UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

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STUDENTS FOR SENSIBLE DRUG POLICY FOUNDATION, KRAIG SELKEN, NATHAN BUSH & ALEXIS SCHWAB,	*	CIV. 06-1010
Plaintiffs,	*	**PLAINTIFFS' NOTICE OF MOTION, MOTION, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**
vs.	*	
MARGARET SPELLINGS, Secretary of the United States Department of Education,	*	
Defendant.	*	

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MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs hereby move the Court for an order preliminarily enjoining enforcement of the Higher Education Act Aid Elimination Penalty, 20 U.S.C. § 1091(r). This motion is based upon the following Memorandum of Points and Authorities in Support of Plaintiffs' Motion for a Preliminary Injunction, all other documents on file in this action, and any such written and oral argument as may hereinafter be made by the parties.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs are dedicated post-secondary students. Like most of their peers, plaintiffs rely on federal student aid to pay their tuition and textbook expenses. What sets plaintiffs apart from their peers, however, is that the U.S. Department of Education ("DOE") will withhold their student aid next academic year because they have been convicted of possessing a small amount of marijuana. By suspending plaintiffs' student aid based on a drug offense—while nonetheless disbursing financial aid to students convicted of any and all other crimes—the DOE has put plaintiffs' educational and career aspirations in jeopardy.[1]

Plaintiffs have fully satisfied their debts to society following their convictions, having paid fines, performed community service, and, in some instances, completed rehabilitation programs. However, following the mandate of the Higher Education Act Aid Elimination Penalty,[2] 20 U.S.C. § 1091(r), the DOE will impose a second punishment for the same offense by suspending plaintiffs' student aid. The imposition of this second punishment violates plaintiffs' rights under the Double Jeopardy Clause of the United States Constitution.[3]

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[1] Plaintiffs represent the class of students and prospective students who are, or will be, ineligible for federal student aid due to a drug conviction and who otherwise would be eligible to receive federal aid. Complaint [Dkt. No. 1], at ¶ 14. Plaintiffs separately, but simultaneously, move for class certification.

[2] In their complaint, plaintiffs refer to this statute as the Higher Education Act Aid Elimination *Provision*. However, because Congress has referred to the provision as a "penalty," *see, e.g.*, Appendix A, p. 235, lines 23-25**;** 136 Cong. Rec. 2616 (1990), plaintiffs will likewise refer to it as the Aid Elimination *Penalty*.

[3] Plaintiffs' Double Jeopardy claim is decidedly *not* about whether the possession or distribution of controlled substances should be punished. Rather, this claim challenges the constitutionality of a statute that imposes punishment *after* a student has been convicted and sentenced, *after* the sentencing judge has already decided not to suspend student-aid eligibility as part of the sentence, and *after* the student has already finished paying his or her debt to society.

The Aid Elimination Penalty uniquely imposes "punishment" for purposes of Double Jeopardy analysis. Frustrated that the judiciary had uniformly refused to rescind student-aid eligibility under the extant discretionary criminal sentencing procedure for drug convictions, Congress enacted the Aid Elimination Penalty in order to shift the imposition of this punishment from the judiciary to the DOE. While debating the Aid Elimination Penalty on the legislative floor, members of Congress repeatedly remarked that the statute would impose serious consequences and demand accountability for criminal offenses.

Congress might have been able to suspend student-aid eligibility based on a drug offense for non-punitive reasons. *Cf. Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 170 n.30 (1963) (holding that a statute revoking one's citizenship for evading military service was an unconstitutional second punishment, even though Congress has permissibly expatriated Americans in other, non-punitive contexts); *Trop v. Dulles*, 356 U.S. 86, 98-99 (1958) (plurality) ("[T]he fact that deportation and denaturalization for fraudulent procurement of citizenship may be imposed for purposes other than punishment affords no basis for saying that in this case denationalization is not a punishment."). However, Congress enacted the Aid Elimination Penalty as punishment—a second punishment for the same offense in violation of the Double Jeopardy Clause. Accordingly, plaintiffs have a high probability of success on the merits of their Double Jeopardy claim.[4]

Pursuant to the Aid Elimination Penalty, the DOE is currently denying students and would-be students the aid that they need to enroll in classes next fall. By being denied the opportunity to attend school—or even just postponing their post-secondary education—

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[4] Plaintiffs state two causes of action in their complaint: violations of the Fifth Amendment's Equal Protection Component of the Due Process Clause (Claim I) and Double Jeopardy Clause (Claim II). Complaint [Dkt. No. 1], at ¶¶ 28-35. They base this motion for a preliminary injunction solely on their Double Jeopardy claim.

plaintiffs suffer an irreparable injury with life-long consequences. Because plaintiffs are likely to succeed on the merits of their Double-Jeopardy claim and because the equities tip decidedly in their favor, plaintiffs respectfully move the Court to issue a preliminary injunction that enjoins the DOE from enforcing the Aid Elimination Penalty.

II. FACTUAL BACKGROUND

Attempting to fill the gap between the substantial—and ever-increasing—cost of post-secondary education and the financial means of students and their families, Congress enacted a sweeping bill to allow Americans to realize their educational and professional dreams: The Higher Education Act of 1965 ("HEA"), 20 U.S.C. § 1070 et seq. Title IV of the HEA has provided federal financial assistance to students who could not personally finance their education at universities and colleges, as well as at business, trade, and technical schools. 20 U.S.C. §§ 1002, 1070(a), 1091(a)(1), 1094(d). Upon signing the HEA, President Johnson proclaimed that the statute would "open a new door for the young people of America" and would "mean[] the path of knowledge is open to all that have the determination to walk it." App. B, p.1. As President Johnson predicted, the HEA has allowed generations of Americans to obtain their college degrees and to become productive, tax-paying members of society.[5]

[5] The average annual cost of tuition, books, and expenses at a private four-year post-secondary institution is $29,026 ($11,376 at a four-year public institution). App. M. Accordingly, a significant majority of would-be students cannot afford to pay for college without some form of financial assistance from the government.

