New Civil Liberties Alliance

May 17, 2024

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 Proposed Rule, Student Debt Relief for the William D. Ford Federal Direct Loan Program (Direct Loans) Program, the Federal Family Education Loan (FFEL) Program, the Federal Perkins Loan (Perkins) Program, and the Health Education Assistance Loan (HEAL) Program

Dear Secretary Cardona,

The New Civil Liberties Alliance (NCLA) welcomes this opportunity to comment on the recent notice of proposed rulemaking (NPRM) by the Department of Education (Department) entitled *Student Debt Relief for the William D. Ford Federal Direct Loan Program (Direct Loans) Program, the Federal Family Education Loan (FFEL) Program, the Federal Perkins Loan (Perkins) Program, and the Health Education Assistance Loan (HEAL) Program*, 89 Fed. Reg. 27,564 (Apr. 17, 2024).

NCLA opposes the proposed rule and urges the Department not to adopt it. As explained below, the Department lacks any lawful statutory authority to promulgate the proposed rule and, if it implemented the rule, the Department would violate the Appropriations Clause of the Constitution by depleting nearly $150 billion from the public fisc without any appropriation from Congress. The Department should abandon the proposed rule.

STATEMENT OF INTEREST

NCLA is a nonpartisan, nonprofit civil-rights organization founded by 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, 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). Such unconstitutional administrative state actions violate more rights of more Americans than any other aspect of American law, so they are the focus of NCLA's efforts.

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 should do so here.

SUMMARY AND BACKGROUND OF THE PROPOSED RULE

The proposed rule represents the Department's 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 Department estimates the total cost to taxpayers to be $147 billion. 89 Fed. Reg. at 27,565-66 (listing "net budget impacts" for different elements of the policy). The Wharton School at the University of Pennsylvania estimates this includes $19 billion being bestowed on approximately 750,000 student-loan debtors whose average household income exceeds $300,000—each of whom would receive an average taxpayer bailout of more than $25,000.[1]

In an earlier debt-cancellation plan announced in August 2022, the Department invoked the HEROES Act of 2003 to cancel up to $20,000 in qualifying borrowers' federal student loans, purportedly to address the financial harms of the Covid-19 pandemic. In June 2023, the Supreme Court struck down that $430 billion policy as exceeding the Department's statutory authority, thus precluding the Department from cancelling any loan balances under that policy. *Biden v. Nebraska*, 143 S. Ct. 2355 (2023). Before the ink was dry on that decision, the President defiantly announced the Department would use its rulemaking authority under the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified at 20 U.S.C. § 1001 *et seq.*) (HEA) to cancel as much student-loan debt as possible.

The Department engaged in negotiated rulemaking from October 2023 to February 2024. On April 17, 2024, the Department published the NPRM, which proposes to waive federally-held

[1] Analysis of President Biden's New Plans for Student Loan Debt Relief—April 2024, available at: https://budgetmodel.wharton.upenn.edu/issues/2024/4/11/biden-student-loan-debt-relief (last visited May 16, 2024).

loans under the Federal Family Education Loan (FFEL) program authorized under Part B of Title IV of the HEA, the Direct Loan program under Part D of Title IV, the Perkins program under Part E, and the Health Education Assistance Loan (HEAL) program.[2] These waivers would include:

- For borrowers whose loan balances exceed the amount owed when the loan entered repayment, the Department would waive up to $20,000 of the excess amount. The amount waived would be unlimited if the borrower is enrolled in an income-driven repayment (IDR) plan and has an annual income of $120,000 or less individually, $180,000 or less as an individual filing as a head of household, or $240,000 for married couples filing jointly. 89 Fed. Reg. at 27,614.
- Waiver of the entire outstanding balance of a borrower's loan if the Department determines that the borrower is not enrolled in an IDR plan or an alternative repayment plan but otherwise meets the eligibility requirements for forgiveness under such plan. *Id.*
- Waiver of the entire outstanding balance of a borrower's loan if the Department determines that the borrower has not sought but otherwise meets the eligibility requirements for "any loan discharge, cancellation, or forgiveness opportunity" including, for instance, the Public Service Loan Forgiveness program (PSLF), total and permanent disability, or closed-school discharge. *Id.*
- Waiver of the entire outstanding balance of certain loans obtained to attend an institution that was closed by Department action for failing to meet an "accountability standard" or for failing to "deliver sufficient value" to students. *Id.* at 27,615.
- Waiver of the entire outstanding balance of certain loans obtained to attend an institution or program that has closed and that the Department determines either did not satisfy, for at least one year, an "accountability standard based on student outcomes" or was the subject of an unresolved Department review of an alleged failure to "deliver sufficient financial value" to students at the time of closure. *Id.*
- Waiver of the entire outstanding balance of certain loans obtained to attend "Gainful Employment" programs that have closed and that the Department determines failed debt-to-earnings and earnings premium measures that are modeled on the Department's separate rules pertaining to requirements for such programs. *Id.*

The Department estimates that a total of 27.6 million borrowers (approximately 64 percent of all borrowers) would receive some cancellation of their student-loan debt under the NPRM. *Id.* at 27,603. The Department estimates the total cost of such cancellations would be $147 billion. *Id.* at 27,565-66.

