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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

STATE OF ARIZONA and MARK BRNOVICH, in his official capacity as Arizona Attorney General,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., in his official capacity as the President of the United States of America;

MIGUEL CARDONA, in his official capacity as Secretary of Education; United States Department of Education; and

UNITED STATES DEPARTMENT OF EDUCATION;

Defendants.

No.

COMPLAINT

INTRODUCTION

1. On September 18, 2022, President Biden forthrightly declared that "[t]he pandemic is over." https://www.politico.com/news/2022/09/18/joe-biden-pandemic-60-minutes-00057423. He further then repeated while the Administration is "still doing a lot of work on it but *the pandemic is over*," and emphasized that "[e]verybody seems to be in pretty good shape." *Id.* (cleaned up) (emphasis added).

2. This follows other Administration actions premised on improvements in the COVID-19 pandemic. For example, the Biden Administration has attempted to terminate the Title 42 immigration-processing system based upon improvements in the pandemic. *But see Louisiana v. CDC*, __ F. Supp. 3d __, 2022 WL 1604901 (W.D. La. May 20, 2022) (enjoining attempted termination due to violations of the APA).

3. But despite the President's repeated assertion that the "pandemic is over," the Administration still views the pandemic is still a useful pretext to adopt policies that would otherwise be incontestably illegal.

4. So it is here. Defendants are seizing upon the pandemic that they otherwise acknowledge is over to attempt to execute the most expensive stroke of a pen in the history of this nation.

5. Specifically, President Biden has ordered the massive cancellation of hundreds of billions of dollars in student debt purportedly (and pretextually) based on the COVID-19 pandemic (hereinafter, "Pandemic-Based Debt Nullification" or "Debt Nullification").

6. The Congressional Budget Office has estimated that the Pandemic-Based Debt Nullification will cost the United States federal government "an additional $400 billion" by suddenly writing off enormous amounts of U.S. Treasury's assets. *See* https://www.cbo.gov/system/files/2022-09/58494-Student-Loans.pdf.

7. This is—by an order of magnitude or more—the most expensive unilateral executive action ever attempted by any President. It circumvents Congress's constitutional power of the purse in a manner no other President has ever attempted. It further inflicts greater harm on the fiscal solvency of the United States than any other Presidential action ever.

8. To put the Debt Nullification's fiscal impact in perspective, its cost exceeds the entire amount that Congress has appropriated for the Department of Education ("ED") for the *last five years*.

9. Plaintiffs the State of Arizona and Mark Brnovich, Arizona Attorney General (collectively, the "State") are hardly alone in believing that the Pandemic-Based Debt Nullification is unlawful. The President's own supporters had little difficulty recognizing as much.

10. In particular, House Speaker Nancy Pelosi declared forthrightly: "People think that the President of the United States has the power for debt forgiveness. He does not. … That has to be an act of Congress. … *The President can't do it.* So that's not even a discussion." Lauren Camera, Pelosi: Biden Lacks Authority to Cancel Student Debt, U.S. News & World Report (July 28, 2021), https://tinyurl.com/33ex63de (emphasis added).

11. So too did the Department of Education itself. It published an extensive legal analysis disclaiming any such authority in January 2021. See Memorandum from Reed Rubinstein, Principal Deputy General Counsel, Department of Education, to Betsy DeVos, Secretary of Education 6 (Jan. 12, 2021), https://tinyurl.com/3kp29ys6 [2021 DeVos Memo].

12. The Pandemic-Based Debt Nullification is putatively based on using the COVID-19 pandemic to invoke the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act). The HEROES Act, however, was meant to relieve active-

duty personnel from bureaucratic constraints by waiving various administrative requirements, such as documentation requirements, and to provide grace periods to accommodate service in active operations.

13. It is inconceivable, when it passed the HEROES Act, that Congress thought it was authorizing anything like the Administration's across-the-board debt cancellation, which will result in around half a trillion dollars or more in losses to the federal treasury. *See The Biden Student Loan Forgiveness Plan: Budgetary Costs and Distributional Impact*, Penn Wharton University of Pennsylvania (Aug. 26, 2022), https://tinyurl.com/4y9rz8w5.

14. The fact that the Biden Administration has chosen to usurp the role of Congress and the power of the purse is particularly harmful because nearly every prior bailout of an industry by Congress has also extracted sorely needed reforms from the affected industry.

15. Here, the presence of half a trillion dollars of student debt cancellation is a clear admission that the higher education industry needs structural reforms, but contains no reforms whatsoever such as requiring colleges to reduce costs, or be more transparent about the low job prospects of certain courses of study. This loan cancellation instead is a naked handout by one administration and one party to favored political classes (college graduates and those employed by the higher education industry) at the expense of taxpayers everywhere.

16. The Debt Nullification harms the Plaintiffs in multiple ways.

17. *First*, the Debt Nullification harms the Office of the Attorney General ("OAG"). OAG relies upon the availability of other student debt forgiveness programs to recruit legal talent. Indeed it currently employs dozens of attorneys eligible for relief under the Public Service Loan Forgiveness Program ("PSLF"). But by unilaterally writing off enormous amounts of debts—including debt that is disproportionately held by

law school graduates—the Debt Nullification harms OAG's ability to recruit legal talent, and directly makes it less lucrative for lawyers to work for the OAG.

