Harvard Law School
Briefing Papers on Federal Budget Policy

Briefing Paper No. 74

May the Executive Branch Forgive Student Loan Debt Without Further Congressional Action?

April 2021

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(A full set of HLS Briefing Papers on Federal Budget Policy are available at https://scholar.harvard.edu/briefingpapers/home)

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Nearly forty-three million U.S. borrowers owe $1.5663 trillion in federal student loans.[1] Approximately twenty-five percent of student loan borrowers are struggling to repay or in default,[2] making student loans the form of household debt with the highest rate of delinquency.[3] This debt is particularly onerous because it is rarely dischargeable in bankruptcy.[4]

Federal student loans are divided among three flagship lending programs, administered by the U.S. Department of Education.[5] Some $5.2 billion of this debt[6] falls under the Federal Perkins Loan Program ("Perkins"),[7] which provided partial government funding for higher education institutions to lend to their students.[8] The Perkins program originated in the 1958 National Defense Education Act ("NDEA")[9] and expired in 2017.[10] Another $245.9 billion of student debt[11] falls under the Federal Family Education Loan Program ("FFELP"),[12] under which private lenders lent to students, "guaranty agencies" (state governments or nonprofit organizations) guaranteed the loans, and the federal government insured the guaranty agencies.[13] FFELP originated in the Higher

[1] *Federal Student Aid Portfolio Summary*, U.S DEP'T OF EDUC., https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/PortfolioSummary.xls (last visited Mar. 25, 2021) [hereinafter *Portfolio Summary*].
[2] Jeffrey P. Naimon et al., *School of Hard Knocks: Federal Student Loan Servicing and the Looming Federal Student Loan Crisis*, 72 ADMIN. L. REV. 259, 261 (2020).
[3] *Id.* at 266.
[4] *See* John Patrick Hunt, *Consent to Student Loan Bankruptcy Discharge*, 95 IND. L.J. 1137, 1144 (2020) (citing 11 U.S.C. § 523(a)(8)).
[5] *Portfolio Summary*, *supra* note 1; Hunt, *supra* note 4. Other student loan programs have existed but are not reflected in the Department of Education's report of its current student loan portfolio. *See id.* at 1145 & n.54 (discussing Health Education Assistance Loan program, terminated in 1998, and TEACH Grants, which covert to loans in certain circumstances, and noting the Department of Education does not address these in portfolio reports).
[6] *Portfolio Summary*, *supra* note 1.
[7] 20 U.S.C. §§ 1087aa-1087ii.
[8] *Id.*
[9] National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (codified as amended in scattered sections of 20 U.S.C.); Hunt, *supra* note 4, at 1145.
[10] Hunt, *supra* note 4, at 1145.
[11] *Portfolio Summary*, *supra* note 1.
[12] 20 U.S.C. §§ 1071–1087.
[13] *Id.*

Education Act of 1965 ("HEA")[14] and operated until Congress terminated it in 2010.[15] Fifteen percent of FFELP loans have been taken over by the Department of Education, while the remainder are still owed to private parties.[16] Finally, the remaining $1.3152 trillion of federal student loan debt[17] falls under the William D. Ford Federal Direct Loan Program ("Direct"),[18] under which the Department of Education lends directly to students.[19] This program originated in the Higher Education Amendments of 1992[20] and is the only ongoing federal student lending program.[21]

The consequences of the U.S. student debt burden have galvanized support for federal government forgiveness of some or all outstanding federal student loan debt.[22] President Biden has pledged to seek partial forgiveness of student loan debt.[23] While Democrats in Congress have introduced bills for forgiving some or all such debt,[24] the Biden administration has come under increasing pressure to pursue this forgiveness through administrative action.[25]

Legal scholars as well as progressive advocacy groups have argued that the President could legally forgive the entire federal student debt burden, including Perkins, FFELP, and Direct loans,

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[14] Higher Education Act of 1965, Pub. L. 89-329, § 431, 79 Stat. 1219, 1245.
[15] Hunt, *supra* note 4, at 1146.
[16] *See* Luke Herrine, *The Law and Political Economy of a Student Debt Jubilee*, 68 BUFFALO L. REV. 281, 296, 395 (2020).
[17] *Portfolio Summary*, *supra* note 1.
[18] 20 U.S.C. §§ 1087a-1087j.
[19] Hunt, *supra* note 4, at 1146.
[20] Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448, 569 (1992).
[21] Hunt, *supra* note 4, at 1146.
[22] *See* Herrine, *supra* note 16, at 282; Elizabeth Warren & Chuck Schumer, *Why We, Elizabeth Warren And Chuck Schumer, Believe The Biden-Harris Administration Should Cancel Up To $50K In Student Debt On Day One*, BLAVITY (Dec. 04, 2020, 1:41 PM), https://blavity.com/why-we-elizabeth-warren-and-chuck-schumer-believe-the-biden-harris-administration-should-cancel-up-to-50k-in-student-debt-on-day-one.
[23] Josh Mitchell, *Biden Plan to Forgive Student Debt Hinges on Democratic Control of Senate*, WALL ST. J. (Nov. 14, 2020, 8:00 AM ET), https://www.wsj.com/articles/biden-plan-to-forgive-student-debt-hinges-on-democratic-control-of-senate-11605358800.
[24] *See, e.g.*, Student Debt Cancellation Act of 2019, H.R. 3448, 116th Cong. (2019), https://www.congress.gov/116/bills/hr3448/BILLS-116hr3448ih.pdf; Student Loan Debt Relief Act of 2019, H.R. ___, 116th Cong. (2019), https://www.warren.senate.gov/imo/media/doc/Student%20Loan%20Debt%20Relief%20Act%20(Legislative%20Text).pdf; *see* Herrine, *supra* note 16, at 341 & n. 152.
[25] *See* Mitchell, *supra* note 23; Warren & Schumer, *supra* note 22.

using solely administrative action.[26] On the other hand, in the last weeks of the Trump administration, the Department of Education's Office of the General Counsel ("OGC") opined[27] that the Department of Education "does not have the statutory authority to cancel, compromise, discharge, or forgive, on a blanket or mass basis, principal balances of student loans, and/or to materially modify the repayment amounts or terms thereof."[28] The OGC opinion letter is not binding on the Biden administration, which is free to advance a different interpretation of legal authorities.[29] President Biden initially insisted that he would not pursue administrative cancellation of $50,000 per debtor in student loans, explaining in part: "I don't think I have the authority."[30] However, on April 1, 2021, the White House announced that President Biden has directed Education Secretary Miguel Cardona to prepare a new legal opinion addressing this issue.[31]

This paper summarizes the leading arguments that the Department of Education can forgive all Perkins, FFELP, and Direct loan liability, without additional congressional authorization. This briefing paper highlights the likeliest stumbling blocks for such an administrative debt forgiveness plan, as well as the leading arguments that comprehensive—or, at least, partial—administrative

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[26] *See* Herrine, *supra* note 16; Letter from Eileen Connor, Deanne Loonin, and Toby Merrill to Senator Elizabeth Warren (Sept. 14, 2020) [hereinafter Connor et al.] (attached as Appendix A).

[27] U.S. Dep't of Ed., Off. of Gen. Couns., Opinion Letter on Student Loan Principal Balance Cancellation, Compromise, Discharge, and Forgiveness Authority (Jan. 12, 2021), https://static.politico.com/d6/ce/3edf6a3946afa98eb13c210afd7d/ogcmemohealoans.pdf [hereinafter Department of Education OGC Letter] (attached as Appendix B).

[28] *Id.* at 1; *see also* Email from David Bergeron, Senior Fellow, Ctr. For Am. Progress, to Luke Herrine, Ph.D. in Law Candidate, Yale Law Sch. (June 18, 2019, 10:05 EST) (on file with Luke Herrine) *cited in* Herrine, *supra* note 16, at 388 & n.314 (expressing skepticism that the Department of Education may legally forgive performing student loans); Memorandum from Christopher Healy, Rsch. Assistant & Harvard Law Sch. Class 2017, to Professor Howell Jackson, Steven Swig, & Mary Swig 6 (July 11, 2016) (on file with author) [hereinafter Healy] (same).

[29] *See* Michael Stratford, *Trump Administration Tries to Hamstring Biden on Student Loan Forgiveness*, POLITICO (Jan. 13, 2021), https://www.politico.com/news/2021/01/13/trump-biden-student-loan-forgiveness-459085 ("The legal opinion is not necessarily binding on the Biden administration, which could reverse or change its interpretation of the laws that govern federal student loans.").

[30] Zack Friedman, *Biden: I Will Not Cancel $50,000 of Student Loans*, FORBES (Feb. 16, 2021), https://www.forbes.com/sites/zackfriedman/2021/02/16/biden-i-will-not-forgive-50000-of-student-loans/?sh=456eab1b176e.

[31] Annie Nova, *Biden asks Education Secretary to See if He Can Legally Cancel Student Debt*, CNBC (Apr. 1, 2021), https://www.cnbc.com/2021/04/01/biden-administration-explores-options-for-canceling-student-debt.html.

student loan forgiveness might be within the authority of the Department of Education. The paper also addresses the question whether the federal courts would entertain a private law suit challenging the Department's authority were the Secretary of Education to engage in broad-ranging student loan forgiveness programs without further congressional action.

Part I catalogues the history of federal student loan programs, including forgiveness programs established by statute and administrative actions that have facilitated limited student loan forgiveness. Part II articulates the legal bases for the Department of Education's power to forgive some or all student loan debt and the criticisms of these proffered bases.[32] It considers both the argument that the Department of Education has statutory authority to forgive student loans and that any such forgiveness would represent a nonreviewable exercise of enforcement discretion. Part III analyzes the viability of litigation aimed at enjoining the implementation of administrative forgiveness of student loans. It considers the procedural hurdles facing likely potential plaintiffs and concludes that at least certain plaintiffs are likely to reach the merits in a suit against the Department of Education. It then considers how a federal court would likely receive the legal arguments depending on the nature of the administrative student loan forgiveness actions precipitating the suit. Part IV concludes.

I. HISTORY OF FEDERAL STUDENT LOAN FORGIVENESS PROGRAMS

Since the inception of federal student lending, the federal government has introduced numerous student loan forgiveness programs.[33] These programs have varied in the scope of their

[32] For simplicity, this paper generally will not distinguish between powers conferred on or exercised by the President, the Secretary of Education, and the Department of Education, and will refer to each of these as powers of the Department of Education. The same applies, *mutatis mutandis*, with respect to the U.S. Department of Treasury.
[33] *See* John R. Brooks & Adam J. Levitin, *Redesigning Education Finance: How Student Loans Outgrew the "Debt" Paradigm*, 109 Geo L. J. 5, 21, 28, 30–33 (2020).

coverage and the degree of forgiveness they have conferred.[34] This Part provides a brief history of these federal student loan forgiveness programs.

The first federal student loan forgiveness program was included in the original 1958 NDEA,[35] which created the program that in 1986 became Perkins.[36] The NDEA provided for forgiveness of public school teachers' student loans at a rate of ten percent of the loan balance per year, up to a maximum of fifty percent.[37] When Congress rechristened the Perkins program in 1986, Congress also expanded the list of professions eligible for loan forgiveness to include certain members of the Armed Forces of the United States, Peace Corps volunteers, and volunteers under the Domestic Volunteer Service Act of 1973.[38] Congress expanded the program to nurses, certain medical technicians, and certain child and family service agency employees in 1992;[39] and to certain law enforcement officers, corrections officers, public defenders, firefighters, faculty members of Tribal Colleges and Universities, librarians, library employees, and speech-language pathologists in 2008.[40]

In addition to the Perkins loan forgiveness programs, Congress authorized analogous programs for holders of FFELP and Direct loans who work in particular fields. In 1992, Congress authorized a "demonstration program" authorizing FFELP loan forgiveness for certain teachers, Peace Corps and Domestic Volunteer Service Act of 1973 volunteers, and nurses.[41] In 1998, this

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[34] *See id.*
[35] *See* National Defense Education Act of 1958, Pub. L. No. 85-864, § 205(b)(3), 72 Stat. 1580 ("[N]ot to exceed 50 per centum of any such loan (plus interest) shall be canceled for service as a full-time teacher in a public elementary or secondary school in a State, at the rate of 10 per centum of the amount of such loan plus interest thereon, which was unpaid on the first day of such service, for each complete academic year of such service…."); Brooks & Levitin, *supra* note 33, at 21. The current version of the program is codified at 20 U.S.C. § 1087ee.
[36] *See* Higher Education Act Amendments of 1986, Pub. L. No. 99-498, Title IV, § 405(a), 100 Stat. 1268 (renaming loans to "Perkins Loans").
[37] National Defense Education Act of 1958 § 205(b)(3).
[38] Higher Education Amendments of 1986 § 405(a).
[39] Higher Education Amendments of 1992, Pub L. No. 102-325, Title IV, § 465, 100 Stat. 448.
[40] Higher Education Opportunity Act, Pub. L. No. 110-315, Title IV, § 465, 122 Stat. 3078.
[41] Higher Education Amendments of 1992 Title IV, § 422 (codified as amended at 20 U.S.C. § 1078-10).

demonstration program was replaced with a partial loan forgiveness program for holders of FFELP or Direct Loans who teach for five consecutive, complete school years.[42] Congress also authorized a demonstration program for partially forgiving FFELP and Direct loans of certain child care providers.[43] In 2008, this demonstration program was replaced with a FFELP and Direct loan forgiveness program offering $2,000 of forgiveness per year, up to a total of $10,000, on a "first-come, first-served basis," contingent on "the availability of appropriations," to borrowers employed in certain enumerated professions.[44] At that time, Congress also created a FFELP, Direct, and Perkins loan forgiveness program for civil legal assistance attorneys, authorizing forgiveness of $6,000 per year, up to a total of $40,000, on a "first-come, first-served basis," contingent on "the availability of appropriations."[45]

For debtors outside of these professions, prior to 1998, the primary student loan forgiveness avenue for student borrowers was bankruptcy.[46] For most of the history of student loans, they were dischargeable in bankruptcy.[47] The bankruptcy system thus created a vehicle for discharge of student debt for borrowers facing financial distress.[48] However, Congress began curbing the dischargeability of student debt in 1976, initially prohibiting discharge during the first five years after a borrower's repayments were first due, unless the loan represented an "undue hardship" on the borrower.[49] After a series of statutes further restricting student debtors' recourse to bankruptcy,

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[42] Higher Education Amendments of 1998 Title IV, § 424.
[43] *Id.* Title IV, § 425 (codified as amended at 20 U.S.C. § 1078-11).
[44] Higher Education Opportunity Act Title IV, § 430. The program is open to: early childhood educators; nurses; foreign language specialists; librarians; certain teachers; child welfare workers; speech-language pathologists and audiologists; school counselors; certain public sector employees; nutrition professionals; medical specialists; mental health professionals; dentists; physical therapists; school administrators; occupational therapists; and employees in the applied sciences, technology engineering or mathematics. *Id.*
[45] *Id.* Title IV, § 431 (codifed as amended at 20 U.S.C. § 1078-12).
[46] *See* Brooks & Levitin, *supra* note 33, at 29.
[47] *Id.*
[48] *See id.*
[49] *See* Education Amendments of 1976, Pub. L. No. 94-482, sec. 127(a), § 439A, 90 Stat. 2081, 2141 (codified as amended at 11 U.S.C. § 523(a)(8)); Brooks & Levitin, *supra* note 33, at 29.

in 1998, Congress imposed an "undue hardship" requirement for discharge of any public and nonprofit student loans, stipends, scholarships and educational benefits, at any time.[50] In 2005, Congress expanded this bar to student loans of every kind.[51]

The foreclosing of student debtors' recourse to bankruptcy spurred an uptick in demand for formal student debt forgiveness programs.[52] Congress created the first "Income-Contingent Repayment" ("ICR") plan in 1993.[53] This program allowed student loan borrowers to replace fixed, standardized loan service payments with payments based on a measurement of their income, as well as to receive debt forgiveness over time.[54] As ICR arrived while student loans were still ultimately dischargeable in bankruptcy, the initial ICR program did not attract many student debtors.[55] However, it provided the statutory hook for administrative programs introduced during the Obama administration.[56]

In 2007, following the total exclusion of student debtors from bankruptcy proceedings absent "undue hardship," Congress established the Public Service Loan Forgiveness ("PSLF")[57] and Income-Based Repayment ("IBR (2007)")[58] programs.[59] PSLF promised borrowers working in public service jobs the opportunity to receive loan forgiveness after 120 monthly payments.[60] In 2017, the first participants in the PSLF program completed 120 payments and became eligible

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[50] *See* Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971, 112 Stat. 1581, 1837; Brooks & Levitin, *supra* note 33, at 29.
[51] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59.
[52] *See* Brooks & Levitin, *supra* note 33, at 30.
[53] *See* Student Loan Reform Act of 1993, Pub. L. No. 103-66, sec. 4021, § 455(d)(1)(D), (e), 107 Stat. 312, 341 (enacted as part of the Omnibus Budget Reconciliation Act of 1993); Brooks & Levitin, *supra* note 33, at 28.
[54] Brooks & Levitin, *supra* note 33, at 28.
[55] *See id.*
[56] *See id.* at 28, 32.
[57] *See* College Cost Reduction and Access Act, Pub. L. No. 110-84, sec. 401, § 455, 121 Stat. 784, 800 (2007).
[58] *See id.* sec. 203, § 493C(b).
[59] Brooks & Levitin, *supra* note 33, at 30.
[60] *See* College Cost Reduction and Access Act sec. 401, § 455(m)(1) (codified as amended at 20 U.S.C. § 1087e(m)(1)).

for loan forgiveness.[61] However, in the first two years after borrowers became eligible for PSLF forgiveness, student loan servicers approved fewer than one percent (845 out of 90,962) of debtor applicants.[62] In response to this rejection rate, in 2018, Congress enacted the Temporary Expanded Public Service Loan Forgiveness (TEPSLF) Program to allow student debtors to bypass certain requirements of the PSLF.[63]

IBR (2007) offered all borrowers the opportunity to limit their monthly payments to fifteen percent of their discretionary income and to receive loan forgiveness after twenty-five years of regular payments.[64] In 2010, Congress revised IBR ("IBR (2010)") to permit new borrowers after July 1, 2014 to limit payments to ten percent of discretionary income (as opposed to fifteen percent under IBR (2007)) and to receive forgiveness after twenty years (as opposed to twenty-five years under IBR (2007)).[65]

In 2012, the Obama administration built on the statutory remedies of the PSLF and IBR (2010) programs through administration action.[66] Relying on the 1993 amendments to the HEA that established ICR, the Obama administration created the Pay As You Earn ("PAYE") plan,

