LEGAL MEMO

Biden's IDR Rule is as Illegal and Unconstitutional as his Student Debt Cancelation Plan

To: FGA Partners

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Key points

- The Biden administration's new costly Income-Driven Repayment (IDR) rule is illegal and unconstitutional.
- The Department of Education lacks the statutory authority to promulgate this rule, and even if it did have the authority, the rule is arbitrary and capricious in violation of federal law.
- State attorneys general should step forward and challenge this rule in court, once it is finalized, as they did with the president's student debt cancelation plan.

Background

In April 2020, then-candidate Joe Biden made a series of sweeping promises around student debt forgiveness, which he claimed he would gift to voters if elected.[1] Following his election, however, the president reversed course becoming publicly skeptical of his authority to unilaterally cancel student debt, asking the Departments of Justice and Education, now led by his political appointees, to review the legality of such an effort.[2] The memorandum published by the Department of Education in January 2021, which concluded that no such authority existed, presumably played a part in the president's skepticism, which was shared by then-Speaker of the House Nancy Pelosi.[3-4] Speaker Pelosi quipped in a July 2021 press conference, "the president can't do it…that's not even a discussion." [5]

But then in late summer 2022, with the midterm election fast approaching and congressional Democrats unable to pass legislation forgiving student debt, the president reversed course again, announcing his student debt cancelation plan.[6] Under that plan, the Biden administration claimed it would unilaterally cancel $10,000 to $20,000 in student debt for all borrowers with loans owned by the Department of Education and whose annual income during the pandemic was less than

$125,000 for single tax filers, or $250,000 for married borrowers filing jointly.[7] Borrowers who received a Pell Grant would be eligible for $20,000 cancelation, with all others eligible for $10,000.[8]

Recognizing the harm this unprecedented handout would cause across the country, economically and otherwise, Nebraska and five other states quickly filed a lawsuit in federal court in Missouri arguing that the Biden administration's cancelation plan constituted illegal executive branch overreach directly harming each of their states.[9] Though the lower Court dismissed the case, the Eighth Circuit sided with the states, halting the president's cancelation program in an order issued in October 2022, pending appeal.[10] The Supreme Court then stepped in, agreeing to review the case and oral argument was held on February 28, 2023.[11] To date, the program remains on hold pending the forthcoming Supreme Court ruling with the general legal consensus being that the program is likely to be struck down by the Supreme Court as an unconstitutional abuse of power by the executive branch.[12]

So, on January 10, 2023, with the president's student loan cancelation plan on hold under court order and most certainly doomed to failure, the U.S. Department of Education proposed new "historic changes" to current regulations to reduce the cost of federal student loan payments by amending the terms of the Revised Pay As You Earn (REPAYE) plan.[13] The new plan offers $0 monthly payments for any individual borrower who earns less than approximately $30,600 annually and any borrower in a family of four who makes less than approximately $62,400.[14] For borrowers who do not qualify for the $0 payment option under this plan, the new regulations would cut their monthly payments in half.[15] The proposed regulations would also cover the costs of borrowers' unpaid interest.[16] The new rule would change existing regulations to grant credit toward IDR forgiveness for periods in which the borrower is in deferment or forbearance (i.e. not actually making payments on their loan debt) in ways not currently authorized under existing law, including by retroactively awarding credit for prior periods spent in deferment or forbearance in calculating the borrower's date for loan forgiveness, as if the borrower had been making timely payments toward forgiveness all along.[17] Lastly, this rule would restructure and rename the repayment plans under the William D. Ford Federal Direct Loan Program, combining the Income Contingent Repayment (ICR) and the Income-Based Repayment (IBR) plans under the umbrella term of "Income-Driven Repayment (IDR) plans.[18]

To accomplish all of this, the administration proposes through this rule (the IDR rule) to amend §§685.102, 685.208 through 685.211, and 685.221 of Title 34 of the Code of Federal Regulations to "expand the benefits of the REPAYE plan" in the ways described above (and in other ways outlined in the rule) enabling more borrowers to obtain loan forgiveness, and sooner, than they otherwise would under current regulations.[19-20]

The Biden administration claims these proposed regulatory changes will have a net budget impact of almost $138 billion through 2032.[21] The Congressional Budget Office (CBO) estimates a price tag closer to $230 billion over the next 10 years, but that's assuming the Biden administration's student loan cancelation program doesn't get overturned by the Supreme Court.[22] If it does get overturned—and there are strong legal arguments to suggest that it will—CBO estimates a total cost of $276 billion.[23-24]

Whatever the true cost is from an economic and policy perspective, the rule is a nonstarter as it represents an illegal and unconstitutional abuse of executive branch power for all the reasons outlined below. Given its illegality, state attorneys general should step forward and stop this new rule through the power of the courts, as they did with the president's student debt cancelation plan.[25]

