

The Honorable Miguel Cardona  
Secretary of Education  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, DC 20202  
Via <https://www.federalregister.gov>

Dear Secretary Cardona:

This is a comment on the U.S. Department of Education's proposed regulations under the title, "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," Docket ID ED-2023-OPE-0123.

The Department of Education's initiative to address the mounting federal student loan debt, which currently stands at a staggering \$1.7 trillion and affects over 43 million individuals, is understandable. However, the proposed regulations, if implemented as is, could have far-reaching consequences for borrowers and taxpayers. They include provisions to waive accrued interest, forgive debt for borrowers who have repaid for 20 years or 25 years for graduate students, automatically enroll students in programs that would result in loan forgiveness, and waive debt for students who attended low-quality institutions.

We have the following direct concerns regarding the proposed regulations.

**1. Absence of consideration for the reaction of educational institutions.**

- a. The Department of Education fails to assess how educational institutions may respond to this proposed regulation. With additional loan cancellation and increased borrowing, educational institutions will respond by increasing attendance costs.<sup>1</sup> The proposed regulation, if implemented, could exacerbate the financial burden on borrowers. Evidence suggests that federal subsidies, such as loan cancellation and subsidized student loans, contribute to the rising costs of college. Over the past two decades, the federal government's inflation-adjusted expenditures on student loans have surged<sup>2</sup>, soaring from \$50 billion in the 1999-2000 academic year to \$87 billion in 2019-2020.<sup>3</sup> Similarly, in-state tuition fees at public universities saw a substantial 120 percent increase<sup>4</sup> in real terms during this period. Researchers found that raising subsidized loan limits resulted in a 102

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<sup>1</sup> Federal Reserve Bank of New York (2017),

[https://www.newyorkfed.org/medialibrary/media/research/staff\\_reports/sr733.pdf](https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr733.pdf) (accessed on May 10, 2024)

<sup>2</sup> "Trends in College Pricing and Student Aid 2020," CollegeBoard,

<https://research.collegeboard.org/media/pdf/trends-college-pricing-student-aid-2020.pdf> (accessed on May 10, 2024)

<sup>3</sup> "Democratic Plan to Forgive Student Loans Could Raise Tuition and Hurt Those at the Bottom," Lindsey M. Burke, <https://www.heritage.org/education/commentary/democratic-plan-forgive-student-loans-could-raise-tuition-and-hurt-those-the> (accessed on May 13, 2024)

<sup>4</sup> "The Volume and Repayment of Federal Student Loans: 1995 to 2017," Congressional Budget Office, <https://www.cbo.gov/publication/56754> (accessed on May 10, 2024)

percent surge in tuition<sup>5</sup> between 1987 and 2010.<sup>6</sup> According to their findings, tuition would have increased by only 16 percent on the net without these extra federal subsidies.<sup>7</sup> Likewise, research conducted by the Federal Reserve Bank of New York revealed that for every additional dollar of subsidized federal student loans, tuition increases by 60 cents.<sup>8</sup> In other words, as Washington allocates more funds to federally subsidized student loans, colleges are estimated to raise tuition by 60 cents, capitalizing on students whose purchasing power has expanded due to the new federal subsidies.<sup>9</sup> This trend indicates that the proposed regulation may lead to a further escalation of education expenses for borrowers.

## **2. The Department of Education’s obligation to collect all debt.**

- a. Many borrowers stand to gain significant advantages under the proposed rule. They would be relieved from repaying accrued interest, individuals who have made payments for 20 to 25 years would be eligible for automatic loan cancelation, and those who haven’t applied but would qualify under existing loan cancelation programs would automatically qualify for loan cancelation, among other categories of cancelation. This, however, stands in contrast with the department’s responsibility to try and collect all debts. The Federal Claims Collection Act, 31 U.S.C. § 3711, et. Seq. obligates agencies to “try and collect a claim of the United States Government for money...arising out of the activities of, or referred to, the agency” (31 U.S.C. § 3711(a)(1)). Furthermore, by controlling regulation, the Secretary is directed to “aggressively collect all debts” and is delegated limited compromise and settlement authority (see 31 CFR 901.1(a); see also 31 U.S.C. § 3711(a)(2); 31 CFR 902.2, 902.3, 902.4.) The department has overlooked this mission or neglected to clarify why the proposal's advantages justify the potential compromise of its effectiveness in fulfilling this mission. Such oversight renders the regulation arbitrary and capricious.