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[61] Alan White, *The Contract State, Program Failure, and Congressional Intent: The Case of the Public Service Loan Forgiveness Program,* 11 U.C. IRVINE L. REV. 255, 264 (2020).
[62] *See id.* at 263–64 (citing FED. STUDENT AID OFF., U.S. DEP'T OF EDUC., JUNE 2019 PSLF REPORT: PUBLIC SERVICE LOAN FORGIVENESS (PSLF) PROGRAM DATA ¶¶ 8, 16 (2019), https://studentaid.gov/data-center/student/loan-forgiveness/pslf-data).
[63] *See id.* (citing Pub. L. No. 115-141, § 315, 132 Stat. 348 (2018)).
[64] *See* College Cost Reduction and Access Act sec. 203, § 493C (codified as amended at 20 U.S.C. § 1098e(e)).
[65] *See* SAFRA Act, Pub. L. No. 111-152, sec. 2213, § 493C 124 Stat. 1029, 1074–81 (2010) (enacted as part of the Health Care and Education Reconciliation Act of 2010) (codified at 26 U.S.C. 1098e(e)); Brooks & Levitin, *supra* note 33, at 31.
[66] Brooks & Levitin, *supra* note 33, at 32.

which extended the IBR (2010) payment terms to loans borrowed after October 1, 2011.[67] PAYE also limited the effect of interest accrual on loans subject to an income-based repayment plan.[68]

The Obama administration followed up on PAYE in 2015 with the Revised Pay As You Earn ("REPAYE") payment plan.[69] REPAYE permitted all borrowers, regardless of loan date, to choose to devote ten percent of their discretionary income to student loan debt—including, for the first time among federal student loan repayment plans, borrowers for whom ten percent of their income was greater than the standard repayment.[70] REPAYE thus permitted high income borrowers to pay off their loans faster, avoiding interest that would otherwise accrue over the life of the loan.[71] REPAYE also went even further than PAYE in limiting the effect of interest accrual.[72]

The most recent federal actions to forgive student loans have been emergency measures in response to the COVID-19 pandemic.[73] The Department of Education took certain of these measures under the Higher Education Relief Opportunities for Students Act of 2003 ("HEROES Act"),[74] which authorizes the Department to waive or modify statutory and regulatory requirements governing the HEA student loan programs in connection with a national emergency

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[67] *See id.* (citing 34 C.F.R. § 685.209(a)(1)(iii)(B) (2019) (time period for applicable loans); *id.* § 685.209(a)(2)(i) (repayment terms)).
[68] *See id.* at 31–32 (explaining that loans in income-based repayment plans would accrue interest, which would be capitalized into the loan balance, leading to compounding of interest on a larger principal, a phenomenon known as "negative amortization").
[69] *See* Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 80 Fed. Reg. 67,204 (Oct. 30, 2015); Brooks & Levitin, *supra* note 33, at 32.
[70] *See* Brooks & Levitin, *supra* note 33, at 32–33.
[71] *See id.* at 33.
[72] *See id.* at 32.
[73] *See* ALEXANDRA HEGJI, CONG. RSCH. SERV., R46314, FEDERAL STUDENT LOAN DEBT RELIEF IN THE CONTEXT OF COVID-19, at 8–12 (2020) (discussing limited Department of Education administrative student loan relief in response to COVID-19 national emergency).
[74] 20 U.S.C. §§ 1098aa–1098ee (authorizing student loan relief in connection with national emergencies).

as declared by the President.[75] After President Trump declared a national emergency in connection with the COVID-19 pandemic on March 13, 2020, Secretary of Education Betsy DeVos, acting pursuant to the HEROES Act, "set all federal student loan interest rates to zero and automatically enter[ed] borrowers into administrative forbearance, allowing them to defer payments without financial penalty."[76] By placing federal student loans in forbearance, with an interest rate of 0%, while continuing to permit debtors to make repayments, the Department of Education enabled debtors to pay less than they otherwise would over the lifetime of their loans.[77]

II. THE LEGAL BASIS FOR ADMINISTRATIVE FORGIVENESS OF STUDENT LOANS

This part considers the legal basis for administrative forgiveness of student loans. Section A examines the statutory authority pursuant to which the Department of Education would forgive student loans. Section B considers whether the Department of Education's student loan forgiveness decisions would qualify as an exercise of nonenforcement discretion and be unreviewable under the Administrative Procedure Act ("APA"), as well as whether the Department ought to engage in notice and comment rulemaking in connection with widespread student loan forgiveness.[78] Section C analyzes the alternative argument that the exigency of the COVID-19 national emergency could permit widespread student loan forgiveness through the HEROES Act. Section D discusses recent legislation permitting Treasury to exclude forgiven student loans from taxable gross income and

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[75] *See* HEGJI, *supra* note 73, at 14–16 (discussing applicability of HEROES Act to student loan relief in context of COVID-19 national emergency).

[76] *Secretary DeVos Extends Student Loan Forbearance Period Through January 31, 2021, in Response to COVID-19 National Emergency*, U.S. DEP'T OF ED. (Dec. 4, 2020), https://www.ed.gov/news/press-releases/secretary-devos-extends-student-loan-forbearance-period-through-january-31-2021-response-covid-19-national-emergency.

[77] *See id.*; Kelly Anne Smith, *(COVID-19) Federal Student Loan Forbearance Calculator: How Will You Be Affected?*, FORBES ADVISOR (Aug. 13, 2020, 12:42 PM), https://www.forbes.com/advisor/loans/federal-student-loan-coronavirus-forbearance-covid19-calculator/ ("If you continue to make [federal student loan] payments at this time, you'll be paying down your principal faster, since interest won't accrue. That means you'll make a bigger dent in your balance.").

[78] 5 U.S.C. 701(a)(2) (foreclosing review of agency actions "committed to agency discretion by law").

also considers whether Treasury could have extended favorable tax treatment to student loan forgiveness in the absence of a legislative fix.

A. STATUTORY AUTHORITY FOR ADMINISTRATIVE FORGIVENESS OF STUDENT LOANS

The executive branch may not forgive debts owed to the federal government without a statutory grant of that power from Congress.[79] The Property Clause of the Constitution[80] grants the "[p]ower to release or otherwise dispose of the rights and property of the United States" to Congress alone.[81] Moreover, under the Appropriations Clause,[82] "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress."[83] These constitutional provisions forbid "erroneously or illegally made" expenditures of federal funds or dispositions of federal property.[84] The Federal Circuit reiterated these principles earlier this year, holding that overpayments to federal government contractors violate the Property and Appropriations Clauses and entitle the government to sue to recover such overpayments.[85] In addition to these constitutional principles, the Antideficiency Act imposes criminal liability on executive branch employees who spend unappropriated funds.[86]

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[79] *See* 3 U.S. GEN. ACCT. OFF., OFF. OF GEN. COUNS., PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 14-75 (3d. ed. 2008).
[80] U.S. CONST. art. IV, § 3, cl. 2.
[81] Royal Indemnity Co. v. United States, 313 U.S. 289, 294-95 (1941) (citing U.S. CONST. art. IV, § 3, cl. 2.); *see also* Fansteel Metallurgical Corp. v. United States, 172 F. Supp. 268, 271 (Ct. Cl. 1959) ("[W]hen a payment is erroneously or illegally made it is in direct violation of article IV, section 3, clause 2, of the Constitution." (citing *Royal Indemnity*, 313 U.S. 289).
[82] U.S. CONST. art. I, § 9, cl. 7.
[83] Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937).
[84] Agility Pub. Warehousing Co. K.S.C.P. v. United States, 969 F.3d 1355, 1365 (Fed. Cir. 2020).
[85] *Id.* at 1365–66.
[86] 31 U.S.C. § 1341(a); *id.* § 1350 (authorizing criminal fines and up to two years' imprisonment for violations of Antideficiency Act); *see* Herrine, *supra* note 16, at 399–400; Matthew B. Lawrence, *Disappropriation*, 120 COLUM. L. REV. 1, 83 (2020). *But see* Kenneth J. Allen, *The Obsolete Services Restrictions Of The Antideficiency Act—Still The Law*, BRIEFING PAPERS, Nov. 2017, at 1 n.6, 17-12 Briefing Papers 1 ("[T]here are no reported prosecutions for violations of any of the ADA provisions [as of November 2017].").

The Property Clause, Appropriations Clause, and Antideficiency Act prohibit executive agencies from forgiving debts to the United States or waiving recovery of such debts without "a clear statutory basis."[87] The exacting bite of this principle was exemplified in the Federal Emergency Management Agency ("FEMA")'s efforts to recoup overpayments of disaster relief to victims of Hurricanes Katrina and Rita, even though the payments were made with the encouragement of government agents who miscomprehended the scope of their relief authority.[88] Notwithstanding strong equities favoring the misled victims, FEMA reasoned that "it [did] not have authority to dismiss debts to the U.S. government, even those of small or 'de minimis' amounts," and accordingly concluded that any overpayments of relief were "subject to recoupment."[89]

As a consequence of these background constitutional and statutory rules, executive agencies usually cannot forgive performing debts.[90] The primary statute governing when agencies may forgive debts, the Federal Claims Collection Act of 1966 ("FCCA"), as amended by the Debt Collection Improvement Act of 1996 ("DCIA"),[91] does not provide for forgiveness of performing loans.[92] While the FCCA grants agencies the power to "compromise" debt claims under enumerated circumstances, it also commands agencies to "try to collect" on such claims.[93] The

[87] U.S. GEN. ACCT. OFF., *supra* note 79, at 14-75; *see* 31 U.S.C. § 1341(a); *see also* 31 U.S.C. § 1301(a) ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.").
[88] *See* U.S. DEP'T OF HOMELAND SEC. OFF. OF INSPECTOR GEN., OIG-12-62, FEMA'S EFFORTS TO RECOUP IMPROPER PAYMENTS IN ACCORDANCE WITH THE DISASTER ASSISTANCE RECOUPMENT FAIRNESS ACT OF 2011, at 2 (2012).
[89] *Id.* Congress ultimately awarded FEMA limited authority to waive these debts in 2011. *See* Disaster Assistance Recoupment Fairness Act of 2011, Pub. L. No.112-74, § 565(b)(2), 125 Stat. 786, 982 (2011); *see also* Healy, *supra* note 28, at 7–8 (discussing this statute).
[90] *See* BUREAU OF THE FISCAL SERVICE, TREATISE ON FEDERAL NONTAX DEBT COLLECTION I:3 (2019).
[91] 31 U.S.C. §§ 3701–3702, 3711–3720E.
[92] *See id.* § 3711(a)(1); Healy, *supra* note 28, at 7.
[93] 31 U.S.C. § 3711(a)(1)–(2).

Federal Claims Collection Standards ("FCCS"),[94] regulations implementing the FCCA, require agencies to "aggressively" collect debts, permitting agencies to grant concessions on debt only where: (1) the debtor is unable to pay; (2) the agency is unable to collect; (3) the costs of collection are too onerous; or (4) the government faces litigation risk.[95] As a result, the FCCA grants agencies only a *constrained* authority to forgive debts.[96]

However, the FCCA and FCCS do not apply to debt collection activities expressly governed by other statutes,[97] and the HEA independently grants the Department of Education authority to "modif[y]"[98] and to "compromise, waive, or release"[99] FFELP and Perkins loans.[100] These powers have been described respectively as "modification" and "settlement" authority.[101] Proponents of administrative forgiveness of student loans argue that the HEA provides a "clear statutory basis"[102] for the Department of Education's *plenary* authority to forgive student loans in whole or in part, including in circumstances when agencies bound by the FCCA and FCCS would be unable to forgive debt.[103]

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[94] 31 C.F.R. Subt. B, Ch. IX.
[95] *Id.* §§ 901.1, 902.2(a).
[96] *See* 31 U.S.C. § 3711(a)(1)–(2).
[97] *See* U.S. GEN. ACCT. OFF., supra note 79, at 14-76; Federal Claims Collection Act, Pub. L. No. 89-508, § 4, 80 Stat. 308, 309 (July 19, 1966) ("Nothing in this Act shall increase or diminish the existing authority of the head of an agency to litigate claims, or diminish his existing authority to settle, compromise, or close claims."); 31 C.F.R. § 900.4. The FCCS, as regulations, likely do not permanently preclude administrative forgiveness of student loans even if they apply. *See* Herrine, *supra* note 16, at 386.
[98] 20 U.S.C. § 1082(a)(4) (FFELP); *id.* § 1087hh(1) (Perkins).
[99] *Id.* § 1082(a)(6) (FFELP); *id.* § 1087hh(2) (Perkins).
[100] *But see* Salazar v. King, 822 F.3d 61, 67 (2d Cir. 2016) ("The Secretary [of Education], as the head of the [Department of Education], is required to try to collect federally guaranteed student loan debt." (citing 31 U.S.C. § 3711(a)(1))).
[101] Herrine, *supra* note 16, at 370. Equivalently, other sources refer to this "settlement" authority as the Department of Education's "compromise" authority. *See, e.g.*, Connor et al., *supra* note 26, at 3.
[102] U.S. GEN. ACCT. OFF., *supra* note 79, at 14-75.
[103] *See* Herrine, *supra* note 16, at 379–80 & n.290. This paper will use the term "constrained" forgiveness authority to describe modification or settlement authority insufficient to permit widespread student loan forgiveness, and the term "plenary" forgiveness authority to describe adequate authority for such forgiveness. *Compare* Department of Education OGC Letter, *supra* note 27, at 1 (arguing that Department of Education has only constrained forgiveness authority), *with* Connor et al., *supra* note 26, at 1–2 (arguing that Department of Education has plenary forgiveness authority under the HEA).

As a preliminary matter, even if the HEA provides the Department of Education with plenary authority to forgive FFELP and Perkins Loans, it remains possible that the HEA does not provide the Department of Education with the same authority over Direct Loans.[104] The HEA does not explicitly grant the Department of Education modification and settlement authority over Direct loans.[105] The statutory basis for applying modification and settlement provisions of the HEA to Direct loans is a provision requiring parity between the terms of FFELP and Direct loans.[106] That statutory hook may not be enough for the HEA, rather than the FCCA, to govern collection of Direct loans.[107] In its January 2021 opinion letter, the Department of Education's OGC opined that "because [the Department of Education's] general power to compromise or waive claims under [FFELP] is neither a term nor a condition nor a benefit [FFELP] loans,"[108] it is "debatable" that the Department of Education has the same settlement authority with respect to both FFELP and Direct loans.[109] If the FCCA governs collection of Direct loans, the Department of Education must "try to collect" on these loans and likely could not forgive performing loans.[110]

Assuming that the Department of Education's modification and settlement authorities are the same with respect to Perkins, FFELP, and Direct loans, whether the Department of Education has plenary authority under the HEA to forgive student loans is a matter of statutory interpretation. The Department of Education's interpretations of the HEA may be subjected to the crucible of

[104] *See* Herrine, *supra* note 16, at 370–71 & nn. 262–65.
[105] *See id.*
[106] *See* 20 U.S.C. § 1087e(a)(1) ("Unless otherwise specified in this part, [Direct] loans…shall have the same terms, conditions, and benefits, and be available in the same amounts, as loans made to borrowers [of FFELP loans]").
[107] *See* Federal Claims Collection Act of 1966, Pub. L. No. 89-508, § 4, 80 Stat. 308 (1966). The FCCA yields only to "existing" agency head authority, so the FCCA would apply unless the HEA grants the Department of Education "existing" authority over Direct loan debts. *See id.*
[108] Department of Education OGC Letter, *supra* note 27, at 4. n.3.
[109] *See id.*
[110] *See* 31 U.S.C. § 3711 (a)(1); *see* Healy, *supra* note 28, at 7.

judicial review, whereby the Department would be required to defend in court its view that the HEA permits widespread student loan forgiveness.[111]

Considering solely the plain text of the applicable provision, the provision establishing the Department of Education's settlement authority appears to be consistent with plenary authority for loan forgiveness. The HEA grants the Department of Education authority "to enforce, pay, *compromise, waive, or release any* right, title, *claim*, lien, or demand, however acquired, including any equity or right of redemption…."[112] There is essentially no dispute that this language, read literally, could grant the Department of Education the power to forgive student loans at will—the January 2021 Department of Education OGC letter acknowledges that is the "hyperliteral" reading of the provision.[113] In addition, the Department of Education's settlement authority under the HEA, which includes the power to "waive" and "release" claims, is arguably broader than the FCCA "compromise" authority.[114]

Independently, the Department of Education's modification authority appears to encompass forgiving loan balances and may also be read as a grant of plenary forgiveness authority. The HEA grants the Department of Education authority "to *consent to modification, with respect to* rate of interest, time of payment of any installment of principal and interest or any portion thereof, or *any other provision of any [student loan]*."[115] As a factual matter, the

[111] *See* Herrine, *supra* note 16, at 367.
[112] 20 U.S.C. § 1082(a)(6) (emphasis added) (FFELP); *id.* § 1087hh(2) (emphasis added) (Perkins).
[113] *See* Department of Education OGC Letter, *supra* note 27 ("[R]eading 20 U.S.C. § 1082(a)(6) to permit the Secretary, on a blanket or mass basis, to …forgive student loan principal balances…would 'be hyperliteral and contrary to common sense.'") (quoting RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645 (2012)).
[114] *Compare* 20 U.S.C. §§ 1082(a)(6), 1087hh(2), *with* 31 U.S.C. § 3711(a)(2).
[115] 20 U.S.C. § 1082(a)(4) (emphasis added) (FFELP); *id.* § 1087hh(1) (emphasis added) (Perkins).

