Nos. 22-506 & 22-535

In the Supreme Court of the United States

JOSEPH R. BIDEN,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,
v.
NEBRASKA, ET AL.,
Respondents

DEPARTMENT OF EDUCATION, ET AL.,
Petitioners,
v.
MYRA BROWN, ET AL.,
Respondents

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

BRIEF OF MASSACHUSETTS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA, HAWAIʻI, ILLINOIS, MARYLAND, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, WASHINGTON, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE

In response to an unprecedented global pandemic that has resulted in catastrophic loss of life and economic turmoil, the Secretary of Education has taken action to prevent student loan borrowers from suffering unnecessary financial hardship. Acting pursuant to a statute Congress passed to empower the Secretary to protect borrowers amidst national emergencies, the Secretaries under the administrations of both President Trump and President Biden implemented a complete pause on student loan repayment that has now been in place for nearly three years. In August 2022, in anticipation of ending this payment pause, the Secretary decided to offer limited debt cancellation to a targeted cohort of lower-income borrowers. Facilitating the orderly resumption of loan repayments, this relief is designed to prevent lower-income borrowers from experiencing damaging loan defaults as a result of the COVID-19 pandemic.

As described further below, borrowers who default on their federal student loans face wide-ranging economic consequences. Their credit is damaged, their wages are garnished, their tax refunds are offset, and they lose access to certain federal benefits. As a result, these borrowers have a harder time finding employment and obtaining housing, and they are more likely to require state assistance to pay for basic necessities such as food, clothing, and medicine.

All States—including *Amici* Massachusetts, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawai'i, Illinois, Maryland,

Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin—therefore benefit from policies that prevent such adverse outcomes for our residents. These policies' benefits are particularly salient as we collectively address the economic consequences of the COVID-19 pandemic. Studies of the macroeconomic effects of student debt cancellation show that cancellation lifts GDP and decreases unemployment in a manner that improves state fiscal health.[1] Reductions in student debt facilitate homeownership and small business formation, and contribute to increased consumption growth.[2] And student debt cancellation removes a financial burden that causes borrowers to postpone important life decisions, like getting married or starting a family.[3] These outcomes

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[1] Scott Fullwiler *et al., Macroeconomic Effects of Student Debt Cancellation*, Levy Economics Institute (Feb. 2018), https://tinyurl.com/27c9rrnu.

[2] Brent W. Ambrose *et al.*, *The Impact of Student Loan Debt on Small Business Formation*, Federal Reserve Bank of Philadelphia, 19 (July 2015), https://tinyurl.com/3wtsh2na; Daniel Cooper & J. Christina Wang, *Student Loan Debt and Economic Outcomes*, Current Policy Perspective No. 14-7, Federal Reserve Bank of Boston, 8 (2014), https://tinyurl.com/4xrvh7uz; Berrak Bahadir & Dora Gicheva, *The Effect of Student Debt on Consumption: A State Level Analysis*, Department of Economics, University of North Carolina at Greensboro, 5-6 (Oct. 2019), https://tinyurl.com/5dua6n9s.

[3] Dora Gicheva, *Student Loans or Marriage? A Look at the Highly Educated*, 53 Econ. Educ. Rev. 207, 207-16 (2016); *see also, e.g.*, Abigail Johnson Hess, *CNBC Survey: 81% of Adults with Student Loans Say They've Had to Delay Key Life Milestones*, CNBC (Jan. 28, 2022), https://tinyurl.com/bd9b5afc.

both improve the lives of individual borrowers and contribute to robust state economies.

Consistent with the significant state interests at stake in federal student debt policy, States across the country have long worked with the U.S. Department of Education to support federal student loan borrowers, including by advocating for debt cancellation in appropriate circumstances. As we now continue to address the fallout from the COVID-19 pandemic, *Amici* States seek to ensure that the Secretary's exercise of his statutory authority to prevent pandemic-related defaults is implemented to provide critical relief to borrowers and economic benefits to the States. Although the magnitude of the national emergency necessitating this relief is unprecedented, the relief offered to borrowers falls squarely within the authority Congress gave the Secretary to address such emergencies and is similar in kind to relief granted pursuant to other important federal student loan policies that have concomitantly advanced our state interests. The Secretary's action here is appropriately calibrated to ensure that the borrowers who have been hardest hit during the pandemic will not needlessly default on their student loans and suffer the attendant cascade of economic harms.

SUMMARY OF THE ARGUMENT

Under Title IV of the Higher Education Act of 1965, 20 U.S.C. §§ 1070 *et seq.*, Congress charged the U.S. Department of Education with overseeing the federal student financial aid programs. In so doing, Congress tasked the Department with the important

responsibility of promoting educational access and equity.[4] To achieve these ends, Congress conferred on the Secretary of Education broad authority both to determine borrowers' loan repayment obligations and to modify or discharge these obligations in myriad circumstances.[5]

In 2003, Congress further expanded the Secretary's authority to take action in times of national emergency in the Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108-76, 117 Stat. 904 (2003) (codified at 20 U.S.C. §§ 1098aa-1098ee). The HEROES Act empowered the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" if the Secretary "deems" such actions "necessary" to ensure that borrowers affected by a national emergency "are not placed in a worse position financially" with respect to their student loans. 20 U.S.C. §§ 1098bb(a)(1), (2)(A). Congress authorized the Secretary to take such actions swiftly and decisively, expressly permitting the Secretary to provide relief on a group basis and waiving the Department's typical notice-and-comment requirements to ensure there is "no delay in waivers and modifications." 20 U.S.C. §§ 1098bb(b)(3), (d). And, in the nearly two decades since, the HEROES Act has been invoked in response to multiple national

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[4] *See, e.g.*, Lyndon B. Johnson, Remarks Upon Signing the Higher Education Act of 1965 (Nov. 8, 1965) (discussing goal of preventing any student from being "turned away" from a college or university "because his family is poor"), https://tinyurl.com/3wmv8cct.

