December 2, 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 Based on Hardship for the William D. Ford Federal Direct Loan Program (Direct Loans), 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 by the Department of Education (Department) entitled *Student Debt Relief Based on Hardship 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. 87,130 (October. 31, 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 Pule and, if it implemented the rule, the Department would violate the Appropriations Clause of the Constitution by depleting over $100 billion from the public fisc without any appropriation from Congress. The Department should abandon the Proposed Rule.

Congress has authorized specific forms of debt relief for borrowers who experience economic or financial hardship, including lowering their monthly payments, temporarily pausing their repayment obligations, and temporarily halting the accrual of interest on their debt. Such relief does not, however, include the immediate and outright cancellation of *any* amount of their student-loan balance. Perhaps borrowers in economic hardship should receive some debt cancellation. But that is a decision for Congress to make. Only Congress may define "hardship,"

determine the amount of debt that should be cancelled for borrowers experiencing hardship, and appropriate funds to pay for such cancellations.

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 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 powers 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), the laws passed by 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 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 $112 billion.[1] 89 Fed. Reg. at 87,158.

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

[1] This figure understates the total cost because the Department arrived at it by assuming hundreds of billions in student-loan debt would have already been cancelled by prior student-loan cancellation programs and thus would not be cancelled by this Proposed Rule. But since those prior programs have been blocked in court for being unlawful, the amount this Proposed Rule would cancel is much higher.

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 (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 proposed a rule that would cancel approximately $150 billion of student-loan debt owed to the Treasury. The purported authority for this massive cancellation was § 432(a) of the HEA, which is codified at 20 U.S.C. § 1082(a) and authorizes the Secretary to waive repayment of loans under the now-defunct Federal Family Education Loan (FFEL) program in accordance with "functions, powers, and duties, vested in him by [Title IV Part B of the HEA]." NCLA filed a comment warning the Department that the April 2024 proposal exceeds authority conveyed by § 432(a)'s plain text, is foreclosed by the major questions doctrine, and violates the Vesting and Appropriations Clauses of Article I of the U.S. Constitution. *See* NCLA Comment Letter (May 17, 2024).[2]

The Department began to implement the April 2024 HEA Proposal without publishing a final rule—it secretly instructed loan-servicing contractors to start cancelling loans and balances in September 2024. The U.S. District Court for the Southern District of Georgia entered a temporary restraining order prohibiting the Department from implementing the April 2024 Proposal[3] before transferring the case to the Eastern District of Missouri, which—consistent with NCLA's comment letter—entered a preliminary injunction against the Department's attempt to cancel billions in student-loan debt as exceeding § 432(a)'s authorization. Order, Doc. 57 at 3, *Missouri v. Biden*, No. 24-cv-1316 (E.D. Mo. Oct. 3, 2024).

While that injunction was still in effect, the Department promulgated this Proposed Rule, which again purports to rely on § 432(a)'s waiver authority to cancel an addition $112 billion in student-loan debt for borrowers whom the Secretary deems are "experiencing hardship." 89 Fed. Reg. at 87,130. To determine whether a borrower is experiencing hardship, the Secretary would consider 17 non-exhaustive factors that pertain to the borrower's finances, repayment experience, demographic characteristics, post-secondary experience, and other factors. *Id*. at 87,138-39.

The Proposed Rule's cancellations would proceed along two paths. First, under the "predictive assessment," the Department would automatically cancel all or part of a borrower's outstanding loan balance if it determines, based on the hardship factors, that the borrower is experiencing hardship such that they are at least 80 percent likely to default on their loan in the next two years. *Id.* at 87,163. The Department estimates that this "immediate one-time relief" would automatically cancel $70 billion of debt owed by 6 million borrowers. *Id.* at 87,130, 87,158.

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[2] Available at: https://nclalegal.org/filing/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/ (last visited Nov. 25, 2024).

