STUDENT BORROWER PROTECTION CENTER

February 10, 2023

U.S. Department of Education
Office of the Secretary
400 Maryland Avenue SW
Washington, D.C. 20202

VIA ELECTRONIC SUBMISSION

Re: Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program (Docket ID ED-2023-OPE-0004)

Dear Secretary Cardona:

The Student Borrower Protection Center (SBPC), a national policy non-profit organization committed to ending the student debt crisis, submits this comment in response to the U.S. Department of Education's (the Department) Notice of Proposed Rulemaking (NPRM), published to the Federal Register on January 11, 2023.[1]

## I. Background

Since 1992, the Department has launched several Income-Driven Repayment (IDR) plans in recognition that student loan payments based on outstanding loan balances and prevailing interest rates are simply unaffordable for a significant contingent of borrowers, and that time-limited repayment plans based on a borrower's income are more manageable, affordable, and thereby less likely to lead borrowers to default. IDR plans have proven helpful for some borrowers—for those who are able to access and persist through IDR payments, research shows that IDR can be an effective tool in reducing delinquency, improving credit, and increasing savings and consumption.[2]

Unfortunately, existing IDR options fail to provide true financial relief to financially distressed borrowers. The current plans are largely unaffordable, forcing many borrowers to choose between paying for basic life expenses, such as medical care, childcare, housing, and food, and paying their student loans.[3] Second, runaway interest creates ballooning loan balances for borrowers, negatively impacting borrowers' credit and ability to secure personal loans, housing,

[1] U.S. Dep't of Educ., *Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program* (Docket ID ED-2023-OPE-0004), 88 Fed. Reg. 1894 (Jan. 11, 2023) ("NPRM").
[2] Daniel Herbst, *Liquidity and Insurance in Student Loan Contracts: The Effects of Income-Driven Repayment on Default and Consumption* 33 (2018), https://conference.iza.org/conference_files/Education_2018/herbst_d26912.pdf; Holger M. Mueller & Constantine Yannelis, *Students in Distress: Labor Market Shocks, Student Loan Default, and Federal Insurance Programs* 27 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23284, 2017), https://www.nber.org/papers/w23284.
[3] *Driving Unaffordability: How Income-Driven Repayment Currently Fails to Deliver Financial Security to Student Loan Borrowers*, Student Borrower Prot. Ctr. (Sept. 2021) https://protectborrowers.org/wp-content/uploads/2021/09/Driving-Unaffordability.

auto loans, and even employment.[4] Borrowers also face policy-created obstacles in remaining and persisting in IDR over the long term. And while IDR plans have been expanded such that they are theoretically available to all borrowers, policy design failures and student loan servicer misconduct have combined to keep some borrowers from accessing IDR at all or remaining in these plans over the long-term.[5] Troublingly, Black borrowers in particular are more likely to fall into default without ever accessing IDR.[6]

For these reasons, cancellation through IDR has remained elusive. Though debt cancellation under IDR has been available for qualifying borrowers since at least 2016, a recent Government Accountability Office (GAO) report found that only 132 borrowers have *ever* successfully achieved loan cancellation via IDR.[7] For relative scale, information uncovered by U.S. Senator Elizabeth Warren indicates that more than 4.4 million borrowers have been in repayment for 20 years or more.[8] Using the Department's limited data, the GAO found that at least 7,700 loans, totaling around $49 million in repayment, could potentially be eligible for IDR forgiveness.[9]

The impact of these systemic failures has been devastating and the effects of runaway debt on borrowers are profound. Researchers have found that high debt amounts relative to household assets can increase stress and anxiety and even affect physical health, and cumulative student loan debt in particular is associated with psychological stress,[10] with potentially dire

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[4] Mark Huelsman, *Driving Runaway Debt: How IDR's Current Design Buries Borrowers Under Billions of Dollars in Unaffordable Interest*, Student Borrower Prot. Ctr. (2021), https://protectborrowers.org/wpcontent/uploads/2021/09/SBPC_Driving_Runaway_Debt.pdf.

[5] For details on how shoddy and deceptive student loan servicing has consistently blocked borrowers from accessing and remaining IDR plans, *see 39 State Attorneys General Announce $1.85 Billion Settlement with Student Loan Servicer Navient,* Navient AG Settlement, https://navientagsettlement.com/Home/portalid/0?portalid=0?portalid=0?portalid=0 (last updated June 22, 2022) (settlement with Navient and dozens of Attorneys General resolving allegations that, in part, Navient steered borrowers towards forbearances and deferments rather than income-based plans);Consumer Fin. Prot .Bureau, S*tudent Loan Servicing: Analysis of Public Input and Recommendations for Reform* (Sep. 2015), https://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf (shoddy student loan servicing may have prevented as many as three-in-five borrowers who managed to enroll in IDR from staying on track year-over-year; *see generally Driving into a Dead End,* the Student Borrower Prot. Ctr. (2021), https://protectborrowers.org/wp-content/uploads/2021/10/SBPC_Driving_Into_A_Dead_End.pdf.

[6] Ben Kaufman, *New Data Show Borrowers of Color and Low-Income Borrowers are Missing Out on Key Protections, Raising Significant Fair Lending Concerns*, Student Borrower Prot. Ctr. (Nov. 2, 2020), https://protectborrowers.org/new-data-showborrowers-of-color-and-low-income-borrowers-are-missing-out-on-key-protections-raising-significant-fair-lending-concerns/.

[7] Government Accountability Office, Education Needs to Take Steps to Ensure Eligible Loans Receive Income Driven Repayment Forgiveness (April 2022) 10, https://www.gao.gov/assets/gao-22-103720.pdf.

[8] U.S. Senator Elizabeth Warren of Mass., Education Department Responses to Data Request by Senator Warren (2021), https://www.warren.senate.gov/imo/media/doc/Education%20Department%20Response%20to%20Sen%20Warren%20-%204-8-21.pdf#page=2.

[9] *Id*.

[10] *Sweet v. Cardona,* Case No. 3:19-cv-03674 (July 25, 2022, N.D.Cal.); *The High Price of Debt: Household Financial Debt and its Impact on Mental and Physical Health*, 91 Soc. Sci. & Med. 94, 98–99 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3718010/. ; Katrina M. Walsemann et al., *Sick of our Loans: Student Borrowing and the Mental Health of Young Adults in the United States*, 124 Soc. Sci & Med 85, 91 (2015), https://www.sciencedirect.com/science/article/abs/pii/S0277953614007503.

consequences for women, including single women in lower-income households.[11] As John Beshears, an economist at Harvard Business School who specializes in financial choices and decision-making, said, "[b]eing heavily indebted does change your cognitive capacity . . . over-indebtedness is dehumanizing to the borrower."[12] He continued that "over-indebtedness is dehumanizing to the borrower" and described recent research that suggests that being relieved of debt has multiple benefits, including increasing workers' productivity. Similarly, research by Di Maggio, Kalda, and Yao found that when borrowers' student loan debt was discharged, borrowers were significantly less likely to be delinquent on other forms of debt (like credit cards, auto loans, or mortgages), borrowers' geographic mobility increased, and they were able to earn more income.[13]

Ultimately, many of the same "struggling borrowers"[14] whom IDR plans are meant (but fail) to help are those who default, and from whom the Department collects enormous sums of money.[15] In this way, the failure of existing IDR plans to keep borrowers out of unaffordable, life-altering debt runs counter to the Higher Education Act's (HEA) purpose of expanding higher education to all Americans, regardless of family wealth or background.[16]

Overall, we are encouraged by many of the steps the Department has taken to remedy the failures of IDR and create a truly affordable repayment plan for millions of borrowers. However, too often, the Department has erred on the side of restricting benefits to borrowers, in spite of the data showing the need, in order to ensure that a few wealthy borrowers do not benefit. As a matter of principle, the Department should take the position that it is far more important to protect vulnerable borrowers than to stop the few borrowers from receiving a benefit they may not need.

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[11] Melanie Lockert, *Survey: 1 in 14 High-Debt Borrowers Had Suicidal Ideation Due to Student Loans, Student Loan Planner* (May 5, 2021), https://www.studentloanplanner.com/mental-health-awarenesssurvey/Student_Debt_Weighed_Heavier_on_Women.

[12] NPR, *How debt can affect our decision making* (Oct. 29, 2021); Elina Turunen & Heidi Hiilamo, *Health Effects of Indebtedness, a Systemic Review*, BMC Public Health (2014), https://bmcpublichealth.biomedcentral.com/articles/10.1186/1471-2458-14-489 ("Self-reported problems of indebtedness and financial stress were strongly associated with depression, and indebtedness was also associated with depression-related symptoms such as anxiety and anger").

[13] Di Maggio, Marco, Ankit Kalda, and Vincent Yao. *Second chance: Life without student debt.* No. w25810. National Bureau of Economic Research, 2019.

[14] 80 Fed. Reg. 39616, 39617 (July 9, 2015) (noting that the REPAYE plan is targeted to struggling borrowers).

[15] *Id*.

[16] Joshua Rovenger, *Illogical Collections: How the Department of Education's Involuntary Collection Efforts Undermine the Higher Education Act*, Beyond Fresh Start (2022) at 69, https://protectborrowers.org/wp-content/uploads/2022/08/Beyond-Fresh-Start.pdf.