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[2] HEAL insured loans were made by participating lenders to eligible graduate students in health fields, including medicine, dentistry, and public health. HEAL loans were discontinued in 1998. Section 525 of the Consolidated Appropriations Act of 2014 transferred management of existing HEAL loans from the Department of Health and Human Services to the Department of Education, under Part B of Title IV of the HEA. Pub. L. No. 113-76, 128 Stat. 5, 413.

ANALYSIS

I. THE DEPARTMENT LACKS STATUTORY AUTHORITY TO PROMULGATE THE PROPOSED RULE

The Department claims that its massive debt cancellation is authorized by § 432(a) of the HEA, which states in relevant part: "In the performance of, and with respect to, the functions, powers, and duties, vested in him by [the HEA], the Secretary may … compromise, waive, or release any right, title, claim, lien, or demand[.]" 20 U.S.C. § 1082(a). The phrase "this part" refers to 20 U.S. Code Part B, which pertains to only the FFEL and HEAL programs. The Department nonetheless argues § 432(a) also applies to the Direct Loan and Perkins programs in 20 U.S. Code Parts D and E, respectively.

The Department interprets § 432(a)—which was enacted in 1965 as part of the original HEA—to grant the Secretary unfettered power to cancel *any* federally held student-loan debt. There is no discernible limit—under the Department's logic, it could just as easily—and just as unlawfully—cancel the entire $1.6 trillion in currently outstanding student-loan debt, including loans made under programs that Congress created decades after § 432(a) was enacted, such as the Direct Loan program. Yet, § 432(a) has never before been invoked as authority to broadly cancel student-loan debt owed to taxpayers. Nor was it previously understood to authorize such cancellations. Indeed, if the Secretary always had such unfettered power to cancel Direct Loans, as the Department now claims, various loan-forgiveness programs enacted by Congress for Direct Loans, such as the PSLF or IDR, *see* 20 U.S.C. §§ 1087e(m), 1098e, would be entirely superfluous.

The Department's assertion of this unrestrained power fits a now-familiar pattern of executive agencies "discovering" new meaning in decades-old statutory text to claim unheralded and transformative power to accomplish through administrative fiat what Congress has conspicuously declined to regulate. *See West Virginia v. EPA*, 597 U.S. 697, 724 (2022). The Supreme Court rejected a similar claim of authority to cancel billions of dollars of student debt in *Biden v. Nebraska*, 143 S. Ct. at 2375.

A. Section 432(a)'s Plain Text Precludes the NPRM

The Department's power to "waive" student loans under § 432(a) must be exercised "[i]n the performance of … the functions, powers, and duties, vested in him by this part" of Title IV of the HEA, which is 20 U.S. Code Part B – Federal Family Education Loan Program. 20 U.S.C. § 1082(a). This language contains two explicit limitations that contradict the NPRM's claim of unlimited debt-cancellation power.

First, the waiver power extends only to student loans made under "this part" of Title IV of the Act, meaning FFEL and HEAL loans under Part B. It does not permit the Secretary to waive *any* debt under the Direct Loan program in Part D, *see* 20 U.S.C. § 1087a, nor under the Perkins program in Part E, *see id.* § 1087aa. The vast majority of the Department's proposed debt-cancellation involves Direct Loan debt, which clearly falls outside of § 432(a)'s waiver authority.

A footnote in the NPRM claims § 432(a)'s waiver power applies to Direct Loans because 20 U.S.C. § 1087a(b)(2) states that Direct Loans generally "have the same terms, conditions, and benefits as [FFEL] loans[.]" 89 Fed. Reg. at 27,566 n.4. Not so. That provision regarding "terms, conditions, and benefits" of loans says nothing about the Secretary's *power to waive* debt. Nor is the Secretary's waiver power a term, condition, or benefit of a loan. Finally, Congress's enactment of separate and express provisions for when the Secretary may cancel Direct Loan debt, for example under the PSLF and IDR statutes, *see* 20 U.S.C. §§ 1087e(m), 1098e, firmly establishes that the Secretary *did not* have preexisting authority to generally waive such debt under § 432(a). Otherwise, statutes establishing PSLF, IDR, and other forgiveness programs applicable to Direct Loans would have been entirely superfluous. The NPRM does not even attempt to explain how § 432(a) purportedly applies to Perkins loans under Part E of Title IV of the Act. Section 432(a)'s waiver authority is limited to FFEL and HEAL programs under Part B, so the NPRM's attempt to cancel Direct Loans and Perkins loans is unlawful.

