Nos. 22-506 & 22-535

In the Supreme Court of the United States

JOSEPH R. BIDEN JR., ET. AL.,
Petitioners,
v.
STATE OF NEBRASKA, ET. AL.,
Respondents.

U.S. DEPARTMENT OF EDUCATION & MIGUEL CARDONA,
Petitioners,
v.
MYRA BROWN & ALEXANDER TAYLOR,
Respondents.

On Writs of Certiorari Before Judgment to the United States Courts of Appeals for the Fifth and Eighth Circuits

AMICUS BRIEF FOR BORROWER ADVOCACY AND LEGAL AID ORGANIZATIONS IN SUPPORT OF PETITIONERS

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IDENTITY AND INTERESTS OF AMICI CURIAE

Amici are borrower advocacy and legal aid organizations.[1] They represent, or work on behalf of working- and middle-class student loan borrowers. They do so through policy work, in loan discharge proceedings to the U.S. Department of Education (the Department), and in bankruptcy. Many of *Amici's* clients have already applied for cancellation under the COVID Cancellation Program and face a substantial risk of default if student loan repayments resume without cancellation. Given the impact that the program will have on their clients, as described in this brief, the organizations have a strong interest in ensuring that the program is implemented. They also offer a unique perspective on the impact that the program will yield. *Amici* are:

The Student Borrower Protection Center (a fiscally sponsored project of the Shared Ascent Fund)

The Legal Aid Society of Cleveland

National Consumer Law Center

1000 Women Strong

Access Justice Brooklyn

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *Amici* authored this brief in whole; no party's counsel authored, in whole or in part, this brief; and no person or entity other than *Amici* and their counsel contributed monetarily to preparing or submitting this brief.

Advocates for Basic Legal Equality

Americans for Financial Reform

Appleseed Foundation

Bay Area Legal Aid

Bet Tzedek Legal Services

Blue Ridge Legal Services, Inc.

Cabrini Green Legal Aid

Center for Arkansas Legal Services

Center for Public Representation

Charlotte Center for Legal Advocacy

Children's Law Center of Massachusetts, Inc.

Colorado Legal Services

Columbia Legal Services

Community Legal Aid (Ohio)

Community Legal Aid SoCal

Community Legal Aid Society Inc. Delaware

Community Legal Services, Inc. of Philadelphia

Community Service Society of New York

Consumer Law Clinic, University of Wisconsin Law School

Debt Collective

DNA – People's Legal Services

East Bay Community Law Center

Florida Legal Services, Inc.

Greater Boston Legal Services

Gulfcoast Legal Services

Housing & Economic Rights Advocates

Indiana Legal Services, Inc.

Jacksonville Area Legal Aid

Justice in Aging

Kentucky Equal Justice Center

Legal Action of Wisconsin, Inc.

Legal Aid Foundation of Los Angeles

Legal Aid Center of Southern Nevada, Inc.

Legal Aid Chicago

Legal Aid of the Bluegrass

Legal Aid of Western Ohio

Legal Aid Society of Columbus

Legal Aid Society of Milwaukee

Legal Aid Society of Southwest Ohio, LLC

Legal Counsel for the Elderly

Legal Services NYC

Legal Services of Northern Virginia

Legal Services Vermont

Maryland Volunteer Lawyers Service

Michigan Advocacy Program

Michigan Indian Legal Services

Micronesian Legal Services Corporation

Mississippi Center for Legal Services

Mobilization for Justice

Neighborhood Legal Services (NY)

Neighborhood Legal Services of Los Angeles County

Neighborhood Legal Services Program (D.C.)

New Jersey Appleseed Public Interest Law Center

New York Legal Assistance Group

Pine Tree Legal Assistance

Pisgah Legal Services

Public Counsel

Rural Law Center of New York

South Coastal Counties Legal Services, Inc.

Southeastern Ohio Legal Services

Southern Arizona Legal Aid, Inc.

Student Debt Crisis Center

Tennessee Alliance for Legal Services

The Center for Elder Law & Justice

Virginia Legal Aid Society

Virginia Poverty Law Center

Volunteer Lawyers Project

Young Invincibles

INTRODUCTION AND SUMMARY OF ARGUMENT

Ellen is a 60-year-old mother living in Minnesota.[2] In 2011, Ellen's daughter enrolled in a school that promised a high-paying job upon graduation. Like many other Americans, Ellen did not have the resources to simply pay for her daughter's college, but Ellen was still determined to help her

[2] The stories presented in this Amicus brief were relayed to *Amici* by *Amici's* clients and other student loan borrowers. They represent a small sample of the borrowers that *Amici* work with daily. Names, where used, have been changed to protect borrowers' privacy.

daughter achieve the American dream. So, in addition to the thousands of dollars that her daughter borrowed, Ellen took out approximately $75,000 in federal student loans.

Things did not go as planned. After graduating in 2015, Ellen and her daughter learned that the school was a sham and would not deliver the economic security it promised. In fact, the school precipitously closed just a few years later. Nonetheless, Ellen started making payments on the student loan debt. Over several years, she paid approximately $50,000 towards the balance.

Today, Ellen is struggling to make ends meet. She lost her job at the beginning of the pandemic, and she still lacks a stable income. She cannot apply for a full-time job because she is caring for her terminally ill spouse. In the future, she anticipates relying on survivorship benefits and income from low-paying positions.