## II. Current Proposal and Recommendations

### A. Discretionary Income Threshold and Percentage of Income

We strongly support bringing the share of discretionary income borrowers that have to pay when utilizing IDR down to five percent, although we do not support this modification being limited to borrowers who have only undergraduate loans. Furthermore, while the Department's proposal to raise the threshold for protected non-discretionary income under the Revised Pay As You Earn (REPAYE) plan up to 225 percent of the federal poverty level is an improvement over the levels for existing plans, it is not enough. We urge the Department to raise this threshold to 400 percent of poverty guidance to protect more borrowers from having to choose between paying their student loans and basic necessities.

As mentioned above, the Department's decisions around the design of IDR have doomed the protection to fall far short of delivering student loan borrowers true affordability.[17] In particular, research by SBPC has illustrated how the current menu of IDR plans is likely to leave borrowers forced to choose between their baseline living expenses and their student loan bills, especially if they live in a high-cost area, owe on private student loans, face unexpected costs such as medical bills, or are working parents.[18] These pressures are more likely to fall on Black and Latino/a borrowers, making IDR's longstanding failures a clear civil rights issue.[19] Indeed, a recent survey found that roughly one-in-four Black borrowers could not afford food, housing, or healthcare despite being enrolled in IDR.[20]

The Department acknowledges these concerns in its NPRM, noting that "[b]orrowers would benefit from more affordable IDR plans," and that "[f]or some borrowers, particularly low-income borrowers, the payments on an IDR plan may still not be affordable."[21] To address these problems, the Department proposes revising the definition of "discretionary" income (that is, the income that the Department is able to go after through IDR) so that a greater proportion of borrowers' earnings might be shielded from the Department's reach. In particular, borrowers' incomes up to 225 percent of poverty guidance would be protected from federal seizure under the revised REPAYE plan, up from more recent plans' 150 percent and ICR's 100 percent thresholds. The Department has also proposed limiting the share of discretionary income that borrowers will be obligated to pay to five percent for undergraduate borrowers (down from a previous low of 10 percent), 10 percent for graduate borrowers, and a weighted average between five and 10 percent for borrowers with both undergraduate and graduate loans based on the amount they borrowed for each degree.

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[17] *Driving Unaffordability*, *supra* note 2.
[18] *Id*.
[19] The Education Trust, *Jim Crow Debt: How Black Borrowers Experience Student Loans* 12 (Oct. 2021), https://edtrust.org/wp-content/uploads/2014/09/Jim-Crow-Debt_How-Black-Borrowers-Experience-Student-Loans_October-2021.pdf.
[20] *Id*.
[21] NPRM, 88 Fed. Reg. at 1895.

That this proposal is insufficient (even if an improvement) is immediately clear from the Department's flawed rationale for its design. To identify the revised 225 percent threshold for discretionary income, for example, the Department explains that it "looked for the point at which the share of those who report material hardship—either being food insecure or behind on their utility bills—is statistically different from those whose family incomes are at or below the Federal poverty guidelines."[22] Table 1 of the NPRM offers additional detail on the Department's analysis, illustrating that the agency used regression analysis to show that at a 1 percent level of significance, borrowers exhibit an amount of material hardship (again, defined as a borrower experiencing food insecurity or utility bill delinquency) that is statistically distinguishable from that of borrowers at or below the poverty line only when they have an income equal to at least 225 percent of poverty guidance.

More simply, the Department decided that it would protect borrowers' incomes up to only 225 percent of poverty guidance because that is the level of income at which it could show that borrowers face material hardship that is *not quite at the level of the hardship that people face when living at or below the poverty line.* (Note that the Department did not comment on the magnitude of this difference—if it did, it would have had to concede that the difference in hardship is, while distinguishable, only fractional). The Department did not specify how it determined that borrowers are ready to make payments on their loans as soon as their level of financial difficulty is provably just below that of someone *currently living in poverty*. Given that the present NPRM began with a negotiated rulemaking committee that operated under the title of "Affordability and Student Loans," the Department's lack of interest in what borrowers can actually afford is puzzling.

The Department's rationale for charging borrowers with graduate loans 10 percent of discretionary income is equally faulty. In particular, while the NPRM follows through on President Biden's promise to "[cut] monthly payment in half for undergraduate loans" by "[capping] monthly payments for undergraduate loans at 5% of a borrower's discretionary income,"[23] it claims that it cannot offer the same relief to graduate borrowers because the Department "is concerned that setting payments at 5 percent of discretionary income for graduate

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[22] *Id*. at 1901.

[23] The White House, *Fact Sheet: President Biden Announces Student Loan Relief for Borrowers Who Need it Most*, Statements and Releases (Aug. 24, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/. In actuality, to identify and defend the five percent income share for undergraduate borrowers for the new IDR plan, the Department "calculated how to construct a payment formula in which the income at which an undergraduate borrower who completes their program with median debt ceases to benefit from IDR is equal to the income at which the graduate borrower who completes their program with median debt also ceases to benefit." https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/nprmidr.pdf. Through this exercise, the Department found that setting the cost of the revised REPAYE plan at five percent of discretionary income for undergraduate borrowers leads to the income level at which the typical undergraduate borrower stops benefitting from IDR being roughly equal to the income at which the typical graduate borrower paying 10 percent of discretionary income stops benefitting from IDR. However, given that President Biden's promise to limit the cost of IDR to five percent of discretionary income traces back to his 2020 presidential campaign, we are comfortable dismissing this analysis as pretextual. https://perma.cc/7G6C-25EG. In any case, as described below, this analysis also operates from the fundamentally flawed framework of seeking to design IDR by equating outcomes for wholly different groups by reference to an assumption of equal incomes across undergraduate and graduate borrowers.

loans could result in borrowers taking on significant additional debt that they will not be able to repay."[24] To illustrate the point, the Department calculated the savings that a borrower with a typical level of undergraduate debt and no graduate debt would enjoy compared to a borrower with a typical level of graduate debt and no undergraduate debt if each were asked to pay the same proportion of discretionary income under the revised REPAYE proposal. This analysis purports to reveal that setting the amount that graduate and undergraduate borrowers owe while in IDR to an equal proportion of income would lead graduate borrowers to enjoy disproportionate savings.

But while the Department was careful to use the actual median debt levels for borrowers in these groups while conducting its analysis, it perplexingly assumed in this exercise that the graduate and undergraduate borrowers would have *the same income*. The Department likely took this step because using actual data on the median incomes of bachelor's and master's degree recipients would show that in *neither* case would the typical borrower benefit from the use of the revised REPAYE plan.[25] This evasion illustrates a key point that the Department either omits or does not understand: that graduate borrowers tend to have higher incomes, and that they will therefore be likely to generally pay more when using IDR than undergraduate borrowers *even if the percent of discretionary income that they are obligated to pay via IDR is the same.*

It is striking that the Department appears not to have attempted to incorporate this fact into its proposal to revise REPAYE, or even to analyze how differences across typical income levels for undergraduate and graduate borrowers might inform the dynamics of payments on IDR. Doing so might have lent empirical support to a fact that many graduate borrowers already know well: that these borrowers are struggling even given existing IDR options, and that more relief is necessary to alleviate the burden of graduate school loans.

The Department goes on to double down on its flawed line of reasoning, stating that it cannot set payments at 5 percent of discretionary income for graduate borrowers because "if an undergraduate borrower and graduate borrower have the same income level, it is highly likely that the latter will have significantly larger reductions in monthly payments relative to the 10-year standard plan due to IDR than the former if undergraduate and graduate loans are treated the same."[26]

The Department makes no effort to justify this strange starting point for its defense of cutting graduate borrowers short.[27] (Why should the possible instance of a graduate and undergraduate

[24] NPRM, 88 Fed. Reg. at 1903.

[25] SBPC calculation. Income data from https://www.bankrate.com/loans/student-loans/average-college-graduate-salary/. Assumes, following the example in the NPRM, that the undergraduate borrower has $20,062 in debt at a 4 percent interest rate and that the graduate borrower has $41,000 in debt at a 5.5 percent interest rate. Similarly, this analysis assumes that both borrowers would pay 10 percent of discretionary income, defined as 225 percent of poverty guidance, and that the relevant poverty level for each borrower is $11,880 per year.

[26] NPRM, 88 Fed. Reg. at 1904.

[27] The Department also does not explain why it takes the possible instance of a graduate and undergraduate borrower having the same income as an unfortunate edge case here while using that outcome as its *baseline assumption* when defending its fear, discussed above, that setting graduates' obligations under IDR at 5 percent of discretionary income could lead them to take on additional debt that they would not be able to repay.

borrower having the same income be the point on which this rulemaking should turn? Given that the entire point of attaining a graduate degree is in part to *increase one's earning potential*, shouldn't the possibility of a graduate and undergraduate borrower having the same income be viewed as an edge case, or, more to the point, an instance of there being a borrower whose low earnings relative to their graduate-level education put them in clear need of access to protections? And if a graduate borrower's earnings are relatively low because they chose to enter a public service field, as is often the case, is that not a broader social failure for which the Department should not choose to punish individual borrowers?[28]).

Instead, the Department could have proceeded by noting that graduate borrowers generally face greater debt burdens and often continue to find IDR insufficiently affordable; acknowledging (as discussed above and below) that the weight of graduate debt falls disproportionately on Black, Latino/a, and low-income borrowers; affirming that even graduate borrowers deserve not to be made destitute by payments under IDR; and concluding that all borrowers should have payments be reduced to five percent of discretionary income through the revised REPAYE plan.

