May 16, 2024

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: Rene Tiongquico

Re: Comment on the Department's Notice of Proposed Rulemaking
Student Debt Relief for the William D. Ford Federal Direct Loan Program (Direct Loans), the Federal Family Education Loan (FFEL) Program, the Federal Perkins Loan (Perkins) Program, and the Health Education Assistance Loan (HEAL) Program
Agency/Docket Number: ED–2023–OPE–0123
RIN 1840–AD93
Document Number: 2024–07726

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 in the workplace. DFI envisions a republic where freedom, opportunity, creativity, and innovation flourish in our schools and workplaces. Former senior leaders of the U.S. Department of Education ("Department") who are experts in education law and policy founded DFI in 2021. DFI contributes its expertise to policy and legal debates concerning education law and policy, in particular the areas covered by the Department's notice of proposed rulemaking pursuing mass student loan debt cancellation under an obscure provision of the Higher Education Act of 1965, as amended ("HEA").

Less than one year ago, 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] In its notice of proposed rulemaking issued on April 17, 2024 ("NPRM"),[2] the Department has identified another, significantly older authority in a different statute, the HEA, that it claims authorizes the Department to do the same thing: cancel student loan debt on a mass basis at an enormous cost to American taxpayers.

In pursuing this rulemaking, the Department ignores the text, framework, and nearly 60-year implementation of the HEA, as well as, on a more fundamental level, its place within America's constitutional system. It extends the unrealistic expectation to nearly 30 million student loan borrowers (*i.e.*, prospective voters) that, with a wave of his hand, President Biden will magically wipe away all or a portion of their debts. When the federal courts, as the "adults in the room," strike down this doomed plan because it has no legal basis, the Biden Administration will then (as it has done before[3]) direct these borrowers' vitriol toward the judges who, unlike the leadership of this administration, will have rightly and responsibly heeded their duty to the Constitution and to the "People of the United States" in defeating naked executive overreach.

This is not what faithful execution of the laws is supposed to look like. However, it has become a disturbing hallmark of the Biden Administration.[4] Despite doubt from President Biden and his political allies regarding his authority to engage in the first mass debt cancellation scheme in the absence of congressional legislation,[5] President Biden acted on dubious legal authority under the HEROES Act to do it before the Supreme Court stopped him. Now he does so again, in a transparent vote-buying gambit on the eve of presidential and congressional elections.

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[1] 143 S. Ct. 2355, 2362 (June 30, 2023).
[2] Student Debt Relief for the William D. Ford Federal Direct Loan Program (Direct Loans), the Federal Family Education Loan (FFEL) Program, the Federal Perkins Loan (Perkins) Program, and the Health Education Assistance Loan (HEAL) Program, 89 Fed. Reg. 27564 (Apr. 17, 2024) (hereinafter "NPRM").
[3] *See, e.g.*, https://www.ed.gov/news/press-releases/secretary-cardona-statement-supreme-court-ruling-biden-administrations-one-time-student-debt-relief-plan.
[4] *See, e.g.*, *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (striking down the Biden Administration's CDC eviction moratorium); https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/03/remarks-by-president-biden-on-fighting-the-covid-19-pandemic/ ("The bulk of the constitutional scholarship says that it's not likely to pass constitutional muster.").
[5] https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/17/remarks-by-president-biden-in-a-cnn-town-hall-with-anderson-cooper/ (stating that the President does not have the authority to write off a $50,000 loan debt "[b]ecause I don't think I have the authority to do it by signing the pen"); https://www.forbes.com/sites/adamminsky/2021/07/28/pelosi-president-biden-does-not-have-power-to-cancel-student-loan-debt/?sh=6209fa705504 (quoting then-Speaker Nancy Pelosi's comment that "[p]eople think that the President of the United States has the power for debt forgiveness. He does not have that power. . . .").

If the Biden Administration cared about helping student loan borrowers who are struggling under the weight of their debts, then the Department's leadership would immediately withdraw its lawless NPRM and instead air its concerns in the halls and committee rooms of Congress, which is constitutionally empowered to legislate changes to the federal student loan system. One of the critical features of the legislative process that is not present in administrative rulemaking—at least of the current Administration—is that the resulting product would effect a more appropriate balance between the interests of borrowers and those of American taxpayers who either never attended college or paid off any student loan debt they incurred in doing so. The Department does no such thing in its NPRM, treating taxpayer money as a never-ending spigot of resources to be showered liberally on President Biden's prospective political supporters until they are inclined to grant him their votes.

If the Department somehow manages to evade judicial review of its scheme, then the taxpayer-funded cancellation of nearly $150 billion in student loan debt will do massive harm to the nation (not to mention the additional threat of the to-be-proposed regulations relating to the cancellation of loans based on made-up "hardship" standards).[6] But DFI is confident that, like the Department's illegal effort under the HEROES Act to cancel hundreds of billions in taxpayer debt, the courts will also consign the plan proposed in the NPRM to history, and for the same reasons.

No one who is not employed by the Biden campaign—not the taxpayers, not the higher education system, and not the student loan borrowers whom this Administration claims it is seeking to help—will be better off for the Department ill-conceived scheme. It will only be remembered as a case in a constitutional law textbook that exemplifies lawless executive action. This plan is "but a walking shadow, a poor player. That struts and frets his hour upon the stage, And then is heard no more."[7]

For these reasons and the many that follow, DFI strenuously opposes the cynical ploy that is the NPRM and calls on the Department to withdraw it immediately.

I. Background

A. In 2021, the Department Recognized Its Lack of Authority to Engage in Mass Student Loan Debt Cancellation Under the HEROES Act or the HEA.

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[6] Sovereign states in agreement with DFI's views that the plan proposed in this NPRM has no legal basis should note that the same principle of standing identified by the Supreme Court in *Biden v. Nebraska*—based on the financial injury the proposed plan will cause state instrumentalities that service student loans, 143 S. Ct. at 2368—is applicable to this plan.

[7] WILLIAM SHAKESPEARE, MACBETH act 5, sc. 5.

The idea that the Department may unilaterally cancel over one hundred billion dollars in student loan debt arose not as a consideration by members of Congress in the 1965 passage of the HEA, or in the 1993 establishment of the direct student loan program, but decades after these milestones, in January 2021, when the Department considered whether it had authority under the HEROES Act or the HEA to cancel principal balances of student loan debt "on a blanket or mass basis."[8] In a memorandum composed by the Department's Office of the General Counsel a mere three years ago ("2021 Memorandum"), the Department rightly recognized that neither statute granted it such authority.

The 2021 Memorandum considered whether the HEROES Act, which grants the Secretary authority to "waive or modify any statutory or regulatory provision" relating to student loan programs under Title IV of the HEA "in connection with a war or other military operation or national emergency,"[9] could serve as the basis for such debt cancellation. It concluded that the HEROES Act offered no such authority on various grounds, including the same statutory analysis on which the Supreme Court relied in *Biden v. Nebraska*—namely, that the HEROES authority to "modify" provisions relating to the student loan program could not be read to justify such drastic measures as cancelling repayment amounts.[10]

The 2021 Memorandum also considered whether Title IV of the HEA grants the Department the authority to engage in mass student loan debt cancellation. In doing so, it cited the statutory provision ("Sec. 432(a)") at issue in the present NPRM, which provides in part that, "in the performance of, and with respect to, the functions, powers and duties, vested in him by this part [relating to the Federal Family Education Loan ("FFEL") program], the Secretary may enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption."[11]

Considering this provision in a statutory context where Congress had provided numerous specific directions to the Department to cancel debt in particular circumstances, the 2021 Memorandum properly interpreted this provision 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."[12] It noted that construing the provision otherwise would "swallow up and render surplusage many Title IV provisions" and would