In 2023, the government will send Ellen a federal student loan bill for the first time since the pandemic struck. Though she has already paid approximately two-thirds of the principal balance, she will enter re-payment owing $80,000, or $5,000 ***more*** than the initial debt. This would be bad even without the pandemic; it is potentially catastrophic given the financial impacts of the last three years.

Ellen is in the same predicament as millions of other student loan borrowers. Like Ellen and her daughter, borrowers across the country tried to do everything by the book to improve their economic standing through higher education. But instead of finding the American dream, too many encountered a broken student loan system that left them with ballooning and insurmountable debt. And, in 2020, these borrowers disproportionately bore the brunt of COVID-19's economic effects.

The question now is straightforward: Just like the airlines, Fortune 500 Companies, universities, small businesses, and farmers for whom the government has already delivered significant COVID-19 relief, do student loan borrowers like Ellen get the help they need to recover from the pandemic? The Respondents in these two cases say no. To do so, they conjure illusory harms and ignore that the entire premise of the *Brown* case — that the government should provide *more* student loan cancellation — underscores the COVID Cancellation Program's benefits.

Ultimately, if the Department cannot effectuate the COVID Cancellation Program before repayment resumes, there is a substantial risk that low- and middle-income borrowers will struggle to meet their basic needs and will face unprecedented rates of delinquency and default. The Department's use of the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) to curtail this risk is well justified.

ARGUMENT

The COVID-19 pandemic caused substantial financial disruptions. In recognition of this financial devastation, then-President Trump and the U.S. Congress took emergency actions to protect Americans' financial interests.

Most notably, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, a $2.2 trillion dollar stimulus bill.[3] Among its many provisions, the CARES Act included one-time cash payments to families across the country, increased unemployment benefits, and created the Paycheck Protection Program that provided hundreds of billions of dollars in forgivable loans. The government, through the Small Business Administration, also provided deferments on loans and six months of automatic loan payments for certain debts (with the possibility of additional government loan payments).[4] And, later in the pandemic, the government directed recovery funds to restaurants,[5] airlines, and other transportation entities.[6]

As to student loans, the Secretary of Education paused payments on Department-held student loans in early March 2020, and Congress, through the CARES Act, extended that payment moratorium. The CARES Act also halted collection on defaulted loans, credited payments towards income-driven repayment (IDR), and temporarily blocked the accrual of interest. Although it was set to expire on September 30, 2020,[7] Secretary DeVos and Secretary Cardona have collectively extended the payment pause eight times given the prolonged nature of the pandemic.[8] That

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[3] CARES Act, Pub.L. No. 116–136, H.R. 748.

[4] *Id; see also,* Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, Pub. L. 116-260, H.R. 133.

[5] *See* American Rescue Plan Act of 2021, Pub.L. 117–2; *see also,* U.S. Small Bus. Ass'n, Restaurant Revitalization Fund.

[6] *See* U.S. Dep't of Treasury, Coronavirus Economic Relief for Transportation Services Program.

[7] *Supra* note 3.

[8] U.S. Dep't of Educ., *COVID-19 Emergency Relief and Federal*

pause is now in place until no later than June 30, 2023.[9]

No doubt, the student loan payment pause alleviated the financial hardship of the pandemic for many borrowers. But, at best, it was a stop-gap measure. Millions of borrowers will now re-enter repayment in a worse position than they entered the pandemic, with three additional years added to the life of their student loan. All available data, and borrowers' experience with the student loan system, indicate that the return to repayment will result in a sharp increase in borrowers suffering the harsh consequences of delinquency and default.[10] As detailed below, the government's COVID Cancellation Program is narrowly designed to address this risk.

I. Student loans are the central tool to ensure access to higher education making student loan borrowers uniquely vulnerable to the economic volatility of the pandemic.

The seminal legislation related to student loans – the Higher Education Act – promised to open the door of higher education to millions of Americans. The

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Student Aid available at https://studentaid.gov/announcements-events/covid-19 (last visited Nov. 22, 2022).

[9] U.S. Dep't of Educ., *Biden-Harris Administration Continues Fight for Student Debt Relief for Millions of Borrowers, Extends Student Loan Repayment Pause* (Nov. 22, 2022) available at https://www.ed.gov/news/press-releases/biden-harris-administration-continues-fight-student-debt-relief-millions-borrowers-extends-student-loan-repayment-pause.

[10] *See* Ben Kaufman, *New Data Show Student Loan Defaults Spiked in 2019 – A Warning to Industry and DeVos Amid Economic Fallout* (March 13, 2020) available at https://protectborrowers.org/every-26-seconds.

law was a key piece of President Johnson's anti-poverty agenda and aimed to ensure that any individual, regardless of wealth, could "apply to any college or university . . . and not be turned away because his family is poor."[11]

Although President Johnson initially wanted to provide grants to cover the cost of school, Congress instead created a comprehensive federal student loan program to ensure broad access to higher education. Over the decades, the government has made these loans increasingly available.[12]

Simultaneously, the demand for higher education intensified, meaning more students were seeking such loans to pay for school. While education had long been viewed as the key to economic mobility, this message escalated with increasing globalization in the 1980's and 1990's. During this time, employers turned to individuals with college degrees, while workers without a degree saw their wages decline.[13] Moreover, the various economic crises in the 1980's, 2000's, and 2010's increased the number of people concerned about their job stability, making them more

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[11] *See* Lyndon B. Johnson, Remarks at Southwest Texas State College Upon Signing the Higher Education Act of 1965 (Nov. 8, 1965),https://www.presidency.ucsb.edu/documents/remarks-southwest-texas-state-college-upon-signing-the-higher-education-act-1965.

