Moving the Federal Student Loan Program to the Small Business Administration

An Analysis of Existing Statutory Authorities

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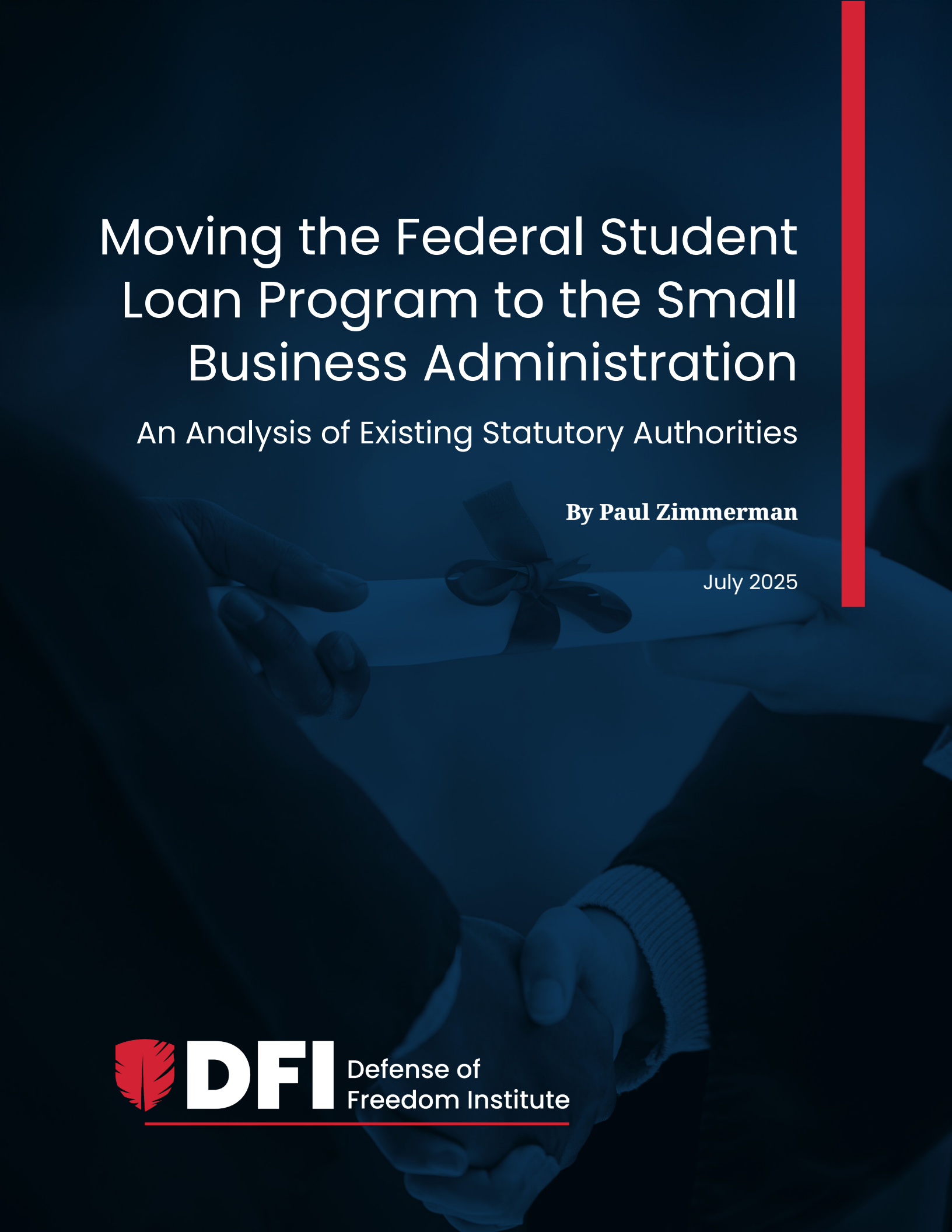

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Key Points

- In the Oval Office on March 21, President Trump announced his desire to move "immediately" the federal student loan portfolio from the U.S. Department of Education ("Department" or "ED") to the Small Business Administration ("SBA"). This announcement occurred the day after the President signed an executive order directing the Secretary of Education to "facilitate the closure" of the Department and return authority over education policy to states and local communities.

- Because the President does not have the unilateral authority to reorganize executive departments and agencies, any directive to move the student loan portfolio must be based in existing federal statutory authority. This brief examines whether authority exists for the President to move the federal student loan program from the Department to the SBA and concludes that the wholesale relocation of this core function from the Department lacks legal support.

- In 2024, the U.S. Supreme Court reasserted its constitutional responsibility to say what the law is in cases and controversies and not defer to agency interpretations of so-called "ambiguous" statutory language. For that reason, the current judicial environment is an unfavorable one for broad, novel interpretations of presidential or administrative authority to reorganize the Executive Branch. Moving the function of managing the federal student loan portfolio to another agency must arise from legislation passed by Congress and signed by the President—not unilateral executive action.

Introduction

On March 21, 2025, President Donald Trump announced that he had decided to move the federal student loan portfolio to the Small Business Administration ("SBA").[1] Specifically, the President said that the SBA "will handle all of the student loan portfolio," and that this portfolio would be "coming out of the Department of Education immediately."[2] This paper proceeds with the understanding that the President desires the wholesale transfer of the Office of Federal Student Aid ("FSA") to the SBA, including FSA's functions relating to loan applications, disbursements, portfolio management, institutional oversight and compliance, program reviews, loan cancellation programs, default management, and collections. I understand the President to mean that he wants to transfer FSA wholesale to the SBA, not merely portfolio management.

