DFI Defense of Freedom Institute

July 20, 2023

SUBMITTED VIA FEDERAL eRULEMAKING PORTAL
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The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202
Attention: Vanessa Gomez

Re: Comment on the Department's Announcement of Intent to Establish a Negotiated Rulemaking Committee
Agency/Docket Number: ED–2023–OPE–0123
Document Number: 2023–14329

Dear Secretary Cardona:

The Defense of Freedom Institute for Policy Studies ("DFI") is a national nonprofit organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting the civil and constitutional rights of Americans at school and work. DFI envisions a republic where freedom, opportunity, creativity, and innovation flourish in our schools and workplaces. Our organization is composed of former U.S. Department of Education ("Department") appointees who are experts in education law and policy, in particular the areas covered by the Department's announcement that it will establish a negotiated rulemaking committee to pursue mass student loan debt cancellation.

On June 30, the U.S. Supreme Court held in *Biden v. Nebraska* that the limited authority Congress granted to the Secretary of Education ("Secretary") in the Higher Education Relief Opportunities for Students Act of 2003 ("HEROES Act") to "waive" or "modify" statutory or regulatory provisions applicable to student financial assistance programs does not extend to the Secretary's mass cancellation of at least $430 billion in student loan debt.[1] Less than one week later, on July 6, the Department issued notice that it intends to engage in negotiated rulemaking procedures to

[1] No. 22-506, slip op. at 12 (Jun. 30, 2023).

develop regulations providing for mass debt cancellation pursuant to authority supposedly existing under the HEA relating to federal student loans.[2]

DFI strenuously objects to this agency's ploy to buy the votes of student loan borrowers in the 2024 presidential election with a scheme that defies the Constitution, the Department's authority under the HEA, and fiscal responsibility. We call on the Department to rescind its notice of negotiated rulemaking and restrain itself to enforcing laws duly enacted by Congress, in line with the clear boundaries established by the Supreme Court in *Biden v. Nebraska* and numerous other recent cases.

The Constitution grants to Congress alone the power to make law and appropriate funds.[3] Federal agencies, including the Department, have no authority to wish law into existence or decide either to expend funds without congressional authorization or refuse to collect obligations due to the federal government. To the contrary: the Antideficiency Act enforces Congress's authority over the appropriation of funds,[4] and the Federal Claims Collection Act requires agencies to "try to collect a claim of the United States Government for money . . . arising out of the activities of, or referred to, the agency . . . ."[5] Thus, when an agency decides to expend money or forgive some financial obligation an individual or set of individuals owes to the federal government, it must point to congressional authorization to do so; otherwise, it is acting beyond its legal and constitutional authority.

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[2] 88 Fed. Reg. 43,069, 43,069 (Jul. 6, 2023) (citing 20 U.S.C. § 1082(a)). While this notice does not provide the exact parameters of the debt cancellation the Department plans to pursue, President Biden's June 30 comments on the Supreme Court's decision in *Biden v. Nebraska* point to a predetermined loan cancellation scheme that is similar in scope to the plan struck down by the Court. White House, Remarks by President Biden on the Supreme Court's Decision on the Administration's Student Debt Relief Program, Jun. 30, 2023 (hereinafter "Biden June 30 Remarks"), https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/06/30/remarks-by-president-biden-on-the-supreme-courts-decision-on-the-administrations-student-debt-relief-program/ ("I'm announcing today a new path consistent with today's ruling to provide student debt relief to *as many borrowers as possible as quickly as possible*." (emphasis added)); *id.* (It's going to take longer, but, in my view, it's the best path that remains to providing for *as many borrowers as possible* with debt relief." (emphasis added)).

[3] U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); *id.* § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .").

[4] 31 U.S.C. §§ 1341–1342, 1349–1351, 1511–1519.

[5] 31 U.S.C. § 3711(a)(1); *see also* 31 C.F.R. § 901.1(a) (directing the Secretary to "aggressively collect all debts").

Burdened by a presidential campaign promise searching in vain for statutory authority,[6] the Department has telegraphed that it will follow up its failure to convince the Supreme Court that the HEROES Act provides authority for its mass cancellation of student loan debt with reliance on similarly cabined language in the HEA for precisely the same purpose. The provision at issue in the HEA grants authority to the Secretary to "enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption" with respect to the Federal Family Education Loan program[7] and, in the Department's view, to the Federal Direct Loan Program.[8]

The Department must confine its interpretation of the scope of these terms to their ordinary public meaning at the time of their enactment,[9] and they must be construed as part of "a symmetrical and coherent regulatory scheme" with all parts fitting, if possible, "into an harmonious whole . . . ."[10] Construing the statute in this way leaves no doubt that the limited terms are intended only to grant the Secretary the authority to deal with the debts of individual loan borrowers on a case-by-case basis in a manner that is explicitly authorized by Congress.[11] If these terms granted the Secretary the immense authority to provide for the mass cancellation of any or all student loan debt held by the federal government, then other portions of the statute providing bounded authority to waive or cancel debt would be rendered entirely superfluous[12] and the underlying purpose of the HEA's student loan provisions—to provide funding for students to attend institutions of higher education that they are then obligated to repay—would be frustrated.

