February 10, 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 Proposed Rule, Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program (ED-2023-OPE-0004)

Dear Secretary Cardona,

The New Civil Liberties Alliance (NCLA) welcomes this opportunity to comment on the recent Department of Education rule proposal entitled *Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program*, 88 Fed. Reg. 1894 (Jan. 11, 2023).

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 more than $100 billion from the public fisc without any appropriation from Congress. Moreover, even assuming congressional authorization for this student-loan giveaway could be found in the decades-old legislation upon which the Department relies—it cannot—if those statutes were interpreted to authorize this proposal, they would violate the Vesting Clause of the Constitution.

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 of Education should do so here.

SUMMARY 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. By the Department's own estimates, the scheme would transfer $138 billion in liabilities now owed by relatively affluent, well-educated student-loan debtors onto other taxpayers who either depleted their own savings to pay for their education, took out student loans and repaid them as promised, or never went to college at all. The grotesque unfairness of this scheme, and the perversely negative economic incentives it would invite, are well documented.[1]

The proposed rule would amend current law in three principal ways:

1. It would reduce the loan-payment cap set by Congress in 2010 from 10 percent of income above 150 percent of the poverty line to only 5 percent of income above 225 percent of the poverty line.

2. It would cancel the entire loan balance after ten years for those who borrow $12,000 or less, as opposed to the 20-year requirement set by Congress in 2010.

3. It would cancel the monthly accrual of interest where a borrower's monthly loan payment using the new cap is less than the interest accrued.

[1] *E.g.*, Adam Looney, Biden's Income-Driven Repayment plan would turn student loans into untargeted grants, Brookings Institute, Sep. 15, 2022., available at: https://www.brookings.edu/opinions/bidens-income-driven-repayment-plan-would-turn-student-loans-into-untargeted-grants/ (last visited Feb. 10, 2023) (explaining the proposal would (1) result in "[i]ncreased borrowing"; (2) "subsidize[] low-quality, low value, low earning programs and gut[] existing accountability policies"; (3) have "[h]igh potential for abuse"; (4) confer "benefits [that are] arbitrary, unequal, and unfair"; and (5) exacerbate "[t]uition inflation.").

The Department claims authority to make these changes administratively based on Sections 455(d) and (e) the Higher Education Act of 1965 (HEA), which were added to the HEA by the Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 312, 347-48. As explained below, the Department is wrong. And even if the Department were right, the relevant statutes would then be unconstitutional.

STATUTORY AND REGULATORY BACKGROUND

I. The 1993 HEA Amendments

The Omnibus Budget Reconciliation Act of 1993 amended HEA by authorizing direct federal lending to student-borrowers and empowering the Department to offer "a variety of plans for repayment of such loan, including principal and interest on the loan." 20 U.S.C. § 1087e(d)(1). One repayment option is the "income contingent repayment plan" (ICR plan), which allowed for "varying annual repayment amounts based on the income of the borrower, paid over an extended period of time prescribed by the Secretary, not to exceed 25 years." *Id.* § 1087e(d)(1)(D). The purpose of ICR plans was to "permit students to pursue public service either for a few years after completing their education or as a career since their loan burden need never be disproportionate to their income." H.R. Rep. No. 103-11, at 107, reprinted in 1993 U.S.C.C.A.N. 378, 475.

The 1993 HEA amendments authorized the Department to gather borrowers' income information and directed the Secretary to establish procedures for determining a borrower's repayment obligation and for "such other procedures as are necessary to implement effectively income contingent repayment." *Id.* § 1087e(e)(1). "A repayment schedule for a loan made under … income contingent repayment shall be based on the [borrower's] adjusted gross income." *Id.* § 1087e(e)(2). Finally, the 1993 amendments further authorized the Secretary to "promulgate regulations limiting the amount of interest that may be *capitalized* …, and the timing of any such capitalization." *Id.* § 1087e(e)(5) (emphasis added). But it did not provide any similar authority to limit, much less cancel, interest *accrual*.

