Defense of Freedom Institute

December 2, 2024

**SUBMITTED VIA FEDERAL eRULEMAKING PORTAL**
**(www.regulations.gov)**

The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202
Attention: Tamy Abernathy

**Re: Comment on the Department's Notice of Proposed Rulemaking**
**Student Debt Relief Based on Hardship 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–AD95**
**Document Number: 2024–25067**

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 based on "hardship" under an obscure provision of the Higher Education Act of 1965, as amended ("HEA").

The Department's notice of proposed rulemaking issued on October 31, 2024 ("NPRM"),[1] marks the culmination of the Biden Administration's unrelenting effort to weaponize its regulatory

[1] U.S. Dep't of Ed., Proposed Rule, *Student Debt Relief Based on Hardship for the William D. Ford Federal Direct Loan Program (Direct Loans), the Federal Family Education Loan (FFEL)*

apparatus against taxpayers by forcing them to pay for the debts of student loan borrowers who chose to take on debt to attend college or a postgraduate institution. In our public comment on the Department's separate notice of proposed rulemaking issued on April 17, 2024 ("April NPRM"),[2] purporting to read into the HEA an unlimited authority to cancel student loan debt, DFI explained to the Department why reading such a power into the HEA subverts the meaning of the statute, ignores Supreme Court precedent, and renders superfluous HEA authorities that actually do authorize loan forgiveness in limited circumstances specified by Congress. Instead of heeding DFI's call to withdraw the April NPRM, the Department is pressing ahead with a proposal to cancel *even more* student loan debt based on the same alleged statutory authority as its previous plan. In the process, the Department does a disservice to taxpayers, student loan borrowers, the constitutional separation of powers, and the rule of law.

Whether to cancel up to $600 billion of student loan debt is a decision for Congress, not for the Department. This is what DFI has consistently told the Department in our public comments on its proposed schemes to cancel debt on a mass basis, and the courts (including the Supreme Court) confronting these programs have consistently agreed with us. In fact, the U.S. District Court for the Eastern District of Missouri has already agreed with DFI's position that the very HEA authority on which the Department relies in the present rulemaking does *not* empower the Department to cancel student loan debt on a massive scale.[3] The Department's attempts to distinguish the present rulemaking from the enjoined April NPRM are entirely unconvincing: when a court says the Department has no authority under the HEA to cancel student loan debt to the tune of over $100 billion, it certainly cannot use the same authority to cancel $600 billion of such debt.

DFI calls on the Department to refrain from burdening the courts with the inevitable litigation that will arise as a result of foisting such massive costs on American taxpayers without statutory authority, burdening the incoming administration with the responsibility of withdrawing this overreaching rule, or burdening Congress with the need to reassert its Article I power by passing a Congressional Review Act resolution disapproving of this rule and removing it from the Code of Federal Regulations. With the election behind us, the political leadership of the Education Department no longer has any reason to instill false hopes in student loan borrowers that their debts will be wiped clean absent relevant action from Congress. Therefore, we call on the Department to withdraw the NPRM immediately.

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*Program, the Federal Perkins Loan (Perkins) Program, and the Health Education Assistance Loan (HEAL) Program*, 89 FED. REG. 87130 (Oct. 31, 2024) (hereinafter "NPRM").

[2] U.S. Dep't of Ed., Proposed Rule, *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 "April NPRM").

[3] *State of Missouri, et al. v. U.S. Dep't of Educ.*, Case No. 4:24-cv-01316-MTS, at 3 (E.D. Mo., Oct. 3, 2024).

## I. Background

### A. The Original Mass Loan Cancellation Scheme

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.[4] In doing so, his Administration relied on the Secretary's authority under the Higher Education Relief Opportunities for Students ("HEROES") Act of 2001 to "waive or modify" student loan program provisions in connection with the "national emergency" of the COVID-19 pandemic.[5]

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, finding that the statute's "waive or modify" language could not justify the expansion of the scope of loan forgiveness authorized under the HEA to apply to nearly every borrower in the country.[6]

### B. Borrower Defense to Repayment, Closed-School Discharge, and Public-Service Loan Forgiveness Regulation

On November 1, 2022, the Department promulgated a final rule amending its regulations related to its borrower defense to repayment ("BDR") and closed-school discharge regulations.[7] Instead of working within the framework of the law, the regulations fundamentally revised the BDR statute and grafted to it a complex loan forgiveness adjudication process, none of which was contemplated by Congress when it legislated the BDR provision. The rule also manufactured extra-statutory discharge opportunities for students at schools that have yet to close in defiance of the law, and it amended the Department's public-service loan forgiveness regulations to count as "payments" qualifying borrowers for forgiveness of their remaining loan balances periods where a borrower is in deferment or forbearance—and thus are making no payments.[8] Based on assumptions in the

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4 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/.
5 *See Biden v. Nebraska*, 143 S. Ct. at 2369 (citing 87 Fed. Reg. 61514).
6 *Id.* at 2371, 2376.
7 U.S. Dep't of Ed., *Institutional Eligibility Under the Higher Education Act of 1965*, 87 FED. REG. 65,904 (Nov. 1, 2022).
8 *Id.* at 66060, 66065, 66068–73.

