NTUF's Comment on Document ID Number ED-2023-OPE-0123
122 C Street N.W., Suite 700, Washington, D.C., 20001
May 17, 2024

Submitted via electronic mail at www.regulations.gov

The Department of Education
400 Maryland Ave. S.W.
Washington, D.C., 20202

Re: Comment on Proposed Rule 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 Document ID Number ED-2023-OPE-0123

Dear Sir or Madam,

On behalf of National Taxpayers Union Foundation ("NTUF") we write with comments on the Department of Education's (the "Department") Proposed Rule 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 (the "Proposed Rule").

I. Introduction

NTUF has been a leader in developing responsible tax administration for nearly five decades. We strive to offer practical, actionable recommendations about how our tax system should function. Our experts and advocates engage in in-depth research projects and informative, scholarly work pertaining to taxation in all aspects, including that of virtual currency.

In 2017, NTUF produced crucial research that guided policymakers as they overhauled the federal tax code for the first time in decades. Our annual Tax Complexity Report highlights the increasing time burden and out-of-pocket filing expenses imposed on taxpayers as they comply with the tax code each year. By combining policy expertise, outreach know-how, and true non-partisanship, we seek to build lasting consensus for impactful reforms.

II. The Proposed Rule Violates the Supreme Court's Holding in *Biden v. Nebraska*, __ U.S. __, 143 S. Ct. 2355 (2023)

This Proposed Rule, on the whole, violates the Supreme Court's 2023 ruling in *Biden v. Nebraska* and must not be implemented.

In *Biden v. Nebraska*, the Department's Secretary attempted to establish a student loan forgiveness program similar to the one in this Proposed Rule. *Biden v. Nebraska*, __ U.S. __, 143 S. Ct. 2355, 2362 (2023). The Secretary cited the Higher Education Relief Opportunities for Students Act of 2003 (the "HEROES Act") for its authority to implement this program. *See id.* The court flatly rejected

this argument. *See id.* at 2368. ("The Secretary asserts that the HEROES Act grants him the authority to cancel $430 billion of student loan principal. It does not."). It explained although the Secretary has some power to waive or modify programs, the Secretary does not have the power "to rewrite the statute from the ground up." *Id.* Although speaking to the Secretary's power to "waive of modify" under 20 U. S. C. §1098bb(a)(1), the Court established that "statutory permission to 'modify' does not authorize 'basic and fundamental changes in the scheme' designed by Congress." *Id.* (quoting *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U.S. 218, 225 (1994)). This term "carries 'a connotation of increment or limitation,' and must be read to mean 'to change moderately or in minor fashion.'" *Id.* (quoting *MCI Telecommunications Corp.*, 512 U.S. at 225). "The authority to 'modify' statutes and regulations allows the Secretary to make modest adjustments and additions to existing provisions, not transform them." *Id.* at 2369.

Given the Court's definition of "modify," the Secretary's proposed "modifications" "were not 'moderate' or 'minor[,]' [but] [is]nstead, they created a novel and fundamentally different loan forgiveness program." *Id.* The Court likened the Secretary's attempt to "modify" student loans by eliminating student loan payments to how "the French Revolution 'modified' the status of the French nobility—it has abolished them and supplanted them with a new regime entirely." *Id.* (internal quotation marks omitted) (quotation omitted). "Congress opted to make debt forgiveness available only in a few particular exigent circumstances; the power to modify does not permit the Secretary to 'convert that approach into its opposite' by creating a new program affecting 43 million Americans and $430 billion in federal debt." *Id.* (citing *Descamps* v. *United States*, 570 U.S. 254, 274 (2013)).

Moreover, the Secretary's invoked ability to "waive legal provisions" under the HEA "does not remotely resemble how [waiver] . . . has been used on prior occasions." *Id.* at 2370. "Previously, waiver under the HEROES Act was straightforward: the Secretary identified a particular legal requirement and waived it, making compliance no longer necessary[,]" such as a requirement for a written request for a student's leave of absence. *Id.* However, "waiver[,] as used in the HEROES Act[,] cannot refer to waiving loan balances or waiving the obligation to repay on the part of a borrower." *Id.* (cleaned up) (quotation omitted). In short, the Secretary's proposed plan in *Biden*

> cannot fairly be called a waiver—it not only nullifies existing provisions, but augments and expands them dramatically. It cannot be mere modification, because it constitutes "effectively the introduction of a whole new regime." [*MCI Telecommunications Corp.*, 512 U.S. at 234] . . . And it cannot be some combination of the two, because when the Secretary seeks to *add* to existing law, the fact that he has "waived" certain provisions does not give him a free pass to avoid the limits inherent in the power to "modify." However broad the meaning of "waive or modify," that language cannot authorize the kind of exhaustive rewriting of the statute that has taken place here.