Department of Education has used this modification authority to modify individual loan balances to zero (at least with respect to non-performing loans).[116]

Authorities are mixed on whether statutory language authorizing "modification" could grant plenary authority to dramatically change a federal program. On one hand, in discussing the Department of Education's modification authority under the HEROES Act (but not the HEA), the Department of Education OGC letter, relying on *MCI Telecomms. Corp. v. Am. Telephone & Telegraph Co.*,[117] argued that the appropriate definition of "modify" is "to change moderately or in minor fashion."[118] On the other hand, in the technical context of federal budgeting for a loan or loan guarantee program, the Office of Management and Budget ("OMB") defines a modification as a "Government action that (1) differs from actions assumed in the baseline estimate of cash flows and (2) changes the estimated cost of an outstanding direct loan" or loan guarantee."[119] Per OMB, in principle, such modifications "may be any size" and may be the product of actions including loan "forgiveness."[120] Moreover, because modifications are actions that deviate from budget assumptions, the OMB definition of modification does *not* include "routine administrative work-outs…of troubled loans or loans in imminent default,"[121] such as "forgiving principal or interest" of such loans.[122] Thus, the relevant HEA language can plausibly be read to authorize the Department of Education to forgive loans in excess of "routine" loan forgiveness.[123] In addition,

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[116] *See* Connor et al., *supra* note 26, at 5 n.21; *Carr et al. v. DeVos*, Case No. 19-cv-6597 (S.D.N.Y.), Dkt. No. 15-1 ¶ 8 (Decl. of Cristin Bulman) ("Plaintiff Carr defaulted on [Direct loan] obligations….Plaintiff Carr's loans were modified…pursuant to 20 U.S.C. § 1082(a)(4), resulting in balances of $0.00 and thus no money owed by Plaintiff Carr.").
[117] 512 U.S. 218, 225 (1994).
[118] *See* Department of Education OGC Letter, *supra* note 27, at 6.
[119] OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR NO. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET § 185.3(s), (z) (2020).
[120] *Id.*
[121] OFF. OF MGMT. & BUDGET, *supra* note 119, § 185.3(z).
[122] *Id.* § 185.3(ac) (defining "work-out").
[123] *See id.* § 185.3(z), (ac).

the HEA's grant of modification authority arguably has no equivalent in the FCCA, which addresses only settlement authority, suggesting that even where the FCCA limits the Department of Education's settlement authority, the Department may independently invoke its modification authority without contradiction.[124] Notably, the Department of Education's HEA modification authority is not discussed in the January 2021 Department of Education OGC opinion letter[125]—although its exclusion may be best explained as a signal that OGC thought the provision establishing settlement authority provides a significantly stronger statutory basis for plenary forgiveness authority than the modification provision.[126]

These modification and settlement provisions appeared in several statutes relating to loans under the discretion of administrative agencies in the two decades preceding the HEA.[127] The formulations of modification and settlement authority used in the HEA seem to have originated in a 1945 draft of amendments to the Servicemen's Readjustment Act of 1944 (the "GI Bill").[128] In a hearing on amending the GI Bill, Maurice Collins, an Assistant Administrator at the Veterans' Administration who oversaw the GI Bill's loan guarantee program, proposed amendments to the

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[124] *See* Connor et al., *supra* note 26, at 6.
[125] *See* Department of Education OGC Letter, *supra* note 27, at 3–4 (addressing the Department of Education's settlement authority under 20 U.S.C. § 1082(a)(6) but not the Department of Education's modification authority under § 1082(a)(4)).
[126] *Cf. id.* at 6 (dismissing argument that HEROES Act "modification" authority could encompass plenary authority to forgive student loans).
[127] *E.g.* Act of Dec. 28, 1945, Pub L. No. 268, § 509(a)(2), (4), 59 Stat. 631 (("[T]he Administrator [of Veterans Affairs] may…(2) consent to the modification, with respect to rate of interest, time of payment of principal or interest or any portion thereof, security or other provisions of any…loan which has been guaranteed or insured [through this program]. . . [and] (4) pay, compromise, waive or release any right, title claim, lien or demand, however acquired, including any equity or any right of redemption…."); Act of Sept. 2, 1958, Pub. L. No. 85-857, § 1820(a)(2), (4), 72 Stat. 1213 (same); *see also* National Defense Education Act of 1958, Pub L. No. 85-864, § 209(a), 72 Stat. 1587 ("The Commissioner [of Education]…shall have power to agree to modifications of agreements or loans…and to compromise, waive, or release any right, title, claim, or demand, however arising or acquired under this title.").
[128] *See Amendments to the Servicemen's Readjustment Act of 1944: Hearing on H.R. 3749 Before the Subcomm. on Veterans' Legis. of the S. Comm. on Fin.*, 79th Cong. 79–83 (1945) (statement of Maurice Collins, Director, Financial Service, Veterans' Administration, Accompanied by Edward E. Odom, Solicitor, and Francis X. Pavesich, Chief, Loan Guaranty Division, Veterans' Administration).

GI Bill expanding the authority of the Administrator of Veteran's Affairs with respect to GI Bill loan guarantees.[129] Assistant Administrator Collins proposed granting the Administrator the power, among other things, to "consent to the modification with respect to rate of interest, time of payment of principal, or interest, or any portion thereof, security or other provisions of any note, contract, mortgage, or any lien instrument with respect to [GI Bill loan guarantees]" and to "pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption."[130] Assistant Administrator Collins argued that these changes would grant the Administrator "proper discretionary power to deal in the various complications which will arise in the course of the guaranty program."[131] He further explained that he proposed expanding the Administrator's powers because "Congress is the only authority that can actually dispose of Government property," and while Congress had placed "certain authority to [dispose of Government property] in different administrative officials," the Administrator of Veterans' Affairs had authority only "to dispose of surplus property."[132] Discretion over a loan guarantee program would require additional power—"this would hardly be surplus property."[133] The Senate version of the 1945 GI Amendments granted the requested modification and settlement authorities essentially unchanged; the Senate Report explained: "The powers at present vested in the Administrator of Veterans' Affairs are inadequate to enable him to perform the functions required of him under the present act. This new section is added in order to enable him efficiently

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[129] *See id.* at 65.
[130] *Id.* at 80.
[131] *Id.* at 79–80.
[132] *Id.* at 81.
[133] *Id.*

to conduct those functions."[134] The 1945 amendments to the GI Bill ultimately incorporated these grants of modification and settlement authority.[135]

On September 2, 1958, Congress passed additional veterans' legislation repeating these grants of modification and settlement authority to the Administrator of Veterans' Affairs, as well as the NDEA, which contained a nearly identical grant of settlement authority, as well as a grant of authority to "agree to modifications of agreements or loans."[136]

In the legislative history of the HEA itself, the adoption of particular language for the Secretary's modification and settlement authority does not appear to have received significant attention,[137] perhaps because those particular formulations of administrative modification and settlement authority had already become entrenched as a consequence of their adoption in the 1945 GI Bill Amendments. A House Report on a draft of the HEA had only the following to say about these powers: "This section authorizes the Commissioner [of Education], in carrying out the act, to make regulations, sue and be sued, prescribe and modify the terms of insurance contracts, permit the modification of student loan agreements, and to settle insurance claims."[138]

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[134] S. Rep. No. 698 at 6 (1945).
[135] *See* Act of Dec. 28, 1945, Pub L. No. 268, § 509(a)(2), (4), 59 Stat. 631 (("[T]he Administrator [of Veterans Affairs] may…(2) consent to the modification, with respect to rate of interest, time of payment of principal or interest or any portion thereof, security or other provisions of any…loan which has been guaranteed or insured [through this program]…[and] (4) pay, compromise, waive or release any right, title claim, lien or demand, however acquired, including any equity or any right of redemption….").
[136] *Compare* Act of Sept. 2, 1958, Pub. L. No. 85-857, § 1820(a)(2), (4), 72 Stat. 1213 (("[T]he Administrator [of Veterans Affairs] may…(2) consent to the modification, with respect to rate of interest, time of payment of principal or interest or any portion thereof, security or other provisions of any…loan which has been guaranteed or insured [through this program]…[and] (4) pay, compromise, waive or release any right, title claim, lien or demand, however acquired, including any equity or any right of redemption…."), *with* National Defense Education Act of 1958, Pub L. No. 85-864, § 209(a), 72 Stat. 1587 ("The Commissioner [of Education]…shall have power to agree to modifications of agreements or loans...and to compromise, waive, or release any right, title, claim, or demand, however arising or acquired under this title.").
[137] *See* Herrine, *supra* note 16, at 377 n.283 (observing that neither the legislative history of the NDEA nor that of the HEA explains the scope of the Department of Education's settlement authority).
[138] H. Rep. No. 621 at 49 (1965). The report's only further comment on the provision was that "[t]he Commissioner's financial operations are subject to the Government Corporation Control Act." *Id.*

On the other hand, the language added into the HEA in 1965 needs also to be understood against the legal structure of government debt collection efforts at the time, under which federal agencies were extremely limited in their authority to compromise on otherwise collectable debts. The original version of the GAO's Principles of Federal Appropriations Law describes this context in an overview of the FCCA:

> Prior to 1966, there were no uniform policies or procedures for debt collection throughout the Government. While GAO made some efforts by virtue of its audit and claims settlement functions, debt collection lacked a Government-wide statutory basis and procedures varied greatly from agency to agency. Lack of adequate statutory powers also hampered debt collection. For example, GAO had long construed the authority to "settle and adjust" claims as not including the authority to compromise….Although a few agencies had specific compromise authority, most, GAO included, did not. *To make things worse, to simply terminate collection action would have been viewed as giving away Government property, which no Government official has the right to do.*
>
> Thus, the administrative agency had to attempt to collect the full amount of the debt. If the agency was unsuccessful, it had to refer the claim to GAO, which again could do nothing more than to attempt to collect the full amount. If GAO's efforts were similarly fruitless, the claim went to the Justice Department, and it was only there that compromise could be considered. Under this system, the Justice Department was burdened with referrals of worthless as well as collectible debts. Congress was also burdened with many requests for private relief legislation.
>
> In 1966, Congress took the first major step toward establishing a Government-wide system of debt collection. This , of course, was the enactment of the Federal Claims Collection Act of 1966.[139]

While not an authoritative interpretation of the HEA, this excerpt explains the contemporaneous and generally understood function of compromise authority—whether as conferred on a particular agency by a specific statute, such as on the Department of Education by the HEA, or as conferred generally by the Federal Claims Collection Act: to facilitate efficient debt collections practices without requiring all debt collection compromises to be run through the Department of Justice or special acts of Congress.[140] Also potentially probative is the GAO's unambiguous statement

[139] *See* U.S. GEN. ACCT. OFF., OFF. OF GEN. COUNS., PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 11-167 (1st ed. 1982) (emphasis added).
[140] *See id.*

(highlighted in italics) that no government official—even one with compromise authority—has authority to "simply terminate collection action," a position that is flatly inconsistent with the assertion that the Department of Education was granted plenary compromise authority with the 1965 HEA amendments.[141]

In sum, the plain text of the HEA's grants of modification and settlement authority, read in isolation, could literally be read as compatible with widespread student loan forgiveness. The legislative history of these particular provisions suggests that Congress uses this language when it wishes to grant discretion to an administrative agency to dispose of the property of the United States, but the scope of that discretion is not well defined. At minimum, the legislative history of the provisions themselves does not foreclose a broad reading of the Department of Education's discretion to forgive performing loans. On the other hand, contemporaneous understandings of compromise authority, of the sort expressed in the GAO excerpt quoted above, might also be thought (at least by some) to bear on the appropriate interpretation of the Department of Education's forgiveness authority.

The plain text and legislative history of the HEA's grants of modification and settlement authority notwithstanding, other portions of the HEA may be read to narrow these grants.[142] Certain provisions of the HEA establish specific cases for when the Department of Education may or must exercise its modification and settlement powers and contour how those powers are to be used in those cases.[143] These provisions may be understood as "specific" provisions that

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[141] *See id.*

[142] *See* Department of Education OGC Letter, *supra* note 27, at 3–4 (arguing that 20 U.S.C. § 1082(a)(6) is a "general" provision and that other "specific" provisions govern).

[143] *See, e.g.*, 20 U.S.C. § 1087e(f) (authorizing "deferment, during which periodic installments of principal need not be paid" for certain borrowers during their studies and for borrowers receiving cancer treatment); *id.* § 1087e(h) (directing the Department of Education to "specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan"); HEROES Act, 20 U.S.C. §§ 1098aa–1098ee

"govern[]"over the "general"[144] grants of modification and settlement authority discussed above.[145] Furthermore, because Congress enacted narrow grants of authority for limited student loan forgiveness through the HEROES ACT, PSLF, IBR (2007), IBR (2010), and TEPSLF, Congress has arguably signaled through statutory history that the Department of Education lacked the authority to implement those programs under the unamended HEA.[146]

In addition, the operation of the modification and settlement authority provisions within the broader HEA is at odds with the theory that these provisions permit widespread loan forgiveness. The two programs for which Congress established express modification and settlement authority, Perkins and FFELP, are the two programs predicated on loans that are, by and large, not owed to the Department of Education.[147] Consequently, when Congress has created FFELP loan forgiveness programs, Congress has chiefly directed the Department of Education to award forgiveness not by canceling borrowers' loan obligations, but by assuming those loan obligations.[148] Meanwhile Congress has been more inclined to direct or permit the Department of

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(authorizing student loan accommodations during national emergencies); *see also* Department of Education OGC Letter, *supra* note 27, at 3 (invoking certain of these provisions).

[144] *See* Department of Education OGC Letter, *supra* note 27, at 3 (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992)).

[145] *See id.* ("Title IV [of the HEA]'s plain text and statutory scheme, and controlling interpretative canons, compel us to conclude Congress appropriated funds for student loans with the expectation that such loans would be repaid except in very specific circumstances.").

[146] *See, e.g.*, Stone v. I.N.S., 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

[147] *See* Herrine, *supra* note 16, at 395 (recognizing that "DOE can only decline to enforce debts it has the ability to enforce" and noting that "DOE does not have direct claims on most FFELP or any Perkins debtors").

[148] *See* 20 U.S.C. § 1078-11(a)(2)(A) ("Method of loan forgiveness[:] To provide loan forgiveness…the Secretary is authorized to carry out a program…through the holder of the loan, to assume the obligation to repay a qualified loan amount for a [FFELP] loan…."); *id.* § 1078-12(c) ("[T]he Secretary shall carry out a program of assuming the obligation to repay a [FFELP, Direct, or Perkins] student loan, by direct payments on behalf of a borrower to the holder of such loan). *But see id.* § 1098e(e) (directing the Department of Education, in connection with income-based repayment plans, to "repay or cancel any outstanding balance of principal and interest due on all [FFELP or Direct] loans"). While § 1098e(e) authorizes both forgiveness through repayment and forgiveness through cancellation, it likely is best read with the understanding that the Department of Education would forgive FFELP loans owed to third parties through repayment.

Education to forgive Direct loans through cancellation.[149] This discrepancy suggests that the Department of Education's modification and settlement authorities must be read against the assumption that the Department would typically not be a creditor when administering the FFELP and Perkins programs, and thus would not typically be in a position to decline to collect claims against borrowers.[150]

Moreover, a court may deny deference to the Department of Education's interpretation of the HEA's grant of settlement authority to the extent that interpretation implies Congress appropriated the entire balance of the student loan portfolio for possible loan forgiveness.[151] Under the Federal Credit Reform Act of 1990 ("FCRA"),[152] the "costs" of most new or "modified" federal loans must be appropriated annually by Congress.[153] However, FFELP and the Direct program are entitlements exempt from the annual appropriations process.[154] As the FCRA requires the government to budget for federal loans under accrual accounting, using an annual estimate of the

[149] *See* 20 U.S.C. § 1078-11(a)(2)(B) ("Method of loan forgiveness[:] To provide loan forgiveness…the Secretary is authorized to carry out a program…to cancel a qualified loan amount for a [Direct] loan…."); *id.* § 1087e(m)(1)) (directing the Department of Education, in connection with income-based repayment plans, to "cancel the balance of interest and principal due, in accordance with paragraph (2), on any eligible Federal Direct Loan not in default"); 20 U.S.C. § 1098e(e) (directing the Department of Education, in connection with income-based repayment plans, to repay or cancel any outstanding balance of principal and interest due on all [FFELP or Direct] loans"); *but see id.* § 1078-12(c) ("[T]he Secretary shall carry out a program of assuming the obligation to repay a [FFELP, Direct, or Perkins] student loan, by direct payments on behalf of a borrower to the holder of such loan).
[150] *See* Herrine, *supra* note 16, at 395.
[151] *See* Healy, *supra* note 28, at 34–37 (discussing Congressional appropriations for FFELP and Direct).
[152] 2 U.S.C. § 661c.
[153] *Id.* § 661c(b), (e).
[154] *See* 20 U.S.C. 1087a(a) ("There are hereby made available, in accordance with the provisions of this part, such sums as may be necessary…to make [Direct] loans…[and to] purchas[e] [Direct] loans under…this title."); Federal Credit Reform Act, 2 U.S.C. § 661c(c) (designating the "guaranteed student loan program" an entitlement exempt from appropriations); Healy, *supra* note 28, at 39.

loans' net present value,[155] under FCRA, forgiving a student loan is tantamount to an expenditure of the value of that loan,[156] yet this expenditure requires no new appropriation.[157]

Reading the HEA alongside the FCRA, a court may consider an interpretation of the HEA that implies the Department of Education can spend $1.5663 trillion without a new appropriation to be "contrary to clear congressional intent."[158] Federal courts have signaled particular resistance to deferring to agencies when agencies infer appropriations from ambiguous statutory text.[159] In *U.S. House of Representatives v. Burwell*, a federal district court refused to grant *Chevron* deference to agency interpretations of provisions of the Patient Protection and Affordable Care Act that inferred a permanent appropriation for reimbursements to health insurers.[160] The court emphasized the maxim that "[a] law may be construed to make an appropriation out of the

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[155] *See* NEILL PERRY & PUJA SEAMS, ACCRUAL ACCOUNTING FOR FEDERAL CREDIT PROGRAMS: THE FEDERAL CREDIT REFORM ACT OF 1990, at 4–6 (Apr. 20, 2005).

[156] *See id.* (detailing calculation of "subsidy cost" of loans on federal balance sheet).

[157] 2 U.S.C. § 661c(c). In addition, a recent Trump administration executive order requires that any "discretionary administrative action" that "increase[s] mandatory spending," such as spending on an entitlement, be offset with reductions elsewhere, unless OMB says otherwise. Exec. Order No. 13,893, 84 Fed. Reg. 55,487 (Oct. 16, 2019); *see* Herrine, *supra* note 16, at 401. This executive order institutionalized an OMB policy known as Administrative Pay-As-You-Go ("Administrative PAYGO"), which OMB introduced in 2005. *See President Trump Bolsters Administrative PAYGO Through Executive Order*, COMM. FOR A RESPONSIBLE FED. BUDGET (Oct. 16, 2019), http://www.crfb.org/blogs/president-trump-bolsters-administrative-paygo-through-executive-order. In contrast to Statutory PAYGO, the legislative equivalent, Administrative PAYGO has no enforcement mechanism that automatically enacts offsetting spending cuts. *Id.* The Biden administration will need to navigate around this policy, either by changing it or by obtaining the applicable OMB waiver. *See* Herrine, *supra* note 16, at 402.

[158] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984); *see* Whitman v. American Trucking Associations, 531 U.S. 457, 468 (2001) ("[Congress] does not…hide elephants in mouseholes."); *see also* Department of Education OGC Letter, *supra* note 27, at 4 ("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 [HEA] Title IV provisions, and needlessly create Spending Clause, Antideficiency Act, and dispensing power concerns." (quoting *Whitman*, 531 U.S. at 468)). The January 2021 Department of Education OGC letter further argued that the executive branch is constrained by the Constitution's Take Care Clause, U.S. CONST. art. II, § 3 ("[the President] shall take Care that the Laws be faithfully executed") not to use settlement authority as a dispensing power. Department of Education OGC Letter, *supra*, at 4.

[159] *See, e.g.*, U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165, 188 (D.D.C. 2016).

