICIAL: Sure. So, the income cap is under $125,000.

In terms of the process here, the Education Department is going to be releasing additional details in the coming days and weeks. Some borrowers are going to have to submit essentially a simple application that goes to their income and shows that they would meet the income caps that have been set out in this plan.

It's also the case that a certain percentage of borrowers —I think roughly 8 million borrowers—have already submitted relevant income information on file to the Education Department through other means. And those folks may—who qualify under the income cap— may be able to receive debt relief automatically.

But I'd refer you to the Education Department for further implementation details.

MR. HASAN: All right. Thank you everyone for joining today's call.

As a reminder, it is on background, attributable to "senior administration officials." No embargo.

You should have, during the call, received a factsheet from the White House as well, (inaudible) look at that. And thanks again for joining.

END

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:22-cv-01040

STATE OF NEBRASKA, ET AL., PLAINTIFFS

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS THE PRESIDENT OF THE UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF TONY WILLIAMS

I, Tony Williams, hereby declare and state as follows:

1. I am over the age of 21 and make this declaration based on my own personal knowledge.

2. I am currently employed as the Director of the Arkansas Student Loan Authority ("ASLA"). I have held that position since 2004. I have been employed by ASLA since 1987.

3. ASLA is a state entity created to provide a comprehensive student loan program for Arkansans. It was established in 1977. As of 2017, ASLA is a division of the Arkansas Development Finance Authority ("ADFA"). ADFA is overseen by a Board of Directors consisting of the Secretary of the Department of Finance and Administration, eleven public members appointed by the Arkansas Governor, and the Secretary of the Department of Commerce, who is a nonvoting member. The public members serve four-year terms.

4. As part of my duties as ASLA Director, I am familiar with ASLA's student loan portfolio.

5. ASLA participates in the Federal Family Education Loan Program ("FFELP"), which was established by the Higher Education Act. Origination of new FFELP loans ceased in 2010, but many FFELP loans still exist and are subject to ongoing repayment.

6. Prior to the announcement of the student loan cancellation by the Biden Administration, ASLA held approximately $100 million in FFELP loans. These FFELP loans provide a source of revenue to ASLA. ASLA generates revenue through collecting an administrative fee, which is calculated based on a percentage of the total outstanding FFELP loan balance. A portion of that administrative fee is paid out by ASLA for administrative and servicing costs, and the excess is retained as revenue. That revenue is primarily used for ASLA's operating expenses but could also be used to finance additional student loans as allowed under Arkansas law.

7. Since the announcement, ASLA estimates that approximately $5-6 million of the FFELP loans held by ASLA have been consolidated into loans under the Direct Loan Program ("OLP").

8. This drop in ASLA's FFELP loan balance will result in a reduction of revenue. That is because the administrative fee ASLA collects on FFELP loans is calculated based on the outstanding loan balance. A reduction in the total balance means a reduction in the administrative fee, resulting in decreased revenue.

9. ASLA's FFELP loans were financed through the issuance of bonds, which ASLA is authorized to do

under Arkansas law, and which generate revenue to support ASLA's ongoing college planning programs, higher education services and financial assistance for Arkansas families. The principal and interest payments made by borrowers ultimately go to satisfy obligations to bondholders. A reduction in the principal balance of ASLA's FFELP loans will result in a reduced administrative fee, as explained above.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on Sept. 29, 2022.

/s/ TONY WILLIAMS
TONY WILLIAMS

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

4:22CV01040-HEA

STATE OF NEBRASKA ET AL., PLAINTIFFS

v.

JOSEPH R. BIDEN, JR. ET AL., DEFENDANTS

Filed: Oct. 20, 2022

OPINION, MEMORANDUM AND ORDER

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

Facts and Background

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

Higher Education Act of 1965

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

The Higher Education Relief Opportunities for Students Act of 2003

In 2003, Congress enacted the Higher Education Relief Opportunities for Students Act of 2003 (HEROES

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

COVID-19 Pandemic

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

Student Loan Debt Relief Plan

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

FFELP loans only qualify to those borrowers who consolidated their FFELP loans into Direct Loans as of September 29, 2022.

The Instant Motion

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

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

Legal Standards

Preliminary Injunction

It is axiomatic that the standard for issuance of the "extraordinary and drastic remedy" of a temporary restraining order or a preliminary injunction is very high, *see Mazurek* v. *Armstrong*, 520 U.S. 968, 972 (1997), and by now very well established. "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter* v. *Nat. Res. Def. Council, Inc*., 555 U.S.

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

7, 24 (2008), quoting *Munaf* v. *Green*, 553 U.S. 674, 689-90 (2008). "Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant, (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant, (3) the probability that movant will succeed on the merits, and (4) the public interest." *Dataphase Sys., Inc.* v. *C.L. Sys., Inc.*, 640 F. 2d 109, 113 (8th Cir. 1981). "At the base, the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." *Id.*

<u>Article III Standing</u>

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

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

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

Discussion

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

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

<u>Plaintiff State of Missouri and MOHELA</u>

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

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

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

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

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

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

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[2] Curiously, the State of Missouri's "dot.gov" website fails to include MOHELA as an agency/department of the state, whereas, the

operates, and Missouri cannot establish standing to bring its claims[3] or establish standing through any arguments relating to MOHELA.

Consolidation

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

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

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

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

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

Arkansas and ASLA

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

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

Nebraska and NIC

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

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

The States of Nebraska, Iowa, Kansas, and South Carolina

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

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

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

Conclusion

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

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

Accordingly,

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

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

Dated this 20th day of Oct., 2022.

/s/ HENRY EDWARD AUTREY
HENRY EDWARD AUTREY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

4:22-cv-01040 HEA

STATE OF NEBRASKA ET AL., PLAINTIFFS

v.

JOSEPH R. BIDEN, JR., ET AL., DEFENDANTS

Filed: Oct. 20, 2022

ORDER OF DISMISSAL

In accordance with the Opinion, Memorandum and Order entered this same date,

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

Dated this day 20th of Oct., 2022.

/s/ HENRY EDWARD AUTREY
HENRY EDWARD AUTREY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

4:22CV1040 HEA

STATE OF NEBRASKA ET AL., PLAINTIFFS

v.

JOSEPH R. BIDEN, JR., ET AL., DEFENDANTS

Filed: Oct. 20, 2022

NOTICE OF APPEAL

All Plaintiff States—Nebraska, Missouri, Arkansas, Iowa, Kansas, and South Carolina—hereby appeal to the United States Court of Appeals for the Eighth Circuit from this Court's October 20, 2022 Opinion, Memorandum and Order, Doc. 44, and this Court's October 20, 2022 Order of Dismissal, Doc. 46.

Dated Oct. 20, 2022

Respectfully submitted,

DOUGLAS J. PETERSON
Attorney General of Nebraska

/s/ JAMES A. CAMPBELL
JAMES A. CAMPBELL
Solicitor General of Nebraska
Office of the Nebraska Attorney General
2115 State Capitol
Lincoln, NE 68509
(402) 471-2686
Jim.Campbell@nebraska.gov
Counsel for Plaintiffs

LESLIE R. RUTLEDGE
Attorney General of Arkansas
/s/ DYLAN L. JACOBS
DYLAN L. JACOBS
Deputy Solicitor General of Arkansas
Nicholas J. Bronni
Solicitor General of Arkansas
Office of the Arkansas Attorney General
328 Center Street, Suite 200
Little Rock, AR 72201
(501) 682-2007
Dylan.Jacobs@arkansasag.gov
Counsel for State of Arkansas

DEREK SCHMIDT
Attorney General of Kansas
/s/ SHANNON GRAMMEL
SHANNON GRAMMEL
Deputy Solicitor General of Kansas
Office of the Kansas Attorney General
120 SW 10th Avenue, 2nd Floor
Topeka, Kansas 66612
(785) 296-2215
shannon.grammel@ag.ks.gov
Counsel for State of Kansas

ERIC S. SCHMITT
Attorney General of Missouri
/s/ MICHAEL E. TALENT
MICHAEL E. TALENT, #73339MO
Deputy Solicitor General of Missouri
D. John Sauer, #58720MO
Solicitor General of Missouri
Missouri Attorney General's Office
Post Office Box 899
Jefferson City, MO 65102
(314) 340-4869
Michael.Talent@ago.mo.gov
Counsel for Plaintiffs

JEFFREY S. THOMPSON
Solicitor General of Iowa
/s/ SAMUEL P. LANGHOLZ
SAMUEL P. LANGHOLZ
Assistant Solicitor General of Iowa
Office of the Iowa Attorney General
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 281-5164
jeffrey.thompson@ag.iowa.gov
sam.langholz@ag.iowa.gov
Counsel for State of Iowa

ALAN WILSON
Attorney General of South Carolina
/s/ J. EMORY SMITH, JR.
J. EMORY SMITH JR.
Deputy Solicitor General of South Carolina
Office of the Attorney General of South Carolina
P.O. Box 11549
Columbia, SC 29211
(803) 734-3680
ESmith@scag.gov
Counsel for State of South Carolina

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

4:22CV1040 HEA

STATE OF NEBRASKA ET AL., PLAINTIFFS

v.

JOSEPH R. BIDEN, JR., ET AL., DEFENDANTS

Filed: Oct. 21, 2022

ORDER

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

Accordingly,

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

Dated this day 21st of October, 2022.

/s/ HENRY EDWARD AUTREY
HENRY EDWARD AUTREY
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 22-3179

STATE OF NEBRASKA ET AL., APPELLANTS

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS THE PRESIDENT OF THE UNITED STATES OF AMERICA, ET AL., APPELLEES

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

Filed: Oct. 21, 2022

ORDER

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

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

October 21, 2022

Order Entered at the Direction of the Court;
Clerk, U.S. Court of appeals, Eighth Circuit.

/s/ MICHAEL E. GANS
MICHAEL E. GANS

UNITED STATES DISTRICT COURT
FOR THE EIGHTH CIRCUIT

No. 22-3179

STATE OF NEBRASKA; STATE OF MISSOURI; STATE OF ARKANSAS; STATE OF IOWA; STATE OF KANSAS; STATE OF SOUTH CAROLINA, PLAINTIFFS–APPELLANTS

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS THE PRESIDENT OF THE UNITED STATES OF AMERICA; MIGUEL CARDONA, IN HIS OFFICIAL CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION; UNITED STATES DEPARTMENT OF EDUCATION, DEFENDANTS–APPELLEES

HAMILTON LINCOLN LAW INSTITUTE; AMERICANS FOR PROSPERITY FOUNDATION;
NEW CIVIL LIBERTIES ALLIANCE,
AMICI ON BEHALF OF APPELLANTS

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

Submitted: Oct. 24, 2022
Filed: Nov. 14, 2022
[Published]

Before: SHEPHERD, ERICKSON, and GRASZ, Circuit Judges.

PER CURIAM

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

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

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

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

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

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

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

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

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

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

Finally, we have carefully considered the Secretary's request that we limit the scope of any temporary relief.

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

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

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

(ORDER LIST: 598 U.S.)

THURSDAY, DECEMBER 1, 2022
CERTIORARI GRANTED

22-506
(22A444)

BIDEN, PRESIDENT OF U.S., ET AL. V.
NEBRASKA, ET AL.