Regarding § 30.81, the department has proposed waiving the following for ED-held loans under the FFELP, Direct Loan program, Perkins Loan program, and HEAL program: the total amount of the excess loan balance for borrowers in income-driven repayment if the borrower’s income is less than \$120,000 (single or married filing separately), \$180,000 (head of household) or \$240,000 (married filing jointly or surviving spouse), and;

in § 30.82, the department has proposed waiving the following for ED-held loans under the FFELP, Direct Loan program, Perkins Loan program, and HEAL program: “the lesser of \$20,000 or the amount by which each of a borrower’s loans has an outstanding balance that generally

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<sup>5</sup> “Accounting for the Rise in College Tuition,” NBER Working Paper Series,

[https://www.nber.org/system/files/working\\_papers/w21967/w21967.pdf](https://www.nber.org/system/files/working_papers/w21967/w21967.pdf) (accessed on May 10, 2024)

<sup>6</sup> “Democratic Plan to Forgive Student Loans Could Raise Tuition and Hurt Those at the Bottom,” Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> “Credit Supply and the Rise in College Tuition: Evidence from the Expansion in Federal Student Aid Programs,” Federal Reserve Bank of New York,

[https://www.newyorkfed.org/medialibrary/media/research/staff\\_reports/sr733.pdf?la=en](https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr733.pdf?la=en) (accessed on May 10, 2024)

<sup>9</sup> “Democratic Plan to Forgive Student Loans Could Raise Tuition and Hurt Those at the Bottom,” Ibid.

exceeds the amount the borrower owed when their loan entered repayment.”<sup>10</sup> Those who benefited from the initial waiver proposal (§ 30.81) mentioned earlier would not qualify for this waiver.

**3. The Department of Education creates a moral hazard by canceling debt.**

- a. The Department does not consider the unintended consequences of borrowers being incentivized by these proposed changes to borrow additional funds or not making their total payments (including accrued interest) in anticipation that they will have accrued interest forgiven. There is no estimate of the costs that would stem from this moral hazard.

**4. Income diversity across states and rewarding upper-income borrowers**

- a. Setting an income threshold of \$120,000 for individuals and \$240,000 for couples does not reflect the diversity of median incomes across the United States. The median income for an individual as of 2022 in Mississippi was \$47,446; in the District of Columbia, it was \$74,266; and in California, it was \$65,895.<sup>11</sup> This category essentially rewards high-earners who are capable of paying back their loans. In addition, upper-income households (those with incomes above \$74,000) own almost 60 percent of the outstanding education debt and make almost 75 percent of the payments.<sup>12</sup> This provision rewards the upper threshold of borrowers without considering that these borrowers typically make their payments and owe the most student debt.

Concerning § 30.83, the department has proposed canceling the following for ED-held loans under the FFELP, Direct Loan program, Perkins Loan program, and HEAL program: the outstanding balance of loans that first entered repayment on or before July 1, 2005 (if the borrower has only undergraduate loans or consolidation loans that repaid only undergraduate loans), or on or before July 1, 2000 (if the borrower has any graduate loans or consolidation loans that repaid any graduate loans).<sup>13</sup>

**5. The Department fails to take into account the affordability of student loan payments over a period of 20 to 25 years.**

- a. Borrowers who obtained undergraduate loans before 2005 and graduate loans before 2000 likely chose low monthly payment plans intended to stretch over approximately 20 to 25 years. This strategy, with its prolonged timeline, inherently guarantees affordability. Additionally, the provision regarding graduate loans predominately benefits a minority demographic, as only 14 percent of adults aged 25 or older possess graduate degrees.<sup>14</sup> Consequently, it fails to reflect the

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<sup>10</sup> “The Biden Administration’s First Student Loan Debt Relief Proposed Rule,” Congressional Research Service, <https://crsreports.congress.gov/product/pdf/IN/IN12350> (accessed on May 13, 2024)

<sup>11</sup> Department of Justice: Census Bureau Median Family Income by Family Size, [https://www.justice.gov/ust/eo/bapcpa/20220401/bci\\_data/median\\_income\\_table.htm](https://www.justice.gov/ust/eo/bapcpa/20220401/bci_data/median_income_table.htm) (accessed on May 10, 2024)

<sup>12</sup> Who owes the most in student loans: New data from the Fed,” Brookings Institute, <https://www.brookings.edu/articles/who-owes-the-most-in-student-loans-new-data-from-the-fed/>, October 9, 2020 (accessed on May 10, 2024)

<sup>13</sup> “The Biden Administration’s First Student Loan Debt Relief Proposed Rule,” Ibid.