Id. at 2371 (emphasis in original) (footnote omitted).

After the Supreme Court struck down the Secretary's student loan forgiveness program, the Biden administration turned to federal regulations as a way to forgive student loans: "We will ground this new approach in a different law than my original plan, the so-called Higher Education Act. That — that will allow Secretary Cardona, who is with me today, to compromise, waive, or release loans under certain circumstances." REMARKS BY PRESIDENT BIDEN ON THE SUPREME COURT'S DECISION ON THE ADMINISTRATION'S STUDENT DEBT RELIEF PROGRAM, THE WHITE HOUSE, https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/06/30/remarks-by-president-biden-on-the-supreme-courts-decision-on-the-administrations-student-debt-relief-program/ (last visited May 16, 2024). The Proposed Rule represents this attempt. Like the program in *Biden*, the Proposed Rule permits the Secretary to "exercise discretion to waive all or part of any debts owed to the Department." Student Debt Relief for the William D. Ford Federal Direct Loan Program, the Federal Family Education Loan Program, the Federal Perkins Loan Program, and the Health Education Assistance Loan Program, 89 Fed. Reg. 27564 (proposed Apr. 17, 2024). The Proposed Rule repeatedly characterizes this regulation as a "specification" or "clarification" of existing law and the Secretary's power. *See id.* at 27569-70. HEA Section 432(a) (codified as 20 U.S.C. § 1082(a)(6)) is touted as the primary law which supports the Secretary's power; it reads, the Secretary in the "performance of, and with respect to, the functions, powers, duties, vested in him by this party- 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).

Notwithstanding the Department's new attempt to re-cast its original student loan forgiveness in a regulation as merely a "specification" of the Secretary's power under 20 U.S.C. § 1082(a)(6), the Proposed Rule, in form and substance, is similar to the student loan forgiveness program held unlawful under *Biden* and must not be promulgated. Like the *Biden* program, the Proposed Rule permits the Secretary to waive student loans under certain conditions. *See* Student Debt Relief for the William D. Ford Federal Direct Loan Program, the Federal Family Education Loan Program, the Federal Perkins Loan Program, and the Health Education Assistance Loan Program, 89 Fed. Reg. 27565-66 (proposed Apr. 17, 2024). Like the budgetary impact under the *Biden* program, the Department conceded that the Proposed Rule would impact the budget by $162.4 billion. *See id.* Thus, not only does the Department's Propose Rule here mimic that under *Biden*, but because of such, it violates the holding and reasoning therein. The Department may not now use a regulation to eliminate student debt: "Congress opted to make debt forgiveness available only in a few particular exigent circumstances[] . . . ." *Biden*, 143 S. Ct. at 2369. Although the Department may now be using 20 U.S.C. § 1082(a)(6) as its crutch to support this Proposed Rule, this reasoning is misguided. The Supreme Court was intentionally broad when it clarified that although the HEA may use the word "waive" or "modify" this does not give the "Secretary unfettered discretion to cancel student loans." *Id.*; *see id.* at 2371 ("What the Secretary has actually done is draft a new section of the Education Act from scratch by 'waiving' provisions root and branch and then filling the empty space with radically new text."). Rather, these terms merely "allow[] the Secretary to 'waive or modify' existing statutory or regulatory provisions applicable to financial assistance programs under the Education Act, not to rewrite that statute from the ground up." *Id.* at 2368.

Moreover, the Department's attempt to categorize this Proposed Rule as a "specification" of the Secretary's power, is misleading. Similar to the Secretary's student loan forgiveness program in *Biden*, this Proposed Rule "create[s] a novel and fundamentally different loan forgiveness

program." *Id.* at 2369. Simply put, the purpose of the Proposed Rule is the same as the program under *Biden*: To eliminate student loans in certain circumstances. The Department's use of a regulation to re-introduce the student loan forgiveness program is nothing more than an attempt to circumvent the Supreme Court's holding in *Biden*.

