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December 2, 2024

VIA Docket ED-2023-OPE-0123

The Honorable Miguel A. Cardona, Ph.D.
Secretary of Education
U.S. Department of Education
400 Maryland Ave. SW
Washington, DC 20202

CC: Linda McMahon, Nominee for Secretary of Education

Re: Comment by States of Missouri, Kansas, and 21 other States on 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. 87,130)

Dear Secretary Cardona,

We write to express our significant concerns about the notice of proposed rulemaking published in the Federal Register on October 31, 2024, titled "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" (the "Proposed Rule"). *See* 89 Fed. Reg. 87,130.

This is the fourth time your Department has tried to shift the expense of student loans from those who willingly took them out to the American taxpayers.

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Everyone from the Supreme Court,[1] to President Joe Biden,[2] to former Speaker of the House Nancy Pelosi[3] has publicly acknowledged that you do not have the authority to forgive debt except in the limited ways Congress clearly outlined. You must adhere to these warnings and *follow the law*.

The Department's first attempt at loan forgiveness relied on purported "waiver" authority under the HEROES Act to broadly forgive between $10,000 and $20,000 for nearly every borrower. This plan would have cost taxpayers upwards of $430 billion. The Department's claimed authority was challenged in federal court by six states—including many States represented by signatories here—and was roundly rejected by the Supreme Court in *Biden v. Nebraska*, 143 S. Ct. 2355 (2023). The Supreme Court stressed the "staggering" "economic and political significance" of the executive action and noted that not only did the Department lack any "clear" textual authority for its action; it did not even have plausible textual authority. *See id.* (citing *West Virginia v. EPA*, 597 U.S. 697 (2022)).

Ten days after that ruling, on July 10, 2023, the Department launched its second attempt, publishing a final rule titled "Improving Income Driven Repayment for the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan (FFEL) Program," (the "SAVE Final Rule"). The Department's second attempt relies on purported authority under the Higher Education Act (the "HEA") to provide broad-based loan forgiveness and offer a new income-driven repayment ("IDR") plan called "SAVE," to reduce—and for many borrowers, outright eliminate—monthly payments and forgive the remaining balances. *See* 88 Fed. Reg. 43,820. The SAVE Final Rule was challenged in two separate federal lawsuits, one led by Kansas and one led by Missouri. In total, eighteen States challenged that rule. *See Kansas v. Biden*, 24-cv-01057 (D. Kan. Mar. 28, 2024); *Missouri v. Biden*, 24-cv-00520 (E.D. Mo. Apr. 9, 2024). On June 24, 2024, the District of Kansas granted a preliminary injunction against the SAVE Final Rule, which "enjoined [the Government] from implementing or acting pursuant to the parts of [the] Final Rule . . . set to become effective on July 1, 2024." *Kansas v. Biden*, 24-cv-01057, ECF No. 76 (D. Kan. June 24, 2024). That same day, the Eastern District of Missouri issued a preliminary injunction, which "enjoined [the Government Defendants] from any further loan forgiveness for borrowers under the Final Rule's SAVE plan." *Missouri v. Biden*, 24-cv-00520, ECF No. 35 (E.D. Mo. June 24, 2024). Those cases proceeded to appeal in the Tenth and Eighth Circuits, respectively. On August 9, 2024, an administrative panel of the Eighth Circuit issued a full injunction pending appeal, which "enjoined [the Government Defendants] from any further forgiveness of

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[1] *See Biden v. Nebraska*, 143 S. Ct. 2355 (2023).
[2] Michael Stratford, *Schumer, White House at Odds over How to Cancel Student Loan Debt*, Politico (Feb. 4, 2021), https://www.politico.com/news/2021/02/04/schumer-biden-student-loan-debt-466054
[3] Press Conference, Office of Speaker of the House Nancy Pelosi (July 28, 2021) ("People think that the President of the United States has the power for debt forgiveness. He does not. He can postpone. He can delay. But he does not have that power. That has to be an act of Congress.").

principal or interest, from not charging borrowers accrued interest, and from further implementing SAVE's payment-threshold provisions." *Missouri v. Biden*, 24-2332 * 24-2351, Doc. ID. 5422990 (8th Cir. August 9, 2024).The Supreme Court declined to lift the Eighth Circuit's injunction. *See Biden v. Missouri*, No. 24A173, 2024 WL 3958856, at *1 (U.S. Aug. 28, 2024).