Consideration of the application to vacate injunction presented to Justice Kavanaugh and by him referred to the Court is deferred pending oral argument. The application to vacate injunction is also treated as a petition for a writ of certiorari before judgment, and the petition is granted on the questions presented in the application.

The Clerk is directed to establish a briefing schedule that will allow the case to be argued in the February 2023 argument session.

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

Civil Action No. ______

MYRA BROWN AND ALEXANDER TAYLOR, PLAINTIFFS

v.

U.S. DEPARTMENT OF EDUCATION; MIGUEL CARDONA, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF EDUCATION, DEFENDANTS

Filed: Oct. 10, 2022

COMPLAINT

Plaintiffs Myra Brown and Alexander Taylor bring this civil action against Defendants the U.S. Department of Education and Miguel Cardona, in his official capacity as the Secretary of Education, for declaratory and injunctive relief, and allege as follows:

INTRODUCTION

1. The Administrative Procedure Act's notice-and-comment procedures exist for good reason: "to ensure that unelected administrators, who are not directly accountable to the populace, are forced to justify their quasi-legislative rulemaking before an informed and skeptical public." *New Jersey* v. *HHS*, 670 F.2d 1262, 1281 (3d Cir. 1981).

2. By requiring notice and comment, the APA "ensure[s] that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas." *U.S. Steel Corp.* v. *EPA*, 595 F.2d 207, 214 (5th Cir. 1979).

3. Simply put, the APA's notice-and-comment requirements promote "openness, explanation, and participatory democracy" and are a critical check on "the dangers of arbitrariness and irrationality in the formulation of rules." *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011, 1027-28 (D.C. Cir. 1978).

4. The Department of Education has flagrantly violated the APA's notice-and-comment requirements. Behind closed doors, the Department promulgated a new Debt Forgiveness Program that will affect tens of millions of Americans and cost more than 400 billion dollars.

5. Instead of providing notice and seeking comment from the public, the Department hammered out the critical details of the Program in secret and with an eye toward securing debt forgiveness in time for the November election.

6. Along the way, the Department made numerous arbitrary decisions about the Program, including which individuals will receive debt forgiveness, how much of their debt will be forgiven, and which types of debt will qualify for the Program.

7. The result of this arbitrariness is predictable: some will benefit handsomely, some will be shortchanged, and others will be left out entirely.

8. Plaintiffs are just a few of the millions of Americans who are being harmed by the Department's arbitrary decisionmaking. Plaintiff Myra Brown does not qualify for debt forgiveness because the Debt Forgiveness Program does not cover commercially held loans that are not in default, and Plaintiff Alexander Taylor does not qualify for the full amount of debt forgiveness because he did not receive a Pell Grant when he was in college.

9. By adopting the Program without providing notice and comment, the Department deprived Plaintiffs of their "'procedural right to protect [their] concrete interests.'" *Texas* v. *EEOC*, 933 F. 3d 433, 447 (5th Cir. 2019) (cleaned up); *see id.* ("A violation of the APA's notice-and-comment requirements is one example of a deprivation of a procedural right.").

10. If the Department is going to pursue debt forgiveness, Plaintiffs believe that their student loan debt should be forgiven too. Ms. Brown believes it is irrational, arbitrary, and unfair to exclude her from the Program because her federal student loans are commercially held and not in default. Mr. Taylor believes that it is irrational, arbitrary, and unfair to calculate the amount of debt forgiveness he receives based on the financial circumstances of his *parents* many years ago. Plaintiffs want an opportunity to present their views to the Department and to provide additional comments on any proposal from the Department to forgive student loan debts.

11. Without relief from this Court, Plaintiffs will be forever denied their procedural rights to protect their concrete interests.

12. Because the Debt Forgiveness Program was adopted in violation of the APA, the Program must be vacated and set aside and the Department should be enjoined from implementing or enforcing the Program in any manner.

PARTIES

13. Plaintiff Myra Brown received her undergraduate degree from the University of Texas at El-Paso in 1993. Ms. Brown then attended graduate school at the Cox School of Business at Southern Methodist University in Dallas, Texas. Ms. Brown completed her graduate school studies in 2002. To pay for graduate school, Ms. Brown received student loans through the Federal Family Education Loan Program ("FFELP").

14. Ms. Brown currently has two FFELP loans totaling more than $17,000. Because Ms. Brown's loans are commercially held and not in default, she is ineligible for debt forgiveness under the Debt Forgiveness Program.

15. Plaintiff Alexander Taylor received his undergraduate degree from the University of Dallas. To pay for his undergraduate studies, Mr. Taylor received federal student loans through the Direct Loan Program.

16. Mr. Taylor currently has four loans totaling more than $35,000. Mr. Taylor's loans are held by the Department of Education and he made less than $125,000 in 2020 and 2021. Because Mr. Taylor never received a Pell Grant, he is ineligible for the full $20,000 in debt forgiveness under the Debt Forgiveness Program.

17. Defendant U.S. Department of Education is an agency of the United States government subject to the APA. *See* 5 U.S.C. § 551(1).

18. Defendant Miguel Cardona is the U.S. Secretary of Education. The Secretary is sued in his official capacity as the head of the Department of Education.

JURISDICTION & VENUE

19. This Court has subject-matter jurisdiction over this case because it arises under the laws of the United States. *See* 5 U.S.C. §§ 701, *et seq.*; 28 U.S.C. §§ 1331, 2201-2202.

20. Venue is proper in this Court under 28 U.S.C. § 1391(e) because this is an action against an officer and an agency of the United States, a plaintiff resides in this judicial district, and no real property is involved in the action. Venue is proper in the Fort Worth Division of this Court because Plaintiff Myra Brown resides in this division.

BACKGROUND

I. The Department of Education's Grant and Loan Programs

21. The Department of Education offers two primary types of financial aid to help students pay for their higher education: grants and loans. *See Types of Aid*, U.S. Dep't of Educ., https://bit.ly/3S51Heu.

22. Federal grants are "[f]inancial aid that generally [don't] have to be repaid." *Id.*

23. For example, the Department provides Pell Grants to undergraduate students if their parents' income is below a certain threshold when they applied for the grant. *Federal Pell Grant Program*, U.S. Dep't of Educ., https://bit.ly/3DKV6BG; 20 U.S.C. § 1070a, *et seq*. The maximum Pell Grant award for the 2022-

2023 year is $6,895. *Federal Pell Grants*, U.S. Dep't of Educ., https://bit.ly/3BCraVq.

24. Federal loans, by contrast, are "[b]orrowed money for college or career school [that] must be repaid with interest." *Types of Aid*, *supra*.

25. The Department currently administers three student loan programs.

26. Under the William D. Ford Federal Direct Loan Program, the federal government makes loans directly to borrowers, who are then responsible for repaying the government. *See* 20 U.S.C. § 1087a, *et seq*. Direct Loans account for about $1.4 trillion of outstanding student debt. *See Federal Student Loan Portfolio*, U.S. Dep't of Educ., https://bit.ly/3qYd5Nm.

27. Under the Federal Family Education Loan Program, the federal government paid lenders to make student loans, and the federal government guaranteed their repayment. 20 U.S.C. § 1071, *et seq*. The authority to issue loans under this program expired in 2010. 20 U.S.C. § 1071(d). FFELP loans currently account for about $213.7 billion of outstanding student debt nationwide. *See Federal Student Loan Portfolio*, *supra*.

28. Under the Perkins Loan Program, colleges and universities made loans to financially needy students, and the federal government guaranteed their repayment. 20 U.S.C. § 1087aa, *et seq*. The authority to issue loans under the Perkins program expired in 2017. 20 U.S.C. § 1087aa(b). Perkins Loans currently account for about $4 billion of outstanding student debt. *See Federal Student Loan Portfolio*, *supra*.

29. About 43 million individuals have debts arising under these three programs. *See Federal Student*

Loan Portfolio, *supra*. These individuals collectively have more than $1.61 trillion in outstanding debts. *Id.*

II. The Department's Limited Authority to Compromise Student Loan Debt

30. Because federal agencies are a "creature of statute," the Department of Education has "*only* those authorities conferred upon it by Congress." *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (cleaned up). The Department thus cannot forgive student loan debt unless Congress has authorized it to do so.

31. The primary statute governing when agencies may forgive debts is the Federal Claims Collection Act of 1966, which provides that agencies "shall try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency." 31 U.S.C. § 3711(a)(1).

32. The Federal Claims Collection Standards ("FCCS"), which implement the Federal Claims Collection Act, require that "[f]ederal agencies shall aggressively collect all debts arising out of activities of . . . that agency." 31 C.F.R. § 901.1.

33. Under the FCCS, agencies are permitted to "compromise a debt" only in four circumstances: (1) where "the debtor is unable to pay the full amount in a reasonable time, as verified through credit reports or other financial information"; (2) the agency is "unable to collect the debt in full within a reasonable time by enforced collection proceedings"; (3) "the cost of collecting the debt does not justify the enforced collection of the full amount"; or (4) "[t]here is significant doubt concerning the Government's ability to prove its case in court." 31 C.F.R. § 902.2(a); *see also id.* § 902.2(b) (requiring

agencies to consider individualized factors, including "[a]ge and health," "[p]resent and potential income," and "[i]nheritance prospects," when determining a debtor's inability to pay).

34. The Department of Education's regulations expressly incorporate the FCCS. Under the Department's regulations, the Department "uses the standards in the FCCS, 31 CFR part 902, to determine whether compromise of a debt is appropriate if the debt arises under a program administered by the Department." 34 C.F.R. § 30.70(a)(1); *see also id.* § 30.70(e)(1) ("[U]nder the provisions of 31 CFR part 902 or 903, the Secretary may compromise a debt in any amount, or suspend or terminate collection of a debt in any amount, if the debt arises under the Federal Family Education Loan Program . . . , the William D. Ford Federal Direct Loan program . . . , or the Perkins Loan Program."); *see also* 81 Fed. Reg. 75,926, 76,070 (Nov. 1, 2016) (adopting these regulations after notice and comment).

35. "It is a fundamental principle of administrative law that an agency is bound to adhere to its own regulations." *Fuller v. Winter,* 538 F. Supp. 2d 179, 186 (D.D.C. 2008); *see Richardson v. Joslin*, 501 F.3d 415, 418 (5th Cir. 2007) (an agency "must abide by its own regulations").

III. The Debt Forgiveness Program

36. In the summer of 2022, reports emerged that the White House was considering executive action to forgive student loan debt for tens of millions of individuals. *See* T. Pager, *Latest White House Plan Would Forgive $10,000 in Student Debt Per Borrower*, Wash. Post (May 27, 2022), https://wapo.st/39lXnpW.

37. Behind closed doors, White House officials were debating the various issues that would arise from such a program. *Id.* None of these discussions were open to the public.

38. According to reports, White House officials "dr[ew] up a range of proposals" and were "waiting on the president to make a final decision." *See* A. Restuccia, *Biden Decision on Student-Loan Forgiveness Unlikely Until Later in Summer, Officials Say*, Wall St. J. (June 6, 2022), https://on.wsj.com/3qZN53V.