Finally, the Department defends charging graduate borrowers 10 percent of discretionary income on the grounds that it "is more concerned about the potential for undergraduate borrowers to struggle with delinquency and default than it is for graduate borrowers."[29] The Department explains that "Department data on borrowers in default as of December 31, 2021, show that 90 percent of borrowers who are in default on their Federal student loans had only borrowed for their undergraduate education. Just one percent of borrowers who are in default had loans only for graduate studies. Similarly, just five percent of borrowers who only have graduate debt are in default on their loans, compared with 19 percent of those who have debt from undergraduate programs."[30]

This reasoning appears to involve a category error, or at least a misunderstanding of what IDR is meant to do. Congress created IDR with the stated goal of broadly reducing borrower default.[31] IDR was not intended to hand out default protection on a pro rata basis determined by how much graduate debt a given borrower took on. Indeed, under Secretary of Education Ted Mitchell noted in 2015 that "[w]ith the tools we have in place, particularly income driven repayment plans, we should all be aiming at a zero default rate among student loan borrowers."[32] He did not limit that statement to undergraduate borrowers.

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[28] The latter idea is explored further in a letter SBPC submitted today in response to the Department's Request for Information Regarding Public Transparency for Low-Financial-Value Postsecondary Programs (Docket No. TREAS-DO-2022-0020). See https://protectborrowers.org/wp-content/uploads/2023/02/SBPC_Low-financial-value-programs.pdf.
[29] NPRM, 88 Fed. Reg. at 1903.
[30] *Id.*
[31] 138 Cong. Rec. 17002 (1992) (statement of Sen. Durenberger) ("The most important principle in the legislation I introduced is that student loan payments should be tied to post-college income--easing cash-flow burdens on students and dramatically reducing current levels of student loan defaults.").
[32] Consumer Fin. Prot. Bur., *Milwaukee, WI - Field hearing on student loans*, YouTube (June 12, 2015), https://www.youtube.com/watch?v=vrEjtQoSna8&t=435s.

The Department should abandon its intent to ration default protection and should instead implement IDR as Congress intended—with the Department meaningfully shielding all borrowers from downside risk. The NPRM's thin reasoning on this topic proves only how indefensible the alternative is.

Instead, addressing each of the criticisms cited above in one fell swoop, the Department should allow all borrowers to pay only five percent of discretionary income on the revised REPAYE plan and substantially raise the threshold for discretionary income. We also recommend the Department protect borrowers' incomes up to 400 percent of poverty guidance, the benchmark that the federal government already uses as a cutoff for certain forms of healthcare assistance.[33] Under this plan, borrowers would not be obligated to make any payments until they earn roughly $54,400, a far more reasonable threshold than is currently available.[34] Moreover, this simple solution would avoid the confusion that the "weighted average" methodology the Department is currently proposing for borrowers with both undergraduate and graduate loans is likely to bring. Avoiding this pitfall is something that the Department should be particularly supportive of given the NPRM's stated desire to avoid "operational complexity"[35] and the longstanding issues that have surrounded the implementation of basic facets of the student loan program.[36]

### B. Borrower Eligibility for IDR Plans

While we applaud the Department's efforts to make IDR payments more affordable for borrowers with loans attributed to both undergraduate and graduate programs, the NPRM as currently drafted exacerbates existing inequalities for some vulnerable borrowers.

*Parent PLUS Borrowers*

Parent PLUS Loan borrowers have long struggled to access affordable repayment plans, including IDR plans.[37] This struggle is in large part due to the underlying Income-Based Repayment (IBR) and Income-Contingent Repayment (ICR) provisions in the HEA excluding these borrowers from enrolling in plans based on these authorities, namely IBR, ICR, "Pay As You Earn" (PAYE), and REPAYE. However the Department has historically exacerbated this exclusion by extending it beyond what is required by statute. The Department's current proposal maintains these unnecessary exclusions.

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[33] 26 U.S.C. § 36B.

[34] Based on current poverty guidance and an assumption of 2 percent annual income growth. See https://www.federalregister.gov/documents/2022/01/21/2022-01166/annual-update-of-the-hhs-poverty-guidelines

[35] NPRM, 88 Fed. Reg. at 1903.

[36] Mike Pierce & Tamera Cesaretti, *The System is Broken: What More Than a Decade of Litigation Reveals About the State of the Student Loan Industry*, Student Borrower Prot. Ctr. (Dec. 3, 2019), https://protectborrowers.org/the-system-is-broken-what-more-than-a-decade-of-litigation-reveals-about-the-state-of-the-student-loan-industry/.

[37] Peter Granville, *Parent PLUS Borrowers: The Hidden Casualties of the Student Debt Crisis*, The Century Foundation (2022), https://tcf.org/content/report/parent-plus-borrowers-the-hidden-casualties-of-the-student-debt-crisis/.

There are specific limitations on Parent PLUS Loan borrowers' ability to directly access certain of these plans, namely the ICR and IBR plans, discussed below. However, the Department has unnecessarily expanded these limitations in its regulations.

The IBR statute explicitly provides that the IBR plan shall not be available to a:

> borrower of a Federal Direct PLUS Loan made on behalf of a dependent student or a Federal Direct Consolidation Loan, if the proceeds of such loan were used to discharge the liability on such Federal Direct PLUS Loan or a loan under section 1078–2 of this title made on behalf of a dependent student.[38]

It is therefore clear that a Parent PLUS Loan borrower cannot access the IBR plan, even upon consolidating their loan. The ICR statutory language, however, is less restrictive than the IBR language, in that it provides only that the ICR plans shall not be available to a "borrower of a Federal Direct PLUS loan made on behalf of a dependent student."[39] Both on its face and when read together with the IBR provisions, it is clear that ICR statutory language permits Parent PLUS Loan borrowers who consolidate their loans to access ICR-based plans.

However, the Department has implemented the ICR provisions in a way that narrows Parent PLUS Loan borrowers' options and is contrary to the ICR statutory provisions. Today, as discussed above, there are three available repayment plans pursuant to ICR: the ICR plan,[40] PAYE plan,[41] and REPAYE.[42] Despite being repayment plans derived from the HEA's ICR provisions, both PAYE and REPAYE exclude borrowers with Direct Consolidation Loans that were used to repay a Parent PLUS Loan, mirroring the HEA's IBR eligibility.[43] This leaves ICR, the least affordable of these plans, as the only option available to parent borrowers. There is no reason for any ICR regulation to exclude these borrowers, especially when the PAYE and REPAYE terms are more favorable than the ICR plan. Any repayment plan based on ICR authority should be accessible to Parent PLUS Loan borrowers once they consolidate their loan.

For this reason, we are disappointed to see that the Department's present IDR proposal maintains this regulatory exclusion and worse treatment of Parent PLUS Loan borrowers, especially since it is within the agency's authority to extend REPAYE to these borrowers once they consolidate their loans. Not only would granting access to the revised REPAYE help a population of borrowers in need, it would also further the Department's stated goal of simplifying and streamlining the IDR program. The current proposal is particularly concerning given the growing evidence that the Parent PLUS Loan program has become a debt trap for many of its borrowers, who by the nature of the program trend older, and that it is exacerbating, not lessening, student loan debts' contributions to the racial wealth gap in this country.[44]

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[38] 20 USC § 1087e(d)(1)(E).
[39] 20 U.S.C. § 1087e(d)(1)(D).
[40] 34 C.F.R. § 685.209(b).
[41] 34 C.F.R. § 685.209(a).
[42] 34 C.F.R. § 685.209(c).
[43] 34 C.F.R. § 685.209(a)(1(ii) (definition of "eligible loan"); 34 CFR § 685.209(c)(1)(ii) (definition of "eligible loan").
[44] *Parent PLUS Borrowers: The Hidden Casualties of the Student Debt Crisis*, *supra* note 37.

We therefore urge the Department to treat Parent PLUS Loan borrowers the same as all other borrowers, and to give them access to the proposed plan's more affordable payments and other proposed benefits upon consolidating their loans.

*Graduate Borrowers*

The current proposal that graduate loan borrowers enrolled in IDR pay 10 percent of their discretionary income toward their monthly payments while undergraduate borrowers pay five percent is unjustifiable and is likely to disproportionately harm Black and Latino/a borrowers, and particularly women of color. The Department's choice to exclude graduate borrowers from the more generous discretionary income threshold is incredibly flawed and myopic; it disregards the necessary context provided by viewing the issue of repayment through racial and economic justice lenses.

