September 17, 2025

Submitted via regulations.gov

Tamy Abernathy
Office of Postsecondary Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Re: William D. Ford Federal Direct Loan (Direct Loan) Program Notice of Proposed Rulemaking [RIN 1801-AA28]

Dear Tamy Abernathy:

The NAACP Legal Defense and Educational Fund, Inc. (LDF) submits the following significant, adverse comment opposing the U.S. Department of Education's (ED) Notice of Proposed Rulemaking (NPRM) [RIN 1801-AA28] published in the Federal Register on Monday, August 18, 2025, that would make unlawful changes to the Public Service Loan Forgiveness (PSLF) program under 34 C.F.R. 685.219. The proposed rule unlawfully attempts to subvert explicit Congressional will and expand ED's power beyond its statutory authority. The NPRM arbitrarily vests unbridled discretion with the Secretary to enforce new, unconstitutional restrictions on eligibility for PSLF targeting organizations which have viewpoints that differ from the Administration's preferences. ED and the Secretary lack the authority, capacity, and relevant expertise to make the types of determinations dictated by the NPRM. If finalized, these changes to PSLF will have devastating consequences for borrowers, non-profit organizations, and all the populations that non-profit organizations serve. Further, this NPRM will harm Black communities by burdening Black borrowers in public service jobs with more debt and punishing non-profit organizations that provide important services for marginalized people. **LDF strongly urges ED to withdraw this unlawful NPRM in its entirety.**

Founded in 1940 by Thurgood Marshall, LDF is the nation's oldest civil rights law organization.[1] LDF was launched at a time when America's aspirations for equality and due process of law were stifled by widespread state-sponsored racial inequality. LDF has long played an instrumental role in passing legislation, encouraging agency actions, and litigating to protect Black people from policies and practices that have unjustified discriminatory effects. For eighty-five years, LDF has worked to dismantle racial segregation and ensure equal educational opportunity for all students, most prominently in the groundbreaking case, *Brown v. Board of Education*.[2] LDF also has represented Black students and applicants, as parties and *amici curiae*,

[1] LDF has been fully separate from the National Association for the Advancement of Colored People (NAACP) since 1957.
[2] 347 U.S. 483 (1954).

in numerous cases regarding educational access and opportunity in education. LDF is a 501(c)(3) non-profit organization that has a decades long history of public service.

Non-profit organizations like LDF rely on PSLF for recruiting and retaining talented public servants. These employees forgo higher-paying opportunities in order to lend their talents in support of important societal needs like advocating for racial justice for Black communities and other marginalized communities. Without organizations like LDF, underserved communities that already struggle to access pathways to justice and opportunity will be further marginalized. If allowed to proceed, this NPRM would threaten many non-profit organizations and their ability to serve their communities by weaponizing a program meant to help relieve pressure for public servants who had no choice but to take on student debt to pursue higher education. This deeply misguided and wholly unlawful NPRM should be rescinded in full.

I. Congress created PSLF to encourage public service, broadly defined to include all 501(c)(3) non-profit organizations.

In 2007, Congress passed the College Cost Reduction and Access Act of 2007 which was then signed into law by President George W. Bush.[3] This legislation established PSLF, which requires the Department to forgive eligible loans of borrowers who make monthly loan payments for ten years while employed in public service jobs. The statute defined "public service jobs" broadly to include:

> [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**.

20 U.S.C. § 1087e(m)(3)(B) (emphasis added).

[3] Pub. L. No. 110-84, 121 Stat. 784.

This definition covers a wide range of professions from educators to public defenders to healthcare professionals. Notably, the definition included a catchall category of any "organization that is described in Section 501(c)(3) of Title 26 and exempt from taxation under section 501(a) of such title." This broad inclusion has long been understood to include all 501(c)(3) tax-exempt, non-profit organizations with no restrictions.[4] In ED's regulations implementing this statutory definition, ED has historically defined "qualifying employer" for the PSLF program to include any 501(c)(3) non-profit organization, and any U.S. based federal, state, and local government entity.[5]