39. A primary point of debate was the size of the debt forgiveness to each individual. Although Senator Elizabeth Warren and others were pushing for forgiving up to $50,000 in student debt per borrower, the President was "more comfortable with debt cancellation in the $10,000-perborrower range." A. Restuccia, *As Biden Zeroes In on Student-Loan Forgiveness Decision, Voter Anxiety Grows*, WSJ (May 23, 2022), https://on.wsj.com/3S46zAl. As of late May, White House officials were "planning to cancel $10,000 in student debt per borrower." Pager, *supra*.

40. The White House also was debating whether high-income individuals should be excluded from the debt forgiveness program. As of late May, the plan was to limit debt forgiveness to Americans "who earned less than $150,000 in the previous year, or less than $300,000 for married couples filing jointly." *Id.* These income limits were "aimed at fending off criticism that across-the-board loan forgiveness would benefit some Americans with higher incomes who don't need the help." M. Stratford, *Harder Than It Sounds: Income-Targeted Student Loan Forgiveness Invites a 'Train Wreck,'* Politico (May 13, 2022), https://politi. co/3LEtXC1. These

"income caps [were] in flux," however, because "some Democratic lawmakers [were] implor[ing] the White House to abandon means-testing." D. Douglas-Gabriel, *Student Loan Borrowers Anxious as Decision Lingers on Debt Cancellation*, Wash. Post (June 10, 2022), https://wapo.st/3NUdlXg. White House officials were also debating alternatives to income thresholds, such as limiting debt forgiveness to "undergraduates or people who attend public universities." Restuccia, *Biden Decision on Student-Loan Forgiveness*, *supra*.

41. Another factor "complicating the decision" was the best way "to implement [this] large new government program." *Id.* Department officials "privately raised concerns about the complexity of adding an income test to student loan forgiveness" and "warn[ed] the White House that the agency lacks the data to automatically cancel loans based on a borrower's earnings." Stratford, *supra*. The Department thus believed that it would likely "need to set up some sort of application process to determine whether borrowers qualify for relief." *Id.*

42. White House officials were also concerned "about the possible effects the move could have on record inflation" and were "cautious about doing anything that could be perceived as contributing to high prices." Restuccia, *Biden Decision on Student-Loan Forgiveness*, *supra*. While some in the Administration dismissed these concerns, others warned that "student debt cancellation would exacerbate price pressures." *Id.* Debt cancellation would also "encourage colleges and universities to continue to raise tuition prices with the expectation that the costs would ultimately not be borne by their students." *Id.*

43. Whether the President had the legal authority for such a program was also being debated. The Justice Department and the Department of Education were "weighing whether Mr. Biden has the legal authority to unilaterally wipe away loans through executive action." Restuccia, *As Biden Zeroes In*, *supra*. The Department of Education under President Trump had determined that it lacked such authority, *see Memo. to Betsy DeVos Re: Student Loan Principal Balance Cancellation, Compromise, Discharge, and Forgiveness Authority*, U.S. Dep't of Educ. Off. of the Gen. Counsel, (Jan. 12, 2021), https://bit.ly/3LBA36n, and key Democrats agreed, including Speaker of the House Nancy Pelosi, *see* A. Nova, *Pelosi Says Biden Doesn't Have Power to Cancel Student Debt*, CNBC (July 28. 2021), https://cnb.cx/3S85wzp; *see also* G. Rubin, *Mass Student Debt Cancellation Legally Risky Says Top Obama Education Lawyer*, Wall St. J. (May 4, 2022), https://on.wsj.com/3DO0tjx. President Biden nevertheless instructed the Department to prepare a memorandum exploring possible legal avenues to justify the Program. *See* L. Egan, *Biden to Review Executive Authority to Cancel Student Debt*, NBC News (Apr. 1, 2021), https://nbcnews.to/3dD85dV.

44. Finally, the White House was "weighing the political boost that could come from forgiving loans among young people and others against the backlash from voters who didn't go to college, don't have loans, or already paid them off." Restuccia, *Biden Decision on Student-Loan Forgiveness*, *supra*. An overriding goal was to get the program done fast—so that debt forgiveness would occur in time for the November election. Restuccia, *As Biden Zeroes In*, *supra*.

45. White House officials indicated that the President would announce his decision in July or August of 2022. Restuccia, *Biden Decision on Student-Loan Forgiveness*, *supra*.

46. At no point did the Department of Education provide notice of its plans or seek public comment on the program. Instead, the countless legal, policy, economic, and other issues implicated by such a program were all debated and determined in secret.

47. On August 24, the White House announced that the President would "fulfill[] [his] campaign commitment" by providing debt forgiveness to millions of borrowers. *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.

48. Under the Program, individuals would receive different levels of debt forgiveness based on whether they had received a Pell Grant in college. Those who received a Pell Grant could get up to $20,000 in debt forgiveness while those who did not could get only $10,000 in debt forgiveness. *One-Time Student Loan Debt Relief*, U.S. Dep't of Educ., https://bit.ly/3ygbuGz (website as of Sept. 8, 2022).

49. The Department also announced that those individuals who exceeded an income threshold would be ineligible for the program. Under the Program, individuals with student loans would be ineligible if they earned more than $125,000 (or $250,000 if married filing jointly) in 2020 and 2021. *Id.*

50. The Department further stated that "most federal student loans" would qualify for debt forgiveness,

including Direct Loans, FFELP loans held by the Department or in default, and Perkins Loans held by the Department. *Id.* But individuals with FFELP loans that are commercially held would "not [be] eligible for debt relief." *Id.* The Department asserted that it was currently "assessing whether to expand eligibility to borrowers with privately owned federal student loans, including FFEL and Perkins Loans." *Id.*

51. The Department also released a five-page legal memorandum asserting that the Higher Education Relief Opportunities for Students ("HEROES") Act of 2003 gave it the legal authority to enact the Debt Forgiveness Program. *See The Secretary's Legal Authority for Debt Cancellation*, U.S. Dept of Educ. (Aug. 23, 2022), https://bit.ly/3fcXeYJ.

52. The HEROES Act was enacted following the September 11 attacks and again shortly after the start of the Iraq War, and was designed primarily to ensure that the "[h]undreds of thousands of Army, Air Force, Marine Corps, Navy, and Coast Guard reservists and members of the National Guard [who] ha[d] been called to active duty or active service" would not be "placed in a worse position financially in relation to that financial assistance" because of their military service. *See* 20 U.S.C. §§ 1098aa(b)(4), 1098bb(a)(2)(A).

53. The Department's legal justification for the Program was widely criticized following the White House's announcement, even by those supporting debt cancelation. *See, e.g.*, Jed Shugerman, *Biden's Student-Debt Rescue Plan Is a Legal Mess*, The Atlantic (Sept. 4, 2022), https://bit.ly/3qVEK18.

54. On September 27, the Secretary of Education sent a memorandum to the Assistant Secretary for Postsecondary Education in which he officially "issu[ed] waivers and modifications" to certain statutes and regulations in order to effectuate the Debt Forgiveness Program. Citing the HEROES Act, the Secretary directed the Department to "take all necessary actions to implement these waivers and modifications and to provide notice of these waivers and modifications in the Federal Register."

55. The memorandum contained no estimate of the Program's cost. But the nonpartisan Congressional Budget Office has estimated that the Program will cost over $400 billion. *Costs of Suspending Student Loan Payments and Canceling Debt*, Cong. Budget Off. (Sept. 26, 2022), https://bit.ly/3SpZk6g. Other economists put that number even higher at $469 billion to $519 billion. *The Biden Student Loan Forgiveness Plan: Budgetary Costs and Distributional Impact*, Penn Wharton, Univ. of Pa. (Aug. 26, 2022), https://bit. ly/3UAxpBI.

56. According to the Department, about 8 million borrowers will soon receive automatic debt forgiveness because the government already has these individuals' income data. *One-Time Student Loan Debt Relief*, *supra*.

IV. Plaintiffs and Others Excluded from the Debt Forgiveness Program

57. Because the Department adopted the Program without going through the notice-and-comment process, Plaintiffs were deprived of their "procedural right to protect [their] concrete interests." *Texas v. EEOC*, 933

F.3d 433, 447 (5th Cir. 2019) (cleaned up); *see id.* ("A violation of the APA's notice-and-comment requirements is one example of a deprivation of a procedural right.").

58. Plaintiff Myra Brown is one of the millions of Americans who is ineligible for the Debt Forgiveness Program because her student loan debt is commercially held and not in default.

59. If the Department is going to provide debt forgiveness, Ms. Brown believes that her student loan debt should be forgiven too. She believes it is irrational, arbitrary, and unfair to exclude her from the Program because her student loan debt is commercially held and not in default. Ms. Brown wants an opportunity to present her views to the Department and provide additional comments on any proposal from the Department to forgive student loan debts.

60. Plaintiff Alexander Taylor is one of the millions of Americans who is ineligible for the full $20,000 in debt forgiveness because he did not receive a Pell Grant in college.

61. If the Department is going to provide debt forgiveness, Mr. Taylor believes that his student loan debt should be forgiven too and that he should not be penalized because he did not receive a Pell Grant in college. Mr. Taylor makes less than $25,000 a year, but he is ineligible for the full $20,000 in debt forgiveness. Yet others making more than *five times* as much as he does (up to $125,000 a year) will receive $20,000 in debt forgiveness if they got a Pell Grant in college. Mr. Taylor believes that it is irrational, arbitrary, and unfair to calculate the amount of debt forgiveness he receives based on the financial circumstances of his *parents* many years

ago. Mr. Taylor wants an opportunity to present his views to the Department and provide additional comments on any proposal from the Department to forgive student loan debts.

CLAIMS FOR RELIEF

COUNT I
Administrative Procedure Act, 5 U.S.C. § 706 (Failure to Follow Proper Rulemaking Procedures)

62. Plaintiffs incorporate all of their prior allegations.

63. The APA requires courts to "hold unlawful and set aside agency action[s]" that are adopted "without observance of procedure required by law." 5 U.S.C. § 706(2).

64. The APA obligates agencies to subject their substantive rules to notice and comment. *See* 5 U.S.C. § 553.

65. A "rule" is "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4).

66. Legislative rules typically "grant rights, impose obligations, or produce other significant effects on private interests." *W&T Offshore, Inc. v. Bernhardt*, 946 F.3d 227, 237 (5th Cir. 2019).

67. Moreover, "[i]f a second rule repudiates or is irreconcilable with a prior legislative rule, the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative." *Clean Water Action v. EPA*, 936 F.3d 308, 314 & n.11 (5th Cir. 2019) (cleaned up).

68. The Debt Forgiveness Program is a legislative rule.

69. It creates a new program designed to implement a policy of eliminating or reducing debt obligations for certain individuals. 5 U.S.C. § 551(4). It "grant[s] rights" by promising to eliminate individuals' debt, it "impose[s] obligations" on the Department to forgive debt, and it produces "significant effects on private interests." *W&T Offshore, Inc.*, 946 F.3d at 237.

70. The Program also effectively amends or repeals the Department's existing regulations that prohibit the Department from forgiving debt except under certain narrow circumstances. *See U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005) (If the agency "effects a substantive change in the regulation, notice and comment are required." (cleaned up)).

71. In addition, to the extent the Program "pertain[s]" to Title IV of the Higher Education Act, the Department was also required to use "negotiated rulemaking" to develop the rule. 20 U.S.C. § 1098a(b)(2); *see The Negotiated Rulemaking Process for Title IV Regulations—Frequently Asked Questions*, U.S. Dep't of Educ., https://bit.ly/3SCFqFf.