[12] This discussion focuses on the federal student loan system, but a $128 billion private student loan market also emerged. *See* Consumer Fin. Protection Bureau, *Report of the CFPB Education Loan Ombudsman*, p. 7 (Oct. 2022) available at https://files.consumerfinance.gov/f/documents/cfpb_education-loan-ombudsman_report_2022-10.pdf.

[13] *See* Josh Mitchell, *The Debt Trap: How Student Loans Became a National Catastrophe* pp. 79-94 (2021).

inclined to return to school.[14] This led many Americans who were disconnected from higher education to return to college.[15]

As more students were forced to utilize loans to access the promised mobility of an education, the cost of school also increased. Between 2006 and 2016, the Consumer Price Index for college tuition and fees "increased 63 percent, compared with an increase of 21 percent for all items."[16] And, "between 1992-93 and 2022-23, the average tuition and fees increased from $2,340 to $3,860 at public two-year, from $4,870 to $10,940 at public four-year, and from $21,860 to $39,400 at private nonprofit four-year institutions, after adjusting for inflation."[17]

These trends also intersected with the expanding financialization of schools through shareholder-run for-profit institutions.[18] These for-

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[14] Jill Barshay, *How the last recession affected higher education. Will history repeat?* Hechinger Report (April 6, 2020) available at https://hechingerreport.org/how-the-2008-great-recession-affected-higher-education-will-history-repeat/.

[15] *Id.*

[16] U.S. Bureau of Labor Statistics, *College tuition and fees increase 63 percent since January 2006* (Aug. 30, 2016) available at https://www.bls.gov/opub/ted/2016/college-tuition-and-fees-increase-63-percent-since-january-2006.htm.

[17] Jennifer Ma & Matea Pender, *Trends in College Pricing and Student Aid 2022*, CollegeBoard (October 2022) available at https://research.collegeboard.org/media/pdf/trends-in-college-pricing-student-aid-2022.pdf.

[18] Various factors played a role in this development, including long-standing racial and gender inequities, and the imposition of work or training requirements for certain government benefits. *See* Tressie McMillan Cottom, Lower Ed: The Troubling Rise of For-Profit Colleges in the New Economy (2017).

profit companies relied on "90 percent of [their] revenue[]" from enrollment (and associated federal student loan dollars), and thus were "concerned first and foremost with enrollment growth."[19] To bolster this enrollment, the companies targeted individuals from low-income backgrounds, Black and Brown communities, veterans, and single women.[20] The institutions also charged more than the average school (approximately $10,000 more than the average community college).[21]

The result of these various changes is clear: in 1995, the government lent $36 billion a year to 4.1 million students; by 2017, it was lending $96 billion a year to 8.6 million students (in total this represents a seven-fold increase of the overall student loan portfolio, which now stands at approximately $1.7 trillion).[22] Today, approximately 40 percent of students borrow to attend school, taking out an

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[19] *Id.* at 20.

[20] *See, e.g.,* Genevieve Bonadies, Joshua Rovenger, Eileen Connor, Brenda Shum, & Toby Merrill, *For-Profit Schools' Predatory Practices and Students of Color: A Mission to Enroll Rather than Educate*, Harvard Law Review Blog (July 30, 2018), available at https://blog.harvardlawreview.org/for-profit-schools-predatory-practices-and-students-of-color-a-mission-to-enroll-rather-than-educate/.

[21] Ariel Gelrud Shrio & Richard V. Reeves, *The for-profit college system is broken and the Biden administration needs to fix it*, Brookings Institution (Jan. 12, 2021) available at https://www.brookings.edu/blog/how-we-rise/2021/01/12/the-for-profit-college-system-is-broken-and-the-biden-administration-needs-to-fix-it/.

[22] CBO, *The Volume and Repayment of Federal Student Loans: 1995 to 2017* (Nov. 2020) available at https://www.cbo.gov/publication/56754.

average of $20,000-$24,999 in federal loans.[23]

Notably, the bulk of these students are working- and middle-class individuals whose families lack the wealth to pay out of pocket and who are forced to take on this growing debt. A disproportionate number are borrowers of color and women, many of whom are supporting other family members.[24] And forty percent of these borrowers lack a four-year college degree.[25]

II. The COVID-19 pandemic amplified the economic difficulties for these working and middle-class borrowers.

The economic fallout from the COVID-19 pandemic caused significant hardship as tens of millions of people lost their jobs.[26] As a borrower from

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[23] *See* The Federal Reserve, *Economic Well-Being of U.S. Households* available at https://www.federalreserve.gov/publications/2022-economic-well-being-of-us-households-in-2021-student-loans.htm.

[24] Louise Seamster and Raphaël Charron-Chénier, *Predatory inclusion and education debt: Rethinking the racial wealth gap* 199-207, Social Currents 4.3 (2017); Ana Hernandez Kent & Fenaba R. Addo, *Gender and Racial Disparities in Student Loan Debt*, Fed. Reserve Bank of St. Louis (Nov. 10, 2022) available at https://www.stlouisfed.org/publications/economic-equity-insights/gender-racial-disparities-student-loan-debt#:~:text=The%20gender%20disparity%20in%20student,(see%20the%20figure%20below).

