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Comments of Legal Aid DC in Response to the Department of Education's Intent to Receive Public Feedback for the Development of Proposed Regulations and Establish Negotiated Rulemaking Committee; Docket ID ED-2025-OPE-0016

Legal Aid DC submits these comments in response to the Department of Education's recent notice seeking public input regarding loan programs administered by the agency. Legal Aid DC is the oldest and largest general civil legal services provider in the District of Columbia. Legal Aid DC is a section 501(c)(3) nonprofit that provides legal representation, free of charge, to people living in poverty. Last year alone, Legal Aid DC served more than 10,000 District residents who were not able to afford a lawyer, on a broad range of legal matters related to housing, public benefits, family law, consumer law, and immigration.

Jobs at Legal Aid DC fit squarely within the statutory definition of "public service jobs" that qualify for the Department of Education's Public Service Loan Forgiveness (PSLF) program. The statute defines "public service job" to include "a full-time job in . . . public interest law services (including . . . legal advocacy on behalf of low-income communities at a nonprofit organization)." 20 U.S.C. § 1087e(m)(3)(B). Accordingly, Legal Aid DC has consistently employed law school graduates who have benefited from the PSLF program that is the subject of these comments. Legal Aid DC also has a vested interest in the continued availability and effective operation of the Income Based Repayment (IBR) and Income Contingent Repayment (ICR) programs.[1]

The Agency Lacks Statutory Authority to Limit Loan Forgiveness Based on Factors Not Stated in the Statute

The statute that establishes the PSLF program excuses the borrower from paying the balance of interest and principal due on the federal direct loans at issue if the borrower (1) has made 120 monthly payments (under a payment plan defined in the statute) and (2) is (and has been for those 120 months) employed in a "public service job" as defined in the statute. For

[1] The applicable statute requires the agency to publish a proposed rule after receiving public input during this comment period. 20 U.S.C. § 1098a(a)(1), (b)(1). The agency then must solicit an additional round of comments on the proposed rule before publishing a final rule. 5 U.S.C. § 553. We submit these comments with the understanding and expectation that a second round of comments will occur in the future. That round of comments will allow interested parties to respond for the first time to the specifics of the language of any proposed regulatory changes.

loans that meet these statutory criteria, the statute implements loan forgiveness by directing that "the Secretary [of Education] *shall cancel* the balance of interest and principal due, in accordance with paragraph (2)." 20 U.S.C. § 1087e(m)(1) (emphasis added). Paragraph (2) states that after the 120 months have passed, "the Secretary *shall cancel* the obligation to repay the balance of principal and interest due as of the time of such cancellation . . . ." *Id*. § 1087e(m)(2) (emphasis added). By using the term "shall" — twice in the same subparagraph — the statute emphatically imposes a mandatory duty on the Secretary to cancel the balance, and obligation to repay, when the statutory criteria are satisfied. *Bufkin v. Collins* 145 S. Ct. 728, 737 (2025) (construing the statutory term "shall" as a "mandatory command"); *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171-72 (2016) ("'shall' is 'mandatory' and 'normally creates an obligation impervious to judicial discretion'") (citation omitted). Accordingly, the Secretary has no statutory authority to refuse to cancel that balance and repayment obligation based on criteria not mentioned in the statute.

On March 7, 2025, the President issued Executive Order #14235, which directed the Secretary of Education (in coordination with the Secretary of the Treasury as appropriate) to propose regulatory revisions that would prevent cancellation of the foregoing loan obligations based on criteria not mentioned in the statute. Specifically, the Executive Order lists five categories of legal violations that would exclude employers from the program, thereby eliminating the statutory loan forgiveness rights of borrowers who work for such employers:

> (a) aiding or abetting violations of 8 U.S.C. 1325 or other Federal immigration laws;
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> (b) supporting terrorism, including by facilitating funding to, or the operations of, cartels designated as Foreign Terrorist Organizations consistent with 8 U.S.C. 1189, or by engaging in violence for the purpose of obstructing or influencing Federal Government policy;
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> (c) child abuse, including the chemical and surgical castration or mutilation of children or the trafficking of children to so-called transgender sanctuary States for purposes of emancipation from their lawful parents, in violation of applicable law;
>
> (d) engaging in a pattern of aiding and abetting illegal discrimination; or
>
> (e) engaging in a pattern of violating State tort laws, including laws against trespassing, disorderly conduct, public nuisance, vandalism, and obstruction of highways.

