BORROWER DEFENSE TO REPAYMENT: ANOTHER EXAMPLE OF THE BIDEN-HARRIS ADMINISTRATION'S FAILURE TO FOLLOW THE RULE OF LAW

I. INTRODUCTION

Throughout the Biden-Harris administration's term, the U.S. Department of Education (Department) has repeatedly failed to follow the rule of law. Its illegal activities involving federal student loan programs are unprecedented both in scope and impact on hardworking taxpayers. One of these illegal and unprecedented activities was the Department's plan to force taxpayers, many of whom never went to college or already paid off their student loans, to pay $430 billion in student loan debt. The Supreme Court invalidated this scheme and said the administration abused the *Higher Education Relief Opportunities for Students Act of 2003* (HEROES Act)[1] to wildly overstep its authority.

In another effort to transfer student debt *en masse* to taxpayers, the Department published and began implementing the so-called "IDR SAVE" regulation.[2] The regulation authorized an estimated $475 billion in student loan "forgiveness" consisting, among other things, of reduced monthly student loan payments (in some cases as little as $0) and substantially shorter maximum repayment periods despite whether a borrower can afford to pay back his or her loan.[3] One of the costliest regulations in history, experts have shown that the IDR scheme will exacerbate the problems of rising college costs and excessive borrowing.[4] The state of Missouri and others challenged the regulation in April 2024, contending it exceeded statutory authority and was arbitrary and capricious.[5] The trial court preliminarily enjoined parts of IDR SAVE, concluding that the plaintiffs had shown a "fair chance" of success on the merits that the forgiveness was not authorized by statute and that the IDR SAVE regulation violated separation of powers under the major questions doctrine.[6] In August 2024, the U.S. Court of Appeals for the Eighth Circuit issued a *per curiam* decision broadening the preliminary injunction pending any appeal of the trial court's order by the Department.[7] The court stopped the Department "from any further forgiveness of principal and interest, from not charging borrowers accrued interest, and from further implementing [IDR] SAVE's payment-threshold provisions."[8]

A third example of the Department's failure to follow the rule of law, which is the focus of this report, is the administration's manipulation of borrower defense, a process to provide student loan debt relief for borrowers who attended schools found to have engaged in fraudulent misrepresentation, such as false advertisements of job placement rates. In the April 2024 decision of the U.S. Court of Appeals for the Fifth Circuit in *Career Colleges and Universities of Texas v.*

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[1] *Biden v. Nebraska*, ___ U.S. ___, 143 S.Ct. 2355, 216 L.Ed.2d 1063 (2023).
[2] 88 Fed. Reg. 43820 (July 10, 2023). "IDR SAVE" refers to Income Driven Repayment Saving on a Valuable Education plan.
[3] https://budgetmodel.wharton.upenn.edu/issues/2023/7/17/biden-income-driven-repayment-budget-update.
[4] https://budgetmodel.wharton.upenn.edu/issues/2024/4/11/biden-student-loan-debt-relief
[5] Complaint, *State of Missouri et al. v. Biden et al.,* Civil Action No. 4:24-cv-00520-JAR (April 9, 2024).
[6] *Missouri et al. v. Biden et al.*, 2024 WL 3104514 (E.D. Mo. June 24, 2024); *see also West Virginia v. EPA*, 597 U.S. 697 (2022).
[7] *Missouri v. Biden*, 112 F 4th 531, 538 (8th Cir. 2024). The Eighth Circuit subsequently received further briefing and held oral argument on October 24, 2024. The parties await a decision.
[8] *Id*. at 538.

U.S. Department of Education,[9] the court found the *Career Colleges* would likely succeed on the merits in their challenge of the Department's November 2022 borrower defense to repayment (borrower defense) regulation.[10] The Fifth Circuit stayed the regulation from going into effect pending appeal.[11] After other interim legal filings, the Department appealed, filing a petition for certiorari with the Supreme Court in October of this year, where the matter is pending.[12]

The purpose of this report is to show how the Department distorted the borrower defense to repayment provision, and certain accompanying regulations, to provide illegal *en masse* debt "forgiveness," and how the Biden-Harris administration weaponized the provision against the proprietary school sector. A Department employee (Whistleblower) and Whistleblower documents confirm the Committee's conclusion.