ICR plans were intended to be limited in cost and scope. Then-Deputy Secretary of Education Madeline Kunin explained to Congress that ICR plans would be cost-neutral in the long run: "As to what the cost of [these plans] would be, we see it as a wash" because the government "would eventually get paid" and "[t]here would be interest charged on that, so it isn't like [borrowers] are getting a free ride."[2] She acknowledged that some small portion of loans might become uncollectable at the end of the payment period but viewed that outcome as the exception and a last resort: "So there is a provision in the bill that says the Secretary will make some designation as to when you call it quits and [borrowers] are forgiven. One possibility is around 25 years or so." *Id.* The 1993 amendments, however, did not explicitly authorize the cancellation of any student debt, and cannot plausibly be read to authorize massive, wide-scale cancellation of both principal and interest. At most, it accepted that—as with subsidized, private student loans—a small portion of the then-new direct student loans would have to be written off. In this regard, it is notable that while Congress appropriated funds in 1993 to

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[2] *Hearing of the Committee on Labor and Human Resources to Amend the Higher Education Act of 1965*, 103rd Cong. (1993), 48, available at: https://files.eric.ed.gov/fulltext/ED363187.pdf.

pay for the cost of making direct loans to student borrowers and purchasing such loans, it did not appropriation any funds to cover the cost of cancelling loans. *See* 20 U.S.C. § 1087a(a).

The Department designed the first ICR program in 1994, which allowed a borrower's monthly payment to be capped at 20 percent of income above the federal poverty line and provided that "[i]f the loan has not been repaid in full by the end of the 25-year repayment period, the remaining debt is cancelled by the Secretary."[3] Under this program, interest continues to accrue throughout the repayment period, and the Department estimated that only "approximately 12% of borrowers would not repay [in full] within the 25-year period" and thus have some debt written off.[4] A 1997 GAO report estimated nine percent of borrowers participated in ICR.[5]

II. The 2007 College Cost Reduction and Access Act

Over time, critics of ICR plans alleged two principal shortcomings: (1) monthly payments were still too high as a share of a borrower's income and (2) the 25-year period that borrowers had to wait for forgiveness was too long.[6] In response, Congress passed the College Cost Reduction and Access Act of 2007 ("2007 CCRA"), Pub. L. 110-84, 121 Stat. 784, which created two new programs to address these criticisms.

First, Congress created the Income-Based Repayment (IBR) program, which reduced the annual payment cap for eligible borrowers to 15 percent of income above 150 percent of the poverty line. *See* 20 U.S.C. §§ 1098e(a)(3)(B), (b)(1). Unlike the 1993 HEA Amendments, the 2007 law contained explicit language that authorized the cancellation of loans after 25 years of compliance. *Id.* § 1098e(b)(7) (directing that "the Secretary shall repay or cancel any outstanding balance of principal and interest" for qualifying IBR participants). In addition, the IBR statute specifically provided for relief from interest *accrual*: "interest due and not paid" by qualifying IBR participants would be paid by the Secretary but "for a period of not more than 3 years." *Id.* § 1098e(b)(3).

Second, Congress authorized the Public Service Loan Forgiveness (PSLF) program, which addressed criticism that 25 years is too long to wait for forgiveness. 20 U.S.C. § 1087e(m). Under PSLF, eligible borrowers can have their outstanding balance forgiven after working for 10 years in one or more qualified "public service job[s]" so long as they made all required payments up to that point. 20 U.S.C. § 1087e(1)(B). Borrowers can participate in both IBR and PSLF, so they can have their

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[3] CRS, *The Federal Direct Student Loan Program* 10 (1995), available at: https://files.eric.ed.gov/fulltext/ED378875.pdf.

[4] *Id.* at 11.

[5] GAO *Direct Student Loans: Analysis of Borrowers' Use of Income Contingent Repayment Option* 7 (1997), available at: https://www.gao.gov/assets/hehs-97-155.pdf.

[6] *See, e.g.*, *Robert Shireman*, et al., *Addressing Student Loan Repayment Burdens: Strengths and Weaknesses of the Current System*, Institute for College Access and Success (2006), available at: https://ticas.org/wp-content/uploads/legacy-files/pub_files/WHITE_PAPER_FINAL_PDF.pdf

monthly payments capped by the 15 percent IRB rate and still have their debt forgiven after working 10 years in public service jobs.