18. *Second*, the Debt Nullification will directly harm the State's treasury. The effect of the Debt Nullification is to shift substantial debt cancellation that would otherwise occur after 2025—when it would be taxable income, a portion of which would be paid to the State—to 2022 and 2023, where it is not taxable under the American Rescue Plan Act of 2021 ("ARPA").

19. *Third*, the Pandemic-Based Debt Nullification will harm Arizona's economy. Jason Furman, President Obama's own Chair of the Council of Economic Advisors, perhaps put it best: "*Pouring roughly half trillion dollars of gasoline on the inflationary fire that is already burning is reckless*. Doing it while going well beyond one campaign promise ($10K of student loan relief) and breaking another (all proposals paid for) is even worse." https://twitter.com/jasonfurman/status/1562503985529233410?lang=en (emphasis added). And that is the informed view of one of the most prominent Democratic economic advisors.

20. Lawrence Summers, one of President Obama's Directors of the National Economic Council and one of President Clinton's Secretaries of the Treasury, expressed similarly critical views: "Student loan debt relief is spending that raises demand and increases inflation…. It consumes resources that could be better used helping those who did not, for whatever reason, have the chance to attend college. It will also tend to be inflationary by raising tuitions." https://nypost.com/2022/08/22/larry-summers-student-debt-forgiveness-will-make-inflation-worse/

21. *Fourth*, the Debt Nullification will increase the State's cost of borrowing. The enormous cost of the Debt Nullification will necessarily result in the Federal Government borrowing hundreds of billions of dollars in additional debt as a result of the

foregone interest payments that would otherwise be paid to the Treasury. The State and the Federal Government both compete for access to capital, and by the massive increased total government demand for capital, the Federal Government will increase the State's cost of borrowing by "crowding out" the debt markets.

22. *Fifth*, the Debt Nullification will increase the State's law enforcement costs. The Debt Nullification—particularly given its haphazard, slapdash implementation—is going to increase the amount of consumer (and felony) fraud relating to student debt. The Administration itself has acknowledged the anticipated additional fraud relating to student debt. *See* https://www.cnn.com/2022/09/29/politics/student-loan-forgiveness-update-biden-administration/index.html.

23. In particular, the Department of Education has sent holders of student debt an email explaining that: "You might be contacted by a company saying they will help you get loan discharge, forgiveness, cancellation, or debt relief for a fee. You never have to pay for help with your federal student aid. Make sure you work only with the US Department of Education and our loan servicers, and never reveal your personal information or account password to anyone." *Id.*

24. States—not the federal government—are the primary enforcers of consumer protection laws, including prohibitions on deceptive and unfair practices. That increased fraud is the "predictable effect of Government action on the decisions of third parties," *Department of Commerce v. New York ("Census")*, 139 S. Ct. 2551, 2566 (2019) (citation omitted)—here, opportunistic fraudsters. It is thus a proper basis for establishing Article III standing. *Id.*

25. The State will therefore suffer increased enforcement costs from enforcing its consumer protection and anti-fraud criminal laws against the onslaught of new fraud that the Department of Education is unleashing (and itself predicting). It will further

suffer additional incarceration and probation-related costs as a result of the resulting fraud convictions that are the predictable effect of Defendants' actions.

26. For all of these reasons, the State will suffer cognizable injury from the Pandemic-Based Debt Nullification that supports its Article III standing.

PARTIES

27. Plaintiff State of Arizona is a sovereign state of the United States of America. Arizona sues to vindicate it sovereign, quasi-sovereign, and proprietary interests, including its interest in protecting its citizens. Arizona brings this suit through its Attorney General, Mark Brnovich.

28. Plaintiff Mark Brnovich is the Attorney General of Arizona. The Attorney General is the chief legal officer of the State of Arizona, and has charge of and directs the State's Department of Law/Attorney General's Office ("Arizona Attorney General's Office"). *See*, *e.g*., Ariz. Rev. Stat. ("A.R.S.") §§ 41-191 to 41-193.

29. The Attorney General has the authority to represent the State of Arizona in federal court, including by bringing this lawsuit. *See, e.g*. A.R.S. § 41-193(A)(3).

30. Defendant Joseph R. Biden, Jr. is the President of the United States of America. He is sued in his official capacity.

31. Defendant Miguel Cardona is the Secretary of Education ("Secretary") and is named in his official capacity.

32. Defendant United States Department of Education ("ED") is an agency of the United States government responsible for overseeing federal student loan programs.

JURISDICTION AND VENUE

33. This Court has jurisdiction under 28 U.S.C. § 1331.

34. Venue is proper within this federal District pursuant to 28 U.S.C. § 1391(e) because (1) Plaintiff Arizona and the Arizona Attorney General reside in this District and no real property is involved and (2) a "substantial part of the events and omissions giving

rise to the claim occurred" in this District—*i.e.*, the injury to the state's sovereign interests and the state's management of its fiscal affairs.

35. The situation is rapidly unfolding now. This complaint is based on current information and to the extent that additional information becomes available, the State will file a supplemental or amended complaint as appropriate. *See, e.g*, *Northstar Financial Advisors Inc. v. Schwab Investments*, 779 F.3d 1036, 1043-1048 (9th Cir. 2015) (allowing use of a supplemental complaint to establish standing avoids the needless formality and expense of instituting a new action).