Department's own analysis of the rule, its implementation would have cost taxpayers close to $120 billion.[9]

On April 4, 2024, a unanimous three-judge panel of the U.S. Court of Appeals for the Fifth Circuit found that provisions challenged in a lawsuit against this regulation were "almost certainly unlawful"[10] and directed a federal district court to postpone on a nationwide basis the effective date of the regulations pending a final judgment on the challenge.[11]

### C. The SAVE "Repayment" Plan

On the day 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,"[12] and it published the details of the program in the *Federal Register* 10 days later.[13] 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.[14] One independent estimate pegs the cost of that program to taxpayers at $475 billion.[15]

State attorneys general from 18 states filed two lawsuits against the SAVE plan in federal courts. On August 9, 2024, the U.S. Court of Appeals for the Eighth Circuit issued a nationwide preliminary injunction blocking the full plan from taking effect.[16]

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[9] https://edworkforce.house.gov/uploadedfiles/8.12.22_foxx_and_burr_to_cardona.pdf at 1.
[10] *Career Colleges and Schools of Texas v. U.S. Dep't of Ed.*, No. 23-50491, at 56 (Apr. 4, 2024).
[11] *Id.* at 57.
[12] https://www.ed.gov/news/press-releases/secretary-cardona-statement-supreme-court-ruling-biden-administrations-one-time-student-debt-relief-plan.
[13] U.S. Dep't of Ed., *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).
[14] *See* https://dfipolicy.org/wp-content/uploads/2023/02/DFI-Comment-IDR-NPRM-02.10.2023.pdf at 5–6.
[15] https://budgetmodel.wharton.upenn.edu/issues/2023/7/17/biden-income-driven-repayment-budget-update.
[16] *State of Missouri, et al. v. Biden*, No. 24-2351, at 9 (E.D. Mo., Aug. 9, 2024).

### D. First HEA Mass Loan Waiver Scheme

On April 17, 2024, the Department published its April NPRM, representing a part of its backup plan for engaging in mass loan cancellation after the Supreme Court halted its first mass loan cancellation scheme in *Biden v. Nebraska*.

The April NPRM proposed to create an entirely new set of regulations specifying such circumstances in which the Secretary chose to "waive" student loan balances pursuant to his supposed authority under Section 432(a) of the HEA (discussed in more detail later in this comment). According to the April NPRM, that provision authorizes the Secretary to cancel all or part of a borrower's principal loan balance (depending on the borrower's annual income) if the borrower's outstanding balance is higher than the amount the borrower owed when the loan entered repayment, to cancel the loan balance of borrowers whose undergraduate loans entered repayment more than 20 years ago or whose graduate student loan entered repayment more than 25 years ago, to cancel the loan balance of borrowers who are entitled to a loan cancellation opportunity but have not applied for one, and to cancel the loan balance of borrowers who attended institutions that closed or failed to meet certain standards regarding student outcomes or financial value.[17] The April NPRM estimates that the outlandish net budget impact of its proposals would be approximately $147 billion.[18]

On October 3, 2024, the U.S. District Court for the Eastern District of Missouri, finding a coalition of six plaintiff states were likely to succeed on the merits of their challenge to the first HEA loan waiver scheme, issued a preliminary injunction blocking the Department "from mass canceling student loans, forgiving any principal or interest, not charging borrowers accrued interest, or further implementing any other actions under the [first HEA mass loan cancellation scheme] or instructing federal contractors to take such actions."[19] No doubt due to this preliminary injunction, the Department has not yet published the final rule for the loan cancellation scheme contained in its April NPRM.

### E. Hardship-based HEA Mass Loan Debt Cancellation

On October 31, 2024, five days before the presidential and congressional elections, the Department published a proposed rule that, if finalized, would constitute yet another attempt to engage in mass student loan debt cancellation through imagined authority under the HEA.

The regulations proposed in the present NPRM "would specify the Secretary's authority to waive all or part of any student loan debts owed to the Department based on the Secretary's determination

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[17] April NPRM at 27568–69.
[18] *Id.* at 27603–04.
[19] *State of Missouri, et al. v. U.S. Dep't of Educ.* at 3.

that a borrower has experienced or is experiencing hardship related to such a loan."[20] According to the Department, such discretion exists when "the Secretary determines that a borrower is facing hardship that impairs their ability to fully repay the loan or imposes unwarranted costs that exceed the benefits of continued collection."[21]

The proposed rule would recognize two pathways for the Secretary to cancel such loan debt. First, the Department would develop a "predictive assessment" using data that is already in the possession of the Department to identify borrowers who are at least 80 percent likely to default on their student loans within two years of the publication date of the proposed regulations; the Secretary would have the discretion to cancel the full amount of the student loan debt of those borrowers immediately ("immediate cancellation").[22] Second, the Secretary would have ongoing discretion to cancel all or a portion of the student loan debt of borrowers meeting a standard of "hardship" based on a "holistic assessment" of their circumstances ("additional cancellation"). The Secretary would base this holistic assessment of the borrowers' circumstances on information already in the possession of the Department and an application process through which borrowers may request that the Secretary cancel their loans.[23]

The NPRM lists 17 factors that the Secretary "may consider" in determining whether to cancel student loans using either the predictive assessment or the holistic assessment. The listed factors include those relating to the borrowers' current and past finances, borrowers' experience repaying student loans, borrowers' personal attributes, borrowers' postsecondary experiences, and the extent to which the borrowers' "hardship" is likely to persist.[24] The NPRM explains that this list is "non-exhaustive" and includes a "catch-all" provision that essentially makes the listing of other factors meaningless, stating that the Secretary can identify and consider "[a]ny other indicators of hardship" in canceling the debts of student loan borrowers.[25] Thus, the Secretary is free to consider any of the other 16 factors, or none of them, or any other factor the Secretary fancies, in deciding that a borrower is experiencing "hardship" justifying the cancellation of up to the full outstanding balance of that borrower's loan.