The loans and grants awarded via Federal student aid, as well as the amount of aid provided, have varied over the years.[6] Until recently, however, there was one constant: a criminal conviction would not suspend a student's eligibility for Federal student aid.

This changed in 1988, when Congress passed the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 862. A provision in the Act granted state and Federal judges discretionary authority to suspend federal student aid, as well as other Federal benefits, to individuals convicted of a drug offense. 21 U.S.C. §§ 862(a),(b). The Act prescribed periods of aid ineligibility, but provided that people could regain their eligibility before the end of that time period if they (1) completed a drug rehabilitation program, (2) proved that they otherwise have been rehabilitated, (3) demonstrated that a rehabilitation program is unavailable or inaccessible, or (4) established that they could not afford the cost of such a program. 21 U.S.C. § 862(c). A suspension of Federal student aid under the Act was part of one's criminal sentence and was imposed, if at all, at the time of sentencing. 21 U.S.C. §§ 862(a),(b).

Within one year of enacting the sentencing provision, Congress realized that courts were reluctant to suspend student aid of individuals convicted of a drug offense. 136 Cong. Rec. 18,523 (1990).[7] In fact, between 1988, when the Anti-Drug Abuse Act was enacted, and 1990, when Congress started debating the Aid Elimination Penalty, not a single court in the country had suspended a student's eligibility for federal student aid as part of a sentence for a drug offense. *Id.* Rather than erecting educational roadblocks, courts were encouraging students to remain in school. This trend continued over the next 15 years, with

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[6] Currently, the Federal government disburses student aid in the form of Pell Grants, Perkins Loans, Stafford Loans, Supplemental Educational Opportunity Grants, and work-study opportunities. App. C., p. 51 n.3.

[7] For the convenience of the Court, plaintiffs have attached as Appendix D the pages from the Congressional Record that they cite in this brief.

courts suspending eligibility for student aid in less than two out of every one thousand (0.2%) cases between 1990 and 2004. App. C, p. 16.

Frustrated that judges overwhelmingly declined to impose the discretionary student-aid penalty, Congress took matters into its own hands. Beginning in 1990, the House of Representatives—led by Representative Solomon—introduced bills on nearly an annual basis that would require the DOE to deny student aid for all people convicted of a drug offense. When debating the proposed bills, the legislators did not hide their intent, speaking candidly about retribution and deterrence:

- "Let me again emphasize the fact that this amendment is targeted at the casual drug users. . . . [T]hey should be held accountable." 136 Cong. Rec. 18,522 (1990).

- "[W]e can begin to send the message to illegal drug users that they are no longer immune . . . ." 137 Cong. Rec. 9,579 (1991).

- "Roughly 75 percent of all illegal drug use can be attributed to casual drug users. Many of these users are students who are rarely disciplined . . . ." 138 Cong. Rec. 7,236 (1992).

- "[I]nvolvement with illegal drugs has clear consequences. We must increase the social and legal costs of illegal drug consumption." 141 Cong. Rec. 592 (1995).

These quotations are representative of the vast majority of floor statements by the legislators who supported the Aid Elimination Penalty. Nearly all of the statements indicated that the Aid Elimination Penalty was designed to increase "accountability" or exact retribution for those convicted of drug offenses. *See, e.g.*, 137 Cong. Rec. 9,579 (1991) (referring to "user accountability"); 137 Cong. Rec. 9,579 (1991) ("[I]t is high time we address the issue of user accountability"); 136 Cong. Rec. 18,522 (1990) (emphasizing that "students have to pay . . . penalties" for their drug convictions).

Distinguishing the lenient substance-abuse policy in the National Football League, one supporter of the Aid Elimination Penalty noted that it would impose a penalty "a lot

tougher than the National Football League, because one of those players could be arrested today and they will be playing next Sunday." 144 Cong. Rec. 22631 (1998). Congress' message was clear: students were to be severely and additionally punished for drug convictions.

Nor did Congress mask the fact that they passed the Aid Elimination Penalty because the courts were refusing to impose the discretionary penalty of suspending student-aid eligibility for students convicted of a drug offense. Discussing the need to enact the Aid Elimination Penalty, Congress repeatedly referred to courts' unwillingness to do so at the time of sentencing. 136 Cong. Rec. 18,523 (1990) (proposing the legislation because the "backlog of drug related cases in our courts [means that] casual drug users face minimal sentencing, if any"); 136 Cong. Rec. 18,522 (1990).

One exchange between members of Congress was particularly illuminating with respect to the motivation for passing the Aid Elimination Penalty:

> Rep. Williams: "[C]urrent law [the Anti-Drug Abuse Act of 1988] says that a student may be denied eligibility for any student financial aid, but at the discretion of the court, to be decided on a case-by-case basis. . . . We now allow the courts in their discretion on a case-by-case basis dealing with individual students to decide whether to add this punishment also along with the punishment that the student receives. The gentleman from New York [Mr. Solomon] would have this Congress simply establish by statute that anyone convicted of possession or drug use, no matter how casual, shall lose their right to student financial aid. So we would in effect place a cul-de-sac on the educational opportunity road for anyone so convicted."[8]

136 Cong. Rec. 18,522 (1990).

[8] Representative Williams clearly opposed the Aid Elimination Penalty, noting that it was an ill-advised punishment in light of courts' refusal to impose such a penalty themselves. Plaintiffs acknowledge that the floor statements of opponents of legislation often are not particularly enlightening with respect to Congressional intent, and they quote Representative Williams merely to provide context for Representative Solomon's response, quoted below.