In addition to the statutory language, the legislative history of the PSLF program indicates that Congress intended this program to broadly benefit employees in a wide variety of public service professions.[6] In discussing the need for this program, Congress recognized that growing student loan burdens made it prohibitively expensive for many borrowers to pursue jobs in public service. At the same time, these public service jobs remain critical for meeting national needs related to education, health, security, and well-being—needs not met by governmental entities. In the Committee Report associated with the PSLF legislation, Congress stated, "[d]ebt burdens are particularly troublesome for public servants who often earn low salaries for their work. The policies embodied in H.R. 2669 recognize the contributions and challenges of public service, and the Committee hopes to encourage participation in these careers."[7]

It is just as important now as when PSLF was originally created to support individuals that want to enter public service careers. The country is currently facing significant worker shortages in critical areas. For example, in education, recent studies have found that 1 in 8 teaching positions are either unfilled or filled by a teacher not fully certified for the role.[8] As a result, more than 6 million students nationally have been affected.[9] Black students bear the brunt of these teacher shortages as they are more likely to attend under-resourced schools with less experienced

[4] In fact, litigation around PSLF has largely focused on the extent to which organizations that do not qualify as 501(c)(3) organizations can still be included as eligible employers in PSLF. In those cases, it is taken as a fact that all 501(c)(3) organizations are eligible. *Cf. American Bar Association v. United States Department of Education*, 370 F. Supp. 3d 1 (D.D.C. 2019).
[5] 34 C.F.R. § 685.219.
[6] The Congressional Report associated with the PSLF legislation included a lengthy list of the types of professions worth targeting with federal investment, including, "first responders, law enforcement officers, firefighters, nurses, public defenders, prosecutors, early childhood educators, librarians, and other public sector employees." H. Rept. 110-210 – College Cost Reduction Act of 2007, https://www.congress.gov/committee-report/110th-congress/house-report/210/1?utm_source=chatgpt.com.
[7] *Id.*
[8] Learning Policy Institute, 2025 Update: Latest National Scan Shows Teacher Shortages Persist, (July 15, 2025) https://learningpolicyinstitute.org/blog/2025-update-latest-national-scan-shows-teacher-shortages-persist?utm_source=chatgpt.com.
[9] *Id.*

educators.[10] Similarly in healthcare, a recent study projected that there would be a national deficit of 200,000 to 450,000 registered nurses in 2025.[11] That same study found that to make up for this gap in registered nurses, nursing schools would need to more than double the number of new graduates entering and staying in the nursing workforce every year for the next three years.[12] Once again, these effects will be felt most directly in Black communities where nurse staffing have already struggled to meet the healthcare needs of these communities, including at non-profit and government hospitals that currently benefit from PSLF to recruit healthcare providers.[13]

II. ED has no legal authority to create new restrictions on employer eligibility that go beyond the clear language of the statute.

In this NPRM, ED proposes new restrictions on employer eligibility for PSLF that contradict the statute's plain language. The PSLF statute unambiguously defines "public service jobs" to include jobs "in government … 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."[14] The statute does not confer any authority on the Secretary to narrow the definitions outlined by Congress. Yet, this NPRM proposes to do that just that. In pertinent part, the NPRM amends 34 C.F.R. 685.219(c) to establish that borrower payments shall not be credited while they are employed at a qualifying employer that engages in activities that have a "substantial illegal purpose." In doing so, the NPRM proposes to give the Secretary wide discretion to pick and choose which government and non-profit organization employers qualify for PSLF. Congress clearly stated that PSLF should cover *any* government and 501(c)(3) organization employers, yet the Department now wants PSLF to cover only *some* government and 501(c)(3) organization employers. The Department has no legal authority to subvert Congressional will and contradict clearly defined statutory language.[15]

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[10] EdTrust, *As Districts Face Teacher Shortages, Black and Latino Students Are More Likely to Have Novice Teachers Than Their White Peers* (Dec. 15, 2021), https://edtrust.org/press-release/as-districts-face-teacher-shortages-black-and-latino-students-are-more-likely-to-have-novice-teachers-than-their-white-peers/#:~:text=Not%20only%20do%20Black%20students,5%25%20first%2Dyear%20teachers.

[11] Gretchen Berlin, Meredith Lapoint, Mhoire Murphy, and Joanna Wexler, *Assessing the lingering impact of COVID-19 on the nursing workforce* (May 11, 2022), https://www.mckinsey.com/industries/healthcare/our-insights/assessing-the-lingering-impact-of-covid-19-on-the-nursing-workforce.

[12] *Id*.

