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NCLA Warns Dept. of Education that Proposed Student-Loan Plan Lacks Congressional Appropriation

Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program

Washington, DC (February 14, 2023) – The U.S. Department of Education’s proposed rule “[Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program](#)” represents the latest effort to achieve through administrative fiat a massive and untargeted cancellation of student-loan debt that elected members of Congress have repeatedly declined to legislate, authorize, or pay for. The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed a [Comment](#) objecting to the Department of Education’s planned overhaul of income-driven repayment, on the grounds that the agency not only lacks the statutory authority to promulgate the proposed rule, but its statutory interpretation would also constitute an unconstitutional delegation of legislative power from Congress in violation of the Vesting and Appropriations Clauses of the Constitution.

The Department mistakenly claims authority to amend current law administratively based on 1993 amendments to the Higher Education Act (HEA). Invoking the 1993 HEA amendments, the Department seeks to create yet another loan-cancellation program that would lower the repayment cap further to a mere five percent of income above 225 percent of the poverty line; cancel a borrower’s entire loan balance after 10 years if they borrowed \$12,000 or less; and cancel the monthly accrual of interest where a borrower’s monthly loan payment using the new payment cap is less than the interest accrued. Together, these provisions would transform most student loans into untargeted grants. The Department estimates that its proposed plan would cost the Treasury \$138 billion in debt cancellation. The plan will likely cost far more: the Wharton School [estimates](#) that the cost to the Treasury over a ten-year span would range from \$333 to \$361 billion.

When Congress enacted the 1993 amendments, it did not empower the Department of Education to devise a repayment program in which most student-debt borrowers would have portions of their debt cancelled. On the contrary, those amendments were expected to be close to revenue-neutral in the long run. Congress did not specifically authorize *any* cancellation of debt in the 1993 legislation. Nor did it appropriate funds to pay for such cancellation. The proposed rule purports to find within the decades-old HEA amendments new authority to effectively transform federal student loans into grants. But the Major Questions doctrine forecloses rummaging through old statutes for such purposes. Specifically, it prohibits federal agencies from addressing issues of “vast economic and political significance” without explicit congressional authorization.

The Department essentially claims that the 1993 HEA amendments conferred unfettered unilateral discretion on the Secretary of Education. But if they had done so, that would be an unconstitutional delegation of Congress’ legislative power. Similarly, to the extent the 1993 HEA amendments conferred *any* discretion to cancel student loans, they unconstitutionally delegated Congress’ appropriations power. Thus, the proposed rule impermissibly

seizes Congress' exclusive power of the purse. If promulgated, a court would have to set aside this unlawful rule.

NCLA released the following statements:

“Congress amended the HEA in 1993 primarily to authorize direct federal lending to student borrowers. Although it added vague instructions for the Department of Education to implement income-contingent repayment plans as an afterthought, no Member of Congress who voted for the HEA imagined he or she was authorizing a massive debt-relief program for well-to-do college graduates.”

— **Sheng Li, Litigation Counsel, NCLA**

“Congress has never appropriated funds for massive debt cancellation under the HEA, and the Department of Education cannot do this by administrative fiat. NCLA hopes that our comment will cause the Department to rethink the wisdom of promulgating this proposed rule. But if it insists on keeping up this utterly unconvincing attempt to ground its newest debt-cancellation scheme in the 1993 HEA amendments, NCLA will sue to stop it.”

— **Mark Chenoweth, President, NCLA**

For more information visit the comments page [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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