Second, even with respect to FFEL and HEAL programs, any § 432(a) waiver must be made in the performance of specific "functions, powers, and duties [Part B] *vested in him*." 20 U.S.C. § 1082(a) (emphasis added). In other words, § 432(a) does not provide a standalone power to cancel debt. Rather it grants the Secretary power to cancel debt only insofar as such other provisions of Part B vests in "functions, powers, and duties" to do so. The NPRM, however, fails to identify any Part B provision that vests power allowing or duty requiring the Secretary to cancel loans as proposed.

B. The Major Questions Doctrine Forecloses the Department's Reading of § 432(a)

The major questions doctrine—which the Supreme Court held applies to large-scale student-loan cancellation—confirms the Department's lack of legitimate power to enact the NPRM. The NPRM purports to find within a 60-year-old provision of the HEA new authority to "waive" any student-loan debt, including loans made under programs that did not exist when Congress enacted the statute in 1965. That belated discovery is foreclosed by the major questions doctrine, which forbids the Department from "'discover[ing] in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority.'" *West Virginia v. EPA*, 597 U.S. at 724 (quoting *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). Congress "does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

Federal agencies may not resolve issues of "vast economic and political significance" without explicit congressional authorization. *West Virginia v. EPA*, 597 U.S. at 716. "[B]oth separation of powers principles and a practical understanding of legislative intent" provide "reason to hesitate before concluding that Congress meant to confer" sweeping agency authority—even where such "regulatory assertions ha[ve] a colorable textual basis." *Id.* at 722-24 (citation and quotation marks omitted). In other words, courts must "presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Id.* at 723 (citations quotation marks omitted).

The NPRM implicates the major questions doctrine. Its $147 billion price tag easily qualifies it as having vast "economic … significance." *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (finding $50 billion is economically significant under the major questions doctrine) (citation and quotation marks omitted). The parameters of repaying and cancelling federal student loans are also issues of vast *political* significance that Congress must decide. *Biden v. Nebraska*, 143 S. Ct. at 2375. Thus, the Department must find *clear* statutory language authorizing each of the waiver categories in the NPRM.

The Department instead points to statutory language that, by its express terms, applies only to the waiver of FFEL and HEAL loans under 20 U.S. Code Part B, and only in the performance of specific "functions, powers, and duties vested in him in [that] part." 20 U.S.C. § 1082(a). This falls far short of the major questions doctrine's requirement for the Department to identify specific "functions, powers, and duties" vested in him that would support each of the NPRM's categories of student-loan cancellation.

C. The Department's Interpretation of § 432(a) Violates the Vesting Clause in Article I of the Constitution

The canon of constitutional avoidance further confirms that § 432(a) does not grant the Secretary unfettered discretion to waive debt under any federal student-loan program. Interpreting § 432(a) to authorize the proposed rule would result in an unconstitutional delegation of legislative power to the Department. "Article I, § 1, of the Constitution vests all legislative powers herein granted … in a Congress of the United States. This text permits no delegation of those powers." *Whitman*, 531 U.S. at 472 (cleaned up). Accordingly, "Congress … may not transfer to another branch 'powers which are strictly and exclusively legislative.'" *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825)). The Supreme Court's more recent formulations of that longstanding rule state that Congress may grant regulatory power to an agency only if it provides an "intelligible principle" by which the agency must exercise it. *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

While the intelligible-principle test has been criticized as too lax,[3] it still demands the articulation by Congress of objective principles that allow courts to test whether the agency has faithfully executed the legislative command. *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946); *Yakus v. United States*, 321 U.S. 414, 426 (1944) (delegation would be unconstitutional if "it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed[]"). Thus, a statute that delegates to an agency "unfettered discretion" to make policy choices is unconstitutional. *Jarkesy v. SEC*, 34 F.4th 446, 460-61 (5th Cir. 2022), *cert. granted*,

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[3] *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 77 (2015) (Thomas, J., concurring in the judgment) (explaining that the intelligible-principle "test [that courts] have applied to distinguish legislative from executive power largely abdicates [the judiciary's] duty to enforce that prohibition [against legislative delegation]").

No. 22-859 (U.S. June 30, 2023); *see also Int'l Union v. OSHA*, 938 F.2d 1310, 1317 (D.C. Cir. 1991).