THE HEROES ACT

36. The HEROES Act ("Act") was enacted in the wake of the September 11, 2001 attacks and provides the Secretary with authority to grant relief from student loan requirements during specific periods (a war, military operation, or national emergency) and for specific purposes. Its preamble states its purpose: "To provide the Secretary of Education with specific waiver authority to respond to war or other military operation or national emergency." *See* H.R. 1412, Higher Education Relief Opportunities for Students Act of 2021, *available at* [*https://www.congress.gov/108/plaws/publ76/PLAW-108publ76.pdf*](https://www.congress.gov/108/plaws/publ76/PLAW-108publ76.pdf)

37. Its purpose is further reflected in its "findings" section:

The Congress finds the following:

(1) There is no more important cause than that of our nation's defense.

(2) The United States will protect the freedom and secure the safety of its citizens.

(3) The United States military is the finest in the world and its personnel are determined to lead the word in pursuit of peace.

> (4) Hundreds of thousands of Army, Air Force, Marine Corps, Navy, and Coast Guard reservists and members of the National Guard have been called to active duty or active service.
>
> (5) The men and women of the United States military put their lives on hold, leave their families, jobs, and postsecondary education in order to serve their country and do so with distinction.
>
> (6) There is no more important cause for this Congress than to support the members of the United States military and provide assistance with their transition into and out of active duty and active service.[1]

38. The HEROES Act provides that ED may "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" when "necessary in connection with a war or other military operation or national emergency." 20 U.S.C. § 1098bb(a)(1).

39. The Act further specifies that this waiver or modification must be "necessary to ensure that" certain statutory objectives are achieved, including to ensure 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." *Id.* § 1098bb(a)(2)(A).

40. The Act defines "affected individuals" as including active duty military and National Guard, or individuals who "reside[] or [are] employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency." *Id.* § 1098ee(2).

41. This Secretary's waiver and modification authority is not boundless and is limited, *inter alia*, to period of a "national emergency," to certain categories of eligible

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[1] 20 U.S.C. § 1098aa(b).

individuals or institutions, and to a defined set of purposes. §§ 1098bb(a)(1); 1098bb(a)(2)(A)-(E); 1098ee(2).

42. The Secretary has used this authority to provide relief to borrowers in connection with a war, military operation, or national emergency, including the present moratorium on student loan payments and interest.

43. In March 2020, then Secretary of Education Betsy DeVos, used her authority under the Act to set all federal student loan interest rates to zero and automatically enter borrowers into administrative forbearance, allowing them to defer payments without financial penalty.[2]

44. The same month, Congress directed Secretary DeVos to extend this policy until September 30, 2020, as part of the Coronavirus Aid, Relief, and Economic Security Act. Pub. L. No. 116-136 § 3513 (Mar 27, 2020) (CARES Act).[3] Following the expiration of the CARES Act, the HEROES Act has been invoked to continue the pause on student loan repayment and interest rate relief.

FACTUAL ALLEGATIONS

I. The Push for Student-Loan Debt Forgiveness.

45. There has long been a push for student-loan debt forgiveness. In 2018, one commentator predicted that, "Come 2020, at least one major Democratic candidate for president is going to campaign on outright canceling a boatload of student debt" because "student debt forgiveness is really, really popular among Democrats." Jordan Weissman, *Student Debt Forgiveness is Really, Really Popular Among Democrats*, Slate (Nov. 18, 2018) (https://slate.com/business/2018/11/poll-student-debt-forgiveness-popular-among-democrats.html).

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[2] https://content.govdelivery.com/accounts/USED/bulletins/2afbc4b

[3] https://www.congress.gov/116/plaws/publ136/PLAW-116publ136.pdf

46. Senators Elizabeth Warren and Bernie Sanders announced their own proposals for canceling student loan debt.[4] In April 2020, then-candidate Biden announced a proposal to forgive undergraduate tuition-related federal student loan debt for debt-holders earning up to $125,000, without suggesting that his proposal was related to the COVID-19 pandemic.[5]

II. The Department of Education, Biden Administration, and Speaker Pelosi have recognized that student-debt forgiveness via unilateral executive action is unlawful.

47. The Higher Education Act ("HEA") established the Direct Loan Program ("DLP") and Federal Family Education Loan Program ("FFELP"). 20 U.S.C. §§ 1071 et seq., 1087a et seq. The HEA and its implementing federal regulations provide a comprehensive legal framework governing federal student loan assistance and borrowers' obligations to repay their loans, including how and when certain loan statuses qualify for income-driven repayment and Public Service Loan Forgiveness. The HEA sets forth the "[t]erms and conditions" of DLP loans, including the "[r]epayment plan for public service employees" and "income-based repayment plan." *Id.* § 1087e. Federal regulation also specifies the conditions under which "[a] borrower may obtain loan forgiveness under the [FFELP] program," 34 C.F.R. § 685.219(c), and under which a borrower "qualif[ies] for loan forgiveness" under the IDR program, *id.* § 685.221(f). While the HEA includes a variety of provisions allowing the Secretary to promulgate regulations

