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

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## I. INTRODUCTION

Over forty-three million U.S. borrowers owe $1.6064 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 (Department).[5] Some $4.2 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

[1] *Federal Student Aid Portfolio Summary*, NAT'L STUDENT LOAN DATA SYS., https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/PortfolioSummary.xls (last visited Apr. 29, 2022) [hereinafter *Portfolio Summary*].

[2] Jeffrey P. Naimon, Sasha Leonhardt, & Sarah B. Meehan, *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 P. 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; *see generally* 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* Hunt, *supra* note 4, at 1145 & n.54 (discussing Health Education Assistance Loan program, terminated in 1998, and TEACH Grants, which convert 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 (2018).

[8] *Id.*

1958 National Defense Education Act (NDEA)[9] and expired in 2017.[10] Another $225.7 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 Education Act of 1965 (HEA)[14] and operated until Congress terminated it in 2010.[15] As of 2020, the Department had taken over fifteen percent of FFELP loans, while private parties held the rest of these loans.[16] Finally, the remaining $1.3765 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

[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 (2018).

[13] *Id.*

[14] Higher Education Act of 1965, Pub. L. No. 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 BUFF. 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.

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, using solely administrative action.[26] On the other hand, in the last weeks of the

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[20] Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448, 569.

[21] Hunt, *supra* note 4, at 1146.

[22] *See* Herrine, *supra* note 16, at 282; Elizabeth Warren & Chuck Schumer, *New Op-Ed: Why We, Elizabeth Warren And ChuckSchumer, Believe The Biden-Harris Administration Should Cancel Up To $50K In Student Debt On Day One*, BLAVITY (Dec. 3, 2020, 11:27 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?_gl=1*xbxx0z*_ga*a1lDaWRPZ2FOVFVJX19pWnRKZHRkUDlkMkdQRHpEcUd0bi1xTnF6djV0d3M1LS1OSEprSmVHNkVNN095YUNmaw..&category1=news&category2=opinion.

[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. (2019-2020); Student Loan Debt Relief Act of 2019, H.R. 3887, 116th Cong. (2019–2020); *see* Herrine, *supra* note 16, at 341 & n. 152.

[25] *See* Mitchell, *supra* note 23; Warren & Schumer, *supra* note 22.

[26] *See generally* Herrine, *supra* note 16; Letter from Eileen Connor, Legal Dir., Legal Servs. Ctr. of Harv. L. Sch., Deanne Loonin, Att'y, Legal Servs. Ctr. Of Harv. L. Sch., and Toby Merrill, Dir. Of Project on Predatory Student Lending, Legal Servs. Ctr. Of Harv. L. Sch. To Senator Elizabeth Warren (Sept. 14, 2020) [hereinafter Letter to Senator Warren].; John Patrick Hunt, *Jubilee Under Textualism*, 48 J. LEGIS. 31 (2021).

Trump administration, the Department of Education's Office of the General Counsel (OGC) opined[27] that the Department of Education "[did] 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 does not bind 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] Reports in late April 2022 indicated that President Biden was considering forgiving "at least $10,000" in student loans per borrower through administrative action.[32]

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[27] Memorandum from the U.S. Dep't of Ed., Off. of Gen. Couns. on Student Loan Principal Balance Cancellation, Compromise, Discharge, and Forgiveness Authority to Betsy DeVos, Sec'y of Educ. (Jan. 12, 2021) [hereinafter Department of Education Letter].

[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 L. Sch. (June 18, 2019, 10:05) (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 & Harv. Law Sch. Class 2017, to Professor Howell Jackson, Steven Swig, & Mary Swig 6 (July 11, 2016) (on file with author) [hereinafter Healy] (expressing same).

[29] *See* Michael Stratford, *Trump administration tries to hamstring Biden on student loan forgiveness*, POLITICO (Jan. 13, 2021, 6:23 PM), 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 interpretationof the laws that govern federal student loans.").

[30] Zack Friedman, *Biden: I Will Not Cancel $50,000 of Student Loans*, FORBES (Feb. 16, 2021, 10:17 PM), https://www.forbes.com/sites/zackfriedman/2021/02/16/biden-i-will-not-forgive-50000-of-student-loans/?sh=1f51e0a9176e.

[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.

[32] Nancy Cook, Jarrell Dillard, & Emma Kinery, *Biden Eyes Student-Loan Forgiveness Starting at $10,000*, BLOOMBERG (APR. 22, 2022, 12:11 PM EDT), https://www.bloomberg.com/news/articles/2022-04-29/biden-eyes-targeted-student-loan-forgiveness-starting-at-10-000.

This article interrogates the leading arguments that the Department of Education can forgive all Perkins, FFELP, and Direct loan liability, without additional congressional authorization. It 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 student loan forgiveness might be within the authority of the Department of Education. It also addresses whether federal courts would entertain a private lawsuit challenging the Department's authority if the Secretary of Education were to engage in broad-ranging student loan forgiveness programs without further congressional action.

The short answer is that there is no short answer. The strength of the arguments for executive authority to forgive student loans vary with the type of loan, the likelihood of recovery from the student debtor, and the amount of forgiveness contemplated.[33]

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.[34] 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

[33] For a synopsis of this argument, *see* Howell E. Jackson & Colin A. Mark, Executive Authority to Forgive Student Loans Is Not So Simple, REGUL. REV. (Apr. 19, 2021), https://www.theregreview.org/2021/04/19/jackson-mark-executive-authority-forgive-student-loans-not-simple/. For an analysis reaching a similar conclusion, *see also* Charlie Rose, Legal Assessment of Mass Student Debt Cancellation (May 7, 2021) (on file with author) ("[T]he Secretary's authority to "modify" or "compromise" student loans under existing statutes and regulations appears limited to case-by-case review and, in some cases, only to nonperforming loans.").

[34] 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 (Treasury).

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 potential plaintiffs and concludes that at least some 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.

## II. HISTORY OF FEDERAL STUDENT LOAN FORGIVENESS PROGRAMS

The federal government has introduced numerous student loan forgiveness programs since the inception of federal student lending.[35] These programs have varied in the scope of their coverage and the degree of forgiveness they have conferred.[36] This section provides a brief history of these federal student loan forgiveness programs.

The original 1958 NDEA, which created the program that in 1986 became Perkins,[37] included the first federal student loan forgiveness program.[38] 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.[39] When Congress rechristened the Perkins program

[35] *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).

[36] *See id.*

[37] *See* Higher Education Act Amendments of 1986, Pub. L. No. 99-498, Title IV, § 405(a), 100 Stat. 1268 (renaming loans to "Perkins Loans").

[38] *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 35, at 21. The current version of the program is codified at 20 U.S.C. § 1087ee.

[39] National Defense Education Act of 1958 § 205(b)(3).

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.[40] Congress expanded the program to nurses, certain medical technicians, and certain child and family service agency employees in 1992;[41] 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.[42]

In addition to the Perkins loan forgiveness programs, Congress authorized analogous programs for holders of FFELP and Direct loans who work in particular fields.[43] 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.[44] In 1998, Congress replaced this demonstration program with a partial loan forgiveness program for holders of FFELP or Direct Loans who teach for five consecutive, complete school years.[45] Congress also authorized a demonstration program for partially forgiving FFELP and Direct loans of certain child care providers.[46] In 2008, Congress replaced this demonstration program 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

[40] Higher Education Amendments of 1986 § 405(a).

[41] Higher Education Amendments of 1992, Pub L. No. 102-325, Title IV, § 465, 100 Stat. 448.
[42] Higher Education Opportunity Act, Pub. L. No. 110-315, Title IV, § 465, 122 Stat. 3078.