[25] Tara Siegel Bernard, *They Got the Debt, but Not the Degree,* The New York Times (June 1, 2022) available at https://www.nytimes.com/2022/06/01/your-money/student-loan-debt-degree.html.

[26] See Center on Budget and Policy Priorities, *Tracking the COVID-19 Economy's Effects on Food, Housing, and Employment Hardships* (Feb. 2022) available at

St. Louis, Missouri confirmed, because of the pandemic, they lost their job and relied on unemployment assistance to stay afloat. Another borrower from Monticello, Minnesota lost their home and experienced a cancellation of utilities due to financial difficulties. Understandably, this borrower is "very depressed and there is no end in sight. [She] miscarried a child from stress."

As the pandemic went on, it had a particularly harsh effect on those most impacted by student loan debt, specifically borrowers of color.[27] For example, one report confirms that "Student loan borrowers were more likely to experience job loss, or reduced hours during the pandemic, and were more likely to report concerns about making ends meet."[28]

The result of this, according to a November 2022 Consumer Financial Protection Bureau analysis, is that a "growing share of student loan borrowers are 60 days or more past due on a non-student-loan-credit account since Mid-2021."[29] Moreover, as of

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https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-economys-effects-on-food-housing-and.

[27] Patrick Henry, *Economic inequality has deepened during the pandemic. That doesn't mean it can't be fixed*, World Economic Forum (Apr. 7, 2022) available at https://www.weforum.org/agenda/2022/04/economic-inequality-wealth-gap-pandemic/.

[28] Mitchell Barnes, et. al., *Bolstered balance sheets: Assessing household finances since 2019,* The Brookings Institution (Mar. 22, 2022) available at https://www.brookings.edu/research/bolstered-balance-sheets-assessing-household-finances-since-2019/.

[29] Thomas Conkling & Christa Gibbs, *Office of Research blog: Update on student loan borrowers during payment suspension,* Consumer Financial Protection Bureau (Nov. 2, 2022) available

"September 2022, 7.1 percent of student loan borrowers who were not in default on their loans at the start of the pandemic were having difficulty repaying their debt."[30] So, "despite worsening credit outcomes overall, the cancellation of some student loan debt means that fewer student loan borrowers are likely to be at risk of payment difficulties when federal student loan payments resume."[31]

Borrowers tell *Amici* the same thing. For instance, one borrower is struggling as a single mom and the prospect of paying student loans will likely cause her and her family "to become homeless because [she] can't afford to pay for [their] home and [her] student loans at the same time with [her] salary alone." Another borrower confirms that they're "not even able to pay the bills that [they] have now, let alone student loans." And, a borrower from Missouri explains that they have been "scratching and clawing trying to get somewhere," but feel like they "failed and these student loans are just another thorn in my side, bogging me down."

The experiences of borrowers who did not receive the benefits of a payment pause on their student loans are also telling. During the past three years, these borrowers "were more likely to struggle with payments during the pandemic," and many were only "able to avoid delinquency through forbearance."[32] Notably, as they exited forbearance,

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athttps://www.consumerfinance.gov/about-us/blog/office-of-research-blog-update-on-student-loan-borrowers-during-payment-suspension/.

[30] *Id.*

[31] *Id.*

[32] Jacob Goss, Daniel Mangrum, & Joelle Scally, *Student Loan*

these borrowers had broader economic difficulties and "experienced 33 percent higher delinquency on their non-student, non-mortgage debt after exiting forbearance."

Matt, who has both private and federal student loans from undergraduate and law school, is one borrower who did not fully benefit from the payment pause. As a first-generation student who was told that student loans were "good debt," he has watched his private loan balance double. After the pandemic hit in 2020, he worked two, non-legal jobs for 18 hours a day. He used the bulk of his earnings from work to stay current on his private student loans. If he had not moved home to live with his parents, he would have been unable to make ends meet.

Ultimately, while the federal student loan payment pause provided vital relief to the borrowers who received it, the pause did not address the underlying problems. Unlike direct grants, forgivable loans, or the SBA's automatic debt payments – forms of relief that allowed enterprises to come out of the pandemic in a similar position as they entered – the student loan pause did not and could not have the same effect. Instead, many working-class borrowers are in a *worse* position than they were in March 2020 and are also three years further from being without student loans.

Repayment during the Pandemic Forbearance, Liberty Street Economics (March 22, 2022) available at https://libertystreeteconomics.newyorkfed.org/2022/03/student-loan-repayment-during-the-pandemic-forbearance/.

III. If federal student loan payments resume without cancellation, delinquency and default rates among working and middle class borrowers are expected to spike.

Given the financial impacts of COVID-19, working and middle-class borrowers face the prospect of widespread delinquency and defaults when repayment begins. History confirms this.

Data show that borrowers frequently struggle to get back on track with their loans after experiencing a period of forced-placed (or emergency) forbearance.[33] Specifically, following "natural disasters such as Hurricanes Harvey, Irma, and Maria and the California wildfires," borrowers' loans were placed in mandatory administrative forbearance.[34] In quarterly data following these natural disasters, the Department noted repeatedly that new defaults spiked "as a result of disaster-impacted borrowers exiting forbearance statuses."[35] As compared to the current payment pause, these

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[33] *Supra* note 10.

