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7 **UNITED STATES DISTRICT COURT**
8 **EASTERN DISTRICT OF WASHINGTON**
9 **AT SPOKANE**

10 STATE OF WASHINGTON,

11 Plaintiff,

12 v.

13 BETSY DeVOS, in her official
14 capacity as Secretary of the United
15 States Department of Education, and
16 the UNITED STATES
DEPARTMENT OF EDUCATION, a
federal agency,

Defendants.

NO. 2:20-cv-00182-TOR

FIRST AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF

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I. INTRODUCTION

1. This suit challenges the United States Department of Education’s (the Department) unilateral denial of emergency COVID-19 relief to tens of thousands of Washington higher education students made eligible by Congress and who are in desperate need of help. In the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Congress directed the Department to distribute over \$100 million to colleges and universities in Washington to provide emergency financial aid grants to higher education students whose lives and educations were disrupted by COVID-19. Without Congressional authorization, the Department grafted its own limit on Congress’s directive, requiring students to meet the eligibility requirements for federal financial aid under two different statutes. The Department did so despite its express recognition that CARES Act emergency grants are not federal financial aid, Congress gave institutions—not the Department—“significant discretion” to decide which students need urgent financial help, and the Department lacked authority to impose additional restrictions on the eligibility criteria dictated by Congress.

2. As a result of the Department’s unauthorized eligibility restriction, over 85,000 Washington higher education students who desperately need financial assistance have been excluded from federal help. These students are among those whose financial survival and lifeline to higher education is most threatened by COVID-19, because they worked part-time to pay for tuition,

1 healthcare, and childcare, they did not have high school diplomas, or they had
2 missed payments on federal student loans. They include, for example, 24,364
3 basic adult education students at Washington's 34 community and technical
4 colleges who are acquiring reading, writing, math, and language skills to leverage
5 a job, college degree, or trade certification; 28,451 high school-aged students in
6 Running Start Programs; and many of Washington's approximately 17,000
7 "Dreamers," individuals brought to the country at an early age, educated by
8 Washington secondary schools, and protected under the Deferred Action for
9 Childhood Arrivals program.

10 3. The Department's unauthorized eligibility restriction violates the
11 Administrative Procedure Act, separation of powers, and the Spending Clause in
12 the United States Constitution. The CARES Act does not delegate to the
13 Department authority to interpret its eligibility requirements. Thus, the
14 Department's action is entitled to no or minimal deference. In this case, the
15 applicable CARES Act provision provides no support for engrafting the
16 eligibility requirements from two different statutes onto students' ability to
17 qualify for emergency grants to respond to a sudden pandemic. Further, the
18 Department's eligibility restriction is arbitrary and capricious because, among
19 many reasons, it denies emergency aid to college students who most need
20 pandemic assistance to continue their higher education. Finally, separation of
21 powers principles and the Spending Clause prevent the Department from
22

1 asserting “[the] unilateral authority” to “thwart congressional will by canceling
2 appropriations passed by Congress.” *City & County of San Francisco v. Trump*,
3 897 F.3d 1225, 1232 (9th Cir. 2018) (internal quotation marks and citations
4 omitted).

5 4. To avert irreparable injury to the State and its residents, Washington
6 brings this suit to declare unlawful and enjoin the Department’s restriction on
7 student eligibility for coronavirus emergency financial aid grants.

8 **II. JURISDICTION AND VENUE**

9 5. This Court has personal jurisdiction over the Defendants pursuant to
10 28 U.S.C. § 1391(e) because Defendants are agencies and officers of the United
11 States.

12 6. This Court has jurisdiction over the subject matter of this lawsuit
13 pursuant to 28 U.S.C. § 1331 because this action arises under federal law.

14 7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a)
15 because this is a judicial district in which Plaintiff State of Washington resides,
16 the Department’s interpretation of the CARES Act will adversely affect the
17 health and welfare of residents in this district, and the finances of the State, and
18 this action seeks relief against a federal agency and its official acting in her
19 official capacity.

III. PARTIES

8. The State of Washington represented by its Attorney General is a sovereign state of the United States of America.

9. Plaintiff State of Washington is represented by its Attorney General, who is the State's chief legal advisor. The powers and duties of the Attorney General include acting in federal court on matters of public concern to the State.

10. The State of Washington brings this action to redress harms to its sovereign, proprietary, and quasi-sovereign interests and its interests as *parens patriae* in protecting the health and well-being of their residents. The State of Washington is affected by the Department's interpretation of the CARES Act, is directly injured by it, and the relief requested will redress its injuries.

11. Washington's institutions of higher education are current recipients of CARES Act emergency grant funds. Accordingly, Washington is directly affected by the Department's unlawful interpretation of section 18004 of the CARES Act. Washington institutions are forced to change their behavior because of the Department's unlawful guidance.

12. Washington has a proprietary interest in maintaining the enrollment of students in its institutions of higher education. The Department's guidance harms this interest because it denies emergency assistance to students who need it to remain in school. Washington colleges and universities have experienced

1 harm in the form of loss of enrollment due to students' recent financial insecurity
2 and expect continued loss of enrollment because of the Department's restriction.

3 13. Washington has a quasi-sovereign interest in protecting the health,
4 safety, and well-being of its residents. The Department's interpretation severely
5 limits the use of emergency funding that Congress intended to broadly assist
6 higher education students affected by COVID-19. It therefore jeopardizes the
7 health, housing, nutrition, and well-being of students in the State of Washington.

8 14. The State of Washington and its higher education students will
9 suffer significant and irreparable harm if the Department's interpretation is
10 allowed to stand.

11 15. Defendant Betsy DeVos is the Secretary of the Department of
12 Education. She is sued in her official capacity.

13 16. Defendant United States Department of Education is an executive
14 agency with responsibility for distributing Higher Education Emergency Relief
15 Act funds to Washington institutions of higher education in compliance with
16 section 18004 of the Cares Act.

17 IV. RELEVANT FACTS

18 A. The COVID-19 Pandemic

19 17. A novel coronavirus is a new coronavirus that has not been
20 previously identified. According to Johns Hopkins University & Medicine
21 Coronavirus Resource Center, on December 29, 2019, the Wuhan City
22

1 government, in Hubei Province, China, started to trace cases of a coronavirus. On
2 January 4, 2020, a Shanghai lab detected a coronavirus similar to severe acute
3 respiratory syndrome (SARS). On January 6, 2020, a Wuhan doctor and
4 13 nurses were infected after operating on infected patient, and the next day the
5 pathogen was identified as a novel coronavirus.

6 18. On January 30, 2020, the World Health Organization (WHO)
7 declared the novel coronavirus outbreak a Public Health Emergency of
8 International Concern. On February 11, 2020, it announced an official name for
9 the disease causing the 2019 outbreak, coronavirus disease 2019, abbreviated as
10 COVID-19. (In COVID-19, ‘CO’ stands for ‘corona,’ ‘VI’ for ‘virus,’ and ‘D’
11 for ‘disease.’ Formerly, this disease was referred to as “2019 novel coronavirus”
12 or “2019-nCoV.”)

13 19. Coronaviruses are a large family of viruses that are common in
14 people and may affect different species of animals, including camels, cattle, cats,
15 and bats. The exact source of the COVID-19 virus is unknown.

16 20. The virus that causes COVID-19 is thought to spread mainly from
17 person to person. It is spreading very easily and sustainably between people.
18 Information from the ongoing COVID-19 pandemic indicates this virus spreads
19 more efficiently than influenza.

20 21. One of the most important ways to measure the burden of
21 COVID-19 is mortality. Nevertheless, the actual total death toll from COVID-19
22

1 is likely to be higher than the number of confirmed deaths, due to limited testing
 2 and problems in the attribution of the cause of death. Countries throughout the
 3 world have reported different case fatality ratios – the number of deaths divided
 4 by the number of confirmed cases. Differences in mortality numbers can be
 5 caused by differences in the number of people tested; demographics, because
 6 mortality tends to be higher in older populations, and characteristics of the
 7 healthcare system, because mortality may rise as hospitals become overwhelmed
 8 and have fewer resources.