Because the Supreme Court has already rejected the scheme, reasoning, and purpose behind this Proposed Rule in *Biden v. Nebraska*, the Department must not enact this Proposed Rule. To do otherwise would blatantly violate the Supreme Court's ruling, create concerns over separation of powers, and burden the courts with numerous suits on this issue.

III. 20 U.S.C. § 1082(a)(6) Does Not Permit The Department to Waive Student Loan Payments

The Department primarily relies on 20 U.S.C. § 1082(a)(6) as its authority source for this Proposed Rule. *See* Student Debt Relief for the William D. Ford Federal Direct Loan Program, the Federal Family Education Loan Program, the Federal Perkins Loan Program, and the Health Education Assistance Loan Program, 89 Fed. Reg. 27565 (proposed Apr. 17, 2024). This analysis is misplaced. Under existing precedent on statutory construction, 20 U.S.C. § 1082(a)(6) does not support the Department's Proposed Rule.

When interpreting a statute, a court "start[s] with the text of the statute[]" to decide which interpretation is correct. *Babb v. Wilkie*, 589 U.S. 399, 404 (2020). When interpreting a statute, a court may not construe a statute "so as to deny effect to any part of its language. . . . Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each." *Mkt. Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879). When a court is deciding the correct interpretation of a statute, "the legislative history of a statute is the most fruitful source of instruction as to its proper interpretation[] . . . ." *Flora v. United States*, 362 U.S. 145, 151 (1960).

As an initial matter, the Supreme Court in *Biden v. Harris* already analyzed the language of the HEA in regard to a student loan forgiveness program. The Court made clear the words "waive" and "modify" in the HEA did not permit the Department to create a "novel and fundamentally different" loan program under the statute. *Biden*, 143 S. Ct. at 2369. In other words, *Biden* established that the plain language of the HEA does not allow the Department to waive student loan payments as this Proposed Rule purports.

Even if the Court's reasoning in *Biden* did not extend here, 20 U.S.C. § 1082(a)(6) still does not create the authority to implement the broad sweeping student loan forgiveness found in the Proposed Rule. First, 20 U.S.C. § 1082(a)(6)'s use of the term "waive" and "modify" must be viewed against the entirety of the HEA. The HEA, as a whole, intends for students to obtain student loans to attend institutions of higher education, and then to repay the loans. *See* 20 U.S.C. § 1071(a)(1)(B) (explaining the HEA's purpose is, in part, "to provide a Federal program of student loan insurance for students or lenders who do not have reasonable access to a State or private nonprofit program of student loan insurance covered by an agreement under section 1078(b) of this title[]"). Indeed, terms of the loan programs themselves provide repayment as a requirement: "[A] loan by an eligible lender shall be insurable by the Secretary under the provisions of this part

only if[]. . . [it] provides for repayment . . . ." 20 USCS § 1077(a)(2)(B). *See also* 20 USCS § 1078-2(d)(1) ("Repayment of principal on loans made under this section shall commence not later than 60 days after the date such loan is disbursed by the lender, subject to deferral."). The Proposed Rule's interpretation of 20 U.S.C. § 1082(a)(6) compared to the entirety of the HEA shows the Proposed Rule's interpretation is skewed. To say that 20 U.S.C. § 1082(a)(6) allows the Department to waive loans which the rest of the HEA establishes and sets of repayment terms for is not harmonious. Because "every part of a statute must be construed in connection with the whole[,]" the Department's interpretation of 20 U.S.C. § 1082(a)(6) necessarily fails. *Mkt. Co.*, 101 U.S. at 115-16.