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[4] Elizabeth Warren, *I'm Calling For Something Truly Transformational: Universal Free Public College and Cancellation of Student Loan Debt*, Medium (April 22, 2019), https://medium.com/@teamwarren/im-calling-for-something-truly-transformational-universal-free-public-college-and-cancellation-of-a246cd0f910f; Bernie Sanders, *College for All and Cancel All Student Debt*, https://berniesanders.com/issues/free-college-cancel-debt/

[5] Joe Biden, *Joe Biden Outlines New Steps to Ease Economic Burden on Working People*, Medium (April 9, 2020), https://medium.com/@JoeBiden/joe-biden-outlines-new-steps-to-ease-economic-burden-on-working-people-e3e121037322

for income-driven repayment and other repayment programs, no provision of the HEA authorizes the Secretary to implement a mass cancellation of student-loan debt.

48. On January 12, 2021, the Department of Education published a memorandum addressing the Secretary's statutory authority to cancel, compromise, discharge, or forgive, on a blanket or mass basis, principal balances of student loans made pursuant to HEA, and/or to materially modify the repayment amounts or terms thereof, whether due to COVID-19 or otherwise. Memorandum to Betsy DeVos, U.S. Department of Education Office of the General Counsel (Jan. 12, 2021).[6] The memorandum concluded that mass student-loan debt cancellation could not be accomplished through the HEROES Act. *Id*. at 6.

49. In July 2021, Speaker Pelosi stated at a press conference: "People think that the President of the United States has the power for debt forgiveness. He does not. He can postpone. He can delay. But he does not have that power. That has to be an act of Congress. . . . The President can't do it. So that's not even a discussion." Diana Glebova, *Flashback: Nancy Pelosi said President lacks authority to 'Forgive' student debt*, National Review (Aug. 24, 2022) https://www.nationalreview.com/news/flashback-nancy-pelosi-says-president-lacks-authority-to-forgive-student-debt/

50. The President himself has acknowledged that he does not have authority to unilaterally forgive student loan debt. Adam Shaw, *Biden once doubted he had authority to grant student loan debt handout by executive action*, Fox News, (Aug. 25, 2022) https://www.foxnews.com/politics/biden-once-doubted-he-authority-grant-student-loan-debt-handout-executive-action.

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[6] Available at https://static.politico.com/d6/ce/3edf6a3946afa98eb13c210afd7d/ogcmemohealoans.pdf

III. Several legislative attempts to enact debt forgiveness have failed.

51. In July 2019, Senator Warren's bill to cancel $50,000 of student loan debt for those who make under $100,000 failed. https://www.congress.gov/bill/116th-congress/senate-bill/2235

52. In March 2021, Representative Al Lawson's bill to forgive the outstanding balance on loans for all borrowers under a certain income cap failed. https://www.congress.gov/bill/117th-congress/house-bill/2034

53. In October 2021, a coalition of 105 organizations sent a letter to President Biden urging him to unilaterally cancel most or all of the more than $1.6 trillion in student debt.[7]

IV. As COVID-19 Fades, Department of Education invokes the Pandemic for the Debt Nullification.

54. On August 24, 2022, ED announced a plan to provide widespread student loan forgiveness: "To address the financial harms of the pandemic by smoothing the transition back to repayment and helping borrowers at highest risk of delinquencies or default once payments resume, the Department will provide targeted student debt cancellation to borrowers with loans held by the Department of Education."[8]

55. Specifically, under the plan, student loan borrowers with annual income under $125,000 who received a Pell Grant will be eligible for up to $20,000 in debt cancellation. Non Pell-Grant borrowers will be eligible for up to $10,000 in relief.

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[7] https://mkus3lurbh3lbztg254fzode-wpengine.netdna-ssl.com/wp-content/uploads/Coalition-letter-to-POTUS-re-student-debt_10.28.21_final.pdf

[8] *Biden-Harris Administration Announces Final Student Loan Pause Extension Through December 31 and Targeted Debt Cancellation to Smooth Transition to Repayment* (Aug. 24, 2022), https://www.ed.gov/news/press-releases/biden-harris-administration-announces-final-student-loan-pause-extension-through-december-31-and-targeted-debt-cancellation-smooth-transition-repayment

56. The Wharton School of the University of Pennsylvania released a study concluding that the Department of Education's debt cancellation will cost up to $519 billion over ten years, and the overall cost could rise to more than $1 trillion when factoring in the other components of the department's announced plans. Penn Wharton Budget Model, The Biden Student Loan Forgiveness Plan: Budgetary Costs and Distributional Impact, (August 26, 2022), https://budgetmodel.wharton.upenn.edu/issues/2022/8/26/biden-student-loan-forgiveness

57. On September 26, 2022, the Congressional Budget Office estimated that "the cost of student loans will increase by about an additional $400 billion in present value as a result of the action canceling up to $10,000 of debt issued on or before June 30, 2022, for borrowers with income below specified limits and an additional $10,000 for such borrowers who also received at least one Pell grant." https://www.cbo.gov/system/files/2022-09/58494-Student-Loans.pdf

58. The Office of General Counsel at the U.S. Department of Education rescinded its January 2021 memorandum in August 2022, but it did so on unsustainable grounds.