Legal Aid DC does not condone violations of law. But to the extent that there are organizations that actually violate the law, such violations should be addressed through other

remedies. There is nothing in the statute that empowers the Secretary to deny loan forgiveness to borrowers who work for employers who fall into the five categories stated in the Executive Order.

The Executive Order suggests that its five new qualification exclusions could be implemented by changing the definition of the statutory term "public service job." But the statute specifies the following detailed definition of "public service job," and the definition does not refer to the employer's compliance with law:

> (i) a full-time job in emergency management, government (excluding time served as a member of Congress), military service, public safety, law enforcement, public health (including nurses, nurse practitioners, nurses in a clinical setting, and full-time professionals engaged in health care practitioner occupations and health care support occupations, as such terms are defined by the Bureau of Labor Statistics), public education, social work in a public child or family service agency, public interest law services (including prosecution or public defense or legal advocacy on behalf of low-income communities at a nonprofit organization), early childhood education (including licensed or regulated childcare, Head Start, and State funded prekindergarten), public service for individuals with disabilities, public service for the elderly, public library sciences, school-based library sciences and other school-based services, or at an organization that is described in section 501(c)(3) of title 26 and exempt from taxation under section 501(a) of such title; or (ii) teaching as a full-time faculty member at a Tribal College or University as defined in section 1059c(b) of this title and other faculty teaching in high-needs subject areas or areas of shortage (including nurse faculty, foreign language faculty, and part-time faculty at community colleges), as determined by the Secretary.

20 U.S.C. § 1087e(m)(3)(B). There is no way to shoehorn any of the five proposed exclusions into any of the terms of the statute (all of which simply describe different types of public service work). And there is no way for the agency to avoid the specific definition in the statute by applying some broader, more nebulous, concept of "public service." Just five days ago, the Supreme Court confirmed the longstanding rule that when Congress "define[s] a word or phrase in a specialized way" the agency cannot apply a looser "ordinary meaning" interpretation to that word or phrase. *Feliciano v. Dep't of Transp.*, No. 23-861, 2025 U.S. LEXIS 1745, at *10 (U.S. Apr. 30, 2025). Furthermore, it is the "best meaning" of that specialized definition — not the agency's interpretation of it — that controls. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024).

The best meaning of the statutory definition of "public service job" forecloses all of the five qualification exclusions under consideration in this rulemaking.[2]

Accordingly, implementing any of the five qualification exclusions would change the scope of the mandatory duty for the Secretary to cancel the balance and obligation to repay when the statutory criteria are satisfied. And the agency has no authority to do that. Where, as here, "a statute commands an agency without qualification to carry out a particular program in a particular way, the agency's duty is clear: if it believes the statute untoward in some respect, then 'it should take its concerns to Congress,' for '[i]n the meantime it must obey [the statute] as written.'" *Oceana, Inc. v. Locke*, 670 F.3d 1238, 1243 (D.C. Cir. 2011). It is well established that "[t]he agency's policy preferences cannot trump the words of a statute." *Nat'l Treasury Emps. Union v. Chertoff*, 452 F.3d 839, 865 (D.C. Cir. 2006). Put another way, "an agency is constrained by the language of the statute it must administer and may not rewrite or redefine terms in a way that contradicts the original statute." *Miller v. Garland*, 674 F. Supp. 3d 296, 305 (E.D. Va. 2023) (citing *Texas v. United States*, 497 F.3d 491, 500-01 (5th Cir. 2007)). *See also Tex. Children's Hosp. v. Azar*, 315 F. Supp. 3d 322, 334 (D.D.C. 2018) (a regulation cannot "be used to contradict the text of the statute or rule at issue" (citing *Nat'l Wildlife Fed'n v. Envt'l Prot. Agency*, 286 F.3d 554, 569-70 (D.C. Cir. 2002)); *NRDC, Inc. v. Ross*, 331 F. Supp. 3d 1338 (Ct. Int'l Trade 2018) ("It is worth noting that agency regulations cannot negate mandatory language in a statute: 'Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers.'" (citing *Heckler v. Chaney*, 470 U.S. 821, 833 (1985)).