Here, the NPRM claims § 432(a) grants the Department unfettered discretion to waive student-loan debt. There is no limiting principle. The Department ignores § 432(a)'s requirement for the waiver power to be supported by authority vested in him by other provisions in 20 U.S. Code Part B. That leaves no intelligible principle to guide the exercise of that waiver power. Why limit debt cancellations to unenrolled borrowers who could have been eligible for IDR or PSLF programs described in Part D of the Act? The Secretary could similarly waive his magic wand and conjure a new loan-cancellation program with whatever criteria he wanted. Indeed, that is what the NPRM proposes by cancelling debt for borrowers with balances that exceed their original loans. There is no separate statutory basis for that unprecedented giveaway. Nor do that proposal's thresholds—*i.e.* limiting cancellation to $20,000 unless the borrower makes $120,000 or less per year—have any statutory basis. Rather, the entire policy and its parameters are contrived out of whole cloth.

According to the Department, Congress in 1965 vested the Secretary with authority to waive any amount of federally held student loan debt under all federal programs—even programs Congress had not yet enacted nor even contemplated. And Congress prescribed no guidelines for the exercise of that power. If true, § 432(a) would represent an unconstitutional delegation of legislative power. Such an unconstitutional outcome could be easily avoided by giving force and effect to the plain statutory text limiting § 432(a) waivers relating to the performance of specific functions, powers, and duties vested in the Secretary by 20 U.S. Code Part B.

II. The Proposed Rule Would Violate the Appropriations Clause

The Proposed Rule also runs afoul of the Constitution's Appropriations Clause, which states: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I § 9. This clause reflects the Framers' decision to "carefully separate[] the 'purse' from the 'sword' by assigning to Congress and Congress alone the power of the purse." *Tex. Educ. Agency v. U.S. Dep't of Educ*., 992 F.3d 350, 362 (5th Cir. 2021) (quoting The Federalist No. 78 (Alexander Hamilton) and The Federalist No. 58 (James Madison)); *see also* The Federalist No. 48 (James Madison) ("[T]he legislative department alone has access to the pockets of the people[.]"). Thus, even if Congress has authorized a particular activity, and even if money is available in the Treasury to fund it, that money may lawfully be spent only if Congress specifically authorizes the expenditure. *See, e.g.*, *OPM v. Richmond*, 496 U.S. 414, 424 (1990); *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1851).

Congress' power of the purse is not limited to control over currency but also includes debt instruments held by the United States. *See Putnam v. Comm'r*, 352 U.S. 82, 89 (1956) (a "debt is an asset of full value in the creditor's hands"). "Whatever the scope of the term 'Treasury' in the Appropriations Clause, money otherwise destined for the general fund of the Treasury qualifies." *CFBP v. Comm. Fin. Servs. Ass'n. of Am., Ltd.*, No. 22-448, slip op. at 6 (U.S. May 16, 2024). Debt instruments are merely different types of assets owned by the Treasury and represent money destined for the Treasury. Indeed, there can be no artificial distinction between the two because "[i]n the 1800s … much of the country's paper currency consisted of notes issued by private banks," which were debt instruments.[4] Cancellation of debt owed to the United States, whether owed by students or foreign governments, thus requires specific Congressional appropriation. *Cf.* 7 U.S.C. § 1736e(c) (requiring specific appropriation to forgive debt owed by foreign governments).

The proposed rule would cancel a massive amount of student debt owed to the Treasury. The Department estimates that the net budget impact for all the proposed waivers would be $147 billion. 89 Fed. Reg. at 27,565-66. But the Department has not identified any Congressional appropriation to pay for this massive debt-relief program. The lion's share of waivers comes from Direct Loans held by the Department. The Omnibus Budget Reconciliation Act of 1993, Pub. No. 103-66, 107 Stat. 312, which authorized Direct Loans, included long-term funding of direct federal loans but only for two purposes: "(1) to make loans to all eligible students … ; and (2) for purchasing loans[.]" 20 U.S.C. § 1087a(a). Neither that Act, nor any other statute, appropriates funds to pay for the massive amount of loans that would be *cancelled* under the proposed rule.

CONCLUSION

The Department should not adopt the proposed rule.

Very truly yours,

/s/ Sheng Li

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[4] Bruce Champ, *Private Money in our Past, Present, and Future*, U.S. Fed. Rsrv. Bank of Cleveland (Jan. 1, 2007) (last visited May 17, 2024) *available at* https://www.clevelandfed.org/publications/economic-commentary/2007/ec-20070101-private-money-in-our-past-present-and-future; *see also* SUSAN HOFFMAN, POLITICS AND BANKING: IDEAS, PUBLIC POLICY, AND THE CREATION OF FINANCIAL INSTITUTIONS 75-76 (2001).