III. The 2010 Health Care and Education Reconciliation Act and the PAYE and REPAYE Plans

In his 2010 State of the Union address, President Obama urged Congress to make IBR even more generous by lowering the payment cap to "only 10 percent of their income [above 150 percent of the poverty line]" and shortening IBR participants' forgiveness period so "all of their debt will be forgiven after 20 years—and forgiven after 10 years if they choose a career in public service."[7] Later that year, Congress enacted these 10-percent and 20-year proposals in the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (2010), § 2213 (HCERA), but explicitly restricted the more generous terms to "new borrower[s] on or after July 1, 2014." 20 U.S.C. § 1098(e).

Despite the largesse made available to student borrowers through HCERA in 2010, the Department remained unsatisfied. In 2012, the Department invoked the 1993 HEA amendments to introduce so-called Pay As You Earn (PAYE) plans. These plans brazenly overrode HCERA's statutory restriction of its generous provisions to future loans taken in 2014 and after. *See* 77 Fed. Reg. 66,088. PAYE plans in effect granted HCERA's largesse to loans taken as far back as 2007. *Id.* In 2015, the Department circumvented HCERA's restriction even further through so-called Revised Pay As You Earn (REPAYE) plans, which extended HCERA's generous terms to *all* borrowers, regardless of when they took out loans. 80 Fed. Reg. 67,204.

REPAYE also limited the accrual of interest for certain borrowers. *Id.* at 67,205. One commenter objected that limiting interest accrual violated Section 455(e)(5) of the HEA, which provides that the balance "shall equal the unpaid principal amount of the loan [and] any accrued interest[.]" *Id.* at 67,215 (quoting Section 455(e)(5)). The Department disagreed, responding that "Section 455(e)(5) of the HEA defines how to calculate the balance due on a loan repaid under the ICR plan but does not restrict the Secretary's discretion to define or limit the amounts used in calculating the balance," *id.*, suggesting statutory silence granted the Department discretion to use whatever means it wished to calculate loan balances.

IV. The Proposed Rule

The Department's current rule proposal would push this ever-expanding envelope further, effectively tossing all statutory debt-cancellation limitation to the wind. Again invoking the 1993 HEA amendments, the Department seeks to create yet another loan-cancellation program that would combine preexisting features of ICR and IBR plans (including PAYE and REPAYE) under the umbrella term "Income-Driven Repayment" (IDR) plans. These new IDR plans 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

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[7] Obama, Barack, "Remarks by the President in State of the Union Address." Speech given before Congress at 5, Washington, DC, January 27, 2010, available at: https://www.govinfo.gov/content/pkg/DCPD-201000055/pdf/DCPD-201000055.pdf.

accrual of interest where a borrower's monthly loan payment using the new payment cap is less than the interest accrued.

The proposed rule would transform most student loans into full or partial grants. Its five percent payment cap is so low that few borrowers would pay off their loan balances before those loans are cancelled. Moreover, the accelerated 10-year cancellation for many borrowers and the non-accrual of interest for many others—the latter feature effectuating a cancellation of debt equal to interest that would have accrued—would result in a surge of student debt being cancelled rather than repaid.

A Brookings Institute analysis concluded that "the vast majority of college students will be eligible to make reduced payments (roughly 85% of undergraduates age 25-34) were they to take student loans, and a majority of undergraduate borrowers (perhaps 70%) would expect to have at least some debt forgiven after 20 years."[8] The Urban Institute conservatively estimates that, under the Department's proposal, the proportion of bachelor's degree borrowers who would pay off their entire loans "would fall from 59 percent under current [repayment programs] to 22 percent, and the share repaying no more than half of what they borrowed would increase from 22 percent to 49 percent."[9]

The Department estimates that its proposed IDR plan would cost the Treasury $138 billion in debt cancellation. 88 Fed. Reg. at 1,895. This estimate unrealistically assumes IDR enrollment rate would remain constant despite the program becoming vastly more generous. And it does not account for the obvious perverse economic incentives the proposal would exacerbate, such as encouraging borrowers to take on more loans and emboldening schools to raise tuitions. Accounting for increased enrollment, the Wharton School estimates that the cost to the Treasury over a ten-year span would range from $333 to $361 billion.[10]

ANALYSIS

I. The Department Lacks Statutory Authority to Promulgate the Proposed Rule

The Department cites the 1993 HEA amendments, codified as Sections 455(d) and (e) of the HEA, as purported statutory authority for the proposed rule. When Congress enacted the 1993 amendments, however, it gave no indication of an intent to empower the Department to enact a repayment program in which most student-debt borrowers would have portions of their debt cancelled. To the contrary, those amendments were expected to be close to revenue-neutral in the long run because lower monthly payments were to be largely offset by the interest that would continue

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[8] *Supra* note 1.