[5] *See, e.g.*, 20 U.S.C. §§ 1078-10, 1078-11, 1080, 1087e, 1087j, 1087dd, 1087ee.

emergencies, to waive or modify obligations related to affected borrowers' loan repayments.[6]

Faced with the extraordinary nationwide emergency created by the COVID-19 pandemic, former Secretary Betsy DeVos and current Secretary Miguel Cardona again invoked the HEROES Act to provide relief to affected borrowers. For the first time in the history of the federal student loan program, the Secretaries paused repayment and interest accrual on all federally-held student loans. This payment pause has lasted nearly three years. To address the continuing economic instability caused by the pandemic, and in the interest of responsibly resuming repayment obligations of many borrowers, Secretary Cardona once again invoked his authority under the HEROES Act to provide a limited amount of debt cancellation for lower-income borrowers affected by the pandemic to prevent these borrowers from experiencing pandemic-related economic hardship.

The Secretary's action is an appropriate and targeted exercise of his authority under the HEROES Act. As required by the Act, the policy prevents borrowers affected by a national emergency from being made worse off in relation to their federal student aid. On the basis of considerable empirical evidence, the Secretary determined that, absent additional intervention, lower-income borrowers are likely to face a spike in defaults beyond pre-pandemic levels once repayment commences. Such defaults can

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[6] *See, e.g.*, Federal Student Aid Programs, 77 Fed. Reg. 59,311 (Sept. 27, 2012) (extending and updating HEROES Act waivers and modifications of statutory and regulatory provisions).

have devastating, long-term effects on borrowers—including by contributing to housing and job instability, which, in turn, harm state economies. To prevent these hardships, the Secretary approved targeted debt cancellation for borrowers at the greatest risk of pandemic-related default, using income thresholds and debt relief caps.

This tailored relief is both proper and necessary to address the economic turmoil caused by the COVID-19 pandemic. The HEROES Act expressly permits the Secretary to "waive or modify any statutory or regulatory provision" related to federal student aid, which includes the provisions related to cancellation of student debt. 20 U.S.C. § 1098bb(a)(1). The Secretary thus acted well within his HEROES Act authority to modify these provisions in order to grant limited discharges to borrowers who would otherwise be at risk of grave economic harm due to the pandemic. Moreover, as *Amici* States have learned through our efforts to help student loan borrowers, alternative approaches, such as reducing borrowers' monthly payment amounts, would not prevent these harms as effectively. *Amici* States therefore urge the Court to uphold the Secretary's exercise of his authority under the HEROES Act.

ARGUMENT

I. The Secretary's Targeted Debt Cancellation Is an Appropriate Exercise of His Authority Under the HEROES Act.

The COVID-19 pandemic is an unprecedented national emergency that triggered devastating economic effects, including the sharpest ever recorded

drop in GDP and the highest unemployment rate since the Great Depression.[7] Responding to this catastrophe has required sweeping and multifaceted efforts by federal, state, and local governments to mitigate the economic harms. In the pandemic's early days, Congress passed a $2.2 trillion stimulus bill, the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub L. No. 116-136, 134 Stat. 281 (2020), which included cash payments to families nationwide and billions of dollars in forgivable loans to combat unemployment. Agencies also took action to reduce individuals' financial obligations. For example, the Small Business Administration provided relief in the form of loan deferments and automatically covered payments on loans to small businesses, and the Department of Agriculture granted States administering the Supplemental Nutrition Assistance Program blanket approval not to collect overpayments.[8]

The States sought to mitigate the pandemic's devastating economic effects through our own far-reaching regulatory and legislative actions. Among other measures, 44 States waived a one-week waiting

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[7] Scott Horsley, *3 Months of Hell: U.S. Economy Drops 32.9% in Worst GDP Report Ever*, National Public Radio Chicago (July 30, 2020), https://tinyurl.com/y8vjr22p; Center on Budget and Policy Priorities, *Tracking the COVID-19 Economy's Effects on Food, Housing, and Employment Hardships* at 10 (updated Feb. 11, 2022), https://tinyurl.com/2fa43kvp.

[8] Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, Pub. L. No. 116-260, §§ 301-43, 134 Stat. 1993, 1993-2051 (2020); U.S. Dep't of Ag., *Temporary Suspension of Claims Collection Guidance* (updated Apr. 21, 2021), https://tinyurl.com/4mra3wvn.

period to receive unemployment insurance benefits, and 48 States waived a work-search requirement.[9] In addition, 43 States enacted supplemental eviction moratoriums beyond the restrictions imposed by the federal government to protect renters and homeowners in default on their mortgages.[10]

Consistent with the broad scope of governmental responses to the COVID-19 pandemic, Congress and the Department of Education took the unprecedented step of pausing repayment obligations and accrual of interest for all federally-held student loans. This relief, initially granted by Secretary DeVos, was incorporated by Congress into the CARES Act, which required the Secretary to extend the payment pause from March 27, 2020 through October 1, 2020.[11] In the nearly three years since President Trump declared the COVID-19 pandemic to be a national emergency, Secretary DeVos and then Secretary Cardona invoked

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[9] Julia Raifman *et al.*, *Unemployment Insurance Table*, COVID-19 US State Policies, Boston University (updated May 28, 2021), https://tinyurl.com/52bdwxca.

[10] Abdinasir K. Ali & George L. Wehby, *State Eviction Moratoriums During the COVID-19 Pandemic Were Associated with Improved Mental Health Among People Who Rent*, 41 Health Affairs 1583, 1583 (Nov. 2022).

