Defense of Freedom Institute

February 10, 2023

SUBMITTED VIA FEDERAL eRULEMAKING PORTAL
(www.regulations.gov)

Dr. Miguel Cardona, Secretary of Education
Attention: Richard Blasen
U.S. Department of Education
400 Maryland Ave. SW
PCP-6125
Washington, DC 20202

Re: Comment on the Department's Notice of Proposed Rulemaking Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program
Agency/Docket Number: ED–2023–OPE–0004
RIN: 1840-AD81
Document Number: 2022–28605

Dear Secretary Cardona:

The Defense of Freedom Institute for Policy Studies ("DFI") is a national nonprofit organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting the civil and constitutional rights of Americans at school and work. DFI envisions a republic where freedom, opportunity, creativity, and innovation flourish in our schools and workplaces. Our organization is composed of former U.S. Department of Education ("Department") appointees who are experts in education law and policy, in particular the areas covered by the Department's proposed regulations.

On January 11, 2023, the Department's Office of Postsecondary Education published a notice of proposed rulemaking ("NPRM") "to amend the regulations governing income-contingent repayment plans by amending the Revised Pay as You Earn (REPAYE) repayment plan, and to restructure and rename the repayment plan regulations under the William D. Ford Federal Direct Loan (Direct Loan) Program . . . ."[1]

The Department's proposed regulations purport to act under Title IV of the Higher Education Act of 1965, as amended ("HEA"), requiring that the U.S. Secretary of Education ("Secretary") "offer

[1] 88 Fed. Reg. 1894, 1894 (Jan. 11, 2023) (hereinafter "NPRM").

an income-contingent repayment plan with varying annual repayment amounts based on the borrower's income, paid over an extended period of time prescribed by the Secretary, not to exceed 25 years."[2] The Department asserts that its authority to issue the proposed rule also stems from two statutory provisions, Section 410 of the General Education Provisions Act[3] and Section 414 of the Department of Education Organization Act,[4] authorizing the Secretary to create rules and regulations governing the Department's operations, programs, and functions.[5]

Despite the unprecedented nature, immense cost, and vast implications of the Department's proposal to create a new IDR program, as outlined in this comment, the Department has only permitted the public 30 days to review and comment on its proposed rule.[6]

The Department's proposed regulatory scheme does the following:

- Purports to transform student loans issued under Title IV into a grant program in violation of the clear terms prescribed by Congress in the HEA;

- Exceeds the Department's statutory authority by effectively canceling student loan debt on a massive scale, reading into the clear terms Congress used to define federal student loan programs in the HEA an ambiguity that does not exist;

- Violates the Department's statutory obligation to collect all U.S. monetary claims;

- Ignores the Department's statutory duty to charge interest on Title IV student loan debt;

- Pretends, in clear contradiction to the unambiguous terms of the HEA, that "payments" that count toward student loan forgiveness can refer to circumstances in which the borrower pays nothing to the Department;

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[2] *Id.* at 1898.
[3] 20 U.S.C. 1221e–3 ("The Secretary, in order to carry out functions otherwise vested in the Secretary by law or by delegation of authority pursuant to law, and subject to limitations as may be otherwise imposed by law, is authorized to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department.").
[4] 20 U.S.C. 3474 ("The Secretary is authorized to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department.").
[5] NPRM at 1899.
[6] *Id.* at 1894.

- Justifies the need for a massive, taxpayer-funded subsidy to borrowers and postsecondary institutions with what appear to be pretextual reasons that mislead the public in violation of the statutory requirement that the Department offer genuine justifications for its decisions;

- Grossly underestimates the immense cost of the proposal to American taxpayers; and

- Fails, in violation of federal law, to weigh appropriately against any claimed benefits of the proposal the inevitable rise in tuition and living costs it will generate at postsecondary institutions, its likely contribution to a proliferation of low-quality academic programs, its negative impacts on affordable community colleges and trade schools, its encouragement of millions more students to incur debt to pay for college with no intention of paying it off, its contribution to administrative costs for which the Department appears to be unprepared, and its negative impacts on hiring by small entities.

This proposal, in addition to being inherently unfair to taxpayers who either never attended college or who have settled any debt they took on in doing so, is unauthorized by the HEA, is arbitrary and capricious in violation of federal law, and violates the principle enshrined in the Constitution of the United States that Congress has the exclusive power to make law and appropriate funds. The clear purpose behind the Department's proposed rule is to take a regulatory leap toward free college for all, funded by the American taxpayer, a policy that finds no basis in the statutory authority cited by the Department.

The Department should abandon its proposed rule in full and follow the law requiring the collection of student loan debt under Title IV of the HEA.

I. Background

A. Federal Law Establishing Student Loan Repayment Plans

Since Congress enacted the HEA in 1965, it has amended the law several times to require the Department to establish various plans for the repayment of student loans.[7] Of relevance to the current NPRM, Congress first provided for the creation of a repayment plan with varying payments based on the income of the borrower in 1994 with the introduction of the income-contingent

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[7] As the NPRM notes, Department regulations now contain the following plans for the repayment of Direct Loans: standard, extended, graduated, alternative, IBR, ICR, Pay As You Earn (PAYE), and REPAYE. *Id.* at 1896.

repayment ("ICR") plan.[8] In 2009, Congress introduced income-based repayment ("IBR") plans,[9] and the Department made available a Pay as You Earn ("PAYE") repayment plan in 2012 under HEA authority to establish an income-contingent repayment plan.[10]

Under the rules of the PAYE program, borrowers' required payments are limited to 10 percent of their discretionary income, defined as household income above 150 percent of the federal poverty guideline, and are capped at the amount they would have paid under a standard, 10-year payment plan.[11]

In 2016, the Obama Administration created a new program, the Revised Pay as You Earn ("REPAYE") plan, modeled on the PAYE program while broadly expanding its availability among borrowers and limiting the amount of interest charged to borrowers each month by 50 percent when their repayment amount does not cover the accrued interest.[12]

B. The President's Announcement of Student Loan Debt Cancellation and Changes to Income-Driven Repayment Rules

On August 24, 2022, President Biden announced a "three-part plan" to subvert the student loan provisions of Title IV of the HEA.[13] In the most notorious portion of the announced plan, the Biden Administration announced that it would cancel up to $20,000 in student loan debt for every borrower in America whose individual annual income is less than $125,000—or $250,000 for married couples ("Debt Cancellation Program").[14] In a less-heralded portion of the plan that will likely be more costly and pernicious in its long-term impacts, President Biden announced the proposal of "a new income-driven repayment plan that protects more low-income borrowers from making any payments and caps monthly payments for undergraduate loans at 5% of a borrower's discretionary income—half of the rate that borrowers must pay now under most existing plans."[15] The White House fact sheet announcing the plan touts that the proposal "means that the average annual student loan payment will be lowered by more than $1,000 for both current and future

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8 https://www.cbo.gov/publication/56277#:~:text=Discretionary%20income%20is%20defined%20as,Payments%20and%20Forgiveness
9 *Id.*
10 https://crsreports.congress.gov/product/pdf/R/R45931 at 49.
11 *Id.*
12 80 Fed. Reg. 67,204, 67,204–67,205 (Oct. 30, 2015).
13 https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/
14 *Id.*
15 *Id.*

borrowers."[16] The fact sheet fails to mention that the Biden Administration is placing American taxpayers on the hook for these payments.

The U.S. Court of Appeals for the Eighth Circuit has issued a preliminary injunction preventing the Department from carrying out the Debt Cancellation Program,[17] and the U.S. District Court for the Northern District of Texas has struck down that plan as "an unconstitutional exercise of Congress's legislative power . . . ."[18] Both cases are now before the U.S. Supreme Court, with oral arguments scheduled for February 28, 2023.[19]

C. The Department Publishes Its NPRM and a Request for Information on Transparency for Low-Value Postsecondary Programs

On January 11, 2023, the Department published a NPRM entitled "Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program."[20] The NPRM proposes to replace the current REPAYE plan with a new plan ("New IDR Plan"), which masquerades as a student loan repayment plan but, because of its highly generous terms for all borrowers who enroll, is in reality a program that offers delayed grants to students after they attend undergraduate or postgraduate institutions.

The New IDR Plan would raise the discretionary income excluded from the borrower's adjusted gross income (AGI), which is used to calculate his or her monthly payment, from 150 percent to 225 percent of the federal poverty level—or $30,600 per year.[21] Borrowers with undergraduate or graduate loans in the New IDR Plan who have an annual income below that level would be charged zero dollars each month for their student loans.

For holders of undergraduate loans, enrolling in the New IDR Plan would halve their monthly payment from 10 percent to 5 percent of their AGI, excluding the $30,600 per year of discretionary income noted above.[22]

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[16] *Id.*
[17]
https://www.supremecourt.gov/DocketPDF/22/22A444/247359/20221123113738326_2022.11.23%20-%20SCOTUS%20Response%20to%20Application.pdf at 10.
[18] *Brown, et al., v. U.S. Dep't of Ed., et al.*, No. 4:22-cv-0908-P, slip op. at 1 (N.D. Tx. Nov. 10, 2022).
[19] https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-506.html
[20] NPRM at 1894.
[21] *Id.* at 1925.
[22] *Id.* at 1926.