The President's announcement came a day after he signed Executive Order 14242 ("EO 14242"),[3] a directive targeting the closure of the Department and returning education policymaking to states

1 Arthur Jones II, Cheyenne Haslett & Molly Nagle, *Trump Says Student Loans, Special Needs Programs Will Be Moved to New Departments*, abc news (Mar. 21, 2025), https://abcnews.go.com/Politics/trump-student-loans-special-programs-moved-new-departments/story?Id=120032077.
2 *Id.* (quoting President Donald Trump).
3 Exec. Order No. 14,242, 90 Fed. Reg. 13679 (Mar. 25, 2025).

and local communities. Entitled "Improving Education Outcomes by Empowering Parents, States, and Communities," EO 14242 instructs the Secretary of Education (the "Secretary"), "to the maximum extent appropriate and permitted by law, [to] take all necessary steps to facilitate the closure of the Department of Education and return authority over education to the States and local communities while ensuring the effective and uninterrupted delivery of services, programs, and benefits on which Americans rely."[4] The Administration has not yet explained how it plans to accomplish the transfer of the $1.7-trillion federal student loan program.

As discussed below, the Higher Education Act of 1965, as amended ("HEA"), expressly names the Secretary as the official charged with responsibility for the federal student loan program.[5] The Constitution does not vest the President with any generalized power to reorganize or dissolve federal agencies without the consent of Congress.[6] Thus, in order to transfer the authority to manage the federal student loan portfolio from ED to SBA, the Administration must point to a specific law that allows it to remove this statutory responsibility from the Secretary and send it to the Administrator of the SBA.

This brief considers the General Education Provisions Act ("GEPA"), the HEA, and the Small Business Act of 1953, as amended ("Small Business Act"), on which the Trump Administration might rely to justify such a unilateral reorganization of the Executive Branch. It concludes that, while some support exists for limited, joint action between ED and other federal agencies on federal student loans, none justifies the transfer of the federal student loan program to the SBA.[7] To achieve the mission articulated in EO 14242 and remain on solid legal ground, Administration officials must work with Congress to adopt legislation that either gives the President reorganization authority or directly authorizes the Administration to move FSA from the Department to a different agency.

A Brief Introduction to Federal Student Loans and the SBA

The federal government's massive stake in student loans originated in the Omnibus Budget Reconciliation Act of 1993, which created a federal Direct Loan program intended eventually to replace the guaranteed lending system that existed at that time—the Federal Family Education Loan ("FFEL") program.[8] In 2010, Congress eliminated new loans under the FFEL program, and the

4 *Id.* at 13679.
5 *See infra* note 43.
6 *See generally* Paul Larkin & John-Michael Seibler, The President's Reorganization Authority (2017), https://www.heritage.org/political-process/report/the-presidents-reorganization-authority (analyzing the Constitution's Executive Vesting Clause, Appointments Clause, Opinion Clause, and historical precedent and concluding that "the President does not have constitutional authority to reorganize the executive branch on his own"). Note that Congress granted the President, during various periods during the 20th century, the authority unilaterally to reorganize the Executive Branch, subject to a one-house legislative veto. *See id.* With the Supreme Court's decision in *INS v. Chadha* ending the use of the one-house veto as an unconstitutional exercise of legislative power, 462 U.S. 919, 959 (1983), that reorganization authority has fallen out of favor, and its latest iteration expired in 1984. Larkin & Seibler. Thus, the President and his administration officials do not currently have any generalized statutory authority to reorganize executive agency functions and must rely on specific grants of statutory power to accomplish a transfer of functions from one agency to another.
7 This analysis is limited to the President's decision to transfer the student loan portfolio to the SBA, but the GEPA and HEA authorities discussed in the brief also cannot serve as the basis for the transfer of the ultimate authority to manage this portfolio to any other agencies.
8 *See* Jason Delisle, Defying Intent: Biden's SAVE Plan and the Original Goal of Income-Contingent Repayment for Student Loans 4–5 (2024), https://dfipolicy.org/wp-content/uploads/2024/06/Defying_Intent_Jason_Delisle.pdf.

Direct Loan program has become the primary vehicle for the federal government to provide loans to support students' postsecondary education.[9]

The HEA gives the Secretary the authority to manage student financial assistance programs, including the student loan portfolio created by the Direct Loan program, and establishes the "performance-based organization" overseen by the Secretary—FSA—that stewards the program and related responsibilities.[10] Institutions of higher education ("IHEs") that participate in the Direct Loan program originate loans to borrowers with funding from the U.S. Treasury through a system managed by FSA, and the federal government assumes the risk of losses from the loans due to default or other circumstances enumerated in the statute.[11] ED hires contractors to service and collect student loans under the program.[12]

In addition to issuing student loans through IHEs and managing the federal student loan portfolio, FSA describes its other responsibilities as follows:

- informing students and families about the availability of the federal student aid programs and the process for applying for and receiving aid from those programs;
- developing the Free Application for Federal Student Aid (FAFSA®) form and processing more than 17.6 million FAFSA forms each year;
- offering free assistance to students, parents, and borrowers throughout the entire financial aid process; and
- providing oversight and monitoring of all program participants—schools, financial entities, and students—to

9 *See* Alexandra Hegji, Cong. Rsch. Serv., Federal Student Loans Made Through the William D. Ford Federal Direct Loan Program: Terms and Conditions for Borrowers 1, 3–4 (updated 2024) https://www.congress.gov/crs_external_products/R/PDF/R45931/R45931.20.pdf.
10 *See* 20 U.S.C. § 1018(b)(1) ("[T]he Secretary shall maintain responsibility for the development and promulgation of policy and regulations relating to the programs of student financial assistance under title IV. In the exercise of its functions, the [FSA] shall be subject to the direction of the Secretary."); 20 U.S.C. § 1018(a) (establishing the performance-based organization responsible for overseeing federal student loan programs under the HEA).
11 *See* Hegji, *supra* note 9, at 2.
12 *See id.*

ensure compliance with the laws, regulations, and policies governing the federal student aid programs.[13]