II. BRIEF BACKGROUND AND HISTORY

A. Borrower Defense to Repayment Statute

Enacted in 1993,[13] the core provision of borrower defense to repayment is simple. It reads:

> Notwithstanding any other provision of State or Federal law, the Secretary shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a [federal direct student] loan under this part."[14]

The core language has remained the same in the intervening years.[15] Simply put, Congress delegated to the Secretary of Education (Secretary) the authority to "specify" "acts or omissions" of a postsecondary institution that "***a*** borrower" may assert as "a defense" to repayment of a student loan under the Department's Direct Loan program.[16] No group process was contemplated nor authorized in the statute's text. The text and context govern an individual

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[9] 98 F.4th 220 (5th Cir. 2024) *petition for cert. filed*, Oct. 10, 2024 (No. 24-413).

[10] *Id.* For purposes of this report, the reader should be aware that the collective reference to the borrower defense "regulation" in the singular, contextually, means several sections of Title 34, Subtitle B, Chapter VI, principally Parts 668 and 685 of the Code of Federal Regulations. In general, the November 2016 and November 2022 regulations – the second and fourth borrower defense regulations – provide, among other things, for affirmative group claims and corresponding discharges of a student loan, as well as a refund of payments made on a student loan for certain acts or omissions, or other stated transgressions of postsecondary institutions. 34 C.F.R. § 685.222(f)-(k) (2016) and 81 Fed. Reg. 765926, 76084-76086 (Nov. 1, 2016); 34 C.F.R. 685.222(f)-(k) (2022); 34 C.F.R. Part 685, Subpart D (2022) and 87 Fed. Reg. 65904, 66068-66073 (Nov 1, 2022).

[11] 98 F.4th at 256.

[12] https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/24-413.html.

[13] Student Loan Reform Act of 1993, Pub. L. No. 103-66, 107 Stat. 341, 351 (1993).

[14] 20 U.S.C. § 1087e(h).

[15] Not relevant to this report, the parenthetical "(except as authorized under section 457(A)(1))" [Notice in Lieu of Regulations for First Year of Program] which appeared in 20 U.S.C. § 1087e(h) immediately after the phrase "the Secretary shall specify in regulations," was deleted from the law in 2009. Pub. L. No. 111-39, § 404(b)(3), 123 Stat. 1946 (2009). Otherwise, § 1087e(h) has remained the same for the past 31 years (1993-present).

[16] 20 U.S.C. § 1087e(h). In addition to Direct Loans, Federal Family Education Loans, Federal Perkins Loans, and certain Public Health Service Loans may be eligible for borrower defense to repayment if the loans were first consolidated into a direct consolidation loan. 34 C.F.R. § 685.212(k)(2).

borrower's defense to repayment of his or her loan. Yet, the Department's November 2016 and November 2022 borrower defense regulations ignore the plain text of the HEA and facilitate blanket defenses for groups of borrowers.[17]

Additionally, as the Fifth Circuit discussed, the text of the law evidences a very narrow grant of authority to the Secretary: to "specify in regulations which acts or omissions" of a college or university a borrower may assert as a defense to repayment.[18] "Agencies have only those powers given to them by Congress,"[19] and as a fundamental threshold matter, the Fifth Circuit found an absence of authority in 20 U.S.C. § 1087e(h) for the Secretary to adjudicate any borrower defense claims.[20] In other words, the statute only authorizes the Secretary to identify acts or omissions that may be asserted as defenses, not to adjudicate them.