20 U.S.C. § 1082(a)(6)'s legislative history, furthermore, supports this contention. When Congress was discussing the HEA, at no point did it contemplate that the loans would not be repaid. Rather, repayment was understood as a necessary component of the HEA. *Cf.* 111 Cong. Rec. 21888 (Brademas) ("Question. When must the student begin repaying the loan? Answer. After he graduates, or otherwise ceases to be a student. There is no payment while he is in school."); *Id.* ("Question. If a student fails to pay when his loan becomes due, what efforts will be made to collect from him before turning to the guarantor? Answer. On these loans no security is required, but some States require an endorser on this type of transaction by a minor. However, even where local law requires an endorsement (and this would normally be a parent), the lending institutions will not move against the endorser in event of default. Lending banks take all ordinary steps, except legal action, to secure repayment from the borrower himself, before turning to the insuring agency for the defaulted payment. In short, we do not envision the lending banks turning to the insurer for payment merely because the borrower becomes delinquent in a few installments."); *Id*. at 21891 (Perkins) ("Part B thus, will greatly assist both low – and middle – income students in obtaining loans and in enabling the repayment of them."); *Id.* at 21898 (Gibbons) ("Another question is, When must the student begin repaying the loan? Of course, the answer is after he graduates, or otherwise ceases to be a student. There is no payment while he is in school."); *Id.* at 21899 ("Mr. Chairman, if a student fails to pay when his loan becomes due, what efforts will be made to collect form him before turning to the guarantor? In answering this question it must be borne in mind that on these loans no security is required, but some States require an endorser on this type of transaction by a minor. However, even where local law requires an endorsement . . . the lending institutions will not necessarily move against the endorser in event of a default. Lending banks are expected to take all ordinary steps, including, in exceptional cases, legal action, to secure repayment from the borrower himself, before turning to the insuring agency for the defaulted payment. In short, we do not envision the lending banks turning to the insurer for payment merely because the borrower becomes delinquent in a few installments. We expect the lending institution to take every reasonable and good faith effort to collect the funds from the borrower or endorser and that the loan be uncollectable before resort is made to the insurer."); *Id.* at 21909 (Bingham) ("I find it equally significant that special aid will be extended through insured loan programs to families. . . . Students from these families can get loans which draw no interest while the student is in college and which are to be repaid after completion of their education with a postcollege [sic] interest rate of 3 percent."). Stated simply, the 1965 Legislature's continued affirmation of repayment as a part of the HEA shows that loans under the HEA were meant to be repaid. This also means that the Secretary is meant to oversee the repayment of loans, not issue a broad sweeping regulation such as the one here which eliminates repayment requirements.

In short, the plain language interpretation and legislative history of 20 U.S.C. § 1082(a)(6) in addition to the purpose and language of the HEA as a whole, shows this section does not grant the Department the authority to issue the student loan forgiveness program explained in the Proposed Rule.

IV. The Proposed Rule, If Enacted, Would Violate the Administrative Procedure Act

Additionally, if the Proposed Rule is enacted, it would violate the Administrative Procedure Act (the "APA") because it violates existing law. This is true regardless of what changes the Department may make to the Proposed Rule.

The APA exists to "provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974) Under the APA, a court must "hold unlawful and set aside any agency action, findings, and conclusions found to be[] . . . not in accordance with law[] . . . ." 5 U.S.C. § 706(2)(A). "Law" as used therein, undoubtedly include holdings from the Supreme Court.

Here, the Supreme Court rejected the Department's attempt to establish a student loan forgiveness program in *Biden v. Harris*. *Biden* established a precedent which, absent action from Congress, can not be changed, even by a regulation from the Department. *See Patchke v. Zinke*, 583 U.S. 244, 250 (2018) ("[T]he legislative power is the power to make law, and Congress can make laws that apply retroactively to pending lawsuits, even when it effectively ensures that one side wins."). The Proposed Rule's attempt to reintroduce the student loan forgiveness program under the HEA is a clear violation of the APA. Thus, if the Proposed Rule were to be promulgated, it would likely be invalidated by the courts as not in accordance with *Biden v. Harris*.

V. Conclusion

In conclusion, the Proposed Rule violates the Supreme Court's holding and reasoning in *Biden v. Nebraska*; incorrectly assumes 20 U.S.C. § 1082(a)(6) supports the proposal, when a contextual and legislative history analysis reveals it does not; and violates the APA. Any attempt to forgive student loans should come from a law passed in Congress, not from a rule proposed by an administrative agency. As such, the Department should not promulgate the Proposed Rule.

NTUF thank you for the opportunity to comment. If you have any questions or concerns, please do not hesitate to contact us.

Sincerely,
Lindsey Carpenter
NTUF Attorney