Those who have borrowed less than $12,000 to pay for undergraduate education and enroll in the New IDR Plan would see their remaining debt completely canceled after only 10 years (as opposed to 20 years under the REPAYE plan) of payments—including payments of zero dollars if their income is lower than 225 percent of the poverty level during that time.[23] Every thousand dollars former students have borrowed over that $12,000 threshold translates to an additional year beyond which their full debt is wiped out, whether or not the borrower has actually made any payments.[24]

The Department proposes that, for holders of undergraduate and graduate loans who enroll in its New IDR Plan, it will charge no interest that is not covered by the borrower's monthly payment.[25] That means any borrowers enrolled in the New IDR Plan whose monthly payments are zero dollars because their discretionary income is below 225 percent of the poverty level have their interest fully erased each month.

In yet another example of coerced, taxpayer-funded benevolence, the Department proposes to define "[m]onthly payment or the equivalent," for the purpose of counting such payments toward the cancellation of remaining student loan debt for borrowers enrolled in the New IDR Plan, as including months when a borrower has received deferment or forbearance of their loans—in other words, when they do not make any payments.[26]

On the same day that the Department proposed its New IDR Plan, it also published a "Request for Information ["RFI"] Regarding Public Transparency for Low-Financial-Value Postsecondary Programs."[27] Recognizing that its New IDR Plan "do[es] not address the underlying problems stemming from the high prices charged by some institutions and low graduation rates across postsecondary education over the last few decades," the Department "seek[s] input from the public on which measures and metrics to use to determine 'financial-value', what data could be leveraged to assist this effort, and other technical considerations."[28]

The RFI forecasts policies such as publishing an annual list of low-value programs and a letter-writing campaign to tackle the problem of credential inflation that, as we shall see below, it will only exacerbate and accelerate through the creation of its New IDR Plan.[29]

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[23] *Id.* at 1927.
[24] *Id.*
[25] *Id.*
[26] *Id.* at 1925.
[27] 88 Fed. Reg. 1567, 1567 (Jan. 11, 2023) (hereinafter "Name-and-Shame RFI").
[28] *Id.* at 1568.
[29] *Id.*

II. The New IDR Plan Proposed by the Department Would Violate the Principle of the Separation of Powers Enshrined in the U.S. Constitution

A. In *West Virginia v. EPA*, the U.S. Supreme Court Recognized that the Constitution Forbids Agencies from Basing a "Transformative Expansion" of Their Regulatory Authority on Vague Statutory Language

The Department must consider its attempt to enact its New IDR Plan, which is unauthorized under Title IV of the HEA, in the context of the U.S. Supreme Court's decision in *West Virginia v. EPA*.[30]

In that case, the Court held that the Clean Air Act provided no authority to the U.S. Environmental Protection Agency ("EPA") to promulgate a rule seeking to reduce carbon dioxide emissions from existing coal- and natural-gas-fired power plants by requiring a shift to natural gas and renewable energy sources.[31] The Court concluded that the EPA, by basing its rule on a novel application of a rarely used provision of the federal statute that would have forced a significant shift in electricity production sources,[32] "claim[ed] to discover in a long-extant statute an unheralded power representing a transformative expansion in [its] regulatory authority,"[33] thus implicating the Court's major questions doctrine.

Applying this doctrine, the Court held that the EPA could not point to "clear congressional authorization" for the power it purported to assert in the rule,[34] noting that such extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]."[35] The Court also emphasized Congress's previous rejection of legislative proposals that would have required regulation of carbon dioxide emissions from existing facilities[36] and determined that the EPA's regulatory scheme constituted a "fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation into an entirely different kind."[37] Finding that a "decision of such magnitude and consequence rests with Congress itself, or

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30 142 S. Ct. 2587 (2022).
31 *Id.* at 2603, 2616.
32 *Id.* at 2610.
33 *Id.* (internal quotation marks omitted) (quoting *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).
34 *Id.* at 2614 (quoting *Utility Air*, 573 U. S. at 324).
35 *Id.* at 2609 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).
36 *Id.* at 2614.
37 *Id.* at 2612 (internal quotation marks omitted) (quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994)).

an agency acting pursuant to a clear delegation from that representative body," the Court held that the EPA had no authority to issue the rule.[38]

B. The Department's New IDR Plan Is a Matter of Economic and Political Significance Implicating the Major Questions Doctrine

i. The Department's Proposed Regulatory Scheme Would Effect a "Fundamental Revision of the Statute" by Transforming a Student Loan Program into a Delayed Grant Program

In creating the New IDR Plan, the Department's NPRM points with hope[39] to direction from Congress requiring the Department to offer "an income contingent repayment plan, with 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 . . . ."[40] By effectively canceling the debt of a broad segment of former students of postsecondary institutions, as well as offering free money for prospective students to attend college, the Department's NPRM ignores one of the most basic operative terms in the statute: "repayment." The Department has proposed such generous terms for student "loans" that they purport to fundamentally revise the statute beyond all recognition, no longer requiring repayment of all debt for a huge proportion of the population and instead placing the cost of college education on taxpayers. Such a revision of the statute to support an "unheralded power" giving the Department a "transformative expansion [of] its regulatory authority" implicates the Supreme Court's major questions doctrine.

In its NPRM, the Department also relies on two general grants of power to the Secretary to make rules and regulations as authority for the creation of the New IDR Plan. Section 410 of the General Education Provisions Act authorizes "[t]he Secretary, in order to carry out functions otherwise vested in the Secretary by law or by delegation of authority pursuant to law, and subject to limitations as may be otherwise imposed by law," to issue rules and regulations.[41] Section 414 of the Department of Education Organization Act grants the Secretary the authority "to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department."[42] Neither of these general grants of authority gives the Secretary the power to contravene the much more specific limitations on student loan terms and conditions set out in Title IV of the HEA, which require the Secretary to offer programs for the repayment of loans, not the gifting of grants.

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[38] *Id.* at 2616.
[39] NPRM at 1898.
[40] 20 U.S.C. § 1087e(d)(1)(D).
[41] 20 U.S.C. 1221e–3.
[42] 20 U.S.C. 3474.

ii. The Department's Proposed New IDR Plan Is a Matter of Economic Significance

The Department's proposed regulatory scheme is unquestionably, as conceded by the Department, a matter of economic significance. The Department estimates the New IDR Plan's net budget impact as $137.9 billion, "with annualized transfers of $14.8 billion at 3 percent discounting and $16.3 billion at 7 percent discounting," and recognizes that the proposal is "economically significant" under the terms of Executive Order 12866, requiring review by the Office of Management and Budget ("OMB").[43] Demonstrating its extraordinary cost in the context of the Department's student aid programs, this annual estimated cost comprises over 10 percent of the total federal student aid the Department delivered in fiscal year 2022.[44]

As described in more detail below, the Department's projected cost has been widely panned as an underestimate, to a large extent because the Department arbitrarily and capriciously declines in its NPRM even to attempt to estimate the number of students who would switch to its generous new plan and fails to take into account the increased cost of the program if the Supreme Court strikes down the Debt Cancellation Program. A study from the University of Pennsylvania's Wharton School states that the cost of the New IDR Plan could exceed $520 billion.[45] If the Supreme Court strikes down the Debt Cancellation Program, one comprehensive review of the program estimates that the cost could represent a total cost of over $1 trillion.[46] This is back door student loan cancellation through other means.

As discussed below, the Department also arbitrarily and capriciously fails to account in its estimated costs for the rise in tuition and living expenses that will inevitably result from its New IDR Plan and, even more importantly, the general inflationary impacts of the program, which will represent a double blow to taxpayers as they pay for the Department's redistribution scheme and face the higher prices that result from profligate government spending.

In short, these extraordinary budgetary and other impacts of the Department's proposed regulatory scheme mean that it is a matter of economic significance implicating the major questions doctrine.

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[43] NPRM at 1912.
[44] https://www2.ed.gov/about/reports/annual/2022report/fsa-report.pdf at 8 (containing a graph, labeled Figure 5, showing $111.6 billion in federal student aid delivered in fiscal year 2022).
[45] https://budgetmodel.wharton.upenn.edu/issues/2022/8/26/biden-student-loan-forgiveness
[46] https://www.studentloanplanner.com/new-repaye-plan-ten-year-cost/

iii. The Department's Proposed New IDR Plan Is a Matter of Political Significance

Despite the fact that the New IDR Plan has received less media attention than the Debt Cancellation Program, it is worth recalling that the President announced the proposed New IDR Plan with his cancellation program as part of his "three-part plan" to address student loan costs.[47] The Debt Cancellation Program and the New IDR Plan are part and parcel of the same effort that will have a massive impact, never envisioned by Congress in legislating and amending Title IV of the HEA, on the funding of higher education.

Moreover, the New IDR Plan is, in effect, a loan cancellation program that will likely result in the same or even higher level of taxpayer-funded subsidies to student loan borrowers as the Debt Cancellation Program.[48] President Biden presented the loan cancellation scheme, including the New IDR Plan, as a "*comprehensive effort* to address the burden of growing college costs and make the student loan system more manageable for working families."[49] The Department has characterized the New IDR Plan as "deliver[ing] on President Biden's commitment to *fix the student loan repayment system*, as part of the debt relief announcement in August, and is a *key step* in the Biden-Harris Administration's broader effort to *make higher education more affordable*."[50] These terms demonstrate the view of President Biden and political appointees at the Department that canceling student loan debt at the expense of the taxpayer, as it proposed to do through the New IDR Plan, is a critical part of its plan to subsidize the cost of college for a massive segment of the population.