B. 1994 Regulation

The Department first published borrower defense regulations in December 1994, shortly after the statute was signed into law. In the first borrower defense regulation, the Department makes very clear that "defense" means what it says and is a "defense," not an "affirmative" claim, as the Obama Department of Education later contended in its rewrite of the regulation in November 2016.[21] Of note, the core provision of the borrower defense statute was the same in December 1994 as November 2016. Specifically, the 1994 borrower defense regulation provided for assertion of a "defense against repayment" "[i]n any proceeding to collect on a Direct Loan."[22] The defense asserted may be "any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law."[23] The successful assertion of *a borrower's* defense to repayment results in a cancellation or a discharge of some or all of the borrower's loan debt and a refund of payments he or she made on the loan.[24]

The 1994 Clinton administration regulation then describes a few of the types of collection proceedings at which a "defense" can be asserted: "[t]ax refund offset proceedings under 34 C.F.R. § 30.33," "[w]age garnishment proceedings under section 488A of the [Higher Education] Act," "[s]alary offset proceedings for Federal employees under 34 C.F.R. Part 31," and "[c]redit bureau reporting proceedings under 31 U.S.C. § 3711(f)."[25] In its 1994 regulation, consistent with the statute's text, the Clinton administration made no mention of borrower defense as a group defense. More significantly, the words "group," "affirmative," and "claim" appear nowhere in the regulation, nor are the words reasonably within the scope of this very simply phrased subsection of the HEA. Yet, the Obama and Biden-Harris administrations went on to contend group defenses to repayment and affirmative claims (as opposed to defenses) are

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[17] 81 Fed. Reg. 75926 (Nov. 1, 2016); 87 Fed. Reg. 65904 (Nov. 1, 2022).
[18] 98 F.4th at 246-249.
[19] *West Virginia v. EPA*, 597 U.S. 697,723 (2022).
[20] 98 F.4th at 246-249.
[21] 81 Fed. Reg at 75926.
[22] 59 Fed. Reg. 61664, 61696 (Dec. 1, 1994).
[23] *Id*.
[24] 59 Fed. Reg. 61696; 34 C.F.R. § 685.206 (1994) (emphasis added).
[25] 59 Fed. Reg. at 61696.

allowable.[26] The 1994 regulation very clearly describes a "defense" an individual student loan borrower may assert in a "proceeding to collect on a Direct Loan."[27] Moreover, as the Fifth Circuit noted in *Career Colleges*, the "Clinton Administration's subsequent Notice of Interpretation confirmed that the borrower defense provision of the 1994 Rule 'does not provide a private right of action for a borrower and is not intended to create new Federal rights in this area.'"[28]

C. 2016 Regulation

The 1994 borrower defense regulation was "rarely used prior to 2015."[29] With the closure of Corinthian Colleges in 2015, and its subsequent bankruptcy filing in May of the same year, substantial numbers of borrowers applied for borrower defense for the first time.[30] In November 2016, the Obama administration's rewrite of the regulation – the second borrower defense regulation - made two changes. First, it shifted the standard for borrower defense (for eligible loans made on or after July 1, 2017) from state law causes of action to a federal standard.[31] The federal standard "allow[ed] a borrower to assert a borrower defense on the basis of a substantial misrepresentation, a breach of contract, or a favorable, nondefault contested judgment against . . . [a] school, for its act or omission related to the making of the borrower's Direct Loan or the provision of educational services for which the loan was provided."[32] The state law standard continued to apply to eligible loans made prior to July 1, 2017.[33]

Second, though no change occurred in the underlying borrower defense statute in the intervening years, the Obama administration's November 2016 regulation fundamentally changed the borrower defense provision from a legal action a borrower could take to stop the government from following through on a collection proceeding to an affirmative legal action a borrower could take to wipe away his or her federal student loan balance.[34] The Biden-Harris administration maintained and reinforced the concept of an affirmative claim in its November 2022 regulation,[35] which the Fifth Circuit found "likely violate[d] Section 455(h) [20 U.S.C. § 1087e(h)]."[36] In its reasoning, the Fifth Circuit drew attention to the text of the HEA, which makes no mention of affirmative claims, and to the 1994 regulation's discussion of an available "defense" in various collection proceedings.[37]

Third, and perhaps most significantly, the November 2016 regulation added group borrower defense claims to the regulation, notwithstanding the absence of any legal authority in

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[26] *See* the November 2016 regulation, 83 Fed. Reg. at 76080-76086, and November 2022 regulation, 87 Fed. Reg. at 66039-66073.