Representative Solomon, the bill's sponsor, did not disagree. Rather, he noted that the Aid Elimination Penalty was necessary because "[t]here has not been one court that has denied one student any aid due to drug possession or sale as yet." 136 Cong. Rec. 18,523 (1990). Again, Congress' message was clear: If courts were not going to punish casual drug users by suspending their student aid, Congress would mandate this additional punishment by transferring the responsibility for imposing it from the courts to the DOE.

Year after year, these bills failed. In 1998, however, Congress passed—and the President signed—the Aid Elimination Penalty, which added Section 484(r) to the HEA:

> A student who is convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance for conduct that occurred during a period of enrollment for which the student was receiving any grant, loan, or work assistance under this title shall not be eligible to receive any grant, loan, or work assistance under this title from the date of that conviction for the period of time specified in the following table:
>
> If convicted of an offense involving:
>
> | **The possession of a controlled substance:** | **Ineligibility period is:** |
> |---|---|
> | First offense | 1 year |
> | Second offense | 2 years |
> | Third offense | Indefinite. |
>
> | **The sale of a controlled substance:** | **Ineligibility period is:** |
> |---|---|
> | First offense | 2 years |
> | Second offense | Indefinite. |

20 U.S.C. § 1091(r)(1), *codified as amended at* Pub. L. No. 109-171 (Feb. 8, 2006).[9] The law permits one to regain eligibility for student aid prior to the end of the prescribed time period

[9] The provision quoted above reflects the current language of the Aid Elimination Penalty, which was amended in February 2006. Between 2000, when the law went into effect, and February 2006, when it was amended for the first (and only) time, the Aid

only if the student's conviction is reversed or rendered nugatory, or if the student completes a drug rehabilitation program that includes at least two unannounced drug tests and complies with criteria specified in regulations promulgated by the DOE. 20 U.S.C. § 1091(r)(2).[10] Unlike the Anti-Drug Abuse Act of 1988, the Aid Elimination Penalty bars the disbursement of financial aid even if a rehabilitation program is unavailable, inaccessible, or prohibitively expensive. *Compare id.* (Aid Elimination Penalty), *with* 21 U.S.C. § 862(c) (Anti-Drug Abuse Act of 1988).

Accordingly, students applying for federal student aid must disclose on the Free Application for Federal Student Aid (FAFSA), the application students must complete in order to be considered for federal student aid, whether they have been convicted of a drug offense. Question 31 on the FAFSA asks: "Have you ever been convicted of possessing or selling illegal drugs?" App. F. Of the 100 questions on the FAFSA form, Question 31 is the only question that pertains to a criminal conviction. *Id.*

At the time plaintiffs file this motion, nearly 200,000 would-be students have been denied financial aid after truthfully answering on Question 31 of the FAFSA that they have been convicted of a drug offense. App. C, p. 12. This number does not include the significant, but unknown, number of students who did not even bother applying for student

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Elimination Penalty applied to all drug convictions, regardless of whether the offense occurred while the aid applicant was in school. Even though Congress altered the law earlier this year so it should now bar aid only to those students who were in school at the time of their offense, the DOE continues to deny student aid regardless of one's student-status at the time of the drug offense. Should a preliminary injunction not issue, plaintiffs hope that, at the very least, the DOE starts implementing the "new" Aid Elimination Penalty immediately. Regardless, plaintiffs' legal claims apply equally to either version of the law.

[10] The Aid Elimination Penalty is materially identical to the abovementioned proposed bills that preceded it and that did not pass. *Compare* 20 U.S.C. § 1091(r), *with, e.g.*, H.R. 4106 (Feb. 26, 1990); H.R. 2116 (Apr. 25, 1991); H.R. 134 (Jan. 4, 1995); and H.R. 88 (Jan. 7, 1997). *See* App. E (copies of these earlier, proposed bills).

aid because they knew that their drug conviction would render them ineligible for aid pursuant to the Aid Elimination Penalty. *Id.*

Accordingly, a conservative estimate is that at least one-quarter of a million would-be students have been denied aid pursuant to the Aid Elimination Penalty, notwithstanding the fact that they have paid their debts to society by completing their court-imposed sentences. These students, including plaintiffs, were thus punished by the courts when sentenced following their convictions, and then punished again by Congress and the DOE through the denial of student aid because Congress was dissatisfied with the sentence imposed by the courts.

More than 200 organizations have called on Congress to repeal the Aid Elimination Penalty due to its unconstitutional imposition of double punishment, among other reasons. App. G. For example, the Director for Congressional Relations for the National Association of Student Financial Aid Administrators stated: "We've opposed the drug provision since it was first introduced, and have been trying to repeal it ever since . . . . We feel if someone has a drug conviction, and has been through the criminal courts, they've paid their debt to society." App. H, p.1. Prominent drug-rehabilitation associations (including NAADAC: The Association for Addiction Professionals), religious governing bodies (including the Presbyterian Church (USA)), and legal organizations (including the American Bar Association) have likewise sought repeal of the Aid Elimination Penalty.[11] App. G. Because Congress has not heeded the concern of these groups, plaintiffs filed a Complaint [Dkt. No. 1] in March 2006 asking the Court to strike down this law. Plaintiffs now move the Court to issue a preliminary injunction prohibiting the DOE from enforcing the Aid Elimination

[11] The Congressionally-created Advisory Committee on Student Financial Assistance likewise has recommended that the DOE stop asking about applicants' drug convictions, calling a drug conviction "irrelevant" to the disbursement of student aid. App. I, p. 16.