<sup>14</sup> Ibid.

broader American public accurately and essentially shifts individual debt held by a minority of the population onto American taxpayers for repayment. Furthermore, these two groups of borrowers differ significantly in their average and median incomes, both presently and over their lifetimes, as well as in the levels of debt they hold.<sup>15</sup>

In § 30.84, the department has proposed canceling the following for ED-held loans under the FFELP, Direct Loan program, Perkins Loan program, and HEAL program: “the outstanding balance of a borrower’s loan if the Secretary determines that the borrower is not enrolled in but otherwise meets the eligibility requirements for cancellation under an IDR plan or an alternative repayment plan.”<sup>16</sup>

## **6. Lack of Income Data for Non-Enrolled Borrowers**

- a. It’s uncertain how the proposal would be implemented operationally due to the absence of income data for borrowers not currently enrolled in an income-driven repayment plan within the U.S. Department of Education’s records.<sup>17</sup> What data will the Department use to determine eligibility for this proposed waiver? The absence of income data for these borrowers may lead to inconsistencies or inequities in how the proposal is implemented, meaning American taxpayers may be left with the debt of millions of borrowers if the department cannot make accurate decisions due to the absence of data.

Regarding § 30.85, the department has proposed canceling the following for ED-held loans under the FFELP, Direct Loan program, Perkins Loan program, and HEAL program: “the outstanding balance of a borrower’s loan if the Secretary determines that the borrower has not obtained but otherwise meets the eligibility requirements for ‘any loan discharge, cancellation, or forgiveness opportunity’ under the FFELP or Direct Loan program. Such opportunities include Public Service Loan Forgiveness (PSLF), total and permanent disability (TPD) discharge, and closed school discharge.”<sup>18</sup>

## **7. Absence of clarity on how the Department would determine a borrower’s eligibility.**

- a. Regarding Public Service Loan Forgiveness, it is uncertain how the Department of Education would determine that a borrower was otherwise eligible for PSLF if they did not apply. Is the Department considering employing a data-matching process with the Social Security Administration, similar to what they do for Total and Permanent Disability borrowers, to ascertain a borrower’s eligibility?<sup>19</sup> Lacking comprehensive data poses the risk of inaccurately determining a borrower’s eligibility for loan cancellation, potentially resulting in erroneous denials or approvals. Such errors would ultimately burden American taxpayers,

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<sup>15</sup> Bureau of Labor Statistics: Career Outlook (2023), [https://www.bls.gov/careeroutlook/subject/education\\_level.htm](https://www.bls.gov/careeroutlook/subject/education_level.htm) (accessed on May 10, 2024)

<sup>16</sup> “The Biden Administration’s First Student Loan Debt Relief Proposed Rule,” Ibid.

<sup>17</sup> “Breakdown: Biden’s Second Try At Student Loan Forgiveness,” The College Investor, <https://thecollegeinvestor.com/46293/breakdown-bidens-second-try-at-student-loan-forgiveness/> (accessed on May 10, 2024)

<sup>18</sup> “The Biden Administration’s First Student Loan Debt Relief Proposed Rule,” Ibid.

<sup>19</sup> “Breakdown: Biden’s Second Try At Student Loan Forgiveness,” Ibid.

who would bear the cost of the “canceled” debt incurred by the individual borrower.

## **8. Lack of Consideration for How Student Loan Cancellation Will Affect Military Recruitment and Retention – and Ultimately, National Security**

A strong national defense depends on a well-supported military. Members of the armed services and their families are the most important resource the U.S. has in terms of national defense. Individuals who have served deserve to be well-served through education opportunities for themselves that enable the pursuit of life and career goals.

Yet today, lack of adequate academic achievement, combined with a lack of physical fitness and in some cases, the presence of criminal records, means that more than 70 percent of Americans age 17 to 24 cannot qualify for military service. Moreover, 20 percent of high school graduates who hope to join the Army—which, at 36 percent of the overall armed forces personnel, comprises the largest portion of active-duty military members<sup>20</sup>—cannot achieve an adequate score on the Armed Forces Qualification Test to do so. In Hawaii, Louisiana, Alabama, and South Carolina, this figure exceeds 30 percent.<sup>21</sup>

Blanket student loan cancellation will exacerbate these recruitment challenges. On September 15, 2022, a coalition of Members of Congress, led by Rep. Steve Womack (AR-3) and Rep. Pat Fallon (TX-4), sent a letter to President Joe Biden and Secretary of Defense Lloyd Austin asking, among other things, whether or not the impact of student loan cancellation on military service and recruitment had been considered by the administration.<sup>22</sup> As the signatories explained, the *earned benefit* of student loan cancellation provided through the G.I. Bill is a “top recruiting incentive.” Extending *unearned* loan cancellation to wide swaths of borrowers reduces the “leverage the Department of Defense” maintains with regard to recruitment. Most notably, the Congressmen stated that it “is no secret that each of the services continues to battle hardships in recruiting” and that, as a result of the administration’s cancellation efforts, “it feels like their legs are being cut out from underneath them.”<sup>23</sup>