The flawed logic in the Department's manufactured disparity lies in the lack of consideration of hundreds of years of systemic racism. While it is true that most borrowers' loans cover their undergraduate education, the 1.6 million Grad PLUS borrowers must not be discounted.[45] They are burdened by $91 billion of debt and are disproportionately women and Black borrowers.[46] Women are more likely to need to borrow for graduate school (11.7 percent of women borrow compared to 8.7 percent of men), and so are Black and Latino/a students (17.3 percent and 11.3 percent respectively compared to 9.8 percent of white students).[47]

The exclusionary nature of the new IDR plan will only exacerbate existing racial and gender disparities in debt for Black women in particular, 95 percent of whom reported that it is consistently reinforced that additional advanced degrees are needed to compete with white graduates for the same positions.[48] Due to Black communities being systemically oppressed and denied opportunities over centuries, in combination with factors like the racial wealth gap, racist banking policies, and redlining, Black families are less likely to have the generational wealth to pay for any amount of higher education, let alone the additional degrees they seek to level the playing field.[49]

Moreover, Black and women graduates are still at a disadvantage, even if they are able to secure employment because of the racial and gender wage gaps.[50] Even without accounting for racial disparities, the average salaries of employed graduate students are frequently on-par with the salaries of those who just had an undergraduate degree—and in some cases, graduate students

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[45] *Federal Student Loan Portfolio*, Fed. Student Aid, https://studentaid.gov/data-center/student/portfolio.
[46] *Id.*
[47] U.S. Dep't of Educ., Nat'l Ctr. for Educ. Stat., *Fast Facts: Student Debt,* https://nces.ed.gov/fastfacts/display.asp?id=900, (last visited Feb. 9, 2023).
[48] *Jim Crow Debt*, *supra* note 19.
[49] Kaufman, *supra* note 6.
[50] Jillian Berman, *'I can't imagine the day when I'm not paying.' Black women are being crushed by the student debt crisis — and demanding action*, MarketWatch (Nov. 13, 2021), https://www.marketwatch.com/story/i-cant-imagine-the-day-when-im-not-paying-black-women-are-being-crushed-by-the-student-debt-crisis-and-demanding-action-11635948623?mod=personal-finance.

even had lower salaries than undergraduate degree holders.[51] In fact, 61 percent of Black borrowers reported that having a degree did not increase their ability to build wealth.[52] The Department's assumptions are further discredited by the fact that 33.6 percent of graduate borrowers are unemployed, and roughly 1-in-4 would qualify for $0 payments if included in the new IDR plan.[53] Indeed, even noting the discussion about about how the Department's rationale for charging graduate borrowers 10 percent of discretionary income falls short for its failure to consider that graduate borrowers *generally* or *frequently* have higher incomes than undergraduate borrowers, the Department has clearly ignored that having a graduate degree does not itself guarantee higher earnings, let alone how the absence of higher earnings in the face of onerous graduate debt uniquely weights down borrowers, or how the instance of financial distress due to graduate debt breaks down across demographic groups.

Black graduate degree holders, with higher balances and (under the Department's current proposal) higher monthly payments, are likely to have other areas of life negatively impacted because of their student debt. Among graduate degree holders, 44 percent postponed paying off other debt, 51 percent postponed contributing to retirement, and 61 percent postponed purchasing a home because of their student debt.[54] Clearly, Black borrowers are not able to easily make massive payments for 30 years like the Department suggests. The existence of these massive graduate debt burdens is not only evidence of generations of an inequitable education system, but proof that the disparities will only deepen if the Department moves forward with its proposal as-is.

The bottom line is that the Biden Administration has decided they are able to determine what is affordable for borrowers. Despite recognizing significant shortcomings in establishing a rule that accounts for significant challenges for borrowers (such as geographically-determined cost of living), the Department makes leaps and bounds in their logic to unfairly punish graduate borrowers. Graduate borrowers are in dire need of the relief that the new IDR plan affords undergraduate borrowers. The Biden administration had the choice to make graduate borrowers eligible for the new IDR plan—there are no legal barriers to doing so—and made a choice that only exacerbates racial disparities in debt. It is our position that racial and economic justice must be centered in policymaking, and therefore, the new IDR rule limiting monthly payment amounts to five percent of the borrower's income should include debt attributed to graduate programs.

### C. Married Borrowers

We strongly support the Department's proposal to allow married borrowers filing separate Federal income tax returns to exclude their spouse from the borrower's household income and

[51] *Fast Facts: Student Debt, supra* note 47.
[52] *Jim Crow Debt*, *supra* note 19.
[53] U.S. Dep't of Educ., Nat'l Ctr. for Educ. Stat., *Debt After College: Employment, Enrollment, and Student-Reported Stress and Outcomes,* (March 2018), https://nces.ed.gov/pubs2018/2018401.pdf.; U.S. Dep't of Educ., Nat'l Ctr. for Educ. Stat., *Baccalaureate and Beyond (B&B:16/20): A First Look at the 2020 Employment and Education Experiences of 2015–16 College Graduates* (Sept. 2022), https://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2022241.
[54] *Jim Crow Debt*, *supra* note 19.

size when calculating the borrower's monthly payment amount under all IDR plans. As the Department notes in the NPRM, current tax filing requirements are inconsistent across different IDR plans, leaving married borrowers uncertain of which plan is best for their individual circumstance and creating extra administrative burden for the Department when processing applications.[55] Most importantly, requiring married borrowers who have filed taxes separately to provide spousal income creates unnecessary risk for the most vulnerable borrowers in cases of domestic abuse, divorce, or separation.

### D. Negative Amortization

As mentioned, one of the key design flaws in current IDR plans is the presence of runaway debt balances when borrowers' monthly payments do not cover the interest on their loans, a process known as negative amortization. This phenomenon is not only psychologically debilitating for borrowers whose loan balances spiral seemingly out of control, but it can also extend repayment for years and result in borrowers paying thousands of more dollars than they ever borrowed in the first place, losing years of wealth-building and financial stability in the process. The lack of interest subsidy for borrowers who, by definition, are low-income or facing financial hardship, creates long-term ripple effects on their financial, and even mental and physical, health.[56] Runaway debt balances are both incredibly common[57] and have impacted an increasing share of borrowers over time.[58]

We are glad to see that the current proposal to revise REPAYE goes further toward fully solving the problem by covering borrowers' unpaid monthly interest, so that borrowers' loan balances will not tend to increase over time. This is a critical protection and helps to remedy one of the most significant flaws of current IDR plans.

The revised REPAYE proposal to cover borrower's unpaid monthly interest recognizes that the presence and persistence of debt are burdensome in and of themselves, regardless of how payments on that debt are determined. Over half of all borrowers experience negative amortization and the median amount owed in income-driven repayment plans has grown over time,[59] while borrowers in other repayment plans have proven to be more able to make a dent in their principal—indicating that those in IDR are not repaying principal.[60]

Applying this simple principle—when borrowers make payments, they are able to reduce their debt load—will not only give borrowers peace of mind, it should begin to address some of the more inequitable and devastating consequences of rising debt. High student debt loads negatively

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[55] NPRM, 88 Fed. Reg. at 1907.
[56] *See generally Driving Runaway Debt*, *supra* note 4.
[57] Erin Dunlop Velez et al., RTI Int'l, *The Long Journey Through Student Loan Repayment* (2019), https://www.pewtrusts.org/-/media/assets/2019/10/the-long-journey-through-student-loan-repayment.pdf
[58] Laura Beamer & Eduard Nilaj, *Student Debt and Young America*, Jain Fam. Inst. (2021), https://www.jainfamilyinstitute.org/assets/student-debt-and-young-america-jfi-feb-2021.pdf.
[59] *The Long Journey Through Student Loan Repayment*, *supra* note 57.
[60] Congressional Budget Office, *Income-Driven Repayment Plans for Student Loans: Budgetary Costs and Policy Options* 21 (2020), https://www.cbo.gov/publication/55968.

impact borrowers' credit scores, making it more difficult for them to qualify for other loans such as mortgages and auto loans, and ensuring that they receive harsher terms when they do.[61] A low credit score can also disqualify borrowers from obtaining housing and employment. Adults with any student loan debt report lower levels of financial well-being compared to those who have either repaid their loans or never had to take on student loans in the first place.[62]

The phenomenon of runaway debt is particularly pronounced for Black and Latino/a borrowers. Currently, over three-quarters of student loans in majority-minority zip codes have a higher balance than what was originally borrowed (compared to just half of loans in majority-white zip codes).[63] Data from the Department confirms that twelve years after beginning college, two-thirds of Black borrowers owe more than they had originally borrowed, while only 1-in-9 fully repaid their debts.[64] In contrast, fewer than 1-in-3 white borrowers, twelve years after starting college, are faced with a larger balance than their original obligation.[65]

In designing previous IDR plans, the Department has attempted to take charge of this runaway debt, including by limiting a portion of capitalized interest and subsidizing interest payments for the first few years of a borrower's repayment period. Indeed, some IDR plans, such as PAYE, REPAYE, and IBR, cover some or all of the interest for borrowers, so long as they continually recertify their income, qualify for reduced payments, and do not leave the plan. But critically, the government will not currently pay all the interest in perpetuity, and in fact it generally covers only a portion of interest when it does pay.[66] This results in larger runaway debt balances for borrowers who consistently qualify for low monthly payments who, by definition, are low-income for long periods of time.

While we applaud the coverage of unpaid interest, as well as the shorter timeframe to cancellation for lower-balance borrowers, the Department's proposal does not go far enough to help borrowers. Even when covering unpaid interest, the lowest income borrowers' loan balances will not meaningfully decline under the proposed revisions to REPAYE as currently drafted. Under the Department's proposal, a borrower with a low or $0 monthly payment, by definition a borrower with financial hardship, will see their loan balance remain unchanged. This means their debt-to-income ratio will continue to remain high over potentially decades. To remedy this, we recommend that the Department adopt an annual forgiveness structure, in which borrowers see part of their principal balance discharged each year, described in the next section as "Forgive-As-You-Go."

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[61] *Id*.
[62] Bd. of Governors of the Fed. Rsrv. Sys., Economic Well-Being of U.S. Households in 2020 67–68 (2021), https://www.federalreserve.gov/publications/2021-economic-well-being-of-us-households-in-2020-student-loans.htm.
[63] *Student Debt and Young America*, *supra* note 58 at 4.
[64] *Driving Runaway Debt*, *supra* note 4 at 10 and Fig. 2 at 11.
[65] *Id*.
[66] U.S. Dep't of Educ., *Income-Driven Repayment Plans*, Fed. Student Aid, https://studentaid.gov/manage-loans/repayment/plans/income-driven (last visited Feb. 9, 2023).