As of the second quarter of the 2025 fiscal year, the total outstanding principal and interest balance of the entire FSA loan portfolio was $1,660,700,000,000 (that is, nearly $1.7 trillion) for 42.5 million borrowers, including a $1,494,500,000,000 outstanding balance for 38.2 million borrowers under the Direct Loan program.[14] (As recognized by ED, a large proportion of student loan borrowers are likely to enter default in the coming months as FSA ramps up its collections activities.[15])

The SBA is a cabinet-level agency created in 1953 by the Small Business Act. Its establishment grew out of prior efforts during the Great Depression, World War II, and the Korean War to encourage the development of small enterprises; its immediate predecessor was the Small Defense Plants Administration ("SDPA").[16] Its mission is to "aid, counsel, assist and protect, insofar as is possible, the interests of small business concerns" and to ensure that a "fair proportion" of government contracts and property sales go to small businesses.[17] Among other functions, the agency makes and guarantees loans to small businesses and victims of natural disasters, offers training to small business owners, and funds investment initiatives for small businesses.[18]

Existing Statutory Authorities

This section examines existing authorities under GEPA, the HEA, and the Small Business Act to determine whether they grant the Executive Branch the power to transfer the federal student loan portfolio to the SBA in line with President Trump's decision announced on March 21. Based on the text, legislative history, and historic use by prior Administrations of these authorities, this paper concludes that Congress has not authorized the Executive Branch to move the student loan program from ED to SBA (or any other agency). Although statutory authority exists for the Secretary to coordinate with other agencies certain aspects of the federal student loan portfolio, while maintaining responsibility for the program, ***this authority is severely limited.***

GEPA Authority—20 U.S.C. § 1231(a)

Statutory Text

In the Improving America's Schools Act of 1994 (H.R. 6), Congress amended the General Education Provisions Act, 20 U.S.C. §§ 1221 *et seq.*, ("GEPA") to authorize the Secretary "to enter into arrangements with other Federal agencies to jointly carry out projects of common interest, to

13 *About Us*, Fed. Student Aid, https://studentaid.gov/about (last visited May 28, 2025).
14 Fed. Student Aid, Federal Student Aid Portfolio Summary, https://studentaid.gov/sites/default/files/fsawg/datacenter/library/portfoliosummary.xls (last visited May 28, 2025).
15 Press Release, U.S. Dep't of Educ., U.S. Department of Education to Begin Federal Student Loan Collections, Other Actions to Help Borrowers Get Back into Repayment (Apr. 21, 2025), https://www.ed.gov/about/news/press-release/us-department-of-education-begin-federal-student-loan-collections-other-actions-help-borrowers-get-back-repayment.
16 *Celebrating 70 Years of Service to America's Small Businesses*, U.S. Small Bus. Admin., https://www.sba.gov/about-sba/organization/observances/celebrating-70-years-service-americas-small-businesses (last visited May 28, 2025).
17 *Id.*
18 *Id.*

transfer to such agencies funds appropriated under any applicable program, and to receive and use funds from such agencies, for projects of common interest."[19] This power is subject to the limitation that "[f]unds transferred or received pursuant to paragraph (1) shall be used only in accordance with the statutes authorizing the appropriation of such funds, and shall be made available by contract or grant only to recipients eligible to receive such funds under such statutes."[20]

Legislative History

This GEPA "joint projects" authority originated in an act to extend elementary and secondary education assistance programs adopted by Congress in 1970.[21] That provision allowed the then Commissioner of Education within the U.S. Department of Health, Education, and Welfare to delegate functions to subordinates within his office or "to utilize the services and facilities of any agency of the Federal Government and of any other public or nonprofit agency or institution in accordance with appropriate agreements, and to pay for such services either in advance or by way of reimbursement, as may be agreed upon."[22]

As of 1994, in addition to this delegation and interagency agreement authority, the relevant portions of this statutory provision generally prohibited in the administration of education programs the consolidation of federal programs unless the authorizing statute permitted such consolidation and restricted the waiver or modification of any provision of law authorizing an appropriation. It also provided that "[t]he transfer of any responsibility, authority, power, duty, or obligation subject to this title, from the Commissioner to any other officer in the executive branch of the Government, shall not affect the applicability of this title with respect to any applicable program."[23]

In 1994, Congress scrubbed this GEPA provision and replaced it with the current statutory text. The source of this language is from Senator Ted Kennedy's companion bill, S. 1513, to the House bill that ultimately passed. The House Committee on Education and Labor added Senator Kennedy's language to H.R. 6 (with minor differences) when it reported the bill to the House.

In introducing S. 1513 to the Senate "on behalf of the administration,"[24] Senator Kennedy placed a summary of the legislation into the record that included the following description of this "joint funding" provision:

> The new section 421A would provide express authority for the Secretary to enter into arrangements with other Federal agencies jointly to carry out particular projects of common interest, and to transfer program funds to other Federal agencies, and to receive funds from those agencies, for this purpose. Section 421A(a) would further provide that any funds so transferred or received by the Secretary may be used only for activities authorized by, and made available only to parties eligible under, the statutes authorizing

19 20 U.S.C. § 1231(a)(1).
20 20 U.S.C. § 1231(a)(2).
21 Act of Apr. 13, 1970, title IV, part B, subpart 1, Pub. L. No. 91-230, 84 Stat. 121.
22 *Id.*
23 Education Amendments of 1972, title III, § 302(a), Pub. L. No. 92-318, 86 Stat. 326.
24 139 Cong. Rec. 23416 (1993) (statement of Sen. Edward Kennedy).