[11] *See* Federal Student Aid, U.S. Dep't of Educ., *Fiscal Year 2020 Annual Report*, 38 (Nov. 16, 2020), https://tinyurl.com/5n8vhe3b (describing Secretary DeVos's implementation of the payment pause on March 20, 2020); Pub. L. No. 116-136, Div. A, Tit. III, Subtit. B, § 3513, 134 Stat. 404.

their HEROES Act authority to extend the payment pause eight times.[12]

The measure at issue here reflects Secretary Cardona's appropriate exercise of discretion in determining how to end this payment pause while preventing borrowers from experiencing pandemic-related economic harms. In August 2022, Secretary Cardona determined that it was appropriate to end the payment pause and return loans to repayment status. App. 32a. However, based on a wealth of data indicating that the return to repayment amidst the continuing economic instability created by the pandemic would cause a spike in defaults and delinquencies, the Secretary made a reasoned assessment that targeted debt cancellation was necessary to avoid pandemic-related borrower harm. Accordingly, he determined that borrowers with annual incomes during the pandemic of under $125,000 (or under $250,000 for borrowers filing jointly) should receive $10,000 in debt relief, and that borrowers who met the income thresholds and also received a Pell Grant in college would be eligible for up to $20,000 in debt cancellation.[13] As detailed further below, in selecting these income thresholds and caps on relief amounts, the Secretary tailored the policy to provide relief to the borrowers most affected by the pandemic and most likely to default on their loans without additional relief. In so doing, he

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[12] U.S. Dep't of Educ., *COVID-19 Emergency Relief and Federal Student Aid: History of the COVID-19 Emergency Relief Flexibilities*, https://tinyurl.com/4trwfv83 (providing timeline of all COVID-19 relief measures).

[13] Federal Student Aid Programs, 87 Fed. Reg. 61,512 (Oct. 12, 2022).

exercised authority granted to him by the HEROES Act to modify statutory and regulatory provisions related to student financial aid—including those governing the discharge of student loan debt—in order to protect borrowers from the hardships of preventable pandemic-related defaults.

A. The Targeted Debt Cancellation Is Designed to Prevent Harms Caused by Pandemic-Related Defaults.

In invoking the HEROES Act to provide for tailored debt cancellation, the Secretary correctly recognized that the economic upheaval caused by the pandemic continues to take a serious toll on student loan borrowers. Widespread job losses throughout the pandemic strained household budgets, and pandemic-related supply chain disruptions contributed to the worst inflation in nearly half a century, further reducing household buying power.[14] These economic conditions pose the greatest challenge for lower-income families, who may struggle to afford necessities such as food and housing,[15] and who generally have an increased risk of delinquency and

[14] Laurence Ball *et al.*, *Understanding US Inflation During the COVID Era*, Brookings Papers on Economic Activity (Sept. 7, 2022), https://tinyurl.com/4f5vunf6; Jared Bernstein & Ernie Tedeschi, *Pandemic Prices: Assessing Inflation in the Months and Years Ahead*, White House Council of Economic Advisors (Apr. 12, 2021), https://tinyurl.com/ys4jerh4.

[15] Rachel Siegel & Andrew Van Dam, *"Survival Mode": Inflation Falls Hardest on Low-Income Americans*, The Washington Post (Feb. 13, 2022), https://tinyurl.com/36bf532s.

default on loan payments.[16] In waiving certain debt repayment obligations while also phasing out the payment pause, the Secretary appropriately anticipated and sought to prevent a spike in pandemic-related defaults on student loans—defaults that would inflict both immediate and long-range harms on borrowers and our States.

1. The Secretary Reasonably Concluded that Pandemic-Related Defaults Are Likely.

Considerable evidence supports the Secretary's determination that lower-income student loan borrowers would likely "be placed in a worse position financially," experiencing a spike in pandemic-related defaults and delinquencies, if they returned to repayment status without further relief. 20 U.S.C. § 1098bb(a).

A Consumer Financial Protection Bureau study analyzing Consumer Credit Panel data to identify risk factors correlated with federal student loan default illustrates the conditions contributing to the likelihood of defaults.[17] The CFPB researchers

[16] Claire Kramer Mills *et al.*, *The State of Low-Income America: Credit Access & Debt Payment*, Federal Reserve Bank of New York (Mar. 2022), https://tinyurl.com/3ecaxcnf.

[17] Thomas S. Conkling *et al.*, *Student Loan Borrowers Potentially At-Risk When Payment Suspension Ends*, Office of Research, Consumer Financial Protection Bureau (Apr. 2022), https://tinyurl.com/ywfuc6mx; Thomas Conkling & Christa Gibbs, *Office of Research Blog: Update on Student Loan Borrowers During Payment Suspension*, Consumer Financial

identified a trend of "worsening credit outcomes" with a "growing share of student loan borrowers . . . 60 days or more past due on a non-student-loan-credit account."[18] Since 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 other debts."[19] And borrowers who had previously defaulted on their student loans were more likely to be delinquent on their other debt in September 2022 than they were at the start of the pandemic.[20] Notably, this upward trend in delinquencies is occurring while the payment pause remains in place. The CFPB's analysis thus strongly supports the conclusion that, without additional intervention, student loan delinquencies will also increase once repayment commences.

Researchers from the New York Federal Reserve reached a similar conclusion based on payment histories of borrowers with loans that were not eligible for the payment pause.[21] These borrowers struggled to make payments during the pandemic, with many relying on optional forbearance to avoid delinquency and default.[22] When these forbearances ended, borrower delinquency rates increased, not only on

Protection Bureau (Nov. 2, 2022), https://tinyurl.com/yuxbbbdz (updating study with newly available data).

[18] Conkling & Gibbs, *supra* note 17.

[19] *Id.* (emphasis added).

[20] *Id.*

[21] Jacob Goss *et al.*, *Student Loan Repayment During the Pandemic Forbearance*, Federal Reserve Bank of New York (Mar. 22, 2022), https://tinyurl.com/bdd8may6.