[34] U.S. Dep't of Educ., *Electronic Announcement: Federal Student Aid Posts New Reports to FSA Data Center Q2* (Aug. 7, 2019) available at https://ifap.ed.gov/electronic-announcements/08-07-2019-federal-student-aid-posts-new-reports-fsa-data-center.

[35] *Id; see also* U.S. Dep't of Educ., *Electronic Announcement: Federal Student Aid Posts New Reports to FSA Data Center Q3* (Oct. 3, 2019) available at https://ifap.ed.gov/electronic-announcements/08-07-2019-federal-student-aid-posts-new-reports-fsa-data-center; U.S. Dep't of Educ., *Electronic Announcement: Federal Student Aid Posts New Reports to FSA Data Center Q4* (Jan. 3, 2020). https://ifap.ed.gov/electronic-announcements/010320FSAPostsNewReportstoFSADataCenter

natural-disaster forbearances impacted far fewer borrowers and were of much shorter duration (generally 90 days, with a one-year extension available).[36] If borrowers fall behind on their debts in similar proportions when the COVID-19 payment pause ends, the spike in delinquencies and defaults will dwarf any historical analogue.

Borrower complaints to the Consumer Financial Protection Bureau also underscore the risk of delinquencies and defaults stemming from sloppy or predatory student loan servicing practices.[37] Both before and during the pandemic, student loan servicers maintained intolerably long call wait times, and doled out misinformation raising doubts about their ability to respond to borrowers' inquiries accurately.[38]

For example, in November 2022, the Missouri Higher Education Loan Authority (MOHELA) – the servicer whose interest the States are purporting to

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[36] U.S. Dep't of Educ., *Natural Disasters: Information for Affected Individuals* available at https://studentaid.gov/announcements-events/disaster (last visited Nov. 20, 2022).

[37] *See e.g.,* Complaint to the CFPB (August 16, 2018) available at https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/2993342;
Complaint to the CFPB (June 22, 2019) available at https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/3283590.

[38] Persis Yu, Testimony to the U.S. House of Representatives Committee on Financial Services regarding A 1.5 Trillion Crisis: Protecting Student Borrowers and Holding Student Loan Servicers Accountable (Sept. 10, 2019), available at https://www.congress.gov/116/meeting/house/109897/witnesses/HHRG-116-BA00-Wstate-YuP-20190910.pdf.

vindicate by claiming that MOHELA is harmed if it has a smaller servicing portfolio – announced that it was receiving an increase in call volume far surpassing its capacity to serve.[39] It explained that as the Limited Public Service Loan Forgiveness Waiver deadline approached, its call volume increased 2,000 percent as compared to the same period last year, resulting in average call wait times exceeding 2 hours.[40] Some borrowers reported being on hold *for more than 9 hours*.[41] The increase in call volume, combined with the departure of several servicers from servicing altogether,[42] is exacerbating delays and contributing to borrower confusion.[43] The ultimate result: MOHELA reports an inability to update payment counters, write off loans, or conduct other adjustments due to unexpected delays in receiving files from both federal partners and other servicers, all increasing the risk of widespread delinquency and default if the student loan repayment system is turned back on without a reduction in the overall student loan portfolio.

Additionally, the Department of Education's inaccurate and incomplete records of borrowers' contact information means that many borrowers may

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[39] MOHELA, *Update to Our Consumers* (November 2022) available at https://perma.cc/SM58-JANH

[40] *Id.*

[41] *See e.g.,* @StrikeDebt, Twitter (Oct. 20, 2022, 11:15 PM), https://twitter.com/StrikeDebt/status/1583295853649068032 ("MOHELA is closed. Still nothing That's it folks. Calling it a night.").

[42] Dep't of Educ., *Federal Loan Servicer Updates* available at https://studentaid.gov/announcements-events/loan-servicer-updates.

[43] *Supra* note 37.

never learn about the return to repayment or their repayment options. According to a 2014 GAO report, "Collection agency representatives we interviewed told us they use information from Education (e.g., home and work phone numbers, mailing address) and proprietary databases to locate borrowers. However, they said it can be difficult to contact defaulted borrowers, because their contact information on file with Education may be out-of-date or they may not answer the collection agency's phone calls."[44] A later GAO report confirmed, indicating that contact information is missing for one-quarter of borrowers in default.[45] Given the duration of the payment pause, many borrowers are at risk of default without meaningful affirmative outreach from the Department (which is nearly impossible given the current portfolio of federal student debt).

These administrative complexities are compounded by the passage of time. Many borrowers have moved and changed contact information, reducing the prospect of meaningful Department outreach. And, because the Department has shifted many borrowers to new loan servicers, these individuals will receive contact from an unknown source with whom they never previously interacted.

This risk will be most acute for the same borrowers who were financially impacted by the

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[44] U.S. Gov't Accountability Off., GAO-14-256, Federal Student Loans Better Oversight Could Improve Defaulted Loan Rehabilitation 8 (2014).