[43] *See infra*, text at notes 44–48.

[44] Higher Education Amendments of 1992 Title IV, § 422 (codified as amended at 20 U.S.C. § 1078-10).

[45] Higher Education Amendments of 1998 Title IV, § 424.

[46] *Id.* Title IV, § 425 (codified as amended at 20 U.S.C. § 1078-11).

appropriations," to borrowers employed in certain enumerated professions.[47] 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."[48]

For debtors outside of these professions, prior to 1998, the primary student loan forgiveness avenue for student borrowers was bankruptcy.[49] For most of the history of student loans, they were dischargeable in bankruptcy.[50] However, Congress began curbing the ability to discharge 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.[51] After a series of statutes further restricting student debtors' recourse to bankruptcy, in 1998, Congress imposed an undue hardship requirement for discharge of any public and

[47] 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.*

[48] *Id.* Title IV, § 431 (codified as amended at 20 U.S.C. § 1078-12).

[49] *See* Brooks & Levitin, *supra* note 35, at 29.

[50] *Id.*

[51] *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)); *see also* Brooks & Levitin, *supra* note 35, at 29.

nonprofit student loans, stipends, scholarships and educational benefits, at any time.[52] In 2005, Congress expanded this bar to student loans of every kind.[53]

The foreclosing of student debtors' recourse to bankruptcy spurred an uptick in demand for formal student debt forgiveness programs.[54] Congress created the first "Income-Contingent Repayment" (ICR) plan in 1993.[55] 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.[56] As ICR arrived while student loans were still ultimately dischargeable in bankruptcy, the initial ICR program did not attract many student debtors.[57] However, the program provided the statutory hook for administrative programs introduced during the Obama administration.[58]

In 2007, following the total exclusion of student debtors from bankruptcy proceedings absent undue hardship, Congress established the Public Service Loan Forgiveness (PSLF)[59] and

[52] *See* Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971, 112 Stat. 1581, 1837; *see also* Brooks & Levitin, *supra* note 35, at 29.

[53] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59.

[54] *See* Brooks & Levitin, *supra* note 35, at 30.

[55] *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); *see also* Brooks & Levitin, *supra* note 35, at 28.

[56] Brooks & Levitin, *supra* note 35, at 28.

[57] *See id.*

[58] *See id.* at 28, 32.

[59] *See* College Cost Reduction and Access Act, Pub. L. No. 110-84, sec. 401, § 455, 121 Stat. 784, 800 (2007).

Income-Based Repayment (IBR (2007))[60] programs.[61] PSLF promised borrowers working in public service jobs the opportunity to receive loan forgiveness after 120 monthly payments.[62] In 2017, the first participants in the PSLF program completed 120 payments and became eligible for loan forgiveness.[63] 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.[64] 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.[65]

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.[66] 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

[60] *See id.* sec. 203, § 493C(b).

[61] Brooks & Levitin, *supra* note 35, at 30.

[62] *See* College Cost Reduction and Access Act sec. 401, § 455(m)(1) (codified as amended at 20 U.S.C. § 1087e(m)(1)).

[63] 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).

[64] *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).

[65] *See id.* (citing Pub. L. No. 115-141, § 315, 132 Stat. 348 (2018)).

[66] *See* College Cost Reduction and Access Act sec. 203, § 493C (codified as amended at 20 U.S.C. § 1098e(e)).

to fifteen percent under IBR (2007)) and to receive forgiveness after twenty years (as opposed to twenty-five years under IBR (2007)).[67]

In 2012, the Obama administration built on the statutory remedies of the PSLF and IBR (2010) programs through administrative action.[68] Relying on the 1993 amendments to the HEA that established ICR, the Obama administration created the Pay As You Earn (PAYE) plan, which extended the IBR (2010) payment terms to loans borrowed after October 1, 2011.[69] PAYE also limited the effect of interest accrual on loans subject to an income-based repayment plan.[70]

The Obama administration followed up on PAYE in 2015 with the Revised Pay As You Earn (REPAYE) payment plan.[71] 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.[72] REPAYE thus permitted high income borrowers to pay off their loans faster, avoiding interest that would otherwise accrue over the life

[67] *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)); *see also* Brooks & Levitin, *supra* note 35, at 31.

[68] Brooks & Levitin, *supra* note 35, at 32.

[69] *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)).

[70] *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").

[71] *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); *see also* Brooks & Levitin, *supra* note 35, at 32.

[72] *See* Brooks & Levitin, *supra* note 35, at 32–33.

of the loan.[73] REPAYE also went even further than PAYE in limiting the effect of interest accrual.[74]

The most recent federal actions to forgive student loans have been emergency measures in response to the COVID-19 pandemic.[75] The Department of Education took certain of these measures under the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act),[76] which authorizes the Department to waive or modify statutory and regulatory requirements governing the HEA student loan programs in connection with a national emergency as declared by the President.[77] 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."[78] By placing federal student loans in forbearance, with an interest rate of 0%, while continuing to permit debtors to make repayments, the Department of

[73] *See id.* at 33.

[74] *See id.* at 32.

[75] *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).

[76] 20 U.S.C. §§ 1098aa–1098ee (authorizing student loan relief in connection with national emergencies).

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

[78] *Secretary DeVos Extends Student Loan Forbearance Period Through January 31, 2021, in Response to COVID-19 National Emergency*, U.S. DEP'T OF EDUC. (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.

Education enabled debtors to pay less than they otherwise would over the lifetime of their loans.[79]

## III. 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 primary statutory authorities that the Department of Education might rely on to forgive student loans. Section B considers whether the Department's student loan forgiveness decisions would represent exercises of nonenforcement discretion and be unreviewable under the Administrative Procedure Act (APA); Section B also considers whether the Department ought to engage in notice and comment rulemaking in connection with widespread student loan forgiveness.[80] Section C analyzes the alternative argument that the HEROES Act permits widespread student loan forgiveness during the exigency of a national emergency like the COVID-19 pandemic. Section D discusses recent legislation permitting the Treasury to exclude forgiven student loans from taxable gross income and also considers whether Treasury could have extended favorable tax treatment to student loan forgiveness absent a legislative fix.

[79] *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/student-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.").

[80] 5 U.S.C. 701(a)(2) (foreclosing review of agency actions "committed to agency discretion by law").

### 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.[81] The Property Clause of the Constitution[82] grants Congress alone the "[p]ower to release or otherwise dispose of the rights and property of the United States."[83] Moreover, under the Appropriations Clause,[84] "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress."[85] These constitutional provisions forbid "erroneously or illegally made" expenditures of federal funds or dispositions of federal property.[86] The Federal Circuit recently reiterated these principles, holding that overpayments to federal contractors violate the Property and Appropriations Clauses and, therefore, entitle the government to recover.[87] In addition to these constitutional principles, the Antideficiency Act imposes criminal liability on executive branch employees who spend unappropriated funds.[88]

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[81] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, OFF. OF GENERAL COUNSEL, 3 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 14–17 (3d. 2008).

[82] U.S. CONST. art. IV, § 3, cl. 2.

[83] 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. at 294)).

[84] U.S. CONST. art. I, § 9, cl. 7.

[85] Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937).

[86] Agility Pub. Warehousing Co. K.S.C.P. v. United States, 969 F.3d 1355, 1365 (Fed. Cir. 2020).

[87] *Id.* at 1365–66.

[88] 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*

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."[89] The Federal Emergency Management Agency ("FEMA")'s efforts to recoup overpayments of disaster relief to victims of Hurricane Katrina and Hurricane Rita exemplify the exacting bite of this principle: even though FEMA made the payments with the encouragement of government agents who misunderstood the scope of their power,[90] and 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 were "subject to recoupment."[91]

As a consequence of these background constitutional and statutory rules, executive agencies usually cannot forgive performing debts.[92] 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),[93] does not provide for forgiveness of

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*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].").