[160] *See id.*

Treasury…only if the law specifically states that an appropriation is made,"[161] and stressed that "[t]his principle is even more important in the case of a permanent appropriation."[162]

Comprehensive administrative forgiveness of $1.5663 trillion may also simply be such a "major national policy decision[]" that, per the Non-Delegation Doctrine, it "must be made by Congress and the President in the legislative process, not delegated by Congress to the Executive."[163] Courts may be inclined to read the HEA narrowly to avoid this issue.[164]

Meanwhile, unlike FFELP and the Direct program, Perkins is not an entitlement.[165] While Perkins loans presently are not owed to the federal government,[166] were that to change to facilitate administrative forgiveness of Perkins loans,[167] such forgiveness would be subject to the FCRA.[168] Forgiveness of Perkins loans would still be possible without Congressional appropriations to the extent that the forgiveness could be characterized as a "reestimate," for which the FCRA provides "permanent indefinite authority," rather than a "modification," which requires an appropriation.[169] A "reestimate" is a "revision[]" of the "cost estimate" of a class of loans; a "modification" is "a Government action" that "differs from actions assumed in the baseline estimate" and "changes the

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[161] *Id.* (quoting 31 U.S.C. § 1301(d)).
[162] *Id.* (quoting *Remission to Guam & Virgin Islands of Estimates of Moneys to be Collected*, B-114808, 1979 WL 12213, at *3 (Comp. Gen. Aug. 7, 1979)).
[163] Paul v. United States, 140 S. Ct. 342, 342 (2019) (mem.) (op. of Kavanaugh, J.).
[164] *See, e.g.*, Hooper v. California, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.").
[165] *See* 20 U.S.C. § 1087aa(b) (2012) (amended 2015) (authorizing annual appropriations for Perkins program); 20 U.S.C. § 1087aa(b) (prohibiting future appropriations for Perkins program); Connor et al., *supra* note 26, at 2.
[166] *See* Herrine, *supra* note 16, at 395 (noting that all Perkins loans and some eighty-five percent of outstanding FFELP loans are not owed to the federal fisc).
[167] Proponents of administrative forgiveness of student loans have proposed options for the Department of Education to take possession of these loans. *See id.* However, all of these approaches require actions by autonomous third-parties. *See id.* at 396 (suggesting the Department of Education could obtain possession over FFELP loans through negotiations with guaranty agencies or if FFELP buyers universally defaulted); *id.* at 396–97 (suggesting the Department of Education could obtain possession over Perkins loans through negotiations with higher education institutions). As a result, loans not owed to the federal government would be particularly difficult to forgive administratively. *See id.*
[168] *See* 2 U.S.C. § 661c.
[169] 2 U.S.C. § 661c(e)–(f); *see* PERRY & SEAMS, supra note 155, at 11.

estimated cost of an outstanding…loan."[170] Though limited relief to Perkins loan debtors may plausibly be a reestimate, comprehensive relief for these borrowers is likely a modification that cannot be achieved without Congressional approval.[171]

B. ADMINISTRATIVE ACTIONS TO FORGIVE STUDENT LOANS

Assuming the Department of Education has the appropriate statutory authority to dispose of student loans, the Department could employ that statutory authority in several different ways to achieve administrative student loan forgiveness. In particular, the Department would need to determine to what extent, if at all, it should proceed through notice and comment rulemaking.[172]

Proponents of administrative student debt forgiveness argue that the Department of Education's decision to forgive student loans would be strictly discretionary, require no further rulemaking, and be shielded from judicial review.[173] Proponents argue that loan modification or settlement is an exercise of the Department of Education's enforcement discretion because it represents "a decision not to enforce rights that the HEA grants" to the Department of Education.[174] Agencies' decisions not to enforce statutes are often unreviewable under the APA because they are "committed to agency discretion by law."[175] Proponents argue that the Department of Education therefore has discretion to forgive student loans—i.e., to decide not to enforce the

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[170] OFF. OF MGMT. & BUDGET, *supra* note 119, § 185.3(s), (z).
[171] *See id.*; PERRY & SEAMS, supra note 155, at 11.
[172] *See* Department of Education OGC Letter, *supra* note 27, at 8 ("Even if the HEA could be fairly construed as granting the Secretary authority to provide blanket or mass…forgiveness of student loan[s]…Executive action doing so might be appropriately and necessarily considered a legislative rule under the [APA]. As such, all the requirements of notice and comment rulemaking…might need to be met.")
[173] Herrine, *supra* note 16, at 368.
[174] *Id.*; *see also* Healy, *supra note* 28, at 17–19.
[175] 5 U.S.C. 701(a)(2); *see* Heckler v. Chaney, 470 U.S. 821, 830–31 (1985) (holding Food and Drug Administration's decision not to enforce statute in particular instance was unreviewable under the APA because nonenforcement decisions are committed to agency discretion by law).

HEA—and that the Department of Education's exercise of that discretion would be unreviewable under the APA.[176]

The Supreme Court in *Chaney* articulated the standard for when agencies' nonenforcement decisions are immune to APA review.[177] Under *Chaney*, nonenforcement decisions are unreviewable unless the court has "law to apply" of sufficient specificity to be a "meaningful standard against which to judge" the "agency's exercise of discretion."[178] But agencies' decisions to waive debts may be reviewable if "the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers" and nonenforcement would "disregard legislative direction in the statutory scheme that the agency administers."[179] In *Sioux Honey*, the Federal Circuit applied these principles from *Chaney* to an agency's decision to write down debt as uncollectable.[180] The court held that the write-down was unreviewable, but implied it might have been reviewable if it were prohibited by law.[181]

Chaney and *Sioux Honey* suggest that the Department of Education's decision to forgive student loans could be reviewable to the extent the HEA or FCCA provides "legislative direction" against forgiving performing student loans.[182] Notably, "an agency's statutory interpretations made in the course of nonenforcement decisions are reviewable," leaving interpretation of the HEA and FCCA to the courts.[183] And such statutory interpretations enjoy less judicial deference

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[176] Herrine, *supra* note 16, at 368.
[177] *Chaney*, 470 U.S. at 830.
[178] *Id.*
[179] *See* Sioux Honey Ass'n v. Hartford Fire Ins. Co., 672 F.3d 1041, 1060–61 (Fed. Cir. 2012) (quoting *Chaney*, 470 U.S. at 832–33).
[180] *See id.* at 1061 (citing *Chaney*, 470 U.S. at 831).
[181] *See id.* (citing *Chaney*, 470 U.S. at 831).
[182] *See id.* at 1060 (quoting *Chaney*, 470 U.S. at 832–33).
[183] Montana Air Chapter No. 29, Ass'n of Civilian Technicians, Inc. v. Fed. Labor Relations, Auth., 898 F.2d 753, 756 (9th Cir. 1990).

than interpretations in connection with notice and comment rulemaking.[184] In considering the Department of Education's actions forgiving student loans through nonenforcement, a court may conclude that neither the HEA nor FCCA provides a clear statement conferring discretion on the Department of Education to forgive more than $1 trillion in performing loans.[185]

In particular, there may be sufficient "law to apply" dictating that the Department of Education's modification and settlement authorities apply only to nonperforming loans.[186] The Department of Education does not have modification and settlement authorities over FFELP and Perkins loans until the Department of Education takes possession of these loans from private lenders,[187] and the Department of Education does not typically take possession of performing FFELP and Perkins loans.[188] As Direct loans carry the same terms as FFELP loans,[189] the Department of Education's modification and settlement authorities may be limited to nonperforming loans.[190] A court may agree that governing law creates this limitation and review the Department of Education's forgiveness of performing loans.[191]

Even if a court agreed that the HEA and FCCA are consistent with the Department of Education's having plenary authority to forgive student loans, a court reviewing student loan forgiveness today would still be likely to find "law to apply" forbidding widespread forgiveness: since 2016, the Department of Education has bound itself by its own regulations to apply the FCCS

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[184] *See* JAMES T. O'REILLY, ADMINISTRATIVE RULEMAKING § 18:12 (2020 ed. 2020).
[185] *See* Whitman v. American Trucking Associations, 531 U.S. 457, 468 (2001); *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000) ("[Agencies] may not exercise [their] authority…inconsistent[ly] with the administrative structure that Congress enacted….")
[186] *See* Herrine, *supra* note 16, at 388 & n. 314 (citing Bergeron, *supra* note 28).
[187] *See* Bergeron, *supra* note 28; HERRINE, *supra* note 195, at 11; *see also* 20 U.S.C. § 1082(a)(6) (granting the Department of Education power to "waive or release" claims "acquired" in connection with FFELP).
[188] *See* HERRINE, *supra* note 195, at 11–12 (noting the Department of Education does not typically take possession of FFELP loans unless the "debtor has been in default for many months"); 20 U.S.C. § 1087cc(a)(4) (allowing the Department of Education to obtain assignment of Perkins loans in "default").
[189] *See* 20 U.S.C. § 1087a(b)(2).
[190] *See* Bergeron, *supra* note 28.
[191] *See* Sioux Honey Ass'n v. Hartford Fire Ins. Co., 672 F.3d 1041, 1060–61 (Fed. Cir. 2012).

when "compromis[ing], suspend[ing], or terminat[ing] collection of a debt in any amount" arising under FFELP, Perkins, or Direct.[192] It is black letter law that agencies must comply with their own regulations in matters affecting individual rights, suggesting that the Department of Education must comply with these regulations binding the Department to the FCCS.[193] Moreover, the D.C. Circuit, Second Circuit, and the Seventh Circuit have determined that regulations can create "law to apply" that renders otherwise discretionary acts reviewable, and the D.C. Circuit has extended this principle to certain agency guidance and statements.[194] Department of Education regulations may thus provide courts with a basis to review student loan forgiveness.[195]

However, proponents of administrative student loan forgiveness have argued that the Department of Education's 2016 debt collection regulations are best read as posing no barrier to administrative student loan forgiveness even in their current form.[196] They stress that "the FCCS, on their own terms, apply *only* when an agency is relying" on the FCCA settlement authority, and therefore do not apply to exercises of modification or settlement authority under the HEA.[197] Furthermore, they argue that the regulatory history of the 2016 rule suggests that it was implemented "to reflect expansions in the Secretary's authority," not to limit preexisting

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[192] *See* 34 C.F.R. § 30.70 (2019); Herrine, *supra* note 16, at 381–83.
[193] *See* United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 266–68 (1954); Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 422 (1942).
[194] *See* Herrine, *supra* note 16, at 361 (citing Cardoza v. CFTC, 768 F.2d 1542, 1550 (7th Cir. 1985); Steenholdt v. FAA, 314 F.3d 633, 639 (D.C. Cir. 2003); Salazar v. King, 822 F.3d 61, 76–77 (2d Cir. 2016)).
[195] *See, e.g.*, LUKE HERRINE, AN ADMINISTRATIVE PATH TO STUDENT DEBT CANCELLATION 10–11 (2019) (discussing the Department of Education regulations that limit the Department of Education's modification and settlement authorities). *But see* Herrine, *supra* note 16, at 379–86 (considering numerous regulations that might bind the Department of Education and concluding none bar forgiveness of loans, particularly given that executive regulations may be altered or rescinded).
[196] *See* Connor et al., *supra* note 26, at 5. The Department of Education is not likely to receive much deference from a court on its interpretation of § 30.70, so these arguments would need to persuade a court on their own merits. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2415–18 (2019) (citing Auer v. Robbins, 519 U.S. 452, 462 (1997)) (holding that agencies will not receive *Auer* deference when interpreting a regulation unless the regulation is "genuinely ambiguous," the agency's interpretation is "reasonable," and that interpretation "implicate[s] [the agency's] substantive expertise").
[197] *See* Connor et al., *supra* note 26, at 5.

authority.[198] In addition, they observe that the provision cross-referencing the FCCS is incompatible with the FCCS rules it purports to impose, as the provision "states that the Secretary may compromise a debt *in any amount*, without prescribing any procedures or considerations for the exercise of that discretion" while the FCCS "apply restrictions on the dollar amounts and prescribe considerations and procedures that an agency must follow before compromising a debt."[199] These arguments notwithstanding, the January 2021 Department of Education OGC letter cited the FCCS (though not the Department of Education's specific regulation imposing its strictures) as "controlling regulation" obligating the Department of Education to "aggressively collect all debts."[200] To the extent this regulation constrains the Department of Education's forgiveness authority beyond any statutory constraints, the Department may need to amend its debt collection regulations through notice and comment rulemaking before implementing administrative student loan forgiveness.[201] The decision to amend those regulations would be reviewable, although it should receive the benefit of *Chevron* review.[202]

In addition to the risk that the Department of Education's student loan forgiveness would be reviewable under *Chaney* because there is "law to apply," a blanket forgiveness regime may also be reviewable on the grounds that it is "not simply a non-enforcement policy."[203] In *Regents*, the Supreme Court rejected the Trump administration's attempt to terminate the Deferred Action for Childhood Arrivals ("DACA") program, under which the Department of Homeland Security granted "deferred action" to certain resident aliens otherwise subject to deportation, and held that

[198] *See id.*
[199] *See id.* (citing 34 C.F.R. § 30.70(e) (2019)); *see also* Herrine, *supra* note 16, at 383 ("One way to treat this regulatory change, then, is a massive drafting error. A mistake to be ignored.").
[200] Department of Education OGC Letter, *supra* note 27, at 2 (citing 31 CFR §§ 901.1(a), 902.2, 902.3, 902.4).
[201] *See* Herrine, *supra* note 16, at 381–83.
[202] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984); Herrine, *supra* note 16, at 367.
[203] Department of Homeland Security v. Regents of Univ. of Cal. 140 S. Ct. 1891, 1906 (2020).

DACA was not a discretionary nonenforcement policy committed to agency discretion under *Chaney*.[204] The Court explained that DACA "did not merely [involve] 'refus[ing] to institute proceedings' against a particular entity, or even a particular class."[205] Instead, the agency "'establish[ed] a clear and efficient process' for identifying" eligible aliens and "solicited applications from eligible aliens, instituted a standardized review process, and sent formal notices indicating whether the alien would receive…forbearance."[206] The Court concluded that these processes led to an "affirmative act of approval," not nonenforcement, and they were thus reviewable.[207]

Here, the Department of Education could find its student loan forgiveness characterized as an "affirmative act of approval" for "forbearance," rendering it reviewable under the APA.[208] To avoid this outcome, the Department of Education would likely at least need to avoid establishing policies and procedures for determining eligibility for loan forgiveness, lest the Department of Education replicate the pattern that rendered DACA reviewable.[209]

In sum, the Department of Education has essentially three strategic options if it opts to assert and exercise plenary forgiveness authority. First, the Department could assert nonenforcement discretion to forgive student loans, interpreting the HEA as a grant of plenary forgiveness authority broad enough to overcome the Department's rule committing the Department to applying the FCCS. This approach may well lead a court to block administrative student loan forgiveness on the grounds that the Department failed to comply with its own rules.[210] The

[204] *Id.*
[205] *Id.* (citing *Chaney*, 470 U.S. at 832).
[206] *Id.* (citation omitted).
[207] *Id.* (quoting *Chaney*, 470 U.S. at 831).
[208] *See id.*
[209] *See id.*
[210] *See* United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 266–68 (1954) (establishing doctrine that agency's failure to comply with its regulations to the detriment of individual rights violates due process).

Department could strengthen its case by interpreting its debt collection rule so that—the rule's plain text notwithstanding—it does not actually bind the Department to apply the FCCS.[211] But if a court were to reject the Department of Education's interpretation of its debt collection rule, again, the court may block the Department's loan forgiveness on the basis of the Department's noncompliance with its own rule. However, if a court accepted that the debt collection rule does not constrain the Department of Education's forgiveness authority, then the court would proceed to evaluate whether the HEA and FCCA allow the Department to exercise plenary forgiveness authority.[212] As the Department's actions to forgive student debt under this approach would not involve notice and comment rulemaking, the Department would receive only minimal deference from the court in judicial review of the Department's authority, but the Department could escape judicial review of its individual acts of forgiveness.[213]

Second, the Department could engage in notice and comment rulemaking to repeal or amend its regulation committing it to applying the FCCS, but enact no further regulation before proceeding to widespread loan forgiveness. The change to the regulation would be reviewable, though eligible for *Chevron* deference,[214] while the forgiveness itself might evade judicial review but would not benefit from much judicial deference.[215]

Third and lastly, the Department of Education could engage in notice and comment rulemaking to replace its rule committing it to applying the FCCS with a regulation asserting

[211] *See* Connor et al., *supra* note 26, at 5.
[212] *See* Montana Air Chapter No. 29, Ass'n of Civilian Technicians, Inc. v. Fed. Labor Relations, Auth., 898 F.2d 753, 756 (9th Cir. 1990).
[213] *See* United States v. Mead Corp., 533 U.S. 218, 228–33 (2001).
[214] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984); Herrine, *supra* note 16, at 367.
[215] *See Mead*, 533 U.S. at 228–33.

plenary forgiveness authority. This approach would be reviewable,[216] but could earn the Department the benefit of *Chevron* deference for its forgiveness actions.[217]

C. EMERGENCY STUDENT LOAN FORGIVENESS UNDER THE HEROES ACT

In addition to the possibility that the Department of Education has the authority to forgive student loans at any time at its discretion, the Department of Education may separately be able to argue that the ongoing COVID-19 national emergency permits widespread student loan forgiveness under the HEROES Act.[218] Under the HEROES Act, during a national emergency, the Department of Education has authority to "waive or modify any statutory or regulatory provision applicable to" federal student loans for certain enumerated purposes, including ensuring that "recipients of student financial assistance…who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals"; "avoid[ing] inadvertent, technical violations or defaults," and ensuring that "no overpayment will be required to be returned or repaid."[219] The statute defines an "affected individual" as someone who "is serving on active duty during a war or other military operation or national emergency"; "is performing qualifying National Guard duty during a war or other military operation or national emergency"; "resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency"; or "suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by [the Department of Education]."[220] The Department of Education "is

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[216] *See* Department of Homeland Security v. Regents of Univ. of Cal. 140 S. Ct. 1891, 1906 (2020).
[217] *See Chevron*, 467 U.S. at 843 n.9; Herrine, *supra* note 16, at 361, 367.
[218] *See* HEGJI, *supra* note 73, at 14–16 (discussing applicability of HEROES Act to student loan relief in context of COVID-19 national emergency).
[219] *See* 20 U.S.C. § 1098bb(a)(1)–(2).
[220] *Id.* § 1098ee(2).

not required to exercise the waiver or modification authority" under the HEROES Act "on a case-by-case basis."[221]

The Department of Education could plausibly argue that many or all recipients of student loan forgiveness during the COVID-19 pandemic are "affected individuals."[222] The statute expressly commits to the Department of Education's discretion the determination that an individual "suffered direct economic hardship as a direct result" of the COVID-19 "national emergency," and is thus an "affected individual."[223] The Department could likely argue that widespread forgiveness would ensure that these "affected individuals are not placed in a worse position financially in relation to [student] financial assistance because of their status as affected individuals."[224]

However, the January 2021 Department of Education opinion letter concluded that "plain HEA language and context strongly suggest Congress never intended the HEROES Act as authority for mass cancellation, compromise, discharge, or forgiveness of student loan principal balances."[225] First, the letter construed the HEROES Act as allowing the Department of Education to place "affected individuals" only "in the same position financially in relation to their [HEA] Title IV loans as if the national emergency had not occurred."[226] The letter thus rejected the view that the Secretary could forgive loans to "ensure" affected individuals would not be "placed in a worse position financially in relation to [student] financial assistance."[227] Second, the letter identified the statute's references to "defaults" and modifications of borrowers' obligations to

[221] *Id.* § 1098bb(b)(3).
[222] *See id.* § 1098ee(2).
[223] *See id.*
[224] *See id.* § 1098bb(a)(2)(A).
[225] Department of Education OGC Letter, *supra* note 27, at 6.
[226] *See id.*
[227] *See id.* (quoting 20 U.S.C. § 1098bb(a)(2)(A)).