[13] Eileen T. Lake, Christin Irogbu et. al, *Poorer Nurse Staffing in Black-Serving Hospitals* (Jan. 2025), https://pubmed.ncbi.nlm.nih.gov/39666469/.

[14] 20 U.S.C. § 1087e(m)(3)(B).

[15] *See Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.") (describing step one of the *Chevron* test which was not overruled by *Loper Bright v. Raimondo*, 603 U.S. 369 (2024)).

The NPRM attempts to insert a new eligibility restriction when the statute provides the agency no authorization to make such a limitation. In striking down other regulatory provisions that contradict unambiguous statutory text, courts have stated the governing rule clearly: "[w]here the text and structure of a statute unambiguously foreclose an agency's statutory interpretation, the intent of Congress is clear, and 'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'"[16] ED asserts that Congress "has granted the Secretary broad authority to promulgate regulations to administer the programs administered by the Department of Education and to carry out his or her duties."[17] However, this "authority" is "subject to limitations as may be otherwise imposed by law" and cannot be used to circumvent clear and unambiguous statutory language.

The text and structure of the PSLF statute unambiguously foreclose the agency's interpretation in this NPRM. The PSLF statute provides broad eligibility for loan forgiveness to borrowers in public service jobs. The definition of "public service job" includes some specific types of professions but also the two broad categories of (1) employees of governments and (2) employees of 501(c)(3) organizations. Nowhere in the statute does Congress defer to ED to further restrict this definition based on the activities that those employers engage in. Since ED has not been granted this power, the NPRM cannot proceed.

III. The NPRM's framework for determining an employer ineligible is impossible to administer lawfully or effectively.

Even if Congress provided ED the authority to limit PSLF employer eligibility as contemplated by the NPRM, which it has not, then ED still could not limit participation by targeting viewpoints that the Administration disfavors. The NPRM here attempts to define categories of "substantial illegal purposes" to bar certain employers from participating in PSLF. Instead of carving out all illegal activity, ED has selected a small number of issues that align with the Administrations' ideological preferences. Even then, those select few issues are defined so poorly that they raise a bevy of constitutionality and practicability concerns. These infirmities are compounded by vesting the Secretary with sole discretion for determining whether illegal activity has occurred. As a result, the proposed framework proposes to have the Department make adjudications across wide-ranging areas of law outside the Department's expertise including on matters of immigration, national security, and healthcare. Not only is the Department ill-equipped to make such determinations, but providing the Secretary with this type of unbridled discretion invites unconstitutional abuse.

[16] *See Chamber of Commerce of United States of America v. United States Department of Labor*, 884 F.3d 360, 369 (5th Cir. 2018) (quoting *Chevron*).
[17] 90 FR 40154, 40156.

A. The NPRM proposes definitions of "substantial illegal purpose" that are poorly defined and impossible to administer fairly and gives broad discretion to ED to make these determinations without ensuring proper due process.

In this NPRM, ED contravenes clear statutory instructions from Congress regarding PSLF eligibility by creating an entirely novel and unsupportable framework for stripping eligibility for qualifying employers. ED proposes to do so by amending 34 C.F.R. 685.219(c) to remove eligibility for qualifying employers if they engage in activities with a "substantial illegal purpose." Specifically, ED outlines only the following activities as those that constitute a substantial illegal purpose:

(1) aiding or abetting violations of 8 U.S.C. 1325 or other Federal immigration laws;
(2) 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;
(3) engaging in the chemical and surgical castration or mutilation of children in violation of Federal or State law;
(4) engaging in the trafficking of children to states for purposes of emancipation from their lawful parents in violation of Federal or State law,
(5) engaging in a pattern of aiding and abetting illegal discrimination; or
(6) engaging in a pattern of violating State laws as defined in paragraph (34) of this subsection.

Proposed 34 C.F.R. 685.219(b)(30).

