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United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

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June 30, 2024

VIA ELECTRONIC TRANSMISSION

The Honorable Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Secretary Cardona:

As Ranking Member of the Senate Health, Education, Labor, and Pensions (HELP) Committee, I write concerning the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, and the significant changes that federal agencies will make to their rulemaking and other processes in its aftermath. For 40 years, Congress and federal courts have ceded their respective responsibilities to write and interpret statutes to federal agencies. Under the Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, courts were required to give broad deference to agencies' interpretations of ambiguous provisions in statutes.¹ The Court has now overturned that deference, reinforcing that Congress and the courts are responsible for writing and interpreting the laws, respectively; not agencies.² The Court held that such deference defies the Administrative Procedure Act, and that agency interpretations are no longer entitled to deference.³

This decision is an opportunity for executive agencies to re-examine their role relative to Congress, and to return legislating to the people's elected representatives. For too long, *Chevron* deference has let agencies make broad decisions governing a diverse country of over 330 million people. Instead of engaging in the hard work of making tradeoffs and building coalitions needed to legislate, unelected agency bureaucrats exploit statutes to impose policy decisions that exceed their authority from Congress and exercise discretion far outside their core expertise and purpose.

Such unfettered agency power by the unelected is a perversion of the Constitution. *Loper Bright* makes clear that no agency is above the law or should be afforded special treatment when its authority is challenged. Moreover, the Court has confirmed that the Department of Education (Department) needs clear, specific statutory authorization from Congress to take action on issues

¹ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

² *Loper Bright Enterprises v. Raimondo*, No. 22-1219, 2024 WL 3208360 (U.S. June 28, 2024).

³ *Id.* at *3.

of staggering “economic and political significance.”⁴ Agencies cannot seize broad power based on authorities that Congress intended to be exercised “under certain narrowly prescribed circumstances” and subtle, vague, or ambiguous statutory provisions provide no foundation for sweeping action.⁵ Even then, Congress cannot delegate its Article I legislative powers to agencies.⁶

Congress is the most politically accountable branch in our government, and should be responsible for making the most important policy decisions that affect the American people. The Court also makes clear that Congress makes law, not agencies. When the Executive Branch does make law, by promulgating regulations, it does so only within the clearly established guardrails that Congress sets. In *Loper Bright*, the Court makes clear that the role of federal courts is to “independently interpret the statute and effectuate the will of Congress subject to constitutional limits.”⁷

Despite the Court’s decision, given your agency’s track record, I am concerned about whether and how the Department will adapt to and faithfully implement both the letter and spirit of this decision. The Department has flagrantly and repeatedly violated the law. Examples of the Department’s lawlessness include when it has, without authorization from Congress:

- Refused to return student loan borrowers to repayment without an Act of Congress, despite no authority to do so without a national emergency under the HEROES Act of 2003;
- Delayed to a month of its own choosing, despite clear instruction, the requirement to return borrowers to repayment directed by the Fiscal Responsibility Act and refused to implement any consequences for failure to pay for a year;
- Created a repayment plan where 60 percent of borrowers pay nothing and have it count as an eligible payment, under the guise of the income contingent repayment program created by Congress by amendment to the Higher Education Act of 1965 in 1993;
- Redefined sex to include gender identity under Title IX, exceeding its statutory authority to regulate;
- Attempted mass-transfers of student loan debt from students to the 87 percent of taxpayers that faithfully repaid their student loans or never took out a loan; and
- Stymied federal financial support for the Charter Schools Program with unnecessary regulatory hurdles in the application process that go beyond statutory requirements and unwarranted investigations of grantees.

The Department’s attempts at transferring student loan debt to taxpayers are particularly brazen. After the Supreme Court rejected your Department’s first attempt as illegal, the Department is

⁴ See *Biden v. Nebraska*, 600 U.S. 477 (2023) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

⁵ See *Biden v. Nebraska*, 600 U.S. 477 (2023); see also *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 468 (2001) (“Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”).

⁶ See, e.g., *Gundy v. United States*, 588 U.S. 128, 135 (2019) (“Congress, this Court explained early on, may not transfer to another branch ‘powers which are strictly and exclusively legislative.’” (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825))).