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[8] https://static.politico.com/d6/ce/3edf6a3946afa98eb13c210afd7d/ogcmemohealoans.pdf at 3.
[9] 20 U.S.C. § 1098bb(a)(1).
[10] https://static.politico.com/d6/ce/3edf6a3946afa98eb13c210afd7d/ogcmemohealoans.pdf at 6.
[11] 20 U.S.C. § 1082(a)(6) (cleaned up).
[12] https://static.politico.com/d6/ce/3edf6a3946afa98eb13c210afd7d/ogcmemohealoans.pdf at 4 (footnotes omitted).

potentially run afoul of the Spending Clause,[13] which gives Congress the power of the purse, and federal law that prohibits government officials from engaging in spending that has not been authorized by Congress.[14]

In rejecting the existence of such far-reaching authority to cancel loan balances on a mass basis, the Department noted that it "has never relied on the HEROES Act or any other statutory, regulatory, or interpretative authority for the blanket or mass cancellation, compromise, discharge, or forgiveness of student loan principal balances, and/or the material change of repayment amounts or terms, and rightly so, for the statutory text does not permit, authorize, or support such action."[15]

B. The Supreme Court Invalidates the Biden Administration's First Attempt at Mass Student Loan Debt Cancellation Under the HEROES Act.

After taking office in 2021, the Biden Administration rejected this utterly reasonable interpretation of these limited provision in the HEROES Act and HEA and has attempted to employ them to cancel principal balances on student loans in fulfillment of the President's campaign promises.[16]

On August 24, 2022, President Biden announced that his Department of Education would undermine the federal student loan program by canceling up to $20,000 in student loan debt for every borrower in America whose individual annual income was less than $125,000—or $250,000 for married couples.[17] In doing so, his Administration relied on the Secretary's authority under the HEROES Act to "waive or modify" student loan program provisions in connection with the "national emergency" of the COVID-19 pandemic. The plan specifically blew open two sections of the HEA—relating to discharging the liability of a borrower under limited circumstances such as death, disability, or bankruptcy of the borrower; malfeasance committed by a school; or closure of a school—by applying their generous discharge provisions to nearly every borrower in the country.[18]

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[13] U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").
[14] 31 U.S.C. §§ 1341–1342, 1349–1351, 1511–1519.
[15] https://static.politico.com/d6/ce/3edf6a3946afa98eb13c210afd7d/ogcmemohealoans.pdf at 6.
[16] *See, e.g.*, 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").
[17] https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/.
[18] *See Biden v. Nebraska*, 143 S. Ct. at 2369 (citing 87 Fed. Reg. 61514).

This first mass debt cancellation plan faced several immediate legal challenges in federal courts. On June 30, 2023, in *Biden v. Nebraska*, the Supreme Court struck down the program as beyond the Secretary's authority under the HEROES Act.[19]

In his majority opinion for the Court, Chief Justice Roberts noted that the Secretary's limited authority under the HEROES act to "waive or modify" student loan program provisions in the HEA does not constitute permission "to rewrite that statute from the ground up."[20] In explaining that the plan did not qualify as a "modification" of the student loan program in the sense of a "moderate" or "minor" change, the Court noted that, under the plan, "[n]o prior limitation on loan forgiveness is left standing" and that, "[f]rom a few narrowly delineated situations specified by Congress, the Secretary has expanded forgiveness to nearly every borrower in the country."[21] Likewise, the Court reasoned that the word "waive" grants the Secretary no authority to dramatically expand the scope of the HEA's forgiveness provisions to encompass nearly every borrower.[22] The Court's message was clear: it was "highly unlikely" that Congress had, with such "subtle device[s]," granted the Secretary authority to substitute his preferred version of the HEA over the version that Congress approved.[23]

Importantly, the *Biden v. Nebraska* majority opinion included a description of the Secretary's cabined authority to cancel or reduce loan balances under the HEA, which it explained is applicable "only in certain limited circumstances and to a particular extent."[24] In describing that authority, the Court referred to the congressionally authorized public service loan forgiveness ("PSLF") program directing the Secretary to cancel loan debt of a set of public servants; authorization of the Secretary to cancel the loans of individuals who have died, become disabled, or gone bankrupt; and authorization of the Secretary to discharge loan debt involving the false certification of borrowers, school closures, and failure by schools to pay loan proceeds to lenders.[25] Despite the massive economic and political significance the Department has now applied to Sec. 432(a) regarding its ability to cancel loan balances, the Court made no mention of any HEA-based authority for the Secretary "to enforce, pay, compromise, waive, or release" loan obligations on a mass basis.

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[19] *Id.* at 2376.
[20] *Id.* at 2368.
[21] *Id.* at 2369; *see also id.* ("The Secretary's plan has 'modified' the cited provisions only in the same sense that "the French Revolution 'modified' the status of the French nobility"—it has abolished them and supplanted them with a new regime entirely.") (citing *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 228 (1994)).
[22] *Id.* at 2371.
[23] *See id.* at 2369–70.
[24] *Id.* at 2363.
[25] *Id.*

C. The Department Announces Plans to Circumvent the Supreme Court's *Biden v. Nebraska* Decision.

On the same day the Supreme Court decided *Biden v. Nebraska*, the Department announced that it would respond to its total defeat in the case by again trying to cancel student loan debt on a mass basis, this time under the HEA's "compromise, waive, or release" authority under Sec. 432(a). To do so, the Department would conduct a negotiated rulemaking process involving negotiating sessions with nonfederal representatives of various constituency groups; as it announced on August 31, 2023, those constituency groups included student loan borrowers, civil rights groups, FFEL lenders, postsecondary institutions, and state agencies.[26] Underscoring the Department's lack of consideration for the cost implications of its tax revenue giveaway, the Department did not request or appoint to the negotiating committee any individuals from groups representing American taxpayers.

Also on the day that the Supreme Court issued its decision in *Biden v. Nebraska*, the Department announced that it had finalized a separate student loan plan, the "SAVE Plan,"[27] and it published the details of the program in the *Federal Register* 10 days later.[28] Under the guise of a student loan "repayment" plan, the SAVE Plan offers student loan borrowers such exceedingly generous conditions on the repayment of their loans—including the exemption of a large share of their incomes from the amount used to calculate monthly payments, a reduction in the percentage of undergraduate loan borrowers' income paid each month, substantially shortened payment timelines for borrowers with low original loan balances, and a refusal to charge any interest on loans that is not covered by the borrower's monthly payment—that it transforms the federal student loan program into a grant program. One independent estimate pegs the cost of that program to taxpayers at $475 billion.[29]

On April 17, 2024, just under seven months before the presidential and congressional elections, the Department published the present NPRM, representing its second attempt at mass loan cancellation. The Department noted in the press release accompanying this NPRM that the regulations it proposes do not represent the full extent of the Secretary's authority to waive student loan debts on a mass basis and that it plans to publish a proposed rule relating to "borrowers

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[26] 88 Fed. Reg. 60163, 60163–64 (Aug. 31, 2023).
[27] https://www.ed.gov/news/press-releases/secretary-cardona-statement-supreme-court-ruling-biden-administrations-one-time-student-debt-relief-plan.
[28] Improving Income Driven Repayment for the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan (FFEL) Program, 88 Fed. Reg. 43820, 43875 (July 10, 2023).
[29] https://budgetmodel.wharton.upenn.edu/issues/2023/7/17/biden-income-driven-repayment-budget-update.

experiencing hardship" "in the coming months."[30] According to the Department, that publication "will include proposals to authorize the automatic forgiveness of loans for borrowers at a high risk of future default as well as those who show hardship due to other indicators, such as high medical and caregiving expenses."[31]

D. The NPRM Would Cancel Loan Debt for Nearly 30 Million Borrowers and Cost Almost $150 Billion.

In its NPRM, the Department announces new regulations that "would allow the Secretary to address significant challenges identified with student loan repayment that implicate considerations of equity and fairness," in addition to "a borrower's inability to repay their loans in full within a reasonable period or circumstances where the costs of enforcing the debt exceed the expected benefits of continued collection."[32] The proposals are only intended to "provide greater specificity regarding certain *non-exhaustive* situations in which the Secretary may exercise discretion to waive all or part of any debts owed to the Department."[33] Importantly, the NPRM does not foreclose action by the Secretary outside of these situations or identify *any limitation whatsoever* on his authority to cancel federal student loan balances;[34] it is intended only to provide clarity regarding when the Secretary might choose to exercise this (allegedly) vast statutory authority.