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[6] Cory Turner, *Biden Pledged to Forgive $10,000 in Student Loan Debt. Here's What He's Done So Far*, NPR, Dec. 7, 2021, https://www.npr.org/2021/12/07/1062070001/student-loan-forgiveness-debt-president-biden-campaign-promise (documenting now-President Biden's plan as a candidate to "forgive a minimum of $10,000/person of federal student loans").
[7] 20 U.S.C. § 1082(a)(6).
[8] 20 U.S.C. § 1087a(b)(2).
[9] *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020).
[10] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations and quotation marks omitted).
[11] *See* Memorandum from Reed Rubinstein, Principal Deputy General Counsel delegated the authority and duties of the General Counsel, to Betsy DeVos, Secretary of Education, Re: Student Loan Principal Balance Cancellation, Compromise, Discharge, and Forgiveness Authority, Jan. 12, 2021, at 4 (hereinafter "OGC Memo"), *available at* https://static.politico.com/d6/ce/3edf6a3946afa98eb13c210afd7d/ogcmemohealoans.pdf ("[W]e believe 20 U.S.C. § 1082(a)(6) is best construed as a limited authorization for the Secretary to provide cancellation, compromise, discharge, or forgiveness only on a case-by-case basis and then only under those circumstances specified by Congress." (footnote omitted)).
[12] *See id.* at 6–7 (concluding that mass cancellation of student loan debt by the Department under the HEA would be unlawful in light of that statutory scheme's "many specific provisions for cancellation, compromise, discharge, or forgiveness of student loan principal balances and/or material modifications to the repayment amounts or terms thereof").

In fact, any authority the Department might claim under the HEA to engage in mass debt cancellation would exceed even the authority the Department claimed under the HEROES Act because the Department would not be able to identify *any* explicit limit the HEA contemplates for its use.[13] Relying on these HEA terms to justify the mass cancellation of loan debt, as opposed to their case-by-case use, would mean the Department has the authority to cancel *all* student loan debt—an outcome Congress certainly never contemplated in granting this authorization under the HEA. It is far more likely that Congress intended the terms "compromise," "waive," and "release" in a limited sense, authorizing such actions on an individual basis, in furtherance of legislative goals in offering student loans and providing for their repayment.

Beyond the fact that a proper interpretation of these statutory terms yields the inevitable conclusion that Congress did not intend them to lay the basis for mass debt cancellation, the Department knows full well that the Supreme Court's reliance in *Biden v. Nebraska* on its major questions doctrine to strike down mass loan cancellation under the HEROES Act forecloses any attempt to do the same under the HEA. That case once again gave effect to the powerful interpretive principle, based in the Constitution's separation of powers, that Congress "does not . . . hide elephants in mouseholes."[14] When a federal agency "claim[s] to discover in a long-extant statute an unheralded power representing a transformative expansion in [its] regulatory authority,"[15] it must point to "clear congressional authorization" for the power it asserts,[16] which cannot be accomplished through "modest words," "vague terms," or "subtle device[s]."[17] In *Biden v. Nebraska*, the Supreme Court concluded in no uncertain terms that "[t]he basic and consequential tradeoffs inherent in a mass debt cancellation program are ones that Congress would likely have intended

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[13] In the *Biden v. Nebraska* litigation, the Biden administration identified as a key limitation of the Department's HEROES Act authority its restriction to times of "war or other military operation or national emergency." 20 U.S.C. § 1098bb(a)(1); *Biden v. Nebraska*, slip op. at 19 (quoting the Solicitor General's remarks during oral argument that "[t]he whole point of [the HEROES Act] is to ensure that in the face of a national emergency that is causing financial harm to borrowers, the Secretary can do something"). This limitation of authority to times of emergency, ultimately found wanting by the Supreme Court in *Biden v. Nebraska*, would not apply to the Department's claimed HEA-based authority to "compromise, waive, or release" student loan debt whenever the Secretary wishes to do so.

[14] *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006).

[15] *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022) (quoting *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).

[16] *Id.* at 2614 (quoting *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).

[17] *Id.* at 2609 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

for itself"[18] and that there was no "clear congressional authorization" for the program under the HEROES Act.[19]

The Department can identify no colorable argument that the Supreme Court's major questions doctrine does not do the same work against the HEA authority it will claim as it did against the Department's imagined authority under the HEROES Act. The terms in the HEA on which the Department plans to justify relief—"compromise," "waive," and "release"—are certainly no less modest, vague, or subtle than those the Department attempted to rely upon, ultimately in vain, in the HEROES Act. The Department certainly has never before attempted anything like a mass loan cancellation under the HEA.[20] In fact, less than four years ago, its Office of the General Counsel opined in a memorandum to the Secretary that relying on these HEA terms to justify mass student loan debt relief "wrongfully transforms carefully cabined HEA settlement authority into a general administrative dispensing power."[21] The fact that Congress has considered dozens upon dozens of student loan cancellation bills and other loan legislation in recent years offers yet more concrete evidence that Congress, not the Department, is the appropriate institution under our constitutional system to perform the necessary tradeoffs and make decisions in this inherently legislative endeavor.[22]