59. The Office of Legal Counsel at the U.S. Department of Justice also issued a memorandum asserted that the HEROES Act grants the Secretary authority to "reduce or eliminate the obligation to repay the principal balance of federal student loan debt, including on a class-wide basis in response to the COVID-19 pandemic." *See* OLC August 2022 Memo at 1, Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans (Aug. 23 2022) ("OLC Memo").

60. The memo concluded that the Secretary can exercise the waiver or modification authority "provided the Secretary deems the reduction or cancellation necessary to ensure that affected individuals are not placed in a worse position financially in relation to their financial assistance because of their status as affected individuals." *See*

Id. at 24-25.[9] OLC read this requirement to mean that any waiver or modification should put the loan recipients back in the financial position they would be in were it not for the national emergency. The Biden Administration has not made this determination.

61. "[T]o invoke the HEROES Act in the context of COVID-19, the Secretary would need to determine that the COVID-19 pandemic was a but-for cause of the financial harm" to be redressed by Pandemic-Based Debt Nullification. The Biden Administration has not made this determination.

62. 20 U.S.C. § 1098ee(2) defines "Affected Individuals" as:

> "an individual who (A) is serving on active duty during a war or other military operation or national emergency; (B) is performing qualifying National Guard duty during a war or other military operation or national emergency; (C) 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 (D) suffered direct economic hardship as a direct result of a war or other military operation or national emergency as determined by the Secretary."

63. The Secretary's proposed Debt Nullification contains no requirement that the affected individual live in the relevant geographic area, nor does it purport to tailor relief to affected individuals whose financial situation was harmed by COVID-19. *Id.*

V. On September 29, 2022, the Administration Formally Announces Its Program To Borrowers Via An Email, And Recognizes Its Unprecedented and Rushed Debt Nullification Will Create Fodder For Scam Artists

64. According to press reports, the administration sent an email to Americans on Thursday, September 29, 2022, that offered more concrete details about who is

[9] Available at https://www.justice.gov/olc/file/1528451/download

eligible for its loan program and what to expect in the process. https://www.cnn.com/2022/09/29/politics/student-loan-forgiveness-update-biden-administration/index.html

65. According to press reports, the email stated, "In October, the US Department of Education will launch a short online application for student debt relief. You won't need to upload any supporting documents or use your FSA ID to submit your application." *Id.* "Once you submit your application, we'll review it, determine your eligibility for debt relief and work with your loan servicer(s) to process your relief. We'll contact you if we need any additional information from you." *Id.* According to press reports, the email said that additional updates would be sent "over the coming days" but did not provide a specific date in October for when the application window will open. It will extend through December 2023. *Id.* It also warned readers to "beware of scams." *Id.*

VI. The Administration Keeps Changing Its Program Primarily For the Purpose Of Evading Judicial Review, Rather Than Any Legitimate Purpose

66. As discussed above, various federal officials including the Speaker of the House and the President himself previously recognized that the loan forgiveness program is illegal.

67. The Administration was swiftly sued on Tuesday, September 27, 2022, in federal court in Indiana by Frank Garrison who argued that the policy was an abuse of executive power. Following this suit the Biden Administration created an "opt out" of the loan forgiveness that an individual can invoke. https://www.cnn.com/2022/09/29/politics/student-loan-forgiveness-update-biden-administration/index.html. On information and belief, this opt out was created solely to defeat Mr. Garrison's standing and to evade judicial review. On information and belief, the Biden Administration even went so far as to retaliate specifically against Mr. Garrison by claiming his court complaint was his written "opt out," and many of the Biden

Administration's supporters celebrated on twitter that Mr. Garrison specifically would stand to lose $10,000 for seeking judicial review of the loan cancellation program.

68. On September 29, 2022, several states sued the Biden Administration in the U.S. District Court for the Eastern District of Missouri. One of their theories of standing was that one or more of the plaintiff states operate loan servicers that service FFEL loans, and they would be financially impacted when borrowers consolidated their loans to Direct Loans. The very day that this complaint was filed, the Biden Administration changed its policy such that FFEL borrowers could not consolidate to Direct Loans. Even more shockingly, this new policy only applies to those who did not move to consolidate before September 29, 2022, the date of Missouri's lawsuit. https://www.npr.org/2022/09/29/1125923528/biden-student-loans-debt-cancellation-ffel-perkins?utm_campaign=npr&utm_medium=social&utm_term=nprnews&utm_source=twitter.com.

VII. Harms To Plaintiffs

69. The Arizona Attorney General's Office suffers injury in that it, like other state government offices, relies on debt forgiveness programs, including the Public Service Loan Forgiveness Program ("PSLF"), to recruit employees. The PSLF program forgives the remaining balance on direct loans for individuals who are employed in public service—including federal, state, or local government, or for a non-profit organization—and who have made 120 qualifying monthly parents under a qualifying repayment plan.[10] Any loan received under the William D. Ford Federal Direct Loan Program (DLP) qualifies for PSLF. ED has allowed Federal Family Education Loans (FFEL) and Federal Perkins Loans to become eligible if a borrower consolidates these

[10] https://studentaid.gov/manage-loans/forgiveness-cancellation/public-service#employment-certification

loans into a direct consolidation loan (at present, it is unclear whether ED will continue to allow conversion). Because 120 qualifying monthly payments are required, it takes at least 10 years to qualify for PSLF. Borrowers who are pursuing PSLF are advised, but not required, to certify employment yearly with their employer's human resources department and submit the certification form to ED.[11] AGO is a qualifying employer under the PSLF program and has received dozens of PSLF certification requests from attorneys and non-attorneys pursuing debt forgiveness under the PSLF program.

