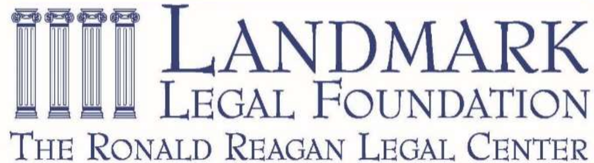

Student Debt Relief for the William D. Ford Federal Direct Loan Program (Direct Loans), the Federal Family Education Loan (FFEL) Program, the Federal Perkins Loan (Perkins) Program, and the Health Education Assistance Loan (HEAL) Program

Agency: Department of Education

Comment Period Opens: April 17, 2024

Comment Period Closes: May 17, 2024

Comment Submitted: May 17, 2024

Landmark Legal Foundation ("Landmark") submits this comment on the Department of Education's ("DOE" or "the Department") 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** ("Proposed Rule" or "the Proposal"). For the reasons set forth in this comment, DOE should immediately revoke the current Proposed Rule.

The Proposed Rule:

1) Exceeds the authority of the Secretary of Education under 20 U.S.C. § 1082(a)(6);
2) Violates the Supreme Court's Major Questions Doctrine set forth in *West Virginia v. EPA; and*

3) Undermines the interests of the American public in the rule of law and the right of contract.

Introduction

Since the passing of the Higher Education Act (HEA) of 1965, the Secretary of Education ("the Secretary") has been authorized in limited situations to cancel or reduce student loans. This includes authorization to forgive the student loans for teachers who elect to teach for five years in certain schools, or for loan holders who become disabled. *See* 20 U.S.C. §§ 1078-10, 1087(a)(1), 1087(b), 1087j, 1087ee. This limited and specific authority has not deterred the Biden Administration's efforts to unilaterally cancel billions in student debt. Several years ago, the Department of Education announced a plan to forgive nearly 430 billion dollars of outstanding student loans under the Higher Education Relief Opportunities for Students (HEROES) Act. The HEROES Act permits the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency." *Biden v. Nebraska,* 143 S. Ct. 2355, 2363 (2023) (quoting 20 U.S.C. § 1098bb(a)(1)). The Supreme Court struck down this regulatory scheme, holding that the government's proposed plan violated the Major Questions Doctrine. In short, the Secretary attempted to authorize a student debt cancellation plan with massive economic consequences by improperly relying on vague language in the statute.

Undeterred, the Biden Administration has embarked once again on a quest to cancel enormous amounts of student debt, this time by boot-strapping provisions of the Federal Claims Collection Standards as justification. On April 17, 2024, the Department released proposed additions to 34 C.F.R. § 30 *et seq.* which would forgive vast quantities of student debt under the Direct Loans Program, FFEL Program, Perkins Program, and the HEAL program.

The Proposed Rule would modify §§ 30.70(a)(1) and 30.70(c)(1) to incorporate the Federal Claims Collection Standards (FCCS) for debt compromise, suspension, or termination, and the introduction of new sections enhancing the Secretary's discretionary authority to waive outstanding student loan debt under a range of conditions. The addition of §§ 30.81 and 30.84 would focus on Income-Driven Repayment (IDR) Plans, allowing the Secretary to cancel the accrued interest of those borrowers enrolled in an IDR Plan, provided their income falls below specific thresholds. Those eligible for IDR but not currently enrolled could also have their debt cancelled. The addition of § 30.82 provides a one-time debt cancellation for the lesser of $20,000 or the interest that has accrued since the loan entered repayment. § 30.83 permits the Secretary to cancel the balance of any outstanding loans older than 20 years for those who pursued an undergraduate degree, or 25 years for loans taken for higher education other than an undergraduate degree. The addition of § 30.85 allows the Department to automatically cancel the loans of those eligible, even if they have not applied to do so. The addition of §§ 30.86-30.88 outlines additional parties eligible for loan cancellation, including students of schools that have lost title IV eligibility, those affected by institutional closures, and those enrolled in Gainful Employment (GE) programs that have closed, and before closure had adverse debt-to-earnings ratios or low median earnings. The addition of § 682.403 outlines conditions under which the Secretary may cancel outstanding balances for Federal Family Education Loans (FFEL): the loan entered repayment in 2000 or earlier, the borrower is eligible for closed school discharge, or institutional loss of title IV eligibility based on high Cohort Default Rates (CDRs).