The Department admits in its NPRM that it has not yet developed a model that would perform the "predictive assessment," but it has proposed a series of "predictors" it will use as inputs in this yet-to-be-prepared model and appears to indicate that the model will be ready in time for the

[20] NPRM at 87130.
[21] *Id.* at 87133.
[22] *Id.* at 87134.
[23] *Id.* at 87134–35.
[24] *Id.* at 87138–44.
[25] *Id.* at 87139.

implementation date of the proposed regulations.[26] The Department also concedes that it "does not currently have sufficient data available to determine whether a borrower meets the eligibility standard" for additional cancellation at the time of the NPRM's publication and does not reveal the precise information it will seek using an application for borrowers requesting that the Secretary cancel their loan balances due to hardship.[27]

As it did for the April NPRM, the Department finds this supposed discretion to cancel the debt of millions of borrowers in Section 432(a)(6) of the HEA ("Sec. 432(a)"), a provision passed as part of the HEA in 1965, stating 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."[28] As described above, the HEA only grants the Secretary this authority with respect to the FFEL program; however, the Department asserts that an HEA provision recognizing that Direct Loans owned by the federal government have the same "terms, conditions, and benefits" as FFEL loans automatically applies this claimed discretionary authority to cancel hundreds of billions of dollars in loans under the Direct Loan program.[29]

The Department estimates the total cost of the plan to be just under $112 billion, but an independent analysis of the cost from the Committee for a Responsible Federal Budget estimates that the cost of the program over the next 10 years could be as high as $600 billion,[30] which would likely make this the costliest government debt cancellation program in the history of the country.

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[26] *Id.* at 87146–47; *id.* at 87147 ("Once the regulations are finalized and implemented, this model would be used to conduct an individualized determination of whether each borrower fits within the hardship standard in proposed § 30.91(a) and therefore qualifies for a waiver under proposed § 30.91(c).").

[27] The Department refers to an Information Collection Request ("ICR") that "[w]ould allow the Secretary to receive applications that provide information for the Secretary to conduct hardship determinations" in its NPRM, stating that commenters "may want to review the ICR, including the supporting materials, in www.regulations.gov by using the Docket ID number specified in this notification." It then identifies the ICR using OMB control number 1845–NEW. NPRM at 87162. However, there is no separate ICR in the docket associated with this rulemaking. Whether the ICR is a separate document that the Department has failed to publish in line with notice-and-comment requirements, or if it is part of the NPRM, DFI notes that it is unable to comment on the ICR because the Department has failed to provide any specific details of what information will be collected. This failure to specify what information is to be collected is arbitrary and capricious and appears to characterize a rushed rulemaking process.

[28] 20 U.S.C. § 1082(a)(6) (cleaned up).

[29] NPRM at 87133–34.

[30] https://www.crfb.org/blogs/student-debt-plan-would-add-hundreds-billions-deficit.

Despite the magnitude of the proposed debt cancellation plan, the Department has offered a mere 30 days for the public to comment on its proposed rule.[31] This minimal time period for comments underscores that the Department is truly uninterested in the views of the public on the proposed rule.

## 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.

DFI's public comment on the April NPRM explains why Sec. 432(a) of the HEA offers no authority to the Secretary to engage in the cancellation of hundreds of billions of dollars of student loan debt on any basis, including based on a finding by the Department of "hardship" on the part of borrowers.[32] Our analysis of the meaning of Sec. 432(a) thus applies as much to the current rulemaking effort as it did to the scheme outlined in the April NPRM.

As DFI pointed out in our May 16 comment,[33] Congress passed Sec. 432(a) as a provision in section B of Title IV of the HEA, which set out a program not of loans that the federal government would offer and hold directly, but rather a program of insurance guaranteeing student loans issued by lenders as incentive for these lenders to enter the student loan market. This guarantee program is now called the FFEL program, new loans for which ceased in 2010. Thus, at the time it was adopted, Sec. 432(a) referred not to any authority to "enforce, pay, compromise, waive, or release" student loan debt, but rather to the authority to perform these actions with respect to the rights and obligations arising from the agreements *with lenders* made pursuant to that part of the statute. To believe otherwise would be to 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.

While Congress has, over the years, authorized or directed the Secretary to offer loan forgiveness under FFEL in specific circumstances,[34] this cabined authority does not offer the Secretary the discretion to cancel all student loan debt as he sees fit. On the contrary, these provisions define the boundaries regarding how the Secretary is supposed to exercise his Sec. 432(a) powers with fidelity to the structure of the HEA and the FFEL program.

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[31] NPRM at 87130.
[32] https://dfipolicy.org/wp-content/uploads/2024/05/DFI-Comment-HEA-Waiver-NPRM-05.16.2024.pdf at 10–17.
[33] *Id.* at 10–13.
[34] *See id.* at 13 (citing 20 U.S.C. § 1087).

The Department imagines that the Secretary's waiver authority under Sec. 432(a) extends to the automatic cancellation of loan balances based on identification of "specific circumstances that warrant relief and affect multiple borrowers."[35] Like the April NPRM, the present 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.

As DFI's public comment on the April NPRM explained, the Department's Office of the General Counsel put this argument to rest in its 2021 Memorandum, which stated that "[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."[36] The HEA's explicit recognition of the Secretary's authority to cancel loan debt in certain defined circumstances 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. A narrower view of Sec. 432(a) to apply 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[37] than the authority to cancel all student loan debt in the country—which is what the Department claims for the Secretary in both the April and present rulemakings.