> the appropriation of, and appropriating, those funds. New section 421A(a) is needed because provisions on which the Secretary has relied in the past are not as clear as is desirable, or, *as in the case of the Joint Funding Simplification Act*, have expired.[25]

Thus, the purpose of replacing the then existing portion of GEPA with the provision currently in force was, at least in part, based on the Clinton Administration's desire for "clear" authority to pursue joint projects in this area and to replace the Joint Funding Simplification Act ("JFSA"), which had expired in 1985.[26]

JFSA Authority

Until it expired, the JFSA had allowed heads of executive agencies, among other things, to "identify related programs likely to be particularly suitable in providing joint financing for specific kinds of projects"; publish joint guidelines, "model or illustrative projects," and application forms common to these programs; and "establish joint or common application processing and project supervision procedures" for these programs.[27] The law defined "project" (as in joint "projects") as "an undertaking that includes components that contribute materially to carrying out one purpose or closely related purposes and are proposed or approved for assistance under . . . more than one United States Government program . . . or . . . at least one Government program and at least one State program."[28]

According to a briefing paper published by the General Accounting Office (now the Government Accountability Office) in 1979 for a Senate subcommittee on the potential reauthorization of the JFSA in 1980,[29] "[t]he primary goal of joint funding is to simplify acquisition and administration of Federal grants by insuring uniformity of regulations, coordination among Federal agencies, and reduction of duplicative services. In short, it allows grantees with multiple Federal (and possible State) grants to more effectively manage these increasingly complex and confusing grants."[30] According to the paper, "[j]oint funding has no impact on the programmatic goals and objectives of any existing

25 *Id.* at 23507 (summary of S. 1513 inserted in the record) (emphasis added).
26 31 U.S.C. § 7112.
27 31 U.S.C. § 7103(b).
28 31 U.S.C. § 7102(4).
29 U.S. Gen. Acct. Off., Briefing Paper for Subcommittee on Intergovernmental Relations, Senate Committee on Governmental Affairs, on U.S. General Accounting Office Study of the Implementation of the Joint Funding Simplification Act (Public Law 93-510) (1979), *available at* https://www.gao.gov/assets/ggd-79-87.pdf.
30 *Id.* at 5.

grantor agency—each grantor agency maintains programmatic, as well as, fiscal responsibility for its particular grant. But the program is administered as a unified group, not as separate, unrelated entities."[31]

One example of a joint project under the JFSA cited in the General Accounting Office paper was the Atlanta Regional Commission ("ARC"), "a multi-purpose comprehensive regional planning agency created in 1971."[32] According to the paper:

> ARC is in its seventh year as a jointly funded project designed to bring regional considerations into the many different actions and decisions affecting the future of metropolitan Atlanta. The Commission's strategy is to (1) develop regional policies and (2) encourage regional policy implementation. For calendar year 1979, five Federal agencies will provide $1,876,981 from nine Federal assistance programs to support the project.[33]

Notably, the briefing paper referred to the implementation of the JFSA as "a disappointment" due to the lack of projects authorized since the law was passed in 1975 (up to 1979, there had been only seven).[34] After Congress reauthorized the JFSA in 1980, as noted above, it expired in 1985.

The Use of the GEPA Authority

The use of the JFSA to fund limited projects carrying out the common statutory purposes of multiple agencies in an interconnected way is consistent with examples of how ED has, since 1994, carried out its "joint projects" authority with other agencies under GEPA. To be clear, publicized uses of this GEPA authority have been limited, whether because it has not often been used or, likelier, because ED has used it to fund interagency projects that are so minor that it has not publicized them in a meaningful way. Two examples follow.

In 2012, ED cited the joint projects authority of GEPA to enter into an interagency agreement with the National Endowment for the Arts "for a joint project to support the activities of the *Arts Education Partnership*."[35] According to the agreement, "[t]he purpose of the Arts Education Partnership is to strengthen arts education as an integral part of the elementary and secondary school curriculum, to help ensure that all students meet challenging State content standards, to assist in the development and implementation of assessments, and to support the national effort to enable all students to demonstrate competence in the arts."[36] Under the agreement, "ED through its Office of Innovation and Improvement (OII) will provide $350,000 to the Endowment in FY 12 for the Arts Education Partnership. The Endowment will enter into a cooperative agreement with the Council of Chief State School Officers (CCSSO) to manage the Arts Education Partnership and will provide the Arts

31 *Id.*
32 *Id.* at 8. The ARC began under a different Executive Branch authority called the Integrated Grant Administration program (launched in 1972) and was authorized under the JFSA after the law was enacted. *Id.* at 1–2.
33 *Id.*
34 *Id.* at 11.
35 Interagency Agreement Between the U.S. Dep't of Educ. & the Nat'l Endowment for the Arts (2012), *available at* https://www.governmentattic.org/13docs/NEA_MOU-MOA_2012-2013.pdf (emphasis in original).
36 *Id.* at 1.

Education Partnership with $700,000 [including the $350,000 from ED] in FY 12."[37] In addition to transferring the money via Title V, Part D, Subpart 15 (Arts in Education) of the Elementary and Secondary Education Act, ED agreed to monitor the joint project, engage in quarterly discussions with partners, and participate on the governance committee of the partnership.[38]

In 2002, Congress illustrated directly how ED could use its joint projects authority, enacting a law encouraging the Institute of Education Sciences to "carry out research projects of common interest with entities such as the National Science Foundation and the National Institute of Child Health and Human Development [Eunice Kennedy Shriver National Institute of Child Health and Human Development] through agreements with such entities that are in accordance with" that GEPA authority.[39]

It does not appear that ED has invoked this GEPA "joint projects" authority in the applicable section of the Code of Federal Regulations. Instead, ED has used the authority on an ad hoc basis for minor projects of common concern with other federal agencies. There is no evidence that this provision has ever been used to justify the wholesale transfer of statute-based agency functions to another entity.

Joint Projects and Limitations on GEPA Enforcement Authority

GEPA includes a limitation to ED's enforcement authority under the statute, exempting from the GEPA statutory provisions regarding enforcement programs governed by a specific statute, such as the HEA.[40] The joint projects authority discussed above is not part of GEPA's enforcement provisions, however, so such limitation does not apply to that grant of authority.