### E. Time to Cancellation

As mentioned earlier, problems with servicers and recertification plague the IDR program—with more than a third of borrowers failing to recertify on time.[67] Requiring borrowers to recertify every year for multiple decades sets millions of borrowers up to fail and risk unnecessary default. Even those who stay in repayment suffer, wondering when they will ever be able to begin saving for their children's education, or their retirement, or to stop living in debt and begin working toward financial security. And given that many borrowers, of course, are already in or approaching retirement—more than 9 million borrowers over 50 owe on more than $400 billion in federal student loans[68]—the current IDR framework means that many will never be able to move past their debt. To fully address these systemic problems, we recommend the Department make several improvements to this NPRM.

*Eliminate Disparate Treatment*

We are glad to see some of the time cancellation shortened to ten years for low-balance borrowers, but are disappointed to see that the maximum time to cancellation remains 20 years for borrowers with undergraduate debt and 25 years for borrowers with graduate debt. No borrower should be forced to repay for more than 15 years. A twenty or twenty-five year repayment period burdens borrowers for far too long during some of the most important years to build and accumulate wealth.

Further, the Department proposes to limit cancellation after ten years to borrowers with original Direct loan amounts of $12,000 or less. Borrowers with larger initial balances can secure cancellation under this proposal after paying for an additional year for every $1,000 of debt beyond $12,000 they initially took on, such that someone who borrowed $13,000 would have their loans forgiven after 11 years.

The Department explains that it chose $12,000 as its threshold for early cancellation because that is "the maximum amount that a dependent undergraduate student can borrow in their first 2 years of postsecondary education ($5,500 for a dependent first-year undergraduate and $6,500 for a dependent second-year undergraduate, for a total of $12,000)"[69] The Department notes that it could have chosen $19,000 (the maximum an independent undergraduate can borrow over two years, as its threshold for early cancellation) but that it opted not to for two reasons: 1) that "63 percent of borrowers in default had an original loan balance of $12,000 or less, while just 15 percent of borrowers in default originally borrowed between $12,000 and $19,000,"[70] and 2) that setting the threshold for early cancellation at $19,000 would make this cancellation less targeted by raising the amount a borrower would need to earn to not receive early forgiveness by roughly $18,000.

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[67] The Pew Charitable Trusts, *Redesigned Income-Driven Repayment Plans Could Help Struggling Student Loan Borrowers* (Feb. 2022), https://www.pewtrusts.org/-/media/assets/2022/02/studentloan_repaymentreport_final.pdf.
[68] SBPC data available upon request.
[69] NPRM, 88 Fed. Reg. at 1908.
[70] NPRM, 88 Fed. Reg. at 1909.

Each of these arguments against setting a $19,000 threshold for early cancellation is puzzling. For example, the Department correctly implies when comparing the 63 percent default rate for borrowers with balances of $12,000 or less to the 15 percent default rate on balances between $12,000 and $19,000 that the return to raising the threshold for early cancellation diminishes with respect to default reduction beyond a certain point. However, the Department fails to notice that lowering the threshold for early cancellation to $12,000 in response to this observation glosses over the huge differences in the level of in-school and post-graduation difficulty dependent and independent borrowers face. (After all, the choice of whether to set the balance limit for early cancellation at $12,000 or $19,000 is fundamentally about whether to have dependent or independent students in mind when determining that threshold.) And indeed, independent students face massive, unique, and varied difficulties during and after their pursuit of higher education, including being more likely to be a single parent, to need to work while in school, to be attending school part-time, to have greater life expenses, and to otherwise have a less robust educational background before enrollment.[71] These students are also more likely to be Black or Native.[72] And—as the Department curiously omits—they are more than 2.5 times more likely to default on a federal student loan than dependent students.[73] Yet the Department concludes that efforts to "target" relief are best carried out by essentially excluding independent borrowers from benefitting fully from early cancellation, lest a dependent student benefit even a modicum more along the way. (Of course, the Department takes this view of the possible trade-off in benefits across dependent and independent students as a starting point, making no effort to defend it.) That runs fundamentally counter to the NPRM's stated goal of promoting affordability for those who need it most. ED should abandon this flawed logic, set the threshold for early cancellation at $19,000, and affirm that it can best target relief by ushering independent students into the set of borrowers whom it will help the most, not by excluding them.

*Forgive-As-You-Go*

A critical problem with the current structure of IDR is that the lowest income borrowers never see their balances decrease. Most recently available data shows only 132 borrowers have ever received cancellation in IDR even though 4.4 million borrowers have been in repayment for over 20 years.[74] Many of the borrowers we work with express skepticism that IDR will pay off for

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[71] *See generally* Courtney Hittepole, *Nontraditional Students: Supporting Changing Student Populations, A Guide for Chief Academic Officers & Chief Student Affairs Officers*, Uni. of Denver, https://www.naspa.org/images/uploads/main/Hittepole_NASPA_Memo.pdf; Rajeev Darolia, *The Unique Challenges Working Students Confront When Seeking Financial Aid*, Brookings Inst. (Jan. 21, 2016), https://www.brookings.edu/blog/brown-center-chalkboard/2016/01/21/the-unique-challenges-working-students-confront-when-seeking-financial-aid/; Kate Barrington, *The Top Challenges for Non-Traditional Students in Community College*, Community College Review (May 31, 2022), https://www.communitycollegereview.com/blog/the-top-challenges-for-non-traditional-students-in-community-college.

[72] Katherine Saunders, *Barriers to Success: Unmet Financial Need for Low-Income Students of Color in Community College*, Ctr. for Postsecondary and Econ. Success (June 2015), https://www.clasp.org/sites/default/files/public/resources-and-publications/publication-1/Barriers-to-Success-Unmet-Financial-Need-for-Low-Income-Students-of-Color.pdf.

[73] Nat'l Ctr. for Educ. Stat., https://nces.ed.gov/datalab/powerstats/table/wlphyo.

[74] Gov't Accountability Office, GAO-22-103720, Federal Student Aid: Education Needs to Take Steps to Ensure Eligible Loans Receive Income-Driven Repayment Forgiveness at 10 (2022), https://www.gao.gov/assets/gao-22-

them, and given the voluminous problems with the administration of IDR documented in lawsuits and government enforcement actions,[75] that skepticism is warranted.

As discussed above, loan balances will not meaningfully decline under the Department's proposed revisions to REPAYE and negative amortization as currently drafted. Instead of the current proposal, under which a borrower with a low or $0 monthly payment will see their loan balance remain unchanged, we recommend that the Department adopt an annual forgiveness structure, in which borrowers see part of their principal balance discharged each year, as proposed by the legal aid negotiators at the 2021 negotiated rulemaking session.[76] The Department should implement principal cancellation based on a borrower's certified income, with greater annual cancellation amounts for the lowest-income borrowers (those whose income is persistently at or below 150 percent of the poverty level, those who qualify for or enroll in public benefit programs such as Temporary Assistance for Needy Families (TANF) or the Supplemental Nutrition Assistance Program (SNAP) SNAP, and others), and smaller percentage for higher-income borrowers. Implementing such a policy would ensure that low-income, low-balance borrowers in particular—a population that the Department is prioritizing in its proposed rule—would see their debts eliminated over a shorter time period than the 10 years currently outlined in the proposed rule, while still helping higher-balance low-income borrowers—who are disproportionately Black and attended for-profit graduate programs—offload their debt well before 25 years.

*Reduce Time to Cancellation for Lowest-Income Borrowers*

Borrowers who live in persistent poverty should have their loans cancelled sooner. Although we do not know what percent of student borrowers meet the 3-year threshold for public assistance, the Census Bureau's longitudinal survey data establishes that 43 percent of the 1 in 5 individuals who participated in means-tested public assistance during the 2009-2012 period did so for more than 3 years.[77] For borrowers who do rely on means-tested public benefits such as TANF or SNAP. Based on the eligibility criteria of SNAP (maximum income at 130 percent of the federal poverty level) and TANF (maximum income varies by state but is almost always below 100 percent of the federal poverty level), cancellation on an earlier timeline would be a huge relief.

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103720.pdf; OFFICE OF U.S. SEN. ELIZABETH WARREN, Education Department Responses to Data Request by Senator Elizabeth Warren, April 2, 2021, https://www.warren.senate.gov/imo/media/doc/Education%20Department%20Response%20to%20Sen%20Warren%20-%204-8-21.pdf.

[75] *Id*. See *CFPB Sues Nation's Largest Student Loan Company Navient for Failing Borrowers at Every Stage of Repayment*, Consumer Fin. Prot. Bureau (Jan. 18, 2017) https://www.consumerfinance.gov/aboutus/newsroom/cfpb-sues-nations-largest-student-loan-company-navient-failing-borrowers-every-stagerepayment/; *MA AG Healey Sues to Protect Public Service Loan Forgiveness* (Aug. 23, 2017), https://www.mass.gov/news/ag-healey-sues-to-protect-public-service-loan-forgiveness; *Case Update: Third Circuit Court Allows AG Shapiro's Case Against Student Loan Giant to Move Forward* (July 27, 2020) https://www.attorneygeneral.gov/taking-action/case-update-third-circuit-court-allows-ag-shapiros-case-against-student-loan-giant-to-move-forward.