9 22. The fatality rate of COVID-19 is higher than the fatality rate for a
 10 more familiar disease: the seasonal influenza. Deaths have been concentrated
 11 among older adults, who have weaker immune systems on average than younger
 12 people and have a higher rate of chronic illness. People of all ages with chronic
 13 medical conditions are also at higher risk. Johns Hopkins University & Medicine
 14 Coronavirus Resource Center reports a death rate in the United States of 3%,
 15 which is higher than the fatality rate in the United States for people infected with
 16 the flu. Johns Hopkins University & Medicine, *Mortality Analyses*,
 17 <https://coronavirus.jhu.edu/data/mortality> (last visited Sept. 9, 2020). Some
 18 scientists estimate that COVID-19 is up to 20 times more deadly than the flu. *See*,
 19 *e.g.*, Jeremy Samuel Faust & Carlos del Rio,
 20 *Assessment of Deaths From COVID-19 and From Seasonal*
 21 *Influenza*, JAMA Internal Med., May 14, 2020,
 22

1 <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2766121>

2 (last visited May 19, 2020).

3 23. On January 21, 2020, the Washington State Department of Health
4 confirmed what was believed to be the first case of COVID-19 in the United
5 States in Snohomish County, Washington. The Centers for Disease Control and
6 Prevention (CDC) then confirmed as the first-known U.S. case a diagnosis of a
7 35-year-old man living in Snohomish County, Washington.¹ Since then, as of
8 September 17, the country has reported 6,644,311 cases and 197,120 deaths.
9 Johns Hopkins University & Medicine, COVID-19 Dashboard by the Center for
10 Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU),
11 <https://coronavirus.jhu.edu/map.html> (last visited Sept. 17, 2020).

12 24. On February 19, 2020, a resident of a Life Care Centers of America
13 nursing home in Kirkland, Washington, was transferred to a local hospital and
14 later tested positive for COVID-19. On February 24, a 54-year-old man was
15 transferred from the Life Care Center of Kirkland to Harborview Medical Center
16

17 ¹It was later determined that a woman in California died on February 6
18 from COVID-19, meaning she likely contracted it in early to mid-January. CNN,
19 Jason Hanna, et al., *2 Californians died of coronavirus weeks*
20 *before previously known 1st US death* (Apr. 22, 2020),
21 <https://www.cnn.com/2020/04/22/us/california-deaths-earliest-in-us/index.html>
22 (last visited May 19, 2020).

1 and died there on February 26. Also on February 26, a woman in her 80s from
2 the center died at her family home. Both were found to have had COVID-19. On
3 February 28, a high school student at Henry M. Jackson High School in
4 Mill Creek, Washington, was confirmed as having the virus, causing the school
5 to be closed immediately. The following day, researchers confirmed the
6 coronavirus strain in the student's case may be related to the coronavirus strain
7 in the first confirmed U.S. case from January 21, suggesting that the virus may
8 have been spreading in the area for up to six weeks.

9 25. Washington State made the first announcement of a death from the
10 disease in the U.S. on February 29 and later announced that the two deaths on
11 February 26 were also due to COVID-19. Until mid-March, Washington had the
12 highest absolute number of confirmed cases and the highest number per capita of
13 any state in the country, when it was surpassed by New York.

14 26. On February 29, 2020, Washington Governor Jay Inslee declared a
15 state of emergency in all counties in Washington. In Proclamation 20-05,
16 Governor Inslee stated that the CDC had identified the potential public health
17 threat posed by COVID-19 both globally and in the United States as "high." He
18 provided that there were 85,688 confirmed cases of COVID-19 worldwide with
19 66 of those cases in the United States. Governor Inslee found that the Washington
20 State Department of Health had confirmed localized person-to-person spread of
21 COVID-19 in Washington State, which "significantly increase[ed] the risk of
22

1 exposure and infection to Washington State’s general public and creat[ed] an
 2 extreme public health risk that may spread quickly[.]” State of Washington Office
 3 of the Governor, Proclamation by the Governor 20-05,
 4 [https://www.Governor.wa.gov/sites/default/files/proclamations/20-](https://www.Governor.wa.gov/sites/default/files/proclamations/20-05%20Coronavirus%20%28final%29.pdf)
 5 [05%20Coronavirus%20%28final%29.pdf](https://www.Governor.wa.gov/sites/default/files/proclamations/20-05%20Coronavirus%20%28final%29.pdf) (last visited May 14, 2020).

6 27. The two largest state universities, University of Washington (UW)
 7 and Washington State University (WSU) curtailed on-campus classes during the
 8 pandemic. UW announced its closure on March 6; and on March 11, WSU
 9 announced the closure would begin after its spring break, on March 23.

10 28. On March 12, 2020, Governor Inslee announced closures for all
 11 public and private K-12 schools in King, Snohomish, and Pierce Counties
 12 beginning from March 17 through at least April 24. Later, on March 13,
 13 Governor Inslee announced K-12 closures until at least April 24 throughout the
 14 state. On April 6, 2020, Governor Inslee announced that the school closure would
 15 encompass the rest of the school year statewide.

16 29. On March 13, 2020, President Trump issued a proclamation that the
 17 COVID-19 outbreak constituted a national emergency.

18 30. As of September 16, 2020, the Washington State Department of
 19 Health reported 80,812 confirmed cases of COVID-19 in the State and 2,020
 20 deaths.

31. As of September 17, 2020, Johns Hopkins University & Medicine Coronavirus Resource Center reported over 29.9 million confirmed COVID-19 cases, with over 6.6 million in the United States, and over 942,259 global deaths.

B. The Coronavirus Aid, Relief, and Economic Security Act

32. In late March 2020, the United States Congress acted to address the COVID-19 outbreak. It passed legislation, signed by the President, that included large new appropriations to federal agencies with explicit directions for distributing the new funding.

33. At 11:17 p.m., on March 25, 2020, the Senate passed the Coronavirus Aid, Relief, and Economic Security Act as an amendment in the nature of a substitute to H.R. 748. On March 27, 2020, the House passed the bill and presented it to the President, who signed it the same day. Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020) (CARES Act).

34. The CARES Act appropriates federal funding for a wide array of purposes related to COVID-19. It contains a series of provisions directing funding through the Department of Education. Specifically, the CARES Act makes the following appropriation to the Department:

For an additional amount for “Education Stabilization Fund”, \$30,750,000,000, to remain available through September 30, 2021, to prevent, prepare for, and respond to coronavirus, domestically or internationally[.]

Id.

1 35. Section 18001 of the CARES Act directs the Secretary of Education
2 to allocate the Education Stabilization Fund for specified purposes in specified
3 percentages. After directing the Secretary to allocate 2% of the Education
4 Stabilization Fund to certain purposes, Section 18001 specifies the percentages
5 the Secretary is to allocate to three funds created by the Act, the Governor's
6 Emergency Education Relief Fund, the Elementary and Secondary School
7 Emergency Relief Fund, and the Higher Education Emergency Relief Fund
8 (HEERF). CARES Act, § 18001(b).

9 36. In total, the CARES Act appropriates approximately \$14 billion in
10 funding to institutions of higher education to assist with the costs associated with
11 disruptions in education due to COVID-19. In Section 18004(a), Congress details
12 exactly how the Secretary is to allocate the Higher Education Emergency Relief
13 Fund. This subsection gives the Secretary discretion only with regard to the
14 allocation of 2.5% of the roughly \$14 billion fund.

15 37. Subsection (a)(1) directs the Secretary how to allocate the vast
16 majority of the HEERF. "The Secretary shall allocate funding under this section
17 as follows: (1) 90 percent"—\$12.56 billion—"to each institution of higher
18 education to prevent, prepare for, and respond to coronavirus," using a detailed
19 formula specified by Congress based on student enrollment. CARES Act,
20 § 18004(a)(1).

38. Subsection (a)(2) directs 7.5% of the HEERF to minority-serving institutions, again based on a specified, non-discretionary formula. CARES Act, § 18004(a)(2) (“allocated by the Secretary proportionally to such programs based on the relative share of funding appropriated to such programs in the Further Consolidated Appropriations Act, 2020 . . .”).

39. Finally, subsection (a)(3) gives the Secretary some discretion over just 2.5% of the HEERF. That percentage is reserved for “institutions of higher education that the Secretary determines have the greatest unmet needs related to coronavirus[.]” CARES Act, § 18004(a)(3).