In the "Short title; applicability; definitions" section of GEPA, the law provides that, "[e]xcept as otherwise provided, this title applies to each applicable program of the Department of Education."[41] It defines "applicable program" as "any program for which the Secretary or the Department has administrative responsibility as provided by law or by delegation of authority pursuant to law. The term includes each program for which the Secretary or the Department has administrative responsibility under the Department of Education Organization Act or under Federal law effective after the effective date of that Act."[42] Thus, there is no apparent bar to ED's application of its joint projects authority to HEA programs, including the federal student loan program.

Of course, this does not change the fact that, based on the legislative history and history of the provision's use, the GEPA joint projects provision appears to be aimed not at relocating critical agency functions to a separate agency, but rather loosening restrictions regarding interagency cooperation on responsibilities and concerns that are within the statutory focus of each agency—like common research interests and (arguably) arts in education. The fact that there is no precedent

37 *Id.*
38 *Id.* at 2.
39 20 U.S.C. § 9518.
40 *See* Rebecca R. Skinner & Jody Feder, Cong. Rsch. Serv., General Education Provisions Act (GEPA): Overview and Issues 19 (2010), https://www.congress.gov/crs_external_products/R/PDF/R41119/R41119.3.pdf.
41 20 U.S.C. § 1221(b)(1).
42 20 U.S.C. § 1221(c)(1).

for the fundamental reordering of agency priorities using the joint projects provision strongly cautions against reading into that 30-year-old statutory language (based on even older legal authorities) such a novel interpretation granting extraordinary power. The problems with this claim of power are compounded when one considers that the HEA expressly places the Secretary, and no others, in charge of managing the federal student loan program.[43]

Finally, even if the joint projects authority applies to the transfer of some or all of the responsibilities for the federal student loan program from the Secretary to another federal agency, the plain meaning of the joint projects provision clearly demonstrates that the Secretary would retain ultimate authority over the program. The most that can be said of the joint projects provision is that the Secretary arguably may be able to use it to "farm out" a subset of responsibilities for the federal student loan program to a joint initiative established with another agency that has a statutory interest in the successful operation of that program. ED has no authority to abandon its decision-making power over the program and, in line with the text of the GEPA provision, would need to jointly operate any of those aspects of the student loan program alongside another federal agency. Simply put, without an ED, there can be no *joint* project.

Sale of Defaulted Loans—20 U.S.C. § 1082

Statutory Text

The HEA grants the Secretary the following authority with respect to student loans issued under the FFEL program (discontinued in 2010[44]):

> In the event that all other collection efforts have failed, the Secretary is authorized to sell defaulted student loans assigned to the United States under this part to collection agencies, eligible lenders, guaranty

43 *See, e.g.*, 20 U.S.C. § 1087b(a) ("*The Secretary shall provide*, on the basis of the need and the eligibility of students at each participating institution, and parents of such students, for such loans, funds for student and parent loans under this part . . . .") (emphasis added); 20 U.S.C. § 1087c(a) ("*The Secretary shall enter* into agreements . . . .") (emphasis added); 20 U.S.C. § 1087e(d)(1) ("*[T]he Secretary shall offer* a borrower of a loan made under this part a variety of plans for repayment of such loan . . . .") (emphasis added).
44 *See supra* note 9.

> agencies, or other qualified purchaser on such terms as the Secretary determines are in the best financial interests of the United States. A loan may not be sold pursuant to this subsection if such loan is in repayment status.[45]

Thus, the Secretary may sell defaulted FFEL program loans that have been assigned to the United States to various named entities, including "eligible lenders" and "other qualified purchaser[s]," unless the loan is in repayment status.

20 U.S.C. § 1085(d) defines "eligible lender" to include certain banks, pension funds, insurance companies, state agencies, and certain other lenders; the definition does not mention and does not appear to contemplate another federal agency.[46]

The HEA does not define "other qualified purchaser" as used in this provision, so it is possible that ED could consider "selling" defaulted FFEL program loans to another federal agency using that provision. However, the statute further narrows its application by defining "default" as "only such defaults as have existed for (1) 270 days in the case of a loan which is repayable in monthly installments, or (2) 330 days in the case of a loan which is repayable in less frequent installments."[47]

But there is no reason to read into that provision any authority broader than the ability to sell defaulted FFEL program loans assigned to the federal government that are not in repayment. That is narrow authority indeed. According to FSA data, in the second quarter of fiscal year 2025, the amount of FFEL program loans in ED's default management system was approximately $34 billion;[48] that amount constitutes about two percent of the entire federal student loan portfolio of nearly $1.7 trillion.[49] Of course, some of those loans in the default management system may not have existed for the requisite amount of time specified in the FFEL statutory provisions and thus may not be eligible to sell.

Application to Direct Loans

If the FFEL sales provision does apply to the transfer of defaulted FFEL program loans to a different federal agency, then the Secretary could try to extend that provision to defaulted Direct Loans via 20 U.S.C. § 1087e(a)(1), which provides that, "[u]nless otherwise specified in this part [relating to Direct Loans], loans made to borrowers under this part shall have the same terms, conditions, and benefits, and be available in the same amounts, as loans made to borrowers, and first disbursed on June 30, 2010, under [the FFEL program]."[50] But it is highly doubtful that the Secretary's authority to sell a defaulted loan is a "term," "condition," or "benefit" of that loan rather than an independent power of the Secretary. Of course, any such power would only apply to defaulted loans under the Direct Loan program, subject to the same limitations as the FFEL-based authority discussed above.

45 20 U.S.C. § 1082(i).
46 20 U.S.C. § 1085(d).
47 20 U.S.C. § 1085(l).
48 Fed. Student Aid, Location of Federal Family Education Loan (FFEL) Program Loans, https://studentaid.gov/sites/default/files/fsawg/datacenter/library/locationofffelploans.xls (last visited May 28, 2025).
49 *Supra* note 14.
50 20 U.S.C. § 1087e(a)(1).