The NPRM proposes to create an entirely new set of regulations (34 C.F.R. § 30.80 *et seq.*) specifying such circumstances in which the Secretary has chosen, for now, to exercise his unfettered discretion to "waive" student loan balances pursuant to his supposed authority under Sec. 432(a). The Department describes these authorities as follows:

- § 30.81: The Secretary may provide for a one-time cancellation of a borrower's entire loan principal balance if the borrower's outstanding balance is higher than the amount the borrower owed when the loan entered repayment, is enrolled in an income-driven repayment ("IDR") plan, and has an annual income of up to $120,000 for a borrower who is single or married filing separately ($180,000 as head of household and $240,000 as married filing jointly).

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[30] https://www.ed.gov/news/press-releases/biden-harris-administration-releases-first-set-draft-rules-provide-debt-relief-millions-borrowers.
[31] *Id.*
[32] NPRM at 27567.
[33] *Id.* at 27564 (emphasis added).
[34] *See, e.g.*, *id.* at 27568 (characterizing the regulatory text as "specifying the Secretary's authority to waive *all or part of any debts* owed to the Department, including, *but not limited to*, waivers" identified in the following sections) (emphases added).

- § 30.82: The Secretary may provide for a one-time cancellation of the lesser of $20,000 or the amount by which the borrower's balance exceeds the amount the borrower owed when the loan entered repayment for any borrower who does not qualify for cancellation under § 30.81.

- § 30.83: The Secretary may cancel the entire outstanding student loan balance for any borrower who only has undergraduate student loans that first entered repayment at least 20 years ago and for any borrower who has other student loans that first entered repayment at least 25 years ago.

- § 30.84: The Secretary may cancel the entire outstanding student loan balance for any borrower who is eligible for cancellation in an IDR plan but who is not enrolled in one.

- § 30.85: The Secretary may cancel the entire outstanding student loan balance for any borrower who has not applied for (or has not successfully applied for) a statutory loan cancellation opportunity but who is eligible for such an opportunity.

- § 30.86: The Secretary may cancel the entire outstanding student loan balance for any borrower who used the loan to attend an institution or program for which the Department has issued a final decision or determination that ends its eligibility for funds under Title IV of the HEA due to failure to meet standards related to student outcomes or financial value.

- § 30.87: The Secretary may cancel the entire outstanding student loan balance for any borrower who used the loan to attend an institution or program that closed and has not met for at least a year a standard relating to student outcomes or was subject to a Department review relating to financial value that was unresolved when it closed.

- § 30.88: The Secretary may cancel the entire outstanding student loan balance for any borrower who used the loan to enroll in a gainful employment program that has closed and prior to its closure had a high debt-to-earning rate or low median earnings or (if the Department did not produce such data) received a majority of funds from programs with high debt-to-earnings or low median earnings rates.[35]

For FFEL loans, which are private loans guaranteed by the Department, the Department claims the authority to waive loan balances in the case of loans that first entered repayment in 2000 or earlier,

[35] *Id.* at 27568–69.

loans that are eligible for closed school discharge relief for which the borrower has not applied, and loans used to attend institutions that lost eligibility for funding under Title IV of the HEA due to high borrower default rates.[36] To do so, the Secretary will force the lender to surrender the FFEL loan in return for the cost of the current loan balance and then waive the outstanding balance of the loan.[37]

Finally, in a doomed attempt to dodge any attack on its authority to issue the regulations on the grounds of its obligations to collect outstanding debts under the Federal Claims Collection Act ("FCCA"), the Department proposes to amend its regulations at § 30.70 to provide that, when exercising the authority it claims in the NPRM to cancel student loan balances, the Secretary "may use" the regulatory standards associated with the FCCA.[38]

The NPRM estimates that its net budget impact would be approximately $147 billion,[39] and the accompanying Department press release estimates that nearly 30 million borrowers would receive debt cancellation under the provisions of the NPRM.[40] Despite its massive costs and import for taxpayers, borrowers, states, nonprofit employers, and others across society, the NPRM sets a 30-day deadline for comments.[41]

II. The Department's Proposed Rule Is Not in Accordance with Law and in Excess of Its Statutory Authority.

A. The Secretary's Waiver Authority in the HEA Is Limited to Carrying out Explicit Congressional Directives and Cannot Be Applied on a Mass Basis.

1. The History and Structure of the HEA Make Clear that Sec. 432(a) Never Authorized Mass Student Loan Debt Cancellation.

The Department relies on Sec. 432(a) throughout the NPRM as the statutory authority for the Secretary to cancel, on a mass basis, any student loan balances he wishes for whatever reasons he determines are relevant to his decision.

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[36] *Id.* at 27569.
[37] *Id.* at 27616.
[38] *Id.* at 27568.
[39] *Id.* at 27603–04.
[40] https://www.ed.gov/news/press-releases/biden-harris-administration-releases-first-set-draft-rules-provide-debt-relief-millions-borrowers (estimating that over 4 million borrowers have received loan cancellation so far due to Biden Administration actions and that the proposed rule would increase this number to over 30 million borrowers).
[41] NPRM at 27564.

As explained *supra*, that provision merely provides that, "in the performance of, and with respect to, the functions, powers and duties, vested in him by this part, the Secretary may enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption."[42]

The text of Sec. 432(a) was included in the HEA as passed in 1965, and specifically in section B of Title IV of that Act, which created a loan guarantee program through which the federal government offered insurance on student loans issued by lenders (but not directly by the federal government) to encourage the development of a robust student loan market in the states to help middle-income students pursue higher education opportunities.[43] That guarantee program is now called the FFEL program, and while that program ceased in 2010, many FFEL loans are still in repayment. Importantly, as discussed *infra*, Sec. 432(a) is thus in the portion of the HEA that authorizes the FFEL program, and not the Direct Loan program created by Congress in 1993.

As passed in 1965, part B of Title IV of the HEA, where the Department's sole authority to pursue this rulemaking resides, *did not* envision that the federal government would issue, collect, or much less forgive student loan debt. The purpose of that program was to encourage state instrumentalities and nonprofit private funds that did not already do so to insure loans to students for attendance at postsecondary institutions and for the federal government to insure such loans in states where that insurance apparatus did not exist.[44] The legislation itself identified that its purpose was "to encourage States and nonprofit private institutions and organizations to establish adequate loan insurance programs for students in eligible institutions" and "to provide a Federal program of student loan insurance for students who do not have reasonable access to a State or private nonprofit program of student loan insurance . . . ."[45]

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[42] *Supra* note 11.
[43] *See, e.g.*, Congressional Record, Aug. 26, 1965, at 21898 (Statement of Rep. Gibbons) ("The question is asked, Who will make the loans? The answer is private lending institutions. The bill in section 434(b) defines an eligible lender to include any financial or credit institution subject to examination and supervision by any State or by the United States. It will, of course, include the thousands of commercial banks throughout the Nation, many of whom are now making higher education loans to students under established State and private nonprofit guaranty programs.").
[44] *See, e.g.*, *id.* ("There has been a most commendable effort by State and private agencies in meeting a pressing national need. Instead of discouraging and possibly displacing these efforts by an active and competing Federal program, this legislation encourages and fosters even greater non-Federal effort.").
[45] Sec. 421(a), Title IV HEA (as enacted), Public Law 89-329, 79 Stat. 1219, Nov. 8, 1965. The statute as enacted separately provided for the federal government to pay a portion of interest on certain student loans, but that provision did not constitute an agreement or transaction between the federal government and the borrower, but rather between the federal government and the lender.