40. Subsection (b) of Section 18004 directs the Secretary how to distribute the HEERF, and subsection (c) directs how the HEERF may be used. Neither subsection grants the Secretary any interpretive authority or any discretion in implementing Congress’s directives.

41. Subsection (b) states that HEERF funds “shall be distributed by the Secretary using the same systems as the Secretary otherwise distributes funding to each institution under title IV of the Higher Education Act of 1965 (20 U.S.C. [§] 1001 et seq.).” This refers to an existing G5 grants management system the Department uses to disburse money. CARES Act, § 18004(b). *See also* U.S. Dep’t of Educ., Frequently Asked Questions, https://www.g5.gov/g5/home/!ut/p/z1/hY1BC4IwHMu_za77_zHN6GahkHaIQly7xAZrCrrJXAp9-gYduhS923vv93jAgQE3Yu608J01og_-

1 `yte3CPeIWF3q9JyneEiKuDxVdRQXCM0_gIcafyhDKIHr3sr3VWbkaqOBO3`
 2 `VXTjn6cCFuvR-`
 3 `nLUGCy7JQnVBtZ4KNkjthTIBaP3wdt3bywD4bGAf2PKomewEZ_rsa/dz/d5/`
 4 `L2dJQSEvUUt3QS80TmxFL1o2XzVJMVVRM0tTVUY3SkQwSUFKMFY3O`
 5 `DgxMDA3/#faqQuestion11` (last visited May 14, 2020).

6 42. Subsection (c) addresses “use of funds” by institutions. It gives the
 7 Secretary no authority; indeed, it does not mention the Secretary. “Except as
 8 otherwise specified in subsection (a), an institution . . . may use the funds received
 9 to cover any costs associated with significant changes to the delivery of
 10 instruction due to the coronavirus,” excluding athletics, religious instruction, and
 11 other activities for which Congress denies funding. CARES Act, § 18004(c).

12 43. Further addressing the emergency grants at issue in this litigation,
 13 Congress directs that:

14 Institutions of higher education shall use no less than 50 percent of
 15 such funds to provide emergency financial aid grants to students for
 16 expenses related to the disruption of campus operations due to
 17 coronavirus (including eligible expenses under a student’s cost of
 18 attendance, such as food, housing, course materials, technology,
 19 health care, and child care).

20 *Id.*

21 44. The education provisions in the CARES Act define “cost of
 22 attendance” as used in section 18004(c). “Except as otherwise provided in
 sections 18001–18006 of this title, as used in such sections . . . the term ‘cost of
 attendance’ has the meaning given such term in section 472 of the Higher

1 Education Act of 1965.” CARES Act, § 18007(5). In turn, section 472 of the
 2 HEA is an expansive definition that includes things like tuition, books,
 3 miscellaneous personal expenses, computer equipment, room and board, and
 4 certain dependent care expenses. 20 U.S.C. § 1087II (2008).

5 **C. The Department’s CARES Act Guidance**

6 **1. April 9, 2020, guidance**

7 45. On April 9, 2020, the Department released the portion of the
 8 CARES Act funding Congress appropriated for student emergency grants. The
 9 Department issued a press release, in which Defendant DeVos was quoted:
 10 “What’s best for students is at the center of every decision we make[.]” Press
 11 Release, U.S. Dep’t of Educ., Secretary DeVos Rapidly Delivers More Than \$6
 12 Billion in Emergency Cash Grants for College Students Impacted by Coronavirus
 13 Outbreak (Apr. 9, 2020), [https://www.ed.gov/news/press-releases/secretary-](https://www.ed.gov/news/press-releases/secretary-devos-rapidly-delivers-more-6-billion-emergency-cash-grants-college-students-impacted-coronavirus-outbreak)
 14 [devos-rapidly-delivers-more-6-billion-emergency-cash-grants-college-students-](https://www.ed.gov/news/press-releases/secretary-devos-rapidly-delivers-more-6-billion-emergency-cash-grants-college-students-impacted-coronavirus-outbreak)
 15 [impacted-coronavirus-outbreak](https://www.ed.gov/news/press-releases/secretary-devos-rapidly-delivers-more-6-billion-emergency-cash-grants-college-students-impacted-coronavirus-outbreak) (last visited May 14, 2020) (emphasis added).

16 46. In addition to a press release, the Department contemporaneously
 17 issued a letter from Secretary DeVos to college and university presidents, a
 18 certification form for higher education institutions, a list of individual allocations
 19 to colleges and universities, and a methodology for how it calculated the
 20 allocations schools were scheduled to receive.

1 47. The documents issued by Defendants on April 9, 2020, correctly
 2 read the CARES Act as giving no authority to the Department to restrict the
 3 students to whom institutions awarded emergency grants, not limiting recipients
 4 to students eligible for financial aid under Title IV of the HEA, and as
 5 empowering institutions to determine the recipients limited only by the express
 6 requirements in the Act.

7 48. In the April 9, 2020, letter to college and university presidents,
 8 Defendant DeVos wrote that “[t]he CARES Act provides institutions with
 9 significant discretion on how to award this
 10 emergency assistance to students.” Letter from the Secretary of
 11 Education to College and University Presidents (Apr. 9, 2020),
 12 [https://www2.ed.gov/about/offices/list/ope/caresactgrantfundingcoverletterfinal.](https://www2.ed.gov/about/offices/list/ope/caresactgrantfundingcoverletterfinal.pdf)
 13 [pdf](https://www2.ed.gov/about/offices/list/ope/caresactgrantfundingcoverletterfinal.pdf) (last visited Sept. 9, 2020). DeVos continued:

14 This means that *each institution may develop its own system and*
 15 *process for determining how to allocate these funds*, which may
 16 include distributing the funds to all students or only to students who
 17 demonstrate significant need. The *only statutory requirement* is that
 18 the funds be used to cover expenses related to the disruption of
 campus operations due to coronavirus (including eligible expenses
 under a student’s cost of attendance, such as food, housing, course
 materials, technology, health care, and child care).

19 *Id.* (emphasis added).

20 49. The Department’s press release confirmed the Department’s initial
 21 understanding of the CARES Act: “In order to access the funds, the Department
 22 must receive a signed certification from the higher education institution affirming

1 they will distribute the funds in accordance with applicable law. *The college or*
 2 *university will then determine which students will receive the cash grants.*”
 3 Press Release, U.S. Dep’t of Educ., Secretary DeVos Rapidly Delivers More
 4 Than \$6 Billion in Emergency Cash Grants for College Students Impacted by
 5 Coronavirus Outbreak (Apr. 9, 2020), [https://www.ed.gov/news/press-](https://www.ed.gov/news/press-releases/secretary-devos-rapidly-delivers-more-6-billion-emergency-cash-grants-college-students-impacted-coronavirus-outbreak)
 6 [releases/secretary-devos-rapidly-delivers-more-6-billion-emergency-cash-](https://www.ed.gov/news/press-releases/secretary-devos-rapidly-delivers-more-6-billion-emergency-cash-grants-college-students-impacted-coronavirus-outbreak)
 7 [grants-college-students-impacted-coronavirus-outbreak](https://www.ed.gov/news/press-releases/secretary-devos-rapidly-delivers-more-6-billion-emergency-cash-grants-college-students-impacted-coronavirus-outbreak) (last visited May 14,
 8 2020) (emphasis added).