The Secretary does have the authority under the Direct Loan program, in consultation with the Secretary of the Treasury, "to sell loans made under this part on such terms as the Secretary determines are in the best interest of the United States, except that any such sale shall not result in any cost to the Federal Government."[51] The only two restrictions applicable to that authority appear to be that such a sale must be completed in consultation with the Treasury Secretary and that it cannot result in a cost to the federal government. Since the transfer of a program from one federal agency to another would undoubtedly result in some cost (for instance, the cost of relocating student loan repayment systems from FSA to SBA), it does not appear that this authority can be used to justify an interagency transfer of the federal student loan portfolio. Additionally, this authority would only apply to existing student loans; the Secretary would retain the responsibility to issue and manage student loans issued in the future.

Alternative Originators—20 U.S.C. § 1087a(a)

Statutory Text and Context

The HEA statutory provisions governing the Direct Loan program include the following directive: "Loans made under this part shall be made by participating institutions, or consortia thereof, that have agreements with the Secretary to originate loans, or by alternative originators designated by the Secretary to make loans for students in attendance at participating institutions (and their parents)."[52]

Any suggestion that the Secretary could use this provision to divest ED from all or portions of the federal student loan program by designating another federal agency as an "alternative originator" of student loans for higher education encounters multiple insurmountable issues.

First, this is not a standalone HEA provision and must be read in conjunction with another, more specific authority regarding the Direct Loan program:

> Alternative origination services, through which an entity other than the participating institution at which the student is in attendance originates the loan, shall be provided by the Secretary, through 1 or more contracts . . . or such other means as the Secretary may provide, for students attending participating institutions that do not originate direct student loans under this part.[53]

So, according to the HEA, "alternative origination" is only available when the institution of higher education attended by the borrowing student does not originate direct student loans. This provision thus does not support an attempt by the Secretary to designate another federal agency as the "originator" of all loans under the Direct Loan program; such a policy could only apply to loans for students to attend institutions that do not originate those loans themselves.

51 20 U.S.C. § 1087i.
52 20 U.S.C. § 1087a(a).
53 20 U.S.C. § 1087c(a).

Second, use of this statutory provision to transfer responsibility for the student loan program would be based on an incorrect understanding of the role of the "originator" in the federal student loan system. A report from the Congressional Research Service briefly explains how the origination process generally works:

> If a student accepts a Direct Loan, an [institution of higher education] may then originate it. Origination is the process through which an IHE submits information to FSA regarding a borrower's eligibility for a Direct Loan and requests Direct Loan funds on behalf of a student. After an IHE has confirmed that a potential borrower remains eligible (e.g., determining that the student is enrolled at least half-time and ensuring the loan amount to be borrowed does not exceed annual and lifetime borrowing limits), it must submit the information related to the student's eligibility, loan period, anticipated disbursement dates, and disbursement amounts to FSA's Common Origination and Disbursement (COD) system, which then processes, accepts, edits, or rejects the records.[54]

Thus, the "originator" of the loan is the educational institution—or, if the institution chooses not to originate loans, some alternative student loan provider. Designating another federal agency as an "originator" of loans would presumably just add a pass-through agency to the process of distributing student loans: the money would come from ED (subject to all of ED's statutory responsibilities and restrictions), pass through another federal agency (*e.g.*, the SBA), pass through an educational institution or a loan servicer, and finally reach the hands of a student. It is difficult to see how such a complicated system would benefit ED, the pass-through federal agency, the originators, the students, or the American taxpayers. It certainly would not transfer control of federal student loans to a different federal agency.

Other Student Loan-Related Functions of the FSA

Moreover, as discussed previously, FSA does much more than simply distribute student loans. The statute establishing the organization gives it the following responsibilities:

> (A) The administrative, accounting, and financial management functions for the Federal student financial assistance programs authorized under title IV, including—

54 Alexandra Hegji, Cong. Rsch. Serv., Administration of the William D. Ford Federal Direct Loan Program 11 (updated 2017), https://www.congress.gov/crs-product/R44845.

(i) the collection, processing, and transmission of data to students, institutions, lenders, State agencies, and other authorized parties;

(ii) the design and technical specifications for software development and procurement for systems supporting the Federal student financial assistance programs authorized under title IV;

(iii) all software and hardware acquisitions and all information technology contracts related to the administration and management of student financial assistance under title IV;

(iv) all aspects of contracting for the information and financial systems supporting the Federal student financial assistance programs under title IV;

(v) providing all customer service, training, and user support related to the administration of the Federal student financial assistance programs authorized under title IV; and

(vi) ensuring the integrity of the Federal student financial assistance programs authorized under title IV.

(B) Annual development of a budget for the activities and functions of [FSA], in consultation with the Secretary, and for consideration and inclusion in the Department's annual budget submission.

(C) Taking action to prevent and address the improper use of access devices, as described in section 485B(d)(7), including by—

(i) detecting common patterns of improper use of any system that processes payments on Federal Direct Loans or other Department information technology systems;

(ii) maintaining a reporting system for contractors involved in the processing of payments on Federal Direct Loans in order to allow those contractors to alert the Secretary of potentially improper use of Department information technology systems;

(iii) proactively contacting Federal student loan borrowers whose Federal student loan accounts demonstrate a likelihood of improper use in order to warn those borrowers of suspicious activity or potential fraud regarding their Federal student loan accounts; and

(iv) providing clear and simple disclosures in communications with borrowers who are applying for or requesting assistance with Federal Direct Loan programs (including assistance or applications regarding income-driven repayment, forbearance, deferment, consolidation, rehabilitation, cancellation, and forgiveness) to ensure that borrowers

are aware that the Department will never require borrowers to pay for such assistance or applications.