In response to its stinging defeat in *Biden v. Nebraska*, the administration has resorted to the tired platitude that it is "not going to stop fighting" for mass student loan debt cancellation.[23] But the

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[18] *Biden v. Nebraska*, slip op. at 24–25 (quoting *West Virginia v. EPA*, 142 S. Ct. at 2613 (internal quotation marks omitted)).
[19] *Id.* (quoting *West Virginia v. EPA*, 142 S. Ct. at 2614).
[20] *Id.* at 20 ("The Secretary has never previously claimed powers of this magnitude under the HEROES Act. As we have already noted, past waivers and modifications issued under the Act have been extremely modest and narrow in scope.").
[21] OGC Memo, *supra*, at 6–7 (citing *Zuber v. Allen*, 396 U.S. 168, 183 (1969)).
[22] *Biden v. Nebraska*, slip op. at 22 ("Congress is not unaware of the challenges facing student borrowers. 'More than 80 student loan forgiveness bills and other student loan legislation' were considered by Congress during its 116th session alone.") (quoting Mark Kantrowitz, *Year in Review: Student Loan Forgiveness Legislation*, FORBES, Dec. 24, 2020, https://www.forbes.com/sites/markkantrowitz/2020/12/24/year-in-review-student-loan-forgiveness-legislation/?sh=67a864f7e9af). President Biden's bizarre comments blaming congressional Republicans for his Supreme Court defeat in *Nebraska* vindicate the Court's conclusion that Congress never would have approved this measure and certainly never authorized it. *See* Biden June 30 Remarks, *supra* ("Republicans in Congress voted to overturn the plan. I think every one. I don't think I had any Republican votes for this plan.").
[23] Biden June 30 Remarks, *supra*; *id.* ("I'm never going to stop fighting for you."); White House, Press Briefing by Press Secretary Karine Jean-Pierre, Secretary of Education Miguel Cardona, and Deputy Director of the National Economic Council Bharat Ramamurti, Jun. 30, 2023, https://www.whitehouse.gov/briefing-room/press-briefings/2023/06/30/press-briefing-by-press-

fight is over. The administration lost. Rather than pursuing the same doomed action using a statute that, like the HEROES Act, contains no path to mass student loan cancellation and saddling millions of student loan borrowers with the false expectation that they will have thousands of dollars in debt magically wiped out, the Department must work with Congress to provide any debt relief or flexibility—just as the Court suggested in *Biden v. Nebraska*.[24]

Such a sensible way forward would recognize that, under our constitutional system, Congress makes the law and appropriates funds. It would avoid forcing the Supreme Court—as the "adult in the room"—to strike down baseless legal arguments in a decision that some Americans may misinterpret as political maneuvering, thus threatening the Court's longstanding and deserved reputation as a fair and impartial umpire in our country's legal disputes.[25]

The Department's abuse of the HEA ignores recent Supreme Court precedent and will generate yet another dispute in service to a legal theory devoid of any substance—that the administration can offer whatever cancellations, forgiveness, or discharges that it wishes in connection with the federal student loan program. This habit—announcing vote-buying measures without any hope of being upheld in the courts—has become disturbingly commonplace[26]and irresponsibly toys with the hard-won legitimacy of this country's judicial system. The president, who has a constitutional duty to "take Care that the Laws be faithfully executed,"[27] owes every citizen much more than this.

For the foregoing reasons, we call on the Department to rescind its notice of intent to pursue negotiated rulemaking and abandon its unlawful attempt to negotiate regulations seeking to cancel federal student loans on a mass or blanket basis under the HEA.

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secretary-karine-jean-pierre-secretary-of-education-miguel-cardona-and-deputy-director-of-the-national-economic-council-bharat-ramamurti/ ("Our fight is not over. We're taking action."); *id.* ("[W]e're going to fight. We're going to keep fighting."); *id.* ("We're going to keep fighting, and we're going to put the best legal argument for it to stand up for borrowers and to keep fighting for affordable college.").

[24] *Biden v. Nebraska*, slip op. at 19 ("The question here is not whether something should be done; it is who has the authority to do it.").

[25] The Chief Justice signaled the dangers to the Supreme Court inherent in its being required to decide such cases. *See id.* at 25–26 ("We do not mistake this plainly heartfelt disagreement for disparagement. It is important that the public not be misled either. Any such misperception would be harmful to this institution and our country.").

[26] *See, e.g.*, *Alabama Association of Realtors v. Dept. of Health & Human Services*, 594 U.S. ___ (2021) (striking down an eviction moratorium imposed by the Director of the Centers for Disease Control and Prevention because Congress had not authorized the action).

[27] U.S. CONST. art. II, § 3.

Sincerely,

/s/ *Robert S. Eitel*
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Defense of Freedom Institute for Policy Studies

/s/ *Paul F. Zimmerman*
Paul F. Zimmerman
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