Instead of relying on courts or even the IRS to determine whether an employer has violated the law, this NPRM proposes to vest sole authority with the Secretary. Proposed 34 C.F.R. 685.219(h) outlines the following standard:

> (h) Standard for determining a qualifying employer engaged in activities that have a substantial illegal purpose.
>
> (1) The Secretary determines by a **preponderance of the evidence**, and after notice and opportunity to respond, that a qualifying employer has engaged on or after July 1, 2026, in activities that have a substantial illegal purpose by considering the materiality of any illegal activities or actions. In making such a determination, the Secretary shall presume that any of the following is conclusive evidence that the employer engaged in activities that have a substantial illegal purpose:

(i) A final judgment by a State or Federal court, whereby the employer is found to have engaged in activities that have a substantial illegal purpose;

(ii) A plea of guilty or nolo contendere, whereby the employer admits to have engaged in activities that have substantial illegal purpose or pleads nolo contendere to allegations that the employer engaged in activities that have substantial illegal purpose; or

(iii) A settlement that includes admission by the employer that it engaged in activities that have a substantial illegal purpose described in subsection (h) of this section.

(2) Nothing in this subsection shall be construed to authorize the Secretary to determine an employer has a substantial illegal purpose based upon the employer or its employees exercising their First Amendment protected rights, or any other rights protected under the Constitution.

Proposed 34 C.F.R. 685.219(h) (emphasis added).

1. **The process outlined in proposed subsection (h) falls well short of appropriate due process for determinations of this significance.**

ED frames this entire NPRM under the false assertation that the PSLF program currently benefits too many organizations that violate the law. In particular, several of the substantial illegal purpose definitions directly cite criminal statutes. Yet, it remains a central tenet of the American legal system that the standard of proof in criminal cases is "beyond a reasonable doubt."[18] The preponderance standard employed here falls well short of the burden of proof normally used to determine whether an entity is culpable of a crime.

Not only is the burden of proof lower than what is necessary to sufficiently protect due process interests of organizations, but subsection (h) vests sole discretion for adjudications of criminal law with the Secretary and not with courts. ED is dramatically ill-equipped to determine whether employers have engaged in activities with a "substantial illegal purpose." The Secretary and her designees within the Department lack the relevant expertise, capacity, and impartiality to make determinations of law in such wide-ranging areas as national security and healthcare. While proposed subsection (h) notes that court findings would be conclusive evidence, the NPRM remains silent with regards to what other types of evidence the Secretary could consider in making her determination.

[18] *See In re Winship*, 397 U.S. 358 (1970).

The process outlined in subsection (h) pales in comparison to how adjudications of illegality are normally handled. For example, when courts adjudicate whether an entity has engaged in material support of terrorism in violation of 8 U.S.C. 1189, the government must prove its case beyond a reasonable doubt. In such a case, the accused would have the procedural protections inherent in a fair trial, the government would need to marshal evidence of various types (e.g. forensic accounting, witnesses, expert testimony, etc.) to meet its high burden, and a jury would need to come to a unanimous conclusion. Here, ED proposes to eschew those important due process protections. As a poor substitute, the NPRM would let the Secretary decide whether an organization has engaged in activities with a "substantial illegal purpose" based on whether she personally believes that it is more likely than not that an entity has violated the law. Subsection (h) fails to outline what type of evidence the Secretary would consider, what expertise ED has to assess the reliability and persuasiveness of such evidence, and what type of procedural protections there will be to ensure the determination is fair and impartial.

Exacerbating the situation is the fact that ED already has limited capacity to make fact-intensive legal determinations. Earlier this year, ED implemented Reductions in Force (RIFs) that resulted in around a 50% cut in staffing.[19] The short-staffed Department and its contractors already struggle to process PSLF applications effectively, with more than 72,000 borrowers awaiting forgiveness due to an application processing backlog.[20] Layering on this novel framework for determining whether an employer is eligible for PSLF will slow down an already unacceptably slow process. Even if ED was fully staffed, it is hard to imagine how the agency would even manage the eligibility process it proposes in this NPRM. To administer the rule fairly, ED would need to ensure that employers do not engage in any illegal activity as defined under this proposed rule. That would require ED to assess whether tens of thousands of employers are in compliance with laws related to immigration, national security, health care, anti-discrimination, and state torts. Such a task would be impossible for any agency to accomplish effectively. Alternatively, ED could rely on selective enforcement by targeting select employers, which itself invites unconstitutional abuse.