(3) Additional functions. The Secretary may allocate to [FSA] such additional functions as the Secretary and the Chief Operating Officer determine are necessary or appropriate to achieve the purposes of [FSA].[55]

Even if the cited provision offered the Secretary the ability to transfer the distribution of student loan funds to a different federal agency (which it does not do), FSA would retain responsibility—under the authority of the Secretary—to perform all of the functions listed here, requiring personnel and funding to carry out the federal student loan program.

Contract Authority—20 U.S.C. § 1087f(b)

Statutory Text

The HEA grants the Secretary the following authority with respect to the Direct Loan program:

The Secretary may enter into contracts for—

(1) the alternative origination of loans to students attending institutions of higher education with agreements to participate in the program under this part (or their parents), if such institutions do not have agreements with the Secretary under section 454(b);

(2) the servicing and collection of loans made or purchased under this part;

(3) the establishment and operation of 1 or more data systems for the maintenance of records on all loans made or purchased under this part; and

(4) such other aspects of the direct student loan program as the Secretary determines are necessary to ensure the successful operation of the program.[56]

According to this section of the HEA, "The entities with which the Secretary may enter into contracts shall include only entities which the Secretary determines are qualified to provide such services and supplies and will comply with the procedures applicable to the award of such contracts. In the case of awarding contracts for the origination, servicing, and collection of loans under this part, the Secretary shall enter into contracts only with entities that have extensive and relevant experience and demonstrated effectiveness."[57]

55 20 U.S.C. § 1018(b). As noted previously, FSA is also responsible for the FAFSA and monitoring of the use of federal student funds by IHEs. *See supra* note 13. Any authority to designate another agency to distribute federal student loan funds would not touch these other major functions of FSA.
56 20 U.S.C. § 1087f(b).
57 20 U.S.C. § 1087f(a)(2).

Legislative History

Congress added this provision to the HEA as part of its creation of the Direct Loan program in the Omnibus Budget Reconciliation Act of 1993. According to the House Budget Committee's report on that legislation: "The contract authorities under this section give the Secretary the administrative flexibility necessary under the expected transition schedule to ensure loan access prior to full implementation of the Federal Direct Student Loan Program. Where feasible during this period, the Secretary expects to utilize the competitive process when awarding contracts for Federal Direct Student Loan Program services."[58]

Thus, the provision is targeted at granting the Secretary flexibilities in implementing the Direct Loan program and ensuring that there is no interruption in student loan access as students switched from FFEL to Direct Loans. As with the joint projects authority in GEPA, it must be read with caution in light of this limitation of its purpose; however, perhaps in conjunction with the GEPA joint funding authority, the Secretary could consider using this provision to contract with another federal agency (where that agency has the requisite statutory authority) to carry out limited functions regarding the federal student loan program, such as the servicing and collection of certain loans. As long as the Secretary, in line with the plain meaning of the HEA, retained ultimate authority over this loan program, ED could rely on the GEPA joint projects authority and this contracting authority to justify a reduction in ED's footprint, in terms of expended resources and staff, in implementing that program. These authorities, however, do not authorize the Executive Branch to move the entire federal student loan program to another federal agency.

Authority to Transfer Functions to SBA—15 U.S.C. § 641

Statutory Text and Legislative History

As enacted in 1953, the Small Business Act provided that "[t]he President may transfer to the [SBA] any functions, powers, and duties of any department or agency which relate primarily to small-business problems."[59] With respect to such transfers, the law authorizes the President to complete "appropriate transfers of records, property,

58 H.R. Rep. No. 103-111, at 125 (1993), *available at* https://babel.hathitrust.org/cgi/pt?Id=mdp.39015087604883&seq=867&q1=4002.
59 15 U.S.C. § 641.

necessary personnel, and unexpended balances of appropriations and other funds available to the department or agency from which the transfer is made."[60]

The same language granting to the President the authority to transfer agency functions related to "small-business problems" appeared in the Defense Production Act Amendments of 1951, which created the SDPA[61]—the SBA's immediate predecessor.[62]

Given the SBA's functions to "assist and protect" small businesses, the phrase "which relate primarily to small-business problems" appears to refer to responsibilities that apply, for the most part, to help alleviate challenges faced by small businesses. Pursuant to the Small Business Act, a "small business" is an entity that:

- is organized for profit;
- has a place of business in the United States;
- operates primarily within the United States or makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials, or labor;
- is independently owned and operated; and
- is not dominant in its field on a national basis.[63]

Because "[i]t would be impractical to include in the act a detailed definition of small business because of the variation between business groups,"[64] in addition to the general standards included in the statute, the Small Business Act directs the SBA Administrator to set size standards for small businesses by regulation.[65] The SBA uses one of two measures to determine whether a business is "small": industry-specific size standards and alternative standards based on the business's "maximum tangible net worth and average net income after federal taxes."[66] For the purpose of applying industry-specific size standards, the SBA uses 1,037 industrial classifications described in the North American Industry Classification System and develops size standards based on data, such as a firm's number of employees, average annual receipts, and average asset size.[67] For instance, the SBA's standard for a small business in the Consumer Lending industry is one with annual receipts up to $47 million; its standard for small mortgage and nonmortgage loan brokers is annual receipts

60 *Id.*
61 Defense Production Act Amendments of 1951, ch. 275, § 110, 65 Stat. 131, 143 (1951).
62 *See supra* note 16.
63 R. Corinne Blackford & Anthony A. Cilluffo, Cong. Rsch. Serv., Small Business Size Standards: A Historical Analysis of Contemporary Issues 1 (updated 2022), https://www.congress.gov/crs_external_products/R/PDF/R40860/R40860.104.pdf (citing Small Business Act of 1953, Pub. L. No. 83-163, § 202).
64 H.R. Rep. No. 83-494, at 3 (1953).
65 15 U.S.C. § 632(a)(2).
66 Blackford & Cilluffo, *supra* note 63, at 1.
67 *Id.* at 1–2.