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."[38] As DFI explained in our public comment on the April NPRM, this language makes clear that the "waiver" of loan balances must be limited to circumstances specified under the HEA.[39] The Department, on the other hand, interprets Sec. 432(a) to offer the Secretary discretion to cancel any loan balances for any reason based on any consideration on which he wishes to rely.

The Department's reference in the present NPRM to circumstances in which hardships "are likely to impair [borrowers'] ability to repay a Federal loan in full or cause the anticipated costs of collecting the loan to exceed the likely benefits of continued collection of the entire debt,"[40] which is perhaps an attempt to connect this mass loan cancellation attempt to the goals of Sec. 432(a) in

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[35] NPRM at 87135.
[36] https://static.politico.com/d6/ce/3edf6a3946afa98eb13c210afd7d/ogcmemohealoans.pdf at 4 (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).
[37] 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.").
[38] 20 U.S.C. § 1082(a).
[39] https://dfipolicy.org/wp-content/uploads/2024/05/DFI-Comment-HEA-Waiver-NPRM-05.16.2024.pdf at 15–16.
[40] NPRM at 87150.

granting the Secretary some flexibility on a case-by-case basis, is unavailing. If the Department were actually concerned about the costs to the Department of collecting certain loans, then there is no reason that it could not resolve this problem on an individualized basis by deciding whether it is worth expending Department resources to collect certain individual loan balances when the borrower is in default. The Department also would not propose a rebuttable presumption in favor of canceling a borrower's entire outstanding loan balance merely because the borrower, according to the Department's predictive model or "holistic assessment," may not repay *all* of his or her loans but may be able to pay a sizeable portion of them. And, of course, it is difficult to see how promulgating a rule that even the Department admits will cost over $110 billion (and will likely cost many times more than that) will help lower the costs of operating the federal student loan program.

Like its original mass student loan debt cancellation plan, the borrower defense rule, the SAVE plan, and the first HEA loan cancellation plan, all of which have now been either invalidated or temporarily blocked by federal courts, the Department's concern underlying this "hardship" proposal is not about saving money by no longer pursuing those who are not likely to pay their debts. The Department is instead attempting to push as much money out the door to student loan borrowers as it believes it can, thus retroactively paying for the cost of college of these borrowers. The Department never states this true goal, and is thus engaged in arbitrary and capricious rulemaking on the basis of pretextual reasoning.

And to the extent the Department is attempting to address "hardship" for the sake of alleviating burdens on borrowers and not saving money on collection costs, Congress has specified by statute the circumstances in which the Department may offer forbearance, deferment, and forgiveness. Even the Department admits that "[t]he HEA contains many provisions intended to assist borrowers when their investment in postsecondary education does not result in the expected benefits," citing statutory provisions permitting relief in the case of fraud on the part of institutions, closed-school discharge, and total and permanent disability.[41] The Department then fails to recognize that these provisions, setting the boundaries of student loan relief, totally undermine the justification for its extra-statutory program.

Mere wishful thinking on the part of the Department that Congress had addressed "the full set of circumstances that may impair borrowers' ability to fully repay their loans" does not justify the Department's unpersuasive reading of a narrow, 60-year-old HEA provision allowing it to "enforce, pay, compromise, waive, or release" certain rights and obligations under the FFEL program as an unbounded grant of discretion allowing it to cancel loans on a mass basis due to perceived "hardship" or any other reason. To the extent Congress *did* give the Secretary the discretion to cancel any loans he wants for any reason he wants (it did not), such a grant of

[41] *Id.* at 87133.

legislative authority with no accompanying intelligible principle on the basis of which to exercise it would clearly run afoul of the Vesting Clause and the Spending Clause of the U.S. Constitution.

Finally, as DFI pointed out in our comment on the April NPRM,[42] if Congress granted the Department the power it claims under the HEA to cancel any loan debt it wishes with the stroke of a pen (or, in this case, by plugging variables into a "predictive model"), then its subsequent authorization in the HEROES Act of 2003 for 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,"[43] 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,"[44] was pointless. The Secretary would have already had the authority to wipe out any debt he chose without engaging in notice-and-comment rulemaking. The Department's failure to address the extent of its discretion under Sec. 432(a) in light of the HEROES Act and other explicit statutory grants of authority to alleviate burdens on certain classes of borrowers is arbitrary and capricious.

In short, there is a mountain of textual, structural, and historical evidence that Sec. 432(a) does not offer the Secretary the discretion to engage in the mass cancellation of any loan debt. The Department's attempt in this rulemaking to gesture toward alleviating loan collection costs on the part of the Department does nothing to dispel these doubts about its authority, particularly in light of the admittedly enormous (yet likely underestimated) costs of the Department's rule.

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

DFI's comment on the April NPRM explains why the Secretary's discretion under Sec. 432(a) to "enforce, pay, compromise, waive, or release" rights under the FFEL program do not apply to the Direct Loan program.[45] That is because 20 U.S.C. § 1087a(b)(2), cited by the Department as authority for the application of its rule to Direct Loans,[46] recognizes that Direct Loans owned by the federal government have the same "terms, conditions, and benefits" as loans under the FFEL program,[47] but these statutory terms say nothing of the Secretary's discretionary authority to "enforce, pay, compromise, waive, or release" rights. Since these discretionary powers have

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[42] https://dfipolicy.org/wp-content/uploads/2024/05/DFI-Comment-HEA-Waiver-NPRM-05.16.2024.pdf at 16–17.
[43] 20 U.S.C. § 1098bb(a)(1).
[44] *Id.* § 1098bb(b)(3).
[45] https://dfipolicy.org/wp-content/uploads/2024/05/DFI-Comment-HEA-Waiver-NPRM-05.16.2024.pdf at 17–20.
[46] NPRM at 87133–34.
[47] 20 U.S.C. § 1087a(b)(2).

nothing to do with "terms, conditions, and benefits" of loans, the Department can cite no authority for the application of its supposed authority to "waive" loans under the FFEL program on a mass basis to the Direct Loan program.