[27] 59 Fed. Reg. at 61696.
[28] 98 F.4th at 230 citing 60 Fed. Reg. 37,768,37,769 (July 21, 1995).
[29] 87 Fed. Reg. 65904, 65979 (Nov. 1, 2022).
[30] 81 Fed. Reg. at 76047.
[31] 81 Fed. Reg. 765926, 75927 (Nov. 1, 2016).
[32] 81 Fed. Reg. at 76529.
[33] 81 Fed. Reg. at 76080; 34 C.F.R. § 685.206(c) (2016).
[34] 81 Fed. Reg. at 76080 -76081, 76083-76084.
[35] *Id*.
[36] 98 F.4th at 240-243.
[37] *Id.*

the statute.[38] Under the group claims provision of the regulation, if there are certain common facts and claims of borrowers about a school's acts or omissions in the making of a loan or the provision of educational services, a borrower's application is not required.[39] In such case, the Secretary may simply identify borrowers, even those who have not applied, as a part of the group.[40] This interpretation flies in the face of the statute's explicit text, as the statute speaks of an *individual* borrower. "[T]he Secretary shall specify in regulations which acts or omissions . . . ***a*** *borrower* may assert as *a defense* to repayment of ***a*** *loan* . . . [and] in no event may ***a*** *borrower* recover from the Secretary, in any action arising from or relating to ***a*** *loan* made under this part, an amount in excess of the amount ***such*** *borrower* has repaid *on* ***such*** *loan*."[41]

Contrary to the text of the HEA, this November 2016 unauthorized group claims process was continued and expanded upon by the Biden-Harris administration's November 2022 regulation.[42] The Fifth Circuit discussed troubling aspects of the group claims process and how that process "involve[d] applying presumptions to matters requiring individualized proof and [thereafter] extrapolating them collectively."[43] Finally, the court gave expression to the gravity of its concerns about the November 2022 regulation -

> Ultimately, the evidentiary presumptions and group-claim procedures built into the Rule are not designed to further the truth-seeking process. Instead, these are policy-driven mechanisms designed to selectively target proprietary schools, as the Department expects that 75 percent of all borrower claims associated with proprietary schools will be group claims. [87 Fed Reg.] at 65,993. The Department has stated outright that it sees driving enrollment away from these schools to be a "benefit." [87 Fed. Reg.] at 65, 996.[44]

The court picked up on the games being played by the Biden-Harris administration – it was continuing the path initially laid by the Obama administration to use a narrow provision in the statute as a weapon against an entire sector of postsecondary education institutions.

D. 2019 Regulation

Meanwhile, in 2017 and 2018, lawsuits were filed challenging the 2016 regulations or other related rulemaking actions.[45] In September 2019, the Trump administration published the third borrower defense regulation.[46] One key provision of the 2019 regulation was the establishment of a revised federal standard for loans made on or after July 1, 2020 (i.e., a borrower could assert a defense to repayment if the borrower established by a preponderance of the evidence that the postsecondary institution made a *misrepresentation of a material fact* on

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[38] 81 Fed. Reg. at 76084-76085; 34 C.F.R. § 685.222(e)-(h) (2016).
[39] 34 C.F.R. § 685.222(f)(1)(ii) (2016).
[40] *Id*.
[41] 20 U.S.C. § 1087e(h) (emphasis added).
[42] 87 Fed. Reg. 65904, 66068-66073 (Nov. 1, 2022).
[43] 98 F.4th at 250.
[44] 98 F.4th at 251.
[45] *See* 84 Fed. Reg. 49788, 49789 (Sept. 23, 2019) for a brief history of the litigation.
[46] 84 Fed. Reg. 49788 (Sept. 23, 2019).

which the borrower *reasonably relied* in deciding to obtain a loan, and the borrower was "*financially harmed* by the misrepresentation").[47]

Significantly, a misrepresentation is a "statement, act or omission by an eligible school that is false, misleading, or deceptive; that was made with knowledge of its false, misleading, or deceptive nature or with a reckless disregard for the truth; and that directly and clearly relates to enrollment at the institution or the provision of educational services for which the loan was made."[48] Financial harm is "the amount of monetary loss that a borrower incurs as a consequence of a misrepresentation."[49]