Penalty because it unconstitutionally imposes a second punishment on plaintiffs and plaintiff class members in violation of the Double Jeopardy Clause of the U.S. Constitution.

III. LEGAL STANDARD APPLICABLE TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

This Court has "broad discretion" when ruling on a motion for a preliminary injunction. *Coca-Cola Co. v. Purdy*, 382 F.3d 774, 782 (8th Cir. 2004) (affirming grant of preliminary injunction); *see also Medicine Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 803 (8th Cir. 2003) (noting the court of appeals' "deferential review" of district court orders granting preliminary injunctions and affirming the issuance of a preliminary injunction). In determining whether to grant a motion for a preliminary injunction, this Court should weigh four factors: (1) the probability of plaintiffs' success on the merits, (2) the irreparable harm plaintiffs would suffer if the Court did not issue the injunction, (3) the balance between this harm and the injury to defendant if the Court were to issue the injunction, and (4) whether the issuance of the preliminary injunction is in the public interest. *Coca-Cola*, 382 F.3d at 782; *Livestock Marketing Ass'n v. United States Dep't of Agric.*, 132 F. Supp. 2d 817, 824 (D. S.D. 2001). No single factor is dispositive, and the Court should issue a preliminary injunction, even if it is not convinced that plaintiffs will likely succeed on the merits of their claims, so long as the equities "tip[] decidedly toward plaintiff" and plaintiffs merely "raise[] questions so serious and difficult as to call for more deliberate investigation." *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc); *see also Gen'l Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 624-25 (8th Cir. 1987); *Yankton Sioux Tribe v. United States Army Corps of Eng'r*, 209 F. Supp. 2d 1008, 1021-22 (D. S.D. 2002).

IV. ARGUMENT

The Court should issue a preliminary injunction for two reasons: First, plaintiffs will likely succeed on their merits of their Double Jeopardy claim. Reacting to the fact that judges were not suspending student aid as part of one's sentence following a drug conviction, Congress enacted the Aid Elimination Penalty with the intent and effect of punishing students for their drug convictions. Second, the equities decidedly militate in favor of granting plaintiffs relief. Students are irreparably harmed when they are denied student aid, forcing them to either drop out of school or take out high-interest loans that will saddle their parents and them with substantial debt; the government has only a minimal interest in suspending aid to these students; and the public interest in a well-educated citizenry is considerable. Issuing an injunction will allow plaintiffs to remain in school and to become educated, productive, tax-paying members of society.

A. Plaintiffs Will Likely Succeed on the Merits of their Double Jeopardy Claim Because The Aid Elimination Penalty Is an Unconstitutional Second Punishment.

The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy . . . ." U.S. Const. amend. V. The Double Jeopardy Clause proscribes three distinct scenarios: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) the imposition of multiple punishments for the same offense. *N. Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *United States v. Kehoe*, 310 F.3d 579, 587 (8th Cir. 2002). Underpinning the multiple-punishments prong is the idea that punishment "must be imposed during the first prosecution or not at all." *Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 784 (1994) (holding that an agency's levying of a tax against an individual

following his criminal conviction for the same conduct violated the multiple-punishments prong of the Double Jeopardy Clause). The Aid Elimination Penalty's suspension of eligibility for student aid following a student's conviction for a drug offense is an unconstitutional second punishment for a single offense.

Not every penalty, of course, implicates the Double Jeopardy Clause; this Constitutional provision protects only against imposing multiple *criminal punishments* for the same offense. *See, e.g.*, *Hudson v. United States*, 522 U.S. 93, 99 (1997); *Padavich v. Thalacker*, 162 F.3d 521, 522-23 (8th Cir. 1998). In assessing whether a statute imposes criminal punishment, the Supreme Court has admonished that "the question is not . . . whether [the penalty in question] is civil or criminal, but rather whether it is punishment." *Austin v. United States*, 509 U.S. 602, 610 (1993); *see also Hudson*, 522 U.S. at 110-11 (Stevens, J., concurring) (noting the "settled proposition that the Government cannot use the 'civil' label to escape entirely the Double Jeopardy Clause's command, as we have recognized for at least six decades. . . . That proposition is extremely important because the . . . Government ha[s] an enormous array of civil administrative sanctions at [its] disposal that are capable of being used to punish persons . . . .").

There is a two-step process for ascertaining whether a sanction should be deemed punitive or non-punitive for Double Jeopardy purposes. First, a court seeks to "determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *United States v. Ward*, 448 U.S. 242, 248 (1984). If the legislature intended the provision to impose punishment, then the statute violates the Double Jeopardy Clause. *Id.* at 248-49. If, however, "Congress has indicated an intention to establish a [non-punitive] penalty, we have inquired further whether the

statutory scheme was so punitive either in purpose or effect as to negate that intention." *Id.*; *see also Hudson*, 522 U.S. at 99.