2. The definitions of substantial illegal purposes are poorly defined and impossible to administer lawfully and fairly.

Even if ED had the legal authority to remove eligibility from employers based on the commission of activities with a "substantial illegal purpose," the specific definitions outlined in 34 C.F.R. 685.219(b)(30) are poorly defined and would be impossible to administer lawfully and

[19] United States Department of Education, *U.S. Department of Education Initiates Reduction in Force* (Mar. 11, 2025), https://www.ed.gov/about/news/press-release/us-department-of-education-initiates-reduction-force.
[20] Annie Nova, *Student loan forgiveness program has a 72,730-person backlog. Here's what borrowers need to know* (Aug. 15, 2025), https://www.cnbc.com/2025/08/15/public-service-loan-forgiveness-buyback-has-a-72730-person-backlog.html.

fairly. It is clear that the selection of these specific categories of "substantial illegal purposes" is another attempt by this Administration to weaponize loose interpretations of the law to chill the lawful provision of services and advocacy that it disagrees with. In this instance, the NPRM targets organizations that work with immigrants, condemn wars abroad, provide gender affirming care, advocate for racial justice, and engage in peaceful protest.

The first four categories of "substantial illegal purpose" activities target areas of advocacy that the Administration disfavors. Again, while the NPRM claims that only *illegal* activity in these areas is being punished, the slippery process by which the Secretary can make these determinations of "illegality" invites abuse. Instead of curbing illegal behavior, what this NPRM will do in effect is chill lawful activity in these areas. As a result, pro bono legal organizations may hesitate to take on an asylum case for fear of being accused of aiding and abetting violations of immigration law or a university hospital may institute a policy that restricts certain hormone therapies for youth out of an abundance of caution. Many individuals in this country will lose out on life altering legal advocacy or lifesaving healthcare as a result. That chilling effect is amplified dramatically by the fact these decisions would not be made by courts or afford affected parties full due process protections. Instead, it would be the Secretary making these judgments under the lowered preponderance of the evidence standard in areas far outside the Department's expertise.

The fifth category of "substantial illegal purpose" would remove eligibility for any employer found to have "engaged in a pattern of aiding and abetting illegal discrimination." The NPRM defines "illegal discrimination" to include "a violation of any Federal discrimination law including, but not limited to the Civil Rights Act of 1964, Americans with Disabilities Act, and the Age Discrimination in Employment Act of 1967." The NPRM includes a definition of aiding and abetting in proposed 34 C.F.R. 685.219(b)(1) to mean the definition used in Title 18 of the United States Code in Section 2. This category of "substantial illegal purpose" is so ill-defined that it can be read to either include no employers or tens of thousands of employers. The definition of aiding and abetting used in the NPRM references the criminal legal standard for aiding and abetting: "whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."[21] This standard is wholly inapplicable to the federal anti-discrimination laws included in the definition of "illegal discrimination" since the federal anti-discrimination laws included in the regulation generally outline *civil* and not *criminal* law infractions. Since aiding and abetting is never an independent criminal charge, as there must be an underlying principal offense against the United States, a court would *never* find an entity to be guilty of aiding and abetting a violation of a

[21] 18 U.S.C. 2.

federal anti-discrimination civil law.[22] If this regulatory provision is meant to be read broadly and include all findings of discrimination under federal anti-discrimination law, then thousands if not all state and local government entities would be included due to violations of the Americans with Disabilities Act[23] (e.g. discrimination in provision of public accommodations) or Title VII of the Civil Rights Act of 1964 (e.g. discrimination in employment)[24]. As a result, tens if not hundreds of thousands of educators, sanitation workers, law enforcement officers, firefighters, and other government employees would lose access to PSLF. Additionally, racial justice organizations would be dissuaded from zealous advocacy for Black and other marginalized communities in fear that the Secretary would once again make an incorrect application of federal civil rights laws.[25]

The final category of "substantial illegal purpose" targets organizations that engage in peaceful protest. With this proposal, ED would use the PSLF program to punish those that protest against the Administration's policies. Once again, the NPRM attempts to frame this activity in the context of violations of laws. Yet the punishment here, ineligibility for PSLF, far outweighs the traditional punishments for violations of state laws related to trespass, disorderly conduct, and public nuisance. For example, state laws related to trespass are often considered tort violations or misdemeanor infractions. In many states, punishments for trespass amount to fines of a few hundred dollars.[26] This NPRM proposes to impose disproportionate consequences for minor violations. If an employer were to lose eligibility for PSLF, that could mean that thousands of employees would lose tens of thousands of dollars each in forgiveness benefits, a penalty far greater than the punishments contemplated by state legislatures when passing these laws. Furthermore, peaceful protests, including ones that may result in minor infractions of state law, are a cornerstone of our multiracial democracy. If allowed to proceed, this NPRM would weaponize the PSLF program to dissuade government entities and non-profit organizations from

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[22] United States Department of Justice, *Criminal Resource Manual – 2476. 18 U.S.C. 2 Is Not An Independent Offense*, https://www.justice.gov/archives/jm/criminal-resource-manual-2476-18-usc-2-not-independent-offense.