Pursuant to this purpose, the legislation as debated and passed spoke not of any agreement between the federal government and the borrower, but rather the federal government and lenders[46] as well as states and nonprofit organizations that insure student loans[47] for the purpose of guaranteeing loans and paying interest on behalf of student loan borrowers. Sec. 432(a) can only be understood in light of the original structure, as passed in 1965, of part B of Title IV of the HEA: it referred not to the authority to "compromise, waive, or release" any student loans, but rather of the rights and obligations arising from the agreements made pursuant to that part of the statute. Given the provisions of authority with regard to agreements between the federal government and lenders, the law reasonably granted the Department the authority to "enforce, pay, compromise, waive, or release" its rights with respect to these claims. There is absolutely no indication that, under the indirect structure contemplated by Congress in establishing the loan *insurance* program in Title IV of the HEA, that it was granting anything close to the right of the Department to "waive" any (or all) debt borrowers owed to their lending institutions. To believe so would be to totally misunderstand the nature of the federal government under the HEA as passed in 1965 as a *guarantor* of federal loans, not as a direct lender.

This understanding allows us to make sense of the remaining powers granted to the Commissioner of Education (the Secretary's predecessor in implementing part B of Title IV of the HEA) in Sec. 432(a). These powers included "consent to the modification, with respect to rate of interest, time of payment of any installment of principal and interest or any portion thereof, or any other provision of any note or other instrument evidencing a loan which has been insured by [the Commissioner] under this part . . . ."[48] This provision allowed the then-Commissioner of Education to *consent* to a lender's alteration of the terms and conditions of a loan, but not to modify those terms himself through his general powers to "enforce, pay, compromise, waive, or release" rights and obligations.

This interpretation of the original language is confirmed in the House Education and Labor Committee Report describing the legal powers of the Commissioner of Education under § 1082:

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[46] *See, e.g., id.* Sec. 428(a)(2) ("The holder of a loan with respect to which payments are required to be made under this section shall be deemed to have a contractual right, as against the United States, to receive from the Commissioner the portion of interest which has been so determined."); *id.* at Sec. 429 ("If, upon application by an eligible lender . . . , the Commissioner finds that the applicant has made a loan to an eligible student which is insurable under the provisions of this part, he may issue to the applicant a certificate of insurance covering the loan and setting forth the amount and terms of the insurance.").
[47] *See, e.g., id.* Sec. 428(b)(1) ("Any State or any nonprofit private institution or organization may enter into an agreement with the Commissioner for the purpose of entitling students who receive loans which are insured under a student loan insurance program of that State, institution, or organization to have made on their behalf the payments provided for in subsection (a) . . . .").
[48] 20 U.S.C. § 1082(a)(4).

"This section authorizes the Commissioner, in carrying out the act, to make regulations, sue and be sued, prescribe and modify the terms of insurance contracts, permit the modification of student loan agreements, and to settle insurance claims."[49] This description confirms that the Commissioner of Education's powers were of a limited nature, in particular regarding permitting modification of loan agreements and settling insurance claims. The report moreover confirms that no one considered the Commissioner of Education's power under the HEA to include the waiver of student loan debts owed by a borrower to a lender.

While the FFEL program certainly changed over the course of ensuing decades, this legislative history serves as powerful evidence that Congress did not write this provision to grant extensive waiver or compromise authority to the Secretary over vast (or, at the time, any) amounts of student loan debt. Congress, over the years, authorized or directed the Secretary to offer loan forgiveness under FFEL in specific circumstances. For instance, in 20 U.S.C. § 1087, Congress provided for the discharge of loans for borrowers who have died or become permanently disabled,[50] borrowers who have gone bankrupt,[51] and borrowers of loans for students who could not complete their educational program because the closure of the institution.[52] The fact that Congress provided for the discharge of debt in these limited situations did nothing to transform Sec. 432(a) into an all-encompassing authority for the Secretary to cancel debt as he sees fit. On the contrary, these specific directions and authorities represent the kinds of boundaries in which Congress contemplated that the Secretary would exercise his Sec. 432(a) powers with fidelity to the structure of the HEA and the FFEL program.

In sum, the legislative history of the HEA and the text and structure of the statute confirm that Sec. 432(a) grants the Secretary no authority to waive student loan debt outside of the narrow circumstances in which Congress has directly authorized the Secretary to do so.

2. The Structure of the HEA Confirms that Any Sec. 432(a) Waiver Must Be Carried out on a Case-by-Case Basis.

The Department imagines that the Secretary's waiver authority under § 1082(a)(6) extends to "automated" cancellation of loan balances based on identification of "specific circumstances that warrant relief and those circumstances affect multiple borrowers."[53] The NPRM cites no authority for this assertion, and it completely contradicts the HEA's structure in authorizing the Secretary to grant relief in some circumstances but not others.

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[49] House Education and Labor Committee Report, Higher Education Act of 1965, 89th Congress, 1st Session, Report No. 621, at 49, July 14, 1965.
[50] 20 U.S.C. § 1087(a)(1).
[51] *Id.* 1087(b).
[52] *Id.* 1087(c).
[53] NPRM at 27567.

As the 2021 Memorandum authored by the Department's Office of the General Counsel points out, "[a]ttempting to shoehorn broad authority into [Sec. 432(a)] would create a paradigmatic 'elephant in a mousehole,' swallow up and render surplusage many Title IV provisions, and needlessly create Spending Clause, Antideficiency Act, and dispensing power concerns."[54] The HEA's explicit recognition of the Secretary's authority to cancel loan debt in certain defined circumstances, such as those discussed *supra* in § 1087, would make no sense in light of the unfettered power the Department asserts on behalf of the Secretary in this NPRM to cancel any debt he sees fit. And the interpretation of the Secretary's authority to be limited to case-by-case, individualized decisions to waive loan debt in circumstances authorized by Congress is far less likely to generate major constitutional concerns under the Spending Clause and Vesting Clause[55] than the authority to cancel all student loan debt in the country—which is what the Department claims for the Secretary in this rulemaking.

3. The Considerations on Which the Department Bases the Contours of the Secretary's Waiver Action Are Totally Divorced from Any Standards Set out by the HEA.

Sec. 432(a) states that the Secretary may only "enforce, pay, compromise, waive, or release" the rights and obligations to which it refers "in the performance of, and with respect to, the functions, powers and duties, vested in him by this part."[56] This language makes clear not only that loan balance "waiver" must be limited to circumstances specified under the HEA; it requires the Secretary to exercise this power "in the performance of" his HEA-prescribed "functions, powers and duties." As this is the only principle on which the exercise of this power is based under the statute, it is important to consider what it means.