Related to the foregoing, the 2019 regulation allowed schools and borrowers alike to have "opportunities to provide evidence and arguments when a defense to repayment application has been filed and to provide an opportunity for each side to respond to the other's submissions, so that the Department can review a full record as part of the adjudication process."[50] The 2016 regulation, on the other hand, had provided a biased borrower defense adjudicatory and fact finding process that limited schools' participation.[51]

Finally, consistent with the text of the HEA's borrower defense statute, the 2019 regulation provided for an individual borrower (not group) defense claims process for loans first disbursed on or after July 1, 2020.[52] As the Department wrote, "the standard for a borrower defense claim and the process that we are adopting in these final [2019] regulations is much different from the standard and process in the 2016 final regulations."[53] "Determinations under these final rules will be highly reliant upon evidence specific to *individual* borrowers."[54] Additionally, the borrower must demonstrate the school "made misrepresentations with knowledge of its false, misleading, or deceptive nature or with reckless disregard and . . . [the borrower must] provide evidence of financial harm."[55] The 2019 regulation did, however, allow group claims to continue for the limited category of loans first disbursed on or after July 1, 2017, and before July 1, 2020.[56]

E. 2022 Regulation

The November 2022 borrower defense regulation – the fourth such regulation – remains on hold as ordered by the Fifth Circuit pending a petition for certiorari filed by the Department with the Supreme Court.[57] The Biden-Harris administration's 2022 regulation tilts the playing field, making it relatively easy for borrowers to obtain borrower defense even though the HEA's

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[47] 84 Fed. Reg. at 49926-49927; 34 C.F.R. § 685.206(e)(4) (2019) (emphasis added).
[48] 34 C.F.R. § 685.206(e)(3) (2019).
[49] 34 C.F.R. § 685.206(e)(4) (2019).
[50] 84 Fed. Reg. at 49790.
[51] *See* 34 C.F.R. § 685.222 (2016).
[52] 34 C.F.R. § 685.206(e) (2019); 84 Fed. Reg. at 49926-49929.
[53] 84 Fed. Reg. at 49799.
[54] *Id*. (emphasis added).
[55] 84 Fed. Reg. at 49799,
[56] 34 C.F.R. § 685.206(d) (2019) and § 685.222 (2019); 87 Fed. Reg. 49788, 49926 and 49932-33 (Sept. 22, 2019). *See supra* the limited group claims in the 2019 regulation discussed under the section on the 2016 regulation.
[57] *See note* 8*, Career Colleges and Universities of Texas v. U.S. Dept. of Educ. Et al.*, 98 F.4th at 256 (5th Cir. 2024) *petition for cert. filed*, Oct. 10, 2024 (No. 24-413).

borrower defense text remains largely the same as it was at the time of the 1994 regulation.[58] Despite the text remaining consistent, the 2022 amendments to the 2019 borrower defense regulation establish a new federal standard for borrower defense claims filed on or after July 1, 2023, and for applications pending with the Secretary on July 1, 2023, regardless of the date of disbursement.[59] The rule also expanded the definition of misrepresentation, provided an additional basis for claims based on aggressive and deceptive recruitment practices, and continued to allow state law standards to be applied for loans first disbursed prior to July 1, 2017.[60] Though group claims had been permitted under the 2016 regulation and for certain pre-July 1, 2020, loans under the 2019 regulation, the 2022 regulation substantially expanded the reach of group debt claims and corresponding debt discharges in contravention of the statute's text.[61]

III. THE DEPARTMENT OF EDUCATION'S ULTRA VIRES ACTIONS

A. Group Claims and Discharges Circumvent the HEA

Between 2021 and the present, the Department repeatedly approved *en masse* borrower defense open and closed school "group" claims through the means of settlement and compromise authority, 20 U.S.C. § 1082(a)(6), to provide nearly $18 billion in taxpayer money for borrower defense discharges as follows[62] –