[23] *See e.g.*, Agreement between United States of America and North Carolina Department of Adult Corrections, DJ No. 204-54-135, https://www.justice.gov/crt/media/1412321/dl; Letter from United States Department of Justice to the State of Alabama (Jan. 15, 2025), https://www.justice.gov/crt/case/state-alabama; and Agreement between United States of America and the Shelby County District Attorney General's Office, DJ No. 204-70-85, https://www.justice.gov/crt/media/1352376/dl.

[24] *See e.g.*, Consent Decree, *Michael J. McCullough v. Independent School District No. 89 of Oklahoma City*, No. Civ-24-544-R (W.D. Ok. 2025), https://www.justice.gov/crt/case-document/consent-decree-mccullough-v-oklahoma-city-public-schools; Consent Decree, *United States of America v. Cobb County, Georgia*, Civ. No. 1:24-cv-02010-WMR-JEM (N.D. Ga. 2024), https://www.justice.gov/crt/media/1351361/dl; and Settlement Agreement between United States of America and Tallahatchie County and the Tallahatchie County Sheriff, Civ. No. 3:21-cv0045NBB-RP (N.D. Miss. 2021), https://www.justice.gov/crt/media/1377946/dl.

[25] *See American Federation of Teachers v. U.S. Department of Education*, No. CV SAG-25-628, 2025 WL 2374697 (D. Md. 2025).

[26] *See e.g.*, Oklahoma, 21 OK Stat § 1835 (fine of not more than $250); West Virginia, WV Code §61-3B-3 (not less than $100 nor more than $500); and Vermont, 13 V.S.A. § 3705 (not more than $500).

doing important advocacy work on behalf of marginalized communities, including Black communities. This country will be worse off as a result.

B. Defining "substantial illegal purpose" to only include the categories outlined in proposed 34 C.F.R. 685.219(b)(30) constitutes viewpoint discrimination in violation of the First Amendment.

By weaponizing PSLF through this NPRM, ED is targeting non-profit organizations and government entities that provide critical services or advocate for causes adverse to the Administration's ideological agenda. ED attempts to justify this exclusion of qualifying employers by improperly borrowing a doctrine from tax law. The Internal Revenue Service (IRS) enforces the "illegality doctrine" when making determinations about whether organizations can receive or maintain 501(c)(3) status.[27] In its determinations, the IRS conducts careful inquiries assessing the substantiality of illegal activities, including conducting quantitative and qualitative tests to determine if an organization is on balance incompatible with the public interest.[28] The NPRM's version of this rule strips both the nuances and the general applicability of the IRS doctrine and implements a crude facsimile. While the IRS illegality doctrine broadly includes all illegal conduct, the NPRM proposes only a select few issues that align with the Administration's ideological agenda. In fact, many of the cases in which the IRS has actually determined that organizations have engaged in substantial illegal purposes relate to organizational violations of laws regarding fraud, gambling, and drug use.[29] None of those substantial illegal purposes appear in this NPRM.

Instead of broadly prohibiting illegal activities, this NPRM selectively outlines specific types of activities to target governments and non-profit organizations that engage in activities at odds with the Administration's ideological preferences. Coupled with the slippery burden of proof and deficient process for determining that an organization has engaged in one of these illegal activities, this framework invites unconstitutional abuse by ED. As proposed, these rule changes would give the Secretary discretion to target organizations that work towards supporting immigrants, advocating against war, providing healthcare to transgender individuals, promoting