[22] *Id.*

borrowers' student loan debt but also on other debts. These borrowers experienced "33 percent higher delinquency on their non-student, non-mortgage debt after exiting forbearance" than did federal student loan borrowers benefiting from the payment pause.[23] The study supports the conclusion that borrowers with federally-held student loans who are presently benefiting from the payment pause "are likely to experience a meaningful rise in delinquencies, both for student loans and for other debt, once forbearance ends."[24]

The Department's own default and delinquency data following previous periods of emergency forbearance also prefigure a spike in defaults once repayment restarts. The Department's repayment data show that, after emergency forbearance in the wake of natural disasters like hurricanes and wildfires, borrowers experienced a notable uptick in delinquencies and defaults.[25] While only 0.3 percent of affected borrowers had entered default in the year *prior* to a mandatory forbearance period, 6.5 percent

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[23] *Id.*

[24] *Id.*; *see also* U.S. Gov't Accountability Office, *COVID-19: Significant Improvements Are Needed for Overseeing Relief Funds and Leading Responses to Public Health Emergencies,* Rep. to Cong. Comms. No. 105291, at 102 (2022), https://tinyurl.com/yc4f2whj (estimating that about 50% of borrowers are at risk of delinquency when the payment pause ends).

[25] Press Release, U.S. Dep't of Educ., *Federal Student Aid Posts New Reports to FSA Data Center Q2* (Aug. 07, 2019), https://tinyurl.com/2bdjufre; Press Release, U.S. Dep't of Educ., *Federal Student Aid Posts New Reports to FSA Data Center Q3* (Oct. 3, 2019), https://tinyurl.com/44hpk683.

of affected borrowers defaulted on their federal student loans in the year *after* these forbearance periods ended. App. 37a. The spike in defaults was even more pronounced for Pell Grant recipients, seven percent of whom entered default in the year following resumption of repayment obligations, as compared with five percent of other borrowers. *Id.*

Notably, these prior periods of mandatory administrative forbearance due to localized natural disasters both were shorter and affected many fewer borrowers than the present payment pause amidst the nationwide pandemic. The previous forbearances were a maximum of twelve months long, as compared with the nearly three years of the current payment pause.[26] And the prior mandatory forbearance periods affected fewer than a million borrowers cumulatively, while the present payment pause has halted monthly payments for tens of millions of borrowers with federally-held loans.[27] If similar trends hold and defaults spike more than twentyfold when repayment restarts, the number of borrowers facing pandemic-related default will be orders of magnitude greater than following past periods of mandatory administrative forbearance.

The State respondents' rejoinder to this body of evidence of forthcoming defaults—that this increased default risk cannot justify debt cancellation because

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[26] U.S. Dep't of Educ., *Frequently Asked Questions for Borrowers Affected by Natural Disasters*, https://tinyurl.com/j897csac.

[27] *See* U.S. Dep't of Educ., *Portfolio by Loan Status—Direct Loan Portfolio by Forbearance Type*, https://tinyurl.com/4r6hezbx.

the Secretary "caused the problem" with the payment pause, State Resp. to Emerg. App. 24—defies both Congress's command and common sense. First, respondents fail to acknowledge that, even aside from Secretary DeVos's and Secretary Cardona's respective invocations of the HEROES Act to pause repayment, Congress *required* the Department to implement the payment pause for a period of at least six months, from March 27, 2020 to October 1, 2020.[28] Second, and more fundamentally, Congress's decision to mandate this relief, and the subsequent decisions of Secretaries DeVos and Cardona to extend it, were necessitated by the devastating impact of the COVID-19 pandemic itself—the plain cause of the need for relief here. All such forbearance periods necessarily must be ended at some point, and the Secretary's actions here simply represent a reasonable way to do so while attempting to limit pandemic-inflicted harms to affected borrowers.

2. Pandemic-Related Defaults Would Inflict Direct Economic Hardship on Borrowers and the States.

The reasonableness of the Secretary's actions is all the more evident in light of defaults' catastrophic, long-term effects on student loan borrowers' personal and economic well-being. Without debt cancellation, many borrowers facing pandemic-related defaults would needlessly suffer grave harms.

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[28] CARES Act, Pub. L. No. 116-136, Div. A, Tit. III, Subtit. B, § 3513, 134 Stat. 404.

Defaulting on federal student loans causes borrowers' credit scores to crater and remain depressed for years, with long-lasting consequences that tend to compound.[29] Defaulted borrowers are more likely to face housing and employment insecurity due to their low credit scores and may also be unable to obtain a car loan, set up utilities, purchase insurance, or secure an affordable line of credit for emergency expenditures.[30]

Defaulting on student loans may also block borrowers' access to critical anti-poverty programs. Borrowers in default face the seizure of payments they would have otherwise received under programs such as the Earned Income Tax Credit and the Child Tax Credit.[31] These programs are designed to lift families, and children in particular, out of poverty; in 2018 alone, the two programs together helped raise 5.5 million children above the poverty line.[32] But these benefits—received as a tax refund—are unavailable to defaulted borrowers facing offsets by the Department

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[29] Pew Charitable Trusts, *Student Loan Default Has Serious Financial Consequences* (Apr. 2020), https://tinyurl.com/5n6fbhdm.

[30] Diana Elliott & Ricki Granetz Lowitz, *What Is the Cost of Poor Credit?*, Urban Institute (2018), https://tinyurl.com/yujt5k96; Michelle Conlin, *Student Loan Borrowers, Herded into Defaults, Face a Relentless Collector: the US*, Reuters (July 25, 2017), https://tinyurl.com/bddjmvnp.

[31] U.S. Dep't of Treas., *What is the Treasury Offset Program?*, Bureau of the Fiscal Service, https://tinyurl.com/5cc7xzbd.