The Biden administration lacks a statutory basis to promulgate its new IDR rule

Under the Administrative Procedure Act (APA), a court must "hold unlawful and set aside agency action" that is "not in accordance with law," or "in excess of statutory … authority, or limitations, or short of statutory right."[26-27] "[A]n agency literally has no power to act … unless and until Congress confers power upon it."[28] In other words, the Department of Education, like all federal agencies, possesses only those powers delegated to it by Congress through statute, and it may not confer power upon itself through rule-making, as it seeks to do here with this new, costly IDR rule.[29]

Here, the Department of Education has claimed authority to promulgate this new IDR rule under three statutes: the Higher Education Act (HEA), the General Education Provisions Act (GEPA), and the Department of Education Organization Act.[30-31-32-33] But none of these statutes grant the Department the power it claims.

First, the HEA does not grant the Department the authority required to promulgate this new rule. Section 455(d) of the HEA provides that the Secretary of Education shall offer a variety of plans for repayment of eligible Direct Loans, including principal and interest on the loans, while §455(d)(1)(D) requires the Secretary to offer 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.[34-35] And Section 455(e)(4) authorizes the Secretary to establish income-contingent repayment schedules through regulation.[36] But Section 455(e)(7) of the HEA clearly identifies the circumstances that the Secretary must use in calculating the maximum repayment period under the ICR repayment plans, and the changes the Department is seeking to make through this new IDR rule would add new criteria not included in the codified list Congress prescribed in painstaking detail in §455(e)(7)(B).[37-38] Nowhere in the HEA is the Department granted authority to add additional circumstances to rely upon in calculating the maximum repayment period under the income contingent repayment option.[39] Yet, that is precisely what the Department seeks to do with this new rule, by providing a shorter repayment period and earlier forgiveness for certain borrowers, and by allowing borrowers to receive credit toward forgiveness for certain periods of deferment or forbearance not allowed under current law.[40-41] Lacking the requisite statutory authority to create through this IDR rule, a new criteria which would have the practical effect of granting loan forgiveness to more borrowers, and in less time than current law allows, a court "must hold unlawful and set aside" this rule if one or more states legally challenge it under the APA.[42]

In addition, the other two statutes the Department points to, GEPA and the Department of Education Organization Act, also fail to grant the authority it claims.[43] Section 410 of GEPA provides the Secretary of Education with authority to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operations of, and governing the applicable programs administered by, the Department of Education, but *only in order to carry out functions otherwise vested in the Secretary by law or by delegation of authority pursuant to law* [emphasis added].[44] And §414 of the Department of Education Organization Act merely authorizes the Secretary 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.[45] Both of these laws simply give the Secretary the power to create regulations in order to carry out a function that Congress has lawfully delegated to the Department of Education through another statute. As outlined above, Congress never granted the Department the authority to add additional circumstances to rely upon in calculating the maximum repayment period under the income contingent repayment option, so it cannot claim authority for this action under GEPA or the Department's enabling statute.[46]

Despite the claims of the Department, Congress has not delegated to the Department the unbridled power to expand loan forgiveness in any way the current administration sees fit by unilaterally shortening the length of codified payment periods or by expanding the circumstances under which the department will credit borrowers as being in compliance with an income contingent payment plan for purposes of determining the date when they are entitled to loan forgiveness.[47-48-49-50] Clearly, with the Department's initial effort to unilaterally cancel student debt through a simple guidance document halted by the Supreme Court and likely to be ruled unconstitutional, the current administration has shifted to "Plan B" and will seek to make similar sweeping changes to the law governing student loans aimed at producing almost the exact same outcome its student debt cancelation plan would have created, this time through the rule-making process. But this backup plan is doomed to the same fate as the Department's initial student debt cancelation plan because the Department lacks the statutory authority needed to promulgate this rule.

The rule is arbitrary and capricious in violation of federal law

Besides lacking a statutory basis to promulgate the IDR rule, the Department has also failed to satisfy the arbitrary and capricious standard under the APA.[51] Under federal law, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[52] Agency action is arbitrary and capricious if the agency fails to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[53] A rule created by an agency is arbitrary and capricious if, in rationalizing the creation of the rule, "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[54]

Here, the Department is seeking to create a new regulation that would grant credit toward IDR forgiveness for periods in which the borrower is in deferment or forbearance (i.e. not actually making payments on their loan debt) in ways not currently authorized under existing law, including by retroactively awarding credit for prior periods spent in deferment or forbearance in calculating the borrower's date for loan forgiveness, as if the borrower had been making timely payments toward forgiveness all along.[55] The result of this change is obvious: more borrowers will have their loans forgiven, and sooner than they would otherwise.