Apparently recognizing the shortcomings of its legal analysis with respect to this issue in its April NPRM, which spanned a single footnote,[48] the Department explains its position in slightly more detail in the present NPRM. Specifically, it refers to one definition of "benefit" offered by *Merriam Webster Online*—"something that produces good or helpful results or effects"—and states that the Secretary's discretion to waive rights under Sec. 432(a) in the form of cancellation of student loan balances is undoubtedly a benefit to borrowers under the FFEL program that must be shared by borrowers under the Direct Loan program.[49]

There are several shortcomings of this abbreviated analysis. First, the Department cherry-picks a definition of "benefit" from the online dictionary but ignores other, more salient definitions offered elsewhere. As just one example, the HEA at 20 U.S.C. § 1078 provides for interest subsidies, to which the statute refers in some instances as "benefits," to which borrowers under the FFEL program are entitled as a matter of law based on their financial need.[50] Such an understanding of the term, like "unemployment benefits" and "veterans' education benefits," appropriately refers to something to which a borrower who meets certain conditions is *entitled*, by law, as part of an agreement made under the student loan program. To apply the term "benefit" to a discretionary decision on the part of the Secretary to pursue or not pursue loan cancellation as part of a policy judgment is to take that term completely out of context and interpret it in a way that Congress never could have intended.

Another reason to dismiss the Department's interpretation of the term "benefits" is that the Secretary's authority under Sec. 432(a) cuts both ways. It is not just discretion to "waive" rights and obligations; it is authority to "enforce, pay, compromise, waive, *or* release" rights and obligations. In its full context, this administrative discretion cannot be characterized as a "benefit" of the FFEL program because the Secretary's authority, as fully understood, is not necessarily "beneficial" to any particular party. Even if the Department's sweeping interpretation of the Secretary's authority is correct (it is not), the Secretary could just as easily decide to "enforce" the right to collect loans as he can "waive" that right. How can authority (as interpreted by the Department) of the Secretary to do whatever he wants with respect to canceling or collecting loans be considered a "benefit" to the borrower? The Department arbitrarily and capriciously fails to offer any answer to this question.

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[48] April NPRM at 27566 n.4.
[49] NPRM at 87134.
[50] 20 U.S.C. § 1078(a), (b)(1)(I).

On the contrary, the Department's NPRM (as did its April NPRM) offers compelling evidence 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."[51] As DFI confirmed in our comment on the April NPRM,[52] 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 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.[53]

Likewise, in authorizing the Secretary to carry out the Perkins Loan program, Congress explicitly granted the Secretary the same powers (as relevant to the present rulemaking) 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."[54]

This statutory evidence confirms that Congress is well aware of how to extend the Secretary's discretionary authority under the FFEL program to other loan programs. In the case of the Direct Loan program, however, Congress merely applied the "terms, conditions, and benefits" of loans guaranteed under the FFEL program to loans under that separate program.[55] The fact that the Department may wish that Congress had extended its discretionary "waiver" authority to the Direct Loans program does not make it so.

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[51] NPRM at 87134.

[52] https://dfipolicy.org/wp-content/uploads/2024/05/DFI-Comment-HEA-Waiver-NPRM-05.16.2024.pdf at 18.

[53] Consolidated Appropriations Act 2014, 113 P.L. 76, Division H, title V, Sec. 525(d) (emphasis added).

[54] 20 U.S.C. § 1087hh.

[55] Of course, the fact that Congress extended the Secretary's Sec. 432(a) powers under the FFEL program to the HEAL and Perkins programs does not change the fact that the Secretary has no power to pursue mass student loan debt cancellation under the FFEL program in the first place. Thus, he has no such power to proceed with mass cancellation under the HEAL and Perkins programs.

DFI already explained in our comment on the April NPRM why the Department's citation of two district court cases and one Court of Federal Claims decision offer no sufficient justification to apply the Sec. 432(a) authority to the Direct Loans program, especially in light of contrary precedent.[56] The Department seems to have agreed with DFI's analysis of the Court of Federal Claims case because it has abandoned any mention of that case in the present NPRM.[57] Instead of grappling with the contrary case law DFI discussed in our comment on the April NPRM,[58] the Department cites another case, this time from the U.S. Court of Appeals from the Ninth Circuit, that does not even mention the Secretary's discretionary authority under the FFEL program to "enforce, pay, compromise, waive, or release" rights and claims.[59] The court in that case merely notes the application of the "terms, conditions, and benefits" of loans under the FFEL program to loans under the Direct Loans program as evidence that Congress intended to preempt lawsuits filed pursuant to state law against a lender offering loans under the FFEL program.[60] That case has no relevance to this rulemaking, and the Department's reliance on it to support its claim that it can cancel up to $600 billion in loan balances under multiple loan programs is arbitrary and capricious.