Demonstrating the political controversy generated by the Debt Cancellation Program, the announcement of the plan, which has been held unconstitutional by a federal district court as being beyond the authority of the Biden Administration, generated at least half a dozen lawsuits across the country,[51] two of which are now before the Supreme Court. These two lawsuits include a suit by six states—Nebraska, Missouri, Arkansas, Iowa, Kansas, and South Carolina—all of which contest the President's statutory and constitutional authority to cancel student loans on a

[47] https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/
[48] *See supra* notes 45, 46.
[49] https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/ (emphasis added).
[50] https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/idrfactsheetfin.pdf at 1 (emphases added). As discussed below, the New IDR Plan would not "make higher education more affordable," but rather force taxpayers to shoulder more of the rising burden of college tuition and living expenses while doing nothing to address the root cause of such credential inflation.
[51] https://www.highereddive.com/news/a-running-list-of-lawsuits-against-bidens-student-loan-forgiveness-plan/634707/

categorical basis.[52] The U.S. Court of Appeals for the Eighth Circuit, in issuing a preliminary injunction prohibiting the Biden Administration from implementing the program, concluded that these states raised "substantial questions of law" regarding the program's legality.[53] Since that case reached the Supreme Court, 17 other states filed an amicus brief in support of the plaintiffs' lawsuit.[54] 128 Members of the House of Representatives submitted an amicus brief in the case,[55] as have 43 Senators[56] and five former secretaries of education.[57]

Because it is part of the same plan to "fix" the problem of student loan debt, the Department's proposed New IDR Plan is inextricably linked to the political controversy surrounding the Debt Cancellation Program, and it would serve to do precisely the same thing as the Debt Cancellation Program—cancel the student loan debt of a large proportion of borrowers—albeit less obviously and on a more permanent scale. As discussed previously, it may cost even more than the Debt Cancellation Program, whose cost the Congressional Budget Office ("CBO") has projected to be approximately $400 billion,[58] and its cost will certainly increase dramatically if the Supreme Court strikes down the Debt Cancellation Program.

The Department's proposed New IDR Plan is thus, for the same reasons as the Debt Cancellation Program, a matter of political importance, implicating the major questions doctrine and requiring the Department's review, as part of the rulemaking process, of whether it is based on "clear authorization" from Congress.

iv. Congress Has Considered and Rejected Massive Taxpayer Subsidies to Cancel All or Portions of Student Loan Debt

In his concurring opinion in *West Virginia v. EPA*, U.S. Supreme Court Justice Neil Gorsuch reasoned that Congress's consideration and rejection of proposals similar to those contained in a

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[52] *See* https://www.supremecourt.gov/DocketPDF/22/22A444/247359/20221123113738326_2022.11.23%20-%20SCOTUS%20Response%20to%20Application.pdf.
[53] *Id.* at 11.
[54] https://www.supremecourt.gov/DocketPDF/22/22A444/247371/20221123114518033_Motion%20for%20Leave%20to%20File%20Brief%20-%20FINAL.pdf
[55] https://www.supremecourt.gov/DocketPDF/22/22-506/253929/20230203131154392_22-506%20Amicus%20Brief%20of%20128%20U.S.%20Representatives.pdf
[56] https://www.supremecourt.gov/DocketPDF/22/22-506/253935/20230203133433451_Final%20Senators%20Amicus%20Brief%20-%20Biden%20v.%20Nebraska.pdf
[57] https://dfipolicy.org/wp-content/uploads/2023/02/DFI-Amicus-Brief-Biden-v.-Nebraska-S.Ct_..pdf
[58] https://www.npr.org/2022/09/27/1125272287/student-loan-forgiveness-cost-billion

regulation "may be a sign that an agency is attempting to 'work around' the legislative process to resolve for itself a question of great political significance."[59] In recent years, Congress has considered multiple attempts to legislate categorical cancellation of loans, which is at issue in the Department's proposal of its New IDR Plan, and has failed to adopt any of these proposals.

In 2019, Senator Elizabeth Warren and House Majority Whip James Clyburn introduced in their respective chambers legislation that would cancel up to $50,000 in loan debt for each borrower making under $100,000 per year.[60] In fact, during the 2019–20 legislative session, Members of Congress introduce over 80 bills seeking to cancel loans on a categorical basis or otherwise reform the student loan system.[61] Congress failed to pass any debt-forgiveness legislation.[62]

During its 2021–22 session, Congress considered proposals that would, among other things, cancel the debts of educators; permit borrowers to discharge their loans in bankruptcy; give the Department the authority to pay $25,000 to settle student loans of each borrower; and, most pertinently with regard to the Department's present proposal, refinance student loans at a zero-percent interest rate.[63] Representative Al Lawson proposed legislation to cancel outstanding student loan balances for anyone making under $100,00 per year individually or $200,000 per year for married couples filing their taxes jointly.[64] Congress passed none of these bills.

Former House Speaker Nancy Pelosi only recently explained, "People think that the president of the United States has the power for debt forgiveness. . . . He does not. He can postpone, he can delay, but he does not have that power. That has to be [accomplished through] an act of Congress."[65] This statement applies just as much to a permanent program of canceling all or a portion of former, current, and prospective students' debt, as set out in the Department's proposed New IDR Program, as it does to the Debt Cancellation Program.

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[59] https://dfipolicy.org/wp-content/uploads/2023/02/DFI-Amicus-Brief-Biden-v.-Nebraska-S.Ct_..pdf at 16–17 (quoting *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring)).
[60] https://www.supremecourt.gov/DocketPDF/22/22-506/253811/20230202144517744_AFPI%20Amicus%20Brief.pdf at 16 (citing Press Release, Sen. Elizabeth Warren, Senator Warren, House Majority Whip Clyburn Introduce Legislation to Cancel Student Loan Debt for Millions of Americans (July 23, 2019)).
[61] https://www.supremecourt.gov/DocketPDF/22/22-535/253308/20230127141422535_22-535 Respondents Brief Final.pdf at 10 (citing Kantrowitz, Year in Review: Student Loan Forgiveness Legislation, Forbes (Dec. 24, 2020)).
[62] *Id.* at 11.
[63] https://www.supremecourt.gov/DocketPDF/22/22-506/253811/20230202144517744_AFPI Amicus Brief.pdf at 17.
[64] *Brown, et al., v. U.S. Dep't of Ed., et al.*, No. 4:22-cv-0908-P, slip op. at 2 (N.D. Tx. Nov. 10, 2022) (citing H.R. 2034, 117th Cong. (2021)).
[65] *Quoted in id.* at 3.

The extensive legislative efforts described above simply make no sense in a universe where the Department, through its use of pens and phones, can simply transform a student loan system into a delayed grant program, ensuring zero-dollar payments and *de facto* mass cancellation of unpaid loans in the process. Members of Congress of both parties have demonstrated very clearly that they believe Congress holds the reins regarding authorization of spending to cancel student loan debt or to convert loans into grants. The Department's proposal to co-opt this authority thus implicates the major questions doctrine.

v. The Department Has Never Interpreted Its Authority to Offer Income-Contingent Student Loan Repayment Plans to Convert Student Loans into Grants

As Chief Justice John Roberts wrote in the Court's decision in *West Virginia v. EPA*, "[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred."[66] It is thus telling and consequential that, since Congress introduced the first income-contingent repayment plan in 1994, the Department has never determined that it has the authority effectively to cancel massive amounts of student debt through such plans.

Even the most radical revamp of income-contingent repayment before the current NPRM—the Obama Administration's REPAYE program, made available to borrowers in 2016—broadly accepted the contours of the repayment plans that came before it, such as maintaining the 150 percent discretionary income exemption, the limit on monthly payments to 10 percent of adjusted gross income, and at least 20 years of repayment prior to cancellation.[67] In keeping with statutory requirements, the REPAYE plan limited *but did not eliminate* the interest capitalized on student loans when borrowers did not cover interest accrual in their monthly payments.[68]

The Department's proposed New IDR Plan leaves behind any of the regulatory or statutory guardrails the Department observed in previous interpretations of the law and attempts to establish a program that drastically increases the share of student loan debt that is paid by the taxpayer rather than the borrower who agreed to the loan. As explained above, the New IDR Plan radically departs from previous plans by increasing the discretionary income threshold from 150 percent to 225 percent of federal poverty guidelines; halves the percentage borrowers must pay from their

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[66] *West Virginia*, 142 S. Ct. at 2610.

[67] 80 Fed. Reg. 67,204 (Oct. 30, 2015); NPRM at 1896 (stating that the REPAYE plan was "modeled on the PAYE plan").

[68] https://www.cbo.gov/publication/56277#:~:text=Discretionary%20income%20is%20defined%20as,Payments%20and%20Forgiveness (noting that "borrowers in the REPAYE plan are eligible for an interest subsidy, which reduces the unpaid interest added to their loan balance by half").

discretionary incomes to five percent; slashes to 10 years the time after which a large proportion of borrowers who used loans to fund their undergraduate studies will have their remaining balances wiped out; and charges no interest on loans when borrowers' monthly payments do not cover that interest. This is a brave new world of funding college and graduate degrees, unrelated to anything that has come before it in the Department's regulatory efforts.