Although their letter came in the wake of the administration’s “Plan A” proposal for blanket cancellation of up to \$20,000 for borrowers – a plan that was subsequently struck down by the U.S. Supreme Court – these concerns apply equally to the administration’s current cancellation proposals. “The Armed Services have often used educational benefits as a top incentive in the recruitment process, and now that is gone,” explained Congressman Fallon. Congressman Ronny Jackson (TX-13) said that student loan cancellation “is illegal and an insult to millions of

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<sup>20</sup> Kim Parker, Anthony Cilluffo, and Renee Stepler, “6 Facts about the U.S. Military and Its Changing Demographics,” Pew Research Center Fact Tank, April 13, 2017, <http://www.pewresearch.org/fact-tank/2017/04/13/6-facts-about-the-u-s-military-and-its-changing-demographics/>

<sup>21</sup> Committee for Education Funding, “Fact Sheet: Education Matters: Invest in Learning for Military Readiness,” April 29, 2015, <https://cef.org/wp-content/uploads/Fact-Sheet-Invest-in-Learning-for-Military-Readiness.pdf>

<sup>22</sup> Letter to President Joe Biden, Congress of the United States, September 15, 2022, at [https://womack.house.gov/uploadedfiles/09.15.22\\_ltr\\_to\\_potus\\_re\\_student\\_loans\\_53\\_.pdf](https://womack.house.gov/uploadedfiles/09.15.22_ltr_to_potus_re_student_loans_53_.pdf)

<sup>23</sup> *Ibid.*

Americans, including those who have put their lives on the line to keep us safe. I am proud to join my colleagues in demanding answers on behalf of those servicemembers who are as angry as we are.”<sup>24</sup>

Providing for national defense is an explicitly enumerated power of the federal government. Six of the 17 enumerated powers in Article 1, Section 8 of the U.S. Constitution pertain to the military and national defense. The Constitution outlines three key tenets of federal responsibility and purpose vis à vis national defense:

1. National defense is the responsibility and first priority of the federal government (Article 1, Section 9);
2. The federal government is mandated to provide for national defense (Article 4, Section 4); and
3. National defense is exclusively the function of the federal government (Article 1, Section 10).<sup>25</sup>

The federal government’s exclusive responsibility and mandate to oversee national defense and the military extends to military-related issues that impact education. Whereas education is not an enumerated power of the federal government per the U.S. Constitution, national defense is clearly so.<sup>26</sup> As such, measures to provide benefits to military members – such as student loan cancellation – are appropriate. Such measures are inappropriate for the civil population. The administration and Congress should provide only narrow loan cancellation solely for those Americans who have volunteered to deploy into harm’s way, as all members of the military do.

## **9. Failure to Provide Adequate Legal Justification for the Proposed Debt Waivers**

The proposed rule also exceeds the limited authority that Congress delegated to the Secretary of Education over student loans. In the Higher Education Act (HEA), Congress created a few targeted programs under which the Secretary could forgive student-loan debts in “certain limited circumstances and to a particular extent.”<sup>27</sup> Per, the Supreme Court:

The secretary can cancel a set amount of loans held by some public servants—including teachers, members of the Armed Forces, Peace Corps volunteers, law enforcement and corrections officers, firefighters, nurses, and librarians—who work in their professions for a minimum number of years. §§1078–10, 1087j, 1087ee. The Secretary can also forgive the loans of borrowers who have died or been “permanently and totally disabled,” such that they cannot “engage in any

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<sup>24</sup> Womack Joins Letter Regarding Student Loan Cancellation’s Impact on Military Recruitment, U.S. Congressman Steve Womack, September 15, 2023, at <https://womack.house.gov/news/documentsingle.aspx?DocumentID=405794>

<sup>25</sup> James Talent, “A Constitutional Basis for Defense,” Heritage Foundation *America at Risk* Memo No. 10-06, June 1, 2010, <http://www.heritage.org/defense/report/constitutional-basis-defense>.