[32] Chuck Marr *et al.*, *American Rescue Plan Included Critical Expansions of Child Tax Credit and EITC*, Center on Budget and Policy Priorities (Mar. 12, 2021), https://tinyurl.com/ycy67x5r.

of the Treasury.[33] Older borrowers in default similarly face withholding of a portion of their Social Security retirement benefits.[34] The cumulative impact of losing access to these benefits leaves defaulted borrowers less able to afford necessities, more likely to face housing insecurity and job loss, and less able to care for dependent family members.[35]

When defaulted borrowers face these dire economic circumstances, our state economies suffer follow-on harms. We expend more resources trying to address these residents' immediate needs and also lose the economic benefits that come with our residents' economic security.[36] For instance, without the challenges that may arise from default, residents are more likely to purchase homes or engage in discretionary spending—activities that benefit state

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[33] *See* 26 U.S.C. § 6402(d) (collection of debts owed to federal agencies through tax refund offsets); 31 U.S.C. § 3720A (reduction of tax refunds by the amount of debt owed); 31 C.F.R. 285.2 (implementing such offsets); *see also* National Consumer Law Center *et al.*, *Group Letter to Secretary Yellen Regarding CTC and EITC Protection from Offset* (Feb. 17, 2022), https://tinyurl.com/2dk9dw86.

[34] 31 U.S.C. § 3716 (administrative offsets of federal benefits payment to collect debts owed to federal government); *see also* AARP, *Student Loan Debt Can Sink Your Retirement Plan* (Sept. 18, 2018), https://tinyurl.com/mppu8b35.

[35] Joshua Rovenger, *Illogical Collections: How the Department of Education's Involuntary Collection Efforts Undermine the Higher Education Act*, Student Borrower Protection Center 80 (Aug. 2022), https://tinyurl.com/3m3zm2sn.

[36] Ambrose *et al.*, *supra* note 2 at 19; Cooper & Wang, *supra* note 2 at 8; Bahadir & Gicheva, *supra* note 2 at 5-6.

economies.[37] The Secretary's plan to limit the spike in pandemic-related defaults upon lifting of the payment pause—and thereby forestall profound financial insecurity due to preventable defaults for our lower-income residents—thus benefits the States as well.

B. The Secretary Targeted Debt Cancellation to Help Those Borrowers Most Harmed by the Pandemic.

The Secretary tailored this grant of debt cancellation to provide limited relief to the borrowers at greatest risk of pandemic-related defaults. Both the income eligibility thresholds and the dollar caps on relief selected by the Secretary are the products of reasoned analysis identifying which borrowers affected by the pandemic are most likely to miss loan payments once the payment pause is ended. This cohort of borrowers thus falls well within the definition of "affected individuals" for purposes of HEROES Act relief eligibility.

The HEROES Act authorizes the Secretary to take action in order to prevent disaster-related harms to all borrowers who are "affected individuals." 20 U.S.C. § 1098bb(a)(2). The Act defines multiple categories of "affected individuals," including any borrower who "resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency," or those who

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[37] *See supra* note 35 at 80; *see also* Bruce McClary, *How Your Defaulted Student Loans Affect Homebuying*, U.S. News (Mar. 6, 2019), https://tinyurl.com/2f3ru54e.

"suffered direct economic hardship" due to such an emergency. 20 U.S.C. §§ 1098ee(2)(C), (D).

In light of the scope of the President's "national emergency" declaration in March 2020, the Secretary appropriately determined that all borrowers with federally-held student loans qualify as "affected individuals" under section 1098ee(2)(C).[38] "All 50 states, the District of Columbia, and 5 territories" were approved for "major disaster declarations" by the Federal Emergency Management Agency following the President's declaration.[39] The national scope of the emergency was reconfirmed as recently as October 13, 2022, when the Department of Health and Human Services renewed its COVID-19 public health emergency declaration "nationwide."[40] The breadth of the declared national emergency guided Secretary DeVos and Secretary Cardona in their previous invocations of the HEROES Act, which paused repayment and waived interest accrual for *all* federally-held student loan borrowers. *See supra* at 8-9 & notes 11, 12.

Nonetheless, the Secretary designed the debt cancellation to provide relief to the borrowers who are at greatest risk of pandemic-related loan delinquency

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[38] Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2022).

[39] *See* Federal Emergency Management Agency, *COVID-19 Disaster Declarations* (last updated Aug. 20, 2021), https://tinyurl.com/4f65vvsz.

[40] Department of Health & Human Services, *Renewal of Determination That a Public Health Emergency Exists*, Administration for Strategic Preparedness Response (Oct. 13, 2022), https://tinyurl.com/46txzswd.

and default following the return to repayment. The Secretary selected the $125,000 individual income threshold for cancellation eligibility based on data indicating that borrowers under that threshold are considerably more likely to default once repayment resumes. App. 42a. For example, data provided to the Department by the Federal Reserve Bank of Philadelphia indicate that borrowers with incomes between $100,000 and $124,000 are nearly twice as likely to miss loan payments—or entirely fail to make loan payments—as individuals with incomes between $125,000 and $149,000. *Id.*

Additional data identify $125,000 as a meaningful income level below which individuals are most likely to default on their loans upon the restart of repayment. Federal Reserve data considered by the Department indicate that "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." *Id.* Amidst the on-going pandemic, about twice as many borrowers earning between $40,000 and $75,000 reported expected difficulties making student loan payments in the future than experienced payment difficulties in 2019, and about one third more borrowers with incomes between $75,000 and $125,000 expect difficulties with loan repayment than experienced payment difficulties in 2019.[41]

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[41] Tom Akana & Dubravka Ritter, *Expectations of Student Loan Repayment, Forbearance, and Cancellation: Insights from Recent Survey Data*, Federal Reserve Bank of Philadelphia, Table 1 (May 2022), https://tinyurl.com/yrvmb9x6.