72. The Department adopted the Program without publishing prior notice and affording Plaintiffs and other members of the public an opportunity to submit written comments. The Department also did not adopt the Program through the "negotiated rulemaking" process.

73. Because the Program is a legislative rule that did not go through the proper procedures, the Program

must be held unlawful and set aside. *See* 5 U.S.C. § 706(2)(D).

WHEREFORE, Plaintiffs ask this Court to enter judgment in their favor and to provide them with the following relief:

a. Declare that the Debt Forgiveness Program has been adopted without observance of procedure required by law and therefore violates the APA.

b. Preliminarily and permanently enjoin Defendants from enforcing, applying, or implementing the Program anywhere within the Department's jurisdiction.

c. Vacate and set aside the Program.

d. Award all other relief to which Plaintiffs are entitled, including but not limited to Plaintiffs' attorneys' fees and costs.

e. Grant all other relief that this Court deems just and proper.

Dated: Oct. 10, 2022

Respectfully submitted,

/s/ JAMES F. HASSON
JAMES F. HASSON
(TX BAR NO. 24109982)
J. Michael Connolly (VA Bar No. 77632)
Matthew Pociask* (IL Bar No. 6336568)
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, VA 22209
Tel: (703) 243-9423
Fax: (703) 243-9423
mike@consovoymccarthy.com
james@consovoymccarthy.com
matt@consovoymccarthy.com

Steven C. Begakis (VA Bar No. 95172)
CONSOVOY MCCARTHY PLLC
Fort Worth, TX
Tel: (703) 243-9423
Fax: (703) 243-9423
steven@consovoymccarthy.com

Admitted in Illinois, but not Virginia.
Supervised by principals at firm.
Counsel for Plaintiffs

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

Case No. ______

MYRA BROWN AND ALEXANDER TAYLOR, PLAINTIFFS

v.

U.S. DEPARTMENT OF EDUCATION; MIGUEL CARDONA, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF EDUCATION, DEFENDANTS

DECLARATION OF MYRA BROWN

1. I am over the age of eighteen and under no mental disability or impairment. I have personal knowledge of the following facts and, if called as a witness, I would competently testify to them.

2. I received my undergraduate degree from the University of Texas at El-Paso in 1993. I then attended graduate school at the Cox School of Business at Southern Methodist University in Dallas, Texas.

3. I completed my graduate school studies in 2002.

4. To pay for graduate school, I received student loans through the Federal Family Education Loan Program ("FFELP").

5. I currently have two FFELP loans totaling more than $17,000. My loans are commercially held and are not in default.

6. Because my loans are commercially held and not in default, I am ineligible for debt forgiveness under the Debt Forgiveness Program.

7. If the Department is going to provide debt forgiveness, I believe that my student loan debt should be forgiven too.

8. I believe it is irrational, arbitrary, and unfair to exclude me from the program because my federal student loans are commercially held and not in default.

9. I want an opportunity to present my views to the Department and provide additional comments on any proposal from the Department to forgive student loan debts.

Per 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on Oct. [3], 2022

/s/ MYRA BROWN
MYRA BROWN

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

Case No. ______

MYRA BROWN AND ALEXANDER TAYLOR, PLAINTIFFS

v.

U.S. DEPARTMENT OF EDUCATION; MIGUEL CARDONA, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF EDUCATION, DEFENDANTS

DECLARATION OF ALEXANDER TAYLOR

1. I am over the age of eighteen and under no mental disability or impairment. I have personal knowledge of the following facts and, if called as a witness, I would competently testify to them.

2. I received my undergraduate degree from the University of Dallas. To pay for my undergraduate studies, I received federal student loans through the Direct Loan Program.

3. I currently have four loans totaling more than $35,000. My loans are held by the Department of Education.

4. I am not married and made less than $125,000 in 2020 and 2021.

5. Because I never received a Pell Grant, I am ineligible to receive $20,000 in debt forgiveness under the Debt Forgiveness Program.

6. If the Department is going to provide debt forgiveness, I believe that my student loan debt should be forgiven too and that I should not be punished because I did not receive a Pell Grant in college.

7. I make less than $25,000 a year, but I am ineligible for the $20,000 in debt forgiveness.

8. Yet others making more than five times as much as I do (up to $125,000 a year) will receive $20,000 in debt relief if they got a Pell Grant in college.

9. I believe that it is irrational, arbitrary, and unfair to calculate the amount of debt forgiveness I receive based on the financial circumstances of my parents many years ago.

10. I want an opportunity to present my views to the Department and provide additional comments on any proposal from the Department to forgive student loan debts.

Per 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on Oct. 1, 2022.

/s/ ALEXANDER TAYLOR
ALEXANDER TAYLOR

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

Case No. ______

MYRA BROWN AND ALEXANDER TAYLOR, PLAINTIFFS

v.

U.S. DEPARTMENT OF EDUCATION; MIGUEL CARDONA, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF EDUCATION, DEFENDANTS

DECLARATION OF J. MICHAEL CONNOLLY

1. I am an attorney at the law firm Consovoy McCarthy PLLC and am counsel for Plaintiffs.

2. I am over the age of eighteen and under no mental disability or impairment. I have personal knowledge of the following facts and, if called as a witness, I would competently testify to them.

3. Attached as Exhibit A is a true and correct copy of a web page from the Department of Education's StudentAid.gov website titled *One-Time Student Debt Relief*, as it appeared on September 8, 2022, at https://studentaid.gov/debt-reliefannouncement/one-time-cancellation. An archived copy of the web page is available at https://bit.ly/3ygbuGz.

4. Attached as Exhibit B is a true and correct copy of a web page from the Department of Education's StudentAid.gov website titled *One-Time Student Debt*

Relief, as it appeared on October 1, 2022, at https://studentaid.gov/debt-reliefannouncement/one-time-cancellation. An archived copy of the web page is available at https://bit.ly/3fBmyrm.

Per 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on Oct. 4, 2022.

/s/ J. Michael Connolly
J. MICHAEL CONNOLLY

Exhibit A

Federal Student Aid

One-Time Student Loan Debt Relief

On Aug. 24, 2022, the Biden-Harris Administration announced a Student Debt Relief Plan that includes one-time student loan debt relief targeted to low- and middle-income families.

The U.S. Department of Education (ED) will provide up to $20,000 in debt relief to Federal Pell Grant recipients and up to $10,000 in debt relief to non-Pell Grant recipients. Borrowers with loans held by ED are eligible for this relief if their individual income is less than $125,000 (or $250,000 for households).

What Do I Need to Know?

An online form will be available by early October. Here are some steps you can take now and in the future.

Step 1: Check if you're eligible

You're eligible for student loan debt relief if your annual federal income was below $125,000 (individual or married, filing separately) or $250,000 (married, filing jointly or head of household) in 2021 or 2020.

- **$20,000 in debt relief**: If you received a Pell Grant in college and meet the income threshold, you'll be eligible for up to $20,000 in debt relief.
- **$10,000 in debt relief**: If you did not receive a Pell Grant in college and meet the income threshold, you'll be eligible for up to $10,000 in debt relief.

Step 2: Prepare

Here's what you can do to get ready and to make sure you get our updates:

- Log in to your account on StudentAid.gov and make sure your contact info is up to date. We'll send you updates by both email and text message, so make sure to sign up to receive text alerts. If it's been a while since you've logged in, or you can't remember if you have an account username and password (FSA ID), we offer tips to help you access your account.
- If you don't have a StudentAid.gov account (FSA ID), you should create an account to help you manage your loans.
- Make sure your loan servicer has your most current contact information so they can reach you. If you don't know who your servicer is, you can log in and see your servicer(s) in your account dashboard.

Step 3: Submit your application (when available)

The application will be available online by early October 2022.

We'll share updates on this page and send you an email when the application is available. You'll have until Dec. 31, 2023, to submit your application.

Federal Pell Grants

How Do I Know If I Ever Received a Federal Pell Grant?

Federal Pell Grants typically are awarded to undergraduate students with low or moderate income.

Most borrowers can log in to StudentAid.gov to see if they received a Pell Grant. We display information about the aid you received, including Pell Grants, on your account dashboard and your "My Aid" pages.

Log In to Your Account

When you apply for debt relief, we'll make sure all borrowers who received a Pell Grant receive the full benefit of up to $20,000 in relief if they meet the income requirements. ED has data on all borrowers who received a Pell Grant. If you received a Pell Grant prior to 1994, that information won't display in StudentAid.gov, but you'll still receive the full benefit.

If I have a Pell Grant, do I need to do anything to get the full $20,000 in debt relief?

Yes. You just need to submit your application for debt relief. We have a record of every student who has ever received a Federal Pell Grant. When you submit your application, we'll check our records to determine if you have a Pell Grant, which would qualify you for up to $20,000 in debt relief. You don't need to take any additional action to show us that you received a Pell Grant.

Do I still qualify for the full $20,000 in debt relief if I received only one Pell Grant?

Yes. As long as you received at least one Pell Grant of any amount, you qualify for the additional $10,000 in debt relief. This additional $10,000 will be applied to eligible loans, such as undergraduate, graduate, or parent loans. It doesn't matter if the Pell Grant was used for the same program of study or at the same school as your federal student loan(s).

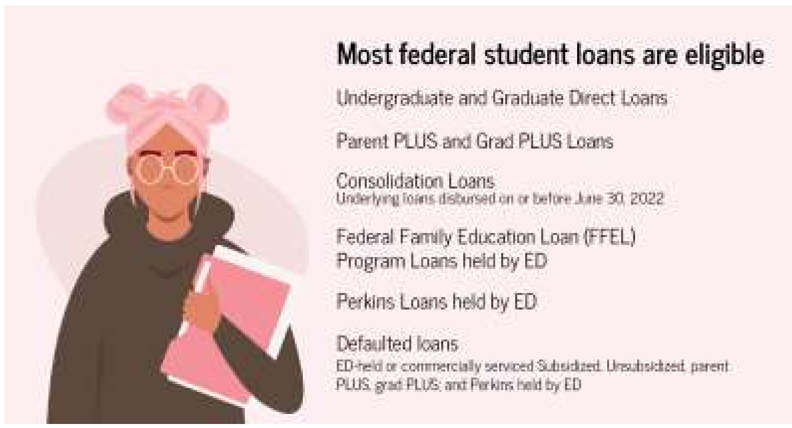
If I have parent PLUS loans and my child received a Pell Grant, can the full $20,000 in debt relief be applied to my parent PLUS loans?

No. Eligibility for debt relief is based on each borrower's situation.

If a dependent student received a Pell Grant, up to $20,000 in debt relief will be applied to the student's loans—not to any loans their parent may have taken out.

A parent who has taken out loans—including loans for their own studies or parent PLUS loans for their child—may qualify for debt relief if they meet the income eligibility criteria. If a parent also received a Pell Grant for their own studies, then the parent borrower may be eligible for up to $20,000 in relief on their loans. Otherwise, the parent borrower may be eligible for up to $10,000 in debt relief.

Which Loans Are Eligible?