Context matters enormously when analyzing whether a sanction is "punishment" for Double Jeopardy purposes. *See, e.g.*, *Flemming v. Nestor*, 363 U.S. 603, 616 (1960) ("[E]ach case has turned on its own highly particularized context."); *Kennedy*, 372 U.S. at 170 n.30 (holding that a statute imposing the loss of citizenship for certain conduct was an unconstitutional punishment, while distinguishing cases that upheld statutes imposing the loss of citizenship for certain other conduct because Congress enacted those statutes for non-punitive reasons). While it may be possible that, under different circumstances and with a different intent, Congress could have limited post-secondary financial assistance based on the applicant's past criminal conduct without running afoul of the Double Jeopardy Clause, it is clear that, in enacting the Aid Elimination Penalty, Congress intended to punish plaintiff class members. In so doing, Congress created a punitive sanction.

1. By Taking Away Judges' Authority to Suspend Student Aid at the Time of Sentencing and Transferring this Authority to the DOE, Congress Intended the Aid Elimination Penalty to be Punishment.

Upset with a judiciary that refused to exercise its discretion to suspend drug offenders' student-aid eligibility as part of their sentences, Congress mandated that the DOE impose this punishment. In light of this context, especially when combined with Congress' stated punitive purposes for enacting the Aid Elimination Penalty, it is clear that Congress intended the Penalty to be a punishment.

Recognizing that "both punitive and remedial goals may be served by criminal penalties," *Austin*, 509 U.S. at 610, courts look to the "primary purposes" of the legislature for enacting a particular statute when assessing Congress' punitive or non-punitive intent, *see,*

e.g., *Kennedy*, 372 U.S. at 169 (discussing the "primary function" sought to be served by the law in question); *Cortinas v. United States Parole Comm'n*, 983 F.2d 46-47 (5th Cir. 1991) (same). Even if the legislation also serves a non-punitive purpose, it will be deemed punishment if punitive objectives predominate. *See, e.g.*, *Austin*, 509 U.S. at 621; *Trop*, 356 U.S. at 96. Furthermore, unlike in Equal Protection claims proceeding under the rational-basis doctrine, it is Congress' *actual* purpose(s) in passing the legislation—not merely any conceivable purpose or post-hoc rationalization—that courts must assess in determining Congress' primary purpose for enacting a particular statute. *See, e.g.*, *Austin*, 509 U.S. at 620-21 (rejecting government counsel's assertions regarding the legislative purposes of the act in question and finding that the statute was enacted for punitive purposes); *Trop*, 356 U.S. at 109 (Brennan, J., concurring) (same); *see generally Trop*, 356 U.S. at 96.

It is apparent that Congress had two primary purposes in enacting the Aid Elimination Penalty: deterring students from using a controlled substance and exacting retribution against students who violate controlled substances laws. As provided in more detail above, the floor debate regarding the Aid Elimination Penalty revolved around a few themes: First, the law would deter students from using controlled substances. *See, e.g.*, 136 Cong. Rec. 2,616 (1990) ("It can definitely be a hard lesson, but one worth learning. Don't use drugs."). Second, individuals who use controlled substances must "pay penalties" and "be held accountable." *See, e.g.*, 137 Cong. Rec. 9,579 (1991); 136 Cong. Rec. 18,522 (1990). Third, the Penalty would send a message to these students that there would be "consequences" for their actions. *See, e.g.*, 141 Cong. Rec. 592 (1995) (stating that the Penalty would "increase the . . . costs of illegal drug consumption"); 141 Cong. Rec. 592 (1995) (noting that the law will be "tough"); 137 Cong. Rec. 9,579 (1991) ("they are no longer immune").

Retribution and deterrence, however, are the objectives of punishment, and statutes motivated primarily by these purposes have repeatedly been deemed punitive for Double Jeopardy purposes. *United States v. Halper*, 490 U.S. 435, 448 (1989) (stating that "punishment serves the twin aims of retribution and deterrence," and further noting that retribution and deterrence "are the 'traditional aims of punishment'") (quoting *Kennedy*, 372 U.S. at 168), *abrogated on other grounds by Hudson*, 522 U.S. 93; *see also United States v. Bajakajian*, 524 U.S. 321, 329 (1998) (finding that a particular sanction was a punishment because its purpose was primarily deterrence). "[R]etribution and deterrence," a unanimous Court noted in *Halper*, "are not legitimate nonpunitive governmental objectives." 490 U.S. at 448, *abrogated on other grounds by Hudson*, 522 U.S. 93; *see also Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979) (same).

The purposes behind the Aid Elimination Penalty are analogous to those in *Kurth Ranch*, where the Montana Department of Revenue assessed a statutorily authorized tax on an individual for possessing marijuana following his criminal conviction for unlawfully possessing the substance. 511 U.S. at 769-72. Finding that the primary purposes of the tax were punitive, the Court held that the tax constituted an impermissible second punishment for the same conduct in violation of the Double Jeopardy Clause. *Id.* at 780-83. As with the purposes motivating the Aid Elimination Penalty, the objectives of the Montana tax were "to deter people from possessing marijuana," to "burden[] violators of the law instead of law abiding taxpayers," and to signal that "use of dangerous drugs is not acceptable." *Id.* at 780 & n.18; *see also Dressler v. Iowa Dep't of Transp.*, 542 N.W. 2d 563, 564 (Iowa 1996).[12]

[12] Congress' punitive intent in passing the Aid Elimination Penalty is also analogous to the Iowa legislature's purpose in enacting a provision in its motor vehicle code, Iowa Code § 321.209(8) (since repealed), that required the Iowa Department of Transportation to automatically revoke one's driver's license for 180 days upon being convicted of a drug