The Department's overreach without any regard to its previous interpretations of its authority of the HEA clearly implicates the major questions doctrine and requires it to evaluate its authority to propose the New IDR Plan in the context of the Supreme Court's ruling in *West Virginia v. EPA.*

C. To Comply with Federal Law, the Department Must Evaluate Its Authority to Establish the New IDR Plan in Light of the Major Questions Doctrine

In Title IV of the HEA, Congress required the Department to offer a variety of student "loan" plans, including income contingent "repayment." If Congress had intended to require the Department to offer a new grant program rather than a loan program for students, it would have done so. As discussed previously, Congress has considered various proposals for categorical student loan cancellation and an expansion of college and university grant programs but has not adopted any legislation that could give the Department the authority it currently claims. The Department cannot point to any "clear authorization" of its New IDR Plan in the statutory text; therefore, its proposal would arrogate to the Department the lawmaking power granted exclusively to Congress in violation of the constitutional principle of the separation of powers.

In light of these considerations, if the Department proceeds to the promulgation of a final rule on this matter, it must explain to the public how a statute intended to provide options for students receiving undergraduate or postgraduate degrees to fund their education using loans that are to be repaid could possibly authorize the Department to instead subsidize the cost of college on a massive scale and at a correspondingly massive cost to the taxpayer. If it does not explain this, the Department's proposed rule is arbitrary and capricious, in violation of federal law.

III. The Department's Proposed New IDR Plan Would Violate the APA Because It Exceeds the Department's Statutory Authority

A. The Department's Proposed Rule, by Twisting the Terms of a Statutory Student Loan Scheme into a Delayed Grant Program, Has No Basis in the Statutory Text

The Administrative Procedure Act ("APA") requires courts to set aside federal agency rulemaking that exceeds the agency's statutory jurisdiction or authority. Section 706(2)(A) of the APA provides that agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" shall be held unlawful and set aside.[69] Section 706(2)(C) requires that when the agency action is found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," the action shall be held unlawful and set aside.[70]

This comment provides a robust explanation as to why the proposed rulemaking ignores clear statutory terms requiring the Department to offer "loans"—not grants—and providing for the "repayment" of these loans. This proposed trespass beyond Congress's clearly marked statutory boundaries violates the principle of separation of powers embedded in the Constitution. The proposed regulations transform the statute into something that it is not and do so without clear congressional authorization; the Department can point to no legislative or regulatory precedent allowing it to accomplish its extraordinary aim of paying for all or part of the cost of college for a massive segment of the population. The Department abuses its statutory authority to provide "free college" for those who would benefit from its scheme.

Because the proposed New IDR Plan goes far beyond any congressional authorization found in the text of Title IV of the HEA, which requires the offering of an income-contingent loan option but says nothing of the taxpayer-funded *de facto* grant program proposed in the NPRM, the Department's proposed rule is "in excess of statutory jurisdiction" and in violation of the APA, and must be withdrawn.

The Department must explain why its attempt to transform a student loan debt program into a reduced-cost college program is not "in excess of statutory jurisdiction" in violation of the APA, or it is acting in an arbitrary and capricious manner.

B. The Department's Statutory Obligation to "Aggressively Collect All Debts" Precludes Its Authority to Issue the Proposed Rule

Under the Federal Claims Collection Act,[71] federal agencies must "try to collect a claim of the United States Government for money . . . arising out of the activities of, or referred to, the agency"[72] and narrowly cabins the authority of such agencies to compromise or otherwise settle such debts.[73] Federal regulation requires that the Secretary "aggressively collect all debts."[74] Against this backdrop, the Secretary has no authority to refuse to collect student loan debts, which are monetary claims of the United States Government. This refusal, through a delayed grant

[69] 5 U.S.C. § 706(2)(A).
[70] 5 U.S.C. § 706(2)(C).
[71] 31 U.S.C. § 3711, *et seq.*
[72] 31 U.S.C. § 3711(a)(1).
[73] 31 U.S.C. § 3711(a)(2).
[74] 31 CFR 901.1(a).

program masquerading as a student loan repayment plan, is not in accordance with law and thus violates the APA.

The Department must explain why it has the authority to ignore statutory and regulatory mandates requiring it to collect claims and limits on its authority to compromise such claims, or it is acting in an arbitrary and capricious manner.

C. The Department's Proposal to Waive Interest Charges Exceeds Its Statutory Authority

In its NPRM, the Department proposes to provide in 34 C.F.R. § 685.209(h)(1) that, "[u]nder the REPAYE plan, during all periods of repayment on all loans being repaid under the REPAYE plan, the Secretary does not charge the borrower's account any accrued interest that is not covered by the borrower's payment."[75] The Department explains, "This would be an expansion of the current REPAYE plan interest benefit," which *limits* to 50 percent the interest charged to borrowers whose payments do not cover their interest accrual.[76]

The Department has no statutory authority to decline to calculate the interest due on a student loan and add it to the amount to be repaid. At most the statute gives the Secretary the power to *limit* the amount of interest capitalized,[77] but this is a far cry from permitting the Secretary to ignore it completely. By vastly expanding the proportion of undergraduate and graduate borrowers who are charged no monthly payment for their student loans, and then failing to charge any interest on those loans—in many cases until they are forgiven after only 10 years—the New IDR Plan would contravene the statute by charging no interest to a large category of student loan borrowers.

The Department must explain its statutory authority to refuse to charge any interest on a substantial proportion of student loans in light of that proposal's contradiction of the terms of the HEA, which only permit the Department to limit the charging of such interest, or it is acting in an arbitrary and capricious manner.

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[75] NPRM at 1927.
[76] NPRM at 1905.
[77] 20 U.S.C. § 1087e(e)(5) ("The balance due on a loan made under this part [20 USCS §§ 1087a et seq.] that is repaid pursuant to income contingent repayment shall equal the unpaid principal amount of the loan, *any accrued interest*, and any fees, such as late charges, assessed on such loan. The Secretary may promulgate regulations *limiting* the amount of interest that may be capitalized on such loan, and the timing of any such capitalization." (emphases added)).

D. The Department's Proposal to Count Months Where Borrowers Make No Payments Because They Are in Deferment or Forbearance Toward Forgiveness Is Not Permitted by Statute

In its NPRM, the Department proposes to count toward the maximum student loan repayment period months when borrowers have made no payments because they are in deferment or forbearance.[78] This is in clear contravention of 20 U.S.C. § 1087e(e)(7), which states that, "[i]n calculating the extended period of time for which an income contingent repayment plan under this subsection may be in effect for a borrower, the Secretary shall include all time periods during which a borrower of loans" is not in default on any such loans, and either "in deferment due to an economic hardship" as described elsewhere in the HEA or making various kinds of "payments" on student loans.[79] The Department's proposed rule would count toward the definition of "payments" any deferment or forbearance, far beyond the kind of deferment "due to an economic hardship" described in the statute.

The Department seems to believe that this statutory mandate setting out how the Secretary must calculate a maximum payment period is simply advisory, asserting in its NPRM that "[t]his section does not specifically limit the calculation to only those periods or specifically preclude the Secretary from using the regulatory authority to add additional periods."[80] But its transformation of the definition of "payment" to include months where a student loan borrower makes *no* payment because he or she is in deferment or forbearance is a twisting of simple language worthy of Orwell and is not allowed under the statute.

The Department must explain how its redefinition of "payment" to include periods of non-payment is authorized by the clear language of the statute, or it is acting in an arbitrary and capricious manner.

IV. The Department's Proposed Rule Violates the APA Because It Is Based on a Contrived Reason

A. The Refusal of the Department to Tailor Its New IDR Plan to the Students It Claims to Help Reveals that the NPRM's Reasoning Is Contrived in Violation of the APA

In *Department of Commerce v. New York*,[81] the U.S. Supreme Court invalidated a rule issued by the U.S. Department of Commerce ("Commerce") adding to the 2020 Decennial Census

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[78] NPRM at 1925 (redefining "Monthly payment or the equivalent" in 685.209(b)).
[79] 20 U.S.C. § 1087e(e)(7).
[80] NPRM at 1899.
[81] 139 S. Ct. 2551 (2019).

questionnaire a question about respondents' U.S. citizenship.[82] The Court found that the sole reason for the addition of the question as stated by Commerce in the contemporaneous record—that it "was simply acting on a routine data request from another agency," in this case the U.S. Department of Justice seeking data to help enforce the Voting Rights Act—"seems to have been contrived."[83] In his opinion for the Court, Chief Justice Roberts explained:

> The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.[84]

In the present rulemaking, the Department states that its New IDR Plan is necessary to help "struggling borrowers . . . improve their chances of avoiding delinquency and default."[85] It bolsters this reasoning by offering analyses showing that "low-income borrowers" are not enrolling in IDR plans, thus exposing them to default on their student loans.[86] The NPRM also identifies the goal of allowing borrowers to access "effective *and affordable* loan repayment plans."[87]

The Department's explanation for giving what it (arbitrarily and capriciously) estimates to be $137.9 billion in taxpayer funds haphazardly to cancel the student loan debt of a broad segment of the population of borrowers in this country simply does not match its stated reason of assisting student loan borrowers who are struggling under their debt. If the Department had such an intention, it would no doubt have attempted in some way to tailor the program to student loan borrowers who are struggling. The fact that it abjectly fails to perform any such tailoring clearly demonstrates that the Department is actually pursuing a different aim that it assiduously avoids setting out in its NPRM, to the detriment of those seeking to comment on the NPRM and in violation of the APA under the Supreme Court's *New York* precedent.