70. The PSLF program allows AGO to incentivize recruitment of employees in order to have their loans forgiven. The office currently employs dozens of attorneys and non-attorneys who are proceeding under the PSLF program. The proposed student loan debt cancellation removes one incentive for employment with government offices, thereby undermining the Attorney General's Office to recruit talent.[12] As the nation is already witnessing an unprecedented labor shortage, the cancelling of student loan debt makes recruitment of talented employees exceedingly difficult.[13] Moreover, the Arizona Attorney General's office is experiencing a number of unfilled positions. The office expects the implementation of the Pandemic-Based Debt Nullification will make it more difficult to recruit new attorneys and non-attorneys, and force it to spend more time and resources on recruitment. Moreover, one of the requirements of PSLF is that borrowers remain in public service for a number of years. If the program becomes less attractive relative to private practice or other opportunities, the office will suffer increased attrition.

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[11] https://studentaid.gov/sites/default/files/public-service-application-for-forgiveness.pdf

[12] *See*, e.g. https://gallagher.house.gov/sites/evo-subsites/gallagher.house.gov/files/evo-media-document/09.15.22%20Ltr%20to%20POTUS%20re%20Student%20Loans.pdf (explaining the negative impact the student loan debt cancellation will have on military recruitment)

[13] *See* https://www.heritage.org/jobs-and-labor/commentary/why-bidens-student-loan-forgiveness-will-make-inflation-labor-shortage

If AGO is unable to fill a position or takes longer to fill a position because of the student loan debt cancellation plan, the office's ability to perform will be reduced, impacting Arizonans. Moreover, the office spends money on recruitment, including paying websites to post job openings. Increased attrition and the decrease of the relative benefit of the PSLF program because of the general loan forgiveness that is at issue here, will cause the Office to have to spend more money and resources on recruitment, which it has not budgeted for.

71. Student loan debt cancellation will also decrease the State of Arizona's tax revenues. Student loan debt cancellation will "raise[] demand and increase[] inflation,"[14] harming the State of Arizona and Arizonans. The proposed student loan debt cancellation has been explained as "pouring roughly half trillion dollars of gasoline on the inflationary fire that is already burning[.]"[15] The resulting economic harm will reduce Arizona's taxable income and impede the state's proprietary interests. The Debt Nullification will cause some persons with student loan debt to delay their search for or their acceptance of employment, as forgiving significant amounts of debt discourages work. Such persons will therefore pay no or less state income tax while they are not working or working less. This additionally harms Arizona businesses, as the country is already experiencing unprecedented labor shortages. To the extent that a tax-paying company cannot fill or takes longer to fill a position because of the student loan debt cancellation plan, the company's ability to perform will be reduced and the company will pay less in state tax.

72. The State will also suffer reduced tax revenue as a result of the Pandemic-Based Debt Nullification.

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[14] Larry Summers, former United States Secretary of the Treasury, https://twitter.com/LHSummers/status/1561701544600428545

[15] Jason Furman, former Director of the National Economic Council of the United States, https://twitter.com/jasonfurman/status/1562503985529233410

73. Arizona tax law conforms to the federal definition of taxable income.

74. Normally, federal adjusted gross income includes student loan discharge. See 26 U.S.C. § 61(a)(11). Under the American Rescue Plan Act of 2021, however, the discharge of student loan debt is not included in federal adjusted gross income if the discharge occurs between December 31, 2020, and January 1, 2026. *See* 26 U.S.C. §108(f)(5).

75. Thus, student loan debt is currently not considered taxable state income in the State but will be in the future.

76. There will undoubtedly be student loan debt discharge in the future. Under federal Income-Driven Repayment (IDR), borrowers receive cancellation after repaying the loans for a certain period of years (20 to 25, depending on the loan). The Government Accountability Office (GAO) estimates that by 2030, "about 1.5 million loans held by about 600,000 borrowers" will be eligible for loan cancellation. U.S. Gov't Accountability Office, GAO-22-103720, Federal Student Aid: Education Needs to Take Steps to Ensure Eligible Loans Receive Income-Driven Repayment Forgiveness 15 (2022), https://tinyurl.com/bdhzca8z. Of those loans, roughly 1.2 million will be forgiven between 2026 and 2030. *See id.* at 16 fig. 3. And data from 2021 shows that the average amount of loan cancellation under the program so far has been about "$34,000 per borrower." *Id.* at 10. Thus, significant amounts of federal loan cancellation will occur after 2026 for Arizona residents. By operation of law, then, substantial income tax revenue will be coming to the State.

77. The Debt Nullification, however, will reduce that tax revenue by decreasing the amount of outstanding student loan debt. It does so because one of its effects is to shift forward some debt forgiveness that would otherwise occur in a period in which it would be taxable income (*i.e.*, 2026 on) into a period where it is not taxable (*i.e.*, 2022-25). As a result, the Defendants' actions will cost the State tax revenue.