[76] Persis Yu and Joshua Rovenger, Memorandum to U.S. Department of Education, "Re: IDR Proposals: Structure of Forgiveness and Discretionary Income Threshold," https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/legaididrpropdiscincomecanc.pdf.

[77] A. Delaney, "*How Long Do People Stay on Public Benefits?,*" The Huffington Post (Dec. 6, 2017), https://www.huffpost.com/entry/public-benefits-safety-net_n_7470060.

During the negotiated rulemaking, negotiators requested the Department provide data about repayment rates and duration of payments, especially for borrowers with zero dollar payments. The Department never provided that data. This information would be useful to identify the point at which borrowers are unlikely to see their incomes increase. However, even without it, we know that low-income borrowers have been in debt for decades, despite the existence of several IDR plans designed to prevent precisely that.[78]

Keeping these borrowers in repayment is both expensive for the government and sets these borrowers up to fail. Existing data shows that the vast majority of borrowers in default are low-income and would otherwise have zero dollar IDR payments.[79] This suggests that administrative burdens make it difficult for these borrowers to enroll in IDR and ultimately leads them into default. While implementation of the Fostering Undergraduate Talent by Unlocking Resources for Education (FUTURE) Act and automatic enrollment of delinquent borrowers might help low-income borrowers avoid default, the details of that implementation are not yet available, and because of the need for consent, will not be sufficient to address this problem.

### F. Qualifying Payments

While we are pleased to see the NPRM takes steps to expand the definition of a payment qualifying for IDR, the Department must do more to ensure that borrowers do not lose time towards cancellation due to the myriad system failures discussed above. As a threshold matter, the Department should assume that borrowers operate in good faith, rather than narrowing relief programs for all to address hypothetical individuals who could potentially abuse the system. Additionally, the relevant statutes already include safeguards—the Department should not unnecessarily create more administrative hoops for borrowers to jump through.

The HEA's deferment and forbearance provisions, for example, generally include caps on the maximum time that a borrower can defer or forbear payments, or contemplate financial, medical, or employment difficulties. And given that any overuse of these programs is often due to servicer steering or other misconduct, instead of punishing borrowers who end up in these programs, the Department should address the overuse through its servicing contracts.

Relatedly, we are glad to see the proposed regulation codifies the IDR Account Adjustment's inclusion of periods of forbearance and deferment in time qualifying for cancellation,[80] we urge the Department to finish the job by striking the following language from proposed § 685.209 (k)(4)(i): "except that those periods of deferment or forbearance treated as a payment under

[78] *Driving into a Dead End, supra* note 5.

[79] Consumer Fin. Prot. Bur., *Annual report of the CFPB Student Loan Ombudsman* (October 2015), available at https://files.consumerfinance.gov/f/201510_cfpb_annual-report-of-the-cfpb-student-loan-ombudsman.pdf; *See also* Adam Looney & Constantine Yannelis, A Crisis in Student Loans? How Changes in the Characteristics of Borrowers and in the Institutions they Attend Contributed to Rising Loan Defaults, BPEA Conference Draft, The Brookings Institution (Sept. 2015), available at https://www.brookings.edu/wp-content/uploads/2015/09/LooneyTextFall15BPEA.pdf.

[80] NPRM, 88 Fed. Reg. at 1927 (proposed § 685.209(k)(4)(iv)).

(k)(4)(iv) of this section do not apply for forgiveness under paragraph (k)(3) of this section." There is no reason that otherwise qualifying borrowers should be blocked from accessing the shortened 10 year cancellation timeline simply because they were improperly counseled into deferment or forbearance.[81]

*Hold Harmless Provision*

The Department also proposes a Hold Harmless procedure whereby borrowers can receive credit for time during which their loans were in non-qualifying deferment or forbearance, either by making a payment commensurate to what would have been required at the time or by establishing their past eligibility for $0 payments under an IDR plan.[82] We urge the Department to award IDR credit for any time on a loan beginning after its initial grace period, including time spent in forbearance, deferment, or default, which would moot the need for a Hold Harmless procedure. We also stress that as a solution to misinformation and inaccurate counseling provided by servicers—an issue the Department described as "deeply concern[ing]"[83]—through this proposal, the Department is yet again asking borrowers to pay for servicers' malfeasances. Nevertheless, we offer the following comments on this proposal.

First, we call the Department's attention to a potential drafting error. The proposed language provides that "For any period in which a borrower was in a deferment or forbearance . . . the borrower may obtain credit toward forgiveness as defined in paragraph (k) of this section for any months *in* which the borrower makes a payment equal to or greater than the amount the borrower would have been required to pay . . . on any IDR plan . . . including a payment of $0."[84] (*Emphasis added.*) Because the Hold Harmless procedure contemplates present payments for past months, the provision should read ". . . for any months *for* which the borrower . . . ." The contemplated payments are being made after the fact, not "in" or during the month for which the borrower seeks to recover credit.

Second, the Hold Harmless provision should be amended to ensure that borrowers who are eligible for the IDR Account Adjustment are able to access that benefit—i.e., receive credit for the periods covered by the program—even after the deadline has passed. As discussed above, each of these policies was a direct response to identified patterns of servicer misconduct and poor communication that resulted in borrowers being misinformed about or unable to access loan types or repayment plans that would qualify them for debt cancellation. Unfortunately, the wrongs that necessitated these remedial policies persist and currently undermine their ability to make borrowers whole. Any borrower with loans in existence at the time of the Account Adjustment but who was unable to access that benefit at the time should therefore be able to avail themselves of that benefit for the remainder of the life of their loans, including after any consolidation.

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[81] Gov't Accountability Office, GAO-22-103720, Federal Student Aid: Education Needs to Take Steps to Ensure Eligible Loans Receive Income-Driven Repayment Forgiveness at 15 (2022), https://www.gao.gov/assets/gao-22-103720.pdf at 17-19.
[82] *See* NPRM, 88 Fed. Reg. at 1928 (proposed § 685.209(k)(6)).
[83] NPRM, 88 Fed. Reg. at 1907.
[84] NPRM, 88 Fed. Reg. at 1928 (proposed § 685.209(k)(6)).

Federal student loan servicers currently issue letters to borrowers seeking to consolidate their loans—a necessary step for many to access the IDR Account Adjustment and Public Service Loan Forgiveness (PSLF)—that inaccurately states that by consolidating their loans, borrowers would lose credit for pre-consolidation time toward their PSLF eligibility. This is wrong. Through the IDR Account Adjustment, borrowers can receive IDR credit for pre-consolidation time, which in turn counts as PSLF credit for any public service workers. Still, we have spoken to borrowers who, understandably, were dissuaded from completing their consolidation as a result of these inaccurate messages, thereby losing out on both IDR and PSLF credit. Clearly not all borrowers will be able to access the IDR Account Adjustment benefit, and related PSLF benefit, by the IDR Account Adjustment deadline, through no fault of their own, and so should be permitted to access this benefit at a later time.

Having framed this wrong, the Department must preserve its remedy. The Department should view these remedial steps as attaching and vesting in any members of the borrower class to whom they are extended, and as traveling with those borrowers' for the duration of their loans, including after a consolidation, not for an artificial window of time. If the Department has concerns about operationalizing this long-term relief, it can do this by granting credit for all time, as discussed above, or by allowing current borrowers to raise their hand to claim their remedy through the Hold Harmless provision.

Third, the Hold Harmless provision requires payments or $0 IDR payment eligibility based on the borrower's circumstances at the time of the deferred or forborne payment. This will require borrowers to document their financial circumstances for periods of time that could be several years in the past, and therefore presents an administrative burden. Particularly given the Department's recognition of its servicers' steering practices, the Department should not put the onus on individual borrowers to recuperate credit for past time.

Fourth, by requiring a present payment based on past financial circumstances, the Hold Harmless provision fails to offer relief to borrowers whose financial circumstances have worsened since the time of their deferred or forborne payment. What could have been affordable in the past may no longer be manageable, which would leave presently-low income public service workers with no way to recuperate past missed payments. For low-income households, especially those that do not qualify for $0 payments, making what is in effect a double payment in a given month to buy back past months may be impossible.

Fifth, the proposal does not include an option for borrowers to recuperate time spent in default. For the reasons discussed above, this is an oversight, and a shortcoming. The same is true for months when the borrower was enrolled in an ineligible payment plan. The Hold Harmless proposal would only apply to deferred or forborne months, but could just as easily apply to time spent in PSLF-ineligible payment plans.

Finally, although well-intentioned, with its Hold Harmless proposal, the Department seeks to introduce yet another procedure to the IDR administration, which has already proven to be overly complex and a barrier to entry for too many borrowers. To the extent the Department plans to rely on its student loan servicers to administer this procedure, these companies' track records for implementing the Department's programs do not bode well. Adopting a policy of granting credit for time spent in forbearance or deferment, as discussed above, is both sound policy and is administratively more feasible than a case-by-case and paperwork-heavy Hold Harmless procedure.

### G. Simplifying Annual Recertification

We appreciate the Department's efforts to simplify the annual recertification process for borrowers in IDR, which should ensure that the millions of borrowers eligible for IDR are able to remain enrolled, stay out of default, and qualify for cancellation in a timely manner. The requirement that borrowers on existing IDR plans re-certify their income to stay enrolled in their plan and update their monthly payments[85] results in a process that is unwieldy and time consuming, particularly for borrowers whose employment and income information changes year to year. These requirements, combined with malfeasance and incompetence by loan servicers, result in an administrative hurdle that can trip them up from remaining in the program and losing out on crucial protections each year. Approximately one-third of borrowers do not recertify their income on time,[86] which can often be linked to servicers' failure to timely process their paperwork or clearly notify borrowers of the deadline. There are several obstacles that borrowers must overcome to remain in IDR longterm.