The Department's apparent interpretation of this clause—that the Secretary may make any consideration he wishes to cancel any loan balances for any reasons—must be incorrect, both because of the limitations provided by the statutory language and because such an interpretation would create serious constitutional issues under the Spending Clause and Vesting Clause. But the NPRM repeatedly refers to "fairness" and "equity" in justifying decisions whether to waive some loans and not others. For instance, to justify the waiver of loans for borrowers who attended a program that lost Title IV funds due to adverse action by the Secretary, the NPRM reasons that "we think it is unfair to expect borrowers to continue repaying loans from a time when we know the issues at the institution or program were so significant that they warranted adverse Secretarial

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[54] https://static.politico.com/d6/ce/3edf6a3946afa98eb13c210afd7d/ogcmemohealoans.pdf at 4 (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).
[55] 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.").
[56] 20 U.S.C. § 1082(a).

action."[57] The Department proposes a FFEL waiver for closed school discharges "because that is a forgiveness opportunity that is available to FFEL borrowers which we are concerned that many eligible borrowers do not appear to be aware of and, as a result, may be unnecessarily struggling with unaffordable loans."[58] The Department states that it wishes to grant waivers "for borrowers who took out loans that are captured in [cohort default rates] that led to institutional ineligibility because we are concerned that when the Secretary cuts off aid to an institution for this reason it is a sign that a borrower is not getting the benefit of the bargain," and this "provides equitable treatment for the borrowers whose results showed their loans were not faring well with those who were protected after that point . . . ."[59] The Department describes the benefits of its proposed rule as "help[ing] some borrowers who receive relief to better afford necessities, prepare for retirement, invest in other assets, and safeguard against financial shocks," as well as "guard[ing] against a 'chilling effect' on postsecondary attainment . . . ."[60]

There is no doubt that fairness and consideration for struggling borrowers are worthy policy concerns that should be included by members of Congress in their deliberations and debates regarding legislation affecting the student loan program—in combination with the cost of any such changes to American taxpayers. However, the Department points to no instance in which Sec. 432(a) allows it to incorporate such fairness and equity concerns in its consideration of whether to "enforce, pay, compromise, waive, or release" rights and obligations. Using the Department's logic, it could incorporate *any* consideration in its decisions regarding who gets a waiver and who does not. On such grounds, the Department could grant waivers only to those borrowers who attended colleges that did *not* close or did *not* lose Title IV funds, or whose loan balances are significantly *below* their original balance. Perhaps these are not good policy judgments, but they would no doubt be permitted under the Department's "anything goes" approach to interpreting the Secretary's authority under the statute.

Escaping this trap is not difficult because the statute provides a solution: the Secretary can only exercise his waiver authority "in the performance of, and with respect to, the functions, powers and duties, vested in him by this part." That means that he must make the decision whether to "enforce, pay, compromise, waive, or release" rights and obligations (on a case-by-case basis) based on whether doing so would be in fulfillment of his HEA duties. A paradigmatic example of such an action would be the Secretary's decision that pursuing a debt claim against a particular borrower would be a waste of federal resources in light of the Secretary's responsibility to pursue other claims under the HEA. This interpretation of Sec. 432(a), entrusting the Secretary as faithful guardian of the student loan system and the taxpayer dollars that fund that system, is far more

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[57] NPRM at 27580.
[58] *Id.* at 27586.
[59] *Id.*
[60] *Id.* at 27588.

realistic than the Department's vision of a Secretary authorized to pursue whatever objectives he prefers and spend whatever taxpayer money is necessary to do so.

4. The Department's Interpretation of Sec. 432(a) Would Render Congress's Passage of the HEROES Act Pointless.

If the Department already possesses the power it claims under the HEA to "compromise, waive, or release" any loan debt it wishes with the stroke of a pen, then Congress's 2003 grant of broad authority to the Secretary to "waive or modify any statutory or regulatory provision applicable to" the student loan program "in connection with a war or other military operation or national emergency,"[61] and its specification that "[t]he Secretary is not required to exercise the waiver or modification authority under this section on a case-by-case basis,"[62] would have been utterly pointless because the Secretary would have already possessed such authority for decades.

The Department offers no limitation for its interpretation of the Secretary's authority to cancel loan debt for whatever reason he decides is necessary. The regulations the Department proposes to issue merely "clarify" the Secretary's waiver authority; they are "nonexhaustive" and do not "limit the Secretary's discretion to waive debt in other circumstances permitted under Sec. 432(a) . . . ."[63] As explained *supra*, the Department also interprets the HEA to grant the Secretary the authority to engage in "automated" cancellation of loan balances based on identification of "specific circumstances that warrant relief and those circumstances affect multiple borrowers."[64]

So if the Secretary could, since 1965, already cancel any student loan balance for any number of borrowers for whatever reason he chose, then why did Congress grant him authority to do exactly the same thing—albeit on a more limited basis (*i.e.*, with respect to wars or other national emergencies)—in the HEROES Act of 2003? The Department cannot respond by relying on any relaxed rulemaking requirements of the HEROES Act because its NPRM explains that the HEA does not "require the Secretary to undergo rulemaking before taking *any* action authorized" under Sec. 432(a).[65] Under its unlimited interpretation of the Secretary's power under Sec. 432(a), the Secretary's authority under the HEROES Act is completely superfluous.

Of course, the reason the HEROES Act was passed is that Sec. 432(a) does not grant the Secretary the unlimited authority to waive any loan balances he sees fit for whatever reason. Sec. 432(a) also must be interpreted to require the Secretary to exercise his waiver authority on a case-by-case basis, a requirement from which the HEROES Act explicitly diverges in the exigent circumstances

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[61] 20 U.S.C. § 1098bb(a)(1).
[62] *Id.* § 1098bb(b)(3).
[63] NPRM at 27569.
[64] *Supra* note 53.
[65] NPRM at 27569 (emphasis added).

where it applies. The fact that the Department's expansive reading of the HEA would render the HEROES Act duplicative is yet further evidence that the assertion of authority at the heart of this NPRM far exceeds the Department's actual authority under the HEA.

B. Even if the Secretary's Claimed Waiver Authority Applies to FFEL Loans, It Does Not Apply to Direct Loans.

As explained *supra*, Sec. 432(a) applies by its terms only to the Secretary's authority as part of the FFEL program of Title IV of the HEA.[66] Therefore, that provision does not and cannot, on its own, authorize *any* waiver authority with respect to the Direct Loan program, much less that proposed in the bulk of the Department's NPRM.

In "analysis" spanning a single footnote, the Department attempts to dodge this major problem by claiming that the Secretary's FFEL-based waiver authority applies to the Direct Loan program through 20 U.S.C. § 1087a(b)(2).[67] That statutory provision, included in the 1993 law creating the Direct Loan program, states that Direct Loans "have the same terms, conditions, and benefits as loans made to borrowers" in the FFEL program. The Department then bases its flawed conclusion on an incomplete and misleading list of court precedents and an unconvincing interpretation of the legislative history of the Direct Loan program.[68]

Starting with the text of the statute, it only applies the "terms, conditions, and benefits" of FFEL loans to Direct Loans but does not define these words. As commonly understood, the "terms" and "conditions" of an agreement (such as a loan) refer, respectively, to "provisions that determine the nature and scope of an agreement,"[69] and the "premise upon which the fulfillment of an agreement depends."[70] These words offer strong evidence that they refer to the provisions of the contract between the borrower and the lender. To interpret them to encompass actions committed to the discretion of the Secretary stretches the meaning of these words to their breaking points. It would be akin to saying that the power of state courts to invalidate a contract for, say, unconscionable provisions is a "term" or "condition" of every agreement reached in the state. Just because a party has the power, at its sole discretion, to render a contract void or nullify its terms does not make that power part of the "nature and scope" of that contract.

Likewise, the Secretary's authority to "enforce, pay, compromise, waive, or release" rights or obligations are not "benefits" of an agreement in any sense of the word, since they are (again) not

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[66] *Supra* page 11.
[67] NPRM at 27566 n.4.
[68] *Id.*
[69] https://www.merriam-webster.com/dictionary/term (definition 4).
[70] https://www.merriam-webster.com/dictionary/condition (definition 1a).

part of any loan agreement, and further are not necessarily "beneficial" to any particular party—depending, for instance, on whether the Secretary chooses to "enforce" or "waive" an obligation.