[3] Order, Doc. 17, *Missouri v. Biden*, No. 24-cv-103 (S.D. Ga. Sep. 5, 2024).

Second, under the "holistic assessment," the Department proposes to use data in its possession or from a borrower's application to cancel all or part of a borrower's loan balance based on a hardship finding. *Id.* at 87,163. The text of the proposed regulation does not provide details of this process. Although the proposed regulatory text contemplates an application system, the Proposed Rule states that the Secretary may also provide "automated relief" under this second process. *Id.* at 87,147. Finally, the Proposed Rule states this option would be available to borrowers going forward, even after the Department finishes granting waivers under the predictive assessment. The Department estimates that the holistic assessment would cancel $42 billion owed by 1 million borrowers. *Id.* at 87,158.

The Proposed Rule acknowledges that the Department's prior proposal to cancel billions of dollars in student-loan debt under § 432(a) has been enjoined by a federal court based on the court's preliminary conclusion that such debt cancellation exceeds statutory authority. 89 Fed. Reg. 87,130 n.1. The Department is nonetheless proposing to cancel even more student-loan debt under the same statutory provision.

ANALYSIS

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

The Supreme Court recently explained that "Congress opted to make debt forgiveness available only in a few particular exigent circumstances." *Biden v. Nebraska*, 143 S. Ct. at 2369. The Department's assertion of unbounded power to cancel "some or all of the outstanding balance on a Federal student loan," 89 Fed. Reg. at 87,130, is patently incompatible the Supreme Court's interpretation of the Department's limited debt-cancellation authority.

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

The Department claims that its massive debt cancellation based on hardship 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 this part, 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 Title IV Part B of the HEA, which govern only the now-defunct FFEL program. Section 432(a) plainly does not apply to the Direct Loan program at all, which is governed under Part D of Title IV of the HEA and is the program from which the vast majority of proposed cancellation would come. Nor does it apply to the Perkins program under Part E.

The Department nonetheless argues that § 432(a) has been incorporated into the Direct Loan program through § 451(b)(2) of the HEA. But § 451(b)(2) specifically incorporates only § 428, not § 432. *See* 20 U.S.C. § 1087a(b)(2) (designating "loans made to borrowers under this part that, except as otherwise specified in this part, have the same terms, conditions, and benefits as loans made to borrowers under section 428 [codified at 20 U.S.C. § 1078]."). Moreover, any incorporation under § 451(b)(2) would be limited to the "terms, conditions, and benefits" of the FFEL program. 20 U.S.C. § 1087a(b)(2). The "terms, benefits, and conditions" refer to the repayment period, interest, eligibility for forbearance, and the like. Another HEA provision, § 1087e(a)(1), expressly incorporates the "terms, conditions, and benefits" of the FFEL program

and states that those terms, conditions, and benefits are found in §§ 1078, 1078-2, 1078-3, and 1078-8. None of these sections includes waiver language from § 432(a). Instead, they deal with actual terms, conditions, and benefits, such as whether interest on loans will be subsidized. *E.g.*, § 1078. The Secretary's waiver authority in the FFEL program is not a "term," "condition," or "benefit" of a loan. Section 432(a) thus does not authorize the waiver of Direct Loans under Part D. Nor does it apply to Perkins loans under Part E—indeed the Department does not even attempt to explain how § 432(a) purportedly applies to Part E. Section 432(a)'s waiver authority is limited to FFEL loans under Part B, so the Proposed Rule's attempt to cancel Direct Loans and Perkins loans is unlawful.

Finally, even with respect to FFEL loans, any § 432(a) waiver must be made in the performance of specific "functions, powers, and duties *vested in him* by [Part B]." 20 U.S.C. § 1082(a) (emphasis added). In other words, § 432(a) does not provide a standalone power to cancel debt. Rather, to the extent that the Secretary has any power to "compromise, waive, or release" student debt, he may do so only if Congress has elsewhere given him a specific power or duty to do so. The Proposed Rule, however, fails to identify any provision that vests the Secretary with authority to immediately cancel loans for borrowers who are experiencing economic hardship.