78. The Pandemic-Based Debt Nullification will also harm the State's economy by directly causing greatly increased inflation—at a time when inflation is already at levels unseen in a generation. Indeed, even prominent Democratic economists—including two of President Obama's closest economic advisors and President Clinton's own Secretary of the Treasury—have confidently predicted that the Debt Nullification will substantially increase inflation.

79. These inflationary effects will harm the State, much as it harms everyone in the U.S. economy. And the effects are particularly prominent as the amount involved—estimated at $400-$500 billion dollars of spending at the stroke of a pen—dwarf any other executive action ever considered by a federal court.

80. Upon information and belief, the Debt Nullification will also increase the State's borrowing costs due to the crowding-out effect in the debt markets resulting from the Federal Government's sudden need to issue hundreds of billions of dollars in new Treasury Notes.

81. "Crowding out" is a well-accepted effect that economics have widely recognized. A further crowding out effect of the Debt Nullification will be to increase mortgage rates. Increased mortgage rates in turn will decrease property values, which depresses the amount of taxes that the State will collect from property taxes.

82. The Pandemic-Based Debt Nullification will also increase the State's law enforcement costs, including the costs of enforcing its consumer protection and anti-fraud laws.

83. The Department of Education itself is predicting that the Debt Nullification will increase fraud in connection with student loans. *See* https://www.cnn.com/2022/09/29/politics/student-loan-forgiveness-update-biden-administration/index.html. The need to enforce the State's laws vis-à-vis this predicted increase in fraudulent activities is cognizable injury under Article III. That is particularly

true as the State can base standing on the "predictable effect of Government action on the decisions of third parties," *Census*, 139 S. Ct. at 2566 (citation omitted). And here ED itself has predicted that increased fraud by third parties as a direct result of its actions.

CLAIMS FOR RELIEF

COUNT I

Violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(C)

Secretary Exceeded Authority

84. The allegations in the preceding paragraphs are reincorporated herein.

85. Under the Administrative Procedure Act ("APA"), a reviewing court shall "hold unlawful and set aside agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

86. The Secretary's Debt Nullification vastly exceeds his authority under the HEROES Act. Section 1098bb does not authorize the Secretary to forgive such large amounts of debt under the circumstances at issue here—the absence of a national emergency and forgiveness of debt without any showing that a borrower has been placed in a worse financial position. The Act only grants ED limited and specific waiver authority to provide relief for borrowers in extraordinary circumstances and only for specified purposes.

87. The COVID-19 pandemic may have been an emergency at one point, but two-and-a-half years since its onset, Congress has had time and knowledge to respond to its effects. Since March 2020, the onset of the pandemic, proposals to forgive student loan debt have been rejected. Today, COVID-19 is not a national emergency justifying massive student loan debt cancellation. Instead, the Secretary's use of this "emergency power" to forgive student loan debt is an attempt to side-step the legislative process.

88. Additionally, the criteria of ED's debt cancellation bear no connection to the specific criteria set forth in the HEROES Act for ED waivers—in particular, the

requirement that any waiver be "necessary to ensure that … recipients of student financial assistance under title IV of the Act who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." 20 U.S.C. § 1098bb(a)(2)(A).

89. The Act does not convey blanket loan forgiveness authority, but only allows the Secretary to "modify" or "waive" payments only under the terms of the specific loan forgiveness programs enacted by Congress. The HEROES Act does not authorize the Secretary's student loan debt cancellation. *See National Federation of Independent Businesses v. OSHA*, 142 S. Ct. 661, 665 (2022) ("'We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance'") (quoting *Alabama Assn. of Realtors v. Dep't of Health and Human Servs*., 594 U.S. (2021)). It does not authorize plenary power to forgive student loans generally.

90. Congress did not contemplate that it was authorizing the Secretary to implement a sweeping nullification of the federal student loan program when it passed the HEROES Act. The HEROES Act does not clearly grant the Secretary the authority to compensate individuals by means of loan cancellation for any and all economic harms arising from national emergencies. The debt cancellation plan is an assertion of "highly consequential power beyond what Congress could reasonably be understood to have granted" by statute and is thus unlawful. *West Virginia,* 142 S.Ct. at 2609.

COUNT II

Violation of the Administration and Procedure Act, 5 U.S.C. § 706(2)(A)

Arbitrary and Capricious

91. The allegations in the preceding paragraphs are reincorporated herein.

92. Under the APA, a reviewing court shall "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2).

93. As explained in the debt cancellation announcement, the $10,000 in loan forgiveness (or $20,000 for those who have previously received Pell Grants) will only apply to those who make less than $125,000 for individuals or $250,000 for married couples.

94. The amount of student loan debt forgiveness per person per household as determined by ED and the Secretary is arbitrary and capricious. The administration's justification for student loan debt cancellation is based on a worsened financial position after two and a half years of the COVID-19 pandemic. The Secretary's limitation on the class (individuals making less than $125,000, and couples making less than $250,000) must reflect line-drawing in an attempt to roughly compensate from the economic losses from COVID-19 as best as possible. But the Secretary cannot make such a showing.