[45] U.S. Gov't Accountability Off., GAO-22-105291, COVID-19: Significant Improvements Are Needed for Overseeing Relief Funds and Leading Responses to Public Health Emergencies 102 (2022).

pandemic. In general, borrowers default because they are facing financial challenges such as a "drop in income, health issues, or other further debt," and are often "living paycheck to paycheck."[46] In fact, "borrowers who default within 12 years of starting college entered school with incomes below 200 percent of the federal poverty level for their family size," and "approximately 65 percent of defaulted borrowers earn income below the federal poverty line."[47] Simply stated: borrowers do not default by choice; they default because they are unable to make payments, experience economic disruptions, and are overwhelmed with a convoluted student loan system.[48]

Borrowers deceived into the underbelly of higher education are also at heightened risk of delinquency and default if repayment begins without some cancellation. Many of these borrowers find that their school's promises were lies and that their degree (if they have one) is worthless.[49] The bulk of those who enrolled in for-profit schools' certificate programs earned less than $30,000, or the equivalent of what they would have earned with a high school diploma.[50]

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[46] The Inst. for Coll. Access & Success, *Casualties of College Debt, What Data Show and Experts Say About Who Defaults and Why* (June 2019) available at https://ticas.org/affordability-2/casualties-of-college-debt-what-data-show-and-experts-say-about-who-defaults-and-why/.
[47] *Id.*
[48] *See* Sarah Sattelmeyer, *Trapped by Default,* New America (July 27, 2022) available at https://www.newamerica.org/education-policy/briefs/trapped-by-default/.
[49] *Supra* note 21.
[50] The Inst. for Coll. Access & Success, *Takeaways from New*

And, "[d]efaulted borrowers are [] over two and half times more likely to have attended a for-profit school than non-defaulters."[51]

At bottom, the precise borrowers for whom the Higher Education Act and student loans were supposed to lift into the middle class are the same ones most likely to default when repayment begins. After three years of widespread economic disruptions and psychological shocks, these borrowers will be thrust into a system that is overly complex and rife with administrative burdens. Absent relief comparable to the kinds that the government provided to other entities, borrowers will likely default on a scale unmatched in the history of the student loan system.

IV. The COVID Cancellation Program is specifically tailored to help these borrowers.

The Department reasonably concluded that to transition back into repayment without plunging millions of borrowers into default (and thus to avoid leaving borrowers in a worse position in relation to their student loans because of the pandemic), it needed to reduce borrowers' balances and its overall student loan portfolio. This is critical; a default can be catastrophic for a student loan borrower given the government's use of punitive, involuntary collection tactics to try to recover the debt. These include seizing

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Program-Level Data on the College Scorecard, The Inst. for Coll. Access & Success (Dec. 5, 2019) available at https://ticas.org/accountability/data-evidence-and-information/takeaways-from-new-program-level-data-on-the-college-scorecard/.

[51] *Supra* note 46.

borrowers' Earned Income Tax Credit, Child Tax Credits, and Social Security retirement benefits (all programs, like the student loan system itself, designed to lift people out of poverty).

The harm of these involuntary collections cannot be overstated. A single instance can "leave a borrower unable to pay for necessities, compound their financial woes and debt, prevent them from securing or maintaining affordable and safe housing, threaten their employment, harm family members, and cause medical problems and additional medical debt."[52] As one borrower explained: "Having them take my tax refund last year has thrown me into the red every single month since then because that was my catch-up fund. That was my money that was actually going to pay my landlady and enable me to get ahead a tiny bit. I have nothing in retirement, and probably never will. This system perpetuates itself."[53]

The COVID Cancellation Program is tailored to help the most at-risk borrowers avoid such harms. For example, one study revealed that a discharge of "$10,000 reduces the share of people with debt from 15% to 10% in the bottom quintile for wealth and from 20% to 15% in the second-lowest quintile. It makes no difference for the 4% of individuals with debt in the top 10% for wealth."[54] Additionally, "$20,000 in

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[52] Joshua Rovenger, *Illogical Collections: How the Department of Education's Involuntary Collection Efforts Undermine the Higher Education Act* (Aug. 2022) available at https://protectborrowers.org/wp-content/uploads/2022/08/Beyond-Fresh-Start.pdf#page=69.

[53] *Supra* note 45.

[54] D. Charlie Eaton, et. al., *Ltr. to Senator Elizabeth Warren* (May 3, 2022) available at

cancellation reduces the share of people with debt from 15% to 7% in the bottom quintile for wealth and from 20% to 11% in the second lowest quintile."[55] For borrowers who were previously in delinquency or default, "$10,000 zeroes out 45% (5 million) of these distressed borrowers," and "$20,000 zeroes out 69% (7 million) of these distressed borrowers."[56] Many of these borrowers never completed their programs and thus did not obtain a benefit from incurring the debt.

Similarly, by providing an additional $10,000 in cancellation for borrowers who received a Pell Grant, the Department ensured that borrowers from the lowest income backgrounds – and who are historically at the highest risk of default – obtain the greatest benefit. Indeed, "virtually all Pell recipients are from families earning less than $60,000 a year, and most earn much less," rendering "Pell eligibility" as a "highly effective way to target financial aid to disadvantaged groups."[57] And "Pell borrowers represent 90% of borrowers in default," while "79% of all dropouts were Pell Grant recipients."[58]

Working- and middle-class borrowers confirm to *Amici* that the COVID Cancellation program is critical. For example, a 64-year-old teacher in Ohio

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https://www.warren.senate.gov/imo/media/doc/Eaton%20et%20al%20analysis_05.03.22.pdf.

[55] *Id.*

[56] *Id.*

[57] Adam Looney, *Does Biden's student debt forgiveness achieve his stated goals?* The Brookings Institution (Sept. 26, 2022) available at https://www.brookings.edu/blog/up-front/2022/09/26/does-bidens-student-debt-forgiveness-achieve-his-stated-goals/.