[27] Internal Revenue Service, *Illegality and Public Policy Considerations*, https://www.irs.gov/pub/irs-tege/eotopicl94.pdf.
[28] *Id*.
[29] *See e.g., Church of Scientology of California v. Commission of Internal Revenue*, 823 F.2d 1310 (9th Cir. 1987) (revoking tax exempt status due to conspiracy to evade taxes); Internal Revenue Service, *Illegality and Public Policy Considerations*, https://www.irs.gov/pub/irs-tege/eotopicl94.pdf ("agents often encounter gambling operations that clearly violate state law.").

racial justice, and engaging in peaceful protest. Organizations working in these areas would be targeted for their viewpoints on these matters, in violation of the First Amendment.[30]

While ED defends its framework by emphasizing that only *illegal* activities would be prohibited, the structure of the proposal lacks sufficient protection to ensure First Amendment covered activity will remain undisturbed. Again, 34 C.F.R. 685.12(h) vests the authority to determine whether an organization has engaged in illegal activities with the Secretary, not with courts of law. The keystone of the illegality analysis is therefore not whether courts have concluded that an organization has violated the law, but whether the Secretary believes an organization has acted illegally. In criminal courts, the government has the burden of proving beyond a reasonable doubt that a law has been violated. Under proposed subsection (h), the Secretary would only need to meet the much lower burden of a preponderance of the evidence. At the same time, subsection (h) provides nearly no instruction on what type of evidence the Secretary should evaluate and how she should do so.

Even for matters that are traditionally within the Department's jurisdiction, such as civil rights in schools, ED has failed to interpret the law accurately and in accordance with the Constitution. Subsection (h) of the NPRM includes a lackluster promise that ED would not make enforcement decisions that run counter to the First Amendment. Such a promise provides cold comfort when this Administration has included similarly weak assertions in documents that courts have subsequently deemed to constitute viewpoint discrimination in violation of the First Amendment.[31] Allowing the Secretary to make determinations of law instead of courts creates a structure that does too little to prevent constitutional harm. These harms are particularly threatening to organizations that advocate for racial justice, as ED has now repeatedly tried to attack lawful strategies schools have taken to create racially inclusive schools for Black students prior to being overruled by courts.[32]

IV. Conclusion

We strongly urge ED to withdraw the NPRM in its entirety and maintain the prior rules governing PSLF.

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[30] *See Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) (overturning a restriction on eligibility for funding that prohibited legal services organizations from qualifying if they did work that advocated for changes to existing welfare law).

[31] *See e.g.*, *American Federation of Teachers v. U.S. Department of Education*, No. CV SAG-25-628, 2025 WL 2374697 (D. Md. 2025) (holding that guidance issued by ED regarding diversity, equity, and inclusion practices in schools was textbook viewpoint discrimination, and indicating ED's interpretations of law lack factual bases, conflict with regulations and caselaw, exceed ED's authority, and are contrary to constitutional rights).

[32] *See id. See also*, *Mid-Atlantic Equity Consortium, et al. v. U.S. Department of Education*, No. CV 25-1407 (D.D.C. 2025) (granting a preliminary injunction in favor of the Mid-Atlantic Equity Consortium in challenging ED's termination of the Equity Assistance Center grant program).

The proposed rule unlawfully subverts Congress's intent in creating the PSLF program. The statute, which authorizes the program, clearly includes all government and legally recognized 501(c)(3) organizations as eligible employers. The restrictions that ED proposes are unlawful; ED has no legal authority to add novel eligibility restrictions to this program. They are also impossible to administer. The eligibility restrictions target a select few issues that align with the Administration's ideological agenda. Furthermore, those issues are so poorly defined that they cannot be effectively implemented. Instead of deferring to courts, the NPRM proposes to grant the Secretary supreme authority to make determinations of law in areas far beyond the Department's expertise. In doing so, the NPRM creates numerous constitutional and other legal problems that cannot be cured with weakly stated promises that ED plans to follow the law.

This rule does not make the PSLF program stronger. This NPRM targets non-profit organizations and state and local governments that carry out important missions and activities. There is no confusion as to how this rule will negatively impact this country, from its institutions to its public servants to the people that rely on important services from the very entities that this rule seeks to punish. It is also no secret that marginalized communities, especially Black communities, will bear the brunt of these harms. ED must rescind this NPRM in its entirety.

Thank you for the opportunity to comment. If you have any questions, please contact Ashley Harrington, Senior Policy Counsel (aharrington@naacpldf.org) and Ray Li, Policy Counsel (rli@naacpldf.org).

Sincerely,

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