In the NPRM, the Department makes the surprising admission that, when Congress wishes to grant the Secretary the same powers he possesses under the FFEL program, it knows how to do so. In applying its unlawful waivers to the Health Education Assistance Loan ("HEAL") program, the Department notes that, "[w]hen transferring the HEAL loan program to the Department [in 2014], Congress explicitly stated that the Secretary's powers with respect to collecting FFEL loans extend to HEAL loans."[71] The Department is correct: the Consolidated Appropriations Act of 2014 granted the following powers to the Secretary:

> In servicing, collecting, and enforcing the loans described in subsection (a) [transferring responsibility for the servicing and collection of any outstanding loans under the HEAL program that remain outstanding to the Secretary], the Secretary of Education shall have available *any and all authorities available to such Secretary in servicing, collecting, or enforcing* a loan made, insured, or guaranteed under part B of title IV of the HEA of 1965.[72]

Likewise, in authorizing the Secretary to carry out the Perkins Loan program, Congress explicitly granted the Secretary the same powers he has under the FFEL program: "to enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption."[73]

Had Congress wished to grant the Secretary the same powers in the FFEL loan program to "enforce, pay, compromise, waive, or release" rights and obligations, it could have easily done so. Instead, it merely applied the "terms, conditions, and benefits" of loans guaranteed under the FFEL program to those issued under the Direct Loan program.

The scant judicial authority the Department cites in favor of its contention that its Sec. 432(a) powers extend to Direct Loans does little to help its argument. The 2011 case it cites from the U.S. Court of Federal Claims simply noted, but did not discuss, that the Department had applied its Sec. 432(a) authority to a defaulted Federal Direct Consolidation Loan.[74] In fact, the Department argued (and succeeded in doing so) that the individual purporting to exercise such authority on behalf of the Department had failed to compromise the debt according to Department guidelines.[75]

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[71] NPRM at 27566 n.5.
[72] Consolidated Appropriations Act 2014, 113 P.L. 76, Division H, title V, Sec. 525(d) (emphasis added).
[73] 20 U.S.C. § 1087hh.
[74] *McCain v. United States*, 2011 U.S. Claims LEXIS 1107, *19–*20.
[75] *Id.* at *19, *25.

The 2020 case the Department cites from the U.S. District Court for the District of Columbia merely paraphrases a contention from the complaint, without any discussion on the issue, that the Secretary's compromise and settlement authority applies both to FFEL and Direct Loans.[76]

The only case the Department cites that can truly be construed in favor of the argument that Sec. 432(a) applies to the Direct Loan program is a case from the U.S. District Court for the Northern District of California, decided in 2022 (nearly 30 years after the creation of the Direct Loan program), applying the Secretary's compromise authority for the FFEL loan program to loans issued under the Direct Loan program.[77] In deciding that issue, the judge notes his disagreement with the decision on the same issue in a case from the U.S. District Court for the District of Connecticut, *Pa. Higher Educ. Assistance Agency v. Perez*,[78] which the Department arbitrarily and capriciously ignores in its NPRM.

In that case, which involved a dispute over a contract made under the Direct Loan program, the judge stated:

> [W]hile there are provisions making clear that loans issued under [the Direct Loan program] are subject to the same terms, conditions, and benefits as loans issued under [the FFEL program] . . . , and that contractors with Section 1087f contracts must comply with certain requirements set out under Part B, 20 U.S.C. § 1087e(p), I have not found, and the parties have not cited, language incorporating into Part D the Secretary's "general powers," including the consent-to-suit language of Section 1082, from Part B.[79]

The Department failed to cite another recent case in its NPRM that casts doubt on its conclusion that Sec. 432(a) applies to the Direct Loan program, *Fla. Coastal Sch. of Law, Inc. v. Cardona*[80] in the U.S. District Court for the Middle District of Florida. In that case, the judge considered whether Sec. 432(a), which bars certain injunctive remedies against the Secretary relating to the performance of duties under the FFEL program, applies to the Direct Loan program. The judge stated that, "[b]ecause the statutory provision on which the Department relies appears to be limited to the Department's duties in the particular part where it is found, . . . the Court questions whether the anti-injunction provision applies to the claims raised in this action."[81]

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[76] *Weingarten v. DeVos*, 468 F. Supp. 3d 322, 328 (D.D.C. 2020).
[77] *Sweet v. Cardona*, 641 F. Supp. 3d 814, 823 (N.D. Cal. 2022).
[78] 416 F. Supp. 3d 75 (D. Conn. 2019).
[79] *Id.* at 96.
[80] 2021 U.S. Dist. LEXIS 148639 (M.D. Fla. Aug. 9, 2021).
[81] *Id.* at *61 n.21 (citing *Perez*, 416 F. Supp. 3d at 95–96).

In sum, of the three district courts that actually considered the question, two rightly recognized that applying FFEL enforcement powers to the Direct Loan program via a provision relating to the "terms, conditions, and benefits" of student loans is questionable at best.

III. The Rule Proposed by the Department Violates the Major Questions Doctrine.

Stunningly, the NPRM includes no discussion of *Biden v. Nebraska*, the case that struck down this rulemaking's predecessor and whose application of the major questions doctrine will certainly be applied to this economically and politically significant rule by courts across the country upon its promulgation. The Department owes the public its view regarding whether the Supreme Court's major questions doctrine applies to this rule (it does) and, if so, whether the Secretary's authority to "enforce, pay, compromise, waive, or release" rights and obligations grants him clear authorization to pursue this rulemaking (it does not). If the Department does not provide its view on these issues, then it is engaged in arbitrary and capricious rulemaking.

The Department estimates that the mass cancellation of student loan balances proposed in its rule will cost taxpayers over $147 billion,[82] which eclipses the annual cost of Pell Grants and student loans.[83] This amount is also approximately three times as high as the amount the Supreme Court found triggers the major questions doctrine in the CDC's eviction moratorium case.[84] There is no question that the Department's second attempt at mass student loan cancellation is a matter of "staggering" economic significance—just as the Supreme Court concluded with regard to the Biden Administration's initial attempt at mass loan cancellation in *Biden v. Nebraska*.[85]

The mass loan debt cancellation proposed by the Department is politically significant for precisely the same reasons articulated by the Supreme Court in *Biden v. Nebraska*. Such an "assertion of administrative authority has conveniently enabled [the Secretary] to enact a program that Congress has chosen not to enact itself."[86] The more than 80 bills considered by Congress during its 116th session relating to student loan debt cancellation and other student loan issues offers strong evidence that Congress considers the issue politically significant and its own to resolve.[87] The lawsuit by six states that overturned the Biden Administration's first mass debt cancellation plan,

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[82] NPRM at 27603–04.
[83] *See* https://www.cato.org/blog/bidens-newest-folly-student-loan-forgiveness.
[84] *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (estimating the moratorium's economic impact to be approximately $50 billion).
[85] *Biden v. Nebraska*, 143 S. Ct. at 2373.
[86] *Id.* (quoting *West Virginia v. EPA*, 142 S. Ct. 2587, 2614 (2022) (internal quotation marks omitted)).
[87] *Id.* (citing M. Kantrowitz, *Year in Review: Student Loan Forgiveness Legislation*, FORBES, Dec. 24, 2020).

as well as more recent lawsuits by 18 states to overturn the Biden Administration's SAVE Plan,[88] emphasize that the issue of cancelling student loan debt is one of vast political significance with federalism impacts implicating the major questions doctrine.

For the reasons above describing why Congress never authorized the Secretary to engage in the mass cancellation of student loans based on his power to "compromise, waive, or release" rights and obligations under the HEA, Congress also never "clearly" authorized such authority. But two important factors bear mentioning here. First, since it became part of the HEA in 1965, the Secretary (and his predecessor) have *never* exercised any power to waive loan balances on an automatic or blanket basis using this provision.[89] That means that the power the Secretary now claims laid dormant for almost 60 years, only now to be conveniently discovered for the purpose of fulfilling the campaign promises of a president who is running for reelection this year. The Supreme Court in *West Virginia v. EPA* quoted Justice Frankfurter in recognizing that, "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred."[90] No such power was conferred here.