To the contrary, Congress has authorized much more limited debt relief for borrowers in hardship, which does not include the outright and immediate cancellation of debt balances. Section 455(f)(2)(D), enacted in 1993, states that the Secretary may defer repayment for up to 3 years for borrowers who experience "economic hardship," during which time interest does not accrue. 20 U.S.C. § 1087e(f)(2)(D). Moreover, in defining economic hardship, the Department may not use a freewheeling 17+ factor test but rather must use "income and debt-to-income ratio as primary factors." *Id.* § 1085(o)(2). For borrowers in "partial financial hardship," which is defined based on annual income, Congress in 2007 authorized the Secretary to cap their monthly payments based on income and to cancel their debt after they have made qualifying monthly payments for 20 years. 20 U.S.C. § 1098e. Congress would have had no need to authorize deferment and payment-caps for borrowers in "economic hardship" or "partial financial hardship," as those terms are defined by statute, if § 432(a) gave the Department unfettered power since 1965 to define hardship along whatever parameters it wants and then "compromise, waive, or release" the debt of borrowers it deems to experience such hardship.

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 Proposed Rule. *See Biden v. Nebraska*, 143 S. Ct. at 2375. The Proposed Rule 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*, 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).

Federal agencies may not resolve 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 Proposed Rule implicates the major questions doctrine. Its $112 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. *Biden v. Nebraska*, 143 S. Ct. at 2375. Thus, the Department must find *clear* statutory language authorizing the cancellation of debt for borrowers in economic hardship.

The Department instead points to statutory language that, by its express terms, applies only to the waiver of now-defunct FFEL 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 Proposed Rule'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." *Am. Trucking*, 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,[4] 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

[4] *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 "largely abdicates [the judiciary's] duty to enforce that prohibition [against legislative delegation]").

(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), *affirmed on other grounds sub nom., SEC v. Jarkesy*, 144 S. Ct. 2117 (2024); *see also Int'l Union v. OSHA*, 938 F.2d 1310, 1317 (D.C. Cir. 1991).

Here, the Proposed Rule claims § 432(a) grants the Department unfettered discretion to waive student-loan debt based on its own definition of economic hardship. There are no limiting principles. The Secretary may cancel any amount of debt for borrowers he deems to have an 80 percent default risk based on a non-exhaustive set of economic-hardship factors. The 80 percent threshold and the non-exhaustive hardship factors are pure inventions of the Department and thus cannot serve as intelligible principles that guide the Department's discretion. *See Am. Trucking*, 531 U.S. at 473 ("The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory."). The Department claims authority to define economic hardship however it wants and then to cancel whatever amount of debt the Secretary wants for such borrowers. That is textbook "unfettered discretion" in violation of the nondelegation principle. 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, as long as the Secretary deems affected borrowers to experience economic hardship under whatever metric he invents and applies. 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 Title IV Part B of the HEA.

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." 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 No. 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' exclusive 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"). Currency and debt instruments 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.[5] Any cancellation of federal student-loan debt thus gives away "money otherwise destined for the general fund of the Treasury" and thus involves an appropriation of funds. *CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 425 (2024); *cf. Biden v. Nebraska*, 143 S. Ct. at 2374 (recognizing "the Secretary's loan forgiveness program … as being in the 'wheelhouse' of the House and Senate Committees on Appropriations.").

The Proposed Rule would cancel a massive amount of student debt owed to the Treasury. The Department estimates that the net budget impact for the proposed waivers would be $112 billion. 89 Fed. Reg. at 87,158. But the Department has not identified any Congressional appropriation to pay for this massive debt-relief program. The lion's share of waivers would come from Direct Loans held by the Department. The Omnibus Budget Reconciliation Act of 1993, which authorized Direct Loans, included long-term funding of Direct 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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[5] 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).