Independent analysis of the Department's proposed New IDR Plan indicates that it constitutes a taxpayer gift to nearly all former, current, and prospective students. For instance, the Department estimates that the point at which it will no longer make sense for a borrower to choose the plan is

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[82] *Id.* at 2576.
[83] *Id.* at 2574, 2575.
[84] *Id.* at 2575–2576.
[85] NPRM at 1913.
[86] *Id.*
[87] *Id.* (emphasis added).

$75,500, which is in the 98th percentile for ages 22 to 25.[88] 225 percent of the current poverty line is $30,600, which is at the 78th percentile for ages 22 to 25.[89] No one earning below this level would pay a cent toward his or her student loans under the New IDR Plan.

Research published by the Brookings Institution indicates that approximately 85 percent of those with undergraduate loans of age 25 to 34 will receive taxpayer subsidies for their loans under the New IDR Plan.[90] While the CBO currently estimates that the average borrower will pay nearly $1.11 per dollar he or she borrows, the Department's proposed plan would drop this number to 50 cents on every dollar for undergraduate borrowers.[91]

This result goes so far beyond targeting a policy measure to solve the specific problem of young borrowers struggling with debt that it seems explainable only if the Department is attempting to fulfill some other goal that it leaves unstated. One possible reason the Department may have for permanently saddling taxpayers with student loan debt of a large majority of those who attended college, including those who have the resources to pay off such debt, would be to implement a quiet policy of paying for at least part of the undergraduate and graduate education for everyone in America. Unlike the unpersuasive reasoning cited by the Department regarding helping borrowers who are struggling with their debt, this reasoning would explain the unnecessarily massive, untargeted scope of the New IDR Plan. Again, the NPRM is a "free college" plan by another name.

The Department must state whether one of its purposes in proposing the New IDR Plan is to implement a policy of replacing at least a portion of federal student loans with taxpayer funding of postsecondary education. If it does not address this issue, it is acting arbitrarily and capriciously. If it maintains that it truly is only interested in helping borrowers who are struggling with paying their loans, then it must explain why it is subsidizing (and in many cases canceling) the debt of so many borrowers—many of them doctors, lawyers, and other professionals—who will have no trouble repaying it.

Regardless of whether or not it issues a late, more realistic explanation for the massive scope of its program, the Department has already failed, arbitrarily and capriciously, to offer a reasoned explanation for its non-tailored proposal to subsidize nearly everyone's postsecondary education.

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[88] https://www.dailysignal.com/2023/01/11/biden-education-departments-plan-for-socializing-higher-education-via-student-loan-repayment-scheme/?fbclid=IwAR09ZwE4opHw9uMoEIkNCPhrpXTG2i5uuO4e5nBhXxSAHDOcZy7LUFcoVSw

[89] *Id.*

[90] https://www.brookings.edu/opinions/bidens-income-driven-repayment-plan-would-turn-student-loans-into-untargeted-grants/

[91] *Id.*

The Department's should therefore withdraw its current NPRM and go back to the drawing board to produce a NPRM that adequately explains its proposed rule.

B. The Department Appears to Justify Its Proposed New IDR Plan with Reasoning About Its Varying Impacts on Racial Groupings that It Fails to Include in the NPRM

In its fact sheet introducing the proposed New IDR Plan, the Department includes the following reasoning that appears nowhere in its NPRM:

> Where differences exist in earnings, unemployment, and other factors for borrowers of different races and ethnicities, these groups may also experience differences in average benefits received from the new REPAYE plan for borrowers in these groups. For Black, Hispanic, American Indian and Alaska Native borrowers, the Department estimates that lifetime payments per dollar borrowed would be around 50 percent of what they would be on the current REPAYE plan. White borrowers' projected lifetime payments per dollar borrowed would be 37 percent less than under the current REPAYE plan. Asian and Pacific Islander borrowers would see average lifetime payments per dollar borrowed fall by approximately 33 percent.[92]

As a substantive matter, this statement is a bewildering admission that, in the name of so-called "equity," the Department is attempting to justify its New IDR Plan on the varying impacts of the program on different racial groups, apparently favoring "Black, Hispanic, American Indian and Alaska Native borrowers," who would purportedly receiver greater monetary benefits from the program over white and Asian and Pacific Islander borrowers. Making decisions on the basis of which racial groups win and lose as a result of their implementation is improper and violates the Constitution and federal civil rights laws.

This reasoning also appears nowhere in the NPRM. The Department must therefore explain whether it based its proposed rule on considerations regarding racial "equity"—namely, determining which racial groups would benefit the most from the New IDR Plan to justify its proposal. If it did rely on this reasoning in proposing the rule but did not include it in the NPRM, then the Department has deprived the public of an adequate opportunity to comment on its reasoning, and it should withdraw its current NPRM in favor of a NPRM that fully states the Department's reasoning.

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[92] https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/idrfactsheetfin.pdf at 6.

V. The Department's Proposed New IDR Plan Violates the APA Because It Is Arbitrary and Capricious

A. The Department Grossly Underestimates the Cost of Its New IDR Plan to Taxpayers

The Department's proposed rule is arbitrary and capricious because it makes no serious attempt to project a realistic anticipated cost for the New IDR Plan.

As discussed previously, the NPRM estimates that "[t]he changes to the REPAYE plan would offer borrowers a more generous IDR plan that would have a net budget impact of approximately $137.9 billion, consisting of a modification of $76.8 billion for cohorts through 2022 and $61.1 for cohorts 2023–2032."[93] The Department bases this estimate in part on the implementation of the Debt Cancellation Program,[94] whose lawfulness is currently under review by the U.S. Supreme Court.

It is widely agreed that the Department's cost estimate is inadequate, for multiple reasons that should have been apparent to the Department in developing its NPRM.[95] First, it declines to take into account the possibility that the Supreme Court will invalidate the Debt Cancellation Program, resulting in a much higher uptake of the proposed New IDR Plan by borrowers and producing massive taxpayer transfers to existing borrowers for which the Department fails to account.[96] The Department arbitrarily and capriciously declined to account for this possibility, depriving commenters of the opportunity to provide input on the Department's views of this potential cost.

Another major failing of the NPRM, which deprives the public of the opportunity to comment meaningfully on the impacts of the proposed regulations on taxpayers and borrowers in violation of the APA, is that it declines to estimate the cost impacts of borrowers who are currently in non-

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93 NPRM at 1919.
94 *Id.*
95 https://www.studentloanplanner.com/new-repaye-plan-ten-year-cost/ ("The Department of Education estimates the net budget impact at $137.9 billion. That's a massive understatement of the benefit to current and future borrowers." (link omitted)); https://www.forbes.com/sites/prestoncooper2/2023/01/11/bidens-quiet-student-loan-cancellation-income-driven-repayment-expansion/?sh=33afeadff4b0 ("ED's proposed rule pegs the cost of the new IDR plan at $138 billion. That is almost certainly an underestimate, for several reasons.").
96 https://www.forbes.com/sites/prestoncooper2/2023/01/11/bidens-quiet-student-loan-cancellation-income-driven-repayment-expansion/?sh=33afeadff4b0 ("[I]f the court strikes down the loan-cancellation scheme, as is likely, borrowers who would have received forgiveness will instead repay their loans through IDR. The cost of making IDR more generous will shoot up.").

IDR plans enrolling in the Department's proposed New IDR Plan.[97] Yet a major objective of the Department's proposal is to provide an IDR plan that is so attractive that it motivates existing borrowers to enroll in it.[98] Due to the much-expanded availability of zero-dollar or near-zero-dollar payments in the proposed New IDR Plan, it is likely that those who enroll in the program will further increase the costs of the program. Data on borrowers who would likely enroll in the program is readily available to the Department through such resources as the Department's College Scorecard and the U.S. Census Bureau's American Community Survey. The Department's failure even to attempt to account for the impact of one of its core motivations for proposing the New IDR Plan in the calculation of the program's cost is arbitrary and capricious.

The NPRM's cost estimate also excludes any impacts of increased borrowing, rising tuition costs, and ballooning living expenses in postsecondary education that would drive up the costs of the New IDR Plan.[99] The Department's refusal to estimate these costs, which are likely to be substantial, in its analysis of the rule's budget impacts is arbitrary and capricious.

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[97] NPRM at 1920 ("The impact of borrowers switching into IDR plans from non-IDR plans is also a potential factor that we do not estimate here.").

[98] https://www.forbes.com/sites/prestoncooper2/2023/01/11/bidens-quiet-student-loan-cancellation-income-driven-repayment-expansion/?sh=33afeadff4b0 ("[T]he cost estimate does not account for the likelihood that some borrowers in non-IDR plans will switch into IDR. This is nonsensical, as a central goal of the proposal is to offer more borrowers an affordable monthly payment through IDR.").