[89] U.S. GOV'T ACCOUNTABILITY OFFICE , *supra* note 81, 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.").

[90] *See* U.S. DEP'T OF HOMELAND SEC. OFFICE 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).

[91] *Id.* Congress ultimately awarded FEMA limited authority to waive these debts in 2011. *See* Consolidated Appropriations Ac, 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).

[92] *See* BUREAU OF THE FISCAL SERV., TREATISE ON FEDERAL NONTAX DEBT COLLECTION I:3 (2019).

[93] 31 U.S.C. §§ 3701–02, 3711–3720E.

performing loans.[94] 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.[95] The Federal Claims Collection Standards (FCCS),[96] regulations implementing the FCCA, require agencies to "aggressively" collect debts, and permit 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.[97] As a result, the FCCA grants agencies only a constrained authority to forgive debts.[98]

However, the FCCA and FCCS do not apply to debt collection activities expressly governed by other statutes,[99] and the HEA independently grants the Department of Education authority to "modif[y]"[100] and to "compromise, waive, or release"[101] FFELP and Perkins loans.[102] These powers have been described respectively as "modification" and "settlement"

[94] *See id.* § 3711(a)(1); Healy, *supra* note 28, at 7.

[95] 31 U.S.C. § 3711(a)(1)–(2).

[96] 31 C.F.R. Subt. B, Ch. IX.

[97] *Id.* §§ 901.1, 902.2(a).

[98] *See* 31 U.S.C. § 3711(a)(1)–(2).

[99] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 81, 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.

[100] 20 U.S.C. § 1082(a)(4) (FFELP); *id.* § 1087hh(1) (Perkins).

[101] *Id.* § 1082(a)(6) (FFELP); *id.* § 1087hh(2) (Perkins).

[102] *But see* Salazar v. King, 822 F.3d 61, 67 (2d Cir. 2016) (citing 31 U.S.C. § 3711(a)(1)), "The Secretary [of Education], as the head of the [Department of Education], is required to try to collect federally guaranteed student loan debt.").

authority.[103] Proponents of administrative forgiveness of student loans argue that the HEA provides a "clear statutory basis"[104] for the Department of Education's plenary authority to forgive student loans in whole or in part, including in circumstances where agencies bound by the FCCA and FCCS would be unable to forgive debt.[105]

As a preliminary matter, even if the HEA grants plenary authority to the Department of Education to forgive FFELP and Perkins loans, it remains possible that the HEA does not provide the Department with the same authority over Direct loans, as the HEA does not explicitly grant modification and settlement authority over Direct loans.[106] The statutory basis for applying both modification and settlement provisions of the HEA to Direct loans is a provision that requires parity between the terms of FFELP and Direct loans.[107] That statutory hook may not be enough for the HEA, and not the FCCA, to govern collection of Direct loans.[108] In its January 2021 opinion letter, the Department of Education's OGC opined that "because [the Department

[103] 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.*, Letter to Senator Warren, *supra* note 26, at 3.

[104] U.S. GEN. ACCT. OFF., *supra* note 81, at 14-75.

[105] *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 authority adequate for such forgiveness. *Compare* Department of Education Letter, *supra* note 27, at 1 (arguing that Department of Education has only constrained forgiveness authority), *with* Letter to Senator Warren, *supra* note 26, at 1–2 (arguing that Department of Education has plenary forgiveness authority under the HEA).

[106] *See* Herrine, *supra* note 16, at 370–71 & nn. 262–65.

[107] *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]").

[108] *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.*

of Education's] general power to compromise or waive claims under [FFELP] is neither a term nor a condition nor a benefit of [FFELP] loans,"[109] it is "debatable" that the Department of Education has the same settlement authority with respect to both FFELP and Direct loans.[110] 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.[111]

Assuming that the Department of Education's modification and settlement authorities are the same with respect to Perkins, FFELP, and Direct loans, then 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 face the crucible of judicial review, requiring the Department to defend its view that the HEA permits widespread student loan forgiveness.[112]

On its face, the provision establishing the Department of Education's settlement authority appears to be consistent with plenary authority for loan forgiveness.[113] 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."[114] Read literally, this language appears to grant the Department of Education the power to forgive student loans at will—the January 2021 Department of Education letter acknowledged that

[109] Department of Education Letter, *supra* note 27, at 4. n.3.

[110] *See id.*

[111] *See* 31 U.S.C. § 3711 (a)(1); *see* Healy, *supra* note 28, at 7.

[112] *See* Herrine, *supra* note 16, at 367.

[113] *See* Hunt, *supra* note 26, at 39 ("[U]nder a textualist approach to statutory interpretation, relinquishment authority should be interpreted to cover a federal student loan jubilee . . . .").

[114] 20 U.S.C. § 1082(a)(6) (emphasis added) (FFELP); *id.* § 1087hh(2) (emphasis added) (Perkins).

interpretation as the "hyperliteral" reading.[115] 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's "compromise" authority.[116]

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.[117] 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]*."[118] As a factual matter, the Department of Education has used this modification authority to eliminate individual loan balances (at least with respect to non-performing loans).[119]

Authorities are mixed on whether statutory language authorizing "modification" could grant plenary authority to dramatically change a federal program. On one hand, the Department of Education letter, relying on *MCI Telecomms. Corp. v. American Telephone & Telegraph Co.*,[120]

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[115] *See* Department of Education 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)).

[116] *Compare* 20 U.S.C. §§ 1082(a)(6), 1087hh(2), *with* 31 U.S.C. § 3711(a)(2).

[117] *See infra* notes 118–130.

[118] 20 U.S.C. § 1082(a)(4) (emphasis added) (FFELP); *id.* § 1087hh(1) (emphasis added) (Perkins).

[119] *See* Letter to Senator Warren, *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(j) (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.").

[120] 512 U.S. 218, 225 (1994).

argued that "modify" means "to change moderately or in minor fashion."[121] On the other hand, in the technical context of federal budgeting for a loan or loan guarantee program, an Office of Management and Budget (OMB) circular defines a modification as a "[g]overnment 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."[122] Per the OMB circular, modifications "may be any size" and may be the product of actions including loan "forgiveness."[123] Moreover, because modifications deviate from budget assumptions, the OMB circular's modification definition excludes "routine administrative work-outs . . . of troubled loans or loans in imminent default,"[124] such as "forgiving [loan] principal or interest."[125] Thus, the relevant HEA language plausibly authorizes more than just "routine" Department loan forgiveness.[126] In addition, the HEA's grant of modification authority arguably has no equivalent in the FCCA, which addresses only settlement authority.[127] Thus, where the FCCA limits the Department's settlement authority, the Department could plausibly rely on HEA modification authority without contradiction.[128] Notably, the January 2021 Department of Education Letter

[121] *See* Department of Education Letter, *supra* note 27, at 6 (discussing the Department of Education's modification authority under the HEROES Act).

[122] 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).

[123] *Id.*

[124] *Id.* § 185.3(z).

[125] *Id.* § 185.3(ac) (defining "work-out").

[126] *See id.* § 185.3(z), (ac).

[127] *See* Letter to Senator Warren, *supra* note 26, at 6.