According to the Department, the Proposed Rule will cost the taxpayer as much as $150 billion. This appears to be a gross underestimate of the costs of the Proposed Rule. An analysis from the Committee for a Responsible Federal Budget (CRFB) found that the cost could be as high as $750 billion, depending on how the Secretary chooses to define what constitutes a "borrower experiencing hardship," something the Department is in negotiation over. 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 (proposed April 17, 2024) (to be codified at 34 C.F.R. pt. 30 and 34 C.F.R. pt. 682).

The Department relies on 20 U.S.C. § 1082(a)(6) as its statutory authority for the Proposed Rule:

> "(a) In the performance of, and with respect to, the functions, powers, and duties, vested in him by this part the Secretary may…
>
> > (6) enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption."

The Proposed Rule exceeds this statutory authority. 20 U.S.C. § 1082(a)(6) does not grant the Secretary of Education the sweeping authority which the Department claims. The Department's own Office of General Counsel concluded as much in 2021. This makes sense logically; if the Secretary was already so empowered under the HEA, the Department would not have initially attempted to cancel student debt using the vaguer statutory language of the HEROES Act. The Proposed Rule therefore violates the Major Questions Doctrine. The regulation would impose, by vague statutory authority, at *minimum*, $150 billion in costs upon the taxpayer, and potentially as much as $750 billion, a cost over one and a half times greater than that of the HEROES Act plan.

The Proposed Rule would also undermine the interests of the American public. It would create significant future distortions in the economy by creating moral hazards and would misallocate taxpayer funds for a plan designed for political gain. It would also upend economic stability by undermining the right to contract and the right to enforce contracts. For these reasons, the Proposed Rule should be revoked.

1. The Proposed Rule goes beyond the statutory authority of the Secretary of Education under the Higher Education Act.

DOE relies on 20 U.S.C. § 1082(a)(6) as authority to justify all changes to 34 C.F.R. § 30 and § 682. This section provides that 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." 20 U.S.C. § 1082(a)(6). The Department claims that this statutory provision gives the Secretary unfettered authority to forgive vast quantities of student loans, here at *least* $150 billion. Simply put, this claim is false. As the Supreme Court stated, "Congress opted to make debt forgiveness available only in a few particular exigent circumstances." *Biden v. Nebraska*, 143 S. Ct. 2355, 2369 (2023). The Department's overly broad interpretation of 20 U.S.C. § 1082(a)(6) is firmly rebutted by the former Secretary of Education, Elizabeth DeVos, as well as the Department of Education's own Office of General Counsel.

In an Amicus brief submitted in 2023 in the consolidated cases of *Biden v. Nebraska* and *Department of Education v. Brown*, Secretary DeVos noted that the Education Department has a long understanding that the Higher Education Act is very clear in its limitation on loan forgiveness. She argued, "Congress has set forth explicit requirements that loans be made available to eligible borrowers with the very clear intention that they be repaid." Brief for Elizabeth DeVos, *et al*. as *Amicus Curiae* Supporting Respondents at 26, *Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (No. 22-506). Continuing, she stated, "Congress has not allowed for the mass cancellation of student loan debt anywhere in this carefully crafted statutory scheme. Rather, in the few instances where Congress did elect to offer loan cancellation to borrowers, it did so directly with respect to specifically tailored groups of borrowers and with detailed instructions." *Id.* at 27 (emphasis omitted). In mentioning various sections of the HEA which do so, she referenced § 1082(a)(6) but notes that this section does not authorize "mass cancellation" *Id*. at 28 (Footnote 8).

Former Secretary DeVos did not concoct this assertion out of thin air. Rather, she relies on a 2021 memorandum from the Office of the General Counsel (OGC) for the Department of Education. The memorandum "memorialize[d the DOE's] opinion concerning the Secretary's statutory authority to cancel, compromise, discharge, or forgive, on a blanket or mass basis…student loans…whether due to…the COVID 19 pandemic, or otherwise." Reed Rubinstein, *Memorandum for Betsy DeVos, Secretary of Education, re: Student Loan Principal Balance Cancellation, Compromise, Discharge, and*