The following types of federal student loans with an outstanding balance as of June 30, 2022, are eligible for relief:

- William D. Ford Federal Direct Loan (Direct Loan) Program loans
  - Subsidized loans
  - Unsubsidized loans
  - Parent PLUS loans
  - Graduate PLUS loans
  - Consolidation loans, as long as all of the underlying loans that were consolidated were first disbursed on or before June 30, 2022

- Federal Family Education Loan (FFEL) Program loans held by ED or in default at a guaranty agency
- Federal Perkins Loan Program loans held by ED
- Defaulted loans (includes ED-held or commercially serviced Subsidized Stafford, Unsubsidized Stafford, parent PLUS, and graduate PLUS; and Perkins loans held by ED)

How do I know what kinds of loans I have?

You can identify your loan types by logging on to StudentAid.gov and selecting "My Aid" in the dropdown menu under your name. In the "Loan Breakdown" section, you'll see a list of each loan you received. You'll also see loans you paid off or consolidated into a new loan. If you expand "View Loans" and select the "View Loan Details" arrow next to a loan, you'll see the more detailed name for that loan.

Direct Loans begin with the word "Direct." Federal Family Education Loan Program loans begin with "FFEL." Perkins Loans include the word "Perkins" in the name. If the name of your servicer starts with "Dept. of Ed" or "Default Management Collection System," your FFEL or Perkins loan is federally managed (i.e., held by ED).

The "My Aid" section will also show you the servicer(s) for your loans.

Are defaulted loans eligible for debt relief?

Yes, defaulted loans are eligible for debt relief. If you have a remaining balance on your defaulted loan(s) after relief is applied, consider getting or staying out of default through the Fresh Start initiative.

Are private loans (i.e., non-federal loans) eligible for debt relief?

No. Private (non-federal) loans are not eligible for debt relief. If you consolidated federal loans into a private (non-federal) loan, the consolidated private loan is not eligible for debt relief.

Are parent PLUS loans and graduate PLUS loans eligible for debt relief?

Yes. All ED-held loans, including PLUS loans for parents and graduate students, are eligible for relief.

Are Federal Family Education Loans (FFEL) or Perkins Loans eligible for debt relief?

It depends. All loans eligible for the student loan pause are also eligible for relief, including loans held by ED and guaranty agencies.

ED is assessing whether to expand eligibility to borrowers with privately owned federal student loans, including FFEL and Perkins Loans. In the meantime, borrowers with privately held federal student loans, such as through the FFEL, Perkins, and HEAL programs, can receive this relief by consolidating these loans into the Direct Loan program.

FFEL Joint Consolidation Loans, often referred to as spousal consolidation loans, are not eligible for consolidation into the Direct Loan program under current law.

Frequently Asked Questions (FAQs)

General Info About Debt Relief

How can I find out how much debt relief I'll get?

If you meet the income requirements and have eligible loans, the amount of your debt relief will depend on your outstanding balance and whether you received a Federal Pell Grant.

- If you received a Pell Grant, you can receive up to $20,000 in debt relief.
- If you didn't receive a Pell Grant, you can receive up to $10,000 in debt relief.

If your outstanding loan balance is less than the maximum amount of debt relief you're eligible for, you'll receive only relief of your full loan balance.

Once you submit your application for debt relief, we'll determine your relief amount.

How will I know when debt relief has been applied to my account?

Your loan servicer will notify you when the relief has been applied to your account, with details on how the relief was applied.

What happens if I still have a loan balance after debt relief is applied?

Loan balances remaining after relief will be re-amortized, meaning we will recalculate your monthly payment based on your new balance, potentially reducing your monthly payment. Your loan servicer will communicate your new payment amount to you.

Do I have to be repaying my loans to be eligible for debt relief?

No. Borrowers are eligible for debt relief regardless of whether they're in repayment, in school, or in grace, as long as they meet the income requirements and have eligible loans.

If I have multiple loans, can I pick which loans get the relief?

We'll determine how relief gets applied to your loans. See the next FAQ for additional details. Federal Student Aid will make this determination and provide the guidance to loan servicers, who will then process the relief.

How will debt relief be applied to my loans?

For borrowers with multiple loans, we'll apply the relief in the following order:

- Defaulted ED-held loans
- Defaulted commercial FFEL Program loans
- Non-defaulted Direct Loan Program loans and FFEL Program loans held by ED
- Perkins Loans held by ED

If you have multiple loans in a program type (e.g., multiple Direct Loan Program loans), we'll apply the relief in the following order:

- Apply relief to loans with highest statutory interest rate.
- If interest rates are the same, apply to unsubsidized loans prior to subsidized loans.

- If interest rate and subsidy status are the same, apply to the most recent loan.
- If interest rate, subsidy status, and disbursement date are the same, apply to the loan with the lowest combined principal and interest balance.

Will my debt relief be taxed?

One-time student loan debt relief will not be subject to federal income taxes. State and local tax implications will vary.

How do I get help if I have questions or need assistance?

We'll continue to update this page as we have more details. **The program information you can read here is the same information our contact center agents have at this time.** After the online application is live, support for the form will be available at 1-833-932-3439.

Applying for Debt Relief

Will any borrowers receive automatic debt relief?

Although most borrowers will have to apply for debt relief, we have income data on hand for around 8 million borrowers. These borrowers will get the relief automatically.

How will I know if I automatically qualify for debt relief?

If we determine that you automatically qualify for debt relief, we'll send you an email and text message (if you're signed up for text alerts). You don't have to take any action. We'll provide your information to your loan servicer to process your relief.

We'll use *Free Application for Federal Student Aid* (FAFSA) and income-driven repayment application information to identify borrowers—or, as appropriate, parents—who have submitted income data for tax years 2021 or 2020. We'll use this data to determine which borrowers meet the income requirements. If we have borrower data for both years, we'll use the year with the lower income.

When will the online application be available?

The online application will be available by early October 2022.

How do I know if you received my application?

When you submit your application for debt relief, you'll see a page online confirming your form was submitted. You'll also get a confirmation email from us, so make sure we have your most current email address. You can log in to StudentAid.gov and review your contact information.

What happens if I applied for Public Service Loan Forgiveness (PSLF)?

We'll identify any borrower who submitted both an application for one-time student loan debt relief and a PSLF form. If you receive one-time student loan debt relief and are then determined to have been eligible for forgiveness under PSLF, we'll adjust your loan and apply the PSLF discharge. The PSLF discharge may provide a refund on certain eligible payments made after the borrower has already made 120 payments.

How long do I have to apply for debt relief?

You'll have until Dec. 31, 2023, to submit your application for student loan debt relief.

Is there a paper version of the debt relief application?

Initially, the application will be available only online. A paper version of the form will be made available at a future date, and you'll have until Dec. 31, 2023, to apply.

Beware of Scams

You might be contacted by a company saying they will help you get loan discharge, forgiveness, cancellation, or debt relief for a fee. You **never** have to pay for help with your federal student aid. Make sure you work only with ED and our trusted partners, and never reveal your personal information or account password to anyone. Our emails to borrowers come from noreply@studentaid.gov.

Learn how to avoid scams and what you can do if you're contacted by a scammer.

Get Support

We'll continue to update this page as we have more details. **At this time, our contact center agents have the same information you can read here**. After the online form is live, support for the form will be available at 1-833-932-3439.

Additional Links

Debt Relief Announcement

Public Service Loan Forgiveness

Income-driven Repayment Plans

Who's My Servicer?

Federal Student Aid
An OFFICE of the U.S. DEPARTMENT of EDUCATION

usa.gov | ed.gov

Exhibit B

Federal Student Aid

One-Time Student Loan Debt Relief

On Aug. 24, 2022, the Biden-Harris Administration announced a Student Debt Relief Plan that includes one-time student loan debt relief targeted to low- and middle-income families.

The U.S. Department of Education (ED) will provide up to $20,000 in debt relief to Federal Pell Grant recipients and up to $10,000 in debt relief to non-Pell Grant recipients. Borrowers with loans held by ED are eligible for this relief if their individual income is less than $125,000 (or $250,000 for households).

What Do I Need to Know?

An online form will be available in October 2022. Here are some steps you can take now and in the future.

Step 1: Check if you're eligible

You're eligible for student loan debt relief if your annual federal income was below $125,000 (individual or married, filing separately) or $250,000 (married, filing jointly or head of household) in 2020 or 2021.

- **$20,000 in debt relief**: If you received a Pell Grant in college and meet the income threshold, you'll be eligible for up to $20,000 in debt relief.
- **$10,000 in debt relief**: If you did not receive a Pell Grant in college and meet the income threshold, you'll be eligible for up to $10,000 in debt relief.

Step 2: Prepare

Here's what you can do to get ready and to make sure you get our updates:

- Log in to your account on StudentAid.gov and make sure your contact info is up to date. We'll send you updates by both email and text message, so make sure to sign up to receive text alerts. If it's been a while since you've logged in, or you can't remember if you have an account username and password (FSA ID), we offer tips to help you access your account.
- If you don't have a StudentAid.gov account (FSA ID), you should create an account to help you manage your loans.
- Make sure your loan servicer has your most current contact information so they can reach you. If you don't know who your servicer is, you can log in and see your servicer(s) in your account dashboard.

- To be notified when the process has officially opened, sign up at the Department of Education subscription page.

Step 3: Submit your application (when available)

The application will be available online in October 2022.

We'll share updates on this page and send you an email when the application is available. You'll have until Dec. 31, 2023, to submit your application.

Federal Pell Grants

How Do I Know If I Ever Received a Federal Pell Grant?

Federal Pell Grants typically are awarded to undergraduate students with low or moderate income.

Most borrowers can log in to StudentAid.gov to see if they received a Pell Grant. We display information about the aid you received, including Pell Grants, on your account dashboard and your "My Aid" pages.

Log In to Your Account

When you apply for debt relief, we'll make sure all borrowers who received a Pell Grant receive the full benefit of up to $20,000 in relief if they meet the income requirements. ED has data on all borrowers who received a Pell Grant. If you received a Pell Grant prior to 1994, that information won't display in StudentAid.gov, but you'll still receive the full benefit.

If I have a Pell Grant, do I need to do anything to get the full $20,000 in debt relief?

Yes. You just need to submit your application for debt relief. We have a record of every student who has ever received a Federal Pell Grant. When you submit your application, we'll check our records to determine if you have a Pell Grant, which would qualify you for up to $20,000 in debt relief. You don't need to take any additional action to show us that you received a Pell Grant.

Do I still qualify for the full $20,000 in debt relief if I received only one Pell Grant?

Yes. As long as you received at least one Pell Grant of any amount, you qualify for $20,000 in debt relief. This debt relief will be applied to eligible loans, such as undergraduate, graduate, or parent loans. It doesn't matter if the Pell Grant was used for the same program of study or at the same school as your federal student loan(s).

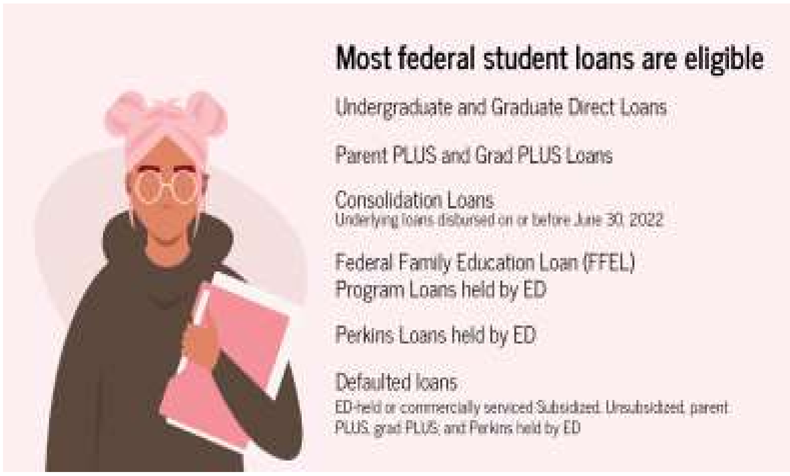
If I have parent PLUS loans and my child received a Pell Grant, can my child's $20,000 in debt relief be applied to my parent PLUS loans?