As if it were not clear enough that Congress acted with punitive intent in passing the Aid Elimination Penalty, it expressly stated that the Aid Elimination Penalty was necessary because courts were not exercising their discretion to suspend student-aid eligibility of drug offenders at the time of their sentencing. *See, e.g.*, 136 Cong. Rec. 18,522 (1990). In other words, because Congress thought that students were not being punished sufficiently by the courts, the legislature shifted this punitive responsibility to the DOE. *Cf. Austin,* 509 U.S. at 620.[13]

It is significant that Congress enacted the Aid Elimination Penalty in response to an earlier penal provision affording judges discretionary authority to impose the same punishment (ineligibility for student financial aid). The Supreme Court has, on more than one occasion, drawn inferences about the punitive purposes of a statute based on the punitive nature of a closely related, previously enacted statute. *See, e.g.*, *Kennedy*, 372 U.S. at 169-70 (stating that, for purposes of determining whether the legislature had a punitive intent in passing the statute in question, reviewing the legislation that preceded the statute

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offense. *Dressler*, 542 N.W. 2d at 564. After his conviction for possessing a controlled substance, plaintiff Dressler received a notice from the Department of Transportation that it had revoked his license pursuant to this civil statute. *Id.* Dressler sued the agency, maintaining that the statute imposed a second punishment for the offense of possessing a controlled substance, in violation of the Double Jeopardy Clause of the U.S. Constitution. *Id.* at 565.

Although the State argued that the statute served non-punitive purposes, the Iowa Supreme Court disagreed, finding that Section 321.209(8) "enhances punishment of a controlled substance possession" offense. *Id.* at 566. As such, the Iowa Supreme Court held that the statute "twice punishes Dressler for the same offense," thereby violating the Double Jeopardy Clause. *Id.*

[13] In a similar vein, the Supreme Court held in *Austin* that Congress intended a particular civil forfeiture statute to be punishment because, in part, the legislature made it clear at the time of passage that the extant criminal sanctions were "inadequate to deter or punish." 509 U.S. at 620 (further characterizing the forfeiture statute as "a powerful deterrent") (quoting a Senate Report). Here, too, Congress enacted the Aid Elimination Penalty because, it stated expressly, courts were not imposing sufficiently harsh criminal sentences for drug offenses.

was "worth a volume of logic"); *Trop*, 356 U.S. at 94-95. In *Trop*, the Court held that a statute that mandated an agency's expatriation of any individual who was convicted by court martial for war-time desertion was unconstitutional punishment. The statute, which allowed reinstatement of citizenship automatically upon re-enlistment in the armed forces, was not "punishment," the government argued, because some members of Congress stated that it was not a penal law and because the law was necessary to improve troop morale and combat readiness during war-time. *Id.* at 94 (plurality opinion), 121 (Frankfurter, J., dissenting). The Court disagreed that these were the true purposes of the law. *Id.* at 94 (plurality opinion). A key factor for its conclusion was that the expatriation statute was born out of an earlier, penal statute. *Id.* (linking the statute in question with an earlier statute that was "distinctly penal in character"). Just as in *Trop*, Congress expressly recognized that the Aid Elimination Penalty had its genesis in an earlier, penal statute, reinforcing that its primary purpose in enacting the Penalty was punitive.

The fact that Congress' primary purpose was punitive is buttressed by the fact that it has called the suspension of student aid a "penalty." App. A; 136 Cong. Rec. 2616 (1990); *see also supra* n.2. Denominating a sanction as a "penalty" is evidence of an intent to punish, *see, e.g.*, *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998); *Kurth Ranch*, 511 U.S. at 779 (stating that "penalties . . . are readily characterized as [punitive] sanctions"), whereas using the word "civil" in a statute evinces a non-punitive intent, *see, e.g.*, *Hudson*, 522 U.S. at 103 (the statutes at issue "expressly provide that such penalties are 'civil'"). By not using the word "civil" in the Aid Elimination Penalty, but instead branding it a "penalty," Congress reiterated its punitive intent.

For the reasons stated above, it is clear that Congress's primary purpose in enacting the Aid Elimination Penalty was punitive and that it was acting to further the traditional aims

of punishment—deterrence and retribution—when it shifted the imposition of this punishment from the courts to the DOE. As in *Kurth Ranch* and *Dressler*, the legislature unconstitutionally intended to impose a second punishment for a drug offense.

2. Regardless of Congress' Intent, The Aid Elimination Penalty's Suspension of Student Aid is Unconstitutional Because it Effectively Punishes Students for the Same Conduct for Which They Were Already Convicted and Punished.

The court need not engage in further analysis if it finds that Congress intended the Aid Elimination Penalty to be punishment. *Ward*, 448 U.S. at 248-49; *Kennedy*, 372 U.S. at 169 (stating that a court need not assess whether the sanction is effectively punitive when Congress intended the sanction to be punishment). However, should the Court conclude that Congress did not intend the Aid Elimination Penalty to impose further punishment following a conviction, then it must assess whether the Penalty's sanction is "so punitive either in purpose or effect as to transfor[m] what was clearly intended as a civil remedy into a criminal penalty." *Padavich*, 162 F.3d at 522-23 (alteration in original); *see also Kurth Ranch*, 511 U.S. at 780-83 (assessing many of the *Kennedy* factors below, without citing *Kennedy* itself).

The Supreme Court has articulated seven factors that help determine whether a sanction is effectively punitive: "(1) Whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as a punishment, (3) whether it comes into play only on a finding of scienter, (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears excessive in relation to the alternative purpose assigned . . . ." *Kennedy*, 372 U.S. at 168-69 (enumeration added).