Forgiveness Authority, at 1 (Jan. 12, 2021), https://tinyurl.com/a4n326cw. The OGC specifically considered whether § 1082(a)(6) grants the Secretary the authority to forgive student loans en masse. It concludes, "We believe reading 20 U.S.C. § 1082(a)(6) to permit [this] would 'be hyperliteral and contrary to common sense.'" *Id.* at 3 (quoting *RadLAX Gateway Hotel, LLC v. Amalgamated Bank,* 566 U.S. 639, 645 (2012)). The OGC goes further, noting:

> Assuming *arguendo* that there is a policy case for student loan principal balance cancellation, compromise, discharge, or forgiveness by administrative decree, the Office of the General Counsel does not believe the statutory scheme fairly allows 20 U.S.C. § 1082(a)(6) to be the basis for doing so. Rather, we believe 20 U.S.C. § 1082(a)(6) is best construed as a limited authorization for the Secretary to provide cancellation, compromise, discharge, or forgiveness only on a case-by-case basis and then only under those circumstances specified by Congress. Attempting to shoehorn broad authority into 20 U.S.C. § 1082(a)(6) 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. *Id.* at 4.

In a footnote, the OGC made the following clear:

> The Department has recognized the far outer boundary of its authority as authorizing partial compromise or waiver of FFEL program loans held by the Department, and only to the extent of providing an interest credit for a defined time period, such as during the time when a borrower defense application regarding such loan(s) is pending or during the weeks between the declaration of the COVID-19 national emergency and the passage of the CARES Act. The Department has also interpreted this general power to apply in a similar way in the context of the Direct loan program and the Perkins loan program, based on statutory language extending 'the same terms, conditions, and benefits' for those loans as are available for FFEL program loans. Yet even this conclusion is debatable because the Secretary's general power to compromise or waive claims under the FFEL program is neither a term nor a condition nor a benefit of FFEL program loans. *Id.* (quoting 20 U.S.C. § 1087e(a)(1)).

Here, the OGC rejects the claim that § 1082(a)(6) grants the authority which the DOE now claims. The Proposed Rule is not an attempt to forgive student loans on a case-by-case basis, nor has DOE received any specific authorization from Congress. DOE's regulation therefore operates far beyond any reasonable interpretation of its statutory authority under 20 U.S.C. § 1082(a)(6).

This conclusion is not surprising. If the HEA had provided the Secretary with the broad power to forgive student loans en masse, why would the Department of Education not have relied on § 1082(a)(6) to begin with? It is illogical to believe DOE would not initially attempt to cancel student debt in the simplest manner with the highest chance of success. That the Department originally relied on the HEROES Act to attempt to cancel student debt is telling. Evidently, the Department considered it less

plausible that 20 U.S.C. § 1082(a)(6) could convey the Secretary with broad powers to forgive loans than that the HEROES Act could do so.

Even Democrats have conceded that only Congress has the authority to take such vast action. Former Speaker of the House Nancy Pelosi stated the following in 2021: "People think that the President of the United States has the power for debt forgiveness. He does not. He can delay. But he does not have that power. That has to be an act of Congress." Press Conference, Office of the Speaker of the House (July 28, 2021).

The authority of the executive branch on this matter has not changed since 2021, as *Biden v. Nebraska* made clear, though shifting political winds may have made action more desirable. Without specific authorization from Congress, the DOE cannot simply wave away billions of dollars in contract obligations Thus, the Department has overstepped its authority in promulgating this Proposal and should revoke it.

2. The Proposed Rule violates the Supreme Court's Major Questions Doctrine.

In overstepping its statutory authority, the Department has violated both the Separation of Powers Doctrine and the Major Questions Doctrine set forth in *West Virginia v. EPA*. In sum, the Biden Administration in general and the Department of Education in particular, lacks authority to impose such massive economic damage through a regulatory back door.

A. Promulgation of the Proposed Rule would have significant economic impact.

According to the Secretary, the total net budget impact through 2034 is estimated to be $147.415 billion. 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 (proposed April 17, 2024) (to

be codified at 34 C.F.R. pt. 30 and 34 C.F.R. pt. 682). This is an exorbitant price tag, but there is evidence to suggest that the actual cost of the proposed regulation will be significantly higher. For example, the Department's estimate does not consider the cost of the "proposed regulations related to possible waivers for borrowers facing hardship," currently under consideration. *Id.*