[128] *See id.*

does discuss HEA modification authority.[129] However, this exclusion may signal that OGC considers the provision establishing settlement authority a significantly stronger statutory basis for plenary forgiveness authority than the modification provision.[130]

During the two decades preceding the HEA, these modification and settlement provisions appeared in several statutes relating to loans under the discretion of administrative agencies.[131] The HEA's formulations of modification and settlement authority likely originated in a 1945 draft of amendments to the Servicemen's Readjustment Act of 1944 (GI Bill).[132] In a hearing on amending the GI Bill, Maurice Collins, who oversaw the GI Bill's loan guarantee program, proposed amending the GI Bill to expand the authority of the Administrator of Veteran's Affairs with respect to GI Bill loan guarantees.[133] Assistant Administrator Collins proposed granting the Administrator the power to "consent to the modification with respect to rate of interest, time of

[129] *See* Department of Education 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)).

[130] *Cf. id.* at 6 (dismissing argument that HEROES Act "modification" authority could encompass plenary authority to forgive student loans).

[131] *E.g.* Act of Dec. 28, 1945, Pub L. No. 268, § 509(a)(2), (4), 59 Stat. 631 ((permitting "the Administrator [of Veterans Affairs to] . . . (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.").

[132] *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).

[133] *See id.* at 65.

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."[134] 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."[135] He further explained that "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."[136] Discretion over a loan guarantee program would require additional power—"this would hardly be surplus property."[137] 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 to conduct those functions."[138] The 1945 amendments to the GI Bill ultimately incorporated these grants of modification and settlement authority.[139]

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[134] *Id.* at 80.

[135] *Id.* at 79–80.

[136] *Id.* at 81.

[137] *Id.*

[138] S. Rep. No. 698 at 6 (1945).

[139] *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

On September 2, 1958, Congress passed additional veterans' legislation repeating these grants of modification and settlement authority to the Administrator of Veterans' Affairs and also passed the NDEA, which contained a nearly identical grant of settlement authority and a grant of authority to "agree to modifications of agreements or loans."[140]

Throughout the HEA's legislative history, the adoption of particular language for the Secretary's modification and settlement authority received little attention,[141] perhaps because those particular formulations of administrative modification and settlement authority were already entrenched as a consequence of their adoption in the 1945 GI Bill Amendments. A House Report on a draft of the HEA stated merely that the section on settlement and modification "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."[142]

On the other hand, the language added to the HEA in 1965 must be contextualized within the era's legal structure of government debt collection, under which federal agencies had

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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 . . . .").

[140] *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.").

[141] *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).

[142] 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.*

extremely limited 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.[143]

While not an authoritative interpretation of the HEA, this excerpt explains the contemporaneous understanding of the purpose of agency compromise authority (whatever its statutory source): allowing agencies to compromise without involving the Department of Justice or Congress.[144] Additionally, the GAO unambiguously states that no government official, even one with

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

[144] *See id.*

compromise authority, had authority to "simply terminate collection action"—implying that the Department had not received plenary compromise authority in the 1965 HEA.[145]

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.[146] 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.[147] 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.[148] On the other hand, contemporaneous understandings of compromise authority, of the sort expressed in the GAO excerpt quoted above, bear on the appropriate interpretation of the Department of Education's forgiveness authority.[149]

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.[150] 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 the extent of those powers in those cases.[151] These provisions may be understood as "specific" provisions that

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[145] *See id.*

[146] *See supra*, text at notes 113–30.

[147] *See supra*, text at notes 131–42.

[148] *See id.*

[149] *See supra*, text at notes 143–45.

[150] *See* Department of Education 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).

[151] *See, e.g.*, 20 U.S.C. § 1087e(f) (authorizing deferment from paying periodic installments of principal need for certain borrowers during their studies and for borrowers receiving cancer treatment); *id.* §

"govern[]" the "general"[152] grants of modification and settlement authority.[153] Furthermore, because Congress enacted narrow grants of authority for limited student loan forgiveness through the HEROES ACT, PSLF, ICR, 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.[154]

In addition, the role of the modification and settlement provisions within the broader HEA suggests that they provide constrained, not plenary, compromise authority. Congress established express modification and settlement authority solely for Perkins and FFELP, the two programs where creditors other than the Department hold most of the debt.[155] When Congress created FFELP loan forgiveness programs, rather than directing the Department to cancel student loans, it instead directed the Department to assume responsibility for repaying those loans—a solution that reflected that debtors typically owed their student loans to creditors other than the Department.[156] Meanwhile, Congress repeatedly directed (or permitted) the Department to

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1087e(h) (directing the Department to specify acts or omissions by institutions of higher education that are permissible defenses to loan repayment); HEROES Act, 20 U.S.C. §§ 1098aa–1098ee (authorizing student loan accommodations during national emergencies); *see also* Department of Education Letter, *supra* note 27, at 3 (invoking certain of these provisions).

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

[153] *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.").

[154] *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.").

[155] *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").

[156] *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

forgive Direct loans—all of which the Department holds—through cancellation.[157] These discrepancies suggest Congress crafted the modification and settlement authorities for programs where Congress did not envision the Department as the chief creditor making the ultimate decision whether to collect.[158]

Moreover, a court may deny deference to the Department's interpreting the HEA's grant of settlement authority to imply Congress appropriated the entire balance of the student loan portfolio for possible loan forgiveness.[159] Under the Federal Credit Reform Act of 1990 (FCRA),[160] Congress must annually appropriate the "costs" of most new or "modified" federal loans.[161] However, FFELP and the Direct program are entitlements exempt from the annual

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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(b) (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(b) 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.

[157] *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).

[158] *See* Herrine, *supra* note 16, at 395.

[159] *See* Healy, *supra* note 28, at 34–37 (discussing Congressional appropriations for FFELP and Direct).

[160] 2 U.S.C. § 661c.

[161] *Id.* § 661c(b), (e).

appropriations process.[162] The FCRA requires the government to budget for federal loans under accrual accounting using an annual estimate of the loans' net present value.[163] Thus, under FCRA, forgiving a student loan is tantamount to an expenditure of the value of that loan,[164] yet this expenditure requires no new appropriation.[165]

Reading the HEA alongside the FCRA, courts may conclude that it would be "contrary to clear congressional intent" to hold that the Department can spend $1.5663 trillion without a new

[162] *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.

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

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

[165] 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.

appropriation.[166] Federal courts have resisted deferring to agencies when agencies infer appropriations from ambiguous statutory text.[167]

In *U.S. House of Representatives v. Burwell*, the federal district court for the District of Columbia 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.[168] The court emphasized that "[a] law may be construed to make an appropriation out of the Treasury . . . only if the law specifically states that an appropriation is made,"[169] and stressed that "[t]his principle is even more important in the case of a permanent appropriation."[170]

Comprehensive administrative forgiveness of $1.5663 trillion may also be such a "major national policy decision[]" that, per the Non-Delegation Doctrine, it "must be made by Congress

[166] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984); *see* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) ("[Congress] does not . . . hide elephants in mouseholes."); *see also* Department of Education 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 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 Letter, *supra*, at 4.

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

[168] *See id.*

[169] *Id.* (quoting 31 U.S.C. § 1301(d)).

[170] *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)).

and the President in the legislative process, not delegated by Congress to the Executive."[171] Courts may be inclined to read the HEA narrowly to avoid this issue.[172]

Meanwhile, unlike FFELP and the Direct program, Perkins is not an entitlement.[173] Currently, Perkins loans debtors are not in debt to the federal government.[174] Were that to change to facilitate Perkins loans' administrative forgiveness,[175] such forgiveness would be subject to the FCRA.[176] Forgiveness of Perkins loans would still be possible without Congressional appropriations to the extent that the forgiveness constitutes a "reestimate" for which the FCRA provides "permanent indefinite authority" rather than a "modification" which requires an appropriation.[177] A "reestimate" is a "revision[]" of the "cost estimate" of a class of loans; a

[171] Paul v. United States, 140 S. Ct. 342, 342 (2019) (mem.) (Kavanaugh, J., respecting the denial of certiorari); *see also* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 665-66 (2022) (citations and internal quotation marks omitted) (enjoining Occupational Safety and Health Administration workplace vaccination mandate as in excess of statutory authority under the major questions doctrine because"[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance" and "lack of historical precedent, coupled with the breadth of authority that the Secretary now claims, is a telling indication that the mandate extends beyond the agency's legitimate reach").