[9] Mathew Chingos, et al., Few College Students Will Repay Student Loans under the Biden Administration's Proposal, Urban Institute, Jan. 19, 2020, available at: https://www.urban.org/sites/default/files/2023-01/Few%20College%20Students%20Will%20Repay%20Student%20Loans%20under%20the%20Biden%20Administrations%20Proposal.pdf (last visited Feb. 10, 2023).

[10] Penn Wharton, Budgetary Cost of Newly Proposed Income-Driven Repayment Plan, Jan. 30, 2023, available at: https://budgetmodel.wharton.upenn.edu/issues/2023/1/30/budgetary-cost-of-proposed-income-driven-repayment (last visited Feb. 10, 2023).

to accrue on unpaid principal balances over longer periods of time.[11] Indeed, Congress did not specifically authorize *any* cancellation of debt in the 1993 legislation, even if some Department officials anticipated that the Department might have to "call it quits" in attempting to collect a limited number of loans after 25 years.[12] Nor did Congress in 1993 appropriate any funds to pay for cancelling debt under ICR plans.

The proposed rule purports to find within the three-decades-old HEA amendments new authority to effectively transform federal student loans into grants. But 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*, 142 S. Ct. 2587, 2610 (2022) (quoting *Utility Air v. EPA*, 573 U.S. 302, 324 (2014)). Congress "does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Assoc.*, 531 U.S. 457, 468 (2001).

The Major Questions doctrine prohibits federal agencies from addressing issues of "vast economic and political significance" without explicit congressional authorization. *West Virginia*, 142 S. Ct. at 2605. "[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 2608–09 (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 2609 (cleaned up).

The current rule proposal implicates the Major Questions doctrine. Its $138 billion price tag easily qualifies it as having vast "economic … significance." *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (finding $50 billion is economically significant under the Major Questions doctrine). The parameters of repaying and cancelling federal student loans are also issues of vast *political* significance that Congress must decide. When, for example, critics argued that ICR plans under the 1993 HEA amendments were insufficiently generous, it was Congress that stepped in to enact more generous IBR loan-relief thresholds in 2007. And when President Obama wanted those thresholds made even more generous in 2010, it was again left to Congress to adjust those thresholds down through HCERA. Congress' repeated action in defining and delimiting the precise parameters of federal student loan repayment and cancellation programs in 2007 and 2010 creates a strong presumption that Congress did not delegate that authority to the Department in the 1993 amendments.

As a result, a "colorable textual basis" grounded in the 1993 amendments' vague language is not enough to authorize the Department to enact its proposed sweeping transformation of the federal student-loan program. Rather, the Department "must point to 'clear congressional authorization' for

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[11] *See supra* note 3 at 10 ("[A]n important consideration for the Administration was attempting to keep the proposed plan essentially cost neutral, *i.e.*, not increase the subsidy rate over that without an income-contingent repayment option."); *supra* note 2 at 48 ("As to what the cost of that would be, we see it as a wash.").

[12] *Id.*

the power it claims" here. *West Virginia*, 142 S. Ct. at 2609. None exists for any of the proposed rule's major elements.

Nothing in the 1993 amendments clearly authorized the Department to dramatically lower the statutory minimum monthly payments to five percent of income over 225 percent of the federal poverty line. The Department's original ICR plan based on the 1993 HEA amendments capped annual payments at 20 percent of income over the poverty line. Under that rubric, a single individual today earning $45,000 would be capped at repaying $507 per month.[13] By contrast, the proposed rule purportedly authorized by the same statute would slash that individual's annual repayment cap by an astonishing 90%, to only $51 per month.[14] If Congress intended in the 1993 HEA amendments to authorize the Department to reduce annual repayments that dramatically, it most certainly would have said so in clearer terms than vague instructions to devise repayment schedules "based on the [borrower's] adjusted gross income." 20 U.S.C. § 1087e(d)(2).