The Committee for a Responsible Federal Budget (CRFB) approximates that this additional proposal could cost taxpayers hundreds of billions, increasing the total cost from around $150 billion to between $250 and $750 billion (about $2,300 per person in the US). The Department has not currently defined what specifically constitutes hardship, but this could include up to 16 factors, including extremely broad criteria such as "any other indicators of hardship identified by the Secretary." *Id.* The Secretary has specified the threshold as 80 percent likelihood of default to qualify debt cancellation based on significant default risk. U.S. Dep't of Educ. Proposed Regulatory Text, (proposed Feb. 23, 2024) (to be codified at 34 C.F.R. § 30.91), https://www2.ed.gov/policy/highered/reg/hearulemaking/2023/sdr-negotiated-rulemaking-section-30-91-final-text-consensus-reached.pdf. Considering that over $150 billion of loan debt is already in default, this would impose significant additional costs. The CRFB estimates that "a further 6 million borrowers are over 90 days delinquent on their loans, which is another predictor of a high likelihood of default and would further push up the number." *Student Debt Plan Would Add Hundreds of Billions to Deficit,* Committee for a Responsible Federal Budget Blog (Apr. 16, 2024) https://www.crfb.org/blogs/student-debt-plan-would-add-hundreds-billions-deficit. While the debt forgiveness program concerning defaults would only apply for the next two years, the provisions regarding hardship would have no expiration, paving the way for future administrations to pursue sweeping debt cancellations at the taxpayers' expense guided simply by the Secretary's discretion. Once again, DOE is attempting to force an elephant through the mousehole.

Even if the current plan were only to impose a cost of $150 billion, as the DOE suggests in its analysis, the Proposed Rule would still impose significant costs on the economy and the taxpayer and likely trigger the Major Questions Doctrine. Yet the CRFB provides a more accurate prediction of the

total cost, which is even higher. The budgetary impact of the Proposed Rule, which could be between $250 and $750 billion is not merely comparable to that of the plan rejected the Supreme Court in *Biden v. Nebraska* but would eclipse it. Equally important, forgiving these loans would interfere with the fundamental right to willingly enter into contracts and upset the ability of those seeking to enforce said contracts. Individuals who elect to obtain loans make a promise to repay those loans and lenders have a right to expect as much.

B. The Major Questions Doctrine forbids the enactment of such an economically significant Proposed Rule.

The Major Questions Doctrine, set forth in *West Virginia v. EPA* and *Biden v. Nebraska*, confirms that executive agencies cannot interpret ambiguous legislation in a manner that would allow agencies to promulgate regulatory actions triggering an overhaul of major economic or political influence. The Doctrine is crucial to the preservation of the separation of powers as it prevents agencies from exceeding the scope of their constitutional authority and ensures that the biggest issues are left to Congress to legislate.

The similarities between this Proposed Rule and the failed attempt by the DOE to implement student loan forgiveness under the HEROES Act should not be ignored. In both cases, the Secretary claims broad authority to forgive student loans en masse using vague statutory language, with significant economic impact. With estimated costs between $150 and $750 billion, this Proposal will have an economic impact *at least* as significant as the HEROES Act forgiveness plan, if not significantly greater. The Supreme Court rejected the latter for exceeding the authority of the Secretary. It stated "'[a] decision of such magnitude and consequence' on a matter of 'earnest and profound debate across the country' must 'res[t] with Congress itself, or an agency acting pursuant to a clear designation from that representative body.'" *Biden v. Nebraska,* 143 S. Ct. 2355, 2374 (2023) (quoting *West Virginia v. EPA* 142 S. Ct. 2587 (quoting *Gonzales v. Oregon* 546 U.S. 243, 267-268)). The same is true for this proposal. The text of 20 U.S.C. § 1082(a)(6), as previously noted, is not a *clear* authorization from Congress to engage in mass

student debt cancellation to the tune of hundreds of billions of dollars. That decision would impose vast economic costs on the taxpayer.

The Supreme Court already rejected an attempt by DOE to implement an enormous student debt cancellation scheme. The regulatory justification is different in this case. But by promulgating this regulation, the Department appears to discount the Supreme Court's ruling in *Biden v. Nebraska.* The debt cancellation issue is extremely economically impactful, and therefore any solution to that problem is a "Major Question" which must be considered by Congress. The executive branch cannot take such a drastic action based on a single vague sentence, one which the DOE had stated does not confer it with such broad powers.

This regulation thus violates the Major Questions doctrine and must be revoked.