<sup>26</sup> Lindsey Burke and Anne Ryland, A GI Bill for Children of Military Families: Transforming Impact Aid into Education Savings Accounts, *The Heritage Foundation*, Backgrounder No. 3180, June 2, 2017, at <https://www.heritage.org/education/report/gi-bill-children-military-families-transforming-impact-aid-education-savings>

<sup>27</sup> *Biden v. Nebraska*, 143 S. Ct. 2355, 2363 (2023).



substantial gainful activity.” §1087(a)(1). Bankrupt borrowers may have their loans forgiven. §1087(b). The Secretary is directed to discharge loans for borrowers falsely certified by their schools, borrowers whose schools close down, and borrowers whose schools fail to pay loan proceeds they owe to lenders. §1087(c).<sup>28</sup>

The Court gave no indication that the HEA contains a further delegation of power to the Secretary to create new cancellation programs on an ad-hoc basis. Nevertheless, under the proposed rule, the Secretary asserts that the power to waive a “right, title, claim, lien, or demand” contained in 20 U.S.C. § 1082 enables him to erase up to \$84 billion worth of student debt held by roughly 17 million borrowers, conceding that in many instances the result of the waiver will be that the “entire outstanding balance of a loan” is erased.<sup>29</sup> This is neither a reasonable reading of the HEA nor a faithful execution of Congress’ purpose.

As explained below, the waiver power, when it applies, is an inadequate legal basis for the vast undertaking previewed in the Notice. But a threshold problem precedes that difficulty: by the HEA’s plain terms, the Secretary lacks the power to waive loans issued under the Ford Federal Direct Loan Program. Thus, those portions of the proposal that waive balances on direct federal loans are flatly beyond the Secretary’s authority. Whatever waiver authority the Secretary has applies only in the context of the Federal Family Education Loan (FFEL) Program.

Section 1082(a), where the waiver power is found, is an adjunct to the responsibilities conferred on the Secretary in “this part,” which refers to “Part B” covering FFEL loans.<sup>30</sup> The direct loan program, by contrast, is dealt with in a separate part of the HEA, Part D.<sup>31</sup> Part D contains no stand-alone waiver authority. Thus, the Secretary tries to import it. Relying on 20 U.S.C. § 1087a(b)(2) and a handful of thinly reasoned district court opinions, the Secretary maintains that all his powers over the FFEL program necessarily apply with equal force to the direct loan program.<sup>32</sup> That assumption is unwarranted. Section 1087a(b)(2) states that “loans made to borrowers under this part . . . have the same terms, conditions, and benefits as loans made” under the FFEL program.<sup>33</sup> Congress, however, characterized the Secretary’s waiver authority not as a term, condition, or benefit but as a “general power.”<sup>34</sup> The Notice makes no argument for why these manifestly different concepts should be conflated. Principles of sound statutory interpretation dictate the contrary approach; each word in a statute should be given its own commonly understood meaning, not blended willy-nilly into a *mélange* of implausible synonyms.

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<sup>28</sup> *Id.*

<sup>29</sup> Notice at 17, <https://public-inspection.federalregister.gov/2024-07726.pdf>; see also <https://budgetmodel.wharton.upenn.edu/issues/2024/4/11/biden-student-loan-debt-relief>.

<sup>30</sup> 20 U.S.C. § 1082(a).

<sup>31</sup> See 20 U.S.C. § 1087a *et seq.*

<sup>32</sup> Notice at 17 n.4.

<sup>33</sup> 20 U.S.C. § 1087a(b)(2).

<sup>34</sup> 20 U.S.C. § 1082(a).

The Notice gains little in the way of legal support by citing a few district court opinions.<sup>35</sup> For instance, in *Sweet v. Cardona*, an opinion out of the U.S. District Court for the Northern District of California, the judge made no effort to parse the HEA's text; the court noted only that the Department has operated under the assumption that the Secretary's FFEL powers applied to the direct loan program.<sup>36</sup> An opinion issued by a judge on the District Court for the District of Columbia, *Weingarten v. Department of Education*, contains no reasoning at all on this issue, nor a scrap of legal authority for the court's conclusion that the Secretary has the same powers over direct loans as he does over FFE loans; instead, the decision contains a lonely record citation to allegations in the borrowers' amended complaint.<sup>37</sup> To call these legal justifications a foundation of sand would be an injustice to the cohesive properties of sand.

The HEA offers the Secretary no clear power to waive borrower balances on direct loans. At best, the Secretary's assertion of waiver authority rests on the existence of an ambiguity as to whether the words "terms, conditions, and benefits" in § 1087a incorporate the "general powers" in § 1082(a). This was the conclusion implicit in the court's approach in *Sweet*, when the judge stated that "courts generally will defer to an agency's construction of the statute it is charged with implementing."<sup>38</sup> But this raises several difficulties unaddressed in the Notice. First, the Secretary makes no argument that the HEA is ambiguous. Presumably, the Secretary's general powers must fit within one of the three headings listed in § 1087a, but which is it? Are the general powers a term, a condition, or a benefit? One sifts the notice's 279 pages for an answer in vain.