9 50. The Department’s certification form expressly disavowed that
 10 CARES Act emergency grants were subject to Title IV requirements: “The
 11 Secretary does not consider these individual emergency financial aid grants to
 12 constitute Federal financial aid under Title IV of the HEA.” Recipient’s Funding
 13 Certification and Agreement Emergency Financial Aid Grants to Students under
 14 the Coronavirus Aid, Relief, and Economic Security (CARES) Act ¶ 3,
 15 [https://www2.ed.gov/about/offices/list/ope/caresheerfcertificationandagreement](https://www2.ed.gov/about/offices/list/ope/caresheerfcertificationandagreementfinalombapprovedforissuance.pdf)
 16 [finalombapprovedforissuance.pdf](https://www2.ed.gov/about/offices/list/ope/caresheerfcertificationandagreementfinalombapprovedforissuance.pdf) (last visited May 14, 2020). The certification
 17 form also expressly acknowledged that Congress assigned to institutions the
 18 discretion to determine the amount, and thus necessarily the recipients, of
 19 emergency aid, subject to applicable statutes: “Recipient retains discretion to
 20 determine the amount of each individual emergency financial aid grant consistent
 21 with all applicable laws including non-discrimination laws.” *Id.* The language the
 22

1 Department included in the certification regarding institutions' use of CARES
 2 Act emergency grant funding was intentionally hortatory and not mandatory,
 3 using phrases such as "the Secretary recommends," "the Recipient should be
 4 mindful," and the "Secretary strongly encourages." *Id.*

5 51. Contemporaneous reporting on the website of a prominent higher
 6 education trade organization, the National Association of Financial Aid
 7 Administrators, noted institutions' broad discretion recognized by the
 8 Department, expressly reporting that the Title IV federal financial aid eligibility
 9 requirements did not apply: "Notably, neither the statute or certification form
 10 require that these funds be provided to Title IV eligible students, meaning schools
 11 are able to cast a wider net in determining and meeting emergency needs."
 12 Owen Daugherty, *ED Provides Details on Institutional*
 13 *Allocation for \$6 Billion in Emergency Funds for Students*,
 14 NASFAA (Apr. 10, 2020, 12:35 p.m.), [https://www.nasfaa.org/news-](https://www.nasfaa.org/news-item/21501/ED_Provides_Details_on_Institutional_Allocation_for_6_Billion_in_Emergency_Funds_for_Students)
 15 [item/21501/ED_Provides_Details_on_Institutional_Allocation_for_6_Billion_i](https://www.nasfaa.org/news-item/21501/ED_Provides_Details_on_Institutional_Allocation_for_6_Billion_in_Emergency_Funds_for_Students)
 16 [n_Emergency_Funds_for_Students](https://www.nasfaa.org/news-item/21501/ED_Provides_Details_on_Institutional_Allocation_for_6_Billion_in_Emergency_Funds_for_Students) (last visited May 14, 2020).

17 52. The Department's April 9, 2020, guidance to institutions is
 18 consistent with guidance its Office of Postsecondary Education issued on April 3,
 19 2020. In a memorandum posted on that office's website, it stated: "***Any aid (in***
 20 ***the form of grants or low-interest loans) received by victims of an emergency***
 21 ***from a federal or state entity for the purpose of providing financial relief is not***
 22

1 *counted* as income for calculating a family's Expected Family Contribution
 2 (EFC) under the Federal Methodology or *as estimated financial assistance for*
 3 *packaging purposes.*" Office of Postsecondary Education, UPDATED Guidance
 4 for interruptions of study related to Coronavirus (COVID-19),
 5 Federal Student Aid (Apr. 3, 2020), [https://ifap.ed.gov/electronic-](https://ifap.ed.gov/electronic-announcements/040320UPDATEDGuidanceInterruptStudyRelCOVID19)
 6 [announcements/040320UPDATEDGuidanceInterruptStudyRelCOVID19](https://ifap.ed.gov/electronic-announcements/040320UPDATEDGuidanceInterruptStudyRelCOVID19)
 7 (last visited May 18, 2020) (emphasis added).

8 **2. April 21, 2020, guidance**

9 53. On April 21, 2020, the Department announced that it would release
 10 the additional \$6.2 billion the CARES Act appropriated for institutions' own use.
 11 The Department recognized that the "funding for these 'Recipient Institutional
 12 Costs' is separate from the funding previously made available for 'Emergency
 13 Financial Aid Grants to Students.' " Press Release, U.S. Dep't of Educ., Secretary
 14 DeVos Delivers \$6 Billion in Additional Grant Funding to Support Continued
 15 Education at America's Colleges, Universities (Apr. 21, 2020),
 16 [https://www.ed.gov/news/press-releases/secretary-devos-delivers-6-billion-](https://www.ed.gov/news/press-releases/secretary-devos-delivers-6-billion-additional-grant-funding-support-continued-education-americas-colleges-universities)
 17 [additional-grant-funding-support-continued-education-americas-colleges-](https://www.ed.gov/news/press-releases/secretary-devos-delivers-6-billion-additional-grant-funding-support-continued-education-americas-colleges-universities)
 18 [universities](https://www.ed.gov/news/press-releases/secretary-devos-delivers-6-billion-additional-grant-funding-support-continued-education-americas-colleges-universities) (last visited May 14, 2020).

19 54. Despite the fact that this release of funds did not pertain to
 20 Congress's authorization of emergency grants to students, the Department
 21 reversed its position on the discretion institutions had to determine students
 22

1 eligible for emergency grants, as well as the authority the Department had to
2 restrict student eligibility.

3 55. On April 21, 2020, it posted a document entitled “Frequently Asked
4 Questions about the Emergency Financial Aid Grants to Students under Section
5 18004 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act”
6 (Emergency Grants FAQs). In the Emergency Grants FAQs, the Department
7 purported to answer the question, “What students are eligible to receive
8 emergency financial aid grants from the HEERF?” For the first time, the
9 Department asserted that “[o]nly students who are or could be eligible to
10 participate in programs under Section 484 in Title IV of the Higher Education
11 Act of 1965, as amended (HEA), may receive emergency financial aid grants.”
12 Higher Education Emergency Relief Fund, Frequently Asked Questions about
13 the Emergency Financial Aid Grants to Students under Section 18004 of the
14 Coronavirus Aid, Relief, and Economic Security (CARES) Act (Emergency
15 Grants FAQs I), <https://www2.ed.gov/about/offices/list/ope/heerfstudentfaqs.pdf>
16 (FAQ #9) (last visited May 14, 2020).

17 56. The Department’s FAQ response continued:

18 If a student has filed a Free Application for Federal Student Aid
19 (FAFSA), then the student has demonstrated eligibility to participate
20 in programs under Section 484 the HEA. Students who have not
21 filed a FAFSA but who are eligible to file a FAFSA also may receive
22 emergency financial aid grants. The criteria to participate in
programs under Section 484 of the HEA include but are not limited
to the following: U.S. citizenship or eligible noncitizen; a valid
Social Security number; registration with Selective Service (if the

1 student is male); and a high school diploma, GED, or completion of
2 high school in an approved homeschool setting.

3 *Id.*

4 57. On or about April 21, 2020, the Department also published a second
5 set of FAQs, entitled, “Frequently Asked Questions about the Institutional
6 Portion of the Higher Education Emergency Relief Fund under Section
7 18004(a)(1) and 18004(c) of the Coronavirus Aid, Relief, and Economic Security
8 (CARES) Act.” Higher Education Emergency Relief Fund, Frequently Asked
9 Questions about the Institutional Portion of the Higher Education Emergency
10 Relief Fund under Section 18004(a)(1) and 18004(c) of the Coronavirus Aid,
11 Relief, and Economic Security (CARES) Act (Emergency Grants FAQs II),
12 <https://www2.ed.gov/about/offices/list/ope/heerfinstitutionalfaq.pdf>
13 (last visited May 14, 2020). In this FAQ, the Department repeated that “students
14 must be eligible to receive emergency financial aid grants, and only students who
15 are or could be eligible to participate in programs under Section 484 in Title IV
16 of the Higher Education Act of 1965, as amended (HEA), may receive emergency
17 financial aid grants.” *Id.*, FAQ #5.

18 58. Section 484 of Title IV of the HEA, 20 U.S.C. § 1091, contains
19 numerous requirements for student eligibility for financial aid not contained in
20 the CARES Act. These include “U.S. citizenship or eligible noncitizen; a valid
21 Social Security number; registration with Selective Service (if the student is male);
22 and a high school diploma, GED, or completion of high school in an approved

homeschool setting.” Emergency Grants FAQs I, FAQ #9. Other requirements include that the student not be in default on any loan issued by the Department and have maintained at least a cumulative C average, or its equivalent or academic standing consistent with the requirements for graduation. 20 U.S.C. § 1091(a)(3), (c)(1)(B) (2019); *see also* 34 C.F.R. § 668.32 (2020). By imposing eligibility requirements not contained in the CARES Act, the Emergency Grants FAQs violated section 18004(c) of the CARES Act.