School	**Year of Borrower Defense Group Discharge Announcement or Approval**	**Amount**
Weingarten v. Cardona, No. 1:19-cv-02056-DLF (D.D.C.)	2021	$283,000
Minnesota School of Business/Globe University	2021 & 2022	$26,000,000
Marinello Schools of Beauty	2022	$238,000,000
Corinthian Colleges	2022	$5,800,000,000
ITT Technical Institute	2022	$3,900,000,000
Westwood College	2022	$1,500,000,000
CollegeAmerica, Colorado Campuses (CEHE)	2023	$130,000,000
Art Institutes	2024	$6,100,000,000
Total		**$17.69 billion**

As set forth earlier in Part II ("BRIEF BACKGROUND AND HISTORY") and below, the Department's use of settlement and compromise authority to provide group borrower defense

[58] *See generally,* 87 Fed. Reg. 65904, 66039-66073 (Nov. 1, 2022).
[59] 34 C.F.R. § 685.401(b) (2022); 87 Fed. Reg. at 66068-66069.
[60] 87 Fed. Reg. at 66039-66073.
[61] 34 C.F.R. §§ 685.206, 685.212, 685.400-685.499 (2022).
[62] https://studentaid.gov/announcements-events/borrower-defense-update; *see also* Alexandra Hegji, Cong. Research Serv., Memorandum on "Prior Instances of the Modification, Waiver, or Compromise of Federal Student Loan Debt under Section 432(a) of the Higher Education Act" (Hegji Memo) at 4-5 (July 26, 2023).

discharge was illegal. In abusing the authority of 20 U.S.C. § 1082(a)(6), the Department intentionally circumvented the specific and detailed substantive borrower defense requirements of 34 C.F.R. § 685.206 (Borrower Responsibilities and Defenses) (2016 & 2022), 34 C.F.R. § 685.222 (Borrower Defenses) (2016 & 2022), and 34 C.F.R. §§ 685.401 (Borrower Defense – General), 685.402 (Group Process for Borrower Defense) and 685.404 (Group Process Based on Prior Secretarial Action) (2022).

B. Unlawful Use of Settlement and Compromise Authority

In May 2023, a Whistleblower reached out to the Committee to express concerns about the Secretary's alleged unlawful use of settlement and compromise authority to resolve group borrower defense claims. The Whistleblower's conversations with the Committee continued over several months and included a review of hundreds of pages of documents provided by the Whistleblower to the Committee. Though many issues and documents were discussed and reviewed, two are examined in this report: (1) statutes of limitation governing refunds were routinely ignored; and (2) Federal Claims Collection Standards were not followed. Before turning to these issues, a contextual statement on the use and analysis of settlement and compromise authority follows.

Within Title 20, section 1082(a)(6) of the U.S. Code, Congress delegated authority to the Secretary of Education to "compromise" (herein "settle and compromise") certain claims against the Department. Section 1082(a)(6) states –

> (a) General Powers
> In the performance of, and with respect to, the functions, powers, and duties, vested in him *by this part* [Part B of Title IV– Federal Family Education Loan Program (FFEL)], the Secretary may –
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> * * * *
>
> (6) enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption."[63]

Similar to its actions under the borrower defense statute, the Biden-Harris administration has distorted the meaning of § 1082(a)(6) for the purpose of granting *en masse* debt cancellation.

As a preliminary matter, this settlement and compromise authority applies by its terms to Part B of the HEA –FFEL loans, not to Part D –Direct loans. No companion provision appears in Part D. While the Department contends that loans under Part D have the same terms and conditions as FFEL loans, the congressional delegation of authority to the Secretary to settle and compromise claims is not a term of a loan.[64] Rather, it is a power given to the Secretary.[65] As such, this power does not transfer over to Direct Loans.

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[63] 20 U.S.C. § 1082(a)(6) (emphasis added).
[64] Petition for Writ of Certiorari, *Dept. of Educ. et al. v. Career Colleges and Schools of Texas* at 16, 21 (No. 24-413) (Oct. 10, 2024); *see also* Brief in Opposition for Respondent Career Colleges and Schools of Texas, *Dept. of Educ. et al. v. Career Colleges and Schools of Texas,* at 21-22 (No. 24-413) (Dec. 12, 2024).
[65] 20 U.S.C. § 1082(a)(6).