[99] https://www.forbes.com/sites/prestoncooper2/2023/01/11/bidens-quiet-student-loan-cancellation-income-driven-repayment-expansion/?sh=33afeadff4b0 ("[T]he estimate makes no allowances for increases in borrowing or tuition rates that stem from the IDR plan's enactment."); https://www.studentloanplanner.com/new-repaye-plan-ten-year-cost/ ("The Department admits that their estimate does not incorporate the strong possibility of 'increased take up' of IDR plans and increased borrowing resulting from more generous loan terms."); *id.* ("The Department of Education assumes that high-income graduate borrowers would see their payments increase on the New REPAYE plan, perhaps because of paying back loans for 25 years instead of 20 years. . . . This assumption is faulty because it assumes borrowers on the Old IBR plan will not switch, that borrowers who could benefit from lower payments by filing separately will not do so, and borrowers who could benefit from 20-year repayment terms will not stay on plans that offer them. It also assumes that borrowers will not take advantage of lower New REPAYE payments and switch before the 10-year period of payments locks them into New REPAYE."); *id.* ("If information flows to borrowers efficiently, we could see up to 80% of borrowers signing up for an IDR plan overall as more lower-income borrowers opt to go to school and students become less price sensitive about educational investment."); https://www.urban.org/sites/default/files/2023-01/Few%20College%20Students%20Will%20Repay%20Student%20Loans%20under%20the%20Biden%20Administrations%20Proposal.pdf at 8 ("The Biden plan will transform IDR from a safety net that supports borrowers with low incomes into a substantial subsidy for most undergraduate students who take on debt. Under current IDR plans, most borrowers can expect

This comment notes above the study from the University of Pennsylvania's Wharton School estimating that the cost of the New IDR Plan could exceed $520 billion,[100] along with independent analysis suggesting that a Supreme Court ruling against the Debt Cancellation Program would cause the cost of the New IDR Plan to skyrocket to over $1 trillion.[101] The Department must review these analyses and state in its final rule whether they represent accurate potential estimates of the proposed New IDR Plan's cost; otherwise, the Department is acting arbitrarily and capriciously.

KPMG's decision not to certify the Department's fiscal year 2022 consolidated financial statements over the estimated cost of the Debt Cancellation Program heightens the need for the Department to demonstrate that it is performing an analysis of the New IDR Plan that adequately informs the public of its potential cost. On January 23, 2023, the Department's Office of the Inspector General released findings from accounting firm KPMG declining to certify the Department's financial statements due to failures in estimating the cost of student loan cancellation, explaining as follows:

> Management's internal controls were not properly designed at an appropriate level of precision to address the relevance and reliability of the underlying data used to develop the take-up rate assumption used in the various loan program estimates. In addition, management did not design sufficiently precise controls over the relevance and reliability of certain data used in other key assumptions for the SLM cash flow model to develop the subsidy cost estimates.[102]

KPMG also made the following finding:

> Management's risk assessment process was not sufficient to identify the relevance and reliability of the underlying data used in significant assumptions for the estimates, including the take-up rate assumption, as a risk that required additional

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to repay some or all their debt. If the Biden plan is implemented as proposed, fully repaying a student loan will be the exception rather than the rule. For typical Pell grant recipients, the additional loan forgiveness will be larger than the total Pell grants they receive while in college."); *id.* ("This large increase in generosity for borrowers will come at a substantial cost to taxpayers. The US Department of Education estimates that the proposed changes will cost $138 billion over the next 10 years, which is likely an underestimate because it does not account for the increases in borrowing that are likely to occur as the loan program becomes more heavily subsidized or for borrowers switching into IDR plans from non-IDR plans.").

[100] https://budgetmodel.wharton.upenn.edu/issues/2022/8/26/biden-student-loan-forgiveness

[101] https://www.studentloanplanner.com/new-repaye-plan-ten-year-cost/

[102] https://www2.ed.gov/about/reports/annual/2022report/agency-financial-report.pdf?source=email at 110.

> controls. As a result, the documentation over the subsidy cost estimates in the financial statements was not supportive to evidence the estimate calculations. Inadequate controls over the relevance and reliability of the underlying data used to develop the estimate calculations increases the risk that the financial statements could be materially misstated.[103]

With regard to these shortcomings, KPMG recommended that the Department's management "[d]esign and implement controls that require the validation of the relevance and reliability of underlying data used in developing the assumptions related to the subsidy cost estimates."[104]

In response to these findings, which represented the first time in at least 20 years that the Department failed to receive a clean audit of its annual financial statements,[105] the Department conceded that "controls may not have operated as intended due to the lack of strictly comparable other federal benefit programs."[106]

Because the Department's proposed New IDR Plan is a portion of the "three-part plan" announced by President Biden that includes the Debt Cancellation Program, and because the Department's NPRM also involves questionable assumptions regarding take-up rates described previously, the Department must explain whether it has fixed relevant internal controls and risk assessment processes to the extent that it is able to produce a reliable estimated cost for its New IDR Plan that allows the Department and the public to weigh the costs and benefits of the program appropriately.[107] Specifically, the Department must explain why the faulty internal controls and risk assessment process at issue in KPMG's finding did not taint its calculation of the cost of the New IDR Plan. Otherwise, it is acting in an arbitrary and capricious manner.

If the same problems that resulted in KPMG's refusal to certify the Department's financial statements affected the Department's estimate of the cost of its proposed New IDR Plan, then the Department should withdraw the NPRM and issue a new one that adequately estimates the proposed program's costs and weighs them against its purported benefits. In any event, the

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[103] *Id.*
[104] *Id.* at 111.
[105] https://subscriber.politicopro.com/article/2023/01/auditors-ding-education-department-over-cost-estimate-for-biden-student-debt-relief-00079546
[106] https://www2.ed.gov/about/reports/annual/2022report/agency-financial-report.pdf?source=email at 118.
[107] This concern is heightened by the fact that any reliable estimate of the cost of the Department's proposed New IDR Plan must depend considerably on the extent of the implementation of the Debt Cancellation Program, whose cost estimate is at issue in the KPMG finding on the Department's financial statements.

Department must delay its IDR rulemaking until it receives a clean audit of its annual financial statements. Otherwise, the Department is acting in an arbitrary and capricious manner.

B. The Department's Failure to Estimate the Impact of Its Proposal on Tuition and Living Expenses at Postsecondary Institutions Is Arbitrary and Capricious

In his remarks announcing the "three-part plan" on student loans that included the proposed New IDR Plan, President Biden lamented that "[t]he cost of education beyond high school has gone up significantly. The total cost to attend a public four-year university has tripled—nearly tripled in 40 years—tripled."[108]

It is surprising, then, that the Department concedes in its NPRM that the introduction of its New IDR Plan could *exacerbate* the problem the President identified in his remarks as a key motivation behind the policy:

> [I]nstitutions may be more inclined to raise tuition in order to shift costs to students when loans are more affordable. This effect may be more pronounced at graduate-level programs than at the undergraduate level because of differences in loan limits. Increases in tuition would not solely affect borrowers and, indirectly, taxpayers; students who do not borrow would face higher education costs as well.[109]

Despite this admission, the Department does not attempt to estimate the costs of such tuition increases or weigh their impacts against the purported benefits of the proposed rule. In fact, as discussed previously, the "Name-and-Shame" RFI the Department published the same day as the NPRM candidly recognizes that the Department's New IDR Plan "do[es] not address the underlying problems stemming from the high prices charged by some institutions . . . ."[110]

Such a failure to engage with the problem of the proposed program's negative impacts on students, especially in light of the President's statement that these proposals were intended *as a solution* to this problem, is arbitrary and capricious.

The proposed New IDR Plan would place substantial upward pressure on tuition, especially at undergraduate and community colleges, due to the new availability of loans that the borrower likely will not have to pay back.[111] While undergraduate loans are capped, the New IDR Plan

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[108] https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/08/25/remarks-by-president-biden-announcing-student-loan-debt-relief-plan/
[109] NPRM at 1916.
[110] *Supra* note 27.
[111] https://freopp.org/bidens-income-based-repayment-expansion-could-prove-costlier-than-loan-forgiveness-2b7ada225d36 ("Community college is one of the few arenas of higher education

would almost certainly drive students who otherwise would not have borrowed to pay for their undergraduate degree to take out loans,[112] leading to higher tuition and living expenses on college campuses.[113]

Some graduate programs have already discovered how to use student loan cancellation in the form of plans like the New IDR Plan to their benefit in raising tuition at taxpayers' expense without charging their students any extra money.[114] With the generous taxpayer subsidies available under the New IDR Plan, undergraduate institutions would undoubtedly find similar ways to game the system.

Beyond the increased tuition that would result from the New IDR Plan, students would naturally use the increased availability of free money to pay for "living expenses" that have no direct relation to obtaining a college or university education.[115] The increase in these living expenses has

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where debt is not a major financing tool; just 17 percent of community college students borrow. But the new [IDR] plan means that community college students can get essentially free money by taking out a loan. Though community colleges have done a decent job keeping tuition down in recent years, that may change if federal loans become a larger part of their funding." (links omitted)); *id.* ("Colleges are sure to point this fact out to students as a justification for the loan-heavy aid packages they will inevitably offer. A greater willingness to borrow will lead to higher tuition as colleges pass more costs onto taxpayers."); https://www.brookings.edu/blog/brown-center-chalkboard/2022/09/20/democrats-high-wire-act-on-student-loan-forgiveness/ ("Price subsidies—in this case, the new IDR rules—increase demand and that increases prices to some degree.").