[172] *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.").

[173] *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); Letter to Senator Warren, *supra* note 26, at 2.

[174] *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 government).

[175] Proponents of administrative forgiveness of student loans have proposed options for the Department of Education to take possession of loans owed to third-parties. *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.*

[176] *See* 2 U.S.C. § 661c.

[177] 2 U.S.C. § 661c(e)–(f); *see* PERRY & SEAMS, supra note 163, at 11.

"modification" is "a Government action" that "differs from actions assumed in the baseline estimate" and "changes the estimated cost of an outstanding . . . loan."[178] Though limited relief to Perkins loan debtors may plausibly be a reestimate, comprehensive relief for these borrowers is likely a modification impossible without Congressional approval.[179]

### B. ADMINISTRATIVE ACTIONS TO FORGIVE STUDENT LOANS

Assuming the Department of Education has the appropriate statutory authority to dispose of student loans, the Department has several means of achieving administrative student loan forgiveness. Some, but not all, of the Department's options include notice and comment rulemaking.[180]

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 immune from judicial review.[181] On this view, loan modification or settlement is an exercise of the Department of Education's enforcement discretion because it represents "a decision not to enforce" the Department's HEA rights.[182] Agencies' decisions not to enforce statutes are often unreviewable under the APA because they are "committed to agency

[178] OFF. OF MGMT. & BUDGET, *supra* note 122, § 185.3(s), (z).

[179] *See id.*; PERRY & SEAMS, supra note 163, at 11.

[180] *See* Department of Education 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.")

[181] Herrine, *supra* note 16, at 368.

[182] *Id.*; *see also* Healy, *supra note* 28, at 17–19.

discretion by law."[183] Consequently, proponents argue that the Department of Education has discretion to forgive student loans—i.e., to decide not to enforce the HEA—and that the Department of Education's exercise of that discretion would be unreviewable under the APA.[184]

The Supreme Court in *Chaney* articulated the standard for when agencies' nonenforcement decisions are immune to APA review.[185] Under *Chaney*, a court may not review nonenforcement decisions 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."[186] 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."[187] In *Sioux Honey*, the Federal Circuit applied these principles from *Chaney* to an agency's decision to write down debt as uncollectable.[188] The court held that the write-down was unreviewable, but implied it might have been reviewable if law prohibited it.[189]

*Chaney* and *Sioux Honey* suggest that the Department's decision to forgive student loans could be reviewable if the HEA or FCCA provides "legislative direction" against forgiving

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[183] 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).
[184] Herrine, *supra* note 16, at 368.

[185] *Chaney*, 470 U.S. at 830.

[186] *Id.*

[187] *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).

[188] *See id.* at 1061 (citing *Chaney*, 470 U.S. at 831).

[189] *See id.* (citing *Chaney*, 470 U.S. at 831).

performing student loans.[190] Notably, "an agency's statutory interpretations made in the course of nonenforcement decisions are reviewable," meaning courts may at least interpret the HEA and FCCA.[191] And agency statutory interpretations justifying nonenforcement enjoy less judicial deference than those with the benefit of notice and comment rulemaking.[192] In considering the Department's nonenforcement against student debtors, a court may conclude that neither the HEA nor FCCA authorize the Department of Education to forgive more than one trillion dollars in performing loans.[193]

Here, a court might find "law to apply" and review nonenforcement-based student loan forgiveness—specifically, law forbidding the Department from forgiving performing loans.[194] The Department does not have modification and settlement authorities over FFELP and Perkins loans until it takes possession of these loans from private lenders,[195] and it does not typically take possession of performing FFELP and Perkins loans.[196] As Direct loans carry the same terms as

[190] *See id.* at 1060 (quoting *Chaney*, 470 U.S. at 832–33).
[191] Montana Air Chapter No. 29, Ass'n of Civilian Technicians, Inc. v. Fed. Labor Relations, Auth., 898 F.2d 753, 756 (9th Cir. 1990).

[192] *See* JAMES T. O'REILLY, ADMINISTRATIVE RULEMAKING § 18:12 (2020 ed. 2020).

[193] *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 . . . .").

[194] *See* Herrine, *supra* note 16, at 388 & n. 314 (citing Bergeron, *supra* note 28).

[195] *See* Bergeron, *supra* note 28; LUKE HERRINE, AN ADMINISTRATIVE PATH TO STUDENT DEBT CANCELLATION 11 (2019); *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).

[196] *See* HERRINE, *supra* note 203, 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").

FFELP loans,[197] the Department's modification and settlement authorities may not extend beyond nonperforming loans.[198] Upon an appropriate challenge, a court could conclude that governing law creates this limitation and review the Department of Education's forgiveness of performing loans.[199]

Even if a court concluded that the HEA and FCCA granted the Department plenary forgiveness authority, the court would likely still find "law to apply" forbidding widespread forgiveness: since 2016, the Department of Education has bound itself—by its own regulations—to apply the FCCS when "compromis[ing], suspend[ing], or terminat[ing] collection of a debt in any amount" arising under FFELP, Perkins, or Direct.[200] Agencies must comply with their own regulations.[201] Moreover, the D.C. Circuit, Second Circuit, and the Seventh Circuit have ruled that regulations constitute "law to apply" in judicial review; the D.C. Circuit has extended this principle beyond regulations to certain agency guidance.[202] Department of Education regulations may thus provide courts with a basis to review student loan forgiveness.[203]

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[197] *See* 20 U.S.C. § 1087a(b)(2).

[198] *See* Bergeron, *supra* note 28.

[199] *See* Sioux Honey Ass'n v. Hartford Fire Ins. Co., 672 F.3d 1041, 1060–61 (Fed. Cir. 2012).

[200] *See* 34 C.F.R. § 30.70 (2019); Herrine, *supra* note 16, at 381–83.

[201] *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).

[202] *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)).

[203] *See*, *e.g.*, HERRINE, *supra* note 195, at 10–11 (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).

However, proponents of administrative student loan forgiveness argue that the Department's 2016 debt collection regulations are best read as posing no barrier to administrative student loan forgiveness even in their current form.[204] Proponents 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.[205] Furthermore, proponents 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 authority.[206] In addition, proponents 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 regulations "apply restrictions on the dollar amounts and prescribe considerations and procedures that an agency must follow before compromising a debt."[207] 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."[208] If this regulation constrains the Department of

[204] *See* Letter to Senator Warren, *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").

[205] *See* Letter to Senator Warren, *supra* note 26, at 5.

[206] *See id.*

[207] *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.").

[208] Department of Education Letter, *supra* note 27, at 2 (citing 31 CFR §§ 901.1(a), 902.2, 902.3, 902.4).

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.[209] Courts could review the Department's decision to amend those regulations but would likely extend *Chevron* deference.[210]

In addition to the risk that courts would review the Department's student loan forgiveness under *Chaney* because there is "law to apply," courts might also review a blanket forgiveness regime because it is "not simply a non-enforcement policy."[211] 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 DACA was not a discretionary nonenforcement policy committed to agency discretion under *Chaney*.[212] The Court explained that DACA "did not merely [involve] 'refus[ing] to institute proceedings' against a particular entity, or even a particular class."[213] 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

[209] *See* Herrine, *supra* note 16, at 381–83.

[210] *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.