Second, major questions doctrine analysis is not limited to examining the actual rule the agency has issued, but rather "the breadth of the authority that the agency has asserted . . . ."[91] There is no limitation on the authority that the Department has asserted in this NPRM. Based on the Department's interpretation of the HEA presented in the proposed rule, the Secretary may choose to cancel every dollar of student loan debt under the programs it has identified, for any reason whatsoever. But Congress could not have envisioned, especially when it granted the Secretary the authority to "enforce, pay, compromise, waive, or release" rights and obligations in 1965, that it was offering power to the Secretary of such astounding magnitude. That is because the tradeoffs involved in decisions of such import are ones that Congress intends for itself and were never conferred on the Department.

If the Department fails to identify any limiting principle regarding the Secretary's authority to cancel student loan debt on a mass basis under Sec. 432(a), then it is engaging in an arbitrary and capricious rulemaking process, and its proposed rule is contrary to law.

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[88] *See* https://ag.ks.gov/docs/default-source/documents/1747fd3fa045c6d769d9bff0400a29f96.pdf; https://ago.mo.gov/wp-content/uploads/2024-4-8-Final-Complaint-Missouri-v.-Biden-002.pdf.
[89] *See, e.g.*, https://static.politico.com/d6/ce/3edf6a3946afa98eb13c210afd7d/ogcmemohealoans.pdf at 6.
[90] 142 S. Ct. at 2610 (quoting *FTC v. Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941)).
[91] *Id.* at 2608.

IV. The Proposed Rule's Justification Is Pretextual, in Violation of APA Provisions Requiring the Department to State the Basis of Its Decisions.

In *Department of Commerce v. New York*,[92] the U.S. Supreme Court invalidated a rule issued by the U.S. Department of Commerce ("Commerce") adding to the 2020 Decennial Census questionnaire a question about respondents' U.S. citizenship.[93] The Court found that the sole reason for the addition of the question as stated by Commerce in the contemporaneous record—that it "was simply acting on a routine data request from another agency," in this case the U.S. Department of Justice seeking data to help enforce the Voting Rights Act—"seems to have been contrived."[94] In his opinion for the Court, Chief Justice Roberts explained:

> The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.[95]

In its present rulemaking, the Department commits the infraction the Court described in *New York*. The NPRM states with regard to the Department's proposed regulations that they "will allow the Department to take more transparent steps that help to consistently alleviate the significant financial burden Federal student loans have become for *struggling or vulnerable borrowers* by waiving some or all of their outstanding loan balances."[96] Later, the Department asserts that "[t]hrough these targeted and distinct exercises of waiver the Department would deliver relief to borrowers *who need the assistance*, while continuing to collect from borrowers who are able to repay."[97]

The Department's pretense that its mass debt cancellation program is "targeted" when it would reduce the debt of nearly 30 million borrowers is incredible. Also claiming that these nearly 30 million borrowers represent "struggling or vulnerable" borrowers and that waiving these debts would still allow the Department "to collect from borrowers who are able to repay" defies belief. There is no world in which the waiver of debt on a blanket basis for nearly 30 million borrowers will appropriately capture "struggling" borrowers while excluding those who do not need relief. Given the categories the Department has chosen—such as those borrowers with a loan balance that

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[92] 139 S. Ct. 2551 (2019).
[93] *Id.* at 2576.
[94] *Id.* at 2574, 2575.
[95] *Id.* at 2575–76.
[96] NPRM at 27570 (emphasis added).
[97] *Id.* at 27590 (emphasis added).

exceeds their original balance, or those borrowers with undergraduate loans that entered repayment over 20 years ago (but may have been in deferment or forbearance during part of that time), or those borrowers who are eligible for relief on a separate plan but have not yet applied for it—it has no doubt pulled into its debt cancellation scheme millions of borrowers who can afford their student loan payments but happen to fall into one of the Department's preferred categories.

The only reasonable policy explanation behind this mismatch is that the Department's main motivation is not helping vulnerable borrowers, but realigning the HEA to pay for at least part of the cost of college for nearly all students. Having instituted a delayed grant program in the form of the SAVE Plan for borrowers moving forward, the Department is seeking to do the same for borrowers, including for borrowers who have every ability to repay their student loans, as a backward-looking matter. Thus, the justification for the rule—that it is intended to help struggling borrowers while continuing to collect from borrowers who can repay—is mere pretext and at odds with the true motives of the Department.

V. The Proposed Rule Is Arbitrary and Capricious.

A. The Department Must Develop a Secondary Cost Estimate in Case the Courts Invalidate Its SAVE Plan.

The Department has based the cost estimate in its NPRM's regulatory impact analysis on the assumption that the Biden Administration's policies with regard to student loan plans will continue. This assumption is suspect and may result in a skewed cost-benefit analysis if any of its ongoing policies cease to operate, including due to a stay of, injunction against, or declaratory judgment against one of its regulatory actions. To be specific, 18 states have sued the Administration to enjoin its SAVE Plan on the basis that it unlawfully transforms what Congress intended to be a student loan *repayment* plan into a delayed grant program.[98] Independent estimates of the SAVE Plan indicate that it could cost approximately half a trillion dollars over its first ten years.[99]

When it finalized the SAVE Plan on June 30, 2023,[100] just after the Supreme Court had struck down President Biden's first mass debt cancellation program in *Biden v. Nebraska*, the Department failed to account for the fact that the Supreme Court had erased its $430 billion program, thus drastically increasing the projected cost of its forgiveness-intensive "repayment" plan. In doing so,

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[98] *Supra* note 88.
[99] *Supra* note 29.
[100] *Supra* note 27.

the Department rejected DFI's proposal[101] that it develop a secondary cost estimate in case the mass debt cancellation program did not occur.[102]

The Department should not repeat this mistake, which has subjected its SAVE Plan to even greater legal peril under the APA. Given that the unprecedentedly expensive SAVE Plan is on shaky legal ground and will likely be subject to close examination by the courts under the "clear authorization" standard of the major questions doctrine, the Department should develop a secondary cost estimate of the rule proposed in its NPRM in case the unimplemented portions of the SAVE Plan do not go into effect on July 1, 2024. If it does not do so, then the Department is not properly balancing the costs and benefits of its rule and is engaging in arbitrary and capricious rulemaking.

B. The Department Fails to Consider Anywhere in Its Proposed Rule the Inflationary Impacts of Forgiving $147 Billion in Student Loan Debt.

The Department's NPRM fails to consider that its proposed mass debt cancellation will have inflationary impacts that damage the economy and harm the very borrowers that it claims to help through the rule. Research published by the Committee for a Responsible Federal Budget in 2022 indicated that President Biden's "three-part plan" to address student loans announced in August that year (including the mass debt cancellation program that was the precursor to the program proposed in the NPRM) "would boost inflation by 15 to 27 basis points over the next year."[103] With the debt cancellation plan proposed in its NPRM, the Department has slightly narrowed the cost of the plan to the still-massive $147 billion—though this is largely because it has arbitrarily and capriciously delayed the proposal of its plan to cancel loans based on "hardship," which is likely to balloon the cost of the Administration's loan forgiveness to unprecedented heights.

Whether considering the current plan alone or in combination with the yet-to-be-proposed "hardship" standards, these cancellation schemes will add significantly to the national debt and drive up costs to the economy and to American consumers—including student loan borrowers who are struggling with living expenses. The Department must weigh these costs against the purported benefits of the proposed rule. If it fails to do so, then it is engaging in arbitrary and capricious rulemaking.