Moreover, contra the *Sweet* opinion, there is no such thing as generalized judicial deference to agencies when a law is ambiguous. There are certain specifically denominated forms of deference: *Chevron* deference, which enjoins judicial acquiescence to "reasonable" agency interpretations, and *Skidmore* deference, dependent on the persuasiveness of the agency's reasoning.<sup>39</sup> Although each of these deference doctrines is good law for now, it is no longer reasonable for an agency like the Department of Education to presume that a court will defer to an agency's legal interpretations. Not once in nearly eight years has the Supreme Court deferred under *Chevron* to an agency's interpretation of an ambiguous law.<sup>40</sup> The pendency of two cases asking the Court to overrule *Chevron* by the end of this term significantly dims any prospect that a court would review the Secretary's audacious interpretation of the HEA deferentially.<sup>41</sup> That deference will not apply to the proposed rule is a conclusion strengthened by the fact that courts are (and ought to be) unwilling to *imply* powers of such consequence and potency as what the

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<sup>35</sup> Notice at 17 n.4.

<sup>36</sup> *Sweet v. Cardona*, 641 F. Supp. 3d 814, 823–24 (N.D. Cal. 2022).

<sup>37</sup> *Weingarten v. DOE*, 468 F.Supp.3d 322, 328 (D.D.C. 2020).

<sup>38</sup> *Sweet*, 641 F. Supp. 3d at 823–24.

<sup>39</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

<sup>40</sup> Isaiah McKinney, *The Chevron Ball Ended at Midnight, but the Circuits are Still Two-Stepping by Themselves*, YALE J. REG. (Dec. 18, 2022) <https://www.yalejreg.com/nc/chevron-ended/>.

<sup>41</sup> *Loper Bright Enterprises v. Raimondo* (No. 22-451); *Relentless v. Dept. of Commerce* (No. 22-1219).



Secretary asserts in the Notice.<sup>42</sup> Therefore, proceeding with the current proposal under the assumption that a supposed ambiguity is sufficient to support the rule is unreasonable.

The better approach to the HEA comes from an opinion emanating from the District Court for the District of Connecticut, which stated that:

while there are provisions making clear that loans issued under Part D are subject to the same terms, conditions, and benefits as loans issued under Part B ... I have not found, and the parties have not cited, language incorporating into Part D the Secretary's "general powers," ... from Part B.<sup>43</sup>

That is the most natural interpretation of the interplay between Sections 1087a and 1082(a). Congress plainly could have drafted Section 1087a to say that direct loans would be subject to the same terms, conditions, benefits, *and powers or authority*, but it did not. The Secretary is not free to rewrite the law under the pretense of interpretation so that Congress' handiwork better suits his boss's past and future campaign promises.<sup>44</sup>

Putting that aside and assuming for argument's sake that the Secretary has the waiver power over all the affected loans, the legal interpretation the Secretary advances in the proposed rule is not consistent with the HEA's text and structure. Congress created only a few cancellation programs, all subject to stringent criteria, indicating that Congress saw a need only for limited instances of student debt forgiveness. These few debt-relief programs stand against a statutory backdrop that "specifies in detail the terms and conditions attached to federal loans, including applicable interest rates, loan fees, repayment plans, and consequences of default."<sup>45</sup> Among the details specified by Congress is an explicit distinction between student loans and educational grants.<sup>46</sup> Additionally, where Congress gave the Secretary power to dispose of direct loans (through sale or purchase), Congress required the Secretary to confer with the Secretary of the Treasury and to determine that the proposed redistribution of student loans was "in the best financial interests of the Federal Government" in the case of sales or would "not result in any net cost to the Federal Government" in the case of loan purchases.<sup>47</sup>

Taken together, these attributes of the HEA warrant several conclusions. First, Congress was, and remains, well aware that some borrowers become encumbered by student debt that they will struggle to repay in full. Yet Congress determined that it was desirable to provide relief programs only for a limited subset of such borrowers. Given the degree of specificity in the HEA, it beggars belief that when Congress granted the Secretary authority to "waive" a "right, title, claim [or] lien," it intended to give the Secretary authority to create—in his sole discretion—new, and much broader, debt relief programs with wide-ranging consequences for

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<sup>42</sup> See *Biden*, 143 S. Ct. at 2380 (Barrett, J. concurring).