[211] Dep't of Homeland Sec. v. Regents of Univ. of Cal. 140 S. Ct. 1891, 1906 (2020).

[212] *Id.*

[213] *Id.* (citing *Chaney*, 470 U.S. at 832).

would receive . . . forbearance."[214] The Court concluded that these processes led to an "affirmative act of approval," not nonenforcement, and courts could thus review them.[215]

Here, a court could characterize the Department's student loan forgiveness as an "affirmative act of approval" for "forbearance," rendering it reviewable under the APA.[216] To avoid replicating the DACA case, the Department of Education would likely at least need to avoid establishing policies and procedures for determining loan forgiveness eligibility.[217]

In sum, the Department of Education has three strategic options if it opts to 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 lead a court to block administrative student loan forgiveness on the grounds that the Department failed to comply with its own rules.[218] The 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.[219] But if a court were to reject the Department's interpretation, the court may block the Department's loan forgiveness because the Department violated its own rule. However, if a court accepted the Department's interpretation, then the court would proceed to evaluate whether the HEA and FCCA allow the Department to

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[214] *Id.* (citation omitted).

[215] *Id.* (quoting *Chaney*, 470 U.S. at 831).

[216] *See id.*

[217] *See id.*

[218] *See Shaughnessy*, 347 U.S. at 266 (establishing doctrine that agency's failure to comply with its regulations to the detriment of individual rights violates due process).

[219] *See* Letter to Senator Warren, *supra* note 26, at 5.

exercise plenary forgiveness authority.[220] 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; however, the Department could escape judicial review of its individual acts of forgiveness.[221]

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,[222] while the forgiveness itself might evade judicial review but would not benefit from much judicial deference.[223]

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 plenary forgiveness authority. Courts could review this approach[224] but would likely extend *Chevron* deference to forgiveness actions.[225]

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[220] *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).

[221] *See* United States v. Mead Corp., 533 U.S. 218, 228–33 (2001).

[222] *See Chevron*, 467 U.S. at 843 n.9; Herrine, *supra* note 16, at 367.

[223] *See Mead*, 533 U.S. at 228–33.

[224] *See* Department of Homeland Security v. Regents of Univ. of Cal. 140 S. Ct. 1891, 1906 (2020).

[225] *See Chevron*, 467 U.S. at 843 n.9; Herrine, *supra* note 16, at 361, 367.

### C. EMERGENCY STUDENT LOAN FORGIVENESS UNDER THE HEROES ACT

In addition to Department's potential plenary forgiveness authority under the HEA, the Department could separately rely on the HEROES Act.[226] Under the HEROES Act, during a national emergency, the Department of Education can "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."[227] 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]."[228] The Department of Education "is not required to exercise the waiver or modification authority" under the HEROES Act "on a case-by-case basis."[229]

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

[227] 20 U.S.C. § 1098bb(a)(1)–(2).
[228] *Id.* § 1098ee(2).

[229] *Id.* § 1098bb(b)(3).

The Department of Education could plausibly argue that recipients of student loan forgiveness during the COVID-19 pandemic are "affected individuals."[230] The statute expressly gives the Department discretion to determine that an individual "suffered direct economic hardship as a direct result" of the COVID-19 "national emergency," and is thus an "affected individual."[231] 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."[232]

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."[233] 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."[234] 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."[235] Second, the letter noted that the HEROES Act mentions "defaults" and modifications of borrowers' obligations to return overpayments, and the letter called these references a "strong

[230] *Id.* § 1098ee(2).

[231] *Id.*

[232] *Id.* § 1098bb(a)(2)(A).

[233] Department of Education Letter, *supra* note 27, at 6.

[234] *Id.*

[235] *See id.* (quoting 20 U.S.C. § 1098bb(a)(2)(A)).

textual basis for concluding Congress intended loans to be repaid, even after the exercise of HEROES Act authority."[236] Third, relying on *MCI Telecomms. Corp. v. Am. Telephone & Telegraph Co.*,[237] the letter argued that the appropriate definition of "modify" is "to change moderately or in minor fashion."[238] The letter did not consider the technical definition of a loan obligation "modification" in the context of federal budgeting.[239] For these three reasons, the letter concluded that the HEROES Act would not provide independent statutory authority for widespread student loan forgiveness.[240]

### D. TAX TREATMENT OF ADMINISTRATIVE STUDENT LOAN FORGIVENESS

Student loan forgiveness would be counterproductive if student debtors immediately had to pay taxes on their debt relief.[241] Such tax 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."[242] Thus, successful administrative student loan forgiveness requires the Department of Education's actions to receive favorable tax treatment.[243]

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[236] *Id.* (citing 20 U.S.C. § 1098bb(a)).

[237] 512 U.S. 218, 225 (1994).

[238] *See* Department of Education Letter, *supra* note 27, at 6.

[239] *See id. But see* OFFICE OF MGMT. & BUDGET, *supra* note 122, § 185.3(s); *supra* Section II.A (discussing technical definition of modification).

[240] *See* Department of Education Letter, *supra* note 27, at 6.

[241] *See* Herrine, *supra* note 16, at 402.

[242] *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).

[243] HERRINE, *supra* note 203, at 15–16.

Treasury (including the Internal Revenue Service ("IRS")) is an executive agency, and the IRS has some latitude in determining, without Congressional input, that particular debt cancellations do not constitute taxable income.[244] 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.[245] Nevertheless, until recently, IRS policies would have treated blanket student loan forgiveness as taxable gross income.[246] For administrative forgiveness to succeed, Treasury would have needed to change this tax treatment,[247] but such a change would be subject to challenge under the APA.[248]

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.[249] It excludes the full or partial cancellation of student loan debt from gross income,

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[244] *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).

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

[246] *See* INTERNAL REVENUE SERV., *supra* note 244, at 38–39.

[247] *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).

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

[249] *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*, FORBES (Mar. 6, 2021, 02:53 PM), https://www.forbes.com/sites/markkantrowitz/2021/03/06/covid-19-relief-bill-passes-with-tax-free-student-loan-forgiveness/?sh=528d2f7e2d1e.

exempting it from taxation.[250] However, if 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.[251]

## IV. 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. Section A first reviews the constitutional standing requirements of Article III of the Constitution.[252] It then considers the United States' sovereign immunity, concluding that plaintiffs' only avenue for enjoining administrative forgiveness is a suit under § 702 of the APA.[253] 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.[254]

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[250] *See* American Rescue Plan Act § 9675; Kantrowitz, *supra* note 249.

[251] 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 203, 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.

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

[253] 5 U.S.C. § 702.

[254] 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,

Section B considers how the federal courts might resolve the merits of an APA challenge to student loan forgiveness, including how different records of agency action might affect the outcome. Section B 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 standing to sue and that the federal government has waived sovereign immunity with respect to their claim.

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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 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). Federal employees may seek corrective employment action, and possibly certain money damages, but not an injunction preventing forgiveness of student loans. *See* Bohac v. Dep't of Agriculture, 239 F.3d 1334, 1337 (Fed. Cir. 2001) (discussing limited remedies available to aggrieved federal employees).

## I. ARTICLE III STANDING

Any plaintiff seeking to challenge administrative student loan forgiveness must have standing.[255] Article III of the Constitution limits federal-court jurisdiction to "Cases" and "Controversies."[256] 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 challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[257] A plaintiff suffered an injury in fact if they suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."[258] 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."[259] Plaintiffs have standing to seek only those remedies that redress their constitutionally cognizable injuries in fact.[260] 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

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

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

[257] *Spokeo,* 136 S. Ct. at 1547 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)).

[258] *Id.* (citing *Lujan*, 504 U.S. at 560).