No. The debt relief will be applied only to your child's loan(s).

If a dependent student received a Pell Grant, up to $20,000 in debt relief will be applied to the student's loans—not to any loans their parent may have taken out.

A parent who has taken out loans—including loans for their own studies or parent PLUS loans for their child—may qualify for debt relief if they meet the income eligibility criteria. If a parent also received a Pell Grant for their own studies, then the parent borrower may be eligible for up to $20,000 in relief on their loans. Otherwise, the parent borrower may be eligible for up to $10,000 in debt relief.

Which Loans Are Eligible?



The following types of federal student loans with an outstanding balance as of June 30, 2022, are eligible for relief:

- William D. Ford Federal Direct Loan (Direct Loan) Program loans
- Federal Family Education Loan (FFEL) Program loans held by ED or in default at a guaranty agency
- Federal Perkins Loan Program loans held by ED
- Defaulted loans (includes ED-held or commercially serviced Subsidized Stafford, Unsubsidized Stafford, parent PLUS, and graduate PLUS; and Perkins loans held by ED)

This means that subsidized loans, unsubsidized loans, parent PLUS loans, and graduate PLUS loans held by

ED are eligible. Consolidation loans are also eligible for relief, as long as all of the underlying loans that were consolidated were ED-held loans and were disbursed on or before June 30, 2022. Additionally, consolidation loans comprised of any FFEL or Perkins loans not held by ED are also eligible, as long as the borrower applied for consolidation before Sept. 29, 2022.

How do I know what kinds of loans I have?

You can identify your loan types by logging on to StudentAid.gov and selecting "My Aid" in the dropdown menu under your name. In the "Loan Breakdown" section, you'll see a list of each loan you received. You'll also see loans you paid off or consolidated into a new loan. If you expand "View Loans" and select the "View Loan Details" arrow next to a loan, you'll see the more detailed name for that loan.

Direct Loans begin with the word "Direct." Federal Family Education Loan Program loans begin with "FFEL." Perkins Loans include the word "Perkins" in the name. If the name of your servicer starts with "Dept. of Ed" or "Default Management Collection System," your FFEL or Perkins loan is federally managed (i.e., held by ED).

The "My Aid" section will also show you the servicer(s) for your loans.

Are defaulted loans eligible for debt relief?

Yes, defaulted loans are eligible for debt relief. If you have a remaining balance on your defaulted loan(s) after relief is applied, consider getting or staying out of default through the Fresh Start initiative.

Are private loans (i.e., non-federal loans) eligible for debt relief?

No. Private (non-federal) loans are not eligible for debt relief. If you consolidated federal loans into a private (non-federal) loan, the consolidated private loan is not eligible for debt relief.

Are parent PLUS loans and graduate PLUS loans eligible for debt relief?

Yes. All ED-held loans, including PLUS loans for parents and graduate students, are eligible for relief.

Are Federal Family Education Loan (FFEL) Program loans or Perkins Loans eligible for debt relief?

All loans eligible for the student loan payment pause are also eligible for relief, including loans held by ED and guaranty agencies.

As of Sept. 29, 2022, borrowers with federal student loans not held by ED **cannot** obtain one-time debt relief by consolidating those loans into Direct Loans.

Borrowers with FFEL Program loans and Perkins Loans not held by ED who have applied to consolidate into the Direct Loan program prior to Sept. 29, 2022, are eligible for one-time debt relief through the Direct Loan program.

ED is assessing whether there are alternative pathways to provide relief to borrowers with federal student loans not held by ED, including FFEL Program loans and Perkins Loans, and is discussing this with private lenders.

Frequently Asked Questions (FAQs)

General Info About Debt Relief

How can I find out how much debt relief I'll get?

If you meet the income requirements and have eligible loans, the amount of your debt relief will depend on your outstanding balance and whether you received a Federal Pell Grant.

- If you received a Pell Grant, you can receive up to $20,000 in debt relief.
- If you didn't receive a Pell Grant, you can receive up to $10,000 in debt relief.

If your outstanding loan balance is less than the maximum amount of debt relief you're eligible for, you'll receive relief only of your full loan balance.

The application for debt relief will be available in October 2022. Once you submit your application, we'll determine your relief amount.

What will I need to complete the application?

The application will be a short online form. You won't need your FSA ID, and you won't need to upload any documents to submit your application. Our goal is to provide borrowers a seamless and simple experience, and we're working closely with the servicers who will process the relief.

How will I know when debt relief has been applied to my account?

Your loan servicer will notify you when the relief has been applied to your account.

What happens if I still have a loan balance after debt relief is applied?

Loan balances remaining after relief will be re-amortized, meaning we will recalculate your monthly payment based on your new balance, potentially reducing your monthly payment. Your loan servicer will communicate your new payment amount to you.

Am I eligible for a refund if I made voluntary payments during the pandemic?

Yes. You will automatically receive a refund of your payments during the payment pause if:

- you successfully apply for and receive debt relief under the Administration's debt relief plan, AND
- your voluntary payments during the payment pause brought your balance below the maximum debt relief amount you're eligible to receive but did not pay off your loan in full.

  For example, if you're a borrower eligible for $10,000 in relief; had a balance of $10,500 prior to March 13, 2020; and made $1,000 in payments since then—bringing your balance to $9,500 at the time of discharge—we'll discharge your $9,500 balance, and you'll receive a $500 refund.

Other borrowers can still receive refunds on voluntary payments made after March 13, 2020, by contacting their servicer. It's important to note that these refunded payments will increase your loan balance and your monthly payments. If you expect to have a balance after discharge is applied and wish to request a refund, you can do so by contacting your servicer until Dec. 31, 2023.

If you consolidated your loan after March 13, 2020, refunds aren't available for any voluntary payments made prior to the consolidation.

Refund requests can only be made by you and refunded to you, even if someone else made a payment on your loan.

Do I have to be repaying my loans to be eligible for debt relief?

No. Borrowers are eligible for debt relief regardless of whether they're in repayment, in school, or in grace, as long as they meet the income requirements and have eligible loans.

If I have multiple loans, can I pick which loans get the relief?

We'll determine how debt relief gets applied to your loans. We'll then provide the guidance to loan servicers, who will process the relief. See below for additional details.

How will debt relief be applied to my loans?

For borrowers with multiple loans, we'll apply the relief in the following order:

- Defaulted ED-held loans
- Defaulted commercial FFEL Program loans

- Non-defaulted Direct Loan Program loans and FFEL Program loans held by ED
- Perkins Loans held by ED

If you have multiple loans in a program type (e.g., multiple Direct Loan Program loans), we'll apply the relief in the following order:

- Apply relief to loans with highest statutory interest rate.
- If interest rates are the same, apply to unsubsidized loans prior to subsidized loans.
- If interest rate and subsidy status are the same, apply to the most recent loan.
- If interest rate, subsidy status, and disbursement date are the same, apply to the loan with the lowest combined principal and interest balance.

Will my debt relief be taxed?

One-time student loan debt relief will not be subject to federal income taxes. State and local tax implications will vary.

For most borrowers, you will receive debt relief only if you submit an application. But some borrowers may be eligible for relief without applying. If you would like to opt out of debt relief for any reason—including because you are concerned about a state tax liability—you will be given an opportunity to opt out. (See below, "What if I don't want to receive debt relief?")

How do I get help if I have questions or need assistance?

We'll continue to update this page as we have more details. **The program information you can read here is the same information our contact center agents have at this time.** After the online application is live, support for the form will be available at 1-833-932-3439.

Applying for Debt Relief

Will any borrowers receive debt relief without applying?

Although most borrowers will have to apply for debt relief, we have income data on hand for around 8 million borrowers. These borrowers will get the relief without applying, unless they choose to opt out (see below, "What if I don't want to receive debt relief?").

How will I know if I qualify for debt relief without applying?

If we determine that you qualify for debt relief without applying, we'll send you an email and text message (if you're signed up for text alerts). You don't have to take any action, unless you would like to opt out (see below, "What if I don't want to receive debt relief?"). We'll provide your information to your loan servicer to process your relief.

We'll use *Free Application for Federal Student Aid* (FAFSA) and income-driven repayment application information to identify borrowers—or, as appropriate, parents—who have submitted income data for tax years 2020 or 2021. We'll use this data to determine which borrowers meet the income requirements. If we have borrower data for both years, we'll use the year with the lower income.

I'm a dependent student. Do I apply based on my income or my parents' income?

If you were enrolled in school as a dependent student for financial aid purposes between July 1, 2021, and June 30, 2022, your eligibility is based on parent income. After you fill out your own application form, we'll contact you so your parent can complete a Parent Income Form.

When will the online application be available?

The online application will be available in October 2022.

How do I know if you received my application?

When you submit your application for debt relief, you'll see a page online confirming your form was submitted. You'll also get a confirmation email from us, so make sure we have your most current email address. You can log in to StudentAid.gov and review your contact information.

What happens if I applied for Public Service Loan Forgiveness (PSLF)?

We'll identify any borrower who submitted both an application for one-time student loan debt relief and a PSLF form. If you receive one-time student loan debt relief and are then determined to have been eligible for forgiveness under PSLF, we'll adjust your loan and apply the PSLF discharge. The PSLF discharge may provide a refund on certain eligible payments made after the borrower has already made 120 payments.

How long do I have to apply for debt relief?

You'll have from October 2022 until Dec. 31, 2023, to submit your application for student loan debt relief.

Is there a paper version of the debt relief application?

Initially, the application will be available only online. A paper version of the form will be made available at a future date, and you'll have until Dec. 31, 2023, to apply.

What if I don't want to receive debt relief?

For most borrowers, you will receive debt relief only if you submit an application. But if you completed a *Free Application for Federal Student Aid* (FAFSA) form for the 2022-23 school year or are enrolled in an income-driven repayment plan based on your 2020 or 2021 income, you may be eligible for relief without applying. If you would like to opt out of debt relief for any reason—including because you are concerned about a state tax liability—you'll be given an opportunity to opt out.

Beware of Scams

You might be contacted by a company saying they will help you get loan discharge, forgiveness, cancellation, or debt relief for a fee. You **never** have to pay for help with your federal student aid. Make sure you work only with ED and our loan servicers, and never reveal your personal information or account password to anyone. Our emails to borrowers come from noreply@studentaid.gov, noreply@debtrelief.

studentaid.gov, or ed.gov@public.govdelivery.com. You can report scam attempts to the Federal Trade Commission by calling 1-877-382-4357 or by visiting reportfraud.ftc.gov.

Learn how to avoid scams and what you can do if you're contacted by a scammer.