⁷ *Loper Bright*, 2024 WL 3208360 at *2.

doubling down on multiple reckless loan schemes that lack statutory basis. While the Department has yet to propose key details of one of its plans, public statements from you and President Biden reinforce that the Department plans to disregard the law and attempt to again transfer student loan debt to taxpayers well beyond what Congress intended.⁸ President Biden, for example, has bragged that “[t]he Supreme Court blocked it, but that didn't stop me.”⁹ This statement is especially troubling because it displays a lawlessness that rejects the power of both Congress and the courts to limit executive power, checks and balances that are core to our constitutional system. Multiple federal courts agree—one judge lambasted your Savings on a Valuable Education (SAVE) plan as unquestionably representing an “enormous and transformative expansion in regulatory authority without clear congressional authorization.”¹⁰ Regardless of the details, Congress has not given the Department sweeping authority to pursue similarly illegal student loan schemes, and I expect these renewed attempts at illegal action will meet the same ultimate fate as the first.

Moreover, the Department has consistently failed to provide timely or satisfactory responses to oversight requests, hindering Congress’ ability to make informed policy decisions and hold your agency accountable for implementing the laws Congress writes. The Department has also ignored those that act on behalf of Congress, the Comptroller General and the Government Accountability Office. This includes oversight of the return of borrowers to student loan repayment, the botched rollout of the Free Application for Federal Student Aid (FAFSA), the role of Planned Parenthood in full-service community schools, and the protection of students at all levels from antisemitism on school campuses.

Agency responses to congressional oversight are not optional. Constructive dialogue between Congress and Executive agencies is critical to both branches serving the American people and fulfilling their respective constitutional responsibilities. To facilitate this dialogue, agencies cannot simply shrug off oversight or side-step legitimate inquiries by providing only the information the agency wants to share. Congress is constitutionally mandated to perform oversight over federal agencies, and the Department must change its perspective to be more accountable to Congress moving forward.

To understand how the Department will abide by and implement the Court’s new framework, I ask that you answer the following questions, on a question-by-question basis, **by Friday, July 19:**

⁸ Press Release, U.S. Dep’t of Educ., Secretary Cardona Statement on Supreme Court Ruling on Biden Administration’s One Time Student Debt Relief Plan (June 30, 2023), <https://www.ed.gov/news/press-releases/secretary-cardona-statement-supreme-court-ruling-biden-administrations-one-time-student-debt-relief-plan>; Press Release, U.S. Dep’t of Educ., Biden-Harris Administration Releases First Set of Draft Rules to Provide Debt Relief to Millions of Borrowers (Apr. 16, 2024), <https://www.ed.gov/news/press-releases/biden-harris-administration-releases-first-set-draft-rules-provide-debt-relief-millions-borrowers>.


⁹ *Remarks by President Biden on the Saving on a Valuable Education Plan*, The White House (Feb. 21, 2024), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2024/02/21/remarks-by-president-biden-on-the-saving-on-a-valuable-education-plan-culver-city-ca/>.

¹⁰ *Alaska v. U.S. Dep’t of Educ.*, No. 24-1057-DDC-ADM, 2024 WL 3104578, at *11 (D. Kan. June 24, 2024) (quoting *Bradford v. U.S. Dep’t of Lab.*, 101 F.4th 707, 726 (10th Cir. 2024)); see also *Missouri v. Biden*, No. 4:24-CV-00520-JAR, 2024 WL 3104514 (E.D. Mo. June 24, 2024).

1. How will the Department change its current practices to enforce the laws as Congress writes them, and not to improperly legislate via agency action?
 - a. Will the Department be conducting a systematic, action-by-action review of its ongoing activities to identify opportunities where the Department needs to make changes to account to comply with or otherwise account for the decision?
 - b. Will the Department pause or stop any existing rulemaking activities in light of the Court's decision? If so, what rules is the Department halting? If not, why does the Department feel it is legally able to continue existing rulemakings without considering the impacts of the Court's decision?
2. How does the Department plan to facilitate greater congressional involvement in policy issues under the agency's purview? Please be as specific as possible with respect to oversight responses, regular briefings, trainings and seminars, and other actions you plan to take.
3. What are your current policies about when your staff may or may not provide briefings to congressional staff? Under what situations would you refuse to brief congressional staff in response to a request for such a briefing? Where are such policies codified?
4. How do you plan on increasing the Department's responsiveness to oversight requests from Congress?
5. Moving forward, will you commit to providing a substantive response to congressional oversight requests within 30 days of receipt of the request? If not, why not?

Thank you for your prompt attention to this important matter.

Sincerely,



Bill Cassidy, M.D.

Ranking Member

U.S. Senate Committee on Health,
Education, Labor, and Pensions