return overpayments as a "strong textual basis for concluding Congress intended loans to be repaid, even after the exercise of HEROES Act authority,"[228] suggesting that the HEROES Act was not intended to authorize "mass cancellation" of student loans.[229] Third, relying on *MCI Telecomms. Corp. v. Am. Telephone & Telegraph Co.*,[230] the letter argued that the appropriate definition of "modify" is "to change moderately or in minor fashion."[231] The letter did not consider the more technical definition of a "modification" of a loan obligation in the context of federal budgeting.[232] For these three reasons, the letter concluded that the HEROES Act would not provide independent statutory authority for widespread student loan forgiveness.[233]

D. TAX TREATMENT OF ADMINISTRATIVE STUDENT LOAN FORGIVENESS

Administrative forgiveness of student loans would fail to relieve student loan debtors' liabilities if forgiven debtors realized tax liability for their forgiven debt.[234] Such liability, though smaller than their previous debt burden, could be "due as a lump sum immediately, without any of the repayment plan or forbearance options available on student loans."[235] Thus, successful administrative student loan forgiveness requires that the Department of Education's actions receive favorable tax treatment.[236]

Treasury (including the Internal Revenue Service ("IRS")) is itself an executive agency, and the IRS has some latitude to determine, without further Congressional input, that particular

[228] *See id.* (citing 20 U.S.C. § 1098bb(a)).
[229] *See id.*
[230] 512 U.S. 218, 225 (1994).
[231] *See* Department of Education OGC Letter, *supra* note 27, at 6.
[232] *See id. But see* OFF. OF MGMT. & BUDGET, *supra* note 119, § 185.3(s); *supra* Section II.A (discussing technical definition of modification).
[233] *See* Department of Education OGC Letter, *supra* note 27, at 6.
[234] *See* Herrine, *supra* note 16, at 402.
[235] *Id.*; *see* 26 U.S.C. § 61(a)(11) (including "Income from discharge of indebtedness" in taxable gross income); United States v. Kirby Lumber Co., 284 U.S. 1, 3 (1931) (establishing that forgiveness of taxpayer's debt is taxable income).
[236] HERRINE, *supra* note 195, at 15–16.

cancellations of indebtedness do not constitute taxable income.[237] For example, in 2015, the IRS determined that it could exclude from gross income the Department of Education's forgiveness of student debt incurred because of fraud.[238] Nevertheless, until recently, blanket forgiveness of student loans would have been treated as taxable gross income under IRS policies.[239] Treasury would have needed to change this tax treatment[240] and such a change would have been subject to challenge under the APA.[241]

The American Rescue Plan Act of 2021, enacted March 11, 2021, provided a legislative fix for this issue by altering the tax treatment of student loan forgiveness for the years 2021 to 2025, inclusive.[242] It excludes from gross income the full or partial cancellation of student loan debt, exempting it from taxation.[243] However, to the extent that administrative forgiveness of student loans is not completed by 2025 and this provision is not reenacted, Treasury would need to rely on its administrative powers.[244]

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[237] *See* Herrine, *supra* note 16, at 404–05 & n.362 (citing INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, PUB. NO. 970, TAX BENEFITS FOR EDUCATION (Jan. 17, 2019)), https://www.irs.gov/pub/irs-pdf/p970.pdf; INTERNAL REVENUE SERV., *supra*, at 38 (noting cancellation of student loan indebtedness is generally taxable gross income, but may be excludable from gross income when resulting from certain "Student loan repayment assistance" programs); Bailey v. Comm'r of Internal Revenue, 88 T.C. 1293, 1300 (1987) (discussing "general welfare" exception permitting exclusion of welfare benefits from tax treatment).

[238] Rev. Proc. 2015-57, 2015-51 I.R.B. 863, at 864; *see also* Herrine, *supra* note 16, at 410.

[239] *See* INTERNAL REVENUE SERV., *supra* note 237, at 38–39.

[240] *See* Herrine, *supra* note 16, at 403; *see also* John R. Brooks, *The Tax Treatment of Student Loan Discharge and Cancellation*, *in* DELIVERING ON DEBT RELIEF: PROPOSALS, IDEAS, AND ACTIONS TO CANCEL STUDENT DEBT ON DAY ONE AND BEYOND 166, 174–76 (Student Borrower Prot. Ctr. et al. eds., 2020) (arguing that student loan debt cancellation constitutes an untaxable scholarship under the Internal Revenue Code, and that the IRS should cease treating student loan debt as cancellation of indebtedness income).

[241] *See* Cohen v. United States, 650 F.3d 717, 723 (D.C. Cir. 2011) (en banc) (holding APA applies to IRS).

[242] *See* American Rescue Plan Act of 2021, Pub L. No. 117-2, § 9675, 135 Stat. 4; Mark Kantrowitz, *Covid-19 Relief Bill Passes with Tax-Free Student Loan Forgiveness* (Mar. 6, 2021, 02:53 PM EST), https://www.forbes.com/sites/markkantrowitz/2021/03/06/covid-19-relief-bill-passes-with-tax-free-student-loan-forgiveness/?sh=528d2f7e2d1e.

[243] *See* American Rescue Plan Act of 2021§ 9675; Kantrowitz, *supra* note 242.

[244] Concerns about the tax treatment of student loan debt were pronounced prior to the American Rescue Plan Act's legislative fix. *See, e.g.*, HERRINE, *supra* note 195, at 15–16. Such concerns may become more acute once again if administrative student loan forgiveness is not accomplished well before the statute's 2025 favorable tax treatment deadline.

III. VIABILITY OF A LITIGATION CHALLENGE TO ADMINISTRATIVE FORGIVENESS OF STUDENT LOANS

This Part analyzes the prospects of a court challenge to administrative forgiveness of student loans.

Section A examines procedural barriers that may limit potential plaintiffs' access to the courts. The Section first reviews the constitutional standing requirements of Article III of the Constitution.[245] It then considers the key waivers of sovereign immunity permitting suits against the United States and concludes that only suits under § 702 of the APA[246] could yield the requisite equitable relief to prevent implementation of administrative student loan forgiveness. It then analyzes whether the APA permits each of two plausible plaintiff classes—student loan servicers and investors in student loan asset-backed securities—to sue the Department of Education (to block the forgiveness of the debt) or Treasury (to require the IRS to recognize the forgiveness as taxable income). The Section concludes that both servicers and investors could bring APA suits against the Department of Education, but not Treasury.[247]

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[245] U.S. CONST. art. III.

[246] 5 U.S.C. § 702.

[247] In addition to these two exemplar plaintiff classes, who could likely reach the merits phase of litigation against the executive branch, certain potential plaintiff classes whose claims are likely *not* viable deserve mention.

First, a 2015 district court case suggests that the houses of Congress might have standing to challenge administrative student loan forgiveness. *See* U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 58 (D.D.C. 2015) (concluding House of Representatives collectively had standing to challenge executive's violations of Constitution's Appropriations Clause (citing U.S. CONST. art. I, § 9, cl. 7)); *see also* U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165, 188–89 (D.D.C. 2016) (maintaining standing holding). However, this district court case appears to be the only example of its kind. *See* Brief for Appellants at 1, U.S. House of Representatives v. Burwell, No. 16-5202 (D.C. Cir. dismissed May 16, 2018) ("For the first time in our Nation's history, the district court allowed one House of Congress to invoke the jurisdiction of an Article III court to resolve a disagreement between the political branches over the Executive Branch's execution of a federal statute."); *see also* Raines v. Byrd, 521 U.S. 811, 816, 821 (1997) (denying individual legislators standing to challenge executive line item veto); Crawford v. United States Dep't of Treasury, 868 F.3d 438, 451, 460 (6th Cir. 2017) (denying U.S. Senator's legislative standing to sue Treasury for acts "not authorized by Congress through the ordinary legislative process").

Second, because there is a colorable argument that Congress has not appropriated funds for certain forms of federal student loan forgiveness, executive branch employees who carry out such expenditures could face criminal liability under the Antideficiency Act, 31 U.S.C. §§ 1341(a), 1350; *see* Herrine, *supra* note 16, at 399–400, and such employees would therefore seem like plausible plaintiffs with standing. S*ee, e.g.*, Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014) (noting that threat of prosecution typically can ground Article III standing). However, federal

Section B considers how the federal courts might handle the merits of an APA challenge to student loan forgiveness, including how different records of agency action might affect the outcome. The Section also argues that federal courts would be most likely to permit partial as opposed to blanket forgiveness of student loans, especially if the forgiveness is tied to the exigency of a national emergency like the COVID-19 pandemic.

A. PROCEDURAL BARRIERS TO ENJOINING ADMINISTRATIVE STUDENT LOAN FORGIVENESS

Prospective plaintiffs seeking an injunction to frustrate administrative student loan forgiveness must establish that they have standing to sue and that the federal government has waived sovereign immunity with respect to their claim.

I. ARTICLE III STANDING

Any plaintiff seeking to challenge administrative student loan forgiveness must meet the constitutional minimum of standing.[248] Article III of the Constitution limits federal-court jurisdiction to "Cases" and "Controversies."[249] Under Article III, plaintiffs have standing to sue in federal court only if they have "(1) suffered an injury in fact, (2) that is fairly traceable to the

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government employees' claims are likely to be funneled into the employee dispute procedures of the Civil Service Reform Act ("CSRA"), Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.), which would limit employees' remedies to those contemplated for resolving employment disputes. *See* Crane v. Napolitano, No. 3:12-CV-03247-O, 2013 WL 8211660, at *2 (N.D. Tex. July 31, 2013), *aff'd on other grounds sub. nom.* Crane v. Johnson, 783 F.3d 244 (5th Cir. 2015) (holding that federal government employees could not seek equitable relief under the APA based on choosing between violating the law or adverse employment consequences). In *Crane v. Napolitano*, federal employees alleged injury "based on being compelled to violate a federal statute upon pain of adverse employment action." *Id.* at *3. The district court held that such a claim under the APA is precluded by the CSRA's "comprehensive and exclusive remedial scheme." *Id.*; *see also* United States v. Fausto, 484 U.S. 439, 455 (1988) (describing CSRA as a "a comprehensive system for reviewing personnel action taken against federal employees"); Rollins v. Marsh, 937 F.2d 134, 139 (5th Cir. 1991) (describing CSRA's remedies as "the comprehensive and exclusive procedures for settling work-related controversies between federal civil-service employees and the federal government"). Here, federal government employees who must choose between violating the Antideficiency Act and adverse employment consequences are likely similarly limited to a CSRA remedy. Such employees may seek corrective employment action, and possibly certain money damages, but not an injunction preventing forgiveness of student loans. *See* Bohac v. Department of Agriculture, 239 F.3d 1334, 1337 (Fed. Cir. 2001) (discussing limited remedies available to aggrieved federal employees).

[248] *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016), as revised (May 24, 2016).

[249] U.S. CONST. art. III, § 2; *see Spokeo*, 136 S. Ct. at 1547.

challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[250] A plaintiff has suffered an injury in fact if they have suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."[251] The injury is not "fairly traceable to the challenged action of the defendant," if it is "the result of the independent action of some third party not before the court."[252] Plaintiffs have standing to seek only those remedies that redress their constitutionally cognizable injuries in fact.[253] A plaintiff seeking to enjoin administrative forgiveness of student loans must demonstrate an injury in fact, fairly traceable to student loan forgiveness (if suing the Department of Education) or its tax treatment (if suing Treasury), redressable by a favorable ruling.

II. SOVEREIGN IMMUNITY

In addition to Article III's constitutional minimum of standing, "[s]overeign immunity shields the United States from suit absent a consent to be sued that is 'unequivocally expressed.'"[254] As a result, plaintiffs seeking to challenge federal government action must fit their suits within the bounds of an unequivocally expressed waiver of sovereign immunity.[255] The waiver must permit both the type of claim and the relief sought.[256]

Plaintiffs seeking equitable relief from actions of an administrative agency like the Department of Education or Treasury find the requisite waiver of sovereign immunity in § 702 of the APA, which waives the United States' immunity from suits "seeking relief other than money

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[250] *Spokeo*, 136 S. Ct. at 1547 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)).
[251] *Id.* (citing *Lujan*, 504 U.S. at 560).
[252] Bennett v. Spear, 520 U.S. 154, 167 (1997).
[253] *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998).
[254] United States v. Bormes, 568 U.S. 6, 9 (2012) (citation omitted).
[255] *See* Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 602 (2003).
[256] *See* C. Stanley Dees, *The Executive Branch as Penelope: Preserving the Tapestry of Sovereign-Immunity Waivers for Suits Against the United States*, 71 GEO. WASH. L. REV. 708, 710–11 (2003).

damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority."[257] However, such plaintiffs must clear two hurdles before they may seek equitable relief under the APA. First, plaintiffs may not access the § 702 waiver of sovereign immunity "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought" by the plaintiff.[258] This caveat "prevents plaintiffs from exploiting the APA's waiver to evade limitations on suit contained in other statutes."[259] APA claims must challenge agency action "for which there is no other adequate remedy in a court."[260] Second, the APA imposes a "statutory" or "prudential" standing[261] requirement in addition to Article III's constitutional standing requirements: "[t]he interest [the plaintiff] asserts must be 'arguably within the zone of interests to be protected or regulated by the statute' that [the plaintiff] says was violated."[262] While the zone of interest test "is not meant to be especially demanding" and does not require "indication of congressional purpose to benefit the would-be plaintiff," the zone of interest test "denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."[263] A plaintiff seeking equitable relief under the APA from administrative forgiveness of student debt must show that no statute "expressly or impliedly

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[257] 5 U.S.C. § 702.
[258] *Id.*
[259] Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 215 (2012).
[260] 5 U.S.C. § 704.
[261] Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127–28 & n.4 (2014) (explaining that the zone-of-interests tests is not jurisdictional and rests on "statutory, not 'prudential,' considerations," though the Court "admittedly ha[s] placed that test under the 'prudential' [standing] rubric in the past.").
[262] *Match-E-Be-Nash-She-Wish Band*, 567 U.S. at 224 (quoting Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970)).
[263] Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399–400 (1987).

forbids"[264] such relief and that the plaintiff is within the zone of interests of whichever statute the plaintiff argues constrains the Department of Education or Treasury.[265]

Other available waivers of sovereign immunity are unlikely to permit plaintiffs to frustrate administrative forgiveness of student loans. Under the Tucker Act,[266] the United States waived sovereign immunity for suits in the Court of Federal Claims for money damages founded "upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."[267] Similarly, under the Federal Tort Claims Act,[268] the United States waived sovereign immunity for certain suits for money damages sounding in tort.[269] Yet these waivers do not permit suits for equitable relief, as would be required to prevent administrative student loan forgiveness.[270] The United States has also waived sovereign immunity for suits by federal government employees based on adverse employment actions.[271] Yet the remedial framework for such suits includes merely corrective actions related to the adverse employment action and certain money damages, not the sort of equitable relief required to block administrative student loan forgiveness.[272] While none of these non-APA waivers of sovereign immunity suffice for plaintiffs seeking to block administrative student loan forgiveness, they represent "other

[264] 5 U.S.C. § 702.
[265] *See Match-E-Be-Nash-She-Wish Band*, 567 U.S. at 224.
[266] Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491.
[267] *Id.* § 1491.
[268] Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680.
[269] *See id.*
[270] *See* Sisk, *supra* note 255, at 603.
[271] *See* Civil Service Reform Act of 1978, 5 U.S.C. § 7701; Whistleblower Protection Act of 1989, 5 U.S.C. § 1221; *see also* Frazier v. Merit Sys. Prot. Bd., 672 F.2d 150, 154–55, 170 (D.C. Cir. 1982).
[272] *See* Bohac v. Department of Agriculture, 239 F.3d 1334, 1337 (Fed. Cir. 2001) (discussing limited remedies available to aggrieved federal employees).

statute[s] that grant consent to suit [and] expressly or impliedly forbid[]" APA equitable relief where they apply.[273]

In sum, plaintiffs seeking equitable relief to prevent administrative forgiveness of student loans must demonstrate that they have Article III standing, that no statute waiving sovereign immunity other than the APA applies to their claims, and that they fall within the zone of interests of the statute they allege the Department of Education or Treasury has violated. The following section considers whether each of two potential plaintiff classes—student loan servicers and investors in student loan asset-based securities—could meet these requirements.

III. PROCEDURAL BARRIERS TO SUITS BY STUDENT LOAN SERVICERS

Student loan forgiveness would likely cut into the profits of federal student loan servicers. The federal government paid federal student loan servicers $830 million in Fiscal Year 2019.[274] That expenditure is projected to grow to $1.149 billion in Fiscal Year 2021.[275] As servicers' revenues are tied to servicing volume, forgiveness of student loans and the concomitant reduction in the volume of student loans to service would hurt servicers' bottom line.[276]

Student loan servicers would likely clear all procedural hurdles to bringing an APA suit for equitable relief against the Department of Education. Student loan servicers could likely show that they meet Article III's constitutional minimum of standing; that, though they are government contractors, the Tucker Act's waiver of sovereign immunity for contract claims does not preclude APA relief; and that they fall within the zone of interests of the Higher Education Act[277] pursuant

[273] *See* 5 U.S.C. § 702.
[274] OFF. MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2021, DETAILED BUDGET ESTIMATES 363 (2020) https://www.govinfo.gov/content/pkg/BUDGET-2021-APP/pdf/BUDGET-2021-APP.pdf.
[275] *Id.*
[276] *See* Naimon et al., *supra* note 2, at 272 (citing Great Lakes Educational Loan Services, Inc. Servicing Contract No. ED-FSA-09-D-0012, OFFICE OF FED. STUDENT AID, 13–14 (2009), https://www2.ed.gov/policy/gen/leg/foia/contract/greatlakes-061709.pdf [hereinafter Great Lakes Contract]).
[277] Higher Education Act of 1965, Pub. L. 89-329, § 431, 79 Stat. 1219, 1245.

to which the Department of Education administers federal student loan programs. However, student loan servicers likely could not bring an APA suit against Treasury, as servicers would likely both lack Article III standing and fall outside of the zone of interests of the relevant sections of the Internal Revenue Code.

In a suit challenging the Department of Education's authority to forgive student loan debts, student loan servicers that service those debts under contracts with the federal government would likely be able to seek equitable relief under the APA that could block debt forgiveness.