Furthermore, the fact that the five qualification exclusions originated in an Executive Order does not change the foregoing analysis. The President has no authority to change mandatory duties clearly established by statute. "There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Clinton v. City of New York*, 524 U.S. 417, 438 (1998); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J. concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.").

[2] The current version of the implementing regulation properly avoids limiting the types of jobs that qualify as "public service jobs." The regulation focuses instead on the extent to which the organization does "public service" work (as defined in the statute) and the organization's source of funding. Under the regulation, a borrower is eligible if the borrower is employed by a "qualifying employer." 34 C.F.R. § 685.219(c)(1)(ii). The regulation defines a "qualifying employer" as, in pertinent part, "a nonprofit organization that . . . provides a non-governmental public service." 34 C.F.R. § 685.219(b). A "non-governmental public service," as applicable here, means "services provided by employees of a non-governmental qualified employer where the employer has devoted a majority of its full-time equivalent employees to working in . . . public interest law services." *Id*. "Public interest law" means: "legal services that are funded in whole or in part by a local, State, Federal, or Tribal government." *Id*.

Any Proposed Rule That Includes the Qualification Exclusions Should Specify That They Do Not Apply to Legal Representation of Parties Alleged to Have Violated the Laws at Issue

If the agency does propose a rule that includes any of the five qualification exclusions, it should specify that they do not apply to *legal representation* of parties alleged to have violated the laws identified in the Executive Order — whether the representation relates directly to such alleged violations or to other unrelated matters.

Applying the exclusions to such legal representation would conflict with the Executive Order. The Executive Order directs "exclu[sion of] organizations that engage in activities that have a substantial illegal purpose" — defined with respect to five categories of legal violations committed by the organization either as a principal or as an aider and abettor. Legal representation of parties alleged to have committed such violations plainly does not violate any law. To the contrary, our adversarial system of justice depends fundamentally upon lawyers who represent both sides of a controversy, including controversies involving the five categories of alleged violations listed in the Executive Order. The adversarial system of justice is based on the "fundamental premise" that "the robust and fearless exchange of ideas as the best mechanism for uncovering the truth." *Lefebure v. D'Aquilla*, 15 F.4th 670, 674 (5th Cir. 2021). Therefore "'the fundamental assumption of our adversary system' is that 'strong (but fair) advocacy on behalf of opposing views promotes sound decision making.'" *Id*. at 674-75. The system "empowers attorneys to zealously represent" their clients, even when they have "unpopular causes." *Id*. at 675 n.1.

Far from violating the law, attorneys uphold the law when they represent clients accused of legal violations. To the contrary, it is the government that would violate the law if it restricted loan forgiveness to lawyers based upon the clients they represent. In a case involving legal services lawyers, the Supreme Court has held that the "advocacy by [an] attorney to the courts" is "speech and expression" that enjoys First Amendment protection. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542-49 (2001). Accordingly, "state action designed to retaliate against and chill an attorney's advocacy for his or her client strikes at the heart of the First Amendment." *Eng v. Cooley*, 552 F.3d 1062, 1069 (9th Cir. 2009). Penalizing lawyers for the clients they represent, or the arguments they make on behalf of clients, would violate the First Amendment prohibition on viewpoint discrimination, which is a "blatant and egregious form of content discrimination," *Reed v. Town of Gilbert*, 576 U.S. 155, 168 (2015), that "is uniquely harmful to a free and democratic society." *Nat'l Rifle Ass'n v. Vullo*, 602 U.S. 175, 187 (2024). Such penalties also would violate First Amendment rights to petition the government for redress of grievances. The First Amendment's "Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes," *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011). A petition may "take[] the form of a lawsuit," as well as advocacy before executive agencies and their personnel. *Id*. at 390.