*Burdensome Enrollment Requirements*

Borrower delinquency rates have kept apace with rising federal student loan debt loads.[87] Falling into delinquency and, consequently, default exposes borrowers to a range of devastating debt collection measures like wage garnishment and seizure of income tax refunds and vital anti-poverty benefits like the Earned-Income Tax Credit and Child Tax Credit.[88] These consequences of default fall particularly harshly on Black and Latino/a borrowers, who are disproportionately likely to struggle to repay their student loans and access IDR plans due to their need to take on more debt to cover the cost of higher education and generational wealth and pay inequalities.[89] Incarcerated borrowers also face inordinate difficulty accessing and maintaining IDR plans due

[85] 34 C.F.R. §§ 685.209(a)(5), (c)(4), 685.221(e).

[86] Consumer Fin. Prot. Bur., *Data Point: Borrower Experiences on Income-Driven Repayment* (Nov. 2019), https://files.consumerfinance.gov/f/documents/cfpb_data-point_borrower-experiences-on-IDR.pdf at 41.

[87] Student Borrower Prot. Ctr., Disparate Debts: How Student Loans Drive Racial Inequality Across American Cities 13 (2020), https://protectborrowers.org/wp-content/uploads/2020/06/SBPC-Disparate-Debts.pdf.

[88] See Student Loan Borrower Assistance, *Earned Income Tax Credits Seized From Struggling Student Loan Borrowers* (updated Jan. 2018), https://www.studentloanborrowerassistance.org/earned-income-tax-credits-seized-struggling-student-loan-borrowers-2/; *Policy Basics: The Earned Income Tax Credit, Center on Budget and Policy Priorities* (Dec. 10, 2019), http://www.cbpp.org/research/federal-tax/policy-basics-the-earned-income-tax-credit; U.S. Dep't of the Treasury, Treasury Offset Program, https://fiscaldata.treasury.gov/datasets/treasury-offset-program/federal-collections.

[89] *See* Ben Miller, The Continued Student Loan Crisis for Black Borrowers, Center for American Progress (Dec. 2, 2019), https://www.americanprogress.org/article/continued-student-loan-crisis-black-borrowers/.

to systemic barriers that make communicating with the Department, its student loan servicers, and debt collectors nearly impossible while behind bars.[90]

The Department's proposal to provide for automatic enrollment of delinquent borrowers in an IDR plan has great potential to help solve this ongoing civil rights crisis. It is therefore imperative that the Department also commit to fully implementing the FUTURE Act so that these plans for automatic IDR enrollment actually come to fruition. The Department should therefore revise its proposed regulation to count any time a borrower spends in default after the regulation's effective date and prior to the Department's implementation of the FUTURE Act as qualifying for PSLF. Borrowers should not continue to pay the cost for the Department's and its servicers' shortcomings.

*Servicer Misconduct*

Servicers often place borrowers in short-term administrative forbearances as they take months to process recertification paperwork. And when borrowers miss the annual recertification deadline, servicers will capitalize interest on their loans, and often place them on a standard repayment plan, which may drastically increase not only their monthly payments but also their overall loan balance. This leads to the runaway debt phenomenon described above, and increases the likelihood that borrowers will default. Additionally, under the current REPAYE plan, borrowers who do not certify their income are placed on a confusing and unaffordable alternative repayment plan.[91]

According to data from the Consumer Financial Protection Bureau, 12 percent of borrowers failed to recertify and entered forbearance or deferment. Meanwhile, among those who could not recertify, delinquencies more than tripled, and those who were able to recertify also received favorable terms on other credit products.[92]

Again, the plan to implement the FUTURE Act offers some hope here, and could allow the Department to rely on tax data to furnish a monthly payment amount to borrowers that should reduce the opportunity for servicer mishaps and streamline the process for millions of borrowers. This, combined with the proposal to cover unpaid monthly interest, and automatically enroll delinquent borrowers in IDR, should reduce the likelihood that borrowers default or get fully pushed off of the path toward timely forgiveness. The Department's proposal to simplify the alternative repayment plan by re-amortizing the remaining loan balance over 10 years is also a positive step that will ensure that each borrower's monthly payment is lower than it would have been under an original standard 10 year plan.

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[90] Deanne Loonin, Amber Saddler, Robyn Smith, Abby Shafroth, *Collection at All Costs: Examining the Intersection of Mass Incarceration and the Student Debt Crisis*, Student Borrower Prot. Ctr. and the Nat'l Consumer Law Ctr. (Jul. 2022).
[91] *Income-Driven Plans Questions and Answers*, Fed. Student Aid, https://studentaid.gov/manage-loans/repayment/plans/income-driven/questions.
[92] *Data Point: Borrower Experiences on Income-Driven Repayment, supra* note 86.

However, we strongly recommend that the Department go further than its proposal to only allow 12 payments on the alternative plan to count toward IDR cancellation. As an initial matter, when borrowers in REPAYE do not timely recertify their income for IDR purposes, the Department should not, and need not, move them into an alternative repayment plan. While the existing REPAYE regulations instruct the Secretary to transfer borrowers from REPAYE to an alternative payment plan if recertification documentation is not timely received,[93] the ICR statute has no such requirement. In fact, the statute leaves the development of procedures for determining a borrower's annual ICR-eligibility entirely up to the Secretary's discretion.[94] The Department could entirely avoid the question of how many alternative payments to count toward IDR cancellation by modifying the regulation to reflect the flexibility of the statute and allowing borrowers to pay the 10-year standard repayment plan amount under their original REPAYE plan.

Failing that, the Department should allow all payments on alternative plans, both forward- and backward-looking, to count. Borrowers who are unable to recertify, or receive incorrect information from servicers, should not be subject to further confusion nor should they inadvertently lose time toward cancellation. It is especially arbitrary to exclude payments made on an alternative repayment plan, if those payments are in an amount that would otherwise be eligible for cancellation (such as the 10-year standard repayment plan amount). Furthermore, precisely because the monthly payment under the alternative repayment plan is designed to be more affordable, and in some cases may not be largely different than what they would be under the new REPAYE plan, borrowers may not realize that only a certain number of their new payments do not qualify for cancellation.

### H. Aligning PSLF and IDR Payment Counts

The IDR and PSLF programs are inextricably linked. Not only do payments by public service workers on an IDR plan count toward PSLF's 120 qualifying payments for cancellation, but those workers are likely to benefit from an IDR plan given the public sector's generally lower salaries than the private sector. It is therefore incumbent on the Department to align these two programs as much as possible. Although the Department recently finalized new regulations for the PSLF program,[95] it can use the present rulemaking to better coordinate these two regulations. To do this, there are five specific recommendations for the Department's proposed regulations. It is important to note, however, that any shortcomings with respect to the PSLF program rules should not serve to limit what the Department can accomplish here with its IDR rulemaking process.

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[93] 34 C.F.R. §685.209(c)(4)(v)

[94] 20 U.S.C. § 1087e(e)(1), stating "The Secretary shall establish procedures for determining the borrower's repayment obligation on that loan for such year, and such other procedures as are necessary to implement effectively income contingent repayment."

[95] U.S. Dep't of Educ., *Institutional Eligibility Under the Higher Education Act of 1965, as Amended; Student Assistance General Provisions; Federal Perkins Loan Program; Federal Family Education Loan Program; and William D. Ford Federal Direct Loan Program* (Docket ID ED-2021-OPE-0077), 87 Fed. Reg. 65904 (Nov. 1, 2022).

First, wherever possible, when borrowers do not timely recertify their income for IDR purposes, the Department should leave them in the REPAYE plan rather than placing them in an alternative repayment plan under which the borrower's required monthly payment is the amount the borrower would have paid on a 10-year standard repayment plan. As we discuss in the previous section, the current proposal that borrowers who do not recertify be removed from REPAYE is not statutorily required.[96] The recently revised PSLF regulations explicitly exclude payments made on the alternative repayment plan from counting toward cancellation, even if those payments are at least as much as a payment that would be made under the 10-year standard repayment plan.[97] For a public service worker who is pursuing PSLF and who does not timely recertify their income to continue to accrue credit under PSLF, the Department has the discretion to allow them to remain in REPAYE. If the Department instead chooses to penalize borrowers for stumbling over administrative roadblocks and servicer error, it should place them in the 10-year standard plan directly. Although not all consolidation loans are eligible for the 10-year standard plan, in other instances there is nothing prohibiting this action.

Second, and relatedly, the Department must adopt a policy that makes clear that any credits awarded toward IDR cancellation count for PSLF cancellation. This is critical because, as discussed above, the proposed IDR regulations allow payments made on any repayment plan, including the alternative plan, to count toward cancellation if the payments are at least as much as would be paid on the 10-year standard plan,[98] whereas the PSLF regulations count IDR credits but do not count payments made pursuant to the alternative repayment plan.[99] To keep these two programs aligned, IDR credits that are derived from time spent on the alternative repayment plan should count toward PSLF. The Department must make this clear.

Third, the revised PSLF regulations allow for borrowers to receive credit toward cancellation in certain instances through lump sum payments made on an IDR plan.[100] The Department's proposed IDR regulation does not similarly allow borrowers to make lump sum payments and to receive credit for the time frame covered by such a payment. The new IDR regulations should reflect the PSLF regulation's flexibility in this respect.