[259] Bennett v. Spear, 520 U.S. 154, 167 (1997).

[260] *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998).

expressed.'"[261] 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.[262] The waiver must permit both the type of claim and the relief sought.[263]

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 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."[264] However, such plaintiffs must clear two hurdles before seeking 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."[265] This caveat "prevents plaintiffs from exploiting the APA's waiver to evade limitations on suit contained in other statutes."[266] APA claims must challenge agency action "for which there is no other adequate remedy in a court."[267] Second, the APA imposes a "statutory" or "prudential" standing[268] requirement in

[261] United States v. Bormes, 568 U.S. 6, 9 (2012) (citation omitted).

[262] *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).

[263] *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).

[264] 5 U.S.C. § 702 (2018).

[265] *Id.*

[266] Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 215 (2012).

[267] 5 U.S.C. § 704 (2018).

[268] 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,'

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."[269] 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."[270] A plaintiff seeking equitable relief under the APA from administrative forgiveness of student debt must show that no statute "expressly or impliedly forbids"[271] 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.[272]

Other available waivers of sovereign immunity are unlikely to permit plaintiffs to frustrate administrative forgiveness of student loans. Under the Tucker Act,[273] 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

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considerations," though the Court "admittedly ha[s] placed that test under the 'prudential' [standing] rubric in the past.").

[269] *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)).

[270] Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399–400 (1987).

[271] 5 U.S.C. § 702.

[272] *See Match-E-Be-Nash-She-Wish Band*, 567 U.S. at 224.

[273] Tucker Act of 1887, 28 U.S.C. §§ 1346(a)(2), 1491.

damages in cases not sounding in tort."[274] Similarly, under the Federal Tort Claims Act,[275] the United States waived sovereign immunity for certain suits for money damages sounding in tort.[276] However, these waivers do not permit suits for equitable relief, as would be required to prevent administrative student loan forgiveness.[277] The United States has also waived sovereign immunity for suits by federal government employees based on adverse employment actions.[278] Nonetheless, 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.[279] While none of these non-APA waivers of sovereign immunity suffice for plaintiffs seeking to block administrative student loan forgiveness, they represent "other statute[s] that grant consent to suit [and] expressly or impliedly forbid[]" APA equitable relief where they apply.[280]

In sum, plaintiffs seeking equitable relief to prevent administrative forgiveness of student loans must demonstrate they have Article III standing, no statute waiving sovereign immunity other than the APA applies to their claims, and they fall within the zone of interests of the statute they allege the Department of Education or Treasury has violated. The following

[274] *Id.* § 1491.

[275] Federal Tort Claims Act of 1946, 28 U.S.C. §§ 1346(b), 2671–2680.

[276] *See id.*

[277] *See* Sisk, *supra* note 262, at 603.

[278] *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).

[279] *See* Bohac v. Department of Agriculture, 239 F.3d 1334, 1337 (Fed. Cir. 2001) (discussing limited remedies available to aggrieved federal employees).

[280] *See* 5 U.S.C. § 702.

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.[281] That expenditure is likely to grow to $1.149 billion in Fiscal Year 2021.[282] As servicers' revenues depend on servicing volume, forgiveness of student loans and the concomitant reduction in the volume of student loans to service would hurt servicers' bottom line.[283]

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[284] pursuant 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

[281] 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.

[282] *Id.*

[283] *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]).

[284] Higher Education Act of 1965, Pub. L. No. 89-329, § 431, 79 Stat. 1219, 1245.

would likely lack Article III standing and fall outside of the zone of interests of the relevant sections of the Internal Revenue Code.[285]

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.[286]

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.[287] Here, the servicers receive payment on a per loan basis,[288] so administrative student loan forgiveness, if unlawful, would inflict "actual financial injury" on the servicers and "illegally reduc[e]" servicers' return on investment.[289] 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

[285] *See infra*, text at notes 312–24.

[286] *See infra*, text at notes 287–310.

[287] Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd., 493 U.S. 331, 665 (1990).

[288] *See* Naimon et al., *supra* note 2, at 272.

[289] *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 283, at 13–14, likely defeating claims that parties have an investment-backed expectation of a certain loan volume. *See Cienega Gardens*, 331 F.3d at 1334.

"the result of the independent action of some third party not before the court."[290] And the injury would likely be redressable by a favorable ruling[291] because the APA likely authorizes the equitable relief required to preserve the volume of student loans for servicing.[292]

Second, servicers would be able to bring an APA claim seeking equitable relief even though servicers are government contractors, and the Tucker Act precludes certain equitable claims by government contractors.[293] However, servicers could not restrain administrative student loan forgiveness through an action sounding in breach of contract.[294] Plaintiffs may not bring such actions under the APA, but must bring them under the Tucker Act—solely for money damages.[295] 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."[296] Though servicers are government contractors, the APA remedy contemplated here is distinguishable from a suit for specific performance of a government contract.

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[290] Bennett v. Spear, 520 U.S. 154, 167 (1997).

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

[292] *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*.

[293] *See* Sisk, *supra* note 262, 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.").

[294] *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).

[295] *See* Sharp v. Weinberger, 798 F.2d 1521, 1524 (1986).

[296] *Megapulse*, 672 F.2d at 971.

In *Megapulse, Inc. v. Lewis*, the D.C. Circuit confronted whether a government contractor's claim for equitable relief under the APA based on a government contract fell within the Tucker Act.[297] Government contractor Megapulse, Inc. alleged that the Coast Guard violated the Trade Secrets Act[298] when it removed restrictions against commercial use of Megapulse's proprietary data. Megapulse supplied the Coast Guard "pursuant to the terms of various contracts."[299] 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; thus, § 704 of the APA precluded Megapulse's suit under § 702 for an injunction.[300] 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."[301] The court observed that such a rule would permit the government to evade legal requirements simply by contracting not to violate them and thereby limit suits for violations to a Tucker Act money damages remedy.[302]

As in *Megapulse*, servicers seeking to enjoin student loan forgiveness would not be bringing "a disguised contract action"[303] 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

[297] *See id.* at 966.

[298] 18 U.S.C. § 1905.

[299] *Megapulse*, 672 F.2d at 962–64.

[300] *Id.* at 970.

[301] *Id.* at 971.

[302] *Id.*

[303] *Id.* at 968.

even if the acts would also breach the servicers' contracts.[304] 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 HEA.[305] 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."[306] The Higher Education Act expressly contemplates student loan servicers.[307] Subchapter IV of the Higher Education Act, which includes the federal student loan programs,[308] 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."[309] 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."[310] This express statutory mandate to include student loan servicers and their interests

[304] *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.

[305] *See* Higher Education Act of 1965, Pub. L. 89-329, § 431, 79 Stat. 1219, 1245; *see also* Hunt, *supra* note 10, at 1190.

[306] Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399–400 (1987).

[307] *See* 20 U.S.C. § 1098a(a)(1); Hunt, *supra* note 10, at 1190 (quoting 20 U.S.C. § 1098a(a)(1)).

[308] 20 U.S.C. Ch. 28, Subch. IV.

[309] 20 U.S.C. § 1098a(a)(1).

[310] *Id.*

in the administration of the federal student loan programs easily satisfies the zone of interest test.[311]

In sum, student loan servicers could 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. The Tucker Act would not preclude relief, and servicers fall within the zone of interests of the HEA.