Only Congress has the authority to set out a standard of "hardship" that would determine whether borrowers are entitled to have all or part of their student loan balances paid for by American taxpayers. By claiming that authority for itself, the Department overreaches its powers under the HEA and violates the Constitution by co-opting legislative authority to which it has no legitimate claim.

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

Like its April NPRM, the present NPRM offers no reason why canceling an enormous amount of debt under the HEA by reading broad, novel powers into a "long-extant" statutory provision is distinguishable in any way from canceling an enormous amount of debt under the HEROES Act by reading broad, novel powers into its (newer) provisions. The Supreme Court already concluded that the latter program (the original mass cancellation scheme) was a violation of its major questions doctrine; it is highly likely that the Court would decide the same thing with regard to the debt cancellation programs described in its April NPRM and its present NPRM. Merely pointing

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[56] https://dfipolicy.org/wp-content/uploads/2024/05/DFI-Comment-HEA-Waiver-NPRM-05.16.2024.pdf at 18–20.
[57] *See* NPRM at 87133 n.9.
[58] https://dfipolicy.org/wp-content/uploads/2024/05/DFI-Comment-HEA-Waiver-NPRM-05.16.2024.pdf at 19 (citing *Pa. Higher Educ. Assistance Agency v. Perez*, 416 F. Supp. 3d 75, 96 (D. Conn. 2019); *Fla. Coastal Sch. of Law, Inc. v. Cardona*, 2021 U.S. Dist. LEXIS 148639, at *61 n.21 (M.D. Fla. Aug. 9, 2021)).
[59] NPRM at 87133 n.9 (citing *Chae v. SLM Corp.*, 593 F.3d 936, 945 (9th Cir. 2010)).
[60] *Chae*, 593 F.3d at 945.

out that the provision on which the Department now relies is not in the HEROES Act[61] does nothing to help the Department's argument; in fact, as DFI commented with regard to the April NPRM,[62] the Supreme Court's reasoning under the major questions doctrine may apply with even more force to Sec. 432(a) than it does to the HEROES Act.

As previously discussed, the Department estimates that the mass cancellation of student loan balances proposed in its NPRM will cost taxpayers just under $112 billion,[63] while the Committee for a Responsible Federal Budget estimates that the program could cost as much as $600 billion.[64] Even the Department's conservative estimate is more than double the amount the Supreme Court found triggers the major questions doctrine in the Centers for Disease Control and Prevention's eviction moratorium case.[65] Just as the Supreme Court concluded with regard to the Biden Administration's initial attempt at mass loan cancellation in *Biden v. Nebraska*,[66] the claimed authority to cancel all student loan debt based on "hardship" factors that the Department conjures out of thin air is one of "staggering" economic significance.

Likewise, the more than 80 bills considered by Congress during its 116th session relating to student loan debt cancellation and other student loan issues, as well as lawsuits by state plaintiffs across the country that have enjoined both the SAVE Plan and the loan cancellation program announced in the Department's April NPRM, demonstrates that the issue is one of vast political significance with federalism impacts implicating the major questions doctrine.[67]

As discussed in DFI's comment on the April NPRM, since Congress enacted Sec. 432(a) as part of the HEA in 1965, the Secretary has *never* exercised any power to waive loan balances on an automatic or blanket basis using this provision.[68] And there is no limitation on the authority that the Department has asserted in the April NPRM or the present 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. Congress would never have envisioned the Secretary possessing such authority; it would have

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[61] *See* NPRM at 87134 n.12.
[62] https://dfipolicy.org/wp-content/uploads/2024/05/DFI-Comment-HEA-Waiver-NPRM-05.16.2024.pdf at 21.
[63] NPRM at 87158 (Table 4.1).
[64] https://www.crfb.org/blogs/student-debt-plan-would-add-hundreds-billions-deficit.
[65] *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (estimating the moratorium's economic impact to be approximately $50 billion).
[66] *Biden v. Nebraska*, 143 S. Ct. at 2373.
[67] *Id.* (citing M. Kantrowitz, *Year in Review: Student Loan Forgiveness Legislation*, FORBES, Dec. 24, 2020).
[68] *See, e.g.*, https://static.politico.com/d6/ce/3edf6a3946afa98eb13c210afd7d/ogcmemohealoans.pdf at 6.

considered the tradeoffs inherent in such policymaking to be of such import that they must be made by Congress alone.

Thus, the major questions doctrine forbids this massive exercise of authority without clear congressional authorization. In its final rule, the Department must identify *any* limiting principle regarding the Secretary's authority to cancel student loan debt on a mass basis under Sec. 432(a), or it is engaging in an arbitrary and capricious rulemaking process—not to mention a rulemaking process that is completely outside the bounds of its authority under the United States Constitution.

## IV. The Proposed Rule Is Arbitrary and Capricious.

### A. The Department's Refusal to Model the Costs of the Plan in Case the SAVE Plan Is Invalidated Is Arbitrary and Capricious.

For the same reasons discussed in DFI's comment on the April NPRM, the Department must factor into its cost analysis for the present NPRM the high likelihood that the federal courts will invalidate its SAVE plan, which is—at the time of this comment—enjoined in full across the country by order of the U.S. Court of Appeals for the Eighth Circuit. The Department has based its cost estimate of the "hardship" waiver proposed in its NPRM on the implementation of its SAVE plan, which independent analyses have indicated could cost approximately half a trillion dollars over its first ten years.[69] If, due to recognition that the Department unlawfully attempted to transform a student loan "repayment" plan into a delayed grant program covering the cost of college for millions of current and future borrowers, the federal judiciary invalidates the SAVE plan, then the cost of mass loan cancellation proposed in this NPRM will drastically increase. The Department should thus prepare a secondary cost estimate for the "hardship" waiver in case it is never able to implement its blocked SAVE plan.