The justification the Department provides for this sweeping and incredibly costly change is that *some* borrowers may have been confused when they entered these periods of nonpayment, failing to realize "they were delaying the time in which they could have the loan forgiven," and that *some* borrowers would have been better off had they not done so.[56] This justification is legally inadequate.[57] It fails to sufficiently justify this new costly rule which grants to *all* borrowers benefits it claims are intended to alleviate the harm suffered by only *some*. The Department has also failed to provide any evidence to show that borrowers that voluntarily entered forbearance would have been better off had they not. Even if we assume that some borrowers would have ultimately paid less over the course of their loan repayment had they not requested forbearance this does not mean they were better off. To determine whether a borrower was better off, one would need to know whether the borrower was even financially capable of making the payment during the time of forbearance, and the circumstances that led the borrower to request forbearance in the first place. Even if a borrower was technically capable of making a payment, what the borrower would have had to give up in return (food, shelter, or something else) had he not voluntarily entered a period of forbearance would be relevant to determining whether he was better off or not. But the Department failed to consider these facts when making its decision, instead opting to exercise authority it does not have to create a new rule that gives more borrowers credit toward loan forgiveness for making payments they never made. This it cannot do.

At the end of the day, even if the Department had the statutory authority to promulgate a rule of this magnitude, which it does not, it has failed to provide a rational justification for the rule, rendering it arbitrary and capricious under federal law.[58] If legally challenged, a court would most surely find the rule unlawful and strike it down.[59]

The rule violates the Constitution's separation of powers

"The President's power, if any, to issue [an] order must stem either from an act of Congress or from the Constitution itself."[60] This includes issuing orders in the form of new agency rules through federal executive agencies such as the Department of Education, which, like all federal agencies, "literally has no power to act . . . unless and until Congress confers power upon it."[61]

Here, the Biden administration has argued that it possesses the requisite statutory authority needed to issue this new IDR rule based on three statutes: the HEA, GEPA, and the Department of

Education Organization Act.[62-63-64-65] However, as outlined above, a careful reading of these statutes makes clear that they grant the President no such authority.

Yet even were we to pretend for a moment that the statutes somehow furnish a "plausible textual basis" to support the argument that Congress intended to grant the administration the authority to make the unilateral sweeping changes it seeks to make through this rule, well-established precedent makes clear that would still be inadequate to justify this rule under the U.S. Constitution, because if Congress wishes to delegate this magnitude of power to the executive branch, it must do so clearly, and unequivocally.[66-67]

Under the major questions doctrine, courts have long recognized "that there are 'extraordinary cases' . . . in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[68] If Congress wishes to grant an agency authority to "exercise powers of vast economic and political significance," it must do so clearly and unequivocally.[69] Absent such a clear statement, a court should not read into the text "the delegation claimed to be lurking there."[70] Whenever "an agency claims the power to resolve a matter of great 'political significance'" courts must apply the doctrine as a threshold inquiry.[71]

Given the astronomical costs this new program would create, ranging from the administration's estimate of $138 billion to CBO's estimates of either $230 billion in the unlikely event that the administration's student debt cancelation scheme somehow survives Supreme Court review, or, more likely $276 billion if it doesn't, one thing is certain: This IDR rule will be incredibly expensive.[72-73-74-75] And given all the attention and scrutiny the administration's student debt cancelation plan has attracted, this backup plan—which seeks results strikingly similar to those sought through the cancelation plan—is likely to attract similar levels of attention. Clearly, the Department is attempting to "exercise powers of vast economic and political significance," and under the U.S. Constitution, it can only do so with a clear statement from Congress delegating that power to the Department through statute.[76-77]

Here, a careful review of the statutes cited by the Department in claiming authority to promulgate this new IDR rule reveals not a single statement even suggesting that Congress has delegated to the Department the authority it claims, let alone a clear statement as required under the law.[78] Absent such a statement, this rule cannot pass constitutional muster. If legally challenged, a court must strike down this rule as an unconstitutional violation of the separation of powers under the major questions doctrine.[79-80]

Bottom line

The Department of Education lacks the statutory authority to promulgate this new IDR rule, and even it did have the authority, the rule it has proposed is arbitrary and capricious in violation of the APA. The moment the rule is finalized, state attorneys general should step forward and challenge it in court, as they did with the president's student debt cancelation plan. This "plan B"

effort to unilaterally force student-debt forgiveness upon the country is just as illegal and unconstitutional as the administration's student debt cancelation plan, and like the earlier plan, it is up to principled state attorneys general to stop it.

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