<sup>43</sup> *Pennsylvania Higher Educ. Assistance Agency v. Perez*, 416 F. Supp. 3d 75, 96 (D. Conn. 2019).

<sup>44</sup> See Jack Fitzhenry and GianCarlo Canaparo, *The Dean Wormer Theory of Administrative Law*, 27 TEXAS REV. OF L. & POLITICS 371, 375-76, 423 (2023) (describing President Biden's student-loan-related campaign promises).

<sup>45</sup> *Biden*, 143 S. Ct. at 2362.

<sup>46</sup> Compare 20 U.S.C. § 1070a *et seq.* ("Part A—Grants to Students in Attendance at Institutions of Higher Education") with 20 U.S.C. § 1087a ("Part D—William D. Ford Federal Direct Loan Program").

<sup>47</sup> 20 U.S.C. §§ 1087i, 1087i-1.

the federal balance sheet. New debt-relief programs like the ones the Secretary proposes cannot be erected within the HEA's existing structure without disregarding the definitions and limits that Congress carefully worked out for other programs.<sup>48</sup> The creation of these novel programs also disregards the fact that Congress nowhere gave the Secretary authority to convert monies appropriated for loans into grant funding, though this is, in many cases, the intended effect of the proposal as a significant number of borrowers will repay less than the amount loaned to them.

These are difficulties that the Notice does not acknowledge, let alone address; rather, it asserts that the Secretary has "existing and longstanding authority" to implement these new relief programs single-handedly.<sup>49</sup> Rather than explain that legal authority, the Notice merely begs the question: what exactly is this power and where are the past exercises of it that mirror the current project in scope? If the power of mass debt cancellation is indeed longstanding, then why have previous Secretaries been unaware of the vast untapped potential lurking in a law extant since 1965 with even older statutory antecedents?<sup>50</sup> Where are the past instances evidencing the existence of anything akin to the scope of authority the Secretary now claims to find in the "statutory backwater" that is Section 1087a?<sup>51</sup>

Finally, whatever waiver power the Secretary has, he can exercise it only in furtherance of a limited set of aims: those entailed in the "performance of, and with respect to, the functions, powers, and duties" vested in him by the parts of the HEA that create the relevant loan program.<sup>52</sup> The Notice bats away this concern, explaining that here, "waiver authority operates within the context of the HEA's goals" and that "considerations of equity and fairness" militate in favor of this exercise of the waiver authority.<sup>53</sup> Describing the Secretary's duties at that level of generality eliminates any meaningful constraint on the Secretary's discretion, even as the Notice assures the reader that the Secretary has only "bounded flexibility."<sup>54</sup> Bounded by what exactly? A flexible approach to the separation of powers? Absent reference to the Secretary's specific responsibilities under the HEA, considerations of equity and fairness could just as easily become a pretext for expanding student debt relief beyond the programs authorized by Congress and a means for the Secretary to avoid his duty to administer the student loan program. To the extent the Secretary can waive loan balances on the basis of financial hardship, that power is evidently limited to interstitial application on a retail-level basis.

Looming over this proposal and every executive-branch effort to eliminate outstanding student loan debt unilaterally is the major questions doctrine. Where an agency "claim[s] to discover in a long-extant statute an unheralded power representing a transformative expansion in [its] regulatory authority," the Supreme Court has stated that courts should not presume that Congress has delegated the asserted authority.<sup>55</sup> Instead, it will require the agency to identify "clear

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<sup>48</sup> *Cf. Biden*, 143 S. Ct. at 2369 ("No prior limitation on loan forgiveness is left standing.").

<sup>49</sup> Notice at 42.

<sup>50</sup> Colin Mark, *May the Executive Branch Forgive Student Loan Debt Without Further Congressional Action?*, 42 J. NAT'L ASS'N ADMIN. L. JUDICIARY 97 (2022).

<sup>51</sup> *W. Virginia v. Env't Prot. Agency*, 597 U.S. 697, 730 (2022).

<sup>52</sup> 20 U.S.C. § 1082(a).

<sup>53</sup> Notice at 18, 19.

<sup>54</sup> *Id.* at 18.