In its NPRM, the Department recognizes that a permanent injunction of its SAVE plan "could" increase the costs of its "hardship" waiver under the NPRM.[70] Then, without even attempting to estimate this cost impact, the Department concludes that, if the courts stop SAVE from taking effect, "the benefits of these proposed regulations would still outweigh the costs since the proposed regulations would authorize providing waivers to borrowers who are unlikely to fully repay their loans and, relatedly, the waivers would discharge debt that the Department is unlikely to fully collect in a reasonable period of time."[71]

This represents a stunning admission by the Department that it doesn't care about the true cost of its regulations because *any cost would be worth it*. But to engage in a true balancing of costs and

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[69] *Supra* note 15.
[70] NPRM at 87157 n.101.
[71] *Id.*

benefits of a regulatory action as required by the Administrative Procedure Act ("APA"), the Department can't simply fly blind: it must actually weigh the *costs* of the rule against its benefits. Here, it forthrightly states that it is abandoning any attempt at doing so. That is the epitome of arbitrary and capricious rulemaking that is prohibited by the APA.[72]

### B. The Department Arbitrarily and Capriciously Fails to Limit the Level of Debt the Secretary May Cancel Based on the Circumstances of Each Borrower.

The Department states that, with regard to the Secretary's authority to cancel all or part of a student loan borrower's debt in light of a finding of "hardship," it "would adopt a rebuttable presumption that the full amount would be eligible for waiver where the borrower meets the criteria" set out in the proposed rule.[73] It explains this flawed and costly decision by stating, without evidence, that such complete relief would be warranted "in the majority of circumstances" and by reasoning that "doing so would produce the most consistent decision-making."[74] Put another way, the Department has conveniently discovered that the HEA allows it to cancel hundreds of billions of dollars in student loan debt; the Department cannot now be bothered to require the Secretary to save taxpayer dollars as a responsible steward of the federal student loan system by tailoring the amount of relief to the circumstances of each borrower.

This "rebuttable presumption" makes a mockery of the Department's reasoning that it is simply seeking to cancel the loans of borrowers to the extent that they are unlikely to pay the "full amount" of their student loans. If the Department actually cared about the cost of collecting loans versus the amount of the loan in question, then it would require the Secretary to establish some connection between the amount of financial "hardship" the borrower faces and the amount of the outstanding loan balance the Secretary may cancel. Instead, the Department proposes to wave away the entire balance of the borrower's loan in most cases, even if the borrower is likely to pay most of that

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[72] This admission makes resoundingly clear why the plan proposed in this NPRM is not an appropriate subject for administrative rulemaking. Bureaucrats at the U.S. Department of Education may very well believe that they are proposing the most beneficent policies that will have ever graced the Code of Federal Regulations, but they do not answer at any ballot box to voters who would balk at footing the bill for this regulatory largesse. Members of Congress, on the other hand, must carefully weigh their support for costly student loan policies in light of the need to return to the voters every two or six years and explain why they gifted taxpayer money to student loan borrowers, a sizable portion of whom earn six-figure salaries and have professional degrees. This mechanism for accountability is why the Framers of our Constitution granted to Congress, and to no one else, the power to make the laws and appropriate funds.
[73] NPRM at 87138.
[74] *Id.*

loan. This failure to tailor the solution proposed by the Department to the problem it purports to solve is arbitrary and capricious.

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

Like the April NPRM,[75] the present NPRM similarly fails to consider the inflationary impacts of its proposed mass debt cancellation. 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 "would boost inflation by 15 to 27 basis points over the next year."[76] At a potential cost of $600 billion, the damaging impacts of the loan cancellation plan proposed in the present NPRM could be even greater. Yet, inexplicably, the Department fails to consider how its NPRM would add significantly to the national debt and drive up the living costs of Americans—thus contributing to the very "hardship" that the Department purports to address with this rule. 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.

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

The Department continues to assert, as it has in past rulemakings proposing mass student loan debt cancellation, that its proposed "hardship" rule has no impact on federalism or on small, nonprofit employers. But, as DFI explained in our comment on the April NPRM,[77] the Department is arbitrarily and capriciously ignoring the taxation and recruitment impacts of its rule on these respective entities. Specifically, if the Department carries out mass student loan debt cancellation prior to January 1, 2026, states that have pegged their definitions of taxable income to the definitions contained in the federal tax code will either lose the revenue that otherwise would have been taxed had forgiveness of such debts occurred after that date, or they 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.

The Department's action would also have implications on the recruiting and retention efforts of state and local governments and small, nonprofit employers by subverting the student loan advantages Congress has made available to those who work in government and other public-

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[75] *See* https://dfipolicy.org/wp-content/uploads/2024/05/DFI-Comment-HEA-Waiver-NPRM-05.16.2024.pdf at 24.
[76] https://www.crfb.org/blogs/student-debt-changes-would-boost-inflation.
[77] https://dfipolicy.org/wp-content/uploads/2024/05/DFI-Comment-HEA-Waiver-NPRM-05.16.2024.pdf at 25.

service positions through its PSLF program. By canceling student loan debt immediately rather than after the statutorily prescribed 10-year PSLF payment period, the Department reduces the attractiveness of public-sector work and increases state, local, and nonprofit recruiting and retention costs. The Department must consider such costs and balance them against any purported benefits of its proposed rule.