Just as the Supreme Court found that the HEROES Act did not give the Biden-Harris administration legal authority for its *en masse* $430 billion debt cancellation,[66] its use of the HEA's settlement and compromise authority fails. Specifically, in *Biden v. Nebraska*, the Supreme Court found no "clear congressional authorization" of the massive student loan bailout the Department sought to implement.[67] Similarly, a plain reading of § 1082(a)(6) reveals no clear congressional authorization to settle and compromise massive swaths of student loan debt.

Indeed, the Congressional Research Service has pointed out in painstaking detail how the Department's use of settlement and compromise authority was nearly always applied to the loans of individual borrowers, one-by-one.[68] Even the Department admits that the authority has most frequently been used "on an individualized, case-by-case basis, as opposed to providing group discharges."[69]

Evidence of the appropriate use of the settlement and compromise authority is the Department's Private Collection Agencies (PCAs) Procedures Manual published on May 10, 2016. The manual describes a "compromise" as "when the PCA negotiates an approved payment amount with the borrower that satisfies a large portion of the balance owed," and states that a "[c]ompromise must not be offered as the first option in collection negotiations" and "PCAs must negotiate the highest compromise payment possible."[70]

1. Statutes of Limitation Governing Refunds Were Routinely Ignored

As the Whistleblower shared and certain documents revealed, the Biden-Harris Department used settlement and compromise authority to intentionally and unlawfully circumvent certain borrower defense statutes of limitation applicable to refunds of amounts paid by a borrower on a student loan.[71] An October 14, 2021, email from a senior Federal Student Aid (FSA) employee to several senior staff within the Department's Office of General Counsel confirms the administration's position –

> All,
> The following is our understanding with respect to the recent decisions regarding treatment of approved borrower defense claims impacted by a limitations period:
> • OGC [Office of General Counsel] has concluded that the Department may use its settlement and compromise authority to refund amounts paid on Direct

[66] *Biden v. Nebraska*, 600 U.S. ___, 143 S.Ct. 2355, 2372-2375 (2023).
[67] *Biden v. Nebraska,* 600 U.S. ___, 143 S.Ct. at 2375 quoting *West Virginia v. EPA,* 597 U.S. at 723, 732 (internal citation omitted).
[68] Hegji Memo at 4-5.
[69] *Sweet v. Cardona* (N.D. Cal.), No. 3:19-cv-03674-WHA, Joint Response to November 4, 2022 Order (Nov. 9, 2022), p.2; *see also* Hegji Memo at 3.
[70] Department of Education, "Private Collection Agency Procedures Manual" at 54, May 10, 2016.
[71] For example, under the 2016 regulation, the limitation period for the borrower to claim a refund of amounts paid on a student loan was the applicable state law statute of limitation for loans first disbursed prior to July 1, 2017 (34 C.F.R. § 685.212(k)(1)(ii)(2016)), or not later than six years after a breach of contract by the school for loans first disbursed on or after July 1, 2017 (34 C.F.R. § 685.222(c)(2016)), or not later than six years after the borrower discovers or reasonably could have discovered the information constituting a substantial misrepresentation (34 C.F.R. § 685.222(d)(2016)).

> Loans for any borrower whose BD [borrower defense] application is approved but is impacted by one or more limitations periods.
> • The Department has elected to use this authority, and FSA should refund amounts paid on Direct loans relating to approved claims *regardless of whether a limitations period applies*.
> • * * * [T]he limitations period will not be considered in the processing of the approved claims.
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> * * * *
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> Please confirm that our understanding is correct. If so, we will work with the processing team to move forward with processing the discharges.[72]

The response by the Deputy General Counsel for Postsecondary Education of October 16, 2021, stated that a senior postsecondary attorney and the Deputy General Counsel for Postsecondary Education reviewed the statement and "we agree that this is accurate and appropriate."[73] It is noteworthy that the Department has not provided any legal analysis whatsoever in this exchange to demonstrate that its understanding is grounded in law or statutory authority.