<sup>55</sup> *W. Virginia v. Env't Prot. Agency*, 597 U.S. 697, 724 (2022) (internal quotation marks omitted).

congressional authorization for the power it claims,” not merely to a “plausible textual basis” for that power.<sup>56</sup>

Here, the proposed rule bears every relevant hallmark of a major question that Congress alone is competent to address. The reasons why can be found in the decision that struck down the Secretary’s last student-debt-cancellation bid: *Biden v. Nebraska*. There, as here, the Secretary claimed authority effectively “to rewrite [the Higher Education Act] from the ground up” and institute “a novel and fundamentally different loan-forgiveness program” from those designed by Congress.<sup>57</sup> There, as here, the “Secretary’s assertion of administrative authority has ‘conveniently enabled [him] to enact a program’ that Congress has chosen not to enact itself.”<sup>58</sup> And there, as here, the “sweeping and unprecedented impact of the Secretary’s loan forgiveness program” places the issue squarely in the purview “of the House and Senate Committees on Appropriations,” not the Department of Education.<sup>59</sup>

Nor do the legally relevant similarities end there. “The economic and political significance of the Secretary’s action is staggering.”<sup>60</sup> The proposed plan, like its predecessor, is expensive. Its \$84-billion price tag may be small relative to the administration’s previous debt jubilee, but it is no modest sum, and compared with the dollar figure attached to past major questions, it is evident that this amount is more than sufficient.<sup>61</sup> As for political salience, the issue of student loan debt is and remains a matter of great political import. What, if anything, could possibly have intervened between June 2022 and now to make that any less so? One gets the distinct impression that it is precisely the issue’s enduring political significance that has prompted the Secretary to undertake this and other impromptu executive initiatives to eliminate student debts in an election year. The Secretary cannot avoid the issue’s political valence by simply invoking a new statutory justification for the giveaway, particularly when the new statutory basis is as dubious as the last.

More alarming than the exact dollar figure is the lack of any real limiting principle to the authority that the secretary asserts. Here, as in *Biden v. Nebraska*, “the Government’s reading of the [Higher Education] Act, the Secretary would enjoy virtually unlimited power to rewrite the Education Act” as it pertains to student loans.<sup>62</sup> The Notice repeatedly claims that this is only a “one-time waiver.”<sup>63</sup> But the Notice is clear that the already-broad contours of the current proposal do not “limit the Secretary’s discretion to waive debt in other circumstances.”<sup>64</sup> Even were this waiver-en-masse a one-off, that fact would do nothing to bolster its legality. Nothing in

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<sup>56</sup> *Id.* at 723.

<sup>57</sup> *Biden*, 143 S. Ct. at 2368.

<sup>58</sup> *Id.* at 2373.

<sup>59</sup> *Id.* at 2374.

<sup>60</sup> *Id.* at 2358.

<sup>61</sup> *See, e.g., Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (noting that \$50 billion would be a “reasonable proxy of the moratorium’s economic impact”).

<sup>62</sup> *Biden*, 143 S. Ct. at 2373.

<sup>63</sup> *See, e.g., Notice* at 28, 45.

<sup>64</sup> *Notice* at 34.

the Secretary’s thumbnail sketch of a legal theory would prevent future secretaries from doing the same thing as often as the officeholder deems it desirable.<sup>65</sup>

What the Secretary purports to exercise in the proposed rule is no “discretionary” authority appropriate to the executive branch; it is full-blown legislative authority, treading into the appropriations domain constitutionally reserved to Congress, unmoored from any intelligible principled limit to its application. The only limit discernible in the current proposal is the administration’s estimate of how much debt can be erased before more voters will punish the president for his profligacy than will reward him.

The major questions doctrine poses an inescapable legal obstacle to the Secretary’s designs. For the reasons explained, the problem is not obviated simply because the Secretary now purports to find his authority in the HEA instead of the HEROES Act.<sup>66</sup> Thus, the Secretary must confront the matter before he can forge ahead with a dubiously legal undertaking. Agency policymaking is required to be reasonable, not wishful.

In conclusion, financing higher education should empower students to pursue paths that align with their needs without exposing taxpayers to enormous debt burdens. There is an undeniable necessity for reforms within the higher education sector, albeit not in the manner proposed by the Department in the current regulation. The regulation exhibits several shortcomings in its proposed form, which we have identified in our analysis above.

Thank you for considering our concerns.

Respectively submitted,

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<sup>65</sup> See *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) (“Under OSHA’s reading, the law would afford it almost unlimited discretion—and certainly impose no ‘specific restrictions’ that ‘meaningfully constrai[n]’ the agency. OSHA would become little more than a ‘roving commission to inquire into evils and upon discovery correct them.’” (alteration in original) (citations omitted)).

<sup>66</sup> The Higher Education Relief Opportunities for Students Act of 2003, specifically 20 U.S.C.A. § 1098bb(a)(1), was the asserted basis for Secretary’s unlawful attempt at debt cancellation.