Fourth, and similarly, the new PSLF regulations grant credit toward cancellation for payments that are made in multiple installments that equal the full scheduled amount due.[101] The proposed IDR regulations do not allow for this flexibility, but should be revised to do so.

Finally, in certain instances the recent PSLF regulations and the proposed IDR regulations refer to the same type of forbearance or deferment, but use slightly different terminology. Specifically, the PSLF regulations allow time spent in the "AmeriCorps forbearance under sec. 685.205(a)(4)"

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96 *See* proposed C.F.R. § 685.208(l)(10)(iii).
97 C.F.R. § 685.219(b) (definition of "qualifying repayment plan").
98 *See* proposed 685.208(k)(iii); 685.207(l)(10)(iii).
99 C.F.R. § 685.219(b) (definition of "qualifying repayment plan").
100 C.F.R. § 685.219(c)(2)(iii).
101 C.F.R. § 685.219(c)(2)(ii).

to count as a monthly payment.[102] The proposed IDR regulation would give credit for time in the same forbearance, but refers to it as a "national service forbearance under sec. 685.205(a)(4)." Additionally, in the same sections, the PSLF counts time in an "administrative forbearance or mandatory administrative forbearance under sec. 685.205(b)(8) or (9)," whereas the proposed IDR regulations count time in an "administrative forbearance under sec. 685.205(b)(8) or (9).[103] To the extent the Department intends for these two linked programs to count time in these forbearance periods differently, it should explain the rationale for doing so. Otherwise, it should conform the proposed IDR regulation's language to mirror the PSLF regulation.

### I. Counting Pre-Consolidation Time

We are pleased to see the Department allow borrowers who consolidate their loans to maintain some credit toward forgiveness under IDR or PSLF for what may be years of qualifying payments made prior to consolidation. This is critically important to ensuring that Federal Family Education Loan (FFEL) program borrowers in particular have access to an affordable repayment plan. Under current regulations, qualifying payments are not counted toward forgiveness in any of these programs if the loans are later consolidated. This is contrary to the statutory language in IBR[104] which allows borrowers to count qualifying pre-consolidation payments in either the Direct or FFEL program toward cancellation as long as they enroll in IBR at some point during repayment.[105] The Department's policy choice to artificially limit the statute has unfairly put FFEL borrowers in the position of needing to choose between getting credit for the IBR payments they have made and being able to afford their current payment.

### J. Defaulted Borrowers

We appreciate the Department's efforts to provide defaulted borrowers with some of the rights and benefits offered by IDR. Nevertheless, the proposed regulations must go further to ensure borrowers in default are fully protected. Despite decades of attempted reforms and regulations to improve the various IDR plans to make student loan repayment more affordable and accessible to low-income borrowers, more than 7 million had fallen into default before the COVID-19 pandemic, unable to stay on track toward cancellation or even enroll in an IDR plan in the first place.[106]

Servicer misconduct, administrative failure, and unwieldy and complicated regulatory requirements have left the most vulnerable borrowers behind on their loan payments and locked out of the promise of IDR cancellation.[107] Thirty years after the launch of the first IDR program, more than 2 million borrowers have been in repayment for at least 20 years but have no hope of

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[102] C.F.R. § 685.219(c)(2)(v)(E).
[103] *Compare* C.F.R. § 685.219(c)(2)(H) *with* proposed 685.208(k)(4)(J).
[104] 20 U.S.C. § 1098e(b)(7).
[105] Persis Yu, *Relief for Borrowers in Income-Driven Repayment* (Nov. 2020) 84-85, https://protectborrowers.org/wp-content/uploads/2021/02/Delivering-on-Debt-Relief-Final.pdf#page=74, for further discussion see *infra* section II.J
[106] *Federal Student Loan Portfolio, supra* note 45.
[107] *Id.*; *Driving into a Dead End*, *supra* note 5.

realizing the promise of IDR cancellation due to their default loan status.[108] Black and Latino/a borrowers who owe more student debt than their white peers due to generational wealth disparities and the lowest-income earners are disproportionately likely to struggle to access IDR and to fall into default.[109] If the Department intends for its current proposal to finally deliver the promise of IDR to the most financially vulnerable borrowers and help end the student debt civil rights crisis, it must fully commit to bringing borrowers in default into the shelter of IDR. The NPRM is a good start, but IBR payments are still too high to keep those in the lowest-income brackets from falling into default and previous periods of time in default and involuntary payments must be included in borrowers' time towards cancellation.

To ensure the current proposal fulfills the Department's stated purpose of helping borrowers avoid delinquency and default, we first recommend that the Department clarify that IBR is not the only IDR plan through which defaulted borrowers can make progress towards cancellation. Again, the NPRM's initial clarification that the IBR statute allows borrowers in default to make IBR payments towards default is a positive start;[110] however, the statute offers more flexibility than this allowance would suggest and the Department must exercise it to open pathways to more affordable ICR plans for defaulted borrowers.

The IBR statute requires borrowers with qualifying loans to meet only two conditions in order for the Secretary to repay or cancel any outstanding loan balance.[111] Those two conditions are:

1) That a borrower "at any time, elected to participate in income-based repayment"; and

2) That "for a period of time prescribed by the Secretary, not to exceed 25 years," the borrower must make qualifying payments.[112]

This language permits the Department to give defaulted borrowers credit towards IBR cancellation for payments made under ICR payment plans as long as the borrower enrolls in IBR at some point during their repayment period. Clarifying that counting lower monthly ICR payments is available to borrowers seeking cancellation should be a priority if the Department truly intends to decrease the amount of borrowers falling into default.

Second, the Department must retroactively count borrowers' previous time in default towards IDR cancellation. The April 2022 announcement of the one-time IDR Account Adjustment demonstrates that the Department both has the authority to do so and also recognizes the necessity of helping defaulted borrowers recover time towards cancellation lost due to historical

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108 OFFICE OF U.S. SEN. ELIZABETH WARREN, Education Department Responses to Data Request by Senator Elizabeth Warren, April 2, 2021, https://www.warren.senate.gov/imo/media/doc/Education%20Department%20Response%20to%20Sen%20Warren%20-%204-8-21.pdf.
109 Kaufman, *supra* note 6.
110 NPRM, 88 Fed. Reg. at 1913.
111 Persis Yu, *Relief for Borrowers in Income-Driven Repayment* (Nov. 2020) 82, https://protectborrowers.org/wp-content/uploads/2021/02/Delivering-on-Debt-Relief-Final.pdf#page=74.
112 20 U.S.C. § 1098e(b)(7)(A), (B).

servicer misconduct and administrative failure.[113] As the current NPRM makes clear, the IBR statute allows time in default to count towards cancellation.[114] And as time in default is analogous to other prior periods of repayment—such as time in any repayment plan and in certain forbearances and deferments—that the Secretary has already modified to count towards cancellation, the Department's exclusion of default from a similar account adjustment or lookback period would be a puzzling choice, and certainly one not required by statute.

Finally, the Department should count each involuntary payment seized from a defaulted borrower as a payment contributing towards IDR cancellation and cap involuntary payments at an amount tied to what the borrower would pay under IDR. Prior to this rulemaking, the Department had chosen not to make IDR options open to borrowers in default. And yet, the default system is rigged so that many defaulted borrowers pay significantly higher sums through wage garnishment, seizure of critical anti-poverty benefits, and tax refund offsets than they would if they were on an IDR plan.[115] We are pleased to see that some involuntary payments will count towards cancellation. However, they should not be limited to payments in which the amounts were more than the 10-year standard repayment plan amount. Given that involuntary payments are nearly always greater than what a borrower would pay under an IDR plan, the Department should count all involuntary payments as a qualifying payment towards IDR cancellation.[116]

## III. Conclusion

This NPRM presents an opportunity for the Department to dramatically improve the lives of some of the most vulnerable and often forgotten student loan borrowers—those who are low-income, people of color, older borrowers, and more. These proposed regulations take several promising steps toward creating a more equitable student loan system for these borrowers; however, we urge the Department to fully embrace the legal authority afforded it by statute to finally establish income-driven repayment options that are affordable, reduce unnecessary regulatory burden, and are less likely to lead borrowers to default.

Thank you for your consideration of these comments. Please contact Persis Yu, Deputy Executive Director and Managing Counsel, at persis@protectborrowers.org for any additional information.

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[113] Press Release, U.S. Dep't of Educ., Department of Education Announces Actions to Fix to Longstanding Failures in the Student Loan Programs (April 19, 2022), https://www.ed.gov/news/press-releases/department-educationannounces-actions-fix-longstanding-failures-student-loan-programs.

[114] NPRM, 88 Fed. Reg. at 1913.

[115] Claire Torchiana & Persis Yu, *Creating an Income-Driven Repayment Structure for Defaulted Loans*, 11 (Aug. 2022), https://protectborrowers.org/wp-content/uploads/2022/08/Beyond-Fresh-Start.pdf#page=8.

[116] *Id*. at 19 noting: "Currently, Department regulations require payment of 15 percent of disposable pay or of the monthly benefit payment through wage garnishment or benefits offset, respectively. This is not required by the DCIA, HEA, or Treasury regulations, which, if they set any amount, only set an amount not exceeding 15 percent of disposable income. Instead, the Department should amend its regulations to define disposable pay in the same way as it defines discretionary income in the IDR context, and to only require 10 percent of this amount, as in the most recent version of the IDR plan."