After the Kansas and Missouri coalitions filed suit against the SAVE Final Rule, the Department launched a third attempt at mass debt forgiveness on even weaker statutory grounds. In its Third Mass Cancellation Rule, the Department asserted "waiver" authority under HEA Section 432(a)(6). According to the Department, this section gives the Secretary the power to "waive all or part of any debts owed to the Department." 89 Fed. Reg. 27,565. The Third Mass Cancellation Rule directs the Secretary to make use of that purported authority to establish and effectuate nine new "waivers" for the balances—including both principal and interest—for various borrowers. In late August, Missouri obtained internal servicer documents establishing that the Secretary and Department were quietly working behind the scenes with servicers to implement the Third Mass Cancellation Plan before any aggrieved parties could seek judicial intervention. Days later, Missouri and six other states sued for declaratory and injunctive relief against the Third Mass Cancellation Rule.

On October 3, 2024, the Eastern District of Missouri granted Plaintiff States' motion for preliminary injunction finding that the Third Mass Cancellation Rule was "unlawful." *Missouri v. Dep't of Educ.*, 2:24-cv-01316, ECF 57 at 2 (E.D. Mo. Oct. 3, 2024). The Government Defendants did not appeal this finding, and the preliminary injunction against the use of HEA Section 432(a)(6) to forgive loans in the Direct Loan Program.

Despite the aforementioned preliminary injunction, the Department published its *fourth* attempt at mass loan forgiveness through the Proposed Rule on October 31, 2024. *See* 89 Fed. Reg. 87,130. The Proposed Rule is premised on the same purported authority that is preliminarily enjoined by the Eastern District of Missouri. *Id.* at n.1. The Proposed Rule directs the Secretary to make use of that purported authority to establish and effectuate new loan balance waivers for borrowers who the Secretary deems to be "experiencing or has experienced hardship related to [their] loan." *Id.* at 87,163. The Proposed Rule offers includes a non-exhaustive list of seventeen (17) "factors" which "the Secretary may consider" in determining whether a borrower is experiencing "hardship," including "(17) Any other indicators of hardship identified by the Secretary." *Id.* Using these factors, the Proposed Rule permits the Secretary to (1) use a "predictive assessment" to determine whether, based on information in the Department's possession, borrowers are eligible for immediate, full waiver of their student loan balances, and (2) make a "holistic assessment" of whether borrowers are eligible for full waiver of their student loans based on applications by those borrowers. "A borrower would be eligible for relief if, based on the Department's holistic

assessment, the Department determines that the borrower is highly likely to be in default or experience similarly severe negative and persistent circumstances, and other options for payment relief would not sufficiently address the borrower's persistent hardship." *Id.* at 87,131. The Proposed Rule goes as far as to give the Secretary authority to cancel debt of borrowers who have $0 monthly payments, as even the mere "existence of the debt itself" can cause "hardship." *Id.* at 87,148.

The undersigned States urge the Department to withdraw the Proposed Rule. The Proposed Rule is flawed in that (1) it seizes authority for the Secretary that is not statutorily prescribed by the HEA, and is currently enjoined; (2) it violates separation-of-power principles under the major questions doctrine; (3) it includes flawed cost estimates; (4) it is based on a statutorily deficient negotiated rulemaking process; and (5) it seeks to implement a massive loan forgiveness scheme during a lame-duck Presidential administration.

Actions Beyond Statutory Authority:

The Proposed Rule, like the Third Mass Cancellation Rule, unlawfully seizes power for the Secretary in excess of his statutory authority. Sections 432(a) and 468(2) of the HEA do not authorize the Secretary to waive borrowers' balances and interest at his sole discretion. Those sections give the Secretary the authority to "compromise, waive, or release any right, title, claim, lien, or demand" within the FFEL and Perkins Loan programs, respectively. They do not authorize the Secretary with authority to mass-cancel student loans in those programs.