In fact, a detailed memorandum in the CollegeAmerica, Colorado Campuses (CEHE) group discharge case exemplifies how the Department operationalized the settlement and compromise authority to unlawfully circumvent refund limitation periods.[74] The memo, from the Borrower Defense Group to the Office of the Undersecretary, recommended "the Department use the Secretary's settlement and compromise authority set forth in 20 U.S.C. Section 1082(a)(6) and approve the discharge of eligible loans *without applying the statute of limitations periods*, which is consistent with past practices."[75]

2. The Federal Claims Collection Standards Were Not Followed

Under the settlement and compromise authority, 20 U.S.C. § 1082(a)(6), and other laws, the Department also published in the 2016 regulation amendments to 34 C.F.R. § 30.70. The title of § 30.70 is "How does the Secretary exercise discretion to compromise a debt or to suspend or terminate collection of a debt?" In relevant part, § 30.70(a)(1) reads –

> The Secretary uses the standards in the FCCS [Federal Claims Collection Standards], 31 C.F.R. part 902, to determine whether compromise of a debt is appropriate if the debt arises under a program administered by the Department, unless compromise of the debt is subject to paragraph (b) of this section.

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[72] Email of October 14, 2021, 6:04 PM from senior FSA staff to senior OGC staff (on file with the Committee) (emphasis added).
[73] Email of October 26, 2021, 12:16 PM from Deputy General Counsel for Postsecondary Education to senior FSA and OGC staff (on file with the Committee).
[74] Memorandum of June 7, 2023 from Borrower Defense Group to Office of General Counsel (on file with the Committee)
[75] *Id.* at 54 (emphasis added). The memorandum does not discuss any past practices.

The FCCS incorporated into the Secretary's debt collection regulations set forth four circumstances under which the Secretary may compromise a debt: (1) "[t]he debtor is unable to pay the full amount in a reasonable time, as verified through credit reports or other financial information"; (2) "[t]he Government is unable to collect the debt in full within a reasonable time by enforced collection proceedings"; (3) "[t]he cost of collecting the debt does not justify the enforced collection of the full amount"; or (4) "[t]here is significant doubt concerning the Government's ability to prove its case in court."[76]

One additional indicator that the Department intended for the FCCS to apply to the Secretary's settlement and compromise authority for group borrower defense to repayment is the change in 34 C.F.R. § 30.70 from its first publication in 1988 to the 2016 version. As the Whistleblower observed, in 1988 the Department expressly disclaimed any duty to compromise student loan debt under the FCCS.[77] However, with the 2016 changes, the Department fully reversed its own position and added an express requirement that student loan debt be compromised "under the provisions of 31 C.F.R. Part 902," meaning using the FCCS - [78]

> [U]nder the provisions of 31 C.F.R. part 902 . . . the Secretary may compromise a debt in any amount, or suspend or terminate collection of a debt in any amount, if the debt arises under the . . . [FFEL] Program . . . the . . .Direct Loan Program . . . or the Perkins Loan Program.[79]

Further, as the Whistleblower observed from time at the Department, the Department repeatedly ignored 34 C.F.R.§ 30.70 in approving group borrower defense claims and corresponding discharges.

IV. CONCLUSION

The Biden-Harris administration's Department has repeatedly failed to adhere to the rule of law in its implementation of the HEA's borrower defense to repayment provision, 20 U.S.C. § 1087e(h), and its use of the Secretary's settlement and compromise authority, 20 U.S.C. § 1082(a)(6). Both are very straightforward statutes, but the Department has illegally co-opted and distorted each, far beyond the plain meaning of the text or historical interpretation. Indeed, the Fifth Circuit Court of Appeals in *Career Colleges and Universities of Texas v. U.S. Dept. of Educ*. found the Department's borrower defense implementation actions wanting on multiple grounds.[80]

What is the solution? Very simple. Follow the rule of law and start afresh with a new borrower defense rulemaking.

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[76] 31 C.F.R. § 902.2(a)(1)-(4); *see generally* 31 C.F.R. Part 902 for a discussion of "STANDARDS FOR THE COMPROMISE OF CLAIMS."
[77] 34 C.F.R. § 30.70(h) (1988).
[78] 34 C.F.R. § 30.70(e)(1) (2016).
[79] *Id.*
[80] 98 F.4th 220 (5th Cir. 2024) *petition for cert, filed*, Oct. 10, 2024 (No. 24-413).