95. Estimates of the student loan debt cancellation plan are over $500 billion. Defendants' action on an issue of major national and political significance must be supported by clear statutory authorization, which is absent in this case.

96. Agency action is arbitrary and capricious if the agency fails to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on

factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

97. The Secretary's decision to erase student loan debt on the basis of a statutory provision limited to waiver or modification for persons economically harmed "because of" a national emergency is not the result of reasoned decision making. The Secretary and ED have already addressed the potential impact of the COVID-19 pandemic on student loans by pausing loan payments and zeroing interest accrual. The President has stated that the COVID-19 emergency is over, and there has been a long push for student loan forgiveness. The Secretary and ED's invocation of the COVID-19 pandemic is a pretext, not the reasoned decisionmaking required by the APA.

98. Moreover, the Secretary and ED, on information and belief, have not considered the effect of their loan forgiveness program on the reliance interests of states, including through its effect on the attractiveness of the PSLF program relative to private sector employment.

99. Also as discussed above, the Biden administration has made specific, last-minute changes to the program solely to evade judicial review. This includes creating an "opt out" after they were sued by Plaintiff Frank Garrison and changing the ability of FFEL borrowers to consolidate their loans into Direct Loans after or shortly before they were sued by Missouri and other states in the Eastern District of Missouri. These changes, which are solely to evade judicial review by attempting to defeat standing, are necessarily arbitrary and capricious.

100. The Secretary and ED's plan is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law" and must be set aside. 5 U.S.C. § 706(2)(A).

COUNT III

Violation of the U.S. Constitution Exercise of the Spending Power

101. The allegations in the preceding paragraphs are reincorporated herein.

102. The United States Constitution provides "[n]o money shall be drawn from the Treasury, but in Consequence of the Appropriations made by Law[.]" U.S. Const. art. I, § 9, cl. 7. Article 1 of the Constitution "exclusively grants the power of the purse to Congress[.]" *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1231 (9th Cir. 2018) (citing to U.S. Const. art. 1, § 9, cl. 7; U.S. Const. art 1, § 8, cl 1).

103. Appropriations "shall be applied only to the objects for which the appropriations were made except as otherwise provided by law" and must be expressly stated, not inferred or implied. 31 U.S.C. §§ 1301(a), 1301(d). Agencies must "try to collect a claim of the United States Government for money . . . arising out of the activities of, or referred to, the agency[.]" 31 U.S.C. § 3711(a)(1). The Secretary is directed to "aggressively collect all debts" and is delegated limited compromise and settlement authority. *See* 31 CFR 901.1(a); *see also* 31 U.S.C. § 3711(a)(2); 31 CFR 902.2, 902.3, 902.4.

COUNT IV

Violation of the U.S. Constitution

Non-delegation doctrine and separation of powers, 5 U.S.C. § 706(2)(B)

104. The allegations in the preceding paragraphs are reincorporated herein.

105. The APA directs a court to "hold unlawful and set aside" an agency's rule that is "contrary to constitutional right." 5 U.S.C. § 706(2)(B).

106. United States Constitution, Article I, § 1 provides: "All legislative Powers herein granted shall be vested in a Congress of the United States."

107. No agency has any inherent power to make law, and "an agency literally has no power to act . . . unless and until Congress confers power upon it." La. Pub. Serv. Comm'n, 476 U.S. 355, 374 (1986).

108. United States Constitution, Article II, § 3, directs that the President "shall take Care that the law be faithfully executed . . . ."

109. A "fundamental precept" of "another strand of [] separation-of-powers jurisprudence, the delegation doctrine," "is that the lawmaking function belongs to Congress, U.S. Const., Art. 1, § 1, and may not be conveyed to another branch or entity." Loving v. United States, 517 U.S. 748, 758 (1996).

110. Congress may not "abdicated or [] transfer to others the essential legislative functions with which it is vested." A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935).

111. The HEROES Act empowers an Executive official to "waive or modify any statutory . . . provision" as that official "deems necessary." 20 U.S.C. § 1098bb(a)(1).

112. Such waiver or modification of a statute has a "legislative character," as "confirmed by the character of the Congressional action it supplants" –legislative amendment. *INS v. Chadha*, 462 U.S. 919 (1983).

113. The statute permits the Secretary to suspend the law, to "modify" it with his own "terms and conditions," 20 U.S.C. § 1098bb(a)(1), (b)(2), and to do so when and how "[he] deems necessary," id. § 1098bb(a)(1).

114. The statute bestows the Executive with lawmaking power in violation of Article I of the Constitution.

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court enter judgment:

A. Issue an order and judgment declaring that the Debt Nullification violates the separation of powers established by the U.S. Constitution;

B. Issue an order and judgment declaring that the Debt Nullification violates the APA because it is in excess of statutory authority, is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, and is without observance of procedure required by law;

C. Temporarily restrain and preliminarily and permanently enjoin implementation and enforcement of the Debt Nullification;

D. Temporarily restrain and preliminarily and permanently enjoin the Secretary from publishing the Debt Nullification's waiver or modification under the HEROES Act;

E. Set aside the Debt Nullification Cancellation;

F. Award Plaintiffs costs and reasonable attorneys' fees, as appropriate; and

G. Grant any other relief the Court deems just and appropriate.

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