Furthermore, representation of clients alleged to have violated the laws at issue does not constitute *aiding and abetting* a violation of law. The elements of aiding and abetting include "specific intent to facilitate the commission of a crime by another," "requisite intent of the underlying substantive offense," and "assist[ing] or participat[ing] in the commission of the underlying substantive offense." U.S. Dep't of Just., Crim. Res. Manual § 2474: Elements of Aiding and Abetting (1998). Lawyers who represent parties alleged to have violated the law do not engage in such activities. *See, e.g.*, *Piscitello v. Giannetti*, No. 15-CV-3989, 2016 U.S. Dist. LEXIS 51600, *19 (S.D.N.Y. Apr. 18, 2016) ("attorneys do not . . . risk liability for aiding and abetting . . . merely by providing legal representation"). Indeed, because such clients are often unpopular and often unable to afford legal representation, justice (and thus the public) is served when there are lawyers available to advocate on their behalf.

Finally, applying the exclusions to such legal representation would conflict with the statute. The statute expressly includes "public defense" within the definition of "public service job." 20 U.S.C. § 1087e(m)(3)(B)(i). This provision manifests Congress's intent that the program covers organizations that represent parties accused of serious legal violations (even including crimes such as those listed in the Executive order). Congress obviously did not equate legal representation with lawbreaking. Neither should the agency in its forthcoming proposed rule.

Any Proposed Rule That Includes the Qualification Exclusions Should Specify That They Do Not Apply to Any Loan Initiated Before the Effective Date of a Final Rule

Even assuming that the agency had statutory authority to implement the qualification exclusions — which it does not — the agency would lack statutory authority to apply them to loans initiated before a final rule's effective date. Accordingly, if the agency does propose a rule that includes any of the five qualification exclusions, it should specify that the rule only applies to loans initiated after that date.

A final rule that applied to loans initiated before its effective date would be a retroactive rule. A "rule operates retroactively when it 'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" *Bd of County Comm'rs of Weld County, Colorado v. EPA*, 72 F.4th 284, 292 (D.C. Cir. 2023) (quoting *Landgraf v. USI Film Prods*., 511 U.S. 244, 280 (1994)); *see also Nat'l Mining Ass'n. v. U.S. DOI*, 177 F.3d 1, 8 (D.C. Cir. 1999) (an "administrative rule is retroactive if it 'takes away or impairs vested rights acquired under existing law'"). Student borrowers currently enter into the loans at issue with a statutory and regulatory entitlement to loan forgiveness ten years later (assuming that they satisfy the requirements of the statute and current version of the rule) — without regard to whether their employers were alleged to have engaged in violations of law. If a new version of the rule terminated that entitlement (by applying one of the five qualification factors) the rule would impair rights that borrowers had when they assumed liability under their loans, increase their liability for repayment, and impose new repayment duties for the loans.

The agency does not have statutory authority to issue a retroactive rule like that. Because of obvious concerns about fairness, retroactivity "is the exception" and not the norm in legislation, and in "rulemaking, the administrative analogue to legislation, exceptions are fewer still." *Motion Picture Ass'n of Am. v. Oman*, 969 F.2d 1154, 1155 (D.C. Cir. 1992). As a result, "an agency may not promulgate 'retroactive' rules without express authorization from Congress." *Cox v. Kijakazi*, 77 F.4th 983, 991 (D.C. Cir. 2023) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)); *see also Motion Picture Ass'n*, 969 F.2d at 1157. ("If Congress has not conferred retroactive rulemaking power on an agency, the agency has none to exercise."). There is no such express authorization here. The statutory provision for this rulemaking does not mention retroactive rules. *See* 20 U.S.C. § 1098a(a)(1), (b)(1).

Should the agency adopt a new rule that restricts PSLF eligibility, therefore, it must specify that any such regulatory changes apply only to future loans, and that the current version of the rule governs loans initiated before the final rule's effective date even if the ten-year time frame for loan forgiveness extends after that date.

