New Civil Liberties Alliance

July 20, 2023

Submitted electronically at www.regulations.gov

Miguel Cardona,
Secretary of Education
U.S. Department of Education
400 Maryland Ave., SW
Washington, DC 20202

Re: Comments on Negotiated Rulemaking Committee (ED-2023-OPE-0123-0001)

Dear Secretary Cardona,

The New Civil Liberties Alliance (NCLA) appreciates the opportunity to speak at the recent Department of Education public hearing on July 18, 2023 and welcomes the chance to also provide written comment regarding the *Negotiated Rulemaking Committee*, 88 Fed. Reg. 128 (Jul. 6, 2023). NCLA opposes the development of new regulations for Federal Student Aid programs under title IV of the Higher Education Act of 1965, as amended (HEA), and urges the Department not to pursue regulations that would attempt to forgive hundreds of billions in student loan debt without involving Congress.

The Department must stop legislating new programs in the Executive Branch, which is not the proper branch for lawmaking. The Vesting Clause of Article I, Section 1 of the U.S. Constitution states that, "All legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. Article I, Section 9 of the Constitution, the Appropriations Clause, ensures that Congress—not the Department of Education—will have control over federal expenditures. *Id.* art. I, § 9. It provides that, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." *Id.*

Just as the Department's attempt to use the HEROES Act to rewrite statutory provisions and cancel hundreds of billions owed to the Treasury violated both the Vesting and Appropriations Clauses, so too any proposed negotiated rulemaking will do so if it cancels massive amounts of debt owed the Treasury without obtaining Congress' approval. An HEA-based proposal could be even worse than the HEROES Act because it would not be limited to national emergencies nor to making impacted individuals whole.

I. Statement of Interest

NCLA is a nonpartisan, nonprofit civil-rights organization founded by Prof. Philip Hamburger to defend constitutional freedoms against unlawful exercises of administrative power. NCLA challenges constitutional defects in the modern American legal framework by bringing original litigation, defending Americans from unconstitutional actions, filing *amicus curiae* briefs (including in the *Biden v. Nebraska* case), and petitioning for a redress of grievances in other ways, including by filing rulemaking comments. Although Americans still enjoy the shell of our Republic, a very different sort of government has developed within it—a type, in fact, that our Constitution was designed to prevent.

Not only does the administrative state evade constitutional limits through administrative rulemaking, adjudication, and enforcement, but increasingly, agencies bypass Congress by construing old statutes to authorize actions that they never in fact authorized. Frequently, this rummaging around in old statutes directly conflicts with the vesting of authority to set such policies elsewhere, as in this case where Congress itself must legislate the parameters of student loan debt forgiveness with precision (and has). NCLA focuses its efforts on such unlawful administrative state actions, as they violate more rights of more Americans than any other aspect of American law.

Where agencies are poised to act beyond their lawful powers, NCLA encourages them to curb the illegitimate exercise of such power by establishing meaningful limitations on administrative rulemaking, adjudication, and enforcement. The courts are not the only government bodies with the duty to attend to the law. Even more immediately, agencies and agency heads must examine whether their modes of rulemaking, adjudication, and enforcement comply with the Administrative Procedure Act (APA), laws of Congress, and the Constitution. The Department of Education should do so here.

II. An HEA-Based Student Loan Forgiveness Program Would be Unconstitutional, Just Like the HEROES Act-Based Program Was

The Supreme Court just told the Department of Education that the Major Questions Doctrine instructs it not to presume implicit statutory authority exists to sanction the creation of vast new programs based on vague or merely colorable language in old statutes. *See Biden v. Nebraska*, 600 U.S. ___, slip op. at 24–25 (2023). Yet here the Department goes again. The Supreme Court will not permit agencies to discover elephants in mouseholes. *See Nebraska*, slip op. at 12 (Barrett, J. concurring). Instead, there must be statutory clarity proportional to the scope of power asserted. *See Nebraska*, slip op. at 25 ("our precedent—old and new—requires that Congress speak clearly before a Department Secretary can unilaterally alter large sections of the American economy). Finding blanket cancellation authority for student loan debt in the HEA, as this negotiated rulemaking aims to do, will amount to pulling a woolly mammoth out of a statutory mousehole never meant for such massive undertakings. A vote of Congress is required before such a program may be instituted.

Even if the HEA permits the Department of Education to suspend the law on a case-by-case basis, that does not authorize the Department to invent wholesale exemptions. *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 78 (2014) ("The U.S. Constitution thus precluded any executive dispensing or suspending power, including any delegation of such powers to the executive"). Moreover, as Prof. Hamburger has shown, the U.S. Constitution forbids any executive dispensing or suspending power, including any delegation of such powers to the executive. Cancelling debt that borrowers are legally obligated to repay amounts to executive dispensation, that is the "power to act outside the law to relieve persons from a law that applie[s] to them." *Id.* at 77. English Kings'

exercise of dispensing power ended with James II, who was removed from power for abusing it. *Id.* at 67–68. American colonists never tolerated such power in the executive, and the U.S. Constitution forbids it. *Id.* at 73–74. Indeed, the Constitution does not countenance such behavior for the exact reason why this Administration is abusing the power: it would enable forgiving application of the law to the Administration's favored constituencies.

Such gratuitous conduct is simply not the prerogative of the executive. Allowing such behavior would also enable a complete end-run of the bicameralism and presentment requirements under the Constitution for passing laws. *See Nebraska*, slip op. at 24 ("It would be odd to think that separation of powers concerns evaporate simply because the Government is providing monetary benefits rather than imposing obligations."). The Department should consult the *Clinton v. City of New York* line-item veto supreme court case from 1998, which helps explain the constitutional limits on an agency's ability to rewrite statutes to appropriate funds. *Clinton v. New* York, 524 U.S. 417, 440–41 (1998).

In sum, the Department of Education may only cancel debt under specific provisions of the HEA where Congress pre-specifies the reason for cancellation and who qualifies. Congress has enacted numerous loan-forgiveness programs using specific language since 1965. Those specific provisions would be rendered 'surplusage' if general HEA language of Section 432(a) is read to permit the Secretary to cancel loans on a blanket basis.

III. Conclusion and Nomination Consideration

The Department of Education should abandon the proposed negotiated rulemaking, if it intends to propose blanket loan forgiveness. Alternatively, it should propose a regulation that would only take effect upon a vote of Congress. Regardless whether the Department declines the invitation to do that, the Department should at least include among the nominees for the committee set to engage in negotiations over the rule leaders of nonprofit organizations who rely on the Public Service Loan Forgiveness program to attract and retain talent. Such PSLF-participating employers are distinctly harmed and will have standing to sue over the regulations being propounded for the reasons specified in the *amicus* brief NCLA filed in the *Biden v. Nebraska* case. Having representatives from such employers serve on the committee is essential to showing that the Department takes these concerns seriously and is striving to design a rule that does not undermine the Congressionally-created incentives for public-interest employers.

Very truly yours,

/s/ Mark Chenoweth

Mark Chenoweth,
President
NEW CIVIL LIBERTIES ALLIANCE