[58] *Id.*

continually made payments on her loans for 15 years but still saw her loan balance **double** from $20,000 to $40,000. Because of the pandemic, she is working in a new job with a lower wage, barely earning enough to make ends meet. If repayment starts without cancellation, she fears that her loan balance will only continue to grow and "will follow [her] to [her] grave."

Another borrower from Illinois saw her business directly impacted by COVID-19, the lockdowns, and various COVID-19 rules. She's making less money than before and the payment pause has been the only "sav[ing] grace keeping [her] family afloat." She is still experiencing the financial harms from COVID-19.

A single mother in California is also filled with stress and anxiety because of her student loan debt. Although she did not immediately realize it (and has suffered resulting credit damage), only *some* of her student loans benefited from the COVID-19 payment pause. Without cancellation, she will be unable to afford her loan payment and "will certainly default on [her] loans."

A 63-year-old borrower from Kansas also explains that cancellation is key to their ability to retire. Although this borrower has paid over $18,000 on their $42,000 of debt, they have only seen their overall balance drop approximately $800.

And, as a borrower from Houston, Texas says: "I am the only employed member of my household, the other person living with me has been on disability since childhood. Loan forgiveness will help keep a roof over our heads and food on our table. The last few years have been very hard on us . . .”

In addition to helping borrowers avoid the devastating consequences of default, the COVID Cancellation Program yields additional benefits for borrowers. Without cancellation, a borrower’s ability to pay for necessities, invest in affordable housing, or buy goods like a car will be minimal. And, without cancellation, borrowers are left three years behind in repayment – that is, three years further from saving for retirement, three years further from saving for their children’s education, three years further from being able to start a business, three years further from having a debt-to-income ratio that allows them to qualify for certain financial products, or just three years further from making ends meet. The COVID Cancellation Program permits borrowers to make these investments right now.[59]

Again, the borrowers say it best; as one explained to *Amici*: “It [student loan forgiveness] would allow us at middle age to pretend that we now have a chance at owning a home before we die.” Another borrower stated that “Student debt cancellation would allow me the freedom to pour more money back into the economy and purchase other assets for stability like a home.” And, an additional borrower indicated that: “This debt reduction would really help me financially so I can purchase a house.”

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[59] *See* Stephen Roll, Jason Jabbari, & Michal Grinstein-Weiss, *Student Debt forgiveness would impact nearly every aspect of people’s lives*, The Brookings Institution (May 18, 2021) available at https://www.brookings.edu/blog/up-front/2021/05/18/student-debt-forgiveness-would-impact-nearly-every-aspect-of-peoples-lives/.

The COVID Cancellation Program also provides borrowers who want to have children with the financial flexibility to do so. This additional freedom makes good sense; as one borrower underscores: "I want more than anything to adopt, which is impossible when a third of my income is going towards loans. Having any amount forgiven, or even just the permanent elimination of interest, would make a massive difference in ability to have the children I wanted this career to support in the first place."

Finally, and perhaps counter-intuitively, the COVID Cancellation Program makes it more likely that borrowers with remaining balances will pay on that debt. Given the defaults and compounding balances, much of the federal student loan portfolio is unlikely to ever yield returns.[60] Without some policy change that provides borrowers with a manageable balance (as the COVID Cancellation Program does), many borrowers will simply be unable to make payments. The COVID Cancellation Program allows the Department to clear its books of bad debts and facilitate the remaining borrowers' repayment.

Given these benefits, the Secretary drew reasonable lines to ensure that every borrower at risk of default would obtain relief under this program. As evidenced by the 26 million people who have already

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[60] *See generally* Ben Kaufman, *Millions of Borrowers Had a Special Chance to Exit Default During COVID,* Student Borrower Protection Center (Nov. 16 2021), https://protectborrowers.org/millions-of-student-loan-borrowers-had-a-special-chance-to-exit-default-during-covid-the-biden-administration-must-fix-the-system-failure-that-led-almost-no-borrowers-to-access-it/.

applied for cancellation, the Secretary also confirmed that these borrowers would learn about, understand, and access the program. In so doing, the COVID Cancellation Program removes the government's boots off these borrowers' necks and allows them to avoid a government-fueled cycle of poverty.

V. The programs that could otherwise prevent such widespread delinquency and default have historically failed.

The other programs that could theoretically help avoid such catastrophic default – income-driven repayment and targeted loan discharge programs – have historically failed borrowers. Without cancellation, they are insufficient to ward off a wave of default.

By way of background, Congress directed the Department to create repayment plans that tethered a borrower's monthly payment to their income (including, for some borrowers, payments as low as zero dollars per month).[61] These plans also required the Department to discharge the borrowers' debt after a certain period of time in repayment.[62] Congress left it to the Secretary to establish the required period of payment for a discharge under IDR, which is currently 20 or 25 years.

Similarly, Congress directed the Department to discharge loans in other enumerated circumstances. These include: if a school's misconduct violated the law, if a school should have never certified the

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[61] *See* 20 U.S.C. 1087e(e).
[62] *Id.*

borrower for the debt, if the borrower worked in public service for a decade, if the borrower became disabled and unable to work, and if the borrower attended a school that precipitously closed.[63]

In practice, these programs have not existed for millions of working- and middle-class borrowers. The most notable failure has been in income-driven repayment. For years, the Department and loan servicers have actively steered borrowers into costly forbearances (in which interest accrued and capitalized) and away from affordable income-driven plans.[64] Startlingly, only 43 percent of borrowers on income-based government assistance programs (like SSI or SNAP) were enrolled in an income-driven repayment program, even though most, if not all of them, would be eligible for a $0 monthly payment.[65] Indeed, for "every borrower on IDR there are potentially two more who are eligible but not enrolled," with, on average, significantly lower take-home income than those enrolled.[66] Failing to get on

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[63] *See, e.g.,* 20 U.S.C. 1087e(h); 20 U.S.C. 1087e(m); 20 U.S.C. 1087(a); 20 U.S.C. 1087(c).