Narrowing the definition of a "public service job" for purposes of determining PSLF eligibility would undermine the purpose of the program and the ability of public service organizations to continue to serve the public good

Student loans are a tremendous barrier for people seeking employment in public service jobs, particularly where salaries are persistently low compared to private sector jobs. Disparities between student debt undertaken and public-service-sector salaries, and the prospect of more competitive salaries and benefits in the private sector, mean that many borrowers may forgo public service jobs altogether because they unable to afford to pursue that line of work. The result is severe workforce shortages in the nonprofit sector. *See* Nat'l Council of Nonprofits, 2023 Nonprofit Workforce Survey Results: Communities Suffer as Nonprofit Workforce Shortage Crisis Continues 3-4 (2023), https://perma.cc/7NDN-27LG.

Congress, with bipartisan support, established the PSLF program (as part of the College Cost Reduction and Access Act, Pub. L. 110-84, 121 Stat. 784 (2007)) to encourage entry for a wide range of public service professions. The PSLF program makes it possible for borrowers to enter public service careers and carry out critically important work for the public good. Indeed, a significant number of Legal Aid DC staff have indicated that were it not for their ability to participate in the PSLF program, they would simply be unable to pursue a legal services career.

Numerous public service organizations engage in legal services advocacy and litigation that sometimes includes representation of politically unpopular clients. Individuals and families living in and on the cusp of poverty are entitled to rights and due process, even if they may have been accused (or in some cases, convicted) of engaging in unlawful activity or violating civil, criminal, and immigration laws. These organizations provide their clients with zealous representation regardless of who they are or what they have done. Department regulations that

restrict PSLF eligibility based on the kinds of activities that an organization engages in or who its clients are potentially places these organizations in the position of having to make the impossible choice of either carrying out work in furtherance of their missions, on the one hand, or ensuring their continued eligibility in a government program, on the other. Losing eligibility as a qualifying PSLF employer — or the threat of such a loss — would cause immediate, serious, and lasting harm.

If these organizations' employees lose access to the program, it will be economically difficult — if not impossible — for them to remain in public service work there. Even the threat of losing access to the PSLF program would make it more difficult for these organizations to attract new employees and to retain existing ones, because they could no longer offer these employees the prospect of student loan forgiveness after making the requisite number of payments. That, in turn, would frustrate their ability to carry out their critical organizational missions in the public interest.

The Proposed Rule Should Not Impose the Executive Order's Exclusions Upon Income Based Repayment Plans or Income Contingent Repayment Plans

The notice soliciting these comments requests comments on the Income Based Repayment (IBR) and Income Contingent Repayment (ICR) plans as part of this rulemaking. There is no directive to change these programs under the Executive Order, which addresses the separate PSLF program and does not address IBR or ICR. The IBR and ICR programs arise under different statutes than the PSLF program. *Compare* 20 U.S.C. § 1087e(m) (PSLF) *with* 20 U.S.C. § 1087e(d)(1)(D) (ICR) and 20 U.S.C. § 1098e (IBR).

Furthermore, the agency lacks statutory authority to change the requirements for ICR and IBR plans to reflect the violation-based qualification exclusions identified in the Executive Order. Eligibility for both programs depends exclusively on the borrower's income and cannot be changed based on other factors. 20 U.S.C. § 1087e(d)(1)(D) provides the basis for ICR plans. It instructs the Secretary to offer the borrower a variety of plans for loan repayment. One of the plans that the Secretary must offer is a "an income contingent repayment plan, with varying annual repayment amounts based on the income of the borrower . . . ." *Id*. The applicable statute similarly determines eligibility for IBR solely on income. Borrowers who have a "partial financial hardship" can take advantage of an IBR plan. 20 U.S.C. § 1098e(b)(1). A borrower has "partial financial hardship" if the annual amount due for the borrower's loans exceeds 15% of the difference between the borrower's annual adjusted gross income and 150% of the poverty line. 20 U.S.C. § 1098e(a)(1), (3). Eligibility is based solely on income and has nothing to do with the borrower's employer. The agency lacks statutory authority to add eligibility requirements for these programs that are not based solely on income.

Legal Aid DC appreciates the opportunity to comment on these important public service programs. Legal Aid DC looks forward to participating further in future scheduled meetings for this rulemaking.

Respectfully submitted,

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