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

DFI explained in our comment on the April NPRM that the Department should have combined its "hardship" rulemaking with its previous rulemaking purporting to exercise authorities under the HEA to engage in mass student loan debt cancellation because these two rulemakings are based on the same authority.[78] Thus, a comment on the alleged authorities described in the April NPRM is necessarily a comment on those described in the present NPRM. Combining these two rulemakings would have allowed members of the public to consider a full picture of the Department's "clarification" of its unprecedented claimed authority to cancel any student loan debt it wishes at any time for any reason. By requiring the public to comment on its proposed rule separately from the rule issued earlier this year purporting to exercise the same authority, the Department fails to observe the rulemaking procedure required by the APA.

## VI. The Department Must Offer the Public the Opportunity to Review and Comment on Its "Predictive Assessment" Model and Its Application for Additional Loan Cancellation.

In its NPRM, the Department acknowledges that it has not yet chosen the model it will use to predict whether a borrower is 80 percent or more likely to default in the next two years.[79] It offers inputs it will use in such model, which are necessarily subject to change, but it does not describe precisely how the model will weigh these factors or others to determine the millions of borrowers who will receive loan cancellation under its regulations.[80] Especially given that one of the factors identified by the Department in determining whether a borrower is suffering "hardship" is a catch-all provision allowing the Secretary to identify "[a]ny other indicators of hardship," the Department has not provided sufficient information on the model it will use to allow the public to offer an informed comment on its "predictive assessment." With massive amounts of loan debt in the balance, the Department is not entitled under the APA to make things up on the fly and must provide notice to the public of its final model and the opportunity for the public to comment on that model.

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[78] *Id.* at 26.
[79] NPRM at 87146–47.
[80] *Id.*

The Department also offers scant details about what it would include on an application borrowers may use to request that the Secretary cancel their loans based on "hardship." Like the factors that go into the predictive assessment and how they are weighed, the precise information requested by such an application is important and may have a significant impact on the cost of this mass student loan debt cancellation scheme. The Department must do more than simply gesture toward the general factors the Secretary "may" consider in granting additional cancellation and share the application for comment by interested members of the public before releasing it to borrowers.

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

As DFI has explained in detail in response to many of the Department's previous rulemakings, including in response to its April NPRM,[81] the Department should offer at least an additional 30 days for the public to comment on the present NPRM and end the comment period no earlier than December 30, 2024. As discussed previously in this comment, the Department has a miserable track record with regard to judicial review of its previous efforts to engage in the cancellation of student loan debt on a mass basis. Heeding the executive orders it cites in its proposed rule and offering the public a more fulsome opportunity to develop comments with regard to this NPRM may yield better results for the Department and the country—especially if such comments persuade the Department to withdraw the proposed rule.

## VIII. Conclusion

After nearly four years of rulemaking, the Department's regulatory agenda regarding student loan relief is in tatters. Since 2021, the agency has spilled much ink on mass student loan debt cancellation programs that have been blocked by courts on either a permanent or preliminary basis. It may be difficult to calculate the total resources the Department wasted in proposing and defending these stymied, harmful efforts, but what we do know is that the Department could have used these resources to make the lives of current, past, and prospective students better by, for instance, releasing a timely, working version of the Free Application for Federal Student Aid ("FAFSA").[82]

Instead, the Department has imagined its powers under multiple federal statutes to give it free license to reshape the federal student loan system in any way it chooses—never mind its duty to implement actual federal law and not some federal law that it believes should exist. In doing so, it has given misplaced hope to student loan borrowers who believe in the false promise of unilateral

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81 https://dfipolicy.org/wp-content/uploads/2024/05/DFI-Comment-HEA-Waiver-NPRM-05.16.2024.pdf at 27.

82 *See, e.g.*, https://www.nytimes.com/2024/05/20/us/politics/fafsa-application-education-department.html.

student loan debt cancellation. When the courts have rejected the Department's attempts to enact its own laws in place of those Congress put in place, the Biden Administration has blamed the judiciary for recognizing that the power to make law and appropriate funds lies with Congress and not with the Department.[83] Americans can only hope that future administrations—no matter their partisan or ideological affiliation—will make a more faithful effort to respect the rule of law and limits of administrative rulemaking than did the political appointees currently in the Executive Branch.

In short, Congress never granted the Secretary the power to cancel, at any time, in any amount, and for whatever reason, student loan debt held either by the federal government or some other institution. The Department's attempt to "clarify" its authority to do just this is executive overreach, and it must be either withdrawn by the Department or stopped by Congress or the courts.

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

Sincerely,

/s/ *Paul F. Zimmerman*
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[83] *E.g.*, https://www.ed.gov/about/news/press-release/secretary-cardona-statement-on-supreme-court-ruling-on-biden-administrations-one-time-student-debt-relief-plan ("Today, the Supreme Court ruled against students and families across the country."); https://www.ed.gov/about/news/press-release/statement-us-secretary-of-education-miguel-cardona-8th-circuit-court-of ("Today's ruling from the 8th Circuit blocking President Biden's SAVE plan could have devastating consequences for millions of student loan borrowers crushed by unaffordable monthly payments if it remains in effect."); *cf.* https://www.ed.gov/about/news/press-release/secretary-cardona-statement-ahead-of-one-year-anniversary-of-supreme-court-ruling-on-college-affirmative-action-programs (describing the Supreme Court's decision in *Students for Fair Admissions v. Harvard* restricting race-based admissions processes as "a blow to the fight for equal opportunity and a more just, equitable country").