[112] https://freopp.org/bidens-income-based-repayment-expansion-could-prove-costlier-than-loan-forgiveness-2b7ada225d36 ("Remarkably, 45 percent of undergraduates do not take out loans. These students may think they're being responsible, but under the new system they would be leaving money on the table. A new willingness to borrow among this group would reduce sensitivity to price. The result will be upward pressure on tuition." (link omitted)).

[113] *See, e.g.*, https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr733.pdf?la=en at 2 (finding that "increases in institution-specific subsidized . . . loan maximums lead to a sticker-price increase of about 60 . . . cents on the dollar" and that unsubsidized loan maximum increases lead to a sticker-price increase of approximately 40 cents on the dollar).

[114] *See, e.g.*, https://www.washingtonpost.com/news/wonk/wp/2013/08/09/how-georgetown-law-gets-uncle-sam-to-pay-its-students-bills/ (describing Georgetown University Law Center's practice of decreasing the amount students pay for tuition while using a loan forgiveness program to make up the difference).

[115] https://www.brookings.edu/opinions/bidens-income-driven-repayment-plan-would-turn-student-loans-into-untargeted-grants/ ("While students certainly need to pay rent and buy food while in school, under the administration proposal a student can borrow significant amounts for 'living expenses,' deposit the check in a bank account, and not pay it all back. Gaming the system like this wasn't possible when students were asked, on average, to repay loans in full, and

constituted a major part of the increase in the cost of college in the recent years,[116] and the Department's proposed New IDR Plan would push them even higher.

The "Name-and-Shame" RFI, which is merely an information-gathering exercise, does nothing to change these negative impacts, particularly as research has indicated that "shame lists do little to control tuition or deter enrollment."[117]

The Department must attempt to calculate the impacts of its regulations on the rising cost of tuition and living expenses at postsecondary institutions and properly weigh these negative impacts against any purported benefits of its proposed New IDR Plan. If it fails to do so, then it acts in an arbitrary and capricious manner.

C. The Department's Failure to Properly Weigh the Proposal's Impacts on the Growth of Low-Quality Academic Programs Is Arbitrary and Capricious

The Department notes in its NPRM the "possibility" that the proposed New IDR Plan "would result in more aggressive recruiting by institutions that do not provide valuable returns on the premise that borrowers who do not find a job do not have to pay."[118] Despite mentioning this concern in passing, the Department proposes no measures to alleviate it (beyond issuing the "Name-and-Shame" RIA that, as previously discussed, is not a solution[119]) and does not explain why the purported benefits of the rule outweigh this admitted cost. The Department's failure to engage in a sincere balancing of the equities of its rule in this manner is arbitrary and capricious.

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it's not a problem in systems where loans are used exclusively for tuition. But that's not the system we have. Some people will use loans like an ATM, which will be costly for taxpayers and is certainly not the intended use of the loans.").

[116] *Id.* ("Colleges that participate in federal aid programs are required to estimate the cost of rent, food, travel, a computer, and other spending students are expected to incur while enrolled. As the chart below shows, these living expenses are a large share of the top line cost of attendance and are the largest contributor to the increase in the net cost of college over the last 16 years. In fact, at public colleges and 4-year private nonprofits, net tuition (published tuition minus grants) has been falling over the last 15 years; the entire increase in cost of attendance is due to living expenses. . . . At 4-year public colleges in America, living expenses are the largest share of cost of attendance, and they're about half the cost of attendance at for-profit schools." (links omitted)).

[117] https://www.forbes.com/sites/prestoncooper2/2023/01/11/bidens-quiet-student-loan-cancellation-income-driven-repayment-expansion/?sh=33afeadff4b0 (citing https://journals.sagepub.com/doi/full/10.3102/0162373720937672).

[118] NPRM at 1916.

[119] *Supra* note 117.

Independent analysis of the Department's proposed New IDR Plan shows that it will have substantial impacts in incentivizing postsecondary institutions to market low-value programs to students in exchange for free money from the American taxpayers.[120] The Department must review this analysis and explain why the claimed benefits of its proposed New IDR Plan would outweigh the substantial cost of encouraging prospective students to pursue worthless degrees that do not prepare them to start meaningful careers.

D. The Department's Failure to Consider the Negative Impacts of Its Proposed Rule on Affordable Community Colleges and Trade Schools Is Arbitrary and Capricious

The Department's NPRM fails to consider that its proposed New IDR Plan will encourage students to attend four-year colleges at the expense of affordable community colleges and trade schools, contributing to already-rampant credential inflation fueled by the demand for four-year undergraduate and postgraduate degrees.[121] The Department must consider this impact among the costs imposed by its proposed rule and weigh it against the purported benefits of its proposal, or it is acting in an arbitrary and capricious manner.

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[120] *See, e.g.*, https://www.brookings.edu/opinions/bidens-income-driven-repayment-plan-would-turn-student-loans-into-untargeted-grants/ ("Because the IDR subsidy is based primarily on post-college earnings, programs that leave students without a degree or that don't lead to a good job will get a larger subsidy. Students at good schools and high-return programs will be asked to repay their loans nearly in full. Want a free ride to college? You can have one, but only if you study cosmetology, liberal arts, or drama, preferably at a for-profit school. Want to be a nurse, an engineer, or major in computer science or math? You'll have to pay full price (especially at the best programs in each field). This is a problem because most student outcomes—both bad and good—are highly predictable based on the quality, value, completion rate, and post-graduation earnings of the program attended. IDR can work if designed well, but this IDR imposed on the current U.S. system of higher education means programs and institutions with the worst outcomes and highest debts will accrue the largest subsidies.").

[121] https://freopp.org/bidens-income-based-repayment-expansion-could-prove-costlier-than-loan-forgiveness-2b7ada225d36 ("The new [IDR] plan also puts a thumb on the scales in favor of traditional four-year colleges. Students can maximize the subsidy they get from the federal government if they take out more loans. Suddenly, it might make more financial sense to attend an expensive private university rather than a community college or a trade school. Traditional colleges already enjoy an enormous funding advantage relative to alternatives, and the new [IDR] plan will only multiply it. This dynamic will fuel credential inflation—as more students pursue a bachelor's degree, employers will ratchet up their education requirements and further restrict opportunities for people without a college degree." (link omitted)).

E. The Department's Failure to Consider the Negative Consequences of Encouraging a Massive Expansion in Student Loan Debt Is Arbitrary and Capricious

Independent analyses of the Department's proposed New IDR Plan project that, by offering to subsidize student loans with taxpayer money and cancel these loans before they are repaid, the proposal will encourage a substantial increase in those who decide to fund their postsecondary education using debt.[122] The Department must consider whether the purported benefits of its proposed rule outweigh its contribution to rising student debt, which could have significant impacts on students' financial futures whether or not it is canceled. If the Department fails to do so, then it is acting in an arbitrary and capricious manner.

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[122] *See, e.g.*, https://www.forbes.com/sites/prestoncooper2/2023/01/11/bidens-quiet-student-loan-cancellation-income-driven-repayment-expansion/?sh=33afeadff4b0 ("Because most undergraduate students will receive a subsidy on their federal loans, the rational thing to do is borrow the maximum amount possible from taxpayers, and then repay through the new IDR plan. Currently, 45% of all undergraduates and 77% of community college students do not take out loans. Under the new plan, those students will be leaving money on the table." (link omitted)); *id.* ("The result will be an increased willingness to borrow. The Biden administration intends to reduce the burden of student loans, but it could actually cement the role of debt in our higher education system. Borrowing for college will become more common, especially at community colleges and previously inexpensive public schools." (link omitted)); https://www.brookings.edu/opinions/bidens-income-driven-repayment-plan-would-turn-student-loans-into-untargeted-grants/ ("In 2016, undergraduate students borrowed $48 billion in federal student loans. But students were eligible to borrow an additional $105 billion that year and chose not to. Graduate students borrowed about $34 billion, but left $79 billion in unused eligibility on the table. Perhaps they didn't borrow because their parents paid out of pocket or because they chose to save money by living at home—they still were eligible for federal loans. When those students are offered a substantial discount by paying with a federal loan, they will borrow billions more each year."); https://www.brookings.edu/blog/brown-center-chalkboard/2022/09/20/democrats-high-wire-act-on-student-loan-forgiveness/ ("[I]t's clear that, under just about any implementation of the plan, most people will have incentives to borrow more (and no one has an incentive to borrow less). So, the first effect of this of this 'loan forgiveness' policy is going to be raising debt levels."); https://www.urban.org/sites/default/files/2023-01/Few%20College%20Students%20Will%20Repay%20Student%20Loans%20under%20the%20Biden%20Administrations%20Proposal.pdf at 2 ("The proposed IDR plan is the most generous yet, but it will make the student loan program significantly more expensive and risks encouraging students to take on more debt, which could have implications for their personal finances even if it is eventually forgiven.").