59. While the Department’s Emergency Grants FAQ states that a FAFSA is not required, having one on file is the primary practicable means for an institution to determine that a student is eligible to participate in the student aid programs and meet all applicable eligibility requirements.

60. For institutions to access the second wave of funding, the Department announced they first must have submitted the certification form for the emergency grants for students, and then must submit a second certification form attesting that they will use the money in accordance with the law.

61. Both the Department’s certifications purported to impose liability on institutions if they did not comply with the Department’s restriction of student eligibility for emergency grants. The certification required for institutions to receive emergency grant funding for their students states:

[F]ailure to comply with this Certification and Agreement, its terms and conditions, and/or all relevant provisions and requirements of the CARES Act or any other applicable law may result in Recipient’s liability under the False Claims Act, 31 U.S.C. § 3729,

1 *et seq.*; OMB Guidelines to Agencies on Governmentwide
2 Debarment and Suspension (Nonprocurement) in 2 CFR part 180,
3 as adopted and amended as regulations of the Department in 2 CFR
4 part 3485; 18 USC § 1001, as appropriate; and all of the laws and
5 regulations referenced in Attachment A, which is incorporated by
6 reference hereto.

7 Recipient's Funding Certification and Agreement Emergency Financial Aid
8 Grants to Students under the Coronavirus Aid,
9 Relief, and Economic Security (CARES) Act ¶ 4(g),
10 [https://www2.ed.gov/about/offices/list/ope/caresheerfcertificationandagreement](https://www2.ed.gov/about/offices/list/ope/caresheerfcertificationandagreementfinalombapprovedforissuance.pdf)
11 [finalombapprovedforissuance.pdf](https://www2.ed.gov/about/offices/list/ope/caresheerfcertificationandagreementfinalombapprovedforissuance.pdf) (last visited May 14, 2020).

12 62. The certification to receive CARES Act funding for institutions' own
13 use states:

14 Recipient's failure to comply with this Certification and Agreement,
15 its terms and conditions, and/or all relevant provisions and
16 requirements of the CARES Act or any other applicable law may
17 result in Recipient's liability under the False Claims Act, 31 U.S.C.
18 § 3729, *et seq.*; OMB Guidelines to Agencies on Governmentwide
19 Debarment and Suspension (Nonprocurement) in 2 CFR part 180,
20 as adopted and amended as regulations of the Department in 2 CFR
21 part 3485; 18 USC § 1001, as appropriate; and all of the laws and
22 regulations referenced in Attachment A, which is incorporated by
reference hereto.

23 Recipient's Funding Certification and Agreement for the Institutional Portion of
24 the Higher Education Emergency Relief Fund Formula Grants Authorized by
25 Section 18004(a)(1) of the Coronavirus Aid, Relief,
26 and Economic Security (CARES) Act ¶ 4(i),
27 [https://www2.ed.gov/about/offices/list/ope/heerfInstitutionalcertificationagreement](https://www2.ed.gov/about/offices/list/ope/heerfInstitutionalcertificationagreement42020v2.pdf)
28 [ent42020v2.pdf](https://www2.ed.gov/about/offices/list/ope/heerfInstitutionalcertificationagreement42020v2.pdf) (last visited May 14, 2020).

1 **3. May 21, 2020, guidance**

2 63. On May 21, 2020, the Department issued further guidance stating
3 that, in addition to the Title IV eligibility restriction, institutions were further
4 restricted from distributing funds to non-citizen students due to restrictions under
5 8 U.S.C. § 1611.

6 64. 8 U.S.C. § 1611 is part of the Personal Responsibility and Work
7 Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104–193,
8 110 Stat. 2105 (Aug. 22, 1996). PRWORA restricts immigrants’ eligibility for
9 certain “federal public benefits,” which are defined in 8 U.S.C. § 1611(c).

10 65. 8 U.S.C. § 1611 does not include all federal programs and includes
11 several exceptions including those that generally safeguard health during
12 emergencies including emergency health services, public health assistance, and
13 community-based services necessary to protect life and safety.
14 8 U.S.C. § 1611(b), (c)(2) (2020).

15 66. After PRWORA passed, the Attorney General was tasked with
16 promulgating and implementing regulations to govern PRWORA. 8 U.S.C.
17 § 1642(a)(1) (2020). The Attorney General identified many more programs,
18 services, or assistance that do not qualify as “federal public benefits.” Attorney
19 General Order No. 2353-2001, 66 FR 3613-02, 2001 WL 31994 (Jan. 16, 2001).
20 These include programs that provide crisis counseling, assistance with adverse
21 weather conditions, assistance with food insecurity, medical and mental health
22 services, activities to protect life or safety of the community, and “[a]ny other

1 programs, services, or assistance necessary for the protection of life or safety.”

2 *Id.*

3 67. PRWORA designated the U.S. Department of Health and Human
 4 Services (HHS) as the agency responsible for assisting the Attorney General in
 5 promulgating its implementing regulations. *See* 8 U.S.C. §§ 1642(a)(1)-(2)
 6 (2020). HHS has identified many other government-funded programs and
 7 services that are not “federal public benefits.” U.S. Dep’t of Justice, et al., Joint
 8 Letter on Immigrant Access to Housing and Services, at 3 (Aug. 5, 2016),
 9 <https://www.hhs.gov/sites/default/files/Joint-Letter-August-2016.pdf> (last
 10 visited June 26, 2020) (“DOJ Joint Letter”).

11 68. HHS has stated that “block grants” are excluded from the definition
 12 of “federal public benefits” because “grants” under PRWORA are grants to
 13 individuals as opposed to “block grants” which are provided to states or localities.
 14 HHS stated that “unless the authorizing statutes require that the characteristics of
 15 these groups form the basis for denial of services or benefits, these are not
 16 benefits” HHS Notice, PRWORA; Interpretation of ‘Federal Public Benefit,’
 17 63 FR 41658-01, 1998 WL 435846 (Aug. 4, 1998) (“HHS Notice”).

18 **4. The Department’s Interim Final Rule**

19 69. On June 15, 2020, the Department published an Interim Final Rule
 20 that went into effect immediately.

1 70. The Interim Final Rule argues that the CARES Act is ambiguous,
2 *see* Interim Final Rule, 85 Fed. Reg. 36,495 (June 17, 2020), and that Congress
3 intended to exclude students who are not eligible for student financial aid under
4 Title IV of the Higher Education Act from CARE Act grants. *Id.* at 36,496.

5 71. The Interim Final Rule also takes the position that 8 U.S.C. § 1611
6 prohibits non-citizen students from receiving CARES Act emergency grants.
7 *Id.* at 8-9.

8 72. The Department filed contemporaneous press release which stated
9 that “Non-citizens . . . will not receive taxpayer funds.” Press Release, U.S. Dep’t
10 of Educ., U.S. Department of Education Issues Rule to Protect American
11 Taxpayers from Waste, Fraud, and Abuse, Ensure COVID-19 Relief Funds Get
12 to Eligible Students (June 11, 2020), [https://www.ed.gov/news/press-releases/us-](https://www.ed.gov/news/press-releases/us-department-education-issues-rule-protect-american-taxpayers-waste-fraud-and-abuse-ensure-covid-19-relief-funds-get-eligible-students)
13 [department-education-issues-rule-protect-american-taxpayers-waste-fraud-and-](https://www.ed.gov/news/press-releases/us-department-education-issues-rule-protect-american-taxpayers-waste-fraud-and-abuse-ensure-covid-19-relief-funds-get-eligible-students)
14 [abuse-ensure-covid-19-relief-funds-get-eligible-students](https://www.ed.gov/news/press-releases/us-department-education-issues-rule-protect-american-taxpayers-waste-fraud-and-abuse-ensure-covid-19-relief-funds-get-eligible-students) (last visited Sept. 4,
15 2020).

16 **D. The Department’s Reversal of Position in Its April 21 Guidance,**
17 **May 21 Guidance, and Interim Final Rule Is Unlawful**

18 73. The Department’s restriction on student eligibility for CARES Act
19 emergency grants to only those students who qualify for federal financial aid under
20 section 484 of Title IV of the HEA and who are not disqualified under PRWORA
21
22

1 is unlawful.² The CARES Act does not restrict emergency grants to only students
 2 eligible for federal financial aid under section 484 of Title IV of the HEA or who
 3 are not disqualified under PRWORA. Further, the CARES Act does not delegate to
 4 the Department the authority to interpret section 18004.