The absence of Congressional authorization is reinforced by the sequence of subsequent refinements of the parameters for student-loan relief that Congress itself enacted in 2007 and 2010, which would have been unnecessary if the Department already had the delegated authority to take such action administratively. *See United States v. Hernandez-Garcia*, 44 F.4th 1157, 1164 (9th Cir.), *cert. denied*, 143 S. Ct. 508 (2022) ("[T]he later and more specific statute usually controls if two statutes conflict.") (cleaned up).

The proposed cancellation of debt for certain borrowers after 10 years is also foreclosed by the above-discussed 2007 CCRA that created PSLF to allow student borrowers to have their loan balances cancelled after serving 10 years in public-service jobs. If the 1993 HEA amendments had already authorized the Department to define a category of borrowers whose entire debt would be cancelled after 10 years, PSLF's 10-year public-service prerequisite would have been superfluous. Moreover, the Department's current proposal allowing a much broader swath of student debtors to have their entire debt cancelled after 10 years would severely undermine the core goal of PSLF by eliminating Congress' requirement that borrowers work in public-service jobs as a condition of debt cancellation after only 10 years.

Finally, the Department's proposal to cancel the accrual of interest in certain situations lacks even a colorable statutory basis. The 1993 HEA amendments addressed only the capitalization of interest, not its accrual. 20 U.S.C. § 1087e(e)(5). If Congress had wanted to authorize limits on the accrual of interest, it would have clearly said so, but it did not. Congress subsequently did so in 2007 for IBR plans when it said "any interest due and not paid … shall … be paid by the Secretary for a period of not more than 3 years[.]" 20 U.S.C. § 1098e(b)(3). That 2007 legislation, however, does not authorize the Department's current rule proposal either, because the proposal would exceed the three-year limit set by Congress. Additionally, this three-year reprieve on interest accrual is available only to IBR participants who must comply with the congressionally enacted monthly payment cap of 10 percent of income over 150 percent of the poverty line.

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[13] The 2023 federal poverty line for a single individual is $14,580. The individual's monthly payment cap is computed as ($45,000 – $14,580) * 0.2)/12.

[14] The individual's monthly payment cap is computed as ($45,000 – (2.25 * $14,580) * 0.05)/12.

In short, there is no clear authorization to support the Department's rule proposal with respect to lowering repayment caps, accelerating the cancellation period, or limiting the accrual of interest.

II. The Department's Interpretation of the 1993 HEA Amendments Would Violate the Vesting Clause

Interpreting the 1993 HEA amendments 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 states 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,[15] it still demands the articulation of objective principles that allow courts to test whether the agency has faithfully executed Congress' 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); *see also Int'l Union v. OSHA*, 938 F.2d 1310, 1317 (D.C. Cir. 1991).

Here, the Department essentially claims that the 1993 HEA amendments conferred unfettered discretion on the Secretary to invent whatever student-loan repayment plans he wishes. Under the Department's interpretation, the Secretary can disregard Congress' restriction on generous HCERA repayment caps, as the Department did in its 2012 PAYE and 2015 REPAYE programs. And now the Secretary can, by rule, slash repayment obligations further at his unfettered discretion.

There's no limiting principle to the Department's startling assertion of such unfettered, unilateral discretion. In the Department's apparent view, nothing in the statutory text would stop the Secretary from lowering the payment cap to just one percent of income above $1 million, which of course would result in zero payments from the vast majority of borrowers. Nearly all student loans would remain unpaid and then cancelled after even 20 years. Conversely, he could enact a payment cap of 100 percent of income above $1, which would not reduce the monthly payment for any borrower.