[64] *See, e.g.,* Dep't of Educ., *Department of Education Announces Actions to Fix Longstanding Failures in the Student Loan Programs* (April 19, 2022) available at https://www.ed.gov/news/press-releases/department-education-announces-actions-fix-longstanding-failures-student-loan-programs.

[65] Ben Kaufman, *New Data Show Borrowers of Color and Low-Income Borrowers are Missing out on Key Protections, Raising Significant Fair Lending Concerns* (Nov. 2, 2020), available at https://protectborrowers.org/new-data-show-borrowers-of-color-and-low-income-borrowers-are-missing-out-on-key-protections-raising-significant-fair-lending-concerns.

[66] JP Morgan Chase & Co, *Income Driven Repayment: Who needs student loan payment relief* (June 2022) available at

such a plan vastly increases the risk of a default.[67]

For those borrowers who found their way into an affordable repayment plan, the government still erected roadblocks. For them, the loan servicers made it exceptionally difficult to recertify eligibility for a plan. This meant that half of enrolled borrowers failed to re-certify their eligibility on time and faced the risk of default or costly forbearances.[68]

A few borrowers beat the odds and managed to *get in* and *stay in* an income-driven repayment plan. The loan servicers and the Department failed them too. As of June 2021, approximately 4.4 million borrowers were in repayment for 20 years or longer. Although many of these borrowers should be eligible for a discharge, the Department canceled a meager ***157*** loans under its income-driven repayment authority.[69] This cataclysmic failure is no surprise since many servicers were not even tracking borrowers' payments towards loan forgiveness,[70] and

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https://www.jpmorganchase.com/institute/research/household-debt/student-loan-income-driven-repayment

[67] Seth Frotman & Rich Williams, *New data documents a disturbing cycle of defaults for struggling student loan borrowers*, Consumer Financial Protection Bureau (May 15, 2017) available at https://www.consumerfinance.gov/about-us/blog/new-data-documents-disturbing-cycle-defaults-struggling-student-loan-borrowers/.

[68] *Supra* note 37.

[69] *See* U.S. Gov't Accountability Off., GAO-22-103720, Federal Student Aid: Education Needs to Take Steps to Ensure Eligible Loans Receive Income-Driven Repayment Forgiveness (2022).

[70] Cory Turner, *How the affordable student loan program failed low-income borrowers,* NPR (Apr. 1, 2022) available at https://www.npr.org/2022/04/01/1089750113/student-loan-debt-investigation.

"lacked basic information, like when a borrower changed repayment plans or how much the correct payment amount was."[71]

Additional failures also left borrowers with debt that should have been cancelled. For example, under the Public Service Loan Forgiveness program, the government promised public service workers a discharge after 10 years of service. But, as of June 2020, only 2 percent of borrowers who had applied were approved for the relief,[72] while countless more were failed by "government mismanagement, poor loan servicing, and a lack of timely, accurate information about how to access PSLF."[73]

With respect to other cancellation programs, too, the Department failed to provide critical information and created overly restrictive regulations that denied borrowers relief even as the governing statute required discharge. In contrast to the simple form that the Department employed for the COVID Cancellation Program – which allowed eligible borrowers to apply for relief in less than 5 minutes – the Department's other discharge programs are highly technocratic with administrative burdens that leave many borrowers unable to access relief. And,

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[71] *Id.*

[72] *See* U.S. Dep't of Educ., Public Service Loan Forgiveness Data: June 2020 PSLF Report, https://studentaid.gov/data-center/student/loan-forgiveness/pslf-data (last accessed Nov. 22, 2022).

[73] Mike Pierce & Rebecca Maurer, *Relief for Public Service Workers,* (November 2020) available at https://protectborrowers.org/wp-content/uploads/2021/02/Delivering-on-Debt-Relief-Final.pdf#page=27.

even in instances where borrowers applied for a discharge, the Department simply refused to decide applications or provide relief required by law.[74] Critically, without these cancellation programs, borrowers are stuck because there is no statute of limitations on collections and they historically have had limited options to discharge their debt through bankruptcy.

So, the programs that could theoretically protect borrowers from widespread default following this historic emergency have not – and do not – work.[75] Absent some cancellation, borrowers will be driven back into a broken system in a worse position than when they entered the pandemic.

CONCLUSION

COVID-19 has made cancellation a necessity for student loan borrowers. By tailoring the relief to reduce the prospect of widespread defaults upon a return to repayment, the Department acted well within its HEROES Act authority to ensure that borrowers were not in a worse position in relation to their student loans because of the pandemic. This Court should affirm the district court's judgment in *Nebraska* and reverse the district court's judgment in *Brown*.

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[74] *See generally Sweet v. DeVos,* No. C-19-03674 (N.D. Cal).

[75] The Department has recently taken regulatory steps to remedy these malfunctions, but they have not yet been implemented and will take significant time to yield results.

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