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 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, particularly the Department of Education actions already discussed, would inflict a constitutionally cognizable injury on servicers,[312] 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

[311] *But see* Jack V. Hoover, Standing and Student Loan Cancellation, 108 VA. L. REV. ONLINE _, at 12-15 (forthcoming 2022) (arguing that student loan servicers, as third parties who merely have "a financial interest in the mechanism of a statutory regime's execution," would fall outside the zone of interests of the HEA, and noting that 20 U.S.C. § 1082 itself does not "contain any requirement to consider effects on the debtor, let alone third parties relying on the debtor's existence").
[312] *See* Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd., 493 U.S. 331, 665 (1990).

would do so by making student loan forgiveness tenable for the Department of Education.[313] 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.[314] That injury depends on "the result of the independent action of some third party"[315]—the Department of Education—and would not be fairly traceable to Treasury.[316] 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.[317] Thus, servicers would likely lack Article III standing to sue Treasury over student loans' tax treatment.

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."[318] If plaintiffs were permitted "to transfer the Congressional purpose and intent embodied in one section of the Code into other contexts and situations

[313] *See* Herrine, *supra* note 16, at 402.

[314] *See id.*

[315] Bennett v. Spear, 520 U.S. 154, 167 (1997).

[316] *See id.*; Allen v. Wright, 468 U.S. 737, 753 (1984) (holding effect on public schools of tax treatment of private schools was not fairly traceable to IRS), *abrogated on other grounds by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014).

[317] *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").

[318] Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130, 141 (D.C. Cir. 1977).

regulated by different provisions of the Code, the possibilities for litigation would indeed be endless."[319] Here, the relevant portions of the code are Section 61(a)(11),[320] 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).[321] Section 61(a)(11) codified the rule of the Supreme Court's 1931 decision in *United States v. Kirby Lumber Co.*[322] 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."[323] Likewise, none of the Section 108(a)(1) exceptions are related to student loan servicing.[324] 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.

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 would likely lose money if those loans were forgiven. A substantial portion of outstanding FFELP debt is

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[319] *Id.*

[320] 26 U.S.C. § 61(a)(11).

[321] 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).

[322] United States v. Kirby Lumber Co., 284 U.S. 1 (1931); *see* McMahon & Simmons, *supra* note 321, at 419.

[323] Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399–400 (1987).

[324] *See* 26 U.S.C. § 108(a)(1) (providing no nexus to loan servicing).

securitized,[325] and holders of these FFELP asset-backed securities (FFELP ABS) could see their investments lose value if President Biden proceeds with student debt forgiveness.[326]

Like student loan servicers, investors in FFELP ABS can likely sue the Department of Education, but not Treasury, based on impairment to their securities investments.[327] 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 could likely establish Article III standing to sue the Department of Education because they would be injured by forgiveness of the loans underlying their securities.[328] 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 Article III standing.[329] 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

[325] *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), https://www.fitchratings.com/research/structured-finance/fitch-revises-outlooks-to-negative-on-us-ffelp-student-loan-trusts-following-sovereign-revision-06-08-2020.

[326] Max Adams, *Libor, Loan Forgiveness Cast Shadow Over SLABS*, GLOBALCAPITAL (Jan. 13, 2020), globalcapital.com/article/b1jwkv0rzmtnz2/libor-loan-forgiveness-cast-shadow-over-slabs.

[327] *See infra*, text at notes 328–34.

[328] This Section assumes for the sake of argument that securitized FFELP loans could be forgiven administratively. *But see supra* note 175 (discussing barriers to forgiving FFELP loans not owed to the federal government).

[329] Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd., 493 U.S. 331, 336 (1990).

the collateral supporting the investors' securities.[330] And it is redressable because the APA authorizes the equitable relief required to prevent this collateral impairment. [331]

Furthermore, investors in FFELP ABS are likely "within the zone of interests" of the Higher Education Act.[332] 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."[333] This reference to "secondary markets" in student loans, while not as on point as the reference to "loan servicers," suggests investor interests are "arguably within the zone of interests to be protected or regulated by the statute."[334]

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.[335] Furthermore, investors are even less likely than servicers to come within the zone of interests of

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[330] *See* Bennett v. Spear, 520 U.S. 154, 167 (1997); *Fitch Revises Outlooks to Negative on US FFELP Student Loan Trusts following Sovereign Revision*, *supra* note 325, at 1 (describing collateral performance as a factor in rating the quality of FFELP ABS).

[331] *See* 5 U.S.C. § 702 (permitting equitable relief for unlawful agency action). If investors in FFELP ABS are the sole plaintiffs, they may be able to enjoin only forgiveness of FFELP loans, as they face no injury from forgiveness of loans that are not securitized. But because the Department of Education's authority to forgive FFELP loans is clearest, any court decision ruling that even FFELP loans may not be forgiven would cast doubt on the legality of forgiving Direct and Perkins loans.

[332] *See 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)).

[333] 20 U.S.C. 1098a(a)(1). Other language in the Higher Education Act indicates "secondary markets" was primarily a reference to the Student Loan Marketing Association (Sallie Mae). *See id.* § 1087-2(a).
[334] 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)).

[335] *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).

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.[336] Thus, investors in FFELP ABS can likely bring the same claims as loan servicers: they could 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, courts may subject the Department's forgiveness, as well as Treasury's tax treatment of the forgiveness, to judicial review under the APA.[337] In an APA challenge, the Department of Education or Treasury would need to defend the processes under which they promulgated student loan forgiveness[338] and demonstrate that none of the constituent decisions comprising administrative student loan forgiveness were "arbitrary, capricious or an abuse of discretion."[339]

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

[336] *See* 26 U.S.C. §§ 61(a)(11), 108(a)(1).
[337] *See* Herrine, *supra* note 16, at 367.

[338] 5 U.S.C. § 706(2)(D).

[339] *Id.* § 706(2)(A).

"arbitrary and capricious"[340] review when their proffered reasons for their decisions are "contrived."[341] In *Department of Commerce*, the Supreme Court invalidated the U.S. Department of Commerce's 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."[342]

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,"[343] especially if the Department of Education and Treasury offer incompatible reasons for their concerted actions.[344] 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,[345] but Treasury were to justify not taxing this cancellation of indebtedness income because the forgiveness represented a "general welfare benefit[],"[346] a court may find that these conflicting reasons for actions in furtherance of the same program were

[340] Dep't of Commerce v. New York, 139 S. Ct. 2551, 2569 (2019).

[341] *Id.* at 2575; Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1778 (May 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").

[342] Dep't of Commerce, 139 S. Ct. at 2575.

[343] *See id.*

[344] *See* Eidelson, *supra* note 341, at 1790–91 ("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.").

[345] *See* Healy, *supra* note 28, at 23 (discussing FCCA's debt-collection efficiency objectives).

[346] *See* Bailey v. Comm'r of Internal Revenue, 88 T.C. 1293, 1300 (1987).

"contrived."[347] 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.[348]

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 dispose of property of the United States.[349] Under current Department regulations, the Department has incorporated the FCCS as its standards for when a compromise is permissible.[350] Courts may find a complete abandonment of these standards to be arbitrary and capricious.[351] 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.[352] 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

[347] *See Dep't of Commerce*, 139 S. Ct. at 2575.

[348] *See* American Rescue Plan Act of 2021§ 9675; Kantrowitz, *supra* note 249.

[349] *See* Jackson & Mark, *supra* note 33.

[350] 34 C.F.R. § 30.70; 31 C.F.R. § 902.2.

[351] *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").

[352] *See* 31 C.F.R. § 902.2(a)(1).

emergency."[353] This limited administrative relief more comfortably fits within the Department of Education's power to modify or settle student loan claims than comprehensive forgiveness.[354]

## V. 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 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 government.[355]

[353] *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://content.govdelivery.com/accounts/USED/bulletins/28317e2; *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 75 (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).

[354] *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").

[355] *See* BUREAU OF THE FISCAL SERVICE, *supra* note 92, at I:5; Healy, *supra* note 28, at 7–8.