First, servicers would be able to demonstrate Article III standing. The Supreme Court has recognized that "actual financial injury" from "illegally reducing the return on [plaintiffs'] investments" establishes an injury in fact for the purposes of Article III standing.[278] Here, the servicers are paid on a per loan basis,[279] so administrative student loan forgiveness, if unlawful, would inflict "actual financial injury" on the servicers and "illegally reduc[e]" servicers' return on investment.[280] That injury would be fairly traceable to the challenged Department of Education action because the harmful reduction in loan servicing volume would be the direct result of the Department of Education's action forgiving those debts, rather than "the result of the independent action of some third party not before the court."[281] And the injury would likely be redressable by

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[278] Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd., 493 U.S. 331, 665 (1990).
[279] *See* Naimon et al., *supra* note 2, at 272.
[280] Franchise Tax Bd., 493 U.S. at 665. Administrative student loan forgiveness may also raise the specter of a "regulatory taking" under the Fifth Amendment by interfering with the "investment-backed expectations" of participants in the federal student loan industry, such as servicers. *See* Penn Central Transportation Co. v. New York City, 438 U.S. 104, 127 (1978); Cienega Gardens v. United States, 331 F.3d 1319, 1353 (Fed. Cir. 2003) (holding revisions to government's low-income housing program that impaired 96% of value of investments of private actors in that government program was a regulatory taking under *Penn Central*). However, publicly available government student loan servicing contracts state that the government "makes no guarantee" that servicers "will retain their current loan servicing volume" or a "minimum volume," Great Lakes Contract, *supra* note 276, at 13–14, likely defeating claims that parties have an investment-backed expectation of a certain loan volume. *See Cienaga Gardens*, 331 F.3d at 1334.
[281] Bennett v. Spear, 520 U.S. 154, 167 (1997).

a favorable ruling[282] because the APA likely authorizes the equitable relief required to preserve the volume of student loans for servicing.[283]

Second, servicers would be able to bring an APA claim seeking equitable relief even though servicers are government contractors, and certain equitable claims by government contractors are precluded by the Tucker Act.[284] However, servicers could not restrain administrative student loan forgiveness through an action sounding in breach of contract,[285] as such actions may not be brought under the APA, but must be brought under the Tucker Act, solely for money damages.[286] Nevertheless, courts have rejected the view that "any case requiring some reference to or incorporation of a contract is necessarily on the contract and therefore directly within the Tucker Act."[287] Though servicers are government contractors, the APA remedy contemplated here is distinguishable from a suit for specific performance of a government contract.

In *Megapulse, Inc. v. Lewis*, the D.C. Circuit confronted the question of whether a government contractor's claim for equitable relief under the APA that was based on a government contract fell within the Tucker Act.[288] Government contractor Megapulse, Inc. alleged that the Coast Guard violated the Trade Secrets Act[289] when it removed restrictions against commercial use of Megapulse's proprietary data, which Megapulse had supplied the Coast Guard "pursuant to

[282] *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016), as revised (May 24, 2016).
[283] *See* 5 U.S.C. § 702 (permitting equitable relief for unlawful agency action). Servicers would have standing to seek only those equitable remedies that would actually redress their injuries, such as a preliminary injunction preventing loan forgiveness. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998). For example, they would likely not have standing to seek a *post hoc* declaratory judgment that student loan forgiveness was unlawful, as such a declaration would not redress servicers' injuries so long as the debts are not reinstated. *See id*.
[284] *See* Sisk, *supra* note 255, at 628–629 ("The District Courts . . . lack authority to order specific performance by negative implication from the Tucker Act."); *see also* Megapulse, Inc. v. Lewis, 672 F.2d 959, 971 (D.C. Cir. 1982) ("An award of specific performance . . ., as a matter of public policy, is not available against the government.").
[285] *See* Int'l Eng'g Co., Div. of A-T-O v. Richardson, 512 F.2d 573, 577 & n.4 (D.C. Cir. 1975) (explaining that equitable relief is not available in cases governed by the Tucker Act).
[286] *See* Sharp v. Weinberger, 798 F.2d 1521, 1524 (1986).
[287] *Megapulse*, 672 F.2d at 971.
[288] *See id.* at 966.
[289] 18 U.S.C. § 1905.

the terms of various contracts."[290] The government argued that because Megapulse's allegations would state a claim for breach of Megapulse's government contracts, an "adequate remedy" was available under the Tucker Act for breach of contract, and § 704 of the APA precluded Megapulse's suit under § 702 for an injunction.[291] The court declined to credit this argument, rejecting the view "that an agency action may not be enjoined, even if in clear violation of a specific statute, simply because that same action might also amount to a breach of contract."[292] The court observed that such a rule would permit the government to evade legal requirements simply by contracting not to violate them and thereby limiting suits for violations to a Tucker Act money damages remedy.[293]

As in *Megapulse*, servicers seeking to enjoin student loan forgiveness would not be bringing "a disguised contract action"[294] merely because the cause of their injury would be a diminution in the value of their government contracts. A suit alleging that it is unlawful for the Department of Education to forgive student debts at all would not sound in breach of contract even if the acts would also breach the servicers' contracts.[295] Student loan servicers could therefore bring such a suit under the APA, notwithstanding their status as government contractors, and obtain equitable relief.

Third, student loan servicers likely fall within the zone of interests of the Higher Education Act, the statute pursuant to which the Department of Education administers the student loan program and which loan servicers would likely argue the Department breached by forgiving

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[290] *Megapulse*, 672 F.2d at 962–64.
[291] *Id.* at 970.
[292] *Id.* at 971.
[293] *Id.*
[294] *Id.* at 968.
[295] *See id.* at 971. Separately, servicers could also bring a claim for money damages sounding in breach of contract, within the ambit of the Tucker Act, seeking compensation for the drop in loan volume. *See* 28 U.S.C. §§ 1346(a)(2), 1491.

student loans.[296] The zone of interest test "is not meant to be especially demanding," and merely weeds out plaintiffs whose "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."[297] Yet student loan servicers are expressly contemplated by the Higher Education Act.[298] Subchapter IV of the Higher Education Act, which includes the federal student loan programs,[299] commands the Secretary of Education to "obtain public involvement in the development of proposed regulations for this subchapter" including "individuals and representatives of the groups involved in student financial assistance programs under this subchapter, such as…loan servicers."[300] Moreover, these groups, including loan servicers, are to be participants in "a negotiated rulemaking process" before the Secretary of Education "publish[es] proposed regulations in the Federal Register."[301] This express statutory mandate to include student loan servicers and their interests in the administration of the federal student loan programs easily satisfies the zone of interest test.

In sum, student loan servicers would be able to sue to prevent the Department of Education from forgiving student loans. Servicers could demonstrate an injury in fact, fairly traceable to the Department's forgiveness of student loans, and redressable by equitable relief under § 702 of the APA. That relief would not be precluded by the Tucker Act. And servicers fall within the zone of interests of the statute under which the Department of Education would act.

Notwithstanding the viability of a servicer suit against the Department of Education, servicers would likely be unable to bring a similar APA action against Treasury for its tax treatment

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[296] *See* Higher Education Act of 1965, Pub. L. 89-329, § 431, 79 Stat. 1219, 1245; *see also* Hunt, *supra* note 10, at 1190.
[297] Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399–400 (1987).
[298] *See* 20 U.S.C. § 1098a(a)(1); Hunt, *supra* note 10, at 1190 (quoting 20 U.S.C. § 1098a(a)(1)).
[299] 20 USCA Ch. 28, Subch. IV.
[300] 20 U.S.C. § 1098a(a)(1).
[301] *Id.*

of student loan forgiveness. Servicers would likely neither have Article III standing nor satisfy the zone of interests test in a suit against Treasury. As a result, servicers' potential challenge to administrative student loan forgiveness would hinge on the merits of its case against the Department of Education; servicers would not be able to deter the President with the threat of forcing any student loan forgiveness to incur unfavorable tax treatment.

First, servicers would likely not have Article III standing to sue Treasury. While student loan forgiveness as a whole, and in particular the Department of Education actions already discussed, would inflict a constitutionally cognizable injury on servicers,[302] that injury would be neither fairly traceable to Treasury's actions nor redressable by an injunction preventing or reversing those actions. To the extent that tax treatment of student loan forgiveness would injure servicers, it would do so by making student loan forgiveness tenable for the Department of Education; in the absence of favorable tax treatment, the policy objectives of student loan forgiveness would be frustrated to the point where the Department of Education would be unlikely to pursue it.[303] That injury depends on "the result of the independent action of some third party"[304]—the Department of Education—and would not be fairly traceable to Treasury.[305] Moreover, because a court order interdicting Treasury's favorable tax treatment of forgiven student loans would not itself affect servicers' losses, which would be a product of the volume of loans the Department of Education forgives, such an order would not redress servicers' injuries.[306] Thus, servicers would likely not have Article III standing to sue Treasury over tax treatment of student loans.

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[302] *See* Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd., 493 U.S. 331, 665 (1990).
[303] *See* Herrine, *supra* note 16, at 402.
[304] Bennett v. Spear, 520 U.S. 154, 167 (1997).
[305] *See id.*
[306] *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 105 (1998) (holding redressability is not met where "[n]one of the specific items of relief sought, and none that we can envision as 'appropriate' under the general request, would serve to reimburse respondent for losses caused").

Second, student loan servicers are unlikely to be within the zone of interests of the provisions of the Internal Revenue Code relevant to tax treatment of student loan forgiveness. Courts applying the zone of interest test to suits alleging violations of the Internal Revenue Code ask whether the plaintiff falls within the zone of interests of the challenged section of the code, rather than the whole Code, as "the Code is intended to accomplish a wide variety of economic and social goals and purposes."[307] If plaintiffs were permitted "to transfer the Congressional purpose and intent embodied in one section of the Code into other contexts and situations regulated by different provisions of the Code, the possibilities for litigation would indeed be endless."[308] Here, the relevant portions of the code are Section 61(a)(11),[309] which defines gross income to include "income from discharge of indebtedness," and the exceptions to Section 61(a)(11) set out in Section 108(a)(1).[310] Section 61(a)(11) codified the rule of the Supreme Court's 1931 decision in *United States v. Kirby Lumber Co.*[311] As a codification of a preexisting federal common law doctrine relating to tax treatment of forgiveness of any kind of debt, Section 61(a)(11) is "so marginally related to" the interests of student loan servicers "that it cannot reasonably be assumed that Congress intended to permit the suit."[312] Likewise, none of the Section 108(a)(1) exceptions are related to student loan servicing.[313] Student loan servicers would therefore be unlikely to fall within the zone of interests of the relevant provisions of the Internal Revenue Code and would be unable to sue Treasury under § 702 of the APA.

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[307] Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130, 141 (D.C. Cir. 1977).
[308] *Id.*
[309] 26 U.S.C. § 61(a)(11).
[310] 26 U.S.C. § 108(a)(1); *see* Martin J. McMahon & Daniel L. Simmons, *A Field Guide to Cancellation of Debt Income*, 63 TAX LAW. 415, 419 (2010).
[311] United States v. Kirby Lumber Co., 284 U.S. 1 (1931); *see* McMahon & Simmons, *supra* note 310, at 419.
[312] Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399–400 (1987).
[313] *See* 26 U.S.C. § 108(a)(1) (providing no nexus to loan servicing).

In sum, student loan servicers would not have standing to sue Treasury over its tax treatment of student loans, even though servicers could likely sue the Department of Education for equitable relief from the forgiveness itself.

IV. PROCEDURAL BARRIERS TO SUITS BY INVESTORS

In addition to student loan servicers, private investors in public student loans stand to take a haircut if those loans are forgiven. A substantial portion of outstanding FFELP debt has been securitized[314] and holders of these FFELP Asset-backed securities (FFELP ABS) could see their investments lose value if President Biden proceeds with student debt forgiveness.[315]

Like student loan servicers, investors in FFELP ABS are likely to be able to sue the Department of Education, but not Treasury, based on impairment to their securities investments. Investors in FFELP ABS likely would have Article III standing to sue the Department of Education, and they would likely fall within the zone of interests of the Higher Education Act. However, investors would be unlikely to establish Article III standing to sue Treasury, and they are unlikely to fall within the zone of interests of the relevant portions of the Internal Revenue Code.

Investors in FFELP ABS likely would be able to establish Article III standing to sue the Department of Education because they would be injured by forgiveness of the loans underlying their securities.[316] Like the injury to loan servicers, this "actual financial injury" from "illegally reducing the return on [plaintiffs'] investments" establishes an injury in fact for the purposes of

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[314] *See, e.g.*, *Fitch Revises Outlooks to Negative on US FFELP Student Loan Trusts following Sovereign Revision*, FITCH RATINGS (Aug. 6, 2020, 5:46 PM ET), https://www.fitchratings.com/research/structured-finance/fitch-revises-outlooks-to-negative-on-us-ffelp-student-loan-trusts-following-sovereign-revision-06-08-2020.
[315] Max Adams, *Libor, Loan Forgiveness Cast Shadow Over SLABS*, GLOBALCAPITAL (Jan. 13, 2020), globalcapital.com/article/b1jwkv0rzmtnz2/libor-loan-forgiveness-cast-shadow-over-slabs.
[316] This Section assumes for the sake of argument that securitized FFELP loans could be forgiven administratively. *But see supra* note 167 (discussing barriers to forgiving FFELP loans not owed to the federal government).

Article III standing.[317] That injury is likely fairly traceable to the Department of Education's forgiving FFELP loans, as the cessation of cash flows from student loan borrowers would impair the collateral supporting the investors' securities.[318] And it is redressable because the APA authorizes the equitable relief required to prevent this collateral impairment.[319]

Furthermore, investors in FFELP ABS would likely fall within the zone of interests of the Higher Education Act. The list of "groups involved in student financial assistance programs" under Title IV of the Higher Education Act includes—in addition to "loan servicers"—"secondary markets."[320] This reference to "secondary markets" in student loans, while less directly on point than the reference to "loan servicers," suggests investor interests are "arguably within the zone of interests to be protected or regulated by the statute."[321]

In contrast, an investor suit against Treasury for its tax treatment of student loan forgiveness would likely fail for the same reasons as a servicer suit. Because both servicers and investors would allege similar injuries based on the dissipation of student loans, neither has an injury fairly traceable to tax treatment nor redressable by an interdiction of tax treatment.[322] And investors are even less likely than servicers to fall within the zone of interests of Sections 61(a)(11) and 108(a)(1), which concern tax treatment for forgiveness of debt, not the value of securities that depend on the existence of such debt for their value.[323] Thus, investors in FFELP ABS likely would

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[317] Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd., 493 U.S. 331, 665 (1990).
[318] *See* Bennett v. Spear, 520 U.S. 154, 167 (1997); FITCH RATINGS, *supra* note 314, at 1 (describing collateral performance as a factor in rating the quality of FFELP ABS).
[319] *See* 5 U.S.C. § 702 (permitting equitable relief for unlawful agency action).
[320] 20 U.S.C. 1098a(a)(1). Other language in the Higher Education Act indicates "secondary market" was primarily a reference to the Student Loan Marketing Association (Sallie Mae). *See id.* § 1087-2(a).
[321] Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 224 (2012) (quoting Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970)).
[322] *See* Bennett v. Spear, 520 U.S. 154, 167 (1997); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 105 (1998).
[323] *See* 26 U.S.C. §§ 61(a)(11), 108(a)(1).

find that they are able to bring the same claims as loan servicers: they would be able to sue the Department of Education, but not Treasury.

In sum, at least two plaintiff classes—student loan servicers and investors in FFELP ABS—likely could reach the merits of an APA challenge to the Department of Education's administrative student loan forgiveness. That window is likely wide enough for determined plaintiffs to tie up administrative student loan forgiveness in the courts. Section B of this Part considers how the federal courts might receive the merits of such an APA challenge.

B. APA JUDICIAL REVIEW OF THE DEPARTMENT OF EDUCATION'S AND TREASURY'S STUDENT DEBT FORGIVENESS ACTIONS

If administrative student debt forgiveness is not an unreviewable exercise of the Department of Education's enforcement discretion, the Department of Education's actions may be subjected to judicial review under the APA, as may Treasury's tax treatment of the forgiveness.[324] In an APA challenge, the Department of Education or Treasury would need to defend the processes under which they promulgated student loan forgiveness[325] and demonstrate that none of the constituent decisions comprising administrative student loan forgiveness were "arbitrary, capricious or an abuse of discretion."[326]

APA review complicates the interplay between the Department of Education's decision to forgive student loan debt and Treasury's decision not to tax that debt. Agencies may fail "arbitrary and capricious" review when their proffered reasons for their decisions are "contrived."[327] In *Department of Commerce*, the Supreme Court invalidated the U.S. Department of Commerce's

[324] *See* Herrine, *supra* note 16, at 367.
[325] 5 U.S.C. § 706(2)(D).
[326] *Id.* § 706(2)(A).
[327] Dep't of Commerce v. New York, 139 S. Ct. 2551, 2575 (2019); *see* Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 Yale L.J. _, 31 (forthcoming 2021) (classifying *Department of Commerce*'s requirement that agencies articulate their real reasons for their decisions both publicly and in court as a review for "arbitrariness").

decision to add a question concerning citizenship status to the 2020 census, solely because the reason the agency provided for this decision was "incongruent with what the record reveal[ed] about the agency's priorities and decisionmaking process."[328]

Under *Department of Commerce*, administrative student loan forgiveness would likely fail APA review if the reasons that the Department of Education and Treasury offer for their actions conflict with "what the record reveals about [the Department of Education's and Treasury's] priorities and decisionmaking process,"[329] especially if the Department of Education and Treasury offer incompatible reasons for their concerted actions.[330] For example, if the Department of Education were to claim that it is forgiving student debt to improve the efficiency of the student loan program,[331] but Treasury were to justify not taxing this cancellation of indebtedness income because the forgiveness represented a "general welfare benefit,"[332] a court may find that these conflicting reasons for actions in furtherance of the same program were "contrived."[333] Notably, the risk that Treasury will need to offer a reason that conflicts with the Department of Education's reason has been mitigated, if not eliminated, by the American Rescue Plan Act of 2021's exclusion from gross income for the years 2021 to 2025 of the full or partial cancellation of student loan debt.[334]

Administrative student loan forgiveness is most likely to survive arbitrary and capricious review if it is partial, not comprehensive, and faithfully executes Congress's grant of authority to

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[328] Dep't of Commerce, 139 S. Ct. at 2575.
[329] *See id.*
[330] *See* Eidelson, *supra* note 327, at 32 ("The pretext rule [of *Department of Commerce*] should thus require not only that the stated reasons be *among* the actual reasons, but also that the stated reasons be ones regarded by the agency as sufficient without the aid of others.").
[331] *See* Healy, *supra* note 28, at 23 (discussing FCCA's debt-collection efficiency objectives).
[332] *See* Bailey v. Comm'r of Internal Revenue, 88 T.C. 1293, 1300 (1987).
[333] *See Dep't of Commerce*, 139 S. Ct. at 2575.
[334] *See* American Rescue Plan Act of 2021§ 9675; Kantrowitz, *supra* note 242.

dispose of property of the United States. Under current Department of Education regulations, the Department has incorporated the FCCS as its standards for when a compromise is permissible.[335] Courts may find a complete abandonment of these standards to be arbitrary and capricious.[336] The Department could more easily justify liberalizing the strictures of the FCCS, such as by lowering the bar for borrowers to obtain compromises based on inability to pay.[337] Forgiveness based on special circumstances may also encounter less resistance. For example, on March 25, 2020, in advance of Congressional action, the Department of Education announced it would "refund approximately $1.8 billion in offsets" on student debt "due to the COVID-19 national emergency."[338] This limited administrative relief more comfortably fits within the Department of Education's power to modify or settle student loan claims than comprehensive forgiveness.[339]

IV. CONCLUSION

Administrative forgiveness of student loan debt may be legal, but it faces myriad legal obstacles, any one of which might derail the program. An administration considering pursuing such a plan should proceed with caution, recognizing that if the Court concludes that such a

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[335] 34 C.F.R. § 30.70; 31 C.F.R. § 902.2.