Even if that language were sufficient in the FFEL and Perkins Loan programs, the Direct Loan program does not include any similar statutory language. The Proposed Rule contends otherwise, claiming that "Congress established parity between the FFEL and Direct Loan program, providing that Federal Direct Loans 'have the same terms, conditions, and benefits as loans made to borrowers'" under the FFEL program." 89 Fed. Reg. 87,133 (quoting 20 U.S.C. § 1087a(b)(2)). There is no textual basis for this view.

The "terms, conditions, and benefits" language refers to interest rates, fees, and the like, not any authority to cancel loans. The Proposed Rule omits critical language. Section 451(b)(2) of the HEA—*i.e.* 20 U.S.C. § 1087a(b)(2)—provides that Direct Loans will "have the same terms, conditions, and benefits as loans made to borrowers *under section 428*," not section 432, the provision on which the Secretary relies to assert authority. Section 428, in turn, contains the specific terms, conditions, and benefits of loans provided under the FFEL program. The Direct Loan program imports just one aspect of section 432, subsection 432(*l*), which directs the Secretary to establish "uniform claims and administrative procedures." The clear reading is that the Direct Loan program imports only those provisions in section 428, which concern borrower-side "terms, conditions, and benefits," and the claims procedures of

section 432(*l*), not the Secretary's purported authority to waive loan obligations (section 432(a)). The Proposed Rule seeks to permit the Secretary to assert authority that he does not have.

This interpretation was confirmed by the Eastern District of Missouri when it enjoined the Third Mass Cancellation Rule as an "unlawful" exercise of authority. *Missouri v. Dep't of Educ.*, 2:24-cv-01316, ECF 57 at 2 (E.D. Mo. Oct. 3, 2024). The Department attempts to evade this conclusion by asserting that the Eastern District of Missouri focused only on the waivers in the Third Mass Cancellation Rule and suggesting that "the waivers in these proposed regulations would operate separately and distinctly from the waivers proposed" in the Third Mass Cancellation Rule. 89 Fed. Reg. 87,131. This gets it exactly backwards. The waivers in the Third Mass Cancellation Rule and the Proposed Rule are only permissible if the Secretary has statutory authority to cancel direct loans under the HEA. Because the Department relies on the same authority for each of these rules, they cannot "operate separately and distinct" from one another. Quite the opposite: where one waiver is barred under the purported authority, any and all waivers are barred under that authority. Because the authority to mass-cancel loans under Section 432(a) was enjoined and deemed unlawful in *Missouri v. Dep't of Educ.*, the Department would necessarily be acting beyond its statutory authority should it attempt to implement the Proposed Rule.

<u>The Major Questions Doctrine</u>:

The Proposed Rule also violates the major questions doctrine. An agency action involving a matter of "vast economic and political significance" will stand only if the agency can identify "exceedingly clear language" authorizing its actions. *Ala. Assn. of Realtors v. Dep't of Health and Human Servs*, 594 U.S. 758, 764 (2021); *see also West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (per curium) (requiring "clear congressional authorization" rather than a "plausible textual basis"). This is because "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *West Virginia*, 597 U.S. at 722 (cleaned up). The Supreme Court applied this doctrine just last year to strike down the Department's first unlawful mass student loan cancellation scheme. *Biden v. Nebraska*, 143 S. Ct. at 2375. It also applies here.

The Proposed Rule is of vast economic significance. The new provisions carry a combined cost of $111.9 billion dollars, according to the Department's estimate. *See* 89 Fed. Reg. 87,158–59. But the Department has a history of underestimating the cost of mass loan cancellations and appears to have done so this time as well. Other estimates suggest the cost of this rule to be $600 billion over ten years, if not more. *See* Committee for a Responsible Federal Budget, *Proposed Hardship Rule a Brazen Attempt at Student Debt Cancellation* (Oct. 25, 2024) ("We've found the cost could be up to $600 billion. And over time, it could open the door to trillions of dollars of debt

cancellation if future Administrations take advantage of its wide scope.").[4] Even assuming the Department's cost estimate of $111.9 billion is correct, that number is far more than sufficient to trigger the doctrine, as it more than double the $50 billion that triggered the doctrine just three years ago. *Alabama Realtors*, 141 S. Ct. at 2489. Indeed, the Eighth Circuit ruled in August that the effort to "forgive hundreds of millions of dollars' worth of student loans" triggered the major questions doctrine. *Missouri v. Biden*, 112 F.4th 531, 537 (8th Cir. 2024). So too here.