These factors often "point in differing directions," *Kennedy*, 372 U.S. at 169, and thus courts can find a sanction is effectively punitive pursuant to the *Kennedy* factors even when some of them clearly favor the government's position, *see, e.g.*, *Dye v. Frank*, 355 F.3d 1102, 1105 (7th Cir. 2004) (finding that a particular sanction was "so punitive either in purpose or effect" when only four of the seven factors militated in favor of this conclusion).

Six of the seven factors demonstrate that the Aid Elimination Penalty's suspension of student aid is effectively punitive.[14] First, the Penalty promotes the traditional aims of punishment: retribution and deterrence (factor 4). As the *Kurth Ranch* Court concluded, a civil statute promotes these aims of punishment when it serves "to deter people from possessing marijuana" and to "burden[] violators of the law instead of 'law abiding taxpayers.'" 511 U.S. at 780 & n.18.

Second—and flowing from the first point—there is no non-punitive purpose that may rationally be assigned to the Aid Elimination Penalty (factor 6).

Third, the suspension of student aid is conditioned on the commission of a crime (factor 5). In *Kurth Ranch*, the Court found that the assessment of an agency-imposed tax for the possession of controlled substances following a prosecution for the same conduct was an unconstitutional second punishment because, in part, the tax was "conditioned on the commission of a crime." *Id.* at 781; *see also Austin*, 509 U.S. at 620 (finding that a civil forfeiture following a drug conviction is "punishment"). The Aid Elimination Penalty is the quintessential example of conditioning a sanction on the commission of a crime, as the sanction comes into play not only after the commission of a crime, and not only even after an arrest for the commission of a crime, but after a *conviction* for the commission of a crime.

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[14] Plaintiffs concede that the Penalty does not involve an affirmative disability or restraint.

Cf. Kurth Ranch, 511 U.S. at 781 ("In this case, the tax assessment not only hinges on the commission of a crime, it also is exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place."). The fact that the DOE's suspension of student aid is inextricably linked to an applicant's conviction is "is significant of penal and prohibitory intent . . . ." *Id.*

Fourth, the crime upon which the suspension of student aid is conditioned requires a finding of scienter (factor 3). State and federal drug offenses almost invariably include a *mens rea* element. *See, e.g.*, 21 U.S.C. § 844(a); S.D. Codified Laws §§ 22-42-5, 22-42-6; Ind. Code §§ 35-48-4-7, 35-48-4-11; Iowa Code § 124.401(5); *State v. Dudley*, 912 S.W. 2d 525, 527 (Mo. Ct. App. 1995); Neb. Rev. Stat. §§ 28-416(3),(13); *State v. Griffin*, 584 N.W. 2d 127, 131 (Wis. Ct. App. 1998). The Aid Elimination Penalty's suspension of student aid due to a scienter-based crime "is customarily an important element in distinguishing criminal from civil statutes." *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997).

Fifth, the suspension of student aid based on a drug offense has historically been regarded as punishment (factor 2). While the denial of most government benefits has not historically been regarded as punishment, the sanction in this case—the suspension of student aid following the conviction for possessing or distributing a controlled substance—has its origins exclusively in criminal punishment, as discussed above. *See* 21 U.S.C. § 862 (Anti-Drug Abuse Act of 1988). *Cf. Kurth Ranch*, 511 U.S. at 783 n.24 ("Courts—including this Court—have frequently commented on the punishing and deterrent nature of drug taxes.") (internal citation omitted).

Lastly, the suspension of student aid is excessive relative to any alternative purpose (factor 7). As discussed above, there is no "alternative," non-punitive purpose, and therefore the suspension of student aid is necessarily excessive. However, even if there were

a non-punitive purpose, suspending eligibility for student aid, which often means that a student must drop out of school, is simply not proportionate to any alternative purpose. The U.S. Census Bureau recently concluded that the average annual income for high school graduates is approximately $30,000, whereas college graduates earn an average annual salary of approximately $52,000. App. C, p. 59. These annual salary differentials translate into wide gaps in cumulative lifetime income, with high school graduates earning $1.2 million and college graduates earning $2.1 million. *Id.* Moreover, as a Federal government-sponsored report notes, there is a "strong consensus among economists" that formally educated individuals are much more likely to produce societal benefits, such as "creation of new knowledge" and "diffusion and transmission of knowledge," as well as to "become better mothers [and] fathers," to decrease crime rates, and to lessen dependence on public assistance. *Id.* at 59-60. Neither the students themselves nor society at large can afford the consequences of the suspension of financial aid to students convicted of a drug offense, a penalty that is plainly excessive when imposed, as is almost always the case, for possessing a small amount of marijuana.

Accordingly, even if the Court were to find that Congress did not intend to punish students by enacting the Aid Elimination Penalty, the Penalty is effectively punishment. Under either the intent or the effect standard, the Aid Elimination Penalty imposes a second punishment for the same offense, and therefore plaintiffs will likely succeed on the merits of their Double Jeopardy claim.

B. The Equities Tip Strongly in Favor of the Plaintiffs, Whose Student Aid Will Be Taken Away Unless a Preliminary Injunction Issues.

The equities strongly tilt in favor of the students who are being denied student aid, many of whom will have to drop out of school should they not receive assistance to pay for

college. Moreover, the public has a significant interest in students receiving an education, and the harm to the government would be relatively minimal if the Court issues a preliminary injunction.