[336] *See* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (requiring "a reasoned analysis for [a rule] change beyond that which may be required when an agency does not act").

[337] *See* 31 C.F.R. § 902.2(a)(1).

[338] *Secretary DeVos Directs FSA to Stop Wage Garnishment, Collections Actions for Student Loan Borrowers, Will Refund More Than $1.8 Billion to Students, Families*, U.S. DEP'T OF ED. (Mar. 25, 2020), https://www.ed.gov/news/press-releases/secretary-devos-directs-fsa-stop-wage-garnishment-collections-actions-student-loan-borrowers-will-refund-more-18-billion-students-families; *see Coronavirus and Forbearance Info for Students, Borrowers, and Parents*, FEDERAL STUDENT AID, https://studentaid.gov/announcements-events/coronavirus (last visited Dec. 7, 2020); *see also* HEGJI, *supra* note 73 (discussing limited Department of Education administrative student loan relief in response to COVID-19 national emergency). In the case of national emergencies, the Secretary of Education has additional powers to grant relief to student borrowers under the HEROES Act, 20 U.S.C. §§ 1098aa–1098ee. *See* HEGJI, *supra*, at 14–16 (discussing applicability of HEROES Act to student loan relief in context of COVID-19 national emergency).

[339] *See* 20 U.S.C. §§ 1082(a)(4), (6), 1087hh(1)–1087hh(2); *cf.* Katherine Lemire, *Guidance to New York State-Regulated Student Loan Servicers Regarding Support for Borrowers Impacted by the Novel Coronavirus* (COVID-19), N.Y. STATE DEP'T OF FIN. SERVS. (Apr. 7, 2020), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20200407_student_loan_servicers (advising New York State-regulated loan servicers to discuss student loan forgiveness with borrowers facing "financial hardship related to COVID-19").

program violates the Appropriations Clause, the loan forgiveness may be unwound, and would-be beneficiaries may find themselves again owing crisis-level debts to the federal fisc.[340]

[340] *See* BUREAU OF THE FISCAL SERVICE, *supra* note 90, at I:5; Healy, *supra* note 28, at 7–8.

Appendix A

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September 14, 2020

Senator Elizabeth Warren
317 Hart Senate Office Building
Washington, DC 20510

Dear Senator Warren:

You have previously proposed that the President of the United States could direct the Secretary of the United States Department of Education (Secretary) to exercise his or her existing authority to cancel federal student loan debt on a broad or categorical basis.

We have consulted the statutory and regulatory framework governing federal student loan programs administered by the Department of Education, as well as the framework and controlling interpretations of the budgetary structure of these programs. We conclude that such broad or categorical debt cancellation would be a lawful and permissible exercise of the Secretary's authority under existing law.

By way of background, the power to create debt is generally understood to include the power to cancel it. This power rests in the first instance with Congress. The Constitution gives to Congress the power to "dispose of" the property of the United States. U.S. Const. Art. IV, sec. 3, Cl. 2. This means that Congress alone is able to "release or otherwise dispose of the rights and property" of the federal government, and thus "[s]ubordinate officers of the United States are without that power, *save only as it has been conferred upon them by an Act of Congress* or is to be implied from other powers." *Royal Indemnity Co. v. United States*, 313 U.S. 289, 294 (1941) (emphasis added).

Congress gave a general but restricted authority to administrative agencies of the executive branch to cancel debt owed to the federal government in the Federal Claims Collection Act of 1966 (FCCA), as amended by the Debt Collection Improvement Act (DCIA), 31 U.S.C. § 3701 *et seq.*[1] The Departments of Justice and the Treasury have promulgated standards by which this authority is to be exercised by agencies, known as the Federal Claims Collection Standards (FCCS), 31 C.F.R. Subt. B, Ch. IX.

However, as relevant to your proposal, Congress has granted the Secretary a more specific and unrestricted authority to create *and* to cancel or modify debt owed under federal student loan

[1] In general, the FCCA gives heads of agencies the power, in certain circumstances, to compromise (or, cancel) debts owed to the Government of up to $100,000 (exclusive of interest) without the involvement of the Attorney General. 31 U.S.C. § 3711(a)(2).

programs in the Higher Education Act (HEA) itself. That provision empowers the Secretary to execute the broad debt cancellation plan you have proposed.

A. Statutory Authorization to Create Student Loan Debts and Guarantees

Under the Federal Family Education Loan Program (FFELP), Congress authorized the Department of Education to guarantee (and pay a portion of interest on) loans issued to students in eligible institutions as defined by the program. *See generally* 20 U.S.C. § 1071(a)(1); HEA, Title IV, Part B. Congress authorized appropriations for "such sums as may be necessary" under the program, which "shall remain available until expended," 20 U.S.C. § 1071(b).[2] Generally, funds are expended under FFELP when a guarantee agency makes a demand for payment following borrower default, at which point the loan may be assigned to the Department.[3] Congress has authorized the Secretary in certain circumstances to require a guaranty agency to assign to the Secretary any FFELP loan on which the Secretary has made a payment to the guaranty agency. 20 U.S.C. § 1078(c)(8).

Under the Direct Loan Program (DLP), HEA, Title IV, Part D, Congress made available to the Department of Education "such sums as may be necessary" to lend to "all eligible students (and the eligible parents of such students)" who are eligible under the program. 20 U.S.C. § 1087a(a); *see also* 20 U.S.C. § 1087b(a) ("The Secretary shall provide, on the basis of the need and the eligibility of students…funds for student and parent loans under this part….").

Both FFELP and DLP are mandatory programs that Congress has exempted from annual appropriations requirements,[4] the relevance of which to your proposal is discussed below.

Through the Federal Perkins Loan Program (FPLP), HEA, Title IV, Part E, Congress authorized the Secretary to "carry out a program assisting in the maintenance of funds at institutions of higher education" for making loans to undergraduate students. 20 U.S.C. § 1087aa(a). For each fiscal year, Congress appropriates funds for the FPLP, 20 U.S.C. § 1087aa(b), and directs the Secretary in how to allocate such funds to eligible institutions. 20 U.S.C. § 1087bb.

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[2] Congressional authorization for the Department to make or insure new loans under FFELP terminated as of June 30, 2010. 20 U.S.C. § 1071(d).
[3] 20 U.S.C. § 1080.
[4] *See* OMB Circular No. A-11 (2016), Section 20, p. 6 ("Entitlement refers to a program in which the Federal Government is legally obligated to make payments or provide aid to any person who…meets the legal criteria for eligibility. Entitlements are generally provided by an authorizing statute, and can include loan and grant programs."). Congress separately provided for an appropriation of "such sums as may be necessary" for "administrative expenses necessary for carrying out [Title IV], including expenses for staff personnel, program reviews, and compliance activities." 20 U.S.C. § 1098b.

B. *Statutory Authorization to Compromise and Modify Student Loan Debts and Guarantees*

Congress enumerated general powers of the Secretary under Title IV, including the power to prescribe such regulations as are necessary to carry out the programs; to sue and be sued in federal court; and to include terms, conditions, and covenants relating to repayment, and to modify such terms. 20 U.S.C. § 1082(a). Although located in the portion of the HEA specific to FFELP, the Secretary openly relies on these authorities in carrying out activities under other Title IV programs,[5] and Congress has acquiesced in this interpretation. Direct Loans are understood to have the same terms and conditions as FFELP loans, 20 U.S.C. § 1087a(b)(2).

i. Secretary's Compromise Authority under the HEA

Amongst the general powers conferred by Congress to the Secretary in the HEA is the power to "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) (emphasis added).[6] This compromise authority was contained in the HEA from its initial enactment.[7] Any exercise of this compromise authority "shall be final and conclusive upon all accounting and other officers of the Government." 20 U.S.C. § 1082(b). The only statutory limitation on this authority is the requirement that the Secretary "may not enter into any settlement of any claim under [Title IV] that exceeds $1,000,000" without requesting "a review of the proposed settlement of such claim by the Attorney General," 20 U.S.C. § 1082(b).[8]

In 1988, the Secretary finalized a regulation, 34 C.F.R. § 30.70, which explains how the Secretary exercises discretion to compromise a debt.[9] This regulation was enacted as part of a

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[5] For example, there is no other Congressional authorization for the Secretary to sue and be sued in the Higher Education Act, and the Secretary regularly initiates and defends lawsuits related to DLP activities. Likewise, the Secretary promulgates regulations under the DLP. Insofar as the general power conferred in §1082 relates to the ability to set terms and conditions of federal student loans, and to cancel or compromise those loans, Congressional intent to apply such powers to DLP loans is evident in the DLP "parity provision," 20 U.S.C. § 1087e(a)(1): "Unless otherwise specified in this part, loans made to borrowers under this part shall have the same terms, conditions, and benefits, and be available in the same amounts, as loans made to borrowers [of FFELP loans]." Statutory discharges exemplify the functioning of the parity provision. Congress has authorized the Secretary to discharge (or, cancel) student loans under the FFELP in circumstances of death, disability, or false certification by an institution of the student's eligibility for the loan. 20 U.S.C. § 1087. The Secretary has promulgated regulations making these discharges available to borrowers under the DLP. *See* 34 C.F.R. §§ 685.212 (discharge of a DLP loan obligation when borrower dies); 685.213 (discharge of a DLP loan obligation when a borrower is disabled); 685.214 (discharge of a DLP loan obligation when a borrower's school closes); 685.215 (discharge of a DLP loan obligation when a borrower's eligibility is falsely certified by an institution).

[6] Subsection (a)(5) authorizes the Secretary to compromise "any claim on, or arising because of, any such insurance or any guaranty agreement" under FFELP.

[7] Pub. Law 89-329, Section 432(a)(6) (Nov. 8, 1965).

[8] Congress similarly granted authority to the Secretary under the FPLP "to 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. § 1087hh(2).

[9] 53 Fed. Reg. 33424-01 (Aug. 30, 1998).

package of regulations addressed to the Secretary's general authority to collect debt. As explained, those regulations "supplement the FCCS in those instances where the FCCS requires agency-specific rules or the nature of a particular debt collection activity administered by the Department calls for further clarification of the FCCS. In some cases, these regulations clarify the relationship between the laws administered by the Secretary and the requirements of the FCCS."[10] The compromise-specific regulation at § 30.70 clearly preserves the Secretary's authority "to compromise a debt, or suspend or terminate collection of a debt, in any amount," without reference to FCCS or referral to DOJ, "if the debt arises under the Guaranteed Student Loan Program" under Title IV, Part B (FFELP), or Title IV, Part E (PLP). 34 C.F.R. 30.70(h) (eff. until June 30, 2017).[11] With respect to non-Title IV debt, the Secretary would apply the FCCA and FCCS standards only where the Secretary's regulations require that a debt be referred to DOJ for resolution.[12] This requirement is found only in relation to funds misspent by institutional recipients under specific grant programs or cooperative agreements.[13]

As part of the 2016 borrower defense regulations, the Secretary amended § 30.70.[14] The stated intent of the regulatory change was to "reflect a series of statutory changes that have expanded the Secretary's authority to compromise…debts,"[15] and to "[c]larify" that certain limits do "not apply to resolution of claims arising under the FFEL Program, or under the Direct Loan Program or Perkins Loan Program…."[16] The only statutory change to the Title IV compromise authority was the 2008 amendment to section 432 of the HEA to require the Department to provide DOJ an opportunity to review and comment on any proposed resolution of a claim arising under any Title IV program that exceeds $1 million.[17]

The amended §30.70 continues to differentiate the treatment of Title IV debts, addressing them in a new subsection (e). However, this new subsection includes a cross reference to the FCCS—"Subject to [the requirement to consult with DOJ on compromise of a claim over $1 million],

[10] 53 Fed. Reg. at 33424. Other Department regulations clarify that the Secretary may take "any action authorized by law"—not just the FCCA or FCCS—to collect (or compromise) a debt, 30 C.F.R. § 30.1(a), and that the Secretary "complies with the requirements of the FCCS…that are not inconsistent" with the Secretary's own regulations, 30 C.F.R. § 30.1(b).
[11] The pilot version of the DLP was signed into law in the 1992 Reauthorization of the HEA, after the promulgation of this regulation.
[12] 34 C.F.R. § 30.70(a)(1) (eff. until June 30, 2017).
[13] 34 C.F.R. § 30.70(b) (referring to section 452(f) of the General Education Provisions Act (20 U.S.C. § 1234a), which only applies to "recipients" of a "grant or cooperative agreement under an applicable program." With respect to Title IV programs, the Secretary is required to consult with—but not refer to—a proposed compromise of any single Title IV debt that is greater than $1 million, 20 U.S.C. § 1082(b).
[14] 81 Fed. Reg. 75926 (Nov. 1, 2016).
[15] Generally speaking, the FCCS were amended to allow for agencies to compromise debts at a higher dollar level--$100,000 rather than $20,000—without referring them to DOJ.
[16] 81 Fed. Reg. 39330, 39369 (June 16, 2016) (NPRM); *accord* Issue Paper 11, Negotiated Rulemaking Committee, https://www2.ed.gov/policy/highered/reg/hearulemaking/2016/bd3-i11-collection.pdf (proposing to amend § 30.70 to "[c]larify that the generally-applicable $100,000 limit does not apply to resolution of claims arising under" FFELP, DLP, or PLP; "and include the requirement that the Department seek DOJ review of any proposed resolution of a claim exceeding $1,000,000 under any of those loan programs").
[17] *See* Pub. L. 110-315.

under the provisions of 31 CFR part 902 or 903, the Secretary may compromise a debt in any amount, or suspend or terminate collection of a debt in any amount, if the debt arises under" FFELP, DLP, or PLP.[18]

The best reading of the amended regulation is that the Secretary may compromise debts under Title IV programs without following the procedures outlined in the FCCS. *First*, cabining the Secretary's broad authority to compromise Title IV debts under the HEA to the considerations and procedures outlined in the FCCS would constitute a significant limiting of that authority. There is nothing in the regulatory history to suggest this was the intent of the Department. To the contrary, the regulation was revised so as to reflect expansions in the Secretary's authority. *Second*, the language of subsection (e) is not reconcilable with the FCCS. Subsection (e) states that the Secretary may compromise a debt *in any amount*, without prescribing any procedures or considerations for the exercise of that discretion, whereas the FCCS (found in 31 CFR part 902 or 903) apply restrictions on the dollar amounts and prescribe considerations and procedures that an agency must follow before compromising a debt.[19] Moreover, the FCCS, on their own terms, apply *only* when an agency is relying on the Congressional delegation of authority under the FCCA to compromise a debt.[20]

Alternately, it is not inconsistent with the amended regulation for the Secretary to compromise a Title IV debt *outside of*, rather than "under" the provisions of the FCCS. The regulation's language is precatory rather than mandatory, and the statutory authority of § 1082 is broad. The Secretary need not rely on a regulation in order to implement it. Prior to 1988, there was no regulation even addressing the compromise authority, and other powers granted by Congress in § 1082 do not have any implementing regulations, yet are regularly used.[21]

It is also possible that the Secretary could compromise a significant number of outstanding loans in conformity with the FCCS. Specifically, under those standards, agencies may compromise a

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[18] 34 C.F.R. 30.70 (e)(1) (eff. July 1, 2017) (emphasis added).

[19] For the same reason, subsection (e) is incongruous with subsection (a)'s language that "the Secretary uses the standards in the FCCS, 31 CFR part 902, to determine whether compromise of a debt is appropriate if the debt arises under a program administered by the Department…."

[20] *See* 31 C.F.R. § 902.1(a) ("The standards set forth in this part apply to the compromise of debts pursuant to 31 U.S.C. § 3711); 31 C.F.R. § 903.1(a) ("The standards set forth in this part apply to the suspension or termination of collection activity pursuant to 31 U.S.C. § 3711); *see also* 31 C.F.R. § 900.1(a) ("The regulations in this chapter prescribe standards for Federal agency use in the administrative collection, offset, compromise, and the suspension or termination of collection activity…, unless specific Federal agency statutes or regulations apply to such activities…."); §900.4 ("the laws and regulations that are specifically applicable to claims collection activities of a particular agency generally take precedence over [the FCCS]").

[21] For example, section 1082(a)(4) authorizes the Secretary to consent to modification of "any note or other instrument evidencing a loan" under Title IV. The Secretary does modify loans even in the absence of any implementing regulations—and the FCCS do not address modification at all. In fact, the Secretary has used the modification power to cancel out, or modify to zero, loan obligations under FFELP and DLP in certain circumstances. *See Carr et al. v. DeVos*, Case No. 19-cv-6597 (S.D.N.Y.), Dkt. No. 15-1 (Decl. of Cristin Bulman), 16 (Stipulation of Dismissal) (Secretary modified DLP and FFELP loans of Plaintiffs pursuant to 20 U.S.C. § 1082(a)(4) resulting in balances of $0.00).

debt when its collection is in doubt because the debtor is unable to pay the full amount in a "reasonable time,"[22] or if the cost of collecting a debt is greater than the amount likely recoverable in a single installment.[23]

ii. Secretary's Authority to Modify Loans under the HEA

The Secretary may carry out your plan to cancel existing student loan debt under a distinct statutory authority—the authority to modify existing loans found in 20 U.S.C. § 1082(a)(4). Like the compromise authority, the modification power is included in the FFELP section of the HEA, but is read to apply to the DLP, and has a corollary in the FPLP, *see* 20 U.S.C. § 1087hh(1).

Modification of existing loans under Title IV programs is outside of the FCCA and FCCS, which address compromise and settlement, but not modification. The Secretary has the authority to modify a loan to zero,[24] and exercises this authority even in the absence of any implementing regulations.

Such modification (and, likewise, any act to compromise existing student loans), is permissible under the budgetary standards that govern Title IV programs.

Under the Federal Credit Reform Act of 1990 (FCRA), direct loan obligations and guarantee commitments may only be incurred or made to the extent that their "costs" are annually appropriated by Congress. *See* 2 U.S.C. § 661c(b). However, the FCRA specifically exempts any "direct loan or loan guarantee program" that "constitutes an entitlement (such as the guaranteed student loan program…)" from this appropriations requirement. 2 U.S.C. § 661c(c) (exemption for mandatory programs). Likewise, subsection (c) exempts mandatory programs such as FFELP and DLP from the requirement that any outstanding direct loan or loan guarantee "shall not be modified in a manner that increases its cost" unless the cost increase is provided for in an appropriations Act, 2 U.S.C. § 661c(e). Congress also anticipated and provided "permanent indefinite authority" for agencies' "reestimate" of the cost for a group of direct loans or loan guarantees made in a single fiscal year. 2 U.S.C. § 661c(f).

For the foregoing reasons, we conclude that your proposal calls for a lawful and permissible use of the authority Congress has conferred on the Secretary of Education, which is anticipated and allowed for in the budgetary and accounting treatment of federal student loan programs.

[22] 31 C.F.R. § 902.2(a)(1).
[23] 31 C.F.R. § 902.2(e),(f).
[24] *See* fn 21, supra.