5 74. The Department's Eligibility Restriction is illegal whether it is a
 6 legislative or interpretive rule. If it is deemed a substantive rule, it is contrary to the
 7 plain meaning of the CARES Act and is contrary to law. If it is deemed an
 8 interpretive rule, it improperly imposes binding legal obligations on Washington
 9 institutions of higher education that diverge from the CARES Act and purports to
 10 have the force of law. Further, it is entitled to no or minimal deference and
 11 contradicts Congress's manifest intent to funnel emergency aid through institutions
 12 to students they deem in urgent need.

13 75. The Eligibility Restriction also is arbitrary and capricious. The
 14 Department initially acknowledged that "[t]he CARES Act provides institutions
 15 with significant discretion on how to award this emergency assistance to
 16 students," and "[t]he only statutory requirement is that the funds be used to cover
 17 expenses related to the disruption of campus operations due to coronavirus
 18 (including eligible expenses under a student's cost of attendance, such as food,
 19 housing, course materials, technology, health care, and child care)." Letter from
 20 _____

21 ²Washington refers to the restrictions below as the Department's
 22 "Eligibility Restriction."

1 the Secretary of Education to College and University Presidents (Apr. 9, 2020),
 2 [https://www2.ed.gov/about/offices/list/oep/caresactgrantfundingcoverletterfinal.](https://www2.ed.gov/about/offices/list/oep/caresactgrantfundingcoverletterfinal.pdf)
 3 [pdf](https://www2.ed.gov/about/offices/list/oep/caresactgrantfundingcoverletterfinal.pdf) (last visited May 14, 2020). Further, the Department’s certification form
 4 expressly states that the grants are not “Federal financial aid under Title IV of the
 5 HEA.” Recipient’s Funding Certification and Agreement Emergency Financial
 6 Aid Grants to Students under the Coronavirus Aid,
 7 Relief, and Economic Security (CARES) Act ¶ 3,
 8 [https://www2.ed.gov/about/offices/list/oep/caresheerfcertificationandagreement](https://www2.ed.gov/about/offices/list/oep/caresheerfcertificationandagreementfinalombapprovedforissuance.pdf)
 9 [finalombapprovedforissuance.pdf](https://www2.ed.gov/about/offices/list/oep/caresheerfcertificationandagreementfinalombapprovedforissuance.pdf) (last visited May 14, 2020). Nevertheless,
 10 within 11 days the Department changed course and announced that the funds are
 11 federal financial aid and that students would have to qualify under Title IV of the
 12 HEA to be entitled to an emergency grant. The Emergency Grants FAQs contain
 13 no analysis or explanation for this change of course. Nor was the Department’s
 14 certification revised to remove the inconsistent language that the grants were *not*
 15 considered federal financial aid under Title IV of the HEA.

16 76. The Department reversed its position without displaying awareness
 17 that it was changing course, showing that the Eligibility Restriction was permissible
 18 under section 18004, and without providing good reasons for the change.

19 **E. Injuries to the State of Washington and Its Residents**

20 77. The Washington Legislature enacted the Community and Technical
 21 College Act of 1991, Wash. Rev. Code Title 28B.50. This Act created a network
 22

1 of community and technical colleges as an essential part of the State's higher
 2 education system, including the colleges referred to above. The purpose of the
 3 Act is to:

4 provide for the dramatically increasing number of students requiring
 5 high standards of education either as a part of the continuing higher
 6 education program or for occupational education and training, or for
 7 adult basic skills and literacy education, by creating a new,
 8 independent system of community and technical colleges which
 9 will:

10 (1) Offer an open door to every citizen, regardless of his or
 11 her academic background or experience, at a cost normally within
 12 his or her economic means;

13 (2) Ensure that each college district, in coordination with
 14 adjacent college districts, shall offer thoroughly comprehensive
 15 educational, training, and service programs to meet the needs of both
 16 the communities and students served by combining high standards
 17 of excellence in academic transfer courses; realistic and practical
 18 courses in occupational education, both graded and ungraded;
 19 community services of an educational, cultural, and recreational
 20 nature; and adult education, including basic skills and general,
 21 family, and workforce literacy programs and services;

22 (3) Provide for basic skills and literacy education, and
 occupational education and technical training in order to prepare
 students for careers in a competitive workforce;

(4) Provide or coordinate related and supplemental
 instruction for apprentices at community and technical colleges;

(5) Provide administration by state and local boards which
 will avoid unnecessary duplication of facilities, programs, student
 services, or administrative functions; and which will encourage
 efficiency in operation and creativity and imagination in education,
 training, and service to meet the needs of the community and
 students;

(6) Allow for the growth, improvement, flexibility and
 modification of the community colleges and their education,
 training, and service programs as future needs occur; and

(7) Establish firmly that as provided under
 RCW 28B.50.810, community colleges are, for purposes of
 academic training, two year institutions, and are an independent,
 unique, and vital section of our state's higher education system,

1 separate from both the common school system and other institutions
2 of higher learning.

3 Wash. Rev. Code § 28B.50.020 (2019).

4 78. Approximately 363,000 students are enrolled statewide in
5 Washington's community and technical colleges.

6 79. Wash. Rev. Code Title 28B.10 establishes a system of Washington
7 universities. These include state universities, the University of Washington and
8 Washington State University; regional universities, Western Washington
9 University at Bellingham, Central Washington University at Ellensburg, and
10 Eastern Washington University at Cheney; and state college, The Evergreen State
11 College in Thurston county. Wash. Rev. Code § 28B.10.016 (2019). These
12 universities also are part of the State's system of higher education.

13 80. Numerous colleges and universities in Washington have submitted
14 applications to the Department to receive HEERF monies and have signed Funding
15 Certifications and Agreements as required by the Department. This includes
16 Washington's major four-year universities and all 34 community and technical
17 colleges in Washington, including Columbia Basin College, Wenatchee Valley
18 College, Pierce College, North Seattle College, and Skagit Valley College. Many
19 of these institutions signed the Recipient's Funding Certification and Agreement
20 Emergency Financial Aid Grants to Students under the Coronavirus Aid, Relief,
21 and Economic Security (CARES) Act before the Department announced the
22 Eligibility Restriction.

1 81. The Department's Eligibility Restriction applies to Washington
2 colleges and universities and restricts their ability to distribute CARES Act funds
3 to all needy students. But for the Eligibility Restriction, Washington colleges and
4 universities would distribute CARES Act funding to students who qualify under
5 section 18004(c) but are excluded by the challenged action.

6 82. Students at Washington colleges and universities have been deeply
7 affected by the COVID-19 pandemic. The disruption of campus operations has
8 caused them to incur unexpected expenses such as food, housing, course materials,
9 technology, health care, and child care. Some students have been unable to remain
10 in school due to these expenses, and Washington institutions have lost enrollment
11 as a result. In addition, the institutions anticipate continued loss of enrollment in
12 summer terms and future semesters because of these expenses. The Eligibility
13 Restriction has caused students to have to try to absorb the above expenses
14 themselves, forced students to disenroll in order to manage these expenses, and
15 worsened the rate of disenrollment from Washington institutions.

16 83. Lack of financial resources is the most common reason for student
17 disenrollment. Many students, particularly at technical and community colleges,
18 work part-time while in school making them ineligible for unemployment benefits,
19 and others are small business owners. Many such students are without an income
20 because of COVID-19 and desperately need help. In addition, many Washington
21 students are just above the level to receive Pell Grants. These individuals are often
22

1 the hardest hit because they do not meet the threshold to receive any significant
2 amount of aid, but they do not make enough to make ends meet. Many of these
3 students would be able to continue their education if their institutions could provide
4 CARES Act funding more broadly.

5 84. The loss of enrollment at Washington institutions caused by the
6 Eligibility Restriction has reduced tuition payments and will continue to do so. This
7 financial injury harms the proprietary interests of Washington and its institutions of
8 higher education.