1. Students and Would-Be Students Would Suffer Irreparable Harm If the DOE Suspends their Need-Based Financial Aid.

Plaintiffs will be irreparably harmed by the continued administration of the Aid Elimination Penalty. Higher Education Act loans and grants are, by definition, need-based funding, and thus the Aid Elimination Penalty suspends student aid only for those students who need this assistance to further their education. Plaintiffs therefore will be forced either to drop out of college or to take out high-interest private loans if a preliminary injunction does not issue. The harms of either scenario are serious: Many students do not return to college after dropping out of school for a year, and even when they do, delaying receipt of a college degree has life-long consequences. App. J, p. iii (reporting the percentages of students who do not return to four-year and two-year post-secondary institutions after leaving school for one year). Furthermore, securing a private loan, if that is even possible, results in a student and the student's family shouldering an overwhelming amount of debt upon graduating. *See, e.g.*, App. K, p. 2 (discussing how the mother of one student who was denied aid pursuant to the Aid Elimination Penalty had to refinance her home in order for her daughter to remain in school).

2. The Government Will Not Be Seriously Harmed If the Court Preliminarily Enjoins Enforcement of the Aid Elimination Penalty.

Relative to the students' irreparable injury in losing their financial aid, the government will not be significantly harmed if the Court grants a preliminary injunction. As a

government-sponsored report found, the Aid Elimination Penalty results in the suspension of student aid for less than one-half of one percent of all applicants. App. C, p. 3.

3. The Public Has a Strong Interest in a Well-Educated Citizenry.

Finally, the public has a strong interest in would-be students attending college and receiving their degrees. College graduates not only earn higher salaries, on average, than non-college graduates, which results in greater tax revenue, but they are more likely to participate in knowledge creation, to vote, and to contribute positively to the "neighborhood factors" (e.g., crime rates) discussed above. *Id.* at 59-60.[15]

The personal and societal benefits of enjoining the Aid Elimination Penalty are significant, whereas the government's interest in enforcing the provision is not nearly so great. Accordingly, the equities militate strongly in favor of preliminarily enjoining enforcement of the Aid Elimination Penalty.

C. Even if the Court Were Uncertain Whether Plaintiffs Will Likely Succeed on the Merits of their Double Jeopardy Claim, A Preliminary Injunction Should Issue Because Plaintiffs Have Raised Serious And Difficult Questions Regarding Their Claim, and Being Denied the Opportunity to Pursue an Education is a Grave Injury.

Even absent a determination that plaintiffs will likely succeed on the merits, the Court may issue a preliminary injunction if plaintiffs merely raise "serious and difficult questions" regarding their claim and if the equities tip strongly in their favor. *Dataphase Sys.,* 640 F.2d at 113; *N.I.S. Corp. v. Swindle*, 724 F.2d 707, 710 & n.3 (8th Cir. 1984). Thus, even if the Court were uncertain that plaintiffs will likely succeed on the merits of their Double Jeopardy claim, the Court should issue a preliminary injunction—allowing plaintiffs and

[15] Moreover, students who remain enrolled in college are less likely to use controlled substances than those forced to drop out. App. L. (relevant pages of the Federal government's highly regarded "Monitoring the Future" report).

plaintiff class members to receive student aid to attend college next academic year—because plaintiffs have raised such "serious and difficult questions" and because the equities tip strongly in their favor.

1. Plaintiffs Have Raised Serious and Difficult Questions, At the Very Least, Regarding the Success of their Double Jeopardy Claim.

Plaintiffs have raised serious and difficult questions, at the very least, regarding whether the DOE's suspension of student aid pursuant to the Aid Elimination Penalty constitutes a second punishment, in violation of the Double Jeopardy Clause of the United States Constitution. *Cf. Yankton Sioux Tribe*, 209 F. Supp. 2d at 1024 (finding that "the probability of success factor is neutral," but granting a preliminary injunction because, in part, "plaintiffs have raised a substantial question regarding their . . . claims"). As discussed above, Congress passed the Aid Elimination Penalty for primarily punitive purposes—retribution and deterrence—because it was displeased with judges' refusal to suspend student-aid eligibility as part of a criminal sentence.

2. The Equities Tip Strongly in Plaintiffs' Favor.

The equities strongly militate in favor of granting a preliminary injunction. Plaintiffs are students and would-be students who are facing the prospect of not being able to attend college this fall. As discussed above, plaintiffs will suffer irreparable harm should they not receive Federal need-based financial aid. On the other hand, the government's relative harm will be minimal if the Court were to issue a preliminary injunction. Finally, for the reasons discussed above, the public has a significant interest in a well-educated citizenry. *Cf. N.I.S. Corp.*, 724 F.2d at 710 & n.3 (affirming order granting preliminary injunction because "serious questions of law and fact are presented and . . . the balance of hardships otherwise tips in favor of the movant").

V. CONCLUSION

The suspension of student aid following a drug conviction pursuant to the Aid Elimination Penalty is an unconstitutional second punishment for the same offense. Moreover, a preliminary injunction prohibiting the DOE from denying student aid pursuant to the Penalty would prevent the numerous and irreparable harms such denial would inflict, would be in the public interest, and would not unduly burden the DOE. Plaintiffs therefore respectfully request that the Court grant their motion for a preliminary injunction.

Dated this 26th day of May 2006.

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REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1, plaintiffs respectfully request that the Court hear oral argument on Plaintiffs' Motion for Preliminary Injunction.

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2006, I caused to be electronically filed

- PLAINTIFFS' NOTICE OF MOTION, MOTION, AND POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

- APPENDIX OF DOCUMENTS CITED IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

- DECLARATION OF DANELLE J. DAUGHERTY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

- [PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorney of record:

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_____/s/_____
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