The Secretary further narrowed the scope of the debt cancellation by selecting a moderate discharge amount per borrower designed to mitigate the risks of default for those most likely to struggle with repayment. Although the average student loan debt is approximately $30,000 per borrower,[42] low-balance borrowers are more likely to have both lower incomes and higher default rates.[43] The Secretary's $10,000 loan forgiveness cap thus directs relief to those borrowers most likely to be placed in a "worse position financially" because of the pandemic. 20 U.S.C. § 1098bb(a)(2)(A).

Increasing the debt cancellation cap to $20,000 for Pell recipients is also appropriate in light of such individuals' increased default risk. Pell recipients are considerably more likely to have lower incomes than non-Pell recipients; only one percent of Pell recipients have incomes of $125,000 or above. App. 46a. Eligibility for Pell grants is need-based and accounts for family wealth, meaning that Pell recipients are less likely to have family resources to help them get through the financial turmoil of the pandemic. Indeed, even controlling for income, Pell recipients are

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[42] Alicia Hahn, *2022 Student Loan Debt Statistics: Average Student Loan Debt*, Forbes (Sept. 19, 2022), https://tinyurl.com/5e4sr5zj.

[43] App. 40a; White House Council of Economic Advisers, *Investing in Higher Education. Benefits, Challenges and the State of Student Debt*, Figure 27 (July 2016), https://tinyurl.com/33hnfjn9 (demonstrating decreasing rate of default for borrowers with debt loads above $10,000).

approximately twice as likely to default on their loans as borrowers who did not receive Pell grants.[44]

In sum, the Secretary crafted his grant of debt cancellation under the HEROES Act to ensure that the borrowers at greatest risk of pandemic-related defaults receive critical relief, either by eliminating their loan obligations or reducing them to a more manageable level. The scope of the Secretary's action is thus appropriately designed to achieve the Act's express goal: preventing affected borrowers from being placed in a worse position because of a national emergency. *See* 20 U.S.C. § 1098bb(a).

C. The Secretary Has the Authority to Cancel Debt Under the HEROES Act.

The Department of Education has long exercised its authority to cancel student loan debt in appropriate circumstances to address economic and educational challenges for borrowers, including in contexts such as borrower bankruptcy, disability, or death and school closures or fraud.[45] To date, the Department has discharged more than $50 billion in student loan debt for more than 1.5 million borrowers under its various sources of statutory and regulatory debt cancellation

[44] App. 47a; *see also* Adam Looney & 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 55 (2015), https://tinyurl.com/3syn7yrt (demonstrating that lower family incomes at time of college attendance are associated with higher default rates post-graduation).

[45] *See, e.g.*, 20 U.S.C. § 1087; 34 C.F.R. 682.402, 685.212.

and discharge authority.[46] Far from an "unprecedented" action, as disparaged by the State respondents, State Resp. to Emerg. App. 29, the Secretary's decision here is of a piece with these prior actions. Consistent with the HEROES Act, the scope of the debt cancellation reflects the scope of the emergency facing our nation and the "waivers or modifications" the Secretary has "deem[ed] necessary" to prevent pandemic-related economic harm. 20 U.S.C. § 1098bb(a).

Amici States have considerable experience with the Department's authority to cancel student loan debt, having previously sought such relief on behalf of our residents. Recognizing both the importance of higher education and the burden of student loan debt, *Amici* States have engaged in our own efforts to assist student loan borrowers. Where appropriate, we have submitted requests for debt cancellation for cohorts of student borrowers and partnered with the

[46] *See, e.g.*, U.S. Gov't Accountability Office, *College Closures: Many Impacted Borrowers Struggled Financially Despite Being Eligible for Loan Discharges* (2021), https://tinyurl.com/2mx2j43d (discussing closed school discharges granted from 2010 through 2020); U.S. Dep't of Educ., *Public Service Loan Forgiveness (PSLF) Program Data* (Nov. 30, 2020), https://tinyurl.com/mttcbp47; Total and Permanent Disability Discharge of Loans Under Title IV of the Higher Education Act, 86 Fed. Reg. 46,972 (Aug. 23, 2021) (finalizing regulations called for by President Trump to grant discharges to tens of thousands of disabled veterans); Press Release, U.S. Dep't of Educ., *Biden-Harris Administration Continues Fight for Student Debt Relief for Millions of Borrowers, Extends Student Loan Repayment Pause* (Nov. 22, 2022), https://tinyurl.com/33yd4j4v (summarizing recent discharges).

Department to achieve and effectuate this relief.[47] These efforts have resulted in billions of dollars in loan discharges, typically effectuated on a class-wide basis.

For example, the Attorneys General of at least 19 States submitted requests for debt cancellation on behalf of residents who had attended Corinthian Colleges, Inc., or provided information to the Department to facilitate such relief.[48] The Department ultimately granted more than $5.8 billion in debt cancellation to more than half a million borrowers who had attended Corinthian to address widespread harms caused by Corinthian's fraudulent conduct.[49] Similarly, the Attorneys General of 24 States submitted an application to the Department seeking full loan discharges for cohorts of borrowers who attended ITT Technical Institute, a school that

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[47] *See, e.g.*, U.S. Dep't of Educ., *Durbin Question 6.4: Submissions by Attorneys General Seeking Relief for Constituents* (updated Aug. 6, 2019), https://tinyurl.com/3ehjxszm (Department of Education response to Senator Durbin question conveying partial list of group discharge applications submitted to the Department by state Attorneys General); *Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations for Fiscal Year 2020*, Hearing Before the Appropriations Subcommittee on Labor, Health, Human Services, Education, and Other Related Agencies of the Senate Committee on Appropriations, 116th Cong. (2019) (written testimony of Secretary DeVos), https://tinyurl.com/yc3zz97y (further describing table answering "Durbin Question 6.4 (Updated 8.6.2019)").