C. The Department Fails to Consider the Proposed Rule's Federalism Impacts and Impacts on Small, Nonprofit Employers.

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[101] *See* https://dfipolicy.org/wp-content/uploads/2023/02/DFI-Comment-IDR-NPRM-02.10.2023.pdf at 21.
[102] 88 Fed. Reg. 43820, 43875.
[103] https://www.crfb.org/blogs/student-debt-changes-would-boost-inflation.

In its NPRM, the Department asserts in conclusory fashion, "The proposed regulations do not have Federalism implications."[104] The Department also concludes that, because the regulations "are focused on arrangements between the borrower and the Department," they "would not have a significant economic impact on a substantial number of 'small entities.'"[105] In both cases, the Department arbitrarily and capriciously checks a box instead of fulfilling its legal obligations to consider important costs it imposes on states and small employers.

As of January 2023, 36 states used federal taxable income or federal adjusted gross income to calculate state income tax liability.[106] Congress's American Rescue Plan Act passed in 2021 excludes from the definition of taxable income the forgiveness of student loan debt that occurs between December 31, 2020, and January 1, 2026.[107] Thus, if the Department carries out the $147 billion cancellation of debt as proposed in the NPRM before the end of 2025, these states will either lose the tax revenue on the amount of debt that would have been canceled in 2026 or later but for the Department's action, or will be forced to make costly legislative and administrative changes to their tax codes in order to capture the revenue. In either case, the Department is imposing costs on these states by shifting the cancellation of debt earlier than it otherwise would have taken place.

For both states and small nonprofit employers, the Department's proposed rule would have significant negative impacts because it will subvert the student loan advantages Congress has made available to those who work in government and other public-service positions through its PSLF program, thus harming these employers' recruitment and retention efforts. Congress created the PSLF program to make public-service employment more attractive by providing for the cancellation of the student loans of workers in this field after 10 years instead of 25.[108] Mass debt cancellation interferes with this benefit by making public-service work less attractive. Anyone identified by the Department in this proposed rulemaking receiving the cancellation of all or a portion of their remaining loan balances would receive this benefit immediately instead of in recognition of years in public service, as envisioned by Congress in creating the PSLF program. The Department must balance against any claimed benefits of the proposed rule the resulting employee recruiting and retention costs to states and small nonprofit entities that currently benefit from the PSLF; if it does not, then it is engaging in arbitrary and capricious rulemaking.

VI. The Proposed Rule Is Without Observance of Procedure Required by Law.

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[104] NPRM at 27612.
[105] *Id.* at 27609.
[106] https://www.taxpolicycenter.org/briefing-book/how-do-state-individual-income-taxes-conform-federal-income-taxes.
[107] *See* 26 U.S.C. § 108(f)(5).
[108] 20 U.S.C. § 1087e(1)(B).

On the day that it released the NPRM, the Department informed the public by press release, "in the coming months," it will propose a second rule "focused on providing relief for borrowers experiencing hardship . . . ."[109] Despite the Department's characterization of the "hardship" rule as a "separate proposal," that proposal is in the same vein as the proposed regulations in the NPRM and accomplishes the same ends: canceling massive amounts of debt based on political and policy priorities of the Department that are found nowhere in the HEA. The claimed power to cancel this debt will be the same "waiver" authority asserted without legal basis in the NPRM; it is just another facet of what the Department believes to be the Secretary's completely unbounded authority to decide who deserves debt cancellation and who does not.

Given that the alleged purpose of the current rulemaking is to "clarify" how the Secretary might use his claimed power to cancel large swathes of student loan debt,[110] it is arbitrary and capricious that the Department holds back this massive piece of the puzzle ("hardship" standards) in the present rulemaking and forces the public to comment on some "clarifications" of the Secretary's authority without understanding what the others might be.

The Department's decision to split the two proposed rules that purport to clarify the same authority is rendered even more odd because the Department admits that the "hardship" proposal "will mirror the proposals that achieved consensus among negotiators in February" negotiated rulemaking sessions.[111] If the proposed rule simply reflects the language that achieved consensus in negotiated rulemaking, then why does the Department not simply include it in the present rulemaking? The public is left to wonder what the Department is altering in the "hardship" proposal, or if the Department is simply splitting up the two rules as a legal maneuver in a doomed attempt to avoid major-questions-doctrine analysis of the regulations proposed in its current NPRM.

The APA requires more than this from the Department.[112] By leaving interested members of the public in the dark regarding the interaction of the current proposed rule and its TBD "hardship" proposal, the Department fails to observe the rulemaking procedure required by law.

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[109] https://www.ed.gov/news/press-releases/biden-harris-administration-releases-first-set-draft-rules-provide-debt-relief-millions-borrowers.

[110] *See, e.g.*, NPRM at 27571 ("Clarifying how this authority would be used through these regulations would better inform the public about how the Secretary may exercise his waiver authority in a consistent and equitable manner.").

[111] https://www.ed.gov/news/press-releases/biden-harris-administration-releases-first-set-draft-rules-provide-debt-relief-millions-borrowers.

[112] *See* 5 U.S.C. § 553(c) ("After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.").

VII. The Department Should Follow the Authorities It Cites in the NPRM by Extending Its Public-Comment Period.

The 30-day period the Department has allotted for public comments does not provide sufficient opportunity for experts and members of the public who will face substantial impacts from the proposed rule to weigh fully its implications and offer meaningful input for the Department to consider as it develops its final regulations on this subject. The Department should offer at least an additional 30 days for the public to comment on the proposed rule and end the comment period no earlier than June 17, 2024.

Allowing at least 60 days for public comment is standard practice under governing authorities cited by the Department's NPRM. The "Invitation to Comment" section of the proposed rule seeks the public's assistance "in complying with the specific requirements of Executive Orders 12866 [and] 13563 . . . ."[113] Executive Order 13563, "Improving Regulation and Regulatory Review," states that "each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, *with a comment period that should generally be at least 60 days*."[114] Executive Order 12866, "Regulatory Planning and Review," includes similar language: "[E]ach agency should afford the public a meaningful opportunity to comment on any proposed regulation, *which in most cases should include a comment period of not less than 60 days*."[115]

The Department should heed the authorities it cites and offer at least 30 more days for public comment on its NPRM.

VIII. Conclusion

With his first mass debt cancellation scheme slapped down by the Supreme Court, President Biden is trying to claim the same unprecedented and unlimited authority to cancel student loan debt—bragging recently that the Supreme Court "didn't stop me."[116] But it will. And it will for the same reasons it employed in *Biden v. Nebraska*.

Had the Department considered the Supreme Court's *Biden v. Nebraska* decision in its latest NPRM, which it did not, it might have learned that it is highly unlikely that Congress granted an unlimited authority to the Secretary to cancel loans, based on whatever factors he deems worthy, in the subtle terms of a long-extant statute that has never been implemented in the fashion now envisioned by the Department.

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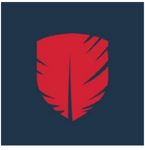
[113] NPRM at 27566.
[114] Executive Order 13563, Sec. 2(b) (emphasis added).
[115] Executive Order 12866, Sec. 6(a) (emphasis added).
[116] https://www.whitehouse.gov/briefing-room/speeches-remarks/2024/02/21/remarks-by-president-biden-on-the-saving-on-a-valuable-education-plan-culver-city-ca/.



The present rule may not be as costly as the first mass debt cancellation program (at least absent the "hardship" regulations that the Department conveniently plans to propose later), but that does not change the scope of the authority that the Biden Administration is asserting, which dwarfs that of even the HEROES Act: the ability to cancel, for any reason and at any time, any student loan debt. This is raw power with no limiting principle. It is unlawful and unconstitutional, and it must be invalidated.

For the reasons discussed above, the Department should immediately withdraw the NPRM in its entirety.

Sincerely,

/s/ *Paul F. Zimmerman*
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