It is also of vast political significance. Mass loan forgiveness had "staggering" political significance last year—as the Supreme Court held—and still does today. "'More than 80 student loan forgiveness bills and other student loan legislation' were considered by Congress during its 116th session alone." *Biden v. Nebraska*, 143 S. Ct. at 2373 (citation omitted). The political salience of this topic should not be lost on the Department. In preparing its scheme to implement the Third Mass Cancellation Rule before the Presidential election, Department employees drafted an email to borrowers directing them to thank the "Biden-Harris Administration" for the loan balance windfall. *Missouri v. Dep't of Educ.*, 2:24-cv-00103, ECF 1-10 (S.D. Ga. Sept. 3, 2024). Simply put, the Department *knew* this was a politically salient topic; so much so that it believed its action could help sway a Presidential election. [5] Student loan cancellation is a significant political topic "that Congress would likely have intended for itself." *Biden v. Nebraska*, 143 S. Ct. at at 2375.

Because the Proposed Rule triggers the major questions doctrine, the agency action must demonstrate "clear congressional authorization." *Id.* It also must justify the full "breadth of the authority that the agency has asserted." *West Virginia*, 597 U.S. at 721 (cleaned up); *see also BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep't of Lab.*, 17 F.4th 604, 617 (5th Cir. 2021) ("assertion of virtually unlimited power" raised separation of powers principles concerns over agency mandate). The Proposed Rule comes nowhere close to satisfying that rigorous standard.

Under the Proposed Rule, like the Third Mass Cancellation Rule, the Department asserts staggering powers to waive debt under the HEA. The Department relies on a dubious two-step textual basis asserting that the authority to "enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption," under the FFEL program, 20 U.S.C. § 1082(a)(6), is attributable to all Direct Loans, as they "have the same terms, conditions, and benefits as loans made to borrowers" under the FFEL program, 20 U.S.C. § 1087a(b)(2). The very need to rely on this strained reasoning

[4] https://www.crfb.org/press-releases/proposed-hardship-rule-brazen-attempt-student-debt-cancellation

[5] The Department of Justice agrees that these are "important issues of nationwide significance." Def.'s Resp. to the Court's Scheduling Notice and Proposed Interim Scheduling Ord. at 3, *Kansas, et al., v. Biden, et al.*, Case No. 24-cv-01057-DDC-ADM (Apr. 12, 2024).

belies any notion of exceedingly clear authorization. Yet the Department asserts that Section 1082(a)(6), gives limitless power to the Secretary to determine what repayments can be waived. *See* 89 Fed. Reg. 87,163 (providing for waiver under "any other indicators of hardship identified by the Secretary."). This assertion would mean the Department could cancel all debts for all borrowers at its sole discretion. This construction was rejected in *Missouri v. Department of Education*. 2:24-cv-01316, ECF 57 at 2 (E.D. Mo. Oct. 3, 2024). As discussed above, the same reasoning applies here.

Moreover, departure from longstanding practice without new authorization from Congress is strong evidence the agency is acting without Congressional authorization. *See Biden v. Nebraska*, 143 S. Ct. at 2372 ("The Secretary has never previously claimed powers of this magnitude under the HEROES Act."); *Nat'l Fed'n Indp. Bus. v. Dep't of Labor*, 595 U.S. 109, 117 (2022). Until this administration, the Department has never interpreted section 1082(a)(6) and 1087a(b)(2) as authority to waive debts at its sole discretion. In so doing, the Department is trying to effectuate "fundamental revision of the statute" from one program to another. *West Virginia*, 597 U.S. at 701 (citing *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994)). Congress did not provide the Department with clear authorization under the HEA to undertake these actions. The Proposed Rule is a clear violation of separation of powers principles under the major questions doctrine.