3. The Proposed Rule undermines the interests of the American public.

Under Federal Regulations, the Secretary of Education may forgive a debt, when statutorily authorized, if, among other factors, it will "further and protect the interests of the United States." 34 C.F.R. § 30.21(b)(2)(ii). As discussed above, the Secretary of Education is not statutorily authorized to enact this Proposed Rule. However, even assuming that 20 U.S.C. § 1082(a)(6) *did* grant the Secretary this authority, and the Proposed Rule *did not contradict* Supreme Court jurisprudence, the Proposed Rule would still not "further…the interests of the United States." *Id.*

A. The Proposed Rule creates the potential for significant future economic distortions.

Not only does the Proposed Rule carry a price tag in the hundreds of billions, but it also fails to consider the broad economic fallout likely to be caused by such a massive amount of student debt cancellation. One such result of widespread loan cancellation is moral hazard. The growth of student loans is already a significant issue. Data from the National Center for Education Studies reveals that incoming college freshman "could take on as much as $37,000, on average, in student debt to earn a bachelor's degree." Jessica Dickler, *As more borrowers qualify for student loan, incoming college*

freshmen are set to rack up $37,000 in new debt, report finds, CNBC, Apr. 25, 2024, https://tinyurl.com/4u6kzb23. The Proposal creates a precedent that leads many borrowers to believe that because their debt is being cancelled now, this will also be the case in the future. Such an idea encourages students to pursue far more costly programs without any regard for the long-term financial implications.

This trend will only serve to exacerbate the student debt crisis. This applies not only to borrowers, but also to colleges and universities. Institutions will be under less pressure to innovate and compete on factors such as affordability and value if prospective students believe that they will have their loans forgiven no matter which school they attend. The problem that moral hazard poses is serious and cannot be ignored. A feedback loop of debt accumulation and forgiveness is unsustainable and will be accelerated by the general belief that no one is truly responsible for their debt and may likely conclude with the straining of already limited government resources.

As noted previously, the Proposed Rule will also undermine the right to contract. Individuals who voluntarily agree to accept and repay loans should be held accountable. Lenders, as parties to valid contracts, should have an expectation that students will fulfill their contractual obligations and repay their loans. The federal government and, by extension, the American taxpayer should not be expected to foot the bill.

B. The Proposed Rule is an unconstitutional attempt to buy votes with taxpayer dollars.

Student debt is a significant issue for many young voters and the administration is obviously aware of this reality. President Biden has been accused of using student debt forgiveness plans in the past for ulterior motives. In 2022, one Hill columnist stated “I voted for Biden, but I do think the move was cynically political, coming as it did 100 days before the November congressional elections. Forgiving loans of up to $20,000 to more than 40 million potential voters could be perceived as a crass attempt to buy votes.” John Pelletier, *Biden’s reckless, broken promise on college debt*, The Hill, Jun. 30, 2023, https://thehill.com/opinion/judiciary/4076409-bidens-reckless-broken-promise-on-college-debt/. The

timing of this Proposed Rule seems equally suspect. As the New York Times noted, "Biden administration officials said they could begin handing out some of the debt relief — including the canceling of up to $20,000 in interest — as soon as this fall." Erica Green, *What to Know About Biden's New Student Debt Relief Plan*, Apr. 8, 2024, https://www.nytimes.com/2024/04/08/us/politics/biden-student-debt-plan-explained.html. One Op-Ed said of the perceived vote-purchasing "[i]t's a risky strategy, but Biden is running short on options to court young Americans who feel shut out of the American dream and are unhappy with Biden's foreign policy." Jennifer Graham, *Biden's student loan forgiveness plan is a campaign strategy that could backfire,* Apr. 20, 2024, https://www.deseret.com/politics/2024/04/20/bidens-student-loan-forgiveness-plan-is-a-campaign-strategy-that-could-backfire/.

The use of student loan cancellation to secure support from borrowers is not in the interest of the American people. These funds, totaling anywhere from $150 billion to $750 billion, could be allocated in many other places in the economy. This Proposed Rule elevates certain private political interests over the economic and political interest of the United States as a whole.

Conclusion

For these reasons, the Department of Education should rescind the Proposed Rule immediately.

Respectfully submitted,

Benjamin L. Whearty
Gary L. McDowell Research Fellow

Benjamin L. Gleason

Research Associate

Michael J. O’Neill

Vice President of Legal Affairs