[48] *See* U.S. Dep't of Educ., *supra* note 47.

[49] Press Release, U.S. Dep't of Educ., *Education Department Approves $5.8 Billion Group Discharge to Cancel all Remaining Loans for 560,000 Borrowers Who Attended Corinthian* (June 1, 2022), https://tinyurl.com/3un3cx8v.

engaged in pervasive misconduct.[50] The Department granted over 200,000 borrowers a total of $3.9 billion in full discharges.[51]

In line with such past actions to address borrower harms in certain circumstances, the Secretary appropriately invoked the HEROES Act to modify the statutory and regulatory provisions that authorize debt cancellation in order to address pandemic-related harms to borrowers. Indeed, the HEROES Act expressly grants the Secretary the authority to "waive or modify *any* statutory or regulatory provision applicable to the student financial assistance programs" to advance the Act's delineated purposes. 20 U.S.C. § 1098bb(a)(1) (emphasis added). There is thus no merit to respondents' contention, Brown Stay Resp. 22, that the existence of other statutory discharge authorities somehow suggests that the Secretary's authority to discharge debt under the HEROES Act is limited.

The extent of this waiver and modification authority is further evidenced by Congress's instruction in the Act that the Secretary may exercise

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[50] *Application for Borrower Defense to Repayment Discharge on Behalf of ITT Borrowers* (Apr. 1, 2021), https://tinyurl.com/52hvxmcs (submitted Colorado, Oregon, Connecticut, the District of Columbia, Hawai'i, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Tennessee, Vermont, Virginia, Washington, and Wisconsin).

[51] Press Release, Dep't of Educ., *Education Department Approves $3.9 Billion Group Discharge for 208,000 Borrowers Who Attended ITT Technical Institute* (Aug. 16, 2022), https://tinyurl.com/2sehhuyx.

his modification and waiver authority "notwithstanding any other provision of law, unless enacted with specific reference to this section[.]" 20 U.S.C. § 1098bb(a)(1). Under this clause, *only* those legal provisions explicitly referencing section 1098bb may limit the Secretary's modification and waiver authority under the HEROES Act.[52] The relevant statutory and regulatory provisions related to student loan repayment and cancellation contain no such express limiting language. *See, e.g.*, 20 U.S.C. §§ 1087, 1087dd(g); 34 C.F.R. part 674, subpart D; 34 C.F.R. 682.402, 685.212. Indeed, nowhere in the Higher Education Act or its implementing regulations is there any provision expressly limiting the Secretary's waiver and modification authority under the HEROES Act.

Instead, the HEROES Act itself provides the relevant constraints on the Secretary's waiver and modification authority, limiting the use of such authority to achieve one of the Act's enumerated purposes. Chief among these purposes is to "ensure" that "affected individuals" as defined under the Act are not placed in a "worse position financially in relation to [their] financial assistance" because of a national emergency. 20 U.S.C. § 1098bb(a)(2)(A). As described above, Part I.A & B, *supra*, the Secretary's

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[52] *See, e.g.*, *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 939 (2017) (explaining that the word "notwithstanding" in statutes "shows which provision prevails in the event of a clash") (internal quotation marks omitted); *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993) (explaining that courts have generally "interpreted similar 'notwithstanding' language to supersede all other laws, stating that a clearer statement is difficult to imagine") (internal punctuation omitted).

actions here adhere to these requirements and were properly designed to prevent borrowers affected by the pandemic from being placed in a worse financial position with respect to their federal student loans.

Notably, Congress's own actions demonstrate that Congress anticipated federal student loan debt cancellation in the wake of the COVID-19 pandemic—and preemptively acted to give such relief greater force. Recognizing the possibility of future student loan discharges, Congress included a provision in the American Rescue Plan Act of 2021 guaranteeing that any student loan discharges effectuated by the Secretary between 2021 and 2025 will be tax-free.[53] Not only does this provision reflect congressional approval of pandemic-related student debt cancellation, but it goes even further in providing additional financial relief to recipients by waiving typical federal taxes.

In sum, the Secretary appropriately invoked his HEROES Act authority to modify the statutory and regulatory provisions governing the discharge of student loan debt in order to prevent vulnerable borrowers from suffering the hardships of preventable pandemic-related defaults.

II. The States Know from Assisting Borrowers That Alternatives to Debt Cancellation Are Insufficient to Meet These Circumstances.

The *Amici* States' experiences assisting borrowers support the Secretary's conclusion that targeted debt

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[53] *See* Pub. L. No. 117-2, § 9675, 135 Stat. 4, 185-86 (2021).

cancellation is "necessary" to prevent the financial hardship resulting from the economic fallout of the pandemic. 20 U.S.C. § 1098bb(a)(1). The State respondents, who contend that the Secretary failed to consider and should instead have adopted monthly payment reduction as an alternative policy, *see* State Resp. to Emerg. App. 32-33, err in suggesting otherwise. In fact, in a memorandum recommending debt cancellation to the Secretary, the Department explicitly concluded that existing payment reduction plans would not prevent pandemic-related defaults as effectively as debt cancellation.[54] *Amici* States' experiences working with struggling borrowers confirm this conclusion.

As an initial matter, the HEROES Act grants the Secretary considerable discretion to determine which policies are necessary to achieve the Act's enumerated goals. The Secretary may "waive or modify statutory or regulatory provision[s]" when the secretary "deems" these actions "necessary to ensure" that the objectives of the Act are met. 20 U.S.C. §§ 1098bb(a)(1)-(2). In the statutory context presented here, such use of the word "deem," "fairly exudes deference" to the agency or official. *Webster v. Doe*, 486 U.S. 592, 601 (1988). Moreover, an agency action is not unlawful merely because alternative actions exist. In reviewing regulatory decisions, courts do not "ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC v.*

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[54] *See* App. 39a-40a (concluding that debt cancellation would reduce delinquency and default risks more than monthly payment reductions under Income-Driven Repayment plans, which allow for reduced monthly payments based on a borrower's income).