Sincerely,

Eileen Connor, Legal Director

Deanne Loonin, Attorney

Toby Merrill, Director

Project on Predatory Student Lending

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE GENERAL COUNSEL

MEMORANDUM TO BETSY DeVOS
SECRETARY OF EDUCATION

Re: Student Loan Principal Balance Cancellation,
Compromise, Discharge, and Forgiveness Authority

You have asked the Office of the General Counsel to memorialize our opinion concerning the Secretary's statutory authority to cancel, compromise, discharge, or forgive, on a blanket or mass basis, principal balances of student loans made pursuant to Title 20, Chapter 28, Subchapter IV of the United States Code ("Title IV" or "HEA"), and/or to materially modify the repayment amounts or terms thereof ,whether due to the declared National Emergency caused by the COVID-19 pandemic, *see Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak*, 85 Fed. Reg. 15337 (March 18, 2020), or otherwise.

Since March 2020, the Department has effectuated appropriate waivers of and modifications to the requirements and conditions of economic hardship deferments described in § 455(f)(2)(D) of the HEA, as codified at 20 U.S.C. § 1087e(f)(2)(D), and the HEROES Act, as codified at 20 U.S.C. § 1098bb(a)(2), and provided such deferments to borrowers as necessary to continue the temporary cessation of payments and the waiver of all interest on student loans held by the Department until January 31, 2020. *See, e.g.*, U.S. Dep't of Educ., Office of Federal Student Aid, Coronavirus and Forbearance Information for Students, Borrowers, and Parents; § 3513 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136 (March 27, 2020); Mem. for the Sec'y of Educ. regarding Continued Student Loan Payment Relief During the COVID-19 Pandemic, 85 Fed. Reg. 49,585 (Aug. 13, 2020); U.S. Dep't of Educ., Off. of Postsecondary Educ., Updated Waivers and Modifications of Statutory and Regulatory Provisions, 85 Fed. Reg. 79,856 (Dec. 11, 2020). At that time, the Secretary also considered her authority to provide blanket or mass cancellation, compromise, discharge, or forgiveness of the student loan principal, and/or to materially modify repayment amounts or terms, but the Department's Office of the General Counsel, in consultation with the Department of Justice's Office of Legal Counsel, concluded she would lack statutory authority to do so. Our opinion has not changed. For the reasons discussed below, we believe the Secretary does not have the statutory authority to cancel, compromise, discharge, or forgive, on a blanket or mass basis, principal balances of student loans, and/or to materially modify the repayment amounts or terms thereof.

A. The Constitution provides "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]" U.S. Const. art. I, § 9, cl. 7. This Clause is intended "to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 428 (1990). Appropriations "shall be applied only to the objects for which the appropriations were made except as otherwise provided by law" and must be expressly stated, not inferred or implied. 31 U.S.C. §§ 1301(a), 1301(d); *see also Andrus v. Sierra Club*, 442 U.S. 347, 361 (1979); *United States v.*

MacCollom, 426 U.S. 317, 321 (1976); U.S. Gov't Accountability Off., Principles of Fed. Appropriations Law, Chapter 1, at p. 1–6 (4th ed. 2016). The Antideficiency Act, codified at 31 U.S.C. §§ 1341-1342, 1349-1351, 1511-1519 ("ADA"), is one of several means by which Congress enforces its Constitutional authority. Also, the Federal Claims Collection Act, 31 U.S.C. § 3711, *et seq*., obligates agencies to "try to 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). By controlling regulation, the Secretary is directed to "aggressively collect all debts" and 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. Among other things, we must be mindful of the fact that the Executive Branch does not have the dispensing power on its own. *Richmond*, 496 U.S. at 435 (White, J. and Blackmun, J., concurring) (citing *Kendall v. United States ex rel. Stokes*, 12 Pet. 524, 613, 9 L.Ed. 1181 (1838)); *Angelus Milling Co. v. Commissioner*, 325 U.S. 293, 296 (1945).

B. The nature and scope of the Secretary's HEA authority is determined by construing the relevant statutory text in accordance with its ordinary public meaning at the time of enactment, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020), in context and with consideration for the overall statutory scheme. *Yates v. United States*, 574 U.S. 528, 537–38, 40–41 (2015) (Ginsberg, J.); *Davis v. Mich. Dep't. of Treasury*, 489 U.S. 803, 809 (1989). The statute must be construed "as a symmetrical and coherent regulatory scheme," and we are obligated to "fit, if possible, all parts into an harmonious whole[.]" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations and quotation marks omitted). Consequently, "every word and every provision is to be given effect. . . .None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *United States v. Alaska*, 521 U.S. 1 (1997); *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202 (1997); *Rake v. Wade*, 508 U.S. 464 (1993); *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion by Scalia, J.) (citing the "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant").

Also, we are obligated to recognize and give effect to the principle Congress "does not . . . hide elephants in mouseholes." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006); *see also Whitman v. Am. Trucking Ass'ns, Inc.*, 531 US 457, 468 (2001); *Brown & Williamson*, 529 U.S. at 160. That is, Congress does not impliedly delegate a policy decision of massive economic and political magnitude – as blanket or mass cancellation, compromise, discharge, or forgiveness of student loan principal balances, or the material modification of the repayment terms or amounts thereof, surely would be – to an administrative agency. *See Whitman,* 531 U.S. at 468.

Finally, if an otherwise acceptable construction of a statute raises serious constitutional problems, and where an alternative interpretation of the statute is "fairly possible," *Crowell v. Benson*, 285 U.S. 22, 62 (1932), then the statute should be construed to avoid such problems. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341, 345–348 (1936) (Brandeis, J., concurring); *see U.S. ex rel. Att'y Gen. v. Del. & Hudson Co*., 213 U.S. 366, 408 (1909); *see also Nielsen v. Preap,* 139 S. Ct. 954, 971 (2019).

C. All federal student loan programs administered by the Department are funded through annual Congressional appropriations drawn from the Treasury. These appropriations are conditioned on the Department's faithful execution of the laws authorizing that loans be made available to eligible borrowers and then repaid or collected. *See* 20 U.S.C. §§ 1077a, 1078, 1078-3, 1078-6, 1078-7, 1080, 1080a, 1082, 1083, 1085, 1087e, 1087-1, 1087gg, 1091b, 1092b, 1092c, 1095a, 1098e. Although Congress could enact legislation authorizing the Department to provide blanket or mass cancellation, compromise, discharge, or forgiveness of student loan principal balances, and/or to materially modify repayment amounts or terms, it has not done so. *See* 20 U.S.C. §§ 1077-10 – 1077-12, 1087e(f), 1087e(h), 1087ee, 1091b, 1098d. Rather, Congress has explicitly authorized cancellation, compromise, discharge, or forgiveness, and/or material modifications to repayment amounts or terms only in very limited circumstances. *See, e.g.*, 20 U.S.C. §§ 1087e(f), 1087e(h), 1094(b)(3), 1098aa, *et seq*.

At the same time, Congress has delegated to the Secretary of Education certain general powers regarding the Family Federal Education Loan program under Part B of Title IV ("FFEL"), including the ability to "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 Secretary's general powers in 20 U.S.C. § 1082(a)(6) also apply to the William D. Ford Federal Direct Loan Program under Part D of Title IV. 20 U.S.C. § 1087a(b)(2).

This raises an obvious interpretative question – whether the general grant of authority under 20 U.S.C. § 1082(a)(6) to "compromise, waive, or release any right, title, claim, lien, or demand" empowers the Secretary, on a blanket or mass basis, to cancel, compromise, discharge, or forgive student loan principal balances and/or to materially modify the repayment amounts or terms thereof, notwithstanding other, more specific Title IV provisions requiring repayment and providing for cancellation, compromise, discharge, forgiveness, or modification only in limited circumstances. We believe reading 20 U.S.C. § 1082(a)(6) to permit the Secretary, on a blanket or mass basis, to cancel, compromise, discharge, or forgive student loan principal balances, or to materially modify the repayment amounts or terms thereof, would "be hyperliteral and contrary to common sense." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). Title IV's plain text and statutory scheme, and controlling interpretative canons, compel us to conclude Congress appropriated funds for student loans with the expectation that such loans would be repaid except in very specific circumstances.

"[I]t is a commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). That is particularly true where, as here, "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *Varity Corp. v. Howe*, 516 U.S. 489, 519 (1996) (Thomas, J., dissenting); *see also HCSC–Laundry v. United States*, 450 U.S. 1, 6 (1981) (per curiam) (the specific governs the general "particularly when the two are interrelated and closely positioned, both in fact being parts of [the same statutory scheme]"). As Justice Scalia, writing for a unanimous Court, pointed out:

> The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an

> exception to the general one. *But the canon has full application as well to statutes such as the one here, in which a general authorization and a more limited, specific authorization exist side-by-side. There the canon avoids not contradiction but the superfluity of a specific provision that is swallowed by the general one, violat[ing] the cardinal rule that, if possible, effect shall be given to every clause and part of a statute.*

Gateway Hotel, 566 U.S. at 645(citations and quotation marks omitted) (emphasis added).

Assuming *arguendo* that there is a policy case for student loan principal balance cancellation, compromise, discharge, or forgiveness by administrative decree,[1] 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[2] and then only under those circumstances specified by Congress.[3] 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. *Whitman*, 531 U.S. at 468; *see also Nielsen*, 139 S. Ct. at 969; *Gateway Hotel*, 566 U.S. at 645; *Yates*, 574 U.S. at 540–41; *Brown & Williamson*, 521 U.S. at 133; *Richmond*, 496 U.S. at 435; *Benson*, 285 U.S. at 62.

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[1]We note evidence suggesting blanket or mass loan forgiveness, especially by administrative fiat, would be a significantly regressive policy with significant moral hazard. *See, e.g.*, Catherine & Yannelis, *The Distributional Effects of Student Loan Forgiveness: University of Chicago, Becker Friedman Institute for Economics Working Paper No. 2020-169* (Dec. 10, 2020).

[2]Consequently, we believe the "class action" provision of the 2016 borrower defense rule, 34 C.F.R. §§ 685.222(f)–(h), providing for blanket or mass cancellation, compromise, discharge, or forgiveness of student loan principal balances based on substantial misrepresentations, is problematic at best. Neither Title IV nor the Administrative Procedure Act specifically authorizes such a provision.

[3]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. 20 U.S.C. § 1087e(a)(1) ("Unless otherwise specified in this part, loans made to borrowers under this part shall have the same terms, conditions, and benefits, and be available in the same amounts, as loans made to borrowers, and first disbursed on June 30, 2010, under sections 1078, 1078-2, 1078-3, and 1078-8 of this title."); 20 U.S.C. § 1087dd. 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.

D. Congress has delegated to the Secretary authority to provide specified waivers or modifications to Title IV federal financial student aid program statutory and regulatory requirements because of the declared National Emergency. *See Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak*, 85 Fed. Reg. 15,337 (March 18, 2020). The HEROES Act of 2003, codified at 20 U.S.C. § 1098aa, *et seq*., provides:

> Notwithstanding any other provision of law, unless enacted with specific reference to this section, the Secretary of Education . . . may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the Act [, 20 U.S.C. §1070, *et seq.*,] as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide the waivers or modifications authorized by paragraph (2).

20 U.S.C. § 1098bb(a)(1). However, Congress narrowly cabined the scope of the Secretary's discretion. Specifically, 20 U.S.C. § 1098bb(a)(2) provides:

> (2) Actions authorized. The Secretary is authorized to waive or modify any provision described in paragraph (1) as may be necessary to ensure that—
>
> > (A) recipients of student financial assistance under title IV of the Act who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals;
> >
> > (B) administrative requirements placed on affected individuals who are recipients of student financial assistance are minimized, to the extent possible without impairing the integrity of the student financial assistance programs, to ease the burden on such students and avoid inadvertent, technical violations or defaults;
> >
> > (C) the calculation of "annual adjusted family income" and "available income", as used in the determination of need for student financial assistance under title IV of the Act for any such affected individual (and the determination of such need for his or her spouse and dependents, if applicable), may be modified to mean the sums received in the first calendar year of the award year for which such determination is made, in order to reflect more accurately the financial condition of such affected individual and his or her family;
> >
> > (D) the calculation under section 484B(b)(2) of the Act (20 U.S.C. 1091b(b)(2)) of the amount a student is required to return in the case of an affected individual may be modified so that no overpayment will be required to be returned or repaid if the institution has documented (i) the student's status as an affected individual in the student's file, and (ii) the amount of any overpayment discharged; and

> (E) institutions of higher education, eligible lenders, guaranty agencies, and other entities participating in the student assistance programs under title IV of the Act that are located in areas that are declared disaster areas by any Federal, State or local official in connection with a national emergency, or whose operations are significantly affected by such a disaster, may be granted temporary relief from requirements that are rendered infeasible or unreasonable by a national emergency, including due diligence requirements and reporting deadlines.

20 U.S.C. § 1098bb(a)(2).

Plain HEA language and context strongly suggest Congress never intended the HEROES Act as authority for mass cancellation, compromise, discharge, or forgiveness of student loan principal balances, and/or to materially modify repayment amounts or terms for at least three reasons. First, the Secretary's delegated authority is limited (a) to the waiver or modification of statutory requirements to put individual borrowers who are "affected individuals," defined as a person who "resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency; or suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary", 20 U.S.C. § 1098ee(2), in the same position financially in relation to their Title IV loans as if the national emergency had not occurred; and (b) to minimize administrative requirements to "avoid inadvertent, technical violations or defaults," among other things. 20 U.S.C. § 1098bb(a)(2)(A), (B). Second, the reference to "defaults" in § 1098bb(a)(2)(B), and the cross-cite to § 1091b(b)(2) dealing with "return" of student loan funds, together provide a strong textual basis for concluding Congress intended loans to be repaid, even after the exercise of HEROES Act authority. Third, the term "modify" does not authorize the Department to make major changes to the repayment provisions of loans made pursuant to Title IV. To the contrary, "modify" means "to change moderately or in minor fashion." *MCI Telecomms. Corp. v. Am. Telephone & Telegraph Co.*, 512 U.S. 218, 225 (1994) ("modify" in federal statute "has a connotation of increment or limitation"). Modifying or waiving repayment amounts or materially altering loan terms would hardly be changing Title IV "moderately or in minor fashion."

The Department has used the HEROES Act to alter or extend certain HEA provisions in certain circumstances, including a National Emergency. However, the Department has never relied on the HEROES Act or any other statutory, regulatory, or interpretative authority for the blanket or mass cancellation, compromise, discharge, or forgiveness of student loan principal balances, and/or the material change of repayment amounts or terms, and rightly so, for the statutory text does not permit, authorize, or support such action. We believe it is impossible to escape the conclusion that Congress funds student loans with the expectation that such loans will be repaid in full with interest, except in identified circumstances, and did not authorize you to countermand or undermine that expectation.

E. Given the HEA's many specific provisions for cancellation, compromise, discharge, or forgiveness of student loan principal balances and/or material modifications to the repayment amounts or terms thereof, we believe any Executive Branch action on a blanket or mass basis, whether under 20 U.S.C. § 1082(a)(6), the HEROES Act, or otherwise, wrongfully transforms carefully cabined HEA settlement authority into a general administrative dispensing power. *Zuber v. Allen*, 396 U.S. 168,

183 (1969). "The details with which the exemptions in [the HEA] have been made preclude their enlargement by implication." *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 618 (1944) (Frankfurter, J.). Congress of course is free to amend the HEA and grant the Secretary this authority at any time. But for now, Congress has made explicit statutory requirements for the cancellation, compromise, discharge, or forgiveness of student loan principal balances, and/or the material modification of the repayment amounts or terms thereof, and they must be observed. *Richmond*, 496 U.S. at 435; *Angelus Milling Co.*, 325 U.S. at 296 ("Insofar as Congress has made explicit statutory requirements, they must be observed and are beyond the dispensing power of [Executive] officials.").

F. Our approach and our analysis are consistent with and supported by both controlling interpretative authorities and persuasive precedent concerning, *inter alia*, the Attorney General's authority to compromise claims by the United States. *See, e.g.*, *Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion*, 23 Op. O.L.C. 126, 135, 137–154 (1999). For example, the Attorney General's power to settle litigation is defined, expressly or implicitly, by statute and must be exercised consistent with his obligation to execute and enforce U.S. laws. "The settlement power is sweeping, but the Attorney General must still exercise h[is] discretion in conformity with h[is] obligation to "enforce the Acts of Congress." *Id.* at 135 (citations omitted).[4] Thus, "the considerations and terms that inform and structure a settlement must be traceable, nonetheless, *to a discernible source of statutory authority.*" *Id.* at 137 (emphasis added). Similarly, "considerations that concern more particular policy aims . . . generally must be rooted in the purposes of the statutes that govern the agency that has been vested by Congress with the policymaking discretion and on whose behalf the settlement would be effected. It is the governing statutes of the agency involved in the litigation, therefore, that in many instances must provide the authority for a settlement." *Id.; see also id.* at 139 ("The ultimate task is to arrive at a faithful determination of Congress's intent, taking into account both the purposes that underlie the Attorney General's statutorily conferred settlement power and the terms and purposes of the statutes that are relevant to the particular matter in litigation, including the statutes that limit the discretion of the agency on behalf of which the Attorney General would be entering into a settlement.").

The Executive Branch's constitutional obligation "to 'take Care that the Laws be faithfully executed' necessarily serves to limit the exercise of the Attorney General's settlement authority so that it does not become a dispensing power." *Id.* at 138 (citation omitted); *see also Angelus Milling Co.,* 325 U.S. at 296 ("Insofar as Congress has made explicit statutory requirements, they must be observed and are beyond the dispensing power of [Executive] officials."); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Consequently, "the Attorney General ordinarily may not settle litigation on terms that would transgress valid, otherwise applicable, statutory restrictions on agency conduct," and "the Attorney General generally may not settle litigation by committing the agency to consider the prohibited factors in future rule makings. A contrary conclusion would transform the settlement power into a general dispensing power with respect to those statutes that purported to govern agency conduct." 26 Op. O.L.C. at 163 (citations omitted).

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[4] By contrast, the Secretary's HEA settlement discretion and authority are narrow and limited, not sweeping and broad. *Compare* Sections C and D *supra* (citing authorities) *with* 23 Op. O.L.C. at 135–36 (citing authorities).

G. Finally, even if the HEA could be fairly construed as granting the Secretary authority to provide blanket or mass cancellation, compromise, discharge, or forgiveness of student loan principal balances, and/or to materially modify the repayment amounts or terms thereof, we note the possibility Executive action doing so might be appropriately and necessarily considered a legislative rule under the Administrative Procedure Act, 5 U.S.C. § 551(4). As such, all the requirements of notice and comment rulemaking under 5 U.S.C. § 553 might need to be met. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins., Co*., 463 U.S. 29, 43 (1983) ("an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider.").

H. For these reasons, we believe the Secretary does not have statutory authority to provide blanket or mass cancellation, compromise, discharge, or forgiveness of student loan principal balances, and/or to materially modify the repayment amounts or terms thereof, whether due to the COVID-19 pandemic or for any other reason.

Please contact us if we may be of further assistance.

U.S. DEPARTMENT OF EDUCATION
THE OFFICE OF THE GENERAL COUNSEL

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the authority and duties of the General Counsel