9 85. Washington higher education students have encountered a variety of
10 needs during the switch to online learning. These include:

- 11 a. Loss of access to campus computer labs, student media centers, artist
12 centers, electronics, science, and/or nursing labs requiring the purchase of
13 technical equipment for use at home such as computers, printers, cameras,
14 other equipment for classes, and upgrades of internet services or internet
15 hotspots;
 - 16 b. Loss of access to technology resources for disability services
17 accommodations such as screen readers, alternate format textbooks,
18 notetakers, or other needs;
 - 19 c. Loss of income from a campus job or other work;
 - 20 d. Loss of access to onsite counselors and other medical care; and
- 21
22

1 e. Loss of access to campus gym shower facilities for personal hygiene
2 when necessary due to living situations or homelessness.

3 86. The Eligibility Restriction has forced Washington colleges and
4 universities to deny emergency financial aid grants to students who are eligible for
5 emergency financial aid grants under the CARES Act.

6 87. 545,000 of Washingtonians 18 and over lack a high school
7 credential. The students improperly denied grants by the Eligibility Restriction
8 include those in Basic Education for Adults (BEA) programs. The majority of
9 Washington's 51,838 Basic Education for Adults students are not receiving or
10 deemed eligible for CARES Act funding. BEA students fall into two categories:
11 students who did not complete high school but are seeking to reengage in school
12 to get a high school diploma and students for whom English is not their first
13 language. The students for whom English is not their first language are often
14 highly educated in their home countries and plan to enroll in a 4-year degree once
15 their English language skills improve. Both these populations are more likely to
16 rely on campus internet or computer labs making the transition to distance
17 learning more challenging or impossible without financial support. Sometimes
18 this is because the students cannot afford laptops or internet. Other students are
19 older and face the additional burden that the use of technology is already more
20 difficult or the use of the internet or a laptop was not part of their daily life.

1 88. The Eligibility Restriction also denies emergency financial aid
 2 grants to students in the Running Start Program. There are a significant number
 3 of Running Start students at Washington higher education institutions who are high
 4 school students taking primarily, or all, community college classes. In the 2017-18
 5 school year, 28,541 community and technical college students were in a Running
 6 Start Program. Many of those students qualify for free or reduced lunches and now
 7 face food insecurity due to campus closure. They already face other economic
 8 barriers. For example, Running Start students do not qualify for federal aid
 9 money to purchase textbooks and other course materials.

10 89. Other Washington students harmed by the Eligibility Restriction
 11 include those under the age of 24 who would otherwise qualify for aid under Title
 12 IV but cannot file a FAFSA because their parents will not sign the document. These
 13 include students who have been abandoned, whose parents were abusive, or whose
 14 parents simply refuse to sign because their child is now over 18 and they will no
 15 longer provide any form of assistance.

16 90. According to data maintained by the Washington Student
 17 Achievement Council, of 76,198 expected graduates for the class of 2020 in
 18 Washington, 34,826 (or 45.7 percent) students did not submit a FAFSA. Wash.
 19 Student Achievement Council, FAFSA Completion, [https://wsac.wa.gov/fafsa-](https://wsac.wa.gov/fafsa-completion)
 20 [completion](https://wsac.wa.gov/fafsa-completion) (last accessed Sept. 17, 2020). Of the 41,372 students who did submit
 21 a FAFSA, 1,634 (or 3.9 percent) of those students submitted FAFSAs with errors.
 22

1 *Id.* Indeed, Washington has an extremely low FAFSA completion rate. According
2 to the Washington Student Achievement Council, for all 2019 seniors, it was
3 46 percent, which placed Washington 49th nationally. *Id.*

4 91. In addition, Washington colleges and universities have many
5 students who have temporary protected status or DACA status. Under the
6 Department's Eligibility Restriction, these students are ineligible to receive
7 emergency financial aid under the CARES Act. If these students do not receive
8 this aid and no other assistance is available, many will have to disenroll, lose
9 housing, or face any number of consequences of lack of funds.

10 92. Washington institutions may face legal claims by the Department if
11 they inadvertently disbursed funds in violation of the Eligibility Restriction. If
12 institutions inadvertently erred in determining a student's eligibility for federal
13 financial aid under Title IV and disbursed an emergency grant to the student, the
14 Department could demand they pay back the money back to the Department, or
15 seek to impose False Claims Act liability.

16 93. The missions of Washington institutions of higher education are
17 harmed by the Eligibility Restriction. Colleges and universities already have lost
18 student enrollment because of the Eligibility Restriction and expect that more
19 students will disenroll. The loss of enrollment because of the Eligibility
20 Restriction will cause students to give up or put on hold their hopes of bettering
21
22

1 their lives, which is the ultimate goal of Washington's system of higher
2 education.

3 V. CAUSES OF ACTION

4 Count I:

5 **Violation of the Administrative Procedure Act** 6 **Agency Action in Excess of Statutory Authority, Short of Statutory Right,** 7 **or Not in Accordance with Law**

8 94. Washington realleges and reincorporates by reference the
9 allegations set forth in each of the preceding paragraphs.

10 95. The APA requires that a court hold unlawful and set aside agency
11 action, findings, and conclusions found to be in excess of statutory authority,
12 short of statutory right, or not in accordance with law. 5 U.S.C. § 706(2)(A), (C)
13 (1966).

14 96. Congress did not grant the Department authority to interpret section
15 18004 of the CARES Act. In addition, Congress did not delegate authority to the
16 Department to make rules concerning section 18004, such as the Eligibility
17 Restriction, carrying the force of law. The Department's Eligibility Restriction is
18 unauthorized by and contrary to section 18004(c) of the CARES Act. It therefore
19 is in excess of statutory authority, short of statutory right, and not in accordance
20 with law.

21 97. To the extent the Department claims that its Eligibility Restriction
22 is merely an interpretation contained in a policy statement, agency manual, or
enforcement guideline that lacks the force of law, the Department's interpretation

1 is entitled to no or only limited deference. The Eligibility Restriction is not
 2 persuasive, nor does it reflect thorough consideration. There are many students
 3 at Washington's institutions of higher education who are not U.S. citizens or who
 4 otherwise do not qualify for financial aid under Title IV, but who need emergency
 5 financial assistance due to the impacts of COVID-19. In fact, many of the
 6 students who do not qualify under the Eligibility Restriction are those most in
 7 need of financial support. In any event, Congress's intent in the CARES Act is
 8 clear that institutions of higher education possess discretion to determine which
 9 students need emergency grants to cover expenses related to the disruption of
 10 campus operations due to coronavirus, and their discretion is not limited by
 11 section 484 of Title IV of the HEA or PRWORA.

12 98. Absent injunctive and declaratory relief suspending and vacating the
 13 April 21 Guidance, the May 21 Guidance, and the Interim Final Rule Washington
 14 and its residents will be immediately, continuously, and irreparably harmed by
 15 Defendants' illegal actions.

16 **Count II:**
 17 **Violation of the Administrative Procedure Act**
 18 **Arbitrary and Capricious Agency Action**

19 99. Washington realleges and reincorporates by reference the
 20 allegations set forth in each of the preceding paragraphs.
 21
 22

100. The APA requires that a court hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2)(A) (1966).

101. The Eligibility Restriction is an arbitrary and capricious agency action because, among other reasons, the Department expressed no awareness that it was reversing its position, its new position is not permissible under section 18004 of the CARES Act, and the Department failed to provide good reasons for its sudden change in interpretation. Further, the Eligibility Restriction is so implausible that it cannot be ascribed to a difference in view or the product of agency expertise ignores important aspects of the problem and runs counter to the evidence before the Department. In addition, the Eligibility Restriction is so implausible that it cannot be ascribed to a difference in view or the product of agency expertise.

102. Absent injunctive and declaratory relief suspending and vacating the April 21 Guidance, May 21 Guidance, and Interim Final Rule Washington and its residents will be immediately, continuously, and irreparably harmed by Defendants' illegal actions.

Count III:
Violation of the Administrative Procedure Act
Agency Action Without Observance of Procedure Required by Law

103. Washington realleges and reincorporates by reference the allegations set forth in each of the preceding paragraphs.

1 104. The APA requires that a court hold unlawful and set aside agency
2 action, findings, and conclusions found to be without observance of procedure
3 required by law. 5 U.S.C. § 706(2)(D) (1966).

4 105. The APA requires an agency to give “[g]eneral notice of proposed
5 rule making” and provide “interested persons an opportunity to participate in the
6 rule making through submission of written data, views, or arguments with or
7 without opportunity for oral presentation.” 5 U.S.C. §§ 553(b), (c) (2020). If an
8 agency foregoes notice-and-comment rulemaking, it generally must “for good
9 cause find[] (and incorporate[] the finding and a brief statement of reasons
10 therefor in the rules issued) that notice and public procedure thereon are
11 impracticable, unnecessary, or contrary to the public interest.”
12 5 U.S.C. § 553(b)(3)(B) (2020).

13 106. “[T]he good cause exception” to the APA “is to be narrowly
14 construed and only reluctantly countenanced.” *Mack Trucks, Inc. v. E.P.A.*,
15 682 F.3d 87, 93 (D.C. Cir. 2012) (quoting *Util. Solid Waste Activities Grp. v.*
16 *E.P.A.*, 236 F.3d 749, 754 (D.C. Cir. 2001)). That standard is “meticulous and
17 demanding.” *N.J., Dep’t of Env’tl. Prot. v. U.S. Env’tl. Prot. Agency*, 626 F.2d
18 1038, 1046 (D.C. Cir. 1980). The exemption excuses agencies from the notice
19 and comment requirement only “in emergency situations, or where delay could
20 result in serious harm.” *Jifry v. F.A.A.*, 370 F.3d 1174, 1179 (D.C. Cir. 2004)
21 (internal citation omitted).
22

1 Constitution . . . authorizes the President to enact, to amend, or to repeal
 2 statutes.”). To that end, the Executive Branch is without inherent power to
 3 “condition the payment of . . . federal funds on adherence to its political
 4 priorities.” *Oregon v. Trump*, 406 F. Supp. 3d 940, 961 (D. Or. 2019) (citing
 5 *City of Chicago v. Sessions*, 888 F.3d 272, 283 (7th Cir. 2018), *reh’g en banc*
 6 *granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817
 7 (7th Cir. June 4, 2018), *vacated on other grounds*, Nos. 17-2991 & 18-2649,
 8 2018 WL 4268814 (7th Cir. Aug. 10, 2018)). If the Executive Branch wishes to
 9 condition the receipt of federal funds, it may *only* do so pursuant to a specific
 10 delegation of spending authority by Congress. *City & County of San Francisco*,
 11 897 F.3d at 1233-34.

12 111. The Eligibility Restriction permits Defendants to withhold, deny,
 13 suspend, claw back, or terminate money appropriated by Congress, thereby
 14 violating constitutional separation of powers principles based on conditions not
 15 provided for in the CARES Act. Defendants did not have inherent authority to
 16 impose these restrictions. Nor did Congress afford Defendants any discretion or
 17 authority to place such restrictions through the CARES Act.

18 112. In unilaterally imposing the Eligibility Restriction, the Department
 19 abrogated the discretion given the educational institutions in the CARES Act and
 20 usurped Congress’ power to legislate in violation of the principles of separation
 21 of powers.
 22

1 113. Absent injunctive and declaratory relief vacating the Final Rule and
 2 prohibiting it from going into effect, Washington and its residents will be
 3 immediately, continuously, and irreparably harmed by Defendants' illegal
 4 actions.

5 **Count V:**
 6 **Spending Clause**

7 114. Washington realleges and reincorporates by reference the
 8 allegations set forth in each of the preceding paragraphs.

9 115. Article I, section 8, clause 1 of the United States Constitution, also
 10 known as the Spending Clause, states that "Congress shall have Power To lay
 11 and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for
 12 the common Defence and general Welfare of the United States[.]"

13 116. Under the Spending Clause, conditions may not be placed on federal
 14 funds that are (1) so coercive that they compel (rather than encourage) recipients
 15 to comply, (2) ambiguous, (3) retroactive, or (4) unrelated to the federal interest
 16 in a particular program. *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S.
 17 519, 575–78 (2012); *South Dakota v. Dole*, 483 U.S. 203, 206–08 (1987).

18 117. At the very least, the Department's Eligibility Restriction violates
 19 the Constitutional requirements that conditions on funds be "unambiguous" and
 20 not retroactive because they are improper "post-acceptance" restrictions.
 21 *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)
 22 ("[I]f Congress intends to impose a condition on the grant of federal moneys, it

1 must do so unambiguously.”). States “cannot knowingly accept conditions of
 2 which they are ‘unaware’ or which they are ‘unable to ascertain.’ ” *Arlington*
 3 *Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting
 4 *Pennhurst*, 451 U.S. at 17).

5 118. “Though Congress’ power to legislate under the spending power is
 6 broad, it does not include surprising participating States with post acceptance or
 7 ‘retroactive’ conditions.” *Pennhurst*, 451 U.S. at 25; *see also Sebelius*, 567 U.S.
 8 at 584 (quoting *Pennhurst*, holding Congress cannot retroactively alter conditions
 9 of Medicaid grants to states). Once a state has accepted funds pursuant to a federal
 10 spending program, the federal government cannot alter the conditions.

11 119. Accordingly, the Spending Power does not permit what the
 12 Department is attempting to do here: “surprising participating States with post
 13 acceptance or ‘retroactive’ conditions” on congressionally appropriated funds.
 14 *Pennhurst*, 451 U.S. at 25; *see also Sebelius*, 567 U.S. at 519 (quoting *Pennhurst*,
 15 holding Congress cannot retroactively alter conditions of Medicaid grants to
 16 states). Once a state or state entity has accepted funds pursuant to a federal
 17 spending program, the federal government cannot alter the conditions attached to
 18 those funds so significantly as to “accomplish[] a shift in kind, not merely
 19 degree.” *Sebelius*, 567 U.S. at 523.

20 120. The Eligibility Restriction is not stated unambiguously in the
 21 CARES Act. Further, Washington institutions did not know of the Eligibility
 22

1 Restriction at the time they signed the Department's certification to receive
 2 emergency financial aid grants for their students. Therefore they were unable to
 3 exercise their choice knowingly, cognizant of the consequences of their
 4 participation, and they were surprised with post acceptance or retroactive
 5 conditions. In addition, the Eligibility Restriction is not related to the federal
 6 interest in assisting students impacted by COVID-19, nor is it consistent with
 7 other provisions of the Constitution. For these reasons, the Eligibility Restriction
 8 violates the Spending Clause.

9 121. Absent injunctive and declaratory relief vacating the Final Rule and
 10 prohibiting it from going into effect, Washington and its residents will be
 11 immediately, continuously, and irreparably harmed by Defendants' illegal
 12 actions.

13 VI. PRAYER FOR RELIEF

14 WHEREFORE, the State of Washington prays that the Court:

15 a. Declare Defendants' April 21, May 21, and Interim Final Rule
 16 restrictions on student eligibility for emergency financial relief grants
 17 unauthorized by and contrary to the Constitution and laws of the United States,
 18 and the only requirement applicable to institutions of higher education is that the
 19 funds be used to provide emergency financial aid to their students for expenses
 20 related to the disruption of campus operations due to coronavirus (including
 21
 22

1 eligible expenses under a student's cost of attendance, such as food, housing,
2 course materials, technology, health care, and child care);

3 b. Declare Defendants' April 21, May 21, and Interim Final Rule
4 restrictions on student eligibility for emergency financial relief grants invalid and
5 without force of law;

6 c. Issue preliminary and permanent injunctions prohibiting Defendants
7 from implementing or enforcing the April 21, May 21, and Interim Final Rule
8 restrictions on student eligibility for emergency financial relief grants;

9 d. Compel Defendants to rescind the April 21, May 21, and Interim
10 Final Rule restrictions on student eligibility for emergency financial relief grants
11 and to distribute CARES Act funds to Washington institutions without any such
12 restriction, pursuant to 28 U.S.C. § 1361;

13 e. Award the State of Washington its costs and reasonable attorneys'
14 fees; and

15 f. Award such other and further relief as the interests of justice may
16 require.

17 RESPECTFULLY SUBMITTED this 18th day of September 2020.

18 ROBERT W. FERGUSON
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20 /s/ R. July Simpson

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