<u>Questionable Cost Estimates</u>:

The cost estimates included in the Proposed Rule are flawed. The two waiver "pathways" have an estimated cost of $111.9 billion dollars. *See* 89 Fed. Reg. 87,158–59. That number nears the Department's estimates for each of the prior Mass Cancellation Rules. And like those rules, the cost estimates in the Proposed Rule are based on flawed assumptions. Indeed, the Proposed Rule *acknowledges* that its estimates are off, in that they assume that the SAVE Rule and Third Mass Cancellation Rules will be implemented. *Id.* at 87,157 n.101 (noting that permanent injunction of the Second and Third Mass Cancellation Rules "could increase the estimated costs for these regulations because there may be more borrowers who are eligible for relief."). If those assumptions prove to be incorrect—and preliminary injunctions of those rules in the Eastern District of Missouri and Eighth Circuit suggest they are—the cost estimate will not reflect reality and will serve to mislead the American public and the courts asked to evaluate this rule when it is inevitably challenged.

At the very least, the Department should produce a second, alternative set of cost estimates that project the costs of the Proposed Rule's "pathways" in the event that the Department does not prevail in the suits challenging the SAVE Rule and Third Mass Cancellation Rule. As noted above, each of those rules has been fully

enjoined, and the courts have concluded that the Plaintiff States are likely to succeed on the merits.

Flawed Negotiated Rulemaking Process:

The Department's negotiated rulemaking process prior to the publication of the Proposed Rule—which was required by the HEA—was deficient as a matter of law. Section 1098a requires the Secretary to undertake a negotiated rulemaking process with respect to regulations pertaining to the HEA. *See* 20 U.S.C. § 1098a. The statute provides that among the participants selected for this process, "[t]he Secretary *shall* select individuals . . . reflecting the diversity of the industry." *Id.* § 1098a(b)(1). A review of those individuals who participated in the negotiated rulemaking, 89 Fed. Reg. 27,567–68, demonstrates that the Secretary failed to meet his statutory obligations.

Five members of the United States Senate wrote to the Secretary on October 9, 2023, before negotiated rulemaking began, with concerns of ideological conformity among the participants. *See* Letter from Senator Chuck Grassley to Dr. Miguel Cardona (Oct. 9, 2023).[6] There can be no diversity of opinions when the negotiated rulemaking process only includes participants who agreed that the Secretary and Department necessarily have otherwise contested authority to act. In fact, the very idea of negotiating requires people with different views on the subject. Similarly, the Department failed to invite representatives of groups that would be harmed by the Proposed Rule, such as taxpayers who did not take out student loan debt. The Department engaged in nothing more than the appearance of negotiated rulemaking. This violates the HEA.

The Rule Should Not Be Implemented During a Lame-Duck Administration

The Department published the Proposed Ruled on October 31, 2024, just days before a Presidential election. On November 5, 2024, Republican-candidate Donald Trump prevailed over Democrat-candidate Vice President Kamala Harris, which will result in a change of administration at noon on January 20, 2024.

The Proposed Rule states that "shortly after finalizing and implementing these regulations, the Department could identify borrowers who would be eligible for waivers . . . and then would expeditiously choose whether to exercise discretion to provide such relief as part of a one-time action." 89 Fed. Reg. 87,145. Given the efforts, and deception, of the Department in its attempt to implement the Third Mass Cancellation Rule, the draft language suggests that the Department may attempt to implement the Proposed Rule before the change on administration in January 2025. Such an outcome would fly in the face of the electorate's decision to change the party

[6] https://www.grassley.senate.gov/imo/media/doc/grassley_colleagues_to_ed_-_student_debt_transfer.pdf

in charge of the Executive Branch. The Department should withdraw the unauthorized Proposed Rule and allow the new administration to determine the best course of action moving forward.

Conclusion

The Department should withdraw the Proposed Rule. The undersigned also state that the complexity and enormity of the issues presented in the Proposed Rule require extending the comment period to 60 days.

Sincerely,

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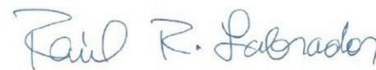

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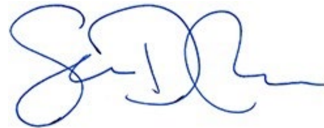

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