Electric Power Supply Ass'n, 577 U.S. 260, 292 (2016). Accordingly, respondent States' preference for alternative approaches is immaterial to whether the Secretary had authority under the HEROES Act to authorize tailored debt cancellation.

In any case, historical evidence and *Amici* States' own experience assisting student loan borrowers have revealed the limitations of payment reduction for addressing the pandemic-related harms borrowers face. In proposing payment reduction as an alternative approach, respondents overlook the fact that payment reduction plans have failed to adequately prevent default and delinquency for borrowers with the greatest need. The Department already offers lower-income borrowers the option of reducing their payments by tying their monthly payment obligations to their discretionary income. *See* 20 U.S.C. § 1087e(e). These repayment plans—known as Income-Driven Repayment ("IDR") plans—allow borrowers with the greatest financial hardships to pay as little as zero dollars per month. While these plans are an important source of relief and have helped many people, borrowers have historically struggled to enroll in IDR plans, which are notoriously complicated to administer and require careful management by third-party student loan servicers.[55]

States across the country have spent considerable time investigating and seeking to remedy the mismanagement of IDR plans by student loan

[55] Press Release, U.S. Dep't of Educ., *Department of Education Announces Actions to Fix Longstanding Failures in the Student Loan Programs* (Apr. 19, 2022), https://tinyurl.com/3fuvhr4c.

servicers. Among other efforts, States have brought enforcement actions against two of the Department's largest student loan servicers, alleging that these servicers mishandled the IDR program to the detriment of borrowers.[56] And 39 States participated in a coordinated investigation of Navient, a major student loan servicer, resulting in a $1.85 billion settlement to resolve allegations including those related to Navient's mismanagement of the IDR program.[57]

Recognizing the importance of IDR plans for struggling borrowers and the complexities of their administration, *Amici* States have also advocated for reforming IDR. In 2021, representatives of state Attorneys General served on the negotiating committee for a negotiated rulemaking initiated by the Department to consider meaningful changes to the IDR program.[58] The Department has since undertaken to draft new proposed regulations intended to improve IDR, published on January 11,

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[56] *See, e.g.*, *Commonwealth of Massachusetts v. Pa. Higher Educ. Assistance Agency*, No. 1784-cv-02682-BLS2 (Mass. Super. Ct. filed Aug. 23, 2017); *Commonwealth of Pennsylvania v. Navient Corp.*, No. 17-1814 (M.D. Pa. filed Oct. 5, 2017); *People of the State of California v. Navient Corp.*, No. CGC-18-567732, 2018 WL 3199474 (Cal. Super. Ct. filed June 29, 2018); *People of the State of New York v. Pa. Higher Educ. Assistance Agency*, No. 1:19-cv-09155, 2019 WL 5095707 (S.D.N.Y. filed Oct. 3, 2019).

[57] Navient Multi-State Settlement, *39 State Attorneys General Announce $1.85 Billion Settlement with Student Loan Servicer Navient* (updated June 22, 2022), https://tinyurl.com/msm7u2kp.

[58] U.S. Dep't of Educ., *2021 Negotiated Rulemaking Affordability and Student Loan Committee US Department of Education* (revised Dec. 2021), https://tinyurl.com/yc73k3ja.

2023.[59] While the States expect that the recently announced changes will result in improvements to the IDR program, such programmatic changes will likely take many months to implement fully by the government and by its third-party servicers—a timescale likely incompatible with the impending lifting of the payment pause.

Even for borrowers who do successfully enroll in existing payment reduction plans, the ability of these plans to prevent pandemic-related defaults is inferior to debt cancellation. A CFPB analysis of pre-pandemic Consumer Credit Panel data found that, for borrowers included in the analysis who *actually enrolled* in IDR, delinquency and default were a problem even without the additional economic harms subsequently posed by the pandemic.[60] The study revealed that "a large share of borrowers continues to struggle while on an IDR plan, and many move in and out of forbearance."[61] And a survey conducted by the Federal Reserve Bank of Philadelphia in 2022 found that lower-income borrowers were far less likely to anticipate being able to make monthly loan payments despite likely eligibility for reduced payments.[62]

To be sure, offering affordable payment options remains a critical form of relief for borrowers. While

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[59] Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program, 88 Fed. Reg. 1,894 (Jan. 11, 2023).

[60] Thomas Conkling & Christa Gibbs, *Data Point: Borrower Experiences on Income-Driven Repayment*, Consumer Financial Protection Bureau (Nov. 2019), https://tinyurl.com/2xkspvta.

[61] *Id.* at 5.

[62] Akana & Ritter, *supra* note 41.

the Department should continue to offer and improve its payment reduction programs, the Secretary correctly concluded on the basis of the available empirical evidence that such plans are not sufficient, by themselves, to address the significant economic harms posed by the COVID-19 pandemic for certain borrowers. In particular, the Secretary reasonably found that further, targeted relief was necessary to address the impending spike in pandemic-related defaults following the end of the payment pause that the prior administration had put into place under the HEROES Act in 2020, that Congress had directed be extended, and that both presidential administrations had repeatedly renewed. In seeking to bring this payment pause to an orderly conclusion, the Secretary again appropriately exercised his discretion under the HEROES Act to grant a capped debt cancellation measure tailored to prevent the borrowers most likely to suffer pandemic-related defaults from experiencing such harms.

CONCLUSION

For the foregoing reasons, if the Court reaches the merits, the Court should uphold the Secretary's exercise of his discretion under the HEROES Act, grant the federal government immediate relief from the injunctions issued below, and remand with instructions to dismiss the plaintiffs' complaints.

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