F. The Department's Basis for Waiving Interest Accrual Is Arbitrary and Capricious

The Department bases its proposal not to charge any interest to borrowers enrolled in its New IDR Plan beyond what they cover in their monthly payments (which in many cases will be payments of zero dollars) on its concern "that growing balances due to unpaid interest may discourage borrowers from repaying their loans and, thus, result in lower amounts repaid to the government."[123] The Department's proposed program does not alleviate such a "discouragement" effect and may even make it worse by encouraging borrowers who otherwise could afford to do so not to repay their loans. By offering widespread taxpayer subsidies to student loan borrowers, the Department ensures that a substantial proportion of these borrowers will not see their loan balance decrease by a single dollar throughout the life of their loans, thus fueling the very frustration among borrowers that the Department claims to alleviate.[124] The Department's interest proposal arbitrarily and capriciously fails to address the problem it claims to resolve.

The Department warns that "[t]he potential for these negative incentives [related to discouraging repayment as a result of growing loan balances] could be even greater as a result of the increases in the amount of income protected from payments and the reduction in payments tied to undergraduate loan balances."[125] With its substantially increased discretionary income exemption and reduced monthly payments, the Department creates the very problem it claims it must solve with the interest accrual provision. The Department must explain why, instead of proposing an IDR plan that causes this problem and then proposing to fix that problem by not charging interest, it instead proposes no changes at all. Otherwise, the Department is acting arbitrarily and capriciously.

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[123] NPRM at 1905.

[124] https://freopp.org/bidens-income-based-repayment-expansion-could-prove-costlier-than-loan-forgiveness-2b7ada225d36 ("Many borrowers complain of making payments year after year, yet never seeing their balances drop; the promise of future forgiveness is cold comfort to people watching interest charges rack up. But the exceedingly low payments under the new [IDR] plan will be insufficient to cover interest for millions of borrowers. While the government will forgive unpaid interest every month, these borrowers still won't make a dent in principal. They will make payments year after year, yet some will never see their balance drop by one penny." (link omitted)); https://www.urban.org/sites/default/files/2023-01/Few%20College%20Students%20Will%20Repay%20Student%20Loans%20under%20the%20Biden%20Administrations%20Proposal.pdf ("Forgiving unpaid interest every month could provide a psychological benefit to borrowers, but they would still see their balance remain the same even if they are making payments.").

[125] NPRM at 1905.

G. The Department's Failure to Consider the Inflationary Impacts of Its Proposed New IDR Plan Is Arbitrary and Capricious

Research published by the Committee for a Responsible Federal Budget indicates that President Biden's "three-part plan" to address student loans announced in August "would boost inflation by 15 to 27 basis points over the next year."[126] As noted previously, analysis of the New IDR Plan, which forms a part of the "three-part plan," pegs its cost as potentially exceeding $520 billion.[127] The Department must attempt to calculate the inflationary impacts of that massive giveaway of taxpayer money to fund undergraduate and graduate education as a major cost of the proposed rule to the economy and to American consumers. It must then weigh that cost against the purported benefits of its New IDR Plan. If the Department fails to do so, then it is acting in an arbitrary and capricious manner.

H. The Department Arbitrarily and Capriciously Underestimates the Administrative Costs that Would Flow from Its Proposed Rule

In its NPRM, the Department estimates that the "modest administrative costs to the Department to implement the changes to the [New IDR] plan, which would require modifications to contracts with servicers," would total about $10 million.[128] The characterization of the administrative costs to the Department (and ultimately to taxpayers) as "modest" is surprising considering the millions of student loan borrowers who will seek to enroll in the New IDR Plan due to its generous terms and the fact that the IDR repayment system has struggled to accommodate users in the past.[129] The Department must explain whether it has included these considerations in its estimation of administrative costs. If not, it must estimate such costs and weigh them against any purported benefits of the proposed New IDR Plan. If it does not do so, then the Department has acted arbitrarily and capriciously.

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[126] https://www.crfb.org/blogs/student-debt-changes-would-boost-inflation
[127] *Supra* note 45.
[128] NPRM at 1916.
[129] https://www.urban.org/sites/default/files/2023-01/Few%20College%20Students%20Will%20Repay%20Student%20Loans%20under%20the%20Biden%20Administrations%20Proposal.pdf ("[It] is important to note that in order to receive the benefits of IDR, most borrowers have to sign up for an IDR plan and successfully navigate the repayment system for 10 to 20 years. Historically, this system has not worked well for borrowers who try to use it, and there are significant resource limitations at the agency charged with implementing this new plan for a potentially much larger number of borrowers." (citing https://www.marketplace.org/2022/12/29/federal-student-aid-office-has-a-big-to-do-list-in-2023-but-the-same-budget/)).

I. The Department's Failure to Consider the Negative Impacts of Its Proposed Rule on Small Entities Is Arbitrary and Capricious

In its NPRM, the Department states that it "has determined that there would be no economic impact on small entities affected by the regulations" under the Regulatory Flexibility Act[130] "because IDR plans are between borrowers and the Department."[131] By denying any impacts on small entities, the Department arbitrarily and capriciously neglects to consider the significant harm nonprofit entities would suffer in their ability to hire recent graduates as a result of the proposed New IDR Plan. This shortcoming may also violate the Department's responsibilities to calculate the burdens of its proposed rule on small entities under the Regulatory Flexibility Act.

By substantially increasing the proportion of undergraduate student loan borrowers who pay nothing or nearly nothing to settle their loans, and especially by offering 10-year debt cancellation to such borrowers, the Department fails to consider whether it would drastically reduce the desire of recent graduates to pursue loan cancellation under the Department's Public Service Loan Forgiveness program in a way that might discourage job seekers from working at small, nonprofit employers.

The Department must consider the negative impacts of its proposed New IDR Plan on nonprofit employers that constitute "small entities" under the Regulatory Flexibility Act. Otherwise, it acts in an arbitrary and capricious manner and may be in violation of its statutory duty to consider such impacts in rulemaking.

VI. The Department Is Correct to Simplify Student Loan Offerings, Automatically Verify Borrowers' Income on an Annual Basis, and Refuse to Engage in Annual Cancellation of Debt

Because of the numerous substantive and procedural defects identified above, DFI urges the Department to withdraw its proposed rule in full. However, in its NPRM, the Department has identified policies that could be included in a future rulemaking effort that works within the bounds of Title IV of the HEA to benefit borrowers without turning federal student loans into grants at the expense of American taxpayers.

One objective the Department identifies that it could pursue in a future, more-restrained rulemaking is its proposal to simplify the student loan programs on offer by consolidating the currently available IDR programs into a single, easy-to-understand program that still requires former students to pay back their student loans.

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130 5 U.S.C. 601 *et seq.*
131 NPRM at 1923.

Another policy that could be included in a future rulemaking effort is the Department's proposal to verify borrowers' income or family size automatically on an annual basis by consulting accurate tax data.[132] Such a policy is a common-sense solution to a problem the Department has identified in persuading borrowers to self-certify their information.

Finally, DFI strongly agrees with the Department's determination that it does not have the statutory authority under the HEA to engage in "annual cancellation of some debt for borrowers."[133] DFI urges the Department to continue to abide by this determination if it chooses to issue its final rule and refrain from providing for such a mechanism of annual debt cancellation in violation of its authority granted by Congress.

VII. The Department Should Honor the Authorities It Cites in the NPRM by Extending Its Public Comment Period

The 30-day period the Department has allotted for public comments does not provide sufficient opportunity for experts and members of the public who will face substantial impacts from the proposed rule to weigh fully its implications and offer meaningful input for the Department to consider as it develops its final regulations on this subject. The Department should offer at least an additional 30 days for the public to comment on the proposed rule and end the comment period no earlier than March 12, 2023.

Allowing at least 60 days for public comment is standard practice under the governing authorities cited by the Department's NPRM. The "Invitation to Comment" section of the proposed rule seeks the public's assistance "in complying with the specific requirements of Executive Orders 12866 and 13563 . . . ."[134] Executive Order 13563, "Improving Regulation and Regulatory Review," states that "each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, *with a comment period that should generally be at least 60 days*."[135] Executive Order 12866, "Regulatory Planning and Review," includes similar language: "[E]ach agency should afford the public a meaningful opportunity to comment on any proposed regulation, *which in most cases should include a comment period of not less than 60 days*."[136]

The Department should heed the authorities it cites and offer at least 30 more days for public comment on its NPRM.

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[132] *Id.* at 1911.
[133] *Id.* at 1922.
[134] *Id.* at 1895.
[135] Executive Order 13563, Sec. 2(b) (emphasis added).
[136] Executive Order 12866, Sec. 6(a) (emphasis added).

VIII. Conclusion

Hoping to achieve its goal of "free college" by working around Congress, the Department's proposed rulemaking would convert a congressionally authorized student loan program into a delayed grant scheme that extensively subsidizes postsecondary education at the expense of American taxpayers. It is contrary to the HEA's express statutory authorization, beyond the Department's authority to enact, arbitrary and capricious, and otherwise not in accordance with law. It would force taxpayers, many of whom never took on debt to attend college or have paid off their college debt, to fund a policy priority of the Biden Administration—free college for all—that it has no statutory authority to impose on the American people.

For the reasons discussed above, the Department should immediately withdraw the NPRM in its entirety.

Sincerely,

/s/ *Robert S. Eitel*
Robert S. Eitel
President
Defense of Freedom Institute for Policy Studies

/s/ *Paul F. Zimmerman*
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