up to $15 million.[68] SBA's table of industry-specific size standards includes a range of standards for "Educational Services," including many different kinds of educational institutions that would be eligible for federal financial assistance.[69]

In light of these federal statutory definitions and regulatory standards classifying certain entities as "small businesses," it is difficult to envision how the federal student loan program is a function of ED "which relate[s] primarily to small-business problems." In fact, such an interpretation seems very much akin to forcing an elephant into a mousehole.[70] Indeed, most colleges and universities are state-supported or private nonprofit entities that historically have not paid taxes and are thus wholly outside of the Small Business Act's definition of a "small business." Federal student loans are not primarily a small-business concern; they are a trillion-dollar industry that includes student loan servicers, private collection agencies, IHEs, students, parents, and, of course, the federal government. The student loan portfolio is thus a function that relates to all entities that deal with federal student loans—whether these entities are dominant or not dominant in their field. In this way, one might describe the student loan portfolio as the field itself.

Perhaps the President could apply the Small Business Act's general definition of a "small business" and the SBA's size standards to entities operating in the federal student loan market, classify some of these entities as "small businesses," and then divide between ED and the SBA functions related to dealing with those entities, including functions related to the student loan portfolio. But carving up such functions would likely be infeasible, entail needless complexities, and fail to advance the President's ED dismantlement agenda when FSA (under the Secretary's authority) would continue to manage parts of the federal student loan portfolio.

Use of the Transfer Authority

It appears that, in the 80-year history of the Small Business Act transfer authority described above, the President has used it only twice.[71]

In 1953, President Eisenhower issued an executive order citing this statutory authority to transfer the functions, powers, and duties of the SDPA (the SBA's then defunct predecessor) and its officials to the SBA.[72]

In 1975, President Ford cited the Small Business Act's transfer authority to move to the SBA the functions, powers, and duties of the ACTION Agency related to the Service Corps of Retired Executives ("SCORE") and the Active Corps of Executives ("ACE") created under Title III of the Domestic Volunteer Service Act of 1973.[73] SCORE is a volunteer program in which retired executives

68 U.S. Small Bus. Admin., Table of Small Business Size Standards 26 (2023), *available at* https://www.sba.gov/sites/default/files/2023-06/Table%20of%20Size%20Standards_Effective%20March%2017%2C%202023%20%282%29.pdf.
69 *Id.* at 32.
70 *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (majority opinion by Justice Scalia).
71 *See §641. Transfer to Administration of Other Functions, Powers, and Duties*, U.S. House of Representatives, https://uscode.house.gov/view.xhtml?Req=granuleid:USC-prelim-title15-section641&num=0&edition=prelim (last visited May 28, 2025).
72 Exec. Order No. 10,504, 18 Fed. Reg. 7667 (Dec. 3, 1953).
73 Exec. Order No. 11,871, 40 Fed. Reg. 30615 (Jul. 18, 1975).

"provide free, expert mentoring, resources and education" specifically for small business owners.[74] ACE appears to have been a volunteer program intended to supplement SCORE by encouraging active executives to mentor members of the small-business community.[75] The Domestic Volunteer Service Act of 1973 included a statement of purpose for SCORE and ACE as "programs in which persons with business experience volunteer to assist persons, especially those who are economically disadvantaged, engaged in, or who seek to engage in, small business enterprises . . . ."[76]

These uses of the Small Business Act transfer authority since the SBA's inception in 1953 offer further evidence that Congress and the President have always understood the limited reach of this authority as applicable to functions, powers, and duties specifically related to and focused on small business—not functions, powers, and duties that have an impact on small and large enterprises alike. At heart, the management of the federal student loan program is a function that primarily centers on an agreement between a student loan borrower (who may or may not have any relation to a small business) and the federal government—a function that has indirect impacts on the entire economy. Thus, the SBA transfer authority offers no basis to move the federal student loan portfolio to SBA.

Conclusion

In its 2024 decision in *Loper Bright Enterprises v. Raimondo*,[77] the Supreme Court overruled its *Chevron* doctrine of deference to administrative agencies regarding the meaning of supposedly "ambiguous" laws and reasserted the principle of *Marbury v. Madison* that the Constitution charges federal courts with stating what the law is in cases and controversies that come before them. As the decision recognized, "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the Administrative Procedure Act (APA) requires."[78] The Supreme Court's message in that case was simple: courts will no longer defer to agency (or, by logical extension, presidential) interpretations of statutes that stretch their meaning beyond the breaking point. To rewrite a law, Congress must legislate and the President must sign the legislation. Anything else runs the substantial risk of court action that ultimately stymies the policy agenda of the Executive Branch.

The limited legal authorities discussed in this brief do not support the wholesale transfer of the federal student loan program from one agency to another. At most, existing statutory authority appears to justify transferring certain defaulted FFEL program loans to a different federal agency and establishing a cooperative arrangement with another agency in carrying out the federal student loan program. Such limited action would entail far less litigation risk than an attempt to spin off a core function of ED in managing federal student loans to another agency, which involves the kinds of tradeoffs and fundamental reordering of responsibilities that are within the constitutional remit of Congress, not any executive agency, to balance and ultimately resolve through legislation.

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74 *See We Help Small Businesses Like Yours*, SCORE, https://www.score.org/about (last visited May 28, 2025).
75 *See Definition of Active Corps of Executives (ACE)*, ALLBUSINESS.COM, https://www.allbusiness.com/dictionary-active-corps-of-executives-ace-4950032-1.html (last visited May 28, 2025). ACE may be defunct and does not appear to have a web presence.
76 Domestic Volunteer Service Act of 1973, Pub. L. No. 93-113, title III, § 301, 87 Stat. 394.
77 603 U.S. 369 (2024).
78 *Id.* at 412 (citation omitted).

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