The Department's interpretation of the 1993 HEA amendments would delegate to the Secretary unfettered discretion to enact either of these extreme options (or anything in between), because each option "is based on the [borrower's] adjusted gross income." 20 U.S.C. § 1087e(e)(2); *see*

[15] *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 77 (2015) (Thomas, J., concurring) (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].").

also 88 Fed Reg. 1898. Such discretion would plainly amount to an unconstitutional delegation of legislative power. *Int'l Union*, 938 F.2d at 1317 (rejecting on nondelegation ground agency's assertion of authority "to require precautions that take the industry to the verge of economic ruin … or to do nothing at all."). Even the lax intelligible-principle test cannot support the Department's interpretation because "it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus*, 321 U.S. at 426. The Department's interpretation of the Secretary's power is therefore untenable.

III. 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." 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." *Texas Educ. Agency v. U.S. Dep't of Educ.*, 992 F.3d 350, 362 (5th Cir. 2021) (quoting The Federalist Nos. 78 (Alexander Hamilton)); *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"). They are merely different types of assets owned by the Treasury. Indeed, there can be no artificial distinction between the two because "[i]n the early 1800s much of the country's paper currency consisted of notes issued by private banks," which were debt instruments.[16] 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. According to the Department, "increased cost of the student loan programs to the taxpayers in the form of transfers [from the Treasury] to borrowers who would pay less on their loans" is "estimated to have a net budget impact of $137.9 billion across all loan cohorts through 2032." 88 Fed. Reg. 1,895. The Wharton school produced a much higher estimate of between $333 and $361 billion by accounting for increased enrollment. But the Department has not identified any Congressional appropriation to pay for this massive debt-relief program. The Omnibus Budget Reconciliation Act of 1993, which authorized ICR plans, 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.

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[16] Bruce Champ, *Private Money in our Past, Present, and Future*, U.S. Fed. Rsrv. Bank of Cleveland (Jan. 1, 2007); *see also* SUSAN HOFFMAN, POLITICS AND BANKING: IDEAS, PUBLIC POLICY, AND THE CREATION OF FINANCIAL INSTITUTIONS 75-76 (2001).

§ 1087a(a). Neither that Act, nor any other statute, appropriates funds to pay for the massive amount of debt that would be cancelled under the proposed rule.

Congress cannot delegate its exclusive power of the purse to an executive agency. *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 51 F.4th 616, 638-39 (5th Cir. 2022), *petition for cert. filed*, Nos. 22-448, 22-663 (U.S. Nov. 14, 2022). The proposed rule, however, is premised on the Secretary exercising this forbidden discretion. In the Department's 2015 rule establishing the REPAYE program, the Department claimed that the Secretary had discretion to cancel or reduce the accrual of interest on a loan because the 1993 HEA amendments did not "restrict the Secretary's discretion to define or limit the amounts used in calculating the balance" due on a loan. 80 Fed. Reg. at 67,215. Non-accrual of interest is a cancellation of the debt in an amount equal to the interest that would have accrued. Such cancellation requires specific congressional appropriation to cover the cost. If the 1993 HEA amendments delegated unfettered discretion to cancel interest—or otherwise to define how the balance due is calculated—they unconstitutionally delegated Congress' appropriation powers.

The same is true of the Department's asserted discretion to reduce minimum payments beyond the limits set by Congress and to accelerate the cancellation period. A person who pays less each month will have more unpaid debt cancelled at the end of 20 years. Thus, the proposal to reduce minimum payments—from 10 percent of income over 150 percent of the poverty line to five percent of income over 225 percent of the poverty line—is an exercise of debt-cancellation authority that requires specific congressional appropriation to cover the cost.

Similarly, when the Department shortens the time period a borrower must wait before cancellation, there will be more unpaid debt to cancel. Thus, the proposal to reduce the cancellation-waiting period for those who borrow $12,000 or less from 20 years to 10 years is likewise an exercise of debt-cancellation authority. To the extent the 1993 HEA amendments delegated discretion to cancel debt in these manners, that would be an unconstitutional delegation of Congress' appropriation powers.

Because the Proposed Rule is premised on the Secretary's purporting to have virtually unfettered discretion to determine how much existing student debt owed to the Treasury is paid back or cancelled, it impermissibly usurps Congress' exclusive power of the purse under the Appropriations Clause.

CONCLUSION

The Department should not adopt the proposed rule.

Very truly yours,

/s/ Sheng Li

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