Get Support

We'll continue to update this page as we have more details. **At this time, our contact center agents have the same information you can read here**. After the online form is live, support for the form will be available at 1-833-932-3439.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

No. 4:22-cv-00908-O

MYRA BROWN & ALEXANDER TAYLOR, PLAINTIFFS

v.

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

DECLARATION OF JAMES RICHARD KVAAL

I, James Richard Kvaal, do declare under penalty of perjury and pursuant to 28 U.S.C. § 1746, that the following is true and accurate to the best of my information and belief:

1. I am the Under Secretary of Education at the United States Department of Education (Department). My nomination for this position was confirmed by the United States Senate on September 14, 2021, and I was sworn in on September 15, 2021. I am a duly authorized Custodian of Records, or other qualified witness for the Department, located in Washington, District of Columbia. As such, I am fully competent to make the statements contained in this Declaration and I have authority to certify the attached records. I make this declaration based on my personal knowledge and based on information provided to me in my official capacity.

2. As the Under Secretary of Education, my responsibilities include the coordination of major policies, programs, and activities related to Postsecondary Education and Federal Student Aid for the Department.

This includes, but is not limited to, the development of policies, procedures, and directives related to the August 24, 2022, decision of the Secretary of Education (Secretary) to provide one-time student loan debt relief under the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act).

3. In execution of my responsibilities, I have under my custody and control documents related to the decision of the Secretary to provide one-time student loan debt relief. These documents are: (A) an August 24, 2022, memorandum from myself to the Secretary recommending the Secretary exercise his discretion under the HEROES Act to issue waivers and modifications necessary to effectuate one-time student loan debt relief, including an August 24, 2022, document titled "Rationale for Pandemic-Connected Loan Discharge Program" that was attached to my memorandum, (B) an August 24, 2022, memorandum from the Secretary to Federal Student Aid Chief Operating Officer Richard Cordray and signed by the Secretary reflecting his determination to issue waivers and modifications necessary to effectuate the one-time student loan debt relief program, and (C) a September 27, 2022, memorandum from the Secretary to the Chief Operating Officer and Assistant Secretary for Postsecondary Education Nasser Paydar, issuing the specific waivers and modifications and directing their implementation and publication in the *Federal Register*. These documents are attached as exhibits A, B, and C, respectively.

4. I certify that each of the attached records: (I) is the original or a duplicate of the original record in the custody of the Department; (2) was made at or near the time of the occurrence of the matters set forth by, or

from information transmitted by, a person with knowledge of those matters; (3) was kept in the course of the Department's regularly conducted activity; and (4) was made in the course of the regular conduct of the Department. These documents will all be part of the Administrative Record in this case. I am providing them now as part of the Department's opposition to Plaintiffs' motion for a preliminary injunction, which were filed contemporaneously with Plaintiffs' complaint (i.e., before the compilation and certification of an administrative record).

Executed on this [19th] day of Oct., 2022.

/s/ JAMES RICHARD KVAAL
JAMES RICHARD KVAAL

Exhibit A

UNITED STATES DEPARTMENT
OF EDUCATION

THE UNDER SECRETARY

DATE: Aug. 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 n*otice (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
Aug. 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

[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.

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

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[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.

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 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

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[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.

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.

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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.

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

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[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).

basic necessities, including energy, food, and shelter costs.[11]

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.

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[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.

[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.

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

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[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.

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 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.

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[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.

[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.

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 re-

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[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.

lief 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

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[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.

during the pause. For example, for a hypothetical borrower midway through loan repayment, the 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]

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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.

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.

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

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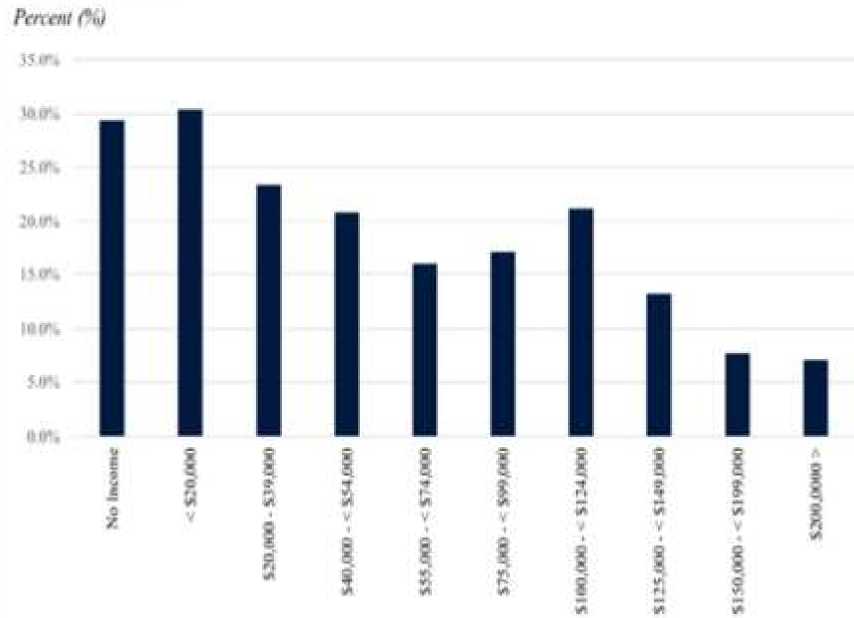
[29] Looney, Adam, and Constantine Yannelis. "A crisis in student loans?: How changes in the characteristics of borrowers and in the institutions they attended contributed to rising loan defaults." *Brookings Papers on Economic Activity*, 2015, no. 2, 2015, pp. 1-89.

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

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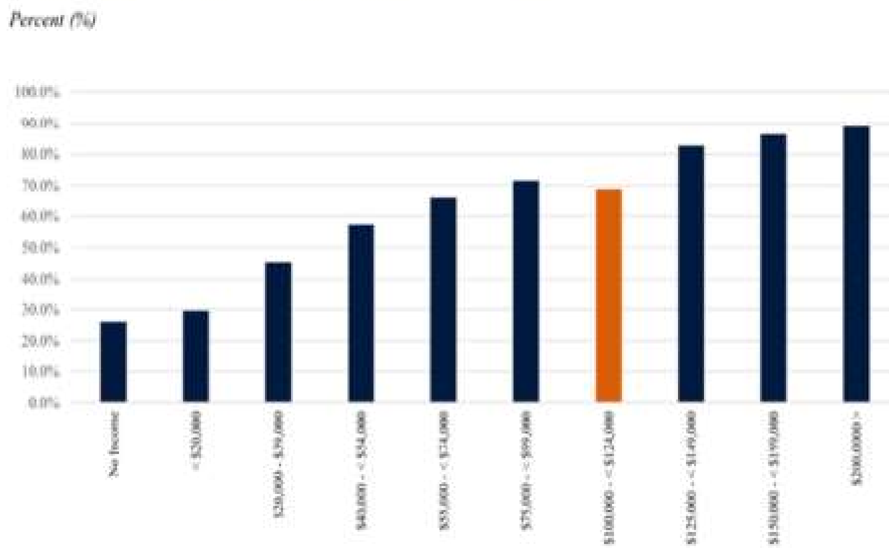
[30] Analyses based on unpublished data provided by the Federal Reserve Bank of Philadelphia.

on firmer financial footing with regards to loan payments, relative to those earning below the eligibility ceiling (see Figure 2).

Figure 2. Regular Payment Consistency in 2019, By Income

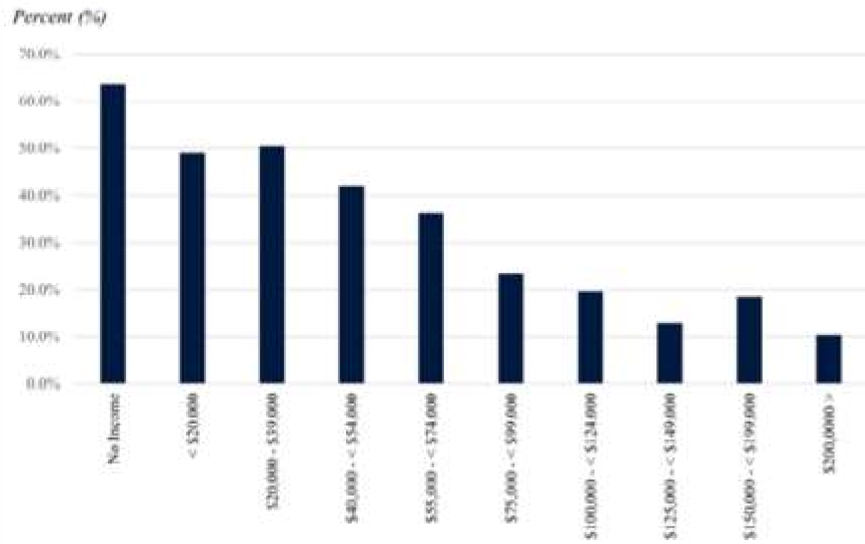


Source: Federal Reserve Bank of Philadelphia CFI COVID-19 Survey of Consumers

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]

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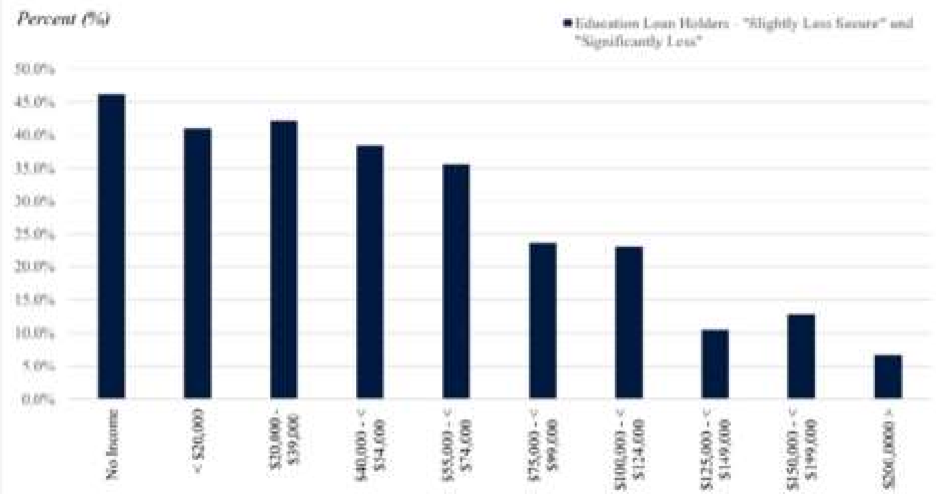
[31] Ibid.

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

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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.

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.

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

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[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.

[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.

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.

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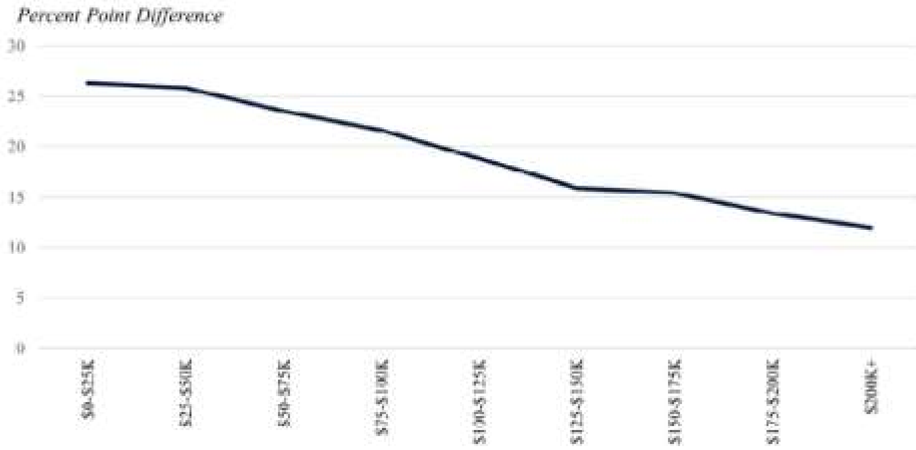
[38] Department estimates using administrative data on Pell Grant borrowers who submitted a FAFSA or IDR application with 2020 or 2021 income information.

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

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

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[39] Department of Education estimates using administrative federal student aid data and imputed income from Census data.

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.

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[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.

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

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[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.

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.

Exhibit B

THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

DATE: Aug. 24, 2022

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.

/s/	MIGUEL A. CARDONA MIGUEL A. CARDONA U.S. Secretary of Education	[8/24/22 9:25 am] Date & Time

Exhibit C

THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

DATE: Sept. 27, 2022

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.

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

No. 4:22-cv-0908-P

MYRA BROWN, ET AL., PLAINTIFFS

v.

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

Filed: Nov. 10, 2022

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]

[1] The Court expresses no opinion on whether the Program constitutes sound or unsound public policy—a consideration inappropriate

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

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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.").

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

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.

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

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

[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.

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

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[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).

next day, the White House announced that the President would "fulfill [his] campaign commitment" by providing debt forgiveness to millions of borrowers.[9]

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).

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[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.

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).

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 considered the objectives of § 1098bb(a)(2) met, the Secretary provided notice of the

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[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.

[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.

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. Plaintiffs' Lawsuit

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 $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.

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[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.

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 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;

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[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").

(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, 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 for 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 Texas 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. § 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

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[14] *See, e.g.*, *Lincoln*, 508 U.S. at 191 (1993) (holding that an agency's use of lumpsum 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).

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 Department'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; s*ee 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]

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[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

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. APA's Substantive Requirements

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. 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

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§ 1098bb(b)(1) means without obstruction from the notice and comment requirements. Plaintiffs do not dispute this meaning.

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

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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.

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 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, given Congress's extensive consideration of various bills seeking 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

[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.

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 title IV portions to provide for loan forgiveness.[19] But "enabling legislation" like

[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

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

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> 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).

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 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). According to the Department, they have not "relied on the HEROES Act or any other statutory, regulatory, or interpretative authority for the blanket or

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

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 for 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.

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[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 fond of admonishing Congress, "Come now, let us reason together." JOHN BARTLETT, FAMILIAR QUOTATIONS 872 (15th ed. 1980).

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

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

/s/ MARK T. PITTMAN
MARK T. PITTMAN
UNITED STATES DISTRICT JUDGE

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

No. 4:22-cv-0908-P

MYRA BROWN, ET AL. PLAINTIFFS

v.

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

Filed: Nov. 10, 2022

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 **Nov. 2022.**

/s/ MARK T. PITTMAN
MARK T. PITTMAN
UNITED STATES DISTRICT JUDGE

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

Civil Action No. 4:22-cv-00908-P

MYRA BROWN AND ALEXANDER TAYLOR, PLAINTIFFS

v.

U.S. DEPARTMENT OF EDUCATION AND MIGUEL CARDONA, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF EDUCATION, DEFENDANTS

Filed: Nov. 10, 2022

NOTICE OF APPEAL

PLEASE TAKE NOTICE that all Defendants in this case hereby appeal to the United States Court of Appeals for the Fifth Circuit from this Court's November 10, 2022 Order (ECF No. 37) and Final Judgment (ECF No. 38).

Dated: Nov. 10, 2022

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

BRIAN D. NETTER
Deputy Assistant Attorney General

MARCIA BERMAN
Assistant Branch Director
/s/ CODY T. KNAP
CODY T. KNAPP (NY #5715438)
KATE TALMOR
R. CHARLIE MERRITT
SAMUEL REBO
Trial Attorneys
U.S. Department of Justice
Civil Division
Federal Programs Branch
1100 L St. NW
Washington, D.C. 20005
Telephone: (202) 532-5663
Facsimile: (202) 616-8470
E-mail: cody.t.knapp@usdoj.gov

Counsel for Defendants

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

Civil Action No. 4:22-cv-00908-P

MYRA BROWN & ALEXANDER TAYLOR, PLAINTIFFS

v.

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

DECLARATION OF JAMES RICHARD KVAAL

I, James Richard Kvaal, do declare under penalty of perjury and pursuant to 28 U.S.C. § 1746, that the following is true and accurate to the best of my information and belief:

1. I am the Under Secretary of Education at the United States Department of Education (Department). My nomination for this position was confirmed by the United States Senate on September 14, 2021, and I was sworn in on September 15, 2021. As such, I am fully competent to make the statements contained in this Declaration. I make this declaration based on my personal knowledge and based on information provided to me in my official capacity.

2. As the Under Secretary of Education, my responsibilities include the coordination of major policies, programs, and activities related to Postsecondary Education and Federal Student Aid for the Department. This includes, but is not limited to, the development of

policies, procedures, and directives related to the August 24, 2022, decision of the Secretary of Education (Secretary) to provide one-time student loan debt relief under the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act).

3. On November 10, 2022, the court in the above-captioned case entered judgment in favor of plaintiffs, declared the one-time student loan debt relief program unlawful, and vacated the program (ECF Nos. 37 & 38).

4. As quickly as possible after this decision, the Department ceased accepting new applications for the program. It has not provided debt relief to any student loan borrowers under the program.

5. During the time the application was open, the Department had or obtained the necessary information of 26 million Americans to be considered for debt relief, including the 16 million borrowers whose applications have already been approved. With up to approximately 40 million student loan borrowers eligible for debt relief, millions more are expected to apply.

6. Preventing the Department from effectuating the debt relief as planned causes significant financial harm to these approximately 40 million student loan borrowers:

a. For a borrower on the standard 10-year repayment plan and five years of payments remaining with a typical balance of $29,400 and whose loan debt exceeds the amount of relief for which they are eligible, monthly payments would be $200 to $300 more than they would be if they received debt relief. This corresponds to an increase of $2,400 to $3,600 in annual payments.

b. On a hypothetical loan taken out at 5% interest, \$10,000 in loan forgiveness would save the borrower \$500 in accrued interest per year, while \$20,000 in loan forgiveness would save the borrower \$1,000 per year.

c. In the past, borrower default rates increased an average of twentyfold following natural disasters despite the Department's grant of administrative forbearances to affected borrowers.[1] We also know that vulnerable borrowers who needed to spend a longer time in an administrative forbearance following a major disaster were more likely to default on their federal student loans after leaving forbearance.[2] Unless the Department is allowed to provide debt relief, we anticipate there could be an historically large increase in the amount of federal student loan delinquency and defaults as a result of the COVID-19 pandemic. This could result in one of the harms that the one-time student loan debt relief program was intended to avoid.

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[1] In the year before the disaster declarations, only an average of 0.3% of borrowers entered default while 6.5% of borrowers entered default after leaving mandatory administrative forbearance.

[2] Among borrowers who had shorter mandatory administrative forbearance spells, 0.3 percent entered default in the year before the disaster declaration and 5.9 percent entered default in the year after, an approximately 19-fold increase. Among borrowers who had longer mandatory administrative forbearance spells, 0.2 percent entered default in the year before the disaster declaration and 7.5 percent entered default in the year after, an approximately 36-fold increase.

d. The consequences of defaulting on Federal student loans are severe: The entire unpaid balance of a borrower's loan and any interest owed becomes immediately due and payable; a borrower loses the ability to receive a deferment of repayment as well as eligibility for other program benefits, such as the ability to choose a repayment plan carrying a lower monthly payment amount, receiving additional federal student aid, and receiving credit toward Public Service Loan Forgiveness; a borrower's wages may be garnished and Federal tax refunds or payments offset by the Department of the Treasury; and the default is reported to credit bureaus, often impacting for years the ability of the borrower to purchase a home or car or get a credit card.

e. Once a borrower defaults, the majority do not return to good standing: In the years prior to the COVID-19 pandemic, approximately 80 percent of those who defaulted were still in default one year later, and 66-70 percent were still in default two years later.[3]

f. The burden of default is disproportionately shouldered by lower-income borrowers: Research shows that student loan repayment is correlated with income, and lower income borrowers are more likely to experience delinquency

[3] Blagg. "Underwater on Student Debt: Understanding Consumer Credit and Student Loan Default." *Urban Institute*, August 2018, pp. 14, *available at* https://www.urban.org/sites/default/files/publication/98884/underwater_on_student_debt.pdf.

and default.[4] This is especially true for Pell Grant recipients. 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.[5]

7. Preventing the Department from effectuating the debt relief as planned also causes significant confusion that will lead to further harm to borrowers:

a. Most borrowers have been told that all they need to do is submit an application to obtain one-time student loan debt relief. Now, as a result of litigation they are left to wonder when, if at all, if debt relief will be effectuated. Despite the Department's efforts to keep borrowers informed, many borrowers may remain uncertain or confused about their repayment obligations.

b. The group most at risk of default is the approximately 18 million borrowers eligible for one-time debt relief who would have their federal student loans discharged in their entirety under the program. These student loan borrowers had the reasonable expectation and belief that they would not have to make additional payments on their federal student loans. This belief may well stop them from making payments even if

[4] 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.

[5] Department of Education estimates using administrative Federal Student Aid data and imputed income from Census data.

the Department is prevented from effectuating debt relief. Unless the Department is allowed to provide one-time student loan debt relief, we expect this group of borrowers to have higher loan default rates due to the ongoing confusion about what they owe.

8. Given these harmful effects on tens of millions of Federal student loan borrowers, the Department is examining all available options. But those options are not without their own costs.

9. For example, the Department estimates that if it temporarily extends the existing COVID-19 pandemic payment and interest accrual pause for federal student loan holders, it will cost taxpayers several billion dollars a month in unrecovered loan revenue.

Executed on this 15th day of Nov., 2022.

/s/ JAMES KVAAL
JAMES KVAAL

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-11115

MYRA BROWN; ALEXANDER TAYLOR,
PLAINTIFFS-APPELLEES

v.

UNITED STATES DEPARTMENT OF EDUCATION; MIGUEL CARDONA, SECRETARY, U.S. DEPARTMENT OF EDUCATION, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF EDUCATION,
DEFENDANTS-APPELLANTS

Filed: Nov. 30, 2022

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.

(ORDER LIST: 598 U.S.)

MONDAY, DECEMBER 12, 2022

CERTIORARI GRANTED

22-535
(22A489)

DEPT. OF EDUCATION, ET AL. V.
BROWN, MYRA, ET AL.

Consideration of the application for stay presented to Justice Alito and by him referred to the Court is deferred pending oral argument. The application for stay is also treated as a petition for a writ of certiorari before judgment, and the petition is granted. The parties are directed to brief and argue the following questions: (1) Whether respondents have Article III standing; and (2) Whether the Department's plan is statutorily authorized and was adopted in a procedurally proper manner.

The Clerk is directed to establish a